No. 16-40948

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BERNHARD GUBSER,

Plaintiff - Appellant

v.

INTERNAL REVENUE SERVICE; JOHN KOSKINEN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA,

Defendants - Appellees

On Appeal From The U.S. District Court For The Southern District Of Texas

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BRIEF OF AFFECTED TAXPAYERS AS AMICI CURAIE
IN SUPPORT OF APPELLANT

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICI[1]

Amici are individual taxpayers who came forward to the Internal Revenue Service (IRS) upon learning that they had failed to file Foreign Bank Account Reports (FBARs) in violation of the Bank Secrecy Act, 31 U.S.C. § 5314. Amici include Eva Maze, Margot Lichenstein, Marie M. Green, Kevin A. and May F. Muench, and Harold D. and Nancy R. Blumenkrantz, and Harry Radzyner.

After recognizing their FBAR violations, amici disclosed their errors to the IRS and entered into the Offshore Voluntary Disclosure Program (OVDP), under which they were required to pay any tax owed on the accounts, interest, accuracy-related penalties, and an additional "offshore penalty" equal to a large portion of the highest aggregate balance in their unreported foreign accounts during the eight-year period covered by the program. A number of amici are presently plaintiffs in litigation challenging the IRS's promulgation of certain rules relating to the OVDP without notice and comment and that are arbitrary, capricious, an abuse of discretion, and otherwise contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *See Green v. IRS*, No. 16-1085 (D.D.C.); *Maze v. IRS*, No. 15-1806 (D.D.C.).

[1] All parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus's counsel made a monetary contribution to the preparation or submission of this brief.

For the reasons explained by Appellant, the district court erred in concluding that Article III's redressability requirement precluded the court from exercising jurisdiction over Mr. Gubser's Declaratory Judgment Action. Amici submit this brief to provide additional context for understanding how the current uncertainty over the standard of proof in these civil penalty proceedings creates a concrete injury for taxpayers accused of willful FBAR violations and why a judicial resolution of that legal question would redress those injuries.

SUMMARY OF THE ARGUMENT

The current legal uncertainty over the standard of proof for willfulness in assessing penalties for FBAR violations is a source of concrete injury, which would be redressed by Appellant's declaratory judgment action.

Good faith violations of the FBAR rules are common and understandable. Yet, innocent violators nonetheless face a very real prospect of being accused of willful violations, given that willfulness must generally be assessed based on circumstantial evidence of the individual's state of mind. The cost of error in this context can be catastrophic for affected individuals – the taxpayer stands to lose half the value of the relevant accounts, which, as Mr. Gubser's case illustrates, may hold a person's entire life savings. Accordingly, the standard of proof for willfulness is critical to a taxpayer's assessment of how to navigate the IRS's complex system for resolving belated admissions of FBAR violations. Specifically, the standard of proof may determine whether a taxpayer sticks to her guns and insists on the truth, or yields to IRS demands that she pay more than she owes in order to avoid the prospect of devastating penalties. Knowing that the IRS may only assess those penalties upon clear and convincing proof of willfulness could lead many taxpayers to refuse to capitulate and thereby avoid serious financial injury.

ARGUMENT

I. Many Taxpayers Violate The FBAR Requirements In Good Faith, But Reasonably Fear Imposition Of Penalties For Willful Noncompliance.

Although Congress enacted the Bank Secrecy Act (Act) and its FBAR requirement to deter tax evasion and other illegal activities by sophisticated groups and individuals, its requirements apply to many ordinary people who regularly run afoul of the rules in a variety of common circumstances. Many of those who discover the law's requirements only after they have committed unknowing violations have reason to fear that the IRS will not see things the same way and may attempt to assess the Act's heavy penalties for willful noncompliance.

A. The FBAR Requirements Can Easily Catch Individuals By Surprise.

"Examples abound of situations in which persons who should file an FBAR unintentionally fail to do so." Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, And Why It Matters*, 7 HOUS. BUS. & TAX L.J. 1, 26 (2006) (hereinafter "*Evolution of FBAR*"). Amici's experiences help illustrate the range of situations in which individuals subject to the FBAR rules may find themselves in unwitting noncompliance.

