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 the Internal Revenue Service, UNITED STATES OF AMERICA

Defendants-Appellees

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(Case No. 5:15-cv-00298; Hon. Marina Garcia Marmolejo)

ANSWERING BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for the appellees respectfully inform the Court that they believe oral argument may be helpful, but is not necessary, to resolve the issues raised in this matter.

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JURISDICTIONAL STATEMENT

On December 15, 2015, Bernhard Gubser (Gubser) filed this suit seeking a declaratory judgment regarding the standard of proof to be applied by the Internal Revenue Service (IRS) Office of Appeals when determining whether to sustain a proposed penalty assessment for willful failure to report his interest in a Swiss bank account on a 2008

Report of Foreign Bank and Financial Accounts, more commonly known as the FBAR. (ROA.6-19.)[1] The complaint named the IRS, IRS Commissioner John Koskinen, and the United States as defendants (ROA.6) and asserted jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201.[2] (ROA.8.)

The Government moved to dismiss the complaint for lack of jurisdiction on the grounds that Gubser's action was not ripe for review, that he lacked standing, and that the court lacked subject matter jurisdiction. (ROA.45-54.) Fed. R. Civ. P. 12(b)(1). In response to the motion to dismiss, Gubser asserted that jurisdiction also existed under 28 U.S.C. § 1355. (ROA.55-58.)

On May 4, 2016, the District Court granted the Government's motion, dismissing the complaint on the ground that Gubser lacked

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[1] "ROA" references are to the record on appeal. "Br." references are to appellant's opening brief. "Amicus Br." References are to the amicus brief.

[2] As we argued below (ROA.45 n.1), if the District Court has jurisdiction, the United States is the only proper defendant. Agencies of the United States, such as the IRS, may not be sued. *See Blackman v. Guerre*, 342 U.S. 521 (1952); *Castleberry v. Alcohol, Tobacco & Firearms Div.*, 530 F.2d 672, 673 n. 3 (5th Cir. 1976). Similarly, Commissioner Koskinen is not subject to suit in his official capacity. *See Keese v. United States*, 632 F. Supp. 85, 92 (S.D. Tex. 1985).

standing. (ROA.81-.86.) The Clerk of the District Court terminated the case without entry of a separate judgment under Fed. R. Civ. P. 58. (ROA.4, entry of May 4, 2016). Although no separate judgment was entered, the District Court's order determining that it lacked jurisdiction and granting the Government's motion to dismiss disposed of all claims of all parties and, therefore, is a final decision. Because no party has objected to the lack of a separate entry of judgment here, this appeal may proceed despite the lack of a separate judgment. *Baker v. Mercedes Benz of N. Am.*, 114 F.3d 57, 60 (5th Cir. 1997) (citing *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978)); *see also Amie v. El Paso Indep. Sch. Dist.*, 253 Fed. App'x 447, 450 n.2 (5th Cir. 2007) (stating that the lack of a separate judgment "is not a jurisdictional bar to appeal" and that this Court may hear the appeal "where the parties voluntarily proceed on appeal from an otherwise final and appealable order but lack a Rule 58 separate judgment").

Gubser filed a timely notice of appeal on June 28, 2016. (ROA.89.) Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the District Court correctly dismissed Gubser's complaint, because the case is not ripe for review, because Gubser lacks standing, and because the court lacks subject matter jurisdiction.

STATEMENT OF THE CASE

Bernhard Gubser failed to file a 2008 FBAR reporting his ownership of a Swiss bank account. After an exam, an IRS examiner proposed a penalty for willful failure to file the FBAR and willful failure to meet recordkeeping requirements under 31 U.S.C. § 5314(a). *See* 5321(a)(5)(C)-(D). Rather than acquiescing in the assessment and seeking judicial review, Gubser invoked his right to an independent review of the proposed penalty through a conference with the IRS Office of Appeals. While his matter was pending with the Office of Appeals – and where it remains pending – Gubser filed this action seeking a declaratory judgment that the IRS must show by clear-and-convincing evidence, and not by a preponderance of the evidence, that Gubser's failure to the file the 2008 FBAR was willful.

The Government moved to dismiss for lack of jurisdiction, arguing that the action was not ripe and that Gubser lacked standing. The Government also argued that the Declaratory Judgment Act did not

expand the jurisdiction of the District Court where it did not otherwise exist, and there was no independent basis for jurisdiction here.

The District Court issued an order granting the Government's motion to dismiss on the ground that Gubser lacked standing because he failed to show that his claimed injury, the proposed penalty assessment, was redressable for purpose of Article III.

This appeal followed.

A. The obligation to report foreign financial accounts

United States citizens and residents are subject to U.S. income taxation on their worldwide income, regardless of where the income is earned. *See* 26 U.S.C. (I.R.C.) § 61(a); 26 C.F.R. § 1.1-1(b). The obligation to report interests in foreign bank accounts arises under the Bank Secrecy Act (BSA), Pub. L. No. 91-508, 84 Stat. 1114 (1970) (31 U.S.C. §§ 5311 et seq.). Pursuant to the BSA and relevant regulations, all U.S. residents or U.S. citizens (regardless of residency) who have an interest in, or signatory or other authority over, a foreign financial account must keep records and file reports, *i.e.*, an FBAR, with respect to foreign financial accounts exceeding $10,000 at any time during the calendar year. *See* 31 U.S.C. § 5314(a); 31 C.F.R. § 1010.306(c). For the

years at issue, the FBAR for each tax year had to be filed on or before June 30 of the following year. 31 C.F.R. § 1010.306(c).

Although the penalty for failing to file an FBAR is not a tax or tax penalty under Title 26 of the U.S. Code, the IRS is responsible for enforcing civil penalties for failure to file an FBAR. 31 U.S.C. § 5321(a)(5); 31 C.F.R. § 1010.810(g); Internal Revenue Manual (I.R.M.) § 8.11.6.1 (02-02-2015). Imposition of a penalty is discretionary. 31 U.S.C. § 5321(a)(5)(A). Penalties for non-willful violations of the FBAR requirements "shall not exceed" $10,000. 31 U.S.C. § 5321(a)(5)(B). For willful violations, the maximum penalty is the greater of $100,000 or 50 percent of the balance in the account at the time of the violation. 31 U.S.C. § 5321(a)(5)(C)-(D). The IRS has six years from the due date of the FBAR to assess a penalty. 31 U.S.C. § 5321(b)(1).

B. The complaint for declaratory judgment

On December 15, 2015, Gubser filed a complaint in District Court seeking a declaratory judgment that the standard of proof applicable to IRS determinations of a penalty for willful failure to file an FBAR is clear-and-convincing evidence, and not a preponderance of the evidence. (ROA.6-19.) The complaint alleged jurisdiction under 28 U.S.C. § 1331

and the Declaratory Judgment Act, 28 U.S.C. § 2201. (ROA.8 ¶ 5.) For purposes of the motion to dismiss, the Government assumes that the following allegations in the complaint are true.

1. Gubser's Swiss bank account

Bernhard Gubser of Laredo, Texas, is a dual citizen of the United States and Switzerland. (ROA.6 ¶ 1; ROA.8 ¶ 7.) Gubser became a naturalized U.S. citizen in 1992 and has lived in the United States since at least that time. (ROA.15 ¶ 28.) Before becoming a U.S. citizen, Gubser and his wife jointly maintained individual bank accounts at UBS AG in Switzerland and continued to do so after he obtained U.S. citizenship. (ROA.15 ¶ 29.) In July 2008, as part of the couple's divorce, funds in the UBS accounts were equally divided, and Gubser and his ex-wife moved their respective funds into two new, separately-owned individual accounts at Bank Julius Baer Co. Ltd in Switzerland. (ROA.15 ¶ 29.) The maximum value of Gubser's Julius Baer account in 2008 was $2,726,672. (ROA.15 ¶ 29.)

