



U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 22, 2025

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *United States v. Schwarzbaum*, 127 F.4th 259 (11th Cir. 2025) (No. 22-14058)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to file a petition for a writ of certiorari in the above-referenced case. A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is attached.

This case concerns civil money penalties assessed by the Internal Revenue Service (IRS) for the defendant's willful failure to report certain foreign financial accounts as required by 31 U.S.C. 5314. The regulations implementing Section 5314 require U.S. persons to report covered foreign financial accounts annually on a form prescribed for that purpose, known as the Foreign Bank Account Report (FBAR). See Op. 2, 5. The Secretary of the Treasury "may impose a civil money penalty on any person who violates" the reporting requirements. 31 U.S.C. 5321(a)(5)(A). The maximum amount of any such penalty generally "shall not exceed \$10,000" for each deficient FBAR. 31 U.S.C. 5321(a)(5)(B)(i); see *Bittner v. United States*, 598 U.S. 85, 89 (2023). The statute authorizes greater maximum penalties, however, "[i]n the case of any person willfully violating * * * any provision of section 5314." 31 U.S.C. 5321(a)(5)(C). For a willful violation of the foreign-account reporting requirements, the maximum penalty is the greater of either \$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) and (D)(ii). Penalties for willful violations are assessed on a "per-account" basis, *Bittner*, 598 U.S. at 94, such that willfully failing to report multiple foreign financial accounts on a single FBAR can warrant the assessment of a penalty for each unreported account.

Here, the IRS determined that the defendant willfully failed to report multiple foreign financial accounts in 2006, 2007, 2008, and 2009. Op. 6-8. The agency assessed aggregate civil penalties of \$13,729,591 for those willful violations. Op. 8. The defendant did not pay the assessed penalties, and the United States brought this suit in the United States District Court for the Southern District of Florida to recover the penalties. Op. 9; see 31 U.S.C. 5321(b)(2). The district court sustained the agency's finding of willfulness for 2007-2009, but not for 2006. Op. 9. In light of that ruling, the district court entered judgment for \$12,555,813 in civil penalties, and

the defendant appealed. Op. 10. The Eleventh Circuit affirmed the finding of willfulness for 2007-2009 but vacated and remanded with instructions to remand the matter to the IRS to recalculate the penalties to correct a perceived methodological error relating to the relevant time for assessing the balance of each account. Op. 10-11. As recalculated by the IRS under the Eleventh Circuit's instructions, the aggregate penalties increased to "\$13,521,328, approximately 7.7% higher than the original" penalties. Op. 11. In renewed litigation, the government asked the district court to "forgo the difference in the revised penalty and limit judgment to the original penalty amount of \$12,555,813—plus interest and failure-to-pay penalties." *Ibid.* The district court granted that request, and the defendant again appealed.

The second appeal culminated in the enclosed decision by the Eleventh Circuit. In that decision, the court of appeals took the view that civil money penalties imposed for willful violations of the foreign-account reporting requirements under Section 5314 "are 'fines' within the meaning" of the Eighth Amendment's prohibition on excessive fines. Op. 12; see U.S. Const. Amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The court explained that when a particular exaction of money or property constitutes a fine for Eighth Amendment purposes, the fine must not be "grossly disproportional to the gravity of [the] defendant's offense." Op. 28 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). Applying that standard to the facts here, the court proceeded to examine on "an account-by-account basis" whether the civil penalty assessed by the IRS for a given account in a given year was grossly disproportional to the gravity of the defendant's willful failure to report that particular account. Op. 29. For one of the defendant's Swiss bank accounts, the court held that the assessment of civil penalties of \$100,000 for each year from 2007 to 2009, although authorized by Section 5321(a)(5)(C)(i), "constitute[d] an excessive penalty" in violation of the Eighth Amendment given the balance in the account. Op. 31. The court determined that the remaining civil penalties "raise[d] no proportionality problems." Op. 33. The court therefore remanded with instructions "to reduce the judgment * * * by \$300,000" and to recalculate the applicable late-payment penalties and interest. Op. 46; see Op. 47, 55.

The Department of Justice has determined that a petition for a writ of certiorari is not warranted in this case. Although the court of appeals held that the penalties authorized by Section 5321(a)(5) constituted "excessive fines," in violation of the Eighth Amendment, as applied to the defendant's failure to disclose one particular foreign bank account in three annual reporting periods, the court rejected the defendant's challenges to the civil penalties assessed by the IRS for his other willful violations. Further review is therefore unnecessary to ensure an appropriate assessment of civil penalties on the particular facts of this case. A petition for a writ of certiorari would be due on April 23, 2025.

Please let me know if I can be of any further assistance in this matter.

Sincerely,



D. John Sauer
Solicitor General

Enclosure