1. Immigrants

Every year hundreds of thousands of people legally immigrate to the United States.[2] At the time of immigration, many have bank accounts in their home countries, which may include accumulated life savings sufficient to trigger the $10,000 limit for FBAR reporting.[3] Few are lawyers or American tax specialists; many are financially unsophisticated. It is hardly surprising, then, that immigrants regularly fail to learn of the FBAR requirement until years after they become subject to it.

Mr. Gubser's story exemplifies these immigrants' plights. So does the story of amicus May Muench. Ms. Muench was raised in France and lived in Paris until she was 35 years old. In 1979, she married her husband in Paris, then moved to the Philippines until 1983, when the couple moved to the United States. While living in this country, she maintained strong family ties in Paris, keeping an apartment there until 2009. She also maintained bank accounts outside of the United States that, upon her becoming a U.S. resident, became subject to the FBAR reporting

[2] *See* Migration Policy Institute, *Legal Immigration to the United States, 1820-Present*, http://www.migrationpolicy.org/programs/data-hub/charts/Annual-Number-of-US-Legal-Permanent-Residents (last visited Aug. 29, 2016).

[3] *See* 31 C.F.R. § 1010.306(c).

requirement. Because she and her husband did not fully understand this country's complex reporting laws, they found themselves in violation of the FBAR rules. Upon realizing their error, they notified the IRS and took action to rectify their mistakes.

Recent immigrants may also violate the FBAR in the process of sending money back to relatives in their home countries. American residents send tens of billions of dollars in remittances abroad every year. *Evolution of FBAR*, *supra*, at 27 & n.161-62. A common method of sending funds that avoids often high fees for wiring money to loved ones is to deposit the funds directly into an account over which both the remitter and the recipient have control. *See id.* at 26-27. If that account is based in the recipient's home country, it is subject to FBAR. *Id*.

2. Heirs To Foreign Bank Accounts

Immigrants and others also often find themselves in non-compliance when they inherent a foreign bank account.

For example, amici Marie Green was born to a Jewish family in 1920s Poland. After most of her family perished in Nazi concentration camps during World War II, Ms. Green immigrated to the United States with her husband in 1947 under a special immigration program for Holocaust survivors. When her husband died in 2005, she inherited foreign bank accounts that her husband had previously established. At the time, she was unaware that upon inheriting the bank accounts, she became subject to the FBAR requirements. When she discovered the obligation, she took immediate action to report her mistake to the IRS and remedy the error.

Amicus Margot Lichtenstein also came to the United States in the aftermath of World War II. Her husband was a Jewish survivor of anti-Semitic pograms in Poland. Like Ms. Green, Ms. Lichentsein inherited certain foreign bank accounts upon the death of her husband, which she mistakenly believed were not subject to any reporting requirement.

3. Americans Living Abroad

FBARs are required of all American citizens and residents, even those living abroad temporarily or longer-term.[4] Understandably, people living abroad often maintain bank accounts where they live. Many have no idea that those accounts are reportable to the United States.

For example, amicus Eva Maze was born in 1922 in Bucharest, Romania. She moved to the United States to escape the Nazi occupation of Romania during World War II and became a U.S. citizen. However, after the War, she moved back to Europe, where she lived until 2012. During her time in Europe, she inherited funds held in a European bank account, which she transferred to another account in France, where she was living. She mistakenly believed that the accounts were not reportable to the United States.

[4] *See* 31 C.F.R. § 1010.350(a), (b).

Amicus Harry Radzyner, likewise has spent most of his life abroad. He was born in Lodz, Poland in 1933 to an American citizen mother. His wife, Micheline Radzyner, was born in Cracow, Poland in 1934. Both survived Nazi concentration camps during World War II, after which Harry moved to the United States to work in 1951. After the couple married, Micheline became a naturalized U.S. citizen. But only two years later, in 1960, they returned to Germany and have lived outside the United States ever since. They continued to utilize CPAs to assist them with their U.S. filing obligations but only reported their U.S. source income and accounts, until recently joining the OVD program.

