Case No. 20-1124

In the UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFREY T. MAEHR,
Appellant,

v.

UNITED STATES DEPARTMENT OF STATE,
Appellee.

Appeal from U.S. District Court for the District of Colorado,
no. 18-CV-02948-PAB-NRN
Judge Philip A. Brimmer; Magistrate Judge N. Reid Neureiter

APPELLANT'S REPLY BRIEF

Dated: August 12, 2020.

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Both sides have requested oral argument.

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The Government's Answer Brief finally acknowledges jurisdiction, and then focuses primarily on defending the FAST Act's passport revocation regime against Mr. Maehr's substantive due process challenge, with only brief discussions of Privileges and Immunities and *ne exeat.*

Mr. Maehr addresses the three arguments in the order presented in the Opening Brief, rather than as re-ordered by the Government.

A. The right of international travel is an established Privilege protected by the still-valid post-*Slaughter House* Privileges and Immunities constitutional framework.

The Government tries to chip around the edges of Mr. Maehr's Privileges and Immunities argument, but fails to make a dent.

First, the Government points to Mr. Maehr's acknowledgment that the Constitution's two Privileges and Immunities Clauses apply only against the States, and not the Federal Government, to argue that the Supreme Court's Privileges and Immunities caselaw "has no relevance here." Answer Brief at 60, last line. To the contrary, the Supreme Court's Privileges and Immunities caselaw is relevant to explain just what "Privileges and Immunities" are, and how they fit into

the constitutional framework for civil rights protections that the Supreme Court had developed until the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75–80 (1873), and then revived with *Saenz v. Roe*, 526 U.S. 489, 501 (1999). The fact that this civil rights framework was nipped in the bud in 1873, and lay dormant for over a century until its revival in 1999, makes the limited caselaw on Privileges and Immunities not just relevant, but critical to this Court's analysis.

As developed in the Opening Brief and not challenged by the Government, the word "Privileges" is an 18th century term of art for what we now call civil rights. The Supreme Court only had rare occasion to identify Privileges and protect them from State infringement, *e.g. Crandall v. Nevada*, 73 U.S. 35, 40 and 43-45 (1868) (striking down a Nevada statute taxing the Privilege of interstate travel), before eviscerating this civil rights paradigm in the *Slaughter-House Cases*, in order to effectively deny federal civil rights protections for African-American citizens. *See Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (reviewing history). Because modern substantive due process jurisprudence evolved to fill the resulting void in civil rights law, it is

now the more familiar and commonly used paradigm of civil rights protection. But the parts of Privileges and Immunities that survived *Slaughter-House* remain a valid and authoritative jurisprudence of civil rights protection in the limited situations where they apply. *McDonald v. City of Chicago*, 561 U.S. 742, 754-59 (2010). The right to travel, both interstate and internationally, is one of the few civil rights to which this Privileges and Immunities framework still applies. This Court is therefore *required* to apply this authority here. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts must follow an applicable precedent of the Supreme Court unless and until it is overruled by the Supreme Court).

Saenz applied Privileges and Immunities framework to the right of interstate travel. 526 U.S. at 501. The Supreme Court has not yet applied the Privileges and Immunities framework to the parallel right of international travel, but *Saenz* and other authorities confirm how the analysis works here. The right to travel is a Privilege. *Corfield v. Coryell*, 6 F.Cas. 546, 551-52 (No. 3,230) (CCED Pa. 1825); *Crandall*, *supra*; *Saenz*, 526 U.S. at 501 n.14 (majority citation to *Corfield* as

authority that the right to travel is a "Privilege") and 524-27 (Thomas's dissent, developing *Corfield* in greater detail).[1] And critically, for purposes of the Privileges and Immunities framework, it is a right that stems from federal rather than state citizenship. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). These predicates, which the Government does not challenge, make the constitutionally established right of international travel a protected Privilege under the Supreme Court's Privileges and Immunities framework, per *Slaughter-House* and *Saenz.*

The Government fails even to chip around the edges of this logically and legally compelling argument. The Government first argues that "there is simply no basis for analyzing restrictions on the right of international travel" under a Privileges and Immunities paradigm, instead of the more familiar substantive due process paradigm. Answer brief at 60. To the contrary, there is ample basis for

