No. 22-9

In the Supreme Court of the United States

WHIRLPOOL FINANCIAL CORPORATION & CONSOLIDATED SUBSIDIARIES AND WHIRLPOOL HOLDINGS S.A.R.L. & CONSOLIDATED SUBSIDIARIES.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[1]

In *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), this Court held that a federal agency must abide by its own valid and applicable regulations when dealing with regulated parties (the *Accardi* doctrine). So too must the courts when regulated parties have relied on such regulations. The regulated public's reliance interests are a bedrock concern of administrative law that has been considered and duly accommodated by this Court, federal appellate courts, and federal trial courts for decades.

The Sixth Circuit's majority decision, however, ignored the *Accardi* doctrine when it disregarded longstanding valid regulations issued under section 954(d)(2) of the Internal Revenue Code[2] (the section 954(d)(2) regulations)—which are plainly embedded in the statutory command of section 954(d)(2)—in favor of its own policy-driven approach.[3] In doing so, it upended petitioners' (and other taxpayers') right to rely on regulations when structuring their global business operations in an efficient and compliant manner. The Sixth Circuit's approach fundamentally conflicts with this Court's precedent.

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[1] All parties received timely notice of *amicus*'s intent to file this brief pursuant to Rule 37.2(a), and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] All "section" references are to the Internal Revenue Code of 1986, as amended (the Code).

[3] Petitioners thoroughly addressed that Congress expressly conditioned the application of section 954(d)(2) on Treasury regulations and that section 954(d)(2) may not be enforced without regard to such regulations. *Amicus* completely agrees with this point and the supporting arguments provided by petitioners.

Compounding its error, the majority adopted a novel interpretation of the applicable statute not argued by the government or adopted by the Tax Court.

The Sixth Circuit's decision thus would allow federal agencies (and courts) to pick and choose which regulations to enforce against the government and regulated parties and which to ignore based on the results sought in a particular case. What is more, given the enormous tax liabilities at issue, not only in this case but for the many taxpayers who manufacture and sell products with similar international business structures, nationwide uniformity in this area is especially critical. Without this Court's intervention, taxpayers will not be able to rely on validly promulgated tax regulations that remain in effect when structuring their global business operations, and will be subject to substantial financial risk based on a court's or an agency's decision to ignore regulations and rely only on an interpretation of the statute for a contrary position. The National Association of Manufacturers (the NAM) urges the Court to grant certiorari to ensure the public that they can rely on valid and applicable regulations.

The NAM is the largest manufacturing association in the United States. The NAM represents thousands of small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.7 million people, contributes roughly $2.71 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. Over half of Fortune 500 manufacturers, and almost 80 percent of Fortune 100 manufacturers, are members of the NAM, and over 90 percent of the NAM's members are small and medium-sized manufacturers, many of whom have foreign operations involving manufacturing and selling products.

An important function of the NAM is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the NAM regularly files *amicus curiae* briefs in cases, like this one, that raise issues of substantial concern to the nation's business community. The NAM has a significant interest in the legal issues present in this case because many of the NAM's members carry on substantial manufacturing and selling operations worldwide. The impact of this issue is not limited to business structures involving Mexican manufacturing branch operations like those at issue in this case—it goes to the heart of determining whether income from a domestic corporation's manufacturing and selling operations *anywhere* outside the United States is subject to taxation at the full rates as a result of section 954(d)(2).

The NAM's members have relied on the section 954(d)(2) regulations for nearly 60 years to determine the amount of sales income derived by their foreign subsidiaries that has been subject to current U.S. taxation, and the amount of sales income for which U.S. taxation was deferred. The Sixth Circuit's disregard of such regulations—which Congress in section 954(d)(2) expressly commanded the U.S. Department of Treasury (Treasury) to issue—risks billions of dollars of unexpected and unjustified taxes for the NAM's members for open tax years, the current year, and future years.

