No. 15-969

In the Supreme Court of the United States

FLORIDA BANKERS ASSOCIATION, ET AL.,
PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Anti-Injunction Act, 26 U.S.C. 7421(a), bars a pre-enforcement challenge to an Internal Revenue Service reporting requirement that is enforced through a penalty that is defined by statute to be a "tax."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-80a) is reported at 799 F.3d 1065. The opinion of the district court (Pet. App. 81a-109a) is reported at 19 F. Supp. 3d 111.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2015. A petition for rehearing was denied on November 5, 2015 (Pet. App. 110a). The petition for a writ of certiorari was filed on January 29, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2012, the U.S. Department of the Treasury (Treasury) amended its bank-deposit interest reporting regulations to require U.S. banks to report to the Internal Revenue Service (IRS) interest on deposits

paid to nonresident alien individuals who are residents of certain countries with which the United States has agreements to exchange tax information. 26 U.S.C. 6049; see 26 C.F.R. 1.6049-4(b)(5), 1.6049-8. Treasury described the amendments as "essential to the U.S. Government's efforts to combat offshore tax evasion." 77 Fed. Reg. 23,391 (Apr. 19, 2012). The success of those efforts "depends, in large part, on the ability of the IRS" in appropriate circumstances "to exchange information that will assist [other] jurisdiction[s] in combatting offshore tax evasion by [their] own residents." *Ibid.* The failure to file this information return is currently subject to a penalty of $250 per return not filed. 26 U.S.C. 6721(a) (as amended by the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, Tit. VIII, § 806(a), 129 Stat. 416); see 26 C.F.R. 1.6049-4(g)(3).

Petitioners filed suit in the United States District Court for the District of Columbia to challenge the regulatory amendments under, *inter alia*, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 90a. The gravamen of their complaint was that, in promulgating the reporting requirement, the agency had disregarded the risk that nonresident aliens would withdraw their deposits from U.S. banks rather than have the interest payments they receive disclosed to their home governments. *Id.* at 102a-103a. Petitioners sought to have the regulations declared invalid and their enforcement enjoined. The government contended that injunctive and declaratory relief was foreclosed by the Anti-Injunction Act, 26 U.S.C. 7421(a), which bars any "suit for the purpose of restraining the assessment or collection of any [federal] tax," and the tax exception to the Declaratory

Judgment Act, 28 U.S.C. 2201, which precludes the issuance of declaratory relief "with respect to [f]ederal taxes." Pet. App. 95a. The government also argued that the regulations were valid under the APA.

The district court rejected the government's threshold justiciability argument. Pet. App. 95a-98a. The court viewed D.C. Circuit precedent as establishing that the Anti-Injunction Act does not bar challenges to tax reporting requirements like the one at issue here. *Id.* at 97a-98a. The court further held, however, that the challenged regulations were "both eminently reasonable and supported by the evidence." *Id.* at 98a; see *id.* at 98a-109a. Petitioners appealed that merits ruling, and the government argued on appeal that the Anti-Injunction Act barred petitioners' suit.

2. The court of appeals vacated the district court's judgment and remanded with instructions to dismiss the case for lack of jurisdiction, holding that the suit is barred by the Anti-Injunction Act. Pet. App. 1a-14a. The court of appeals observed at the outset of its opinion that its "ruling does not prevent a bank from obtaining judicial review of the challenged regulation" because "[a] bank may decline to submit a required report, pay the penalty, and then sue for a refund" of that penalty. *Id.* at 4a.[1]

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[1] The court of appeals noted that it has interpreted the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act as being "coterminous" in scope. Pet. App. 4a (citation omitted). "For simplicity," the court referred only to the Anti-Injunction Act. *Ibid.* Because petitioners do not separately challenge the court's Declaratory Judgment Act holding in their petition for a writ of certiorari, this brief adopts the same convention.

a. The court of appeals held that the penalty for noncompliance with the reporting requirement is a "tax" within the meaning of the Anti-Injunction Act. Pet. App. 4a-9a. The court reached that conclusion "for two good reasons: The text of the Tax Code says so, and the Supreme Court says so." *Id.* at 5a. The court of appeals explained that, under Section 6671(a) of the Code, any penalty established by Subchapter 68B of the Code is classified as a "tax" for purposes of every provision in Title 26 (except as otherwise provided), which includes the Anti-Injunction Act. *Ibid.* The court concluded that, because the penalty at issue here is established by Subchapter 68B, see 26 U.S.C. 6721, it qualifies as a "tax" for purposes of the Anti-Injunction Act. See Pet. App. 5a-6a.