[1] Indeed, the right to travel is a Privilege with an exceptional constitutional pedigree: it was established in the Magna Carta, and is identified by Blackstone as an "absolute" right (including the right to travel in and out of the realm). The Government's Answer Brief mentions the Magna Carta just once, in discussing the seminal international travel case of and *Kent v. Dulles*, 357 U.S. 116, 125 (1958); and the Government does not mention Blackstone at all.

applying the limited but still vital Privileges and Immunities paradigm to the right of international travel. *McDonald v. City of Chicago* recently confirmed that while the Privileges and Immunities paradigm may be old and rarely used, it is still vital and stands alongside the more familiar substantive due process paradigm. 561 U.S. at 754-59. While the Supreme Court did indeed ground the right of international travel in the Fifth Amendment when it first addressed that right in *Kent*, that was only because at the time *Kent* was decided (1958) the Privileges and Immunities paradigm appeared to have been eviscerated and left for dead by the *Slaughter-House Cases*, making substantive due process the only available mode of constitutional protection. *Saenz* changed that premise by reanimating Privileges and Immunities and applying the framework to the right to travel. This Court may not ignore this binding precedent and refuse to apply the Privileges framework just because it is less familiar than substantive due process. *Agostini*, *supra*.

The Government also argues that *Saenz* applied the Privileges and Immunities framework to protect the right of inter*state* travel, but

did not discuss inter*national* travel. Answer Brief at 61-63. The Government's argument is an unpersuasive attempt to distinguish *Saenz* by reducing it to its facts, including the fact that the travel at issue in that case was interstate.

International travel's pedigree (established in Magna Carta and confirmed by Blackstone) prevents the right from being so lightly dismissed or ignored. Blackstone described the right to travel as it was understood by the Framers as the "absolute right" of English citizens to travel generally, including in and out of the realm. Sir William Blackstone, Commentaries on the Laws of England, Book I (Of the Rights of Persons), Chapter 1 ("Of the Absolute Rights of Individuals") pp. 134, 137 and 265-66 (describing the absolute right to travel as the right of "locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct," including in and out of the realm).

Saenz appropriately began its analysis of Privileges and Immunities protection for the right to travel by confirming that it protects the right to travel *generally*, just as described by Blackstone.

526 U.S. at 500 (majority opinion, describing the right to travel as "the right to go from one place to another"); and 511 (Rehnquist and Thomas dissenting, describing the right to travel as "clearly embrac[ing] the right to go from one place to another.") This authoritative description of the right embraces both interstate and international travel.

After establishing that the right to travel generally (*i.e.* both interstate and internationally) is a protected Privilege, the *Saenz* Court naturally and appropriately limited its further analysis to the right of interstate travel because that was the specific right at issue. Any pronouncements about international travel, which can be qualified for different reasons like foreign policy, would have been pure *obiter dicta*. So while the Government can of course distinguish *Saenz* as being about interstate rather than international travel, *Saenz* confirms that international travel is also a protected Privilege under the post-*Slaughter-House* Privilege and Immunities paradigm.

The Government also argues that if the right of international travel is a protected Privilege, it is still only protected against infringement by the States, since the two Privileges and Immunities

clauses in the Constitutional prohibit States from infringing Privileges, not the federal government. Answer Brief at 63-64. But that facile argument runs counter to *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), where the Supreme Court held that it would be "unthinkable" for constitutional civil rights protections that apply against the states to not also apply to the federal government. *Accord Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392 (1971) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946).[2] Some originalists have criticized *Bolling*'s holding that the federal government must respect the same civil rights that states must respect. *E.g.* Robert Bork, *The Tempting of America*, 83 (1990). But *Bolling* and *Bivens* are controlling law, and apply here to require the Federal Government to respect the same constitutionally protected rights that states must respect.

[2] As explained in the Opening Brief, the Supreme Court's recent limitations on *Bivens* actions do not apply here because Mr. Maehr seeks only equitable relief – restoration of his passport – not damages.