This risk is exceptionally important to the NAM's members (and other U.S. multinational companies). According to a report prepared by the Internal Revenue Service (IRS) for 2018 (the last year for which this data is available), there were 38,164 controlled foreign corporations (CFCs) engaged in manufacturing outside of the United States, which generated approximately $140 billion of net income during 2018 that was *not* reported as taxable at the full

corporate rate under section 954(d).[4] It is highly likely that many of the CFCs included in this data operated through branches, in which case a substantial portion of the $140 billion would become fully taxable under the Sixth Circuit's decision.[5] For example, if conservatively one assumes 25% of the income from manufacturing and selling products was earned by CFCs that operated in a branch structure, roughly $3.675 billion of additional U.S. taxes would be due in 2018 under the Sixth Circuit's decision (the income would be subject to the full 21% tax rate rather than the 10.5% effective tax rate imposed on GILTI). And, this is a real concern because for many taxpayers 2018 is still open and subject to IRS audit, and the potential liability would apply for all open years and future years.[6] This is of particular concern for the NAM's thousands of manufacturing members, which likely generate at least half (if not more) of the net income from manufacturing goods outside the United States.

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[4] *See* Form 8992, Global Intangible Low-Taxed Income (GILTI), *Table 2. Form 8992: U.S. Shareholder Calculation of Global Intangible Low-Taxed Income (GILTI), Selected Items, by Sector and Selected Major Industry of Parent* (Nov. 30, 2021), https://www.irs.gov/statistics/soi-tax-stats-international-tcja-studies (select the "2018" hyperlink to access Excel file with the supporting information).

[5] *See* Mindy Herzfeld, *The Sixth Circuit Knows Subpart F Income When It Sees It—Or Does It?*, 105 Tax Notes Int'l 268, 270 (Jan. 17. 2022) (stating that the structure implemented by petitioners "is similar to what many U.S. multinationals entered into before the enactment of the Tax Cuts and Jobs Act").

[6] *See* Robert Goulder, Whirlpool: *Have We Reinvented The Branch Rule?*, 106 Tax Notes Int'l 155, 155 (Apr. 4, 2022) (the majority decision to disregard the regulations in determining the tax liability under section 954(d)(2) "easily" could result in "billions of dollars [in liability] when applied to other similarly situated taxpayers").

The NAM thus has a strong interest in ensuring that valid and applicable regulations, justifiably relied on by its members, cannot be disregarded by agencies and the courts.

SUMMARY OF ARGUMENT

The NAM urges the Court to grant review to confirm the public's right to rely on binding agency action, which is of enormous practical and economic significance. Without enforceable reliance, taxpayers will not be able to achieve the finality and certainty that rightly come with regulatory compliance. Left unchecked, the Sixth Circuit's decision would wreak havoc on U.S. multinational companies by dramatically limiting their flexibility to structure their foreign operations in the most efficient manner when such activity involves operating through branches.[7]

First, the Sixth Circuit applied an entirely novel interpretation—not found anywhere in the Code or Treasury regulations and not advanced by the agency nor adopted by the Tax Court—that conflicts with decades-old regulations promulgated contemporaneously with the underlying statute and at Congress's express command in section 954(d)(2) itself.

Second, reliance on validly promulgated regulations—and therefore regulated parties' ability to comply with the laws—is the bedrock of administrative law. If taxpayers must follow regulations or face the prospect of civil (and

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[7] The NAM does not suggest that a court does not have the power to find a regulation to be an invalid exercise of regulatory authority or that an agency may not withdraw a regulation. Rather, the NAM argues, based on the longstanding *Accardi* doctrine, that until one of those two events occurs (or Congress changes the law that the regulations address), the public's right to rely on regulations is so fundamental—with respect to fairness to the public—that it cannot be disregarded at the discretion of the regulating agency or a lower court.

perhaps even criminal) penalties, then so too must the government be held to its binding, published actions.