So-called "accidental citizens" – individuals who were born in this country or to American citizen parents, but have lived most of their lives abroad – can find themselves in a similar position. Although they are subject to the FBAR rules, many may be unaware of their reporting obligations (and, sometimes, even of their U.S. citizenship). *See* Nat'l Taxpayer Advocate, *Fiscal Year 2017 Objectives Report to Congress*, at 167-68 (June 2016) ("*Taxpayer Advocate Report*").[5]

Many other law abiding Americans also find themselves in unknowing noncompliance. American college students studying abroad may run afoul of FBAR reporting if they transfer $10,000 or more to a local account to pay for tuition or

[5] *Available at* http://taxpayeradvocate.irs.gov/reports/fy-2017-objectives-report-to-congress/full-report (last visited Aug. 29, 2016).

living expenses during their year abroad in Germany or while they obtain an advanced degree at Oxford. An engineer for Exxon may open an account in Dubai while on a long-term work assignment there. And military service members and their spouses, although living abroad for years at a time, are subject to FBAR reporting for any foreign accounts not held in a U.S. military banking facility.[6]

B. Even Good Faith Efforts At Compliance May Fail.

Even if a recent immigrant, member of the military, or American student studying abroad were to become aware of the FBAR rules, there are still ample opportunities for misunderstandings. The rules are complicated. To decide whether she must file a report, an individual must know whether she is the type of person subject to the law,[7] whether she has the right type of relationship[8] to the right kind of account,[9] whether she or the account falls within an exception,[10] and whether she or the account is subject to one of several "special rules" set forth in the regulations.[11] And applying these multi-tiered rules is not always straight-forward. *See Evolution of FBAR*, *supra*, at 28-29.

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[6] *See* 31 C.F.R. § 1010.350(c)(4)(iii).

[7] *See* 31 C.F.R. § 1010.350(a), (b).

[8] *See id*. § 1010.350(a), (e)-(f).

[9] *See id*. § 1010.350(a), (c).

[10] *See id*. § 1010.350(c)(4), (f)(2),

[11] *See id*. § 1010.350(g).

Of course, few ordinary taxpayers even attempt to delve into the regulations themselves. Instead, many rely on tax preparers who, one might hope, could be counted on to lead their clients into compliance. But the "types and training of paid preparers vary widely." *Id.* at 29 (quoting Charles M. Bruce & Lewis J. Saret, *Always-Tricky Reporting of Foreign Bank Accounts Turning Dangerous with Patriot Act, Increased Enforcement Efforts*, No. 110 Daily Tax Report (June 9, 2003)). "Anyone can be a paid tax preparer. No laws or regulations limit who can sell tax preparation services." *Id*. Mr. Gubser's case is illustrative – his tax preparer served him for twenty years before thinking to enquire whether his client might be subject to the FBAR requirements. *See* Gubser Br. 6.

The situation is even more difficult for Americans and others subject to FBAR requirements who are living abroad, where it may be very difficult even to locate someone to help with filing of taxes in the United States.

C. An Individual May Know That A Violation Was Non-Willful, But Reasonably Worry That The IRS Will Conclude Otherwise.

While FBAR violations may be common and understandable, that does not mean that innocent violators have nothing to fear from the catastrophic penalties applied to willful violations.

Determining whether a violation was willful is often difficult, depending on the subjective beliefs of individual taxpayers for which there is often no direct evidence. States of mind are notoriously difficult to prove, and the risk of error is high. In the absence of direct evidence, willfulness determinations are often based on an evaluation of circumstantial evidence.