2. Gubser's failure to report the Swiss bank account and the IRS's proposed penalty for willful failure to file the 2008 FBAR

As alleged in the complaint, Gubser failed to report any interest in his Swiss bank accounts until 2010, when he first became aware of the

FBAR filing requirements. (ROA.16 ¶ 32.) Gubser filed a timely FBAR for the 2009 tax year at that time and has timely filed FBARs for subsequent years. (ROA.16 ¶ 32.) Gubser did not file a timely FBAR for 2008 or any of the preceding years.

In January 2011, Gubser made a voluntary disclosure with respect to the UBS and Julius Baer accounts under the IRS Offshore Voluntary Disclosure Program (OVDP) for tax years 2003 through 2010.[3] In January 2014, Gubser withdrew from the OVDP penalty framework. (ROA.16 ¶ 33.) By doing so, Gubser became potentially subject to a full IRS examination and the imposition of all applicable civil penalties, including the possibility of penalties for willful or non-willful failure to file FBARs. 31 U.S.C. § 5321(a)(5)(A)-(D).

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[3] Generally speaking, the IRS OVDP requires taxpayers who voluntarily disclose previously undisclosed foreign accounts to pay tax, interest, and accuracy-related penalties for the tax years covered by the voluntary disclosure period, plus an additional miscellaneous "offshore penalty" equal to a portion (currently, 27.5%) of the highest aggregate balance of foreign accounts and the highest value of offshore assets during the applicable voluntary disclosure period. *See generally* IRS Offshore Voluntary Disclosure Efforts Produce $6.5 Billion; 45,000 Taxpayers Participate (June 2014), located at https://www.irs.gov/uac/newsroom/irs-offshore-voluntary-disclosure-efforts-produce-6-5-billion-45-000-taxpayers-participate.

On March 30, 2015, after an exam, the IRS issued Gubser a Letter 3709 (or 30-day letter) proposing a civil penalty of $1,363,336, equal to half of the Julius Baer account's maximum balance in 2008, for willful failure to meet FBAR filing and recordkeeping requirements for 2008. ROA.151-153; *see also* Br. 7 n.3. The letter explained that Gubser could either agree to the assessment and collection of the proposed penalty and submit payment, request a conference with the Office of Appeals to contest the proposed penalty, or do nothing and wait for the IRS to assess the penalty and begin collection procedures. (ROA.152-153.) Each of the options allowed Gubser a judicial remedy following an assessment. For example, if a penalty were assessed as the result of either of the three options, Gubser could bring an action in the District Court or the Court of Federal Claims under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491.

Gubser chose to protest the proposed penalty and requested a conference with the Office of Appeals, a separate and independent office within the IRS that independently reviews matters before it. (ROA.16 ¶ 35.) I.R.M. § 1.2.17.2(3)(B) (11-04-1998); I.R.M. § 8.1.3.3 (10-01-2012); *see generally* https://www.irs.gov/individuals/appeals-an-independent-

organization (explaining the role of the Office of Appeals). Appeals Officers have discretion to resolve an FBAR penalty matter by fully or partially sustaining the proposed penalty (with or without the taxpayer's agreement) or by not sustaining the proposed penalty. *See, e.g.*, I.R.M. § 8.11.6.8.2 (11-13-2014) (explaining that the Appeals officer may issue one of three letters upon closing a pre-assessment FBAR matter: an "Agreed" letter showing the taxpayer's agreement to a penalty assessment, an "Unagreed" letter showing that the penalty was fully or partially sustained and that the taxpayer does not agree to the penalty, and a "No Change" letter showing that the proposed penalty was not sustained).

On September 10, 2015, Gubser and his counsel met with an Appeals Officer. According to Gubser, during the meeting, the Appeals Officer opined that if the Government were required to establish Gubser's willful failure to file the 2008 FBAR in court by a preponderance of the evidence, the Government would be able to meet the burden, but that if the standard were clear-and-convincing evidence, the IRS would not. (ROA.17 ¶ 36.) Based on IRS training materials, and consistent with the standard of proof used by courts in

other FBAR cases, the Appeals Officer took the position that a preponderance-of-the-evidence standard applies. (ROA.17 ¶ 36 (citing *United States v. Williams*, 489 Fed. Appx. 655, 656-60 (4th Cir. 2012); *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012); *see also* ROA.14 ¶ 25 (stating that in Appeals, the IRS had "clarified . . . its position with regard to the applicable burden of proof")). The complaint does not indicate anything else that the parties may have discussed at the September 2015 meeting or if the parties had any further discussions before the filing of this suit.

In the complaint, Gubser asserted that because the Appeals Officer "conced[ed]" (ROA.7 ¶ 2) that the Government could not meet the clear-and-convincing-evidence standard, a declaratory judgment in his favor "will allow for complete resolution of the controversy without resorting to litigation" by precluding assessment of the proposed penalty. (ROA.14 ¶ 26; *see also* ROA.7 ¶ 4 (alleging that a declaratory judgment in his favor would "prevent government confiscation" of Gubser's funds).) Gubser alleged that a declaration in his favor would "terminate and afford relief from uncertainty, insecurity, and

controversy" for Gubser, who would no longer face the possibility of a willful failure-to-file penalty. (ROA.14 ¶ 26; *see also* ROA.7 ¶ 3.)

C. The motion to dismiss

The Government filed a motion to dismiss for lack of jurisdiction. (ROA.45-53.) Fed. R. Civ. P. 12(b)(1). The Government argued that no case or controversy existed here under Article III of the U.S. Constitution. The Government argued that the case was not ripe because no penalty had been assessed and such penalty may never be assessed, and that, in effect, Gubser sought an advisory opinion regarding what the standard of proof would be in court *if* a penalty ever were assessed and Gubser litigated it. (ROA.46-47, 49-50.) The Government similarly argued that because there was no actual penalty assessment, there was no injury-in-fact sufficient to create Article III standing. (ROA.48.)

The Government also argued that Gubser could not rely on 28 U.S.C §§ 1331 and 2201 to establish subject matter jurisdiction because those statutes do not provide an independent basis for jurisdiction or waive the Government's sovereign immunity. (ROA.47; ROA.51.) Because the Declaratory Judgment Act does not enlarge jurisdiction

where it does not otherwise exist, the Government argued, Gubser failed to show any basis for jurisdiction. (ROA.51-52.)

In response, Gubser did not dispute that 28 U.S.C. § 1331 and § 2201 do not themselves grant jurisdiction over this action in the District Court, but argued – for the first time – that the District Court nonetheless had jurisdiction over his suit under 28 U.S.C. § 1355, which provides original jurisdiction in federal district courts in "any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress." Gubser contended that even though no penalty had been assessed, the IRS's proposal of a penalty was sufficient to fall within the jurisdictional ambit of § 1355. (ROA.56-59.)