ARGUMENT

The Court should resolve the standard governing reliance on agency regulations and confirm the vitality of *Accardi*'s core holding.

Certiorari is warranted to ensure uniform, nationwide application of the rules governing the public's right to rely on validly promulgated regulations. The Sixth Circuit's decision threatens to destroy this reliance interest by departing from the key holding of *Accardi* itself. Without intervention by this Court, the NAM's members could be unjustifiably subjected to billions of dollars of additional taxes, and cast into utter confusion concerning how to efficiently structure their manufacturing and sales operations outside the United States and comply with mandatory U.S. tax provisions.

A. The Sixth Circuit Ignored Longstanding Valid Regulations and Adopted a Novel Interpretation of the Code that Conflicts with the Regulations and Nearly 60 Years of Tax Law

a. Generally, income derived by a foreign subsidiary of a domestic corporation from selling products is not subject to current U.S. federal income taxation at full corporate rates. Section 954(d), however, provides that sales income derived by a controlled foreign corporation (CFC) that falls within the definition of foreign base company sales income (FBCSI) is included currently in the gross income of the CFC's domestic shareholders. Under the general definition provided by section 954(d)(1), FBCSI includes income derived by a CFC from selling products to related persons; but, FBCSI does not include income from the sale of

products manufactured by the CFC.[8] Section 954(d)(2) provides special rules for determining whether a CFC has FBCSI when it operates through a foreign branch.

The essential facts addressed by the Sixth Circuit concerned petitioners' Luxembourg subsidiary (Lux) that manufactured through a Mexican branch products that were sold to related companies for arm's length prices. All of the business operations and assets were in Mexico, and only one part-time administrative employee was based in Luxembourg. The issue was whether some, all, or none of the income derived by Lux during 2009 from selling the products was FBCSI under section 954(d)(2); only Lux's sales income that was FBCSI was included in the current gross income of petitioners.

b. Under validly promulgated Treasury Regulations implementing section 954(d)(2)—that are expressly required by the statute itself and carry the force of law, the income derived by a CFC's foreign branch that manufactures the products sold is *not* FBCSI.[9] An example in the regulations illustrating this rule involves a CFC with a foreign branch that manufactured products in one country, which were then sold through the CFC's home office in a different country. The example concludes that the CFC's foreign branch, "treated as a separate corporation, derives no foreign base company sales income since it produces

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[8] 26 C.F.R. § 1.954-3(a)(4)(i) ("Foreign base company sales income does not include income of a controlled foreign corporation derived in connection with the sale of personal property manufactured, produced, or constructed by such corporation.").

[9] *Id.*; 26 C.F.R. § 1.954-3(b)(2)(ii)(e) ("Income derived by a branch or similar establishment…will not be foreign base company sales income…if the income would not be foreign base company sales income if it were derived by a separate controlled foreign corporation under like circumstances.").

the product which is sold."[10] Therefore, under the controlling regulations, the income derived by Lux's branch in Mexico was not FBCSI because the branch manufactured the products sold.[11]

The Sixth Circuit expressly disregarded those regulations. The majority interpreted section 954(d)(2) as treating 100% of a CFC's sales income as FBCSI whenever the products sold are manufactured in a foreign branch. Ignoring the regulations and instead applying its own incorrect interpretation of the statute, the majority held that *all* of Lux's 2009 sales income was FBCSI, including, contrary to the clear result under the regulations, the income derived by the Mexican branch that manufactured the products.[12]

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[10] 26 C.F.R. § 1.954-3(b)(4), *Ex.* 2. The IRS has issued several private rulings uniformly concluding that income derived by a branch of a CFC that manufactured the products sold was not FBCSI under the regulations promulgated pursuant to section 954(d)(2). I.R.S. Priv. Ltr. Rul. (PLR) 201325005 (Jun. 21, 2013); Tech. Adv. Mem. (TAM) 8509004 (Nov. 23, 1984); PLR 7612101490A (Dec. 10, 1976); 1996 FSA Lexis 463 (Apr. 30, 1996). Although section 6110(k)(3) provides that private rulings do not have precedential status, taxpayers commonly look to them for insight on the IRS's views and administrative practice on issues.