Given the indirectness of the evidence considered, it should come as no surprise that the outcome will often come down to the standard of proof. This case illustrates the point. The IRS official charged with evaluating Mr. Gubser's violation expressly stated that if the agency was required to prove willfulness through clear and convincing evidence, it could not do so in this case. That would have resulted in no more than a $10,000 penalty. But if the standard of proof was simply a preponderance of the evidence, as the IRS lately claims it to be (*see infra* at pp. 12-13), the Government would attempt to seize half his life savings, a penalty more than 100 times greater. *See* Gubser Br. 3-4.

The jeopardy faced by taxpayers subject to a preponderance of the evidence standard is magnified by the IRS's willingness to infer willful misconduct on the basis of slim evidence. The National Taxpayer Advocate recently told Congress, for example, the IRS considers "a significant portion of its burden" to be "automatically [met]" if "the taxpayer filed a return that included a Schedule B, which references the FBAR filing requirement." *Taxpayer Advocate Report*, *supra*, at 171.[12] Indeed,

[12] Part III of Schedule B asks taxpayers to check a box "Yes" or "No," in response to the question "did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country?" *See https://www.irs.gov/pub/irs-pdf/f1040sb.pdf.* Unfortunately, "the vast majority of professional and consumer

the IRS has persuaded at least one court that under a preponderance of the evidence standard, willfulness can be established through proof of "willful blindness,"[13] which in turn can be proven by simply pointing to the taxpayer's signature on a tax form that included references to the FBAR requirement.[14]

II. Despite Being A Critical Factor For Determining Taxpayers' Liability For Substantial Penalties, The Standard Of Proof For Willfulness Is Unresolved By The Courts.

Although the standard of proof can be *the* essential determining factor in many cases, the proper standard of proof for willfulness under Section 5321(a)(5) is a question upon which the IRS has waffled and the courts have remained largely silent.

1. In 2005, the Office of Chief Counsel of the IRS issued a Memorandum taking the position that the Service bore the burden of proving willfulness by clear and convincing evidence. *See* Office of Chief Counsel, Internal Revenue Service, *Memorandum: Foreign Bank and Financial Accounts Report (FBAR) Penalty, November 23, 2004 Memorandum from Rodney Hare, Territory Manager, FTL1*

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tax software defaults the box to check "no[.]". Anthony Parent, *Schedule B Part III Line 7a*, IRSMedic (July 30, 2014), https://www.irsmedic.com/2014/07/30/schedule-b-part-iii-line-7a/.

[13] *United States v. McBride*, 908 F. Supp. 2d 1186, 1204-05 (D. Utah 2012).

[14] *See id*. at 1205-08.

(Sep. 1, 2005) ("*IRS Memo*").[15] The Chief Counsel explained that Congress intended the word "willful" in Section 5321(a)(5), applicable to FBAR violations, to have the same meaning as in Section 5322(a), which provides for criminal punishment of willful violations of the FBAR and other provisions of the statute. *See IRS Memo, supra*, at 2. After discussing the Supreme Court's decision in *Ratzlaf v United States*, 510 U.S. 135 (1994), which adressed the meaning of the word "willful" in a criminal tax statute, the Chief Counsel explained that "there is no willfulness if the accountholder has no knowledge of the duty to file an FBAR." *IRS Memo, supra*, at 2.

In addition, the memo continued, "[w]e expect that a court will find the burden in civil FBAR cases to be that of providing 'clear and convincing evidence,' rather than merely a 'preponderance of the evidence.'" *Id*. at 3. The Chief Counsel explained:

> The clear and convincing evidence standard is the same burden the Service must meet with respect to civil tax fraud cases where the Service also has to show the intent of the taxpayer at the time of the violation. Courts have traditionally applied the clear and convincing standard with respect to fraud cases in general, not just to tax fraud cases, because, just as it is difficult to show intent, it is also difficult to show a lack of intent. The higher standard of clear and convincing evidence offers some protection for an individual who may be wrongly accused of fraud.

Id.

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[15] *Available at* https://www.irs.gov/pub/irs-wd/0603026.pdf.

Finally, the Chief Counsel explained that "[b]ecause the FBAR penalty is not a tax or a tax penalty, the presumption of correctness with respect to tax assessments would not apply to an FBAR penalty assessment for a willful violation—another reason we believe that the Service will need to meet the higher standard of clear and convincing evidence." *Id*.