The Government's argument, however, draws attention to another reason why the Privileges and Immunities framework properly and necessarily applies here. The Fourteenth Amendment does not subject the federal government to its edicts because the Amendment was specifically written and enacted to prevent constitutional violations by the States – it was not written as a follow-up to the Bill of Rights, to enumerate all the other Privileges not specifically mentioned in the first ten Amendments, but still understood as being Privileges enjoyed by citizens and protected from government infringement. Otherwise, the Fourteenth Amendment would have looked less like a constitutional amendment and more like the lengthy laundry list of civil rights identified in *Corfield* as constitutionally protected, although not mentioned in the Constitution by name. Such laundry-list drafting is common in regulations and civil codes, but is not the way the Constitution is written. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) ("we must never forget, that it is a constitution we are expounding"); *see also* Gregory Dolin, *Resolving the Original Sin of Bolling v. Sharpe*, 44 Seton Hall L. Rev. 749, 788-89 (2014) (reviewing

Bolling's holding generally, and specifically in light of the *Slaughter-House* cases).[3] The Privilege of international travel is thus *already* protected against federal infringement precisely because it is an established Privilege of national citizenship, *Saenz*, *supra*; and need not be enumerated in the Fourteenth Amendment or elsewhere in the Constitution to enjoy this protection.

Finally, the Government does not make any argument that if the right to travel internationally is a constitutionally protected "Privilege" (which it plainly is), the Supreme Court's Privileges and Immunities jurisprudence protecting that right would nonetheless permit the federal government to revoke or suspend the Privilege as a means of coercing a citizen to pay a tax debt. There is no such authority. While Privileges and Immunities cases are scant, what caselaw there is fairly confirms that a government's interest in raising revenue, legitimate though it be, is not a strong enough reason to revoke or suspend a

[3] Like most commentators, and Justice Thomas, Dolin readily acknowledges that the *Slaughter-House Cases* were wrongly decided. *Id.* at 788. But Mr. Maehr's argument proceeds from the existing law of *Slaughter-House*, as reanimated by *Saenz* – both controlling precedents.

citizen's protected Privileges or Immunities. *Saenz*, *supra* (California's interest in reducing welfare payments yields to constitutional right to travel); *Crandall*, *supra* (Nevada's interest in raising revenue through a tax on travel yielded to the right to travel).

Mr. Maehr appreciates the novelty of this Privileges and Immunities argument. But the argument is solidly grounded in controlling Supreme Court precedent and sound, inexorable logic. The Government offers no reason to hesitate applying the post-*Slaughter-House* framework of Privileges and Immunities here, to hold that the FAST Act's passport revocation regime is unconstitutional.

B. The FAST Act's passport revocation regime violates substantive due process.

The Government's substantive due process analysis naturally starts from the premise that all statutes are presumed to be constitutional, and the burden here is on Mr. Maehr to prove otherwise. Mr. Maehr has carried his burden.

The Government cites the relatively recent division of constitutional rights into a binary categorization or fundamental-or-less-than, and argues that because the Supreme Court has never used

the magic word "fundamental" to describe the right of international travel, it must necessarily be a lesser right that can be regulated per the deferential rational basis analysis. And the Government argues that even if the right is deemed fundamental, the Government's interest in collecting tax debt judgments is so compelling as to justify revoking even fundamental constitutional rights to promote "compliance."

The Government's arguments do not withstand scrutiny.

1. The right to travel internationally is indeed fundamental.

Under the most recent substantive due process caselaw, this Court starts its inquiry by describing the right at issue; determining whether it has been infringed; and if so how to classify the right under the current fundamental / non-fundamental system to determine whether strict scrutiny or rational basis applies. Answer Brief at 26-27. There is no dispute here that the right at issue is the right to travel outside the United States; that this requires a valid passport; and that the Government's revocation of Mr. Maehr's passport deprives him of this right. *Id.* The question before the Court is whether the right to

travel internationally is fundamental or not; and as a result how the Government can permissibly qualify the right.

The Supreme Court developed this binary fundamental-or-less-than framework for substantive due process only recently, in cases like *Reno v. Flores*, 507 U.S. 292, 305 (1993) and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). All of the Supreme Court's decisions addressing the right of international travel predate the articulation of this relatively new binary framework. The seminal case of *Kent* was decided in 1958; the most recent case is *Regan v. Wald*, 468 U.S. 222 (1984) (upholding embargo against Cuba, including ban on travel to Cuba, for foreign policy reasons). As a result, the Supreme Court has not itself pronounced whether the right of international travel is fundamental or less than.

Nor has this Court addressed this question. This Court's only decision addressing the right of international travel, *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019), avoided categorizing the right of international travel as either fundamental or less than; but it correctly noted that this Court must look to Supreme Court precedent to insure

that it neither creates a new substantive due process fundamental right of international travel, nor gives this established right less substantive due process weight than Supreme Court precedent requires. 942 F.3d at 1209.