[11] Both Luxembourg and Mexico treated all of Lux's sales income as derived in Mexico where all the business operations and assets were located (with Mexico providing an exemption for around 90% of the income). These facts support a finding that none of Lux's income was FBCSI under the regulations, as was concluded by the Sixth Circuit dissent.

[12] *Whirlpool* v. *Comm'r*, 19 F.4th 944, 952 (6th Cir. 2021) ("[T]he income attributable to the branch's activities 'shall constitute foreign base company sales income' of Lux. That second consequence directly answers the question presented in this appeal."). Because the Sixth Circuit ignored the regulations, it did not address the critical issue under the regulations of how much income was derived by Lux's branch in Mexico. 26 C.F.R. § 1.954-3(b)(2)(ii)(e). *See* notes 9 and 11, *supra*.

It is exceptionally important to the NAM that this Court reject the majority's disregard of the regulations and its incorrect interpretation of section 954(d)(2). The decision extends to all branch operations of CFCs, far beyond the Mexican branch operation directly at issue here, and could subject the NAM's members to substantial amounts of unexpected and unjustified taxes. It also creates substantial confusion with respect to the correct tax reporting of income from foreign manufacturing and sales operations for years to come.

c. The Sixth Circuit simply refused to apply the regulations, without undertaking any analysis to show that the regulations were invalid. Indeed, the majority did not question (or even discuss) the Tax Court's determination in this case that the regulations promulgated under section 954(d)(2) were valid.

The Sixth Circuit's decision erroneously "give[s] effect to [its] interpretation of the statute," disregarding nearly 60-year-old regulations (that have been continuously and consistently applied by the IRS and relied upon by taxpayers), because in its view there is no ambiguity in section 954(d)(2). *Whirlpool*, 19 F.4th at 949. The majority then discusses the Kennedy Administration's initial 1961 proposal to Congress to end deferral of U.S. tax on income of foreign subsidiaries to enable the majority to "construe [the] statutory text as it would have been understood 'at the time Congress enacted the statute.'"[13] But, if the statutory language was clear, there would be no need to consult this history in the first place.[14] The majority's reliance on

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[13] *Id*. at 950-52.

[14] *See, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992)) ("If the words of a statute

extra-statutory materials to "construe" the text of section 954(d)(2) is more consistent with the Tax Court's conclusion in this case that "the statute [section 954(d)(2)] is ambiguous."[15]

Compounding the error, the materials relied on by the Sixth Circuit for its interpretation were not actual Congressional committee reports, and, astonishingly, the 1961 proposal from which the majority derives its "understanding" was actually *rejected* by Congress in enacting the relevant legislation in 1962. Critical to the issue in this case, the Kennedy Administration's 1961 proposal would not have excluded from FBCSI a CFC's income from the sale of products it manufactured. Highlighting this difference between the initial Kennedy Administration proposal and the law ultimately enacted in 1962, a relevant Congressional committee report states: "The definition [of FBCSI] does not apply to income of a controlled foreign corporation from the sale of a product which it manufactures."[16] Thus, the majority's interpretation of section 954(d)(2) treating as FBCSI all income derived by a CFC from the sale of products it manufactures through a branch is both contrary to the regulations implementing that provision, and fundamentally at odds with Congressional intent.

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are unambiguous, this first step of the interpretive inquiry is our last.").

[15] *Whirlpool v. Comm'r*, 154 T.C. 142, 177 (2020). Demonstrating the ambiguity of section 954(d)(2), the dissent engaged in a detailed analysis of the language of that section and arrived at an interpretation that was contrary to the "understanding" of the majority. *Whirlpool*, 19 F.4th 954-58 (Nalbandian, J., dissenting).