2. As this case illustrates, in more recent years at least some officials in the IRS have ignored the Chief Counsel's conclusions, asserting instead that the agency may assess the severe penalties for willful FBAR violations based on a mere preponderance of the evidence. *See Taxpayer Advocate Report*, *supra*, at 171 (section entitled "The Government Is Eviscerating the Statutory Requirement for It to Prove Willfulness Before Imposing the Penalty for 'Willful' Failures to Report Foreign Accounts"); *id.* ("The National Taxpayer Advocate believes the government should have to establish a taxpayer's willfulness by clear and convincing evidence, as articulated in Chief Counsel Advice (CCA) issued in 2006. . . ."); *id*. at 174-75 (explaining why).

At least two district courts have accepted that position. *See United States v. McBride*, 908 F. Supp. 2d at 1201-02; *United States v. Williams*, 2010 WL 3473311, at *1 (E.D. Va. Sept. 1, 2010), *reversed on other grounds*, *United States v. Williams*, 489 F. App'x 655 (4th Cir. 2012). However, to date, no court of appeals has addressed the question. Accordingly, in most of the country, taxpayers are simply left to guess what standard would be applied if they resisted IRS settlement pressure and proceeded to litigation.

III. Uncertainty Over The Standard For Proving Willful Violations Inflicts A Concrete Financial Injury On Individuals In Appellant's and Amici's Position, Which Would Be Redressed By Appellant's Declaratory Judgment Action.

Uncertainty of the standard of proof inflicts a particularly severe injury on individuals in Gubser's position (like amici) because of the particularly severe penalty imposed for willful FBAR violations. It is not simply that such individuals suffer anxiety or worry over the prospect of wrongly being assessed the statute's draconian penalties. Rather, as the National Taxpayer Advocate's office has found, the uncertainty can pressure innocent violators into agreeing to pay the IRS far more in penalties that they owe under the law. *See Taxpayer Advocate Report*, *supra*, at 164, 171. That very concrete financial harm constitutes a cognizable Article III injury that would be redressed by the successful litigation of Mr. Gubser's declaratory judgment action.

A. The Consequences Of Being Held A Willful Violator Are Extraordinarily Severe.

Under the statute, designation as a willful violator has severe consequences. The highest permissible penalty for a non-willful violation is $10,000. *See* 31 U.S.C. § 5321(a)(5)(B)(i). The maximum penalty for a willful violation, on the other hand, is half the value of the unreported accounts. *Id*. § 5321(a)(5)(C). As Mr. Gubser's case illustrates, this can amount to half a person's life savings. Indeed, because the statute provides for a penalty for each year in which the taxpayer failed to file a report, the IRS is permitted to seek – and has sought in the past – penalties *in excess* of the entire value of the account. *See* Charles Rettig, *Zwerner: Jury Determines 150% FBAR Penalty Applies – What Next?*, Forbes (May 29, 2014).[16]

Particularly when assessed late in life – as occurred in Mr. Gubser's case and could occur for amici, who are in their 70s, 80s, and 90s – the penalty for willful violations can be particularly devastating as the taxpayers ordinarily will have few opportunities to replenish the retirement savings upon which they depend for their daily living. Indeed, there is reason to fear that retirement savings accounts are particularly prone to FBAR penalties, since they are often opened in local banks when a person is young and left there despite the saver's subsequent relocation.

Beyond the financial consequences is the stigma of being labeled a willful tax cheat. The prospect of that designation is particularly painful to amici, who find themselves in their present predicament only because they voluntarily reported their FBAR mistakes to the IRS and have tried to make amends. To be subject to the kinds of labels and penalties generally meted out to tax evaders and drug traffickers

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[16] *Available at* http://www.forbes.com/sites/irswatch/2014/05/29/zwerner-jury-determines-150-fbar-penalty-applies-what-next/#7881fe2b5c4c.

would inflict an injury that, although difficult to quantify, is nonetheless very real. *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1386 (2014) (injury to business reputation sufficient to establish Article III standing).