Since the Supreme Court and this Court have not yet spoken on the issue of the right's fundamentality, the Government devotes the bulk of its Answer Brief to deconstructing lower court decisions on international travel caselaw since *Kent*. Answer brief at 28-54. The Government's focus on recent lower court rulings is misplaced here because it deliberately ignores everything the Supreme Court *has* said about the right of international travel. Since the binary fundamental-or-not framework was not in place when the Supreme Court decided its controlling right of international travel cases, the proper question is: what was the analytical framework in effect at that time (from *Kent* in 1958 to *Regan* in 1984), and does that analytical framework answer the question that today would be framed in terms of the binary "fundamentality" framework that emerged in *Reno* and *Glucksberg* a decade later?

Under the substantive due process framework in effect at the time, a court asked whether the right at issue was established as "law of the land" in such sources as the Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689), in which case the right was imported into our constitutional framework and is treated as what we now call a fundamental right under modern substantive due process terminology. *Twining*, 211 U.S. at 100-108. *Accord District of Columbia v. Heller,* 554 U.S. 570, 593-94 (2008) (grounding substantive due process right to bear arms in the 1689 Bill of Rights and Blackstone).

Here is how the Supreme Court described the right of international travel in *Kent*, against the established and authoritative analytical backdrop of *Twining*:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment.... **In Anglo-Saxon law, that right was emerging at least as early as the Magna Carta.** [One authoritative commentator's work] shows how **deeply engrained in our history** this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a **part of our heritage**. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what

> he eats, or wears, or reads. **Freedom of movement is basic in our scheme of values.**

Kent, 357 U.S. at 125-26 and n.12 (emphases added, and quoting article 42 of the Magna Carta).

At the time the Supreme Court wrote these words, this was precisely the way to characterize a constitutional right as what we would now call fundamental: by grounding it in the Magna Carta, calling it "deeply engrained in our history," "part of our heritage," and "basic in our scheme of values." This was the lexicon of fundamentality, as of 1958.[4] As a result, this Court's substantive due process analysis properly starts from the unassailable fact (not disputed by the Government) that the Supreme Court has characterized the right of international travel as a fundamental right in *Kent* and *Aptheker*.

[4] The Court still uses this lexicon. "Basic" can even serve as a synonym for "fundamental" in the more recent *Flores / Glucksberg* binary formulation. *Accord Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964) (striking down statute that revoked communists' passports because any legislative restrictions on "fundamental personal liberties" must be narrowly tailored).

Instead of disputing the premise, the Government argues that the Supreme Court has walked back this holding through various later decisions. Not so.

The Supreme Court has never overruled *Kent* or *Aptheker*, or called this aspect of their holding into question. Rather, consistent with the fundamentality holding, in every single decision where the Supreme Court has actually addressed whether a government infringement of the right to travel internationally is justifiable the Court has qualified the right of international travel due to a truly compelling government interest like national security or foreign policy. *See Zemel v. Rusk*, 381 U.S. 1 (1965) (travel to Cuba could be restricted for foreign policy and national security reasons); *Haig v. Agee*, 453 U.S. 280 (1981) (Government properly revoked ex-CIA agent's passport for national security reasons); *Regan v. Wald*, 468 U.S. 222 (1984) (upholding embargo against Cuba, including ban on travel to Cuba, for foreign policy reasons).

In the course of some of these cases, the Supreme Court has used language that appears to create some tension with treating right of

international travel as fundamental. But reading this language as constituting a formal, intentional demotion of the right would require a huge analytical leap that a lower court should not make lightly. *Abdi*, 942 F.3d at 1209. The close reading of the Supreme Court's authoritative pronouncements required by *Abdi* confirms that the high court did not in fact demote the right from fundamental status.

The basis for assuming a demotion was the Supreme Court's language in *Agee*, which quoted a welfare benefit case stating that the right of interstate travel is "virtually unqualified," whereas the right to international travel may be regulated "within the bounds of due process." *Agee*, 453 U.S. at 307, quoting *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978). As explained in the Opening Brief, and not rebutted (or addressed) by the Government, a right can be fundamental and still be "qualified" by sufficiently compelling governmental interests, like national security and foreign policy, per *Zemel*, *Agee* and *Wald*. And regulating the right of international travel "within the bounds of due process" does not demote the right either – fundamental rights are regulated within the bounds of due process by subjecting

them to strict scrutiny, per *Reno* and *Glucksberg*. The Government's case for recognizing a demotion is based entirely on lower court cases that are not binding, and which this Court may not follow where authoritative Supreme Court precedent commands a different result.