The court of appeals explained that its holding was "confirm[ed]" by this Court's analysis of the Anti-Injunction Act in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*). Pet. App. 6a. The court of appeals described *NFIB* as stating, in "clear and unequivocal" words, that "'[p]enalties in subchapter 68B are * * * treated as taxes under Title 26, which includes the Anti-Injunction Act.'" *Ibid.* (quoting *NFIB*, 132 S. Ct. at 2583).

The court of appeals further explained that this Court's recent decision in *Direct Marketing Ass'n* v. *Brohl*, 135 S. Ct. 1124 (2015), did not support petitioners' argument. See Pet. App. 7a-9a. *Direct Marketing Ass'n*, the court of appeals explained, held that the Tax Injunction Act, 28 U.S.C. 1341, which "bars as premature those suits targeting state tax schemes," did not foreclose a challenge to a "Colorado tax notice requirement" that was enforced by a penalty. Pet. App. 7a (citing *Direct Mktg. Ass'n*, 135 S. Ct. at 1127-

1129). The court observed that "[t]he penalty in [*Direct Marketing Ass'n*] was not itself a tax, or at least it was never argued or suggested that the penalty in that case was itself a tax." *Ibid.* In contrast, the court explained, "this penalty is deemed a tax by Section 6671(a)." *Ibid.*

b. The court of appeals also rejected petitioners' "alternative argument" that, "even if the penalty here is deemed a tax for purposes of the Anti-Injunction Act, the Act still does not apply because [petitioners] do not seek to restrain the assessment or collection of the penalty." Pet. App. 9a; see *id.* at 9a-14a. Petitioners contended that the relief they sought was an injunction against the "regulatory mandate" of the reporting requirement, not the tax penalty by which that requirement is enforced. *Id.* at 9a (citation omitted). The court concluded, however, that "[t]he Anti-Injunction Act cannot be sidestepped by such nifty wordplay." *Ibid.*

The court of appeals explained that petitioners' argument rested on a distinction between revenue-raising taxes and regulatory taxes, *i.e.*, taxes imposed to encourage compliance with a regulatory command rather than to raise revenue. Pet. App. 11a. The court concluded that petitioners' argument was contrary to a series of decisions in which this "Court has 'abandoned' any distinction between 'regulatory and revenue-raising taxes' for purposes of the Anti-Injunction Act." *Ibid.* (quoting *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 741 n.12 (1974)); see *id.* at 10a-11a (citing *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 755-758, 760-761 (1974); *Bob Jones Univ.*, 416 U.S. at 732, 738-739; *United States* v. *Sanchez*, 340 U.S. 42, 44-45 (1950); *Sonzinsky* v. *United States*, 300

U.S. 506, 513 (1937); *Bailey* v. *George*, 259 U.S. 16, 19-20 (1922)). Under those precedents, the court of appeals determined, "[a] challenge to a regulatory tax comes within the scope of the Anti-Injunction Act, even if the plaintiff claims to be targeting the regulatory aspect of the regulatory tax," because "invalidating the regulation would directly prevent the collection of the tax." *Id.* at 11a. The court stated that the contrary view "would reduce the Anti-Injunction Act to dust in the context of challenges to regulatory taxes" because "[a] taxpayer could almost always characterize a challenge to a regulatory tax as a challenge to the regulatory component of the tax." *Id.* at 13a.