D. The hearing on the Government's motion to dismiss

On April 13, 2016, the District Court held a hearing on the Government's motion to dismiss. (ROA.102-150.) At the hearing, counsel for Gubser conceded that a declaratory judgment in his favor would not prevent the Appeals Officer from imposing the proposed penalty. (ROA.116-117; ROA.134-136.) Counsel for Gubser also made several assertions for the first time. Contradicting the allegations in

the complaint that the Appeals Officer took the firm position at the September 2015 meeting that a preponderance-of-the-evidence standard applied in proving willfulness (ROA. 17 ¶ 36; *see also* ROA.14 ¶ 25), counsel for Gubser asserted that the Appeals Officer "didn't know what standard to apply" and asked Gubser and his counsel to "[p]lease try to get some guidance from either the Department of Justice or some other way with respect to" the standard of proof. (ROA.114.) Counsel for Gubser also asserted that the Appeals Officer told them that if a clear-and-convincing-evidence standard applies, "you win." (ROA.131.) Counsel for Gubser further asserted that, after Gubser filed the declaratory judgment action, the Appeals Officer called counsel and thanked him for filing suit because the Appeals officer hoped to "get some guidance on this" because he was not a lawyer and that he "can't resolve this" matter without outside guidance. (ROA.114.) The Government disputed these newly-raised assertions. (ROA.118-119.)

E. The District Court's order

On May 4, 2016, the District Court entered an order granting the Government's motion to dismiss and dismissing Gubser's action. It held

that Gubser lacked standing and declined to address the Government's other arguments challenging jurisdiction.

In ruling that Gubser lacked standing, the District Court determined that the injury claimed by Gubser – the potential assessment of a $1.36 million penalty – was not redressable by a declaratory judgment in his favor regarding the standard for proving willfulness. The District Court found that, even assuming the proposed penalty was an injury-in-fact for standing purposes, the fact that the Appeals Officer was free to assess or not to assess the proposed penalty regardless of whether the District Court issued a declaration in Gubser's favor (as Gubser acknowledged at the hearing (ROA.116-117; ROA.134-136)) made it "far from likely" that a favorable ruling would prevent the harm claimed by Gubser. (ROA.86.) Thus, the District Court concluded, Gubser's arguments were "highly speculative" and the pleadings could not support the conclusion that a declaration by the court would be likely to redress the harm claimed by Gubser. (ROA.86.)

The District Court accordingly dismissed the complaint.

SUMMARY OF ARGUMENT

The District Court correctly dismissed this case for lack of jurisdiction because the case is not ripe for review, because Gubser lacks standing, and because there is no independent statutory basis for jurisdiction. Although the court below addressed only Gubser's lack of standing, this Court may affirm the dismissal on any ground supported by the record.

1. This action is not ripe because there is no final agency action for this Court to review. The Supreme Court has instructed that in determining whether administrative action is ripe for review, courts should evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Both factors weigh against judicial intervention here. Gubser elected to avail himself of the administrative appeals process, and that process is on-going. No penalty has been assessed, and Gubser owes no FBAR penalty to the Government in the meantime. It is entirely speculative whether, and to what extent, a penalty will be assessed because the Office of Appeals has discretion not to sustain the proposed penalty, to settle it, or to reduce the amount.

The relief that Gubser seeks in this case – clarification of the standard for proving willful failure to file an FBAR – will not accelerate the resolution of the penalty issue. Gubser claims that the Appeals Officer took the position that the Government can meet a preponderance-of-the-evidence standard, but that it cannot meet a clear-and-convincing-evidence standard. The Government disputes that the Appeals Officer made these statements, but accepting the allegations as true, resolution of the standard of proof would not result in any particular outcome in the administrative appeal. Thus, a declaratory judgment as to the standard of proof would be nothing more than an advisory opinion.

Nor is there any hardship in waiting for the administrative appeal process to end. If a penalty is ultimately assessed, Gubser can seek judicial review of the assessment in the district court or Court of Federal Claims. In the meantime, the Government would not be able to immediately collect the penalty. There is no imminent harm warranting review at this premature stage.

2. Gubser also lacks standing to bring this action. Gubser has failed to show a cognizable injury-in-fact because there has been no

assessment here. Even assuming the proposed penalty were an injury-in-fact, the District Court correctly concluded that it was not redressable because a declaratory judgment about the standard of proof would not prevent a penalty assessment, as Gubser conceded below. Contrary to Gubser's argument on appeal, the District Court's conclusion did not rest on whether the declaratory judgment would compel the Appeals Officer to act or otherwise bind him, but, instead, rested on the simple and unavoidable fact that the requested declaratory relief would not prevent a penalty from being assessed. Gubser's newly-raised argument on appeal that uncertainty about the standard of proof is itself a discrete injury that can be redressed with a ruling by the District Court – independent of whether the proposed penalty is assessed – is meritless.

3. Finally, this case warrants dismissal because there is no subject matter jurisdiction. It is well established that to bring a declaratory judgment action, the plaintiff must show that the court otherwise has jurisdiction over the case; and when the defendant is the United States, there must be a waiver of sovereign immunity. The Declaratory Judgment Act does not confer such jurisdiction. The

statutes that Gubser relies on, 28 U.S.C. §§ 1331 and 1355, are general jurisdictional grants that do not waive sovereign immunity.

The District Court's order dismissing this case should be affirmed.

ARGUMENT

The District Court properly dismissed the complaint because there is no case or controversy under Article III and no statutory basis for jurisdiction

Standard of review

This Court reviews a District Court's grant of a motion to dismiss for lack of jurisdiction *de novo* and applies the same standards as the District Court. *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 181 (5th Cir. 2016) (citation omitted). Factual allegations set forth in the complaint are accepted as true. *Crane v. Johnson*, 783 F.3d 244, 250-51 (5th Cir. 2015). The party invoking federal jurisdiction bears the burden of establishing it. *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012).

A. Justiciability requirements under Article III

Article III of the U.S. Constitution confines federal courts to the decision of "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). To give

meaning to Article III's case-or-controversy requirement, the courts have developed a series of justiciability doctrines, including, as relevant here, ripeness and standing. *United Transp. Union*, 205 F.3d at 857. The ripeness doctrine separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review. *Id.* The standing doctrine focuses on whether the plaintiff is the proper party to bring the suit. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). If a case is not ripe for review or a party does not have standing, then there is no case or controversy, and the court lacks jurisdiction.

Before the District Court, the Government raised three arguments: (i) that this action is not ripe for adjudication, (ii) that Gubser lacks standing to pursue this action, and (iii) that he failed to identify any statutory basis for jurisdiction. The District Court determined that Gubser lacks standing and granted the Government's motion to dismiss without addressing our remaining arguments. The District Court's decision not to address ripeness and subject matter jurisdiction does not preclude this Court from addressing them in the first instance. *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir.

2000) ("Ripeness is a constitutional prerequisite to the exercise of jurisdiction.") (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

B. There is no case or controversy under Article III because this action is not ripe

1. The ripeness doctrine

The seminal case addressing when administrative agency action is ripe for judicial review is *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). *Accord Imperial Carpet Mills, Inc. v. Consumer Prod. Safety Comm'n*, 634 F.2d 871, 873 (5th Cir. 1981). There, the Supreme Court held that the determination whether an administrative action is ripe for review "requires an evaluation of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. The fitness prong addresses whether the issue is sufficiently concrete "to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies," and whether it is final, so as to "protect the agencies from judicial interference until an administrative decision has

been formalized." *Id.* at 148-149. Generally, the concreteness element of the fitness requirement is satisfied if the challenge presents an issue that is purely legal, and will not be clarified by further factual development. *New Orleans Public Service, Inc. v. Council of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987). The finality element is viewed pragmatically, and if the challenged agency action is informal, tentative, or the ruling of a subordinate official, then it is not final for purposes of the ripeness doctrine. *Abbott Laboratories*, 387 U.S. at 151; *see, e.g.*, *Taylor-Callahan-Coleman Counties District Adult Probation Dep't v. Dole*, 948 F.2d 953, 957-58 (5th Cir. 1991).