The only Supreme Court international travel case the Government raises in its Answer Brief that Mr. Maehr did not address in the Opening Brief is *Regan v. Wald*, upholding the Cuba embargo against a constitutional challenge based on the Government's compelling interest in controlling its foreign policy. The Government makes much of a footnote where the Court stated:

> In *Kent* [], the constitutional right to travel within the United States and the right to travel abroad were treated **indiscriminately**. That position has been rejected in subsequent cases. *See* [*Agee* and *Aznavorian*].

Wald, 468 U.S. at 241, n.25; Answer Brief at 33. But again, this statement is perfectly consistent with fundamentality. The rights of international and interstate travel are indeed different in that they can be qualified for different reasons – such as foreign policy in particular.[5]

[5] National security concerns used to implicate just the right of international travel, but since 9/11 national security concerns qualify

The Cuba travel cases of *Agee* and *Wald* illustrate this reason to *discriminate* between the two rights (*i.e.* not treat the two rights *indiscriminately*). But Mr. Maehr's argument does not conflate the two rights. If the Government had a valid foreign policy reason, or any truly compelling reason, for revoking Mr. Maehr's passport, we would not be here.[6]

As a result, there is no need for the Court to look to non-authoritative lower court decisions construing the right to travel under the current binary framework, given the authoritative pronouncements and guidance from the Supreme Court. It is the Supreme Court's own language and analysis that this Court properly looks to. *Abdi*, 942 F.3d at 1029. And in any event, none of the many lower court decisions the Government cites to support its position that the right of international travel is less-than-fundamental engages in deep analysis of Supreme

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the right of interstate travel just as forcefully as international travel. *Abdi v. Wray*, 942 F.3d at 1029-31.

[6] The Government argues that its interest in collecting tax debt judgments is sufficiently compelling to justify abridging fundamental rights. Answer Brief at 47-49. That argument, addressed below, is meritless.

Court authority undertaken here. This Court should therefore recognize, per *Kent* and its progeny, that the right of international travel is what we would now categorize as a fundamental right for substantive due process purposes. It should go without saying that the Government may not revoke fundamental constitutional rights as a method of judgment collection.

2. Collecting tax debts is not a compelling government interest that can justify abridging fundamental constitutional rights.

Amazingly, it does not go without saying – the Government actually asserts that its interest in collecting tax debts is so compelling as to justify abridging fundamental constitutional rights under the Supreme Court's modern substantive due process framework. Answer Brief at 47-49.

If the Government's argument were accepted, then the Government could revoke any fundamental constitutional right to coerce payment, to vindicate its compelling interest in tax debt collection. Mr. Maehr offered a dystopian hypothetical in his complaint to illustrate that untenable position, thinking that the Government would never actually embrace it:

> *FBI agents walk into your home with no warrant or knock. When you protest, you are told that you are on the IRS's list of tax debtors who have been certified to the Justice Department, so you have no Fourth Amendment rights against unreasonable searches and seizures until you pay up. The agents root around your home until they find some reason to arrest you. You ask for a lawyer at your arraignment, and are told: sorry, no right to counsel for you. And no right to a jury trial either, until you pay up. Now back to jail until your trial, where you will be held incommunicado and maybe tortured a little for good measure, since you have no First or Eighth Amendment rights either – until you get those constitutional rights reinstated by paying your tax debt.*

App. 17.

While this hypothetical was offered tongue-in-cheek, the substantive due process concerns it raises are not joke – or should not be. For example, the Supreme Court long ago recognized a fundamental constitutional right not to be tortured by the Government. *Brown v. Mississippi*, 297 U.S. 278 (1936). If, as the Government contends, its compelling interest in collecting tax debts justifies abridging fundamental rights, then Congress needn't have stopped at passport revocation in the FAST Act – it could authorize the IRS to issue thumbscrews to its revenue agents as much more effective method of garnering "tax compliance." *See* App 77-78; Answer Brief at 19.