c. Judge Henderson dissented. Pet. App. 14a-39a. She viewed the majority's decision as inconsistent with the holding of *Direct Marketing Ass'n* that a challenge to a state reporting requirement was not barred by the Tax Injunction Act. *Id.* at 21a-23a. Judge Henderson acknowledged the majority's distinction of *Direct Marketing Ass'n*: that in this case, unlike in *Direct Marketing Ass'n*, the reporting requirements are enforced by a penalty that is defined to be a "tax" for Anti-Injunction Act purposes. *Id.* at 23a. She believed, however, that the court's distinction conflicted with a prior D.C. Circuit decision holding that "the provision of a tax penalty does not bar a pre-enforcement challenge that would otherwise satisfy the [Anti-Injunction Act]." *Ibid.* (citing *Seven-Sky* v. *Holder*, 661 F.3d 1, 8-10 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 63 (2012)); see *id.* at 23a-31a. She also expressed the concern that, if petitioners sought to challenge the reporting requirement by refusing to file the necessary reports, paying the penalty, and suing for a refund, they could be subject to criminal

liability for willfully violating the regulation. See *id.* at 37a-38a (citing 26 U.S.C. 7203).

ARGUMENT

The court of appeals correctly held that petitioners' suit was brought "for the purpose of restraining the assessment or collection of" federal tax and therefore is barred by the terms of the Anti-Injunction Act. 26 U.S.C. 7421(a). That holding does not conflict with any decision of this Court or of any other court of appeals.

In addition to challenging that aspect of the decision below, petitioners argue (Pet. 20-22) that the Anti-Injunction Act is inapplicable to this suit under *South Carolina* v. *Regan*, 465 U.S. 367 (1984), because the alternative avenue of judicial review that the court of appeals identified—*i.e.*, paying the statutory penalty (which the Tax Code defines to be a "tax") and then suing for a refund of that penalty—is not an adequate one. Petitioners did not advance that argument below until their petition for rehearing, however, and the practical ramifications of the alternative route to judicial review depend on the resolution of subsidiary issues that the courts below did not address. Petitioners offer no sound reason that this Court should depart from its usual practices and address those issues in the first instance. Further review is not warranted.

1. The Anti-Injunction Act provides that, with certain enumerated exceptions not applicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid,

by suing for a refund." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2582 (2012); see *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736 (1974). Where the Anti-Injunction Act applies, it divests the court of subject-matter jurisdiction. *Bob Jones Univ.*, 416 U.S. at 749. In this case, the court of appeals correctly held that the text of the Anti-Injunction Act covers petitioners' suit because (a) the reporting requirement at issue here is enforced through a "tax" within the meaning of the Anti-Injunction Act and (b) petitioners' suit seeks to prohibit the collection of that tax. See Pet. App. 2a-14a.

a. The penalty established by Section 6721 is a "tax" within the meaning of the Anti-Injunction Act. Section 6671(a) states that, unless otherwise provided, any penalty under Subchapter 68B is a "tax" for purposes of any provision of Title 26, which includes the Anti-Injunction Act. Because Section 6721(a) is located in Subchapter 68B, its penalty is a "tax" for purposes of the Anti-Injunction Act. See Pet. App. 5a-6a.

The Court's decision in *NFIB* confirms that conclusion. In *NFIB*, the Court held that the penalty for failing to comply with the requirement to purchase health insurance under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, was not a "tax" within the meaning of the Anti-Injunction Act. 132 S. Ct. at 2582-2584. In the course of its analysis, however, the Court recognized that "Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act." *Id.* at 2583. "For example," the Court continued, "26 U.S.C. § 6671(a) provides that 'any reference in this title to "tax" imposed by this title shall be deemed also to

refer to the penalties and liabilities provided by' subchapter 68B of the Internal Revenue Code." *Ibid.* (citation omitted). Accordingly, the Court explained, "[p]enalties in subchapter 68B are * * * treated as taxes under Title 26, which includes the Anti-Injunction Act." *Ibid.* But because the penalty at issue in *NFIB* was "not in subchapter 68B," it was not covered by the Anti-Injunction Act. *Ibid.*