[16] S. Rep. 87-1881, 87th Cong., 2d Sess., p. 245 (1962). *See also* H.R. Rep. 87-1447, 87th Cong., 2d Sess., p. 62 (1962) (similarly indicating a CFC's gain from selling property it manufactures is not FBCSI).

d. Because the Sixth Circuit viewed the language of section 954(d)(2) as unambiguous, it treated the Congressionally mandated section 954(d)(2) regulations as completely irrelevant to the resolution of the issue in this case. The majority, however, fails to address a single rule in the section 954(d)(2) regulations—a bizarre approach not advocated by the lower court nor by either party to the case.

In 1964, Treasury promulgated final regulations providing that FBCSI does not include income derived by a branch of a CFC that manufactured the products sold, which was consistent with Congressional intent expressed in the Committee Reports.[17] These regulations have been the governing law, and taxpayers have relied on them, for decades. Unlike the Sixth Circuit, the Tax Court applied the regulations concluding that they were a "'reasonable interpretation' of the statute" and "fully consistent with Congress' intent as expressed in the legislative history . . . ."[18]

e. The Sixth Circuit seemed concerned with the overall result of Lux's sales income having been subject to a low tax rate because Mexico exempted around 90% of the income to incentivize foreign companies to manufacture products in Mexico for export. However, taking into account the rate of foreign tax on Lux's income is inconsistent with the majority's determination of the issue based solely on the language of the statute, as section 954(d)(2) itself makes no mention of the rate of foreign tax imposed on a CFC's income.

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[17] T.D. 6734, 29 Fed. Reg. 6392 (May 15, 1964).

[18] *Whirlpool*, 154 T.C. at 179. On appeal to the Sixth Circuit, petitioners argued that the Tax Court erred in applying the section 954(d)(2) regulations to treat 90% of Lux's sales income as FBCSI. The court did not address petitioners' regulatory arguments because it ignored the regulations. *See* notes 9-12, *supra*.

Consistent with the statutory language, the legislative history indicates that Congress intended to exclude from the definition of FBCSI income of a branch that manufactured products sold by a CFC regardless of the rate of foreign taxes imposed on such income. An example in the current regulations with facts similar to those in this case illustrates how the regulations carry out that legislative intent. In that example, a CFC manufactured products in a foreign branch, and carried on all of its activities in the branch's country. The income from selling the products was not subject to tax in the CFC's home country, and 90% of the income was exempt from tax in the branch's country, where the products were manufactured. The example concludes that, even though 90% of the CFC's sales income was not subject to tax in any country, none of it was FBCSI because the income was derived by the branch that manufactured the products.[19]

Under the Sixth Circuit's interpretation of section 954(d)(2), 100% of the CFC's income in that example would have been FBCSI, the opposite of the result provided by the section 954(d)(2) regulations, which carry out Congressional intent by excluding from FBCSI income of a branch that manufactures products sold by a CFC regardless of the foreign taxes imposed on such income.

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[19] 26 C.F.R. § 1.954-3(b)(4), *Ex.* 3 (scenario 3) (2008). *See also* 1996 FSA Lexis 463 (a Hong Kong CFC manufactured products in a branch in Taiwan; the CFC's income from selling the products was not subject to tax in Hong Kong and qualified for a tax holiday in Taiwan; consistent with the conclusion in the example, the IRS National Office, Branch 2 (responsible for section 954(d)), concluded that 100% of the sales income was *not* FBCSI, even though no current tax was paid on the sales income, and the IRS explains that such result is consistent with Congressional intent).