The hardship prong of the ripeness analysis contemplates an "immediate and direct impact" of delaying adjudication of the issue. *Imperial Carpet Mills*, 634 F.2d at 873. The availability of judicial relief from the claimed harm weighs against a finding of hardship. *Caprock Plains Fed. Bank Ass'n v. Farm Credit Admin.*, 843 F.2d 840, 846 (5th Cir. 1988).

A court should dismiss a case for lack of ripeness when the case is abstract or hypothetical. *United Transp. Union*, 205 F.3d at 857 (citation omitted). Thus, where a purported injury is "contingent [on]

future events that may not occur as anticipated, or indeed may not occur at all," the claim is not ripe for adjudication. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (quotation omitted); *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010); *Monk v. Huston*, 340 F.3d 279, 282–83 (5th Cir. 2003).

As this Court has observed, "applying the ripeness doctrine in the declaratory judgment context presents a unique challenge" because declaratory judgments are typically sought before a completed "injury-in-fact" has occurred. *Orix Credit All.*, 212 F.3d at 896 (citing *United Transp. Union*, 205 F.3d at 857). Nonetheless, "a declaratory judgment action, like any other action, must be ripe in order to be justiciable." *Orix Credit All.*, 212 F.3d at 896. Indeed, the "case or controversy" requirement of Article III of the United States Constitution is "identical" to the Declaratory Judgment Act's requirement that such judgment may be issued only in "a case of actual controversy" within a court's jurisdiction. *Orix Credit All.*, 212 F.3d at 896; 28 U.S.C. § 2201(a).

2. This case is not fit for review because there is no final agency action

As explained above, the fitness prong requires that (1) the issue be sufficiently concrete "to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies," and that (2) the challenged action be final, so as to "protect the agencies from judicial interference until an administrative decision has been formalized." *Abbott Laboratories*, 387 U.S. at 148-149. Here, even assuming that this action is sufficiently concrete because it raises solely a legal issue with respect to the standard of proof, Gubser's declaratory judgment action fails because there has been no final action by the IRS.

The willfulness penalty proposed by the IRS examiner in the Letter 3709 is just that: proposed. (ROA.151-153.) The proposed penalty would have become final only if Gubser had agreed to the assessment or if he had done nothing and waited for the IRS to assess it. Instead, he exercised his right to seek administrative review of the proposed penalty in the Office of Appeals. Having initiated an administrative appeal, he cannot interrupt that process with this declaratory judgment action. That is precisely what the ripeness doctrine is meant to prevent – protecting "agencies from judicial

interference until an administrative decision has been formalized." *Abbott Laboratories*, 387 U.S. at 148-49; *see also* ROA.10-11 ¶15 (acknowledging that the Office of Appeals is the "final administrative phase" regarding penalty determinations and the Appeals Officer has discretion whether a penalty is appropriate); *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 (3d Cir. 1988) ("[J]udicial review is premature when an agency has yet to complete its work by arriving at a definite decision."); *Imperial Carpet Mills*, 634 F.2d at 874 (affirming District Court dismissal for lack of ripeness where there was "clearly no final agency action," where a complaint to initiate adjudicatory administrative proceedings had been authorized by a federal agency but was not yet filed). *Accord Crawford v. United States Dept. of the Treasury*, 2015 WL 5697552, *15 (S.D. Ohio Sept. 29, 2015) (facial challenge to the FBAR willfulness penalty as an excessive fine under the Eighth Amendment was not ripe because no FBAR penalty had been assessed) (unpublished); *Mitchell v. Riddell*, 402 F.2d 842, 845-46 (9th Cir. 1968) (finding that no case or controversy existed under the

Declaratory Judgment Act for a determination of a foundation's tax-exempt status because no taxes had yet been assessed against it).[4]

Indeed, Gubser's declaratory suit is even more disruptive to the administrative process than the usual case. In most cases seeking a declaratory judgment as to administrative action, the plaintiff seeks to cut short the agency process and have the court address the merits. *See, e.g., Imperial Carpet Mills*, 634 F.2d at 873-74. That is not what Gubser seeks to do here; he is not seeking review of the proposed FBAR penalty. Rather, he seeks to influence the outcome of the administrative appeal by obtaining an advance ruling from this court on an isolated sub-issue, the standard of proof, and then *resume* his administrative appeal of the proposed penalty. *See Owners Ins. Co. v. Parsons*, 610 Fed. App'x 895, 898 (11th Cir. 2015) ("[The insurance

[4] Amici's related characterization (Amicus Br. 2-3, 14-20) of taxpayers facing proposed FBAR penalties as helpless victims of the Appeals process is without merit. Participation in Appeals is voluntary, and no taxpayer – including Gubser – is required to enter into a settlement with the IRS. No taxpayer is required to complete the process, and Gubser may withdraw from the Appeals process at any time if he is dissatisfied. To be sure, if Gubser were to withdraw from Appeals, the IRS would assess a penalty. Gubser could then seek judicial review of the assessment.

company] seeks a hypothetical advisory opinion to assist it in its ongoing settlement negotiations. Such advisory relief is unavailable through the declaratory judgment procedure.") (citing *Coffman v. Breeze Corps.*, 323 U.S. 316 (1945)) (unpublished). But allowing a person to press "pause" on an administrative appeal to obtain judicial clarification of every disputed legal issue would wreak havoc on the administrative process. It would greatly protract administrative appeals (as it has here), increase taxpayer expense, and delay, rather than accelerate, finality.

Gubser argues (Br. 10) that a resolution of the standard of proof would accelerate ultimate resolution of the FBAR penalty because the Appeals Officer allegedly has opined that, under the facts of this case, the Government cannot prove willfulness by clear-and-convincing evidence, but that it can prove willfulness by a preponderance of the evidence. As the District Court found, even if the Appeals Officer made such non-binding statements, it is far from clear that an advance ruling on the standard of proof would bring a speedy resolution to the penalty issue. Even if the court were to rule that the heightened standard applies (contrary to the decisions of two other courts, *see Williams* and

McBride, *supra*), a supervisor within the Office of Appeals might take the view that the Government could meet a heightened burden. Or the Appeals Officer himself could change his mind about the weight of the evidence. Or new evidence could be discovered that would strengthen the Government's case. A declaratory ruling would be nothing more than an advisory opinion and would not bring about an ultimate resolution of the penalty issue. *See Life Partners, Inc. v. Life Ins. Co. of N. America*, 203 F.3d 324, 325 (5th Cir. 1999) ("Federal courts do not render advisory opinions.").[5]

The outcome in Appeals is uncertain and unknowable at this stage of the proceedings. The Appeals Officer may sustain the proposed penalty, or not, or may impose some lesser amount (whether as part of a settlement or not). I.R.M. § 8.11.6.8.2. The hypothetical and

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[5] Gubser's claim (Br. 2, 3, 4, 8, 9, 10, 21-22, 30) that the Appeals Officer also wants resolution from this Court finds no support in the record and is utterly irrelevant. Even if the Appeals Officer made such statements (which contradicts what Gubser alleged in his complaint (ROA.17 ¶ 36; *see also* ROA.14 ¶25)), they do not represent the views of the Government. A statement by an agency employee does not and cannot bind the Government. And if the Appeals Officer wanted guidance regarding the standard of proof, he has clear channels for seeking it from the IRS Office of Chief Counsel or the Department of Justice. I.R.M. §§ 8.1.10.3.4 (10-01-12); 8.1.10.1.1.5 (6-21-12).

speculative nature of the claimed injury here renders this action unripe, even if the case is otherwise "fit" for review because it presents a purely legal question regarding the applicable standard of proof. *See Thomas*, 473 U.S. at 580-81. The Office of Appeals should be allowed to complete its process and make a final determination without judicial interruption.