Here, by contrast, the penalty for violating the reporting requirement *is* provided by Subchapter 68B. The penalty therefore qualifies as a "tax" within the meaning of the Anti-Injunction Act under this Court's statutory analysis in *NFIB*. That understanding of *NFIB* accords with the decisions of other courts of appeals. See *Hotze* v. *Burwell*, 784 F.3d 984, 997 (5th Cir. 2015), cert. denied, 136 S. Ct. 1165 (2016); *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 88-89 (4th Cir.), cert. denied, 134 S. Ct. 683 (2013); see also *LNV Corp.* v. *Hook*, No. 14-1438, 2015 WL 4927014, at *4 (10th Cir. Aug. 19, 2015).[2]

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[2] Petitioners contend (Pet. 17) that "the penalty at issue" does not qualify as a tax because it "was not enacted by the Congress." That argument was not raised below, and in any event it is incorrect. Congress created the penalty for failing to file an information return and housed it in Subchapter 68B. 26 U.S.C. 6721(a). It also created the requirement that banks report the payment of interest totaling ten dollars or more to any person, and it authorized the Secretary of the Treasury to extend that requirement to interest paid to nonresident aliens even though they are not subject to U.S. tax on that income. 26 U.S.C. 6049(a), (b)(2)(B)(ii), and (5)(B)(iv). The penalty imposed by Section 6721(a) is triggered by, *inter alia*, "any failure to include all of the information required to be shown on the return." 26 U.S.C. 6721(a)(2)(B). That language encompasses a failure to include information required by a Treasury regulation promulgated pursuant to statutory authorization.

b. Petitioners' suit seeks to "restrain[] the assessment or collection of a[] tax." 26 U.S.C. 7421(a). Petitioners seek to invalidate the reporting requirement, see Pet. App. 14a, and "invalidating the regulation would directly prevent collection of the tax" through which the reporting requirement is enforced, *id.* at 11a. Petitioners contend that they are challenging only the underlying reporting requirement, not the tax through which it is enforced. This Court has long recognized, however, that the Anti-Injunction Act's coverage does not distinguish between regulatory and revenue-raising taxes.

In *Bob Jones University*, for example, the Court held that the Anti-Injunction Act prohibited a taxpayer from bringing a pre-enforcement challenge to the IRS's revocation of its tax-exempt status. 416 U.S. at 749. A university whose tax-exempt status was revoked because of its racially discriminatory policies argued that "the Act is inapplicable" because its suit was "not a suit 'for the purpose of restraining the assessment or collection of any tax.'" *Id.* at 738. In particular, the taxpayer contended that the IRS's "actions do not represent an effort to protect the revenues but an attempt to regulate the admissions policies of private universities." *Id.* at 739. The Court rejected that argument, noting that in *Bailey* v. *George*, 259 U.S. 16 (1922), it had "held that the Act blocked a pre-enforcement suit to enjoin collection of the federal Child Labor Tax, although the tax was challenged as a regulatory measure." *Bob Jones Univ.*, 416 U.S. at 740. The Court acknowledged that in an earlier era its decisions had "dr[awn] what it saw at the time as distinctions between regulatory and revenue-raising taxes," but it explained that "the

Court ha[d] subsequently abandoned such distinctions." *Id.* at 741 n.12.

Here, petitioners seek a judicial order that would allow them to omit information about nonresident aliens' interest income *without* paying the penalty that Section 6721(a) prescribes. Their suit thus would bar the collection of a penalty that the Code defines to be a "tax" within the meaning of the Anti-Injunction Act. The fact that the tax is primarily designed to enforce compliance with a regulatory requirement, rather than to raise revenue, is an irrelevant distinction under this Court's precedents.

Petitioners contend (Pet. 12-13, 16-17) that their suit does not seek to restrain the collection of a tax because the penalty cannot be imposed unless and until they violate the reporting regulations, and they (and similarly situated entities) are unlikely to take that step unless the regulations have been invalidated. That argument proves too much. Even a classic revenue-raising tax—for example, a tax on income from a certain activity—could in theory be challenged before the plaintiff has undertaken the activity, and therefore before the IRS has the authority to collect the tax. The plaintiff in such a suit could contend, as petitioners do here, that it seeks to ascertain whether the tax is valid in order to decide whether to engage in the conduct that would trigger it. But there is little doubt that the Anti-Injunction Act would bar a pre-enforcement challenge in those circumstances. There is no reason for a different result in this case.