If allowed to stand, the Sixth Circuit's decision would penalize branch structures that the NAM's members have been operating for years. As indicated above, the majority's decision extends far beyond the Mexico branch structure implemented by petitioners. It interprets a provision that applies to all manufacturing and selling branch structures of foreign subsidiaries that may be currently operating in as many as 100 countries. Thus, in order to eliminate the risk of generating FBCSI as part of such branch structures, the NAM's members (and all taxpayers) will need to reorganize their operations. This is an especially difficult undertaking given the tumultuous conditions manufacturers are facing with the persistent COVID-19 pandemic, snarled supply chains, a workforce crisis, and natural disasters, among other challenges. The NAM respectfully urges the Court to intervene now and prevent the Sixth Circuit's approach from unjustifiably exacerbating the hardships facing America's manufacturers.

f. A logical extension of the Sixth Circuit's decision would be to preclude taxpayers from relying on other regulatory rules that limit a CFC's FBCSI under section 954(d)(2). For example, the regulations provide that section 954(d)(2) does not treat as FBCSI the income derived by a CFC's home office that sells products manufactured in a branch, where the sales income would be taxed at a similar rate if it had instead been derived in the country where the products are manufactured (the tax rate disparity requirement).[20] In an example illustrating this rule, a CFC's branch manufactured products and the CFC's home office sold the products to related persons. The example concludes that section 954(d)(2) did not apply to treat any of the CFC's sales income as FBCSI, because the sales income

[20] 26 C.F.R. § 1.954-3(b)(1)(ii)(*b)*.

derived by the home office was subject to a 10% tax rate, which was the same rate that would have applied if the sales income had instead been derived by the foreign branch that manufactured the products.[21] To the contrary, the majority decision would treat 100% of the CFC's income in that example as FBCSI under its interpretation of section 954(d)(2), notwithstanding the fact that the regulatory tax rate disparity requirement has been at the center of the branch rule since 1964.

g. In summary, the Congressionally mandated section 954(d)(2) regulations provide that FBCSI does not include income derived by a foreign branch of a CFC that manufactures the products sold. The Tax Court in this case determined that those regulations were reasonable and valid. The exclusion in the regulations for income derived by a CFC's branch that manufactures the products sold carries out Congressional intent, and has been consistently applied as the law by Treasury, the IRS, and taxpayers for nearly 60 years. By judicial fiat, the Sixth Circuit substituted its own "divergent" interpretation of section 954(d)(2) treating all of Lux's income as FBCSI, depriving petitioners (and multitudes of other taxpayers) of their right to rely on long-standing, valid regulations, which Congress expressly instructed Treasury to issue.

B. Left Unchecked, the Sixth Circuit's Decision Significantly Infringes on the Rights of the NAM's Members (and all Taxpayers) to Rely on Treasury Regulations.

It is a longstanding and fundamental principle of administrative law that, under the *Accardi* doctrine, the regulated public is entitled to rely on regulations promulgated

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[21] 26 C.F.R. § 1.954-3(b)(4), *Ex.* 8. *See also* 26 C.F.R. § 1.954-3(b)(1)(ii)(*c*)(2), *Ex*; -3(b)(1)(ii)(*c*)(3)(v), *Ex*. 2.

by Federal agencies when arranging and conducting their affairs.[22] This right, as applied with respect to Treasury regulations, is rooted in fairness to taxpayers who are subject to the Federal income tax laws.[23]

All courts (and Federal agencies) should be reminded that taxpayers are entitled to rely on the section 954(d)(2) regulations and other agency regulations while they remain valid and in effect in order to prevent the kind of harsh retroactive effects created by the Sixth Circuit in the current dispute. *Cf. United States* v. *Carlton*, 512 U.S. 26, 39-40 (1994) (Scalia, J., concurring) ("Retroactively disallowing the tax benefit that the earlier law offered, without compensating those who incurred expenses in accepting that offer, seems to me harsh and oppressive by any normal measure.").