As the Supreme Court has explained, this combination of harsh financial and reputational consequences has traditionally triggered the higher "clear and convincing evidence" standard of proof, even in the civil context. *See Addington v. Texas*, 441 U.S. 418, 424 (1979); *see also, e.g.*, TAX CT. R. 142(b) (imposing clear and convincing evidence standard for seeking civil tax fraud penalty under 26 U.S.C § 6663); *Carlson v. United States*, 754 F.3d 1223, 1227-28 (11th Cir. 2014) (explaining that majority of circuits apply the clear and convincing standard to violations under 26 U.S.C. § 6701 for knowingly aiding and abetting understatement of tax liability). As discussed next, the combination of severe monetary penalties and significant harm to reputation also exerts substantial pressure on accused taxpayers to pay more than they owe to the IRS.

B. Uncertainty Over The Standard Of Proof Injures Taxpayers Who May Be Coerced Into Settlements With The IRS For More Than They Owe.

Individuals like amici who notify the IRS of FBAR violations are regularly put into the position of having to guess whether the IRS could establish a willful violation, with significant financial and reputational consequences. And "[b]ecause the IRS has not provided any meaningful assurance that the penalty for a willful failure to file an FBAR will be treated as anything other than a strict liability penalty under a theory of willful blindness," the National Taxpayer Advocate has found, "some who inadvertently failed to file an FBAR have agreed to pay disproportionate penalties in the OVD programs." *Taxpayer Advocate Report*, *supra*, at 172.

In the ordinary course, the IRS may negotiate penalties with taxpayers who admit to violations, using as leverage the threat of conducting an audit through which it may impose the maximum penalties allowed by law. The applicable standard of proof of willfulness is of obvious importance to those negotiations. Should the IRS accuse an innocent violator of willful infringement, it would likely demand penalties commensurate with the very high potential penalties provided by the statute. An innocent taxpayer who knows that those penalties are available only if the IRS can prove willfulness by clear and convincing evidence will be much less likely to be intimidated into agreeing to pay more than she owes than if the standard of proof remains undecided.

This basic dynamic persists under the programs the IRS has established in recent years to regularize treatment of those who voluntarily disclose FBAR violations. In 2003, the IRS instituted what it called the "Offshore Voluntary Compliance Initiative" or "OVCI."[17] Eligible applicants were required to pay any

[17] *See* IRS News Release IR-2003-5 (Jan. 14, 2003), *available at* https://www.irs.gov/pub/irs-news/ir-03-05.pdf.

back taxes, interest, and certain penalties, but did not face criminal prosecution or the FBAR penalty. In 2009, the IRS renewed and revised the program, now called the "Offshore Voluntary Disclosure Program" or "OVDP." Of relevance here, rather than waive all penalties, the OVDP program required applicants to pay a miscellaneous "offshore penalty" equal to 20% of the undisclosed offshore account balances in all but a few narrow circumstances.[18] By the time of amici's disclosures in 2011 and 2012, the "offshore penalty" increased to 25%[19] and 27.5%,[20] respectively, subject to a narrow exception for which amici did not qualify.

Participation in the OVCI and OVDP has been voluntary. Those who elect not to participate, however, face the prospect of an audit in which the IRS could impose the maximum penalties allowed by statute.

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[18] IRS, *Voluntary Disclosure: Questions and Answers, Question and Answer No. 12*, https://www.irs.gov/uac/voluntary-disclosure-questions-and-answers (last updated Dec. 2, 2015).

[19] IRS, *2011 Offshore Voluntary Disclosure Initiative Documents and Forms*, "Penalty Computation Worksheet," *available at* https://www.irs.gov/uac/2011-offshore-voluntary-disclosure-initiative-documents-and-forms (last visited Jan. 29, 2016).

[20] IRS, *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012, Question and Answer No. 7*, https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers (last updated June 8, 2016).