2. Petitioners contend (Pet. 11-15) that the decision below conflicts with *Direct Marketing Ass'n* v. *Brohl*, 135 S. Ct. 1124 (2015). For the reasons given by the court of appeals, that argument is incorrect.

Pet. App. 7a-9a. *Direct Marketing Ass'n* addressed the Tax Injunction Act, which provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. 1341. The Court held that the Tax Injunction Act did not bar a pre-enforcement challenge to certain Colorado tax reporting requirements. *Direct Mktg. Ass'n*, 135 S. Ct. at 1129-1133. The Court concluded that those reporting requirements were "information gathering" tools that are "distinct from" and "precede the steps of 'assessment' and 'collection.'" *Id.* at 1129-1131.

In *Direct Marketing Ass'n*, however, no party contended that the penalty that Colorado used to enforce those requirements, see 135 S. Ct. at 1128, was itself a "tax" within the meaning of the Tax Injunction Act. Here, by contrast, the penalty through which the reporting requirements are enforced is a "tax" within the meaning of the Anti-Injunction Act. See p. 8, *supra*. Because petitioners' suit, if successful, would bar collection of *that* tax, the court below correctly held that *Direct Marketing Ass'n* is not controlling.[3]

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[3] Although the court of appeals did not rely on this ground, the Tax Injunction Act at issue in *Direct Marketing Ass'n* has material textual differences from the Anti-Injunction Act at issue here. For example, the Tax Injunction Act groups the word "restrain" with the words "enjoin" and "suspend." The Court in *Direct Marketing Ass'n* found that grouping significant in concluding that the word "restrain" should be interpreted narrowly, equivalent to "enjoin," rather than given the broader connotation of "hold back" or "inhibit." *Direct Mktg. Ass'n*, 135 S. Ct. at 1132 (emphasis omitted). The Anti-Injunction Act, by contrast, broadly prohibits any "suit for the purpose of restraining the assessment or collection of any tax," without using the words "enjoin" or "suspend." 26 U.S.C. 7421(a).

Judge Henderson in dissent concluded that the court of appeals' distinction of *Direct Marketing Ass'n*—that it did not involve a penalty deemed to be a "tax"—was foreclosed by D.C. Circuit precedent purportedly holding that "the provision of a tax penalty does not bar a pre-enforcement challenge that would otherwise satisfy the [Anti-Injunction Act]." Pet. App. 23a (citing *Seven-Sky* v. *Holder*, 661 F.3d 1, 8-10 (D.C. Cir. 2011), cert. denied, 133 S. Ct. 63 (2012)); see *id.* at 23a-30a. Although the court of appeals' opinion did not discuss *Seven-Sky*, Senior Circuit Judge Randolph filed a concurring opinion that disagreed with Judge Henderson's reading of that precedent. *Id.* at 14a. This Court's review is not warranted to resolve the disagreement among members of the panel. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). For the same reason, petitioners' contention (Pet. 15) that the decision below conflicts with the D.C. Circuit's prior decisions in *Cohen* v. *United States*, 650 F.3d 717 (2011) (en banc), and *Foodservice & Lodging Institute, Inc.* v. *Regan*, 809 F.2d 842 (1987) (per curiam), does not warrant this Court's review either.[4] And petitioners do not contend that

[4] In any event, that contention is incorrect. *Foodservice & Lodging Institute* involved a reporting requirement that was enforced by a penalty that was not located in Subchapter 68B at the time the suit was brought and so was not deemed a "tax" for Anti-Injunction Act purposes. See Pet. App. 8a; see also 26 U.S.C. 6652(a) (1982); *Foodservice & Lodging Inst.*, 809 F.2d at 846 & n.10. The plaintiffs in *Cohen* initiated a post-assessment, post-collection challenge to the adoption, without notice and comment, of a procedure for refunding taxes that had previously been paid, and so "d[id] not seek to restrain the assessment or collection of any tax." 650 F.3d at 725; see *id.* at 725-727.

the decision below conflicts with any decision of another court of appeals.