3. There is no direct and immediate hardship to Gubser in not considering this action

There is also no hardship to Gubser within the meaning of Article III in not adjudicating the standard of proof at this stage. The hardship prong of the ripeness requirement contemplates an "immediate and direct impact" by withholding adjudication of the issue. *Imperial Carpet Mills*, 634 F.2d at 873; *see also Abbott Laboratories*, at 387 U.S. at 153 (stating that the claimed harm must be "immediate and significant"). Here, Gubser has not shown that he would suffer an immediate and direct impact if the District Court withheld consideration of his action.

As explained above, the harm alleged here – the proposed assessment of a willful failure-to-file penalty – is speculative at this point because the administrative appeal is ongoing. Gubser owes no

FBAR penalty to the Government in the meantime, and his future liability – if any – is unknown. Moreover, the possibility of future financial loss is not sufficient in itself to show that Gubser's declaratory judgment action is ripe. *See Abbott Laboratories*, 387 U.S. at 153 (speculative financial loss alone is not sufficient to show direct and immediate harm for purposes of the hardship prong of the ripeness requirement); *Stephenson v. Brady*, 927 F.2d 596, 1991 WL 22835, *3-4 (4th Cir. Feb. 26, 1991) (table) (affirming dismissal of declaratory judgment action for lack of ripeness where plaintiff's past noncompliance with IRS annual pension plan reporting requirements presented only a possible future financial loss as harm, in the event the IRS decided to re-assess a penalty previously assessed and withdrawn) (unpublished); *see also California v. Bennett*, 833 F.2d 827, 834 (9th Cir. 1987) (same, and finding an otherwise ripe matter failed for lack of hardship where the "harm that was presaged [by the accrual of prejudgment interest] is limited to financial expense"); *Michigan Dep't of Educ. v. U.S. Dep't of Educ.*, 875 F.2d 1196, 1206 (6th Cir. 1989) (finding question about possible imposition of prejudgment interest was

not ripe because it involved financial loss and the agency at issue had neither decided whether to seek interest nor taken action to collect it).

Further, even if the Appeals process ends with an assessment of the full amount of the proposed penalty, Gubser may seek judicial review by bringing an action in District Court or the Court of Federal Claims. *See* 28 U.S.C. §§ 1346(a)(2), 1491. Gubser has not challenged the adequacy of judicial remedies available to him. As this court has found, the availability of judicial relief weighs against a finding of hardship. *Caprock Plains*, 843 F.2d at 845–46.

Gubser claims that the harm to him is "imminent and substantial" because "[t]he IRS proposes to take half of Gubser's life savings through the proposed penalty." (Br. 18.) But even if the IRS were to assess the full amount of the proposed penalty, it would not be able to immediately execute on the assessment. An FBAR penalty is not a tax or a tax penalty, so there is no threat of a federal tax lien or levy. Rather, the Government generally must bring an enforcement action in court. *See* 28 U.S.C. §§ 3001, 3101-3206 (available remedies under the Federal Debt Collection Procedures Act (FDCPA)); *United States v. Badger*, 818 F.3d 563, 573 (10th Cir. 2016) (summarizing pre-judgment and post-

judgment remedies under FDCPA); *see, e.g., Williams* and *McBride*, *supra*. Although the Government has some pre-judgment collection remedies available to it (such as withholding government payments due to Gubser, assuming such payments exist), the statutes generally provide for notice and administrative review prior to taking such action. *See, e.g.*, 31 U.S.C. §§ 3716, 3720A, 3720D.

Gubser also alleges harm by contending that the Appeals process "will be fruitless" without clarification of the standard of proof and that he "cannot meaningfully proceed to resolve the case at IRS Appeals" in light of the uncertainty regarding the standard of proof. (Br. 18-19.) This is meritless. At the outset, there *is* guidance regarding the standard of proof: two courts have applied the preponderance-of-the-evidence standard in finding willful failure to file an FBAR. *See Williams*, 489 Fed. Appx. at 656-60; *McBride*, 908 F. Supp. 2d at 1201-02 (proper standard of proof was directly addressed by the court). The fact that an IRS Chief Counsel attorney opined in 2006 in a non-precedential, internal memorandum that courts might apply a clear-and-convincing-evidence standard does not create stymying uncertainty. *See* Br. 12 & n.6; 26 U.S.C. §§ 6110(b)(1)(A), (k)(3). The

Department of Justice – which has the final say as to the Government's litigating position – has consistently maintained that the standard of proof is preponderance of the evidence, and, to date, no court has disagreed.

Gubser's reliance (Br. 11-12) on *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Addington v. Texas*, 441 U.S. 418 (1979), to assert a due process right to an advance ruling on the standard of proof is misplaced. First, neither case involved a declaratory judgment action or issues of Article III jurisdiction. In *Santosky*, the Supreme Court emphasized the importance of advance knowledge of the standard of proof in state-initiated proceedings that posed a "significant deprivation of liberty," such as the termination of parental rights. 455 U.S. at 756-57. *Addington* similarly involved a civil commitment proceeding. This is a far cry from the civil FBAR penalty context at issue here, and the potential financial harm of the proposed penalty does not dictate advance certainty as to the standard of proof.[6]

[6] Gubser also errs by asserting (Br. 11) that *Santosky* and *Addington* point to the necessity of a clear-and-convincing-evidence standard in the FBAR penalty context. In both cases, the Supreme Court observed that a "clear and convincing evidence" standard of proof (continued…)

In sum, there is no threat of "immediate and direct" harm to Gubser in waiting to address the standard of proof until a penalty is assessed (if at all) and a lawsuit addressing the merits of the penalty is filed. "All questions touching on the weakness of the [Government's] case and the difficulty of proof will be before the courts for their review once the administrative function is completed." *Campbell v. Guetersloh*, 287 F.2d 878, 881 (5th Cir. 1961).

C. There is no case or controversy under Article III because Gubser lacks standing to bring this action

1. Standing

"[T]he irreducible constitutional minimum of standing" contains three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must show (1) an "injury in fact," (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* at 560-61.

(…continued)
applies when individual interests at stake in a state government-initiated proceeding are both "particularly important" and "more substantial than mere loss of money," as Gubser potentially faces here if an assessment occurs. *Santosky*, 455 U.S. at 755-56 (quotation and citation omitted); *Addington*, 441 U.S. at 424.

To satisfy the injury-in-fact prong of the standing inquiry, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Lujan*, 504 U.S. at 560. *Accord Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003). The requisite causal link between the injury and the challenged conduct is present for standing purposes if the injury "fairly can be traced to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). An allegation of potential future injury is an injury-in-fact only if "the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, – U.S. – , 134 S. Ct. 2334, 2341. *Accord Bauer v. Texas*, 341 F.3d 352, 357–58 (5th Cir. 2003). Finally, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982).