This put individuals who believed their violations to be non-willful in a bind. Under the statute, they should have been subject to no more than the $10,000 penalty for non-willful violations. *See* 31 U.S.C. § 5321(a)(5)(B)(i). But to participate in the OVDP, they had to agree to pay a penalty that could be ten times that amount or more, depending on how much was held in the unreported accounts. If they did not, they faced the possibility of a vastly greater penalty equal to half the balance in their foreign accounts.[21]

Accordingly, in its recent report to Congress, the National Taxpayer Advocate explained that a serious "problem with the IRS's administration of the FBAR rules is that it may drive more benign actors into the OVD if they fear it can deem their violations willful and impose even more draconian penalties without really proving anything." *See Taxpayer Advocate Report*, *supra*, at 171. In fact, "the mere

[21] Since amici's disclosures, the IRS has continued to modify its programs for those who voluntarily disclose FBAR violations. In 2014, the agency opened up its "Streamlined Filing Compliance Procedures" programs to U.S. residents like amici. The program for the first time distinguished between willful and non-willful violators, lowering the "offshore penalty" for non-willful violations to 5%, which could still far exceed the statutory maximum in many cases. IRS, *U.S. Taxpayers Residing in the United States*, https://www.irs.gov/individuals/international-taxpayers/u-s-taxpayers-residing-in-the-united-states (last updated Aug. 5, 2016). Amici were offered the chance to transition to the new program, but only under rules that were less favorable than those applied to individuals who waited until 2014 to report their violations for the first time. The validity of these so-called "Transition Rules" is the subject of amici's litigation with the IRS mentioned *supra*, at 1.

possibility that the government could rely on circumstantial evidence of willful blindness has prompted some to agree to pay more than they should." *Id*. at 172 (capitalization altered).

C. Successful Litigation Of Appellant's Declaratory Judgment Action Would Redress The Injuries The Existing Legal Uncertainty Imposes On Him And Others.

From the above, it easily follows that the injuries flowing from the existing legal uncertainty over the standard of proving willful FBAR violations would be redressed by a declaratory judgment holding that the IRS must prove willfulness by clear and convincing evidence. The district court believed otherwise because it was convinced that the IRS officials overseeing Mr. Gubser's case would not be bound by the declaratory judgment. ROA.86. Appellant has explained why that is wrong. Even if the judgment had no binding effect on the decision of any particular IRS official, it would apply in any subsequent litigation between Mr. Gubser and the IRS. *See* Gubser Br. 19. As importantly, it would remove a source of coercive pressure on Mr. Gubser and others like him to forego insisting on his Due Process rights and, instead, settling with the IRS on terms dictated by the agency rather than the governing statute.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief Of Affected Taxpayers As Amici Curaie In Support Of Appellant has been mailed to counsel for Appellant and Appellees at the addresses listed below or provided to counsel via email through this Court's electronic Notice of Docket Activity on this 31st day of August, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,331 words, including the cover page but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), as modified by 5th Cir. R. 32.1, and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

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Dated: August 31, 2016

ECF CERTIFICATION

All required privacy redactions have been made.

The electronic submission is an exact copy of the paper document.

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/s/ Kevin K. Russell_________________
Kevin K. Russell
Attorney for Amici Curaie

Dated: August 31, 2016

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 31, 2016

Mr. Kevin K. Russell
Goldstein & Russell, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814

No. 16-40948 Bernhard Gubser v. IRS, et al
USDC No. 5:15-CV-298

Dear Mr. Russell,

The following pertains to your amicus curiae brief electronically filed on 8/31/16.

You must submit the 7 paper copies of your brief required by 5TH Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Jim deMontluzin

By: _________________________
James deMontluzin, Deputy Clerk
504-310-7679

cc:
Mr. George Millington Clarke III
Mr. Jon E. Fisher
Mr. Randolph Lyons Hutter
Mr. Joseph Judkins
Ms. Kathleen Eileen Lyon
Ms. Kathryn E. Rimpfel