3. Petitioners briefly contend (Pet. 20-22) that their members lack "any practical alternative remedy" to challenge the reporting requirements and therefore that their suit should be permitted under *South Carolina*, *supra*. The Court in *South Carolina* held that the Anti-Injunction Act does not bar a suit "where * * * Congress has not provided the plaintiff with an alternative legal way to challenging the validity of a tax." 465 U.S. at 373; see *id.* at 378-380. Petitioners did not raise that argument below until they sought rehearing, and the court of appeals did not pass upon it. Accordingly, that argument does not provide a suitable basis for review by this Court. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Petitioners' failure to assert their *South Carolina* argument below is particularly significant because petitioners seek a significant extension of the rule announced in that case. The Court in *South Carolina* emphasized that the plaintiff State would have *no* alternative means of obtaining judicial review of its constitutional challenge if the Anti-Injunction Act were held to bar its suit. See 465 U.S. at 373, 378-380. The Court contrasted that situation with prior cases in which the plaintiffs had "the alternative remedy of a suit for a refund." *Id.* at 374; see *id.* at 374-376. In this case, the court below premised its holding on the fact that an alternative remedy *is* available because "[a] bank may decline to submit a required report, pay the penalty, and then sue for a refund." Pet. App. 4a.

The preference for resolving legal challenges to federal taxes in refund suits, where that mode of judicial review is available, reflects the basic design of the

Anti-Injunction Act. See *NFIB*, 132 S. Ct. at 2581. Petitioners do not appear to dispute that the alternative mode of review identified by the court below is *legally* available here. They contend (Pet. 20-22), however, that paying the penalty and suing for a refund is not a *practically* feasible alternative because a bank's breach of the reporting requirement could subject it to onerous consequences beyond the statutory penalty itself, including potential criminal sanctions under 26 U.S.C. 7203, if the challenge to the reporting requirement ultimately fails. Petitioners identify no decision in which the *South Carolina* exception to the Anti-Injunction Act has been held applicable despite the legal availability of a refund suit. And because petitioners did not make a *South Carolina* argument below, the court of appeals did not address the question whether such an extension of that decision is warranted.

Even if the Court concluded that the *South Carolina* exception should extend to circumstances in which a refund suit is legally available but practically inadequate, it is unclear whether this case falls within that category. Petitioners are correct that violations of the reporting requirement at issue here can trigger sanctions beyond the statutory penalty. It is unclear, however, and the court below had no occasion to determine, which if any of those sanctions could properly be imposed on a bank that failed to provide the required information but promptly paid the penalty and commenced a refund suit, thus demonstrating a good-faith intent to submit its challenge for judicial resolution and to abide by the court's decision. The potential for criminal penalties under Section 7203, for example, could depend in part on whether the "rea-

sonable cause" defense to civil liability applies in criminal cases as well, and whether that course of conduct is "reasonable" or instead amounts to "willful neglect." 26 U.S.C. 6724(a).

Because petitioners did not invoke the *South Carolina* exception below, the court of appeals did not analyze the relevant statutes to determine what sanctions could potentially apply if petitioners attempted to use a refund suit as a mechanism for obtaining judicial review of the reporting requirement at issue here. If the Court granted certiorari in this case, it would need to decide in the first instance (a) whether the *South Carolina* exception should be extended to cases in which a refund suit is legally available but practically inadequate, and (b) if such an extension is appropriate, whether a refund suit would be practically inadequate under the circumstances of this case. This Court has repeatedly declined to address newly asserted challenges in the first instance, explaining that it is a "court of review, not of first view." *E.g.*, *Cutter*, 544 U.S. at 718 n.7. There is no sound reason for the Court to depart from that practice here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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