2. The proposed FBAR penalty is not an injury-in-fact

There is no injury-in-fact here, and therefore no standing, for the same reason this case is not ripe: the IRS has not assessed a penalty,

and Gubser currently owes no FBAR penalty to the Government. Consequently, Gubser has not suffered any actual harm. *See Stephenson*, 927 F.2d 596, 1991 WL 22835, *2 (finding that because the IRS withdrew a penalty assessment imposed for Stephenson's failure to file returns for certain pension plans before any payments were made, "Stephenson is currently under no assessment [and] [u]ntil such time as the IRS may assess a penalty, Stephenson has suffered no injury and thus remains without standing") (unpublished). Gubser errs in arguing (Br. 20) that his harm "follows from the government's actions to propose, assess and collect the penalty." This claim is based on the Letter 3709's instruction that if Gubser did nothing, the IRS would assess the penalty and begin collection – an option Gubser rejected in favor of Appeals because it offered the possibility of avoiding the penalty altogether (Br. 17).

Similarly, because the IRS has not made a final determination, no action is "certainly impending." *Driehaus*, – U.S. – , 134 S. Ct. at 2341. Gubser's claim that a penalty is "imminent" (Br. 17, 18, 19-20) and "inevitable" (Br. 17-18) is unavailing because the Appeals process is not a "mechanical" (Br. 17-18) rubber stamp for the IRS examiner's

determination that a willful failure-to-file penalty is appropriate here. The Appeals Officer has discretion with respect to the outcome here, and the process is not complete.

Notably, the complaint does not allege any facts reflecting the Appeals Officer's views or thinking regarding, for example, whether the IRS examiner made any errors that bring the proposed penalty into question, whether to sustain the penalty, or whether to settle the matter at an amount acceptable to Gubser. Indeed, the complaint is silent as to whether the parties engaged in any discussion at all beyond the Appeals Officer's alleged comments about the standard of proof. Moreover, Gubser has not alleged any facts indicating what information he provided or arguments he made to the Appeals Officer regarding why the IRS examiner erred. *See* ROA.152-153 (requesting information and argument in support of Gubser's protest). In sum, there simply is no basis for evaluating the likelihood of one outcome over another in Appeals, and Gubser's assertions about the "inevitable" (Br. 17-18) outcome here are based on conclusory assertions and unwarranted and unsupported inferences.

Gubser also errs in arguing (Br. 16) that his matter is a "classic" case or controversy because he contests the action of government officials who threaten to enforce a penalty. There has been no action by the IRS because there has been no assessment, and there can be no threat of enforcement when there is nothing to enforce. As Gubser alleged in the complaint, the Office of Appeals is the "final administrative phase" before a final determination is made and the Appeals Officer has discretion in that determination. (ROA.10-11 ¶ 15.)

Gubser's reliance (Br. 16-17) on *Diamond v. Charles*, 476 U.S. 54 (1986), and *Roark & Hardee LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008), on this score is misplaced. In *Diamond*, while the Supreme Court observed that "[t]he conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art[icle] III," it found that that principle had no bearing on the case before it, in which an intervenor lacked standing to compel the state to prosecute third parties. *Diamond*, 476 U.S. at 64. In *Roark*, this Court found it persuasive for standing purposes that the plaintiffs faced the "real potential of immediate criminal prosecution." *Roark*, 522 F.3d at 543.

Both cases are plainly inapposite here, where Gubser challenges the possible assessment of a civil penalty for conduct that has already occurred. 31 U.S.C. §§ 5314, 5321.

In sum, there is no injury-in-fact here and, therefore, no standing.

3. The District Court correctly concluded that a declaratory judgment in Gubser's favor would not redress the claimed injury

A plaintiff satisfies the redressability requirement "when he shows that a favorable decision will relieve a discrete injury to himself." *Larson*, 456 U.S. at 244 n.15. Throughout the proceedings below, Gubser alleged and argued that a declaratory judgment that a clear-and-convincing-evidence standard applies to willfulness determinations would redress his claimed injury – the proposed penalty – because the Appeals Officer allegedly stated that the Government could not meet the higher evidentiary standard in court.

The District Court correctly concluded (ROA.86) that Gubser's concession during the hearing – that the Appeals Officer could assess or not assess the proposed penalty regardless of whether the court ruled that a clear-and-convincing-evidence standard applied (ROA.116-117; ROA. 134-136) – was fatal to his argument, making it "far from likely"

that a favorable declaration on the standard of proof would prevent the assessment of a penalty against Gubser. (ROA.86.) *See Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 432 (5th Cir. 2014) (*en banc*) (stating that to show redressability, "it must be likely, as opposed to merely speculative, that a favorable decision will redress the plaintiff's injury") (quotation and citation omitted).

Gubser does not dispute that a ruling in his favor would not prevent the IRS from assessing the proposed penalty. (Br. 9-10.) That should end this Court's inquiry. Nonetheless, Gubser argues (Br. 9-10, 13, 21-31) that the District Court erred as a matter of law by focusing on whether the Appeals Officer would be bound by the court's ruling. This is a straw man argument. The gist of the court's opinion was that its ruling would not *matter* at this stage, not that its ruling could be dispositive but ignored. For these reasons, Gubser's emphasis on the non-coercive and non-binding nature of a declaratory judgment (Br. 21-31) misses the point.

In any event, the District Court necessarily assumed that the Appeals Officer would follow the law and apply a court's ruling when it

held that the relief sought here – clarification of the standard of proof – would not redress the alleged injury, *i.e.*, the proposed penalty. As discussed on pp. 27-28, *supra*, there are a number of reasons why a penalty still might be imposed even if the court were to determine that a clear-and-convincing-evidence standard applies to willfulness.

Because there is no injury that would be redressed by clarifying the standard of proof, Gubser's reliance on *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937), is misplaced. (Br. 24-25.) In *Aetna*, the Supreme Court determined that an insurance company had standing to bring a declaratory judgment action to determine rights and obligations under an insurance contract before the insured filed suit. There, the insurance company sought a definitive determination as to a dispositive fact, *i.e.,* whether the insured was permanently disabled. Here, on the other hand, a definitive determination on the standard of proof would not fix the parties' legal obligations going forward. The parties could continue to dispute whether that standard of proof was met.

Nor is this case like *FEC v. Akins*, 524 U.S. 11 (1998), which Gubser discusses at Br. 27-29. There, the Government made a

"harmless error" type of argument that even if the Court were to disagree with the rationale for the agency's decision, the agency had other, different reasons that could support the same decision. That is not the situation here. In *Akins*, the relief sought was effective to reverse the agency decision (which was final) as it stood. Here, a ruling on the standard of proof would be merely a factor for the Appeals Officer to consider in deciding whether, and to what extent, to sustain the proposed penalty.

Finally, Gubser's belated argument (Br. 30, 32-33; *see also* Amicus Br. 14-19) that uncertainty about the standard of proof is itself a discrete injury to be redressed should be rejected out of hand. Gubser did not allege in his complaint that he is "injured" by uncertainty regarding the standard of proof for willfulness. Any such claim is meritless.[7] If legal ambiguity alone were a cognizable injury for Article

[7] In the complaint, Gubser alleged that a ruling in his favor would "terminate and afford relief from uncertainty, insecurity, and controversy" for Gubser. (ROA.14 ¶ 26.) This allegation referred to uncertainty about whether the proposed penalty would be assessed – a question Gubser alleged would be resolved entirely with a declaratory judgment in his favor (ROA.7 ¶4; ROA. 14 ¶ 26) – and not to any discrete harm *independent* of whether a willfulness penalty would be

(continued…)

III purposes, then there would be no end to parties seeking declaratory judgments on an infinite number of legal issues before a matter has matured to litigation. Gubser's and amici's argument that legal uncertainty is a discrete injury showing standing is essentially an argument in favor of advisory opinions. *See Life Partners*, 203 F.3d at 325 ("Federal courts do not render advisory opinions.").