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[22] *Accardi*, 347 U.S. at 268 ("It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. . . . Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.") (emphasis in original). *See also Columbia Broadcasting Systems, Inc.* v. *United States,* 316 U.S. 407, 422 (1942) ("When, as here, the regulations are avowedly adopted in the exercise of that [administrative rule-making] power . . . they must be taken by those *entitled to rely upon* them as what they purport to be . . . which, until amended, are controlling alike upon the [agency] and all others whose rights may be affected by the [agency's] execution of them.") (emphasis added); *United States* v. *Kahn*, 5 F.4th 167, 178 (2d Cir. 2021) ("[T]he Supreme Court has made clear that the *Accardi* principle applies in the tax and non-tax context alike.") (Menashi J., dissenting).

[23] *See, e.g.*, Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 Harv. L. & Pol'y Rev. 295, 328 (2017) ("[R]egulatory estoppel is primarily concerned with fairness to the individual being harmed by the agency's incorrect application of the law.").

a. The right of taxpayers to rely on the Congressionally mandated section 954(d)(2) regulations is evident from the plain language of section 954(d)(2) itself, which unavoidably tells taxpayers that they must apply additional rules provided "*under regulations prescribed by the Secretary*." (Emphasis added). This statutory command has been in place since section 954(d)(2) was enacted. Accordingly, because Congress intended the section 954(d)(2) regulations to be an essential element of the overall statutory scheme, taxpayers must be able to rely on them when arranging their business affairs. *See, e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001) ("[A] reviewing court . . . is obliged to accept an agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.").

b. This Court underscored the significant weight given to taxpayers' reliance interests in *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978). In that case, Japan declined to impose an indirect tax on products exported from Japan while imposing a tax on products imported into and sold in Japan. A U.S. manufacturer challenged Treasury's decision not to impose a countervailing indirect tax in the United States for products imported from Japan. Treasury had based its decision on regulations that were put in place in 1897, which was the same year the governing statute was enacted by Congress and, which this Court observed, Treasury had consistently applied for 80 years.

As part of its decision, this Court acknowledged that "private expectations" have "been built on the assumption that" Treasury would not impose a countervailing indirect tax under the circumstances at issue, and that "[i]n light of these *substantial reliance interests*, the longstanding administrative construction of the statute should 'not be

disturbed except for cogent reasons,'" which this Court did not find. 437 U.S. at 457-58 (emphasis added).

While the litigation postures of the parties in the current dispute are different from those in *Zenith*, this Court's decision to respect the 80-year old regulations (which were contemporaneously issued with the enactment of the governing statute) and to prioritize the public's substantial reliance interests are equally applicable here.

Section 954(d)(2) is 60 years old. Treasury released proposed regulations interpreting section 954(d)(2) two-and-a-half months after section 954(d)(2) was enacted in 1962; the regulations were finalized a little over a year-and-a-half later. *See* Notice of Proposed Rule Making, 27 Fed. Reg. 12759 (Dec. 27, 1962); T.D. 6734, 29 Fed. Reg. 6385 (May 15, 1964). Importantly, the relevant rules in those regulations applicable to this case are substantially identical to the version promulgated in 1964.[24]

No court (not even the Sixth Circuit) has found the section 954(d)(2) regulations to be an invalid exercise of regulatory authority. Treasury and the IRS do not dispute the validity of these regulations and have not attempted to withdraw them.

For decades, the NAM's members have relied on the section 954(d)(2) regulations and arranged their global manufacturing and sales operations to comport with the regulations. Therefore, *Zenith* provides this Court the precedent and justification to intervene and reject the Sixth Circuit's approach before other courts follow suit to avoid contending with complicated tax regulations, further

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[24] *Compare* Prop. 26 C.F.R. § 1.954-3(b)(2)(ii), 27 Fed. Reg. 12767 (1962) *with* 26 C.F.R. § 1.954-3(b)(2)(ii)(e) (2011) (year of last amendment).

infringing on taxpayers' reliance rights with respect to valid Treasury regulations.

c. Upholding taxpayer reliance on the section 954(d)(2) regulations is also justified by the longstanding legislative reenactment doctrine, which this Court has applied when interpreting Treasury regulations.