D. The Declaratory Judgment Act does not provide jurisdiction where it does not otherwise exist

This case also warrants dismissal because the district court lacked subject matter jurisdiction. Gubser cannot rely on the Declaratory Judgment Act, 28 U.S.C. § 2201, to create a private right of action. (Br. 1.) It is well settled that § 2201 does not itself confer federal subject matter jurisdiction, but merely provides an additional remedy in cases where jurisdiction otherwise exists. Thus, to request relief under the Declaratory Judgment Act, the plaintiff must show that subject matter jurisdiction independently exists. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *Jones v. Alexander*, 609

(…continued)
assessed. *See also* ROA.58-59; ROA.60; ROA.62-63; ROA.115, ROA. 131, ROA.134-135, ROA.141.

F.2d 778, 781 (5th Cir. 1980). Because this is a suit against the Government, that showing must include a waiver of sovereign immunity. "Where the United States has not consented to suit or the plaintiff has not met the terms of the statute, the court lacks jurisdiction and the action must be dismissed." *Koehler v. United States*, 153 F.3d 263, 266 (5th Cir. 1998).[8]

In these proceedings, Gubser has invoked 28 U.S.C. §§ 1331 and 1355 as conferring subject matter jurisdiction (Br. 1, 4, 18), but neither statute is sufficient to confer jurisdiction given the current posture of this case. 28 U.S.C. § 1331 grants the district courts general federal question jurisdiction. "It is well settled, however, that sovereign

[8] In the proceedings below, Gubser argued that he need not establish a waiver of sovereign immunity in order to establish jurisdiction for Declaratory Judgment Act purposes. (ROA.56-58.) That position is plainly wrong. In declaratory actions against the Government, this Court and others have required the plaintiff to establish a waiver of sovereign immunity. *See, e.g., Taylor-Callahan-Coleman*, 948 F.2d at 956; *Toledo v. Jackson,* 485 F.3d 836, 838-39 (6th Cir. 2007); *Delgado v. Gonzalez*, 428 F.3d 916, 919 (10th Cir. 2005); *Muirhead v. Mecham*, 427 F.3d 14, 17-18 (1st Cir. 2005); *see also* Wright & Miller, 10B Fed. Practice & Proc. § 2766 (2016) ("If the court would lack jurisdiction of a coercive action against the United States because of sovereign immunity, it is equally without jurisdiction of a declaratory action against the United States.").

immunity is not waived by a general jurisdictional statute such as 28 U.S.C. § 1331." *Koehler*, 153 F.3d at 266, n.2.

28 U.S.C. § 1355(a) states that "[t]he district courts shall have original jurisdiction … of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress. . . ." Here, no FBAR penalty has been assessed, so this is not a suit for the "recovery or enforcement" of a penalty. And like 28 U.S.C. § 1331, section 1355 does not waive sovereign immunity. *See Coastal Rehab. Servs., P.A. v. Cooper*, 255 F. Supp. 2d 556, 561 (D.S.C. 2003); *Mock v. United States*, 2008 U.S. Dist. LEXIS 40100, *6 (E.D.N.C. 2008); *Ousley v. Gritis*, 1998 U.S. Dist. LEXIS 16735, *5 (D. Nev. 1998).[9]

Because there is no independent statutory basis for the District Court to exercise jurisdiction over this case, it was properly dismissed.

[9] As explained *supra*, p. 9, if an FBAR penalty is assessed, Gubser can seek judicial review in the District Court or the Court of Federal Claims under the Tucker Act.

CONCLUSION

Based on the foregoing, the District Court's order of dismissal should be affirmed.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

28 U.S.C.

§ 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

§ 1346 United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, ...

§ 1355 Fine, penalty or forfeiture

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

* * *

28 U.S.C § 1491 Claims against United States generally; * * *

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * *

§ 2201 Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

Internal Revenue Code (26 U.S.C.)

§ 61(a) Gross income defined

(a) General definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, * * *

§ 6110 Public inspections of written determinations

* * *

(b) Definitions.--For purposes of this section--

(1) Written determination.--

(A) In general.--The term "written determination" means a ruling, determination letter, technical advice memorandum, or Chief Counsel advice.

* * *

(k) Special provisions

* * *

(3) Precedential status.--Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

* * *

Bank Secrecy Act (31 U.S.C.)

§ 5314 Records and reports on foreign financial agency transactions

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe--

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

§5321 Civil penalties

* * *

(a)(5) Foreign financial agency transaction violation.—

(A) Penalty authorized.--The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.

(B) Amount of penalty.--

(i) In general.--Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.

(ii) Reasonable cause exception.--No penalty shall be imposed under subparagraph (A) with respect to any violation if--

(I) such violation was due to reasonable cause, and

(II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported.

(C) Willful violations.--In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314--

(i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of--

(I) $100,000, or

(II) 50 percent of the amount determined under subparagraph (D), and

(ii) subparagraph (B)(ii) shall not apply.

(D) Amount.--The amount determined under this subparagraph is--

(i) in the case of a violation involving a transaction, the amount of the transaction, or

(ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

* * *

§ 3716 Administrative offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive, judicial, or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor--

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset, the head of an executive, judicial, or legislative agency must either--

(1) adopt, without change, regulations on collecting by administrative offset promulgated by the Department of Justice, the Government Accountability Office, or the Department of the Treasury; or

(2) prescribe regulations on collecting by administrative offset consistent with the regulations referred to in paragraph (1).

* * *

§ 3720A Reduction of tax refund by amount of debt

(a) Any Federal agency that is owed by a person a past-due, legally enforceable debt (including debt administered by a third party acting as an agent for the Federal Government) shall, and any agency subject to section 9 of the Act of May 18, 1933 (16 U.S.C. 831h), owed such a debt may, in accordance with regulations issued pursuant to subsections (b) and (d), notify the Secretary of the Treasury at least once each year of the amount of such debt.

(b) No Federal agency may take action pursuant to subsection (a) with respect to any debt until such agency--

(1) notifies the person incurring such debt that such agency proposes to take action pursuant to such paragraph with respect to such debt;

(2) gives such person at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable;

(3) considers any evidence presented by such person and determines that an amount of such debt is past due and legally enforceable;

(4) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under paragraph (3) with respect to such debt is valid and that the agency has made reasonable efforts (determined on a government-wide basis) to obtain payment of such debt; and

(5) certifies that reasonable efforts have been made by the agency (pursuant to regulations) to obtain payment of such debt.

* * *

§ 3720D Garnishment

(a) Notwithstanding any provision of State law, the head of an executive, judicial, or legislative agency that administers a program that gives rise to a delinquent nontax debt owed to the United States by an individual may in accordance with this

section garnish the disposable pay of the individual to collect the amount owed, if the individual is not currently making required repayment in accordance with any agreement between the agency head and the individual.

(b) In carrying out any garnishment of disposable pay of an individual under subsection (a), the head of an executive, judicial, or legislative agency shall comply with the following requirements:

(1) The amount deducted under this section for any pay period may not exceed 15 percent of disposable pay, except that a greater percentage may be deducted with the written consent of the individual.