Congress has repeatedly amended and reenacted section 954 with the section 954(d)(2) regulations in place.[25] The Tax Court concluded that the regulations were a "'reasonable interpretation' of the statute" and "fully consistent with Congress' intent as expressed in the legislative history . . . ."[26] Thus, taxpayer reliance on congressionally "approved" regulations that have been part and parcel with section 954(d)(2) is clearly warranted and should be upheld by this Court.

d. Upholding taxpayer reliance is also warranted because of the uncertainty created by the Sixth Circuit's decision. In general, the application of Treasury regulations is a source of dispute in one of two situations. In the first, the government takes a position contrary to regulations, and, if the court agrees with the taxpayer, it must enforce the

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[25] *See Whirlpool,* 154 T.C. at 179 n.13 ("[I]t is relevant that the manufacturing branch rules have now been in existence for 55 years. *See Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991) ('Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.' (quoting *United States* v. *Correll*, 389 U.S. 299, 305-306 (1967))....Congress has repeatedly amended and reenacted section 954 without expressing any disagreement with the manufacturing branch rules....There is no evidence that Congress ever regarded these rules as unreasonable or contrary to its purpose in enacting subpart F.").

[26] *Whirlpool*, 154 T.C. at 179.

regulations against the government on regulatory estoppel grounds. *See, e.g.*, *Mutual Savings Life Insurance* v. *United States*, 488 F.2d 1142, 1145-46 (5th Cir. 1974) (holding that, despite the government's contrary arguments, "[a] taxpayer has the right to rely upon the Government's Regulations . . . . Treasury Regulations having the force and effect of law are binding on tax officials, as well as taxpayers. . . . [T]he Government cannot just abandon . . . the regulation[] and direct it into some type of obscurity oblivion as if it never existed") (internal citations omitted).[27] The second is where a taxpayer challenges the validity of a Treasury regulation the government is attempting to apply. *See, e.g.*, *Mayo Foundation for Medical Education & Research* v. *United States*, 562 U.S. 44 (2011).

The Sixth Circuit created a new, very uncomfortable, third option—selectively choosing *sua sponte* to wholly disregard the application of the Congressionally mandated section 954(d)(2) regulations to a prior tax year that both parties to the dispute agreed applied (as did the Tax Court). For the NAM's members, this selective non-application of the section 954(d)(2) regulations has no practical difference from a scenario in which the government were to selectively not apply its own regulations and a court refused to bind the government to such regulations on regulatory estoppel grounds.

This new approach created by the Sixth Circuit conflicts with longstanding precedent of this Court and should be rejected. *See, e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 425-26 (1977) ("In a situation of this kind, Congress entrusts to

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[27] This is such a well-established principle of administrative law that the IRS does not permit Chief Counsel attorneys to argue contrary to final regulations in litigation. *See* IRS Chief Counsel Notice 2003-014 (May 8, 2003).

the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. . . . A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner."); *United States* v. *Nixon*, 418 U.S. 683, 696 (1974) ("[A]s in *Accardi*, . . . [s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.").

Here, the section 954(d)(2) regulations include detailed rules for what does, and does not, constitute FBCSI. These rules are essential for the NAM's members when arranging their business affairs, determining annual Federal income taxes owed, and reporting annual profits to investors. The Sixth Circuit's erroneous decision has the real possibility of subjecting the NAM's members to billions of dollars of unexpected and unjustified taxes, creating massive uncertainty and disruption for companies' operating structures in numerous foreign countries, and resulting in substantial confusion for companies reporting income from business operations throughout the world.

The NAM urges the Court to grant certiorari to ensure that taxpayers' reliance interests in valid Treasury regulations are protected from both Executive and Judicial Branch actions that may undermine such rights.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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