(2) The individual shall be provided written notice, sent by mail to the individual's last known address, a minimum of 30 days prior to the initiation of proceedings, from the head of the executive, judicial, or legislative agency, informing the individual of--

(A) the nature and amount of the debt to be collected;

(B) the intention of the agency to initiate proceedings to collect the debt through deductions from pay; and

(C) an explanation of the rights of the individual under this section.

(3) The individual shall be provided an opportunity to inspect and copy records relating to the debt.

(4) The individual shall be provided an opportunity to enter into a written agreement with the executive, judicial, or legislative agency, under terms agreeable to the head of the agency, to establish a schedule for repayment of the debt.

(5) The individual shall be provided an opportunity for a hearing in accordance with subsection (c) on the determination of the head of the executive, judicial, or legislative agency concerning--

(A) the existence or the amount of the debt, and

(B) in the case of an individual whose repayment schedule is established other than by a written agreement pursuant to paragraph (4), the terms of the repayment schedule.

* * *

Treasury Regulations (26 C.F.R)

§ 1.1-1 Income tax on individuals

* * *

(b) Citizens or residents of the United States liable to tax. In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States.

* * *

Bank Secrecy Act Regulations (31 C.F.R.)

§ 1010.306 Filing of reports

* * *

(c) Reports required to be filed by § 1010.350 shall be filed with the Commissioner of Internal Revenue on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year.

* * *

§ 1010.810 Enforcement

* * *

(g) The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 1010.350 and 1010.420 of this chapter has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS. Such authority includes, with respect to 31 U.S.C. 5314 and 1010.350 and 1010.420 of this chapter, the authority to: assess and collect civil penalties under 31 U.S.C. 5321 and 31 CFR 1010.820; investigate possible civil violations of these provisions (in addition to the authority already provided at paragraph (c)(2)) of this section); employ the summons power of subpart I of this part 1010;

issue administrative rulings under subpart G of this part 1010; and take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.

Internal Revenue Manual (I.R.M.)

§ 1.2.17.2 Policy Statement 8-1

* * *

2. Pursuant to the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105–206, and Treasury Directive 63–01, this Policy Statement reaffirms the principles of the Appeals administrative dispute resolution process. Since 1927, when the Internal Revenue Service established an administrative appeal to resolve tax disputes without litigation, taxpayers and Appeals have reached mutual agreement in the vast majority of disputed cases.

§ 8.1.3.3 Appeals Employees Involved in Settling and Processing Appeals Cases

1. To accomplish the Appeals mission, it is essential taxpayers have a prompt and independent review when they disagree with the changes proposed by Compliance.

2. Appeals provides the final administrative opportunity to the taxpayer and the Service to resolve tax disputes fairly and without litigation. It is essential Appeals command the respect and trust of taxpayers and practitioners. One aspect of this activity is presenting a unified Appeals position to taxpayers and/or practitioners when settling an issue. See IRM 8.1.1.1, Accomplishing the Appeals Mission.

§ 8.1.10.3.4 Communications with Counsel

1. The Chief Counsel is the legal adviser to the Commissioner and all IRS officers and employees, including Appeals, on all matters

pertaining to the interpretation, administration and enforcement of the internal revenue laws and related statutes. Appeals employees are generally entitled to obtain legal advice from Office of Chief Counsel attorneys and are permitted to do so under the ex parte communication rules. However, Appeals employees should not communicate ex parte regarding an issue in a case pending before them with a field attorney if the field attorney personally provided legal advice regarding the same issue in the same case to the originating function or personally served as an advocate for the originating function regarding the same issue in the same case. * * *

* * *

3. Appeals employees generally are not bound by the legal advice that they receive from the Office of Chief Counsel. Appeals employees independently evaluate the strengths and weaknesses of the specific issues in the cases assigned to them and make an independent judgment concerning the overall strengths and weaknesses of the cases they are reviewing and the hazards of litigation. Legal advice is but one factor that Appeals will take into account in its consideration of the case. *See* IRM 8.6.4.1, Fair and Impartial Settlements per Appeals Mission, and IRM 8.6.2, Appeals Case Memo Procedures.

4. The restriction on Counsel communicating ex parte with Appeals only applies while Appeals is performing its duties of evaluating the strengths and weaknesses of the specific issues in specific cases and the overall hazards of litigation for those cases. If an Appeals employee is not functioning in that capacity, for example, if an Appeals employee is preparing a statutory notice of deficiency, this restriction on ex parte communications does not apply. At this stage of the case, the Appeals employee has concluded that the case will be closed as unagreed and is no longer attempting to settle the case. Therefore, Appeals may seek legal advice from Counsel in connection with the review of the draft statutory notice of deficiency, even if the Counsel attorney

previously provided advice to Examination regarding one or more of the same issues in the same case.

§ 8.1.10.1.1.5 Other Governmental Agencies

1. Communications with other governmental agencies are not considered ex parte communications because RRA 98 section 1001(a)(4) only applies to communications between Appeals and other IRS employees. Examples of other governmental agencies with whom Appeals communicates include the Department of Justice and the Joint Committee on Taxation. Appeals may communicate with the employees of the Department of Justice, including the U.S. Attorneys' offices and the Joint Committee or its staff, without offering the taxpayer or representative an opportunity to participate. * * *

* * *

§ 8.11.6.1 FBAR Overview

1. The Financial Crimes Enforcement Network (FinCEN) delegated its enforcement authority to the IRS for penalties imposed under Title 31, Sections 5314 - 5321 for the failure to file FinCEN Form 114 , Report Of Foreign Bank And Financial Accounts (FBAR). This delegation was effective April 8, 2003, by memorandum of agreement between FinCEN and IRS.

2. A United States person must file an FBAR (FinCEN Form 114, Report of Foreign Bank and Financial Accounts,) if that person has a financial interest in or signature authority over any financial account(s) outside of the United States and the aggregate maximum value of the account(s) exceeds $10,000 at any time during the calendar year. Failure to file this form may result in civil and/or criminal penalties. The civil penalties may be appealed.
* * *

§ 8.11.6.8.2 FBAR Closing - Pre-Assessment Case

1. The Appeals Officer will prepare and mail the closing letter and Form 5402.

2. The types of closing letters are:
Agreed cases Letter 5080
Unagreed cases Letter 5143
No change cases Letter 913
* * *

4. There are two types of Agreed FBAR cases:

Agreed with signed waiver Form 13449, Agreement to Assessment and Collection of Penalties under 31 USC 5321(a)(5) and 5321(a)(6), and itemized statement attached to Form 13449.

No Change case - FBAR is not sustained and signed Form 13449 is not required.

5. An unagreed case is when the FBAR penalty is fully or partially sustained and the taxpayer does not agree. Appeals is not required to prepare Form 13449 for an unagreed case unless there is a computation error or the numbers have changed from Exam's Form 13449. * * *
* * *

9. Form 5402 Closing entries:
Closing Codes: see table above in IRM 8.11.6.8, FBAR Closing Procedures

Revised Penalty - Def/OA:

Agreement type	**Dollar entry for each tax period**
Agreed with waiver	enter total amount of penalty agreed to
No Change	enter zero (0)
Unagreed	total amount of the penalty imposed

CERTIFICATE OF SERVICE

It is hereby certified that, on this 26th day of October, 2016, that:

- this brief was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system;
- all required privacy redactions have been made in accordance with Local Rule 25.2.13;
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Case No. 16-40948

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(s) /s/ Kathleen E. Lyon

Attorney for United States

Dated: October 26, 2016

United States Court of Appeals

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October 28, 2016

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

Dear Ms. Lyon,

The following pertains to your brief electronically filed on 10/26/16.

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:
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