The authorities in the Government's Answer Brief certainly do not support this extraordinary position. *Bull v. United States*, 295 U.S. 247 (1935), an early income tax collection case, used the "taxes are the lifeblood of government" metaphor in the course of describing how the Government is entitled to obtain money judgments on tax assessments, and collect those judgments through ordinary legal collection methods like levy and execution. *Id.* at 259-60. *Flora v. United States*, 362 U.S. 145, 154 (1960), held that a taxpayer generally must pay the full amount of an income tax deficiency assessed by the Commissioner of Internal Revenue before he may challenge its correctness by a suit in a federal district court for refund under 28 U.S.C. § 1346(a)(1). Neither case holds or even suggests that the Government can collect tax debts by revoking tax debtors' fundamental constitutional rights until they pay up.

The Government's other cases hold that the Government need not make exceptions in assessing taxes, rejecting *paying-taxes-is against-my-religion-so-you-can't-even-assess-me* type arguments. *See* Answer Brief at 47-48, citing *Adams v. Commissioner*, 170 F.3d 173, 178-79 (3d

Cir. 1999) (taxpayer did not have a religious free exercise right to control how her taxes were spent); *Ueckert v. United States*, 581 F.Supp. 1262, 1266 (D.N.D. 1984) (requirement to file tax return did not violate taxpayer's Fifth Amendment right against self-incrimination). These cases similarly do not hold that the Government can revoke fundamental constitutional rights to coerce payment of a tax debt. Also, recall that in this action, Mr. Maehr is not challenging the Government's assessment of taxes – just the Government's new judgment collection technique of revoking an established (and fundamental) constitutional right to coerce payment.

The Government's Answer Brief seems to suggest that the Government has a heightened interest in tax compliance as a type of shared sacrifice, like compulsory military service. While not well articulated or supported by Government, Mr. Maehr addresses that concern here, since this Court can consider it *sua sponte*.

Just as the Government has powerful tools to compel citizens to perform required military service during war or a draft, the Government has powerful tools to prevent tax *evasion*. The FAST Act's

passport revocation regime does not target tax evasion. It applies to all citizens who get $50,000 or more behind in their taxes, regardless of their views of the tax laws, and whether they flouted those laws or just had a bad financial year. And there are many ways that our complex tax laws can result in taxpayers being completely surprised by massive tax bills, such as owning stock in a company that undergoes a tax inversion. The FAST Act's passport revocation regime is about judgment collection, not tax evasion.

Indeed, if this were a tax *evasion* case, then we would be talking about a whole different set of legal and constitutional concerns. *See Cheek v. United States*, 498 U.S. 192, 199-204 (1991) (to establish tax evasion, the government must prove that the taxpayer subjectively knew he was obligated to pay taxes and willfully refused). Additionally, had the Government pursued tax evasion, Mr. Maehr's liability would have been determined by a jury of his peers, rather than just the Tax Court and other courts.

But this is not a tax evasion case. The Government chose to assess Mr. Maehr and obtain a money judgment (which is a *final*

judgment subject to the prohibition against claim splitting). This case is about judgment collection. As a result of the Government's choices, the constitutional issues presented here do not concern the Government's interest in shared sacrifice, but simply how far the Government can go to collect a money judgment. If substantive due process means anything, it means that the Government may not torture a judgment debtor to obtain "compliance," or revoke other fundamental constitutional rights to coerce payment.

Mr. Maehr looks forward to the Government's defense of this position at oral argument.

C. Common law *ne exeat* principles confirm that the FAST Act's passport revocation regime is unconstitutional.

The *ne exeat* cases are analytically on all fours. The common law and constitutional analysis of the *ne exeat* cases establish precisely how the constitutional right to international travel may be "regulated within the bounds of due process," per *Agee*. The cases compel the conclusion that whether the right to international travel is deemed a fundamental constitutional right or less than, the Government may not suspend this right as a means of coercing tax debtors to pay their judgments.

Rather, the Government must establish that the tax debtor is trying to take assets out of the country (and hence beyond the Government's reach), or has assets abroad that he refuses to repatriate.

The district court simply ignored how the constitutional analysis for *ne exeat* is perfectly apposite and controlling here. App. 206-07. But the Government can of course ask this Court to affirm on any basis, so the Government attempts to develop distinctions (no matter how minor) between the potential application of a common law writ of *ne exeat* and the FAST Act's statutory passport revocation regime. The Government offers two such differences:

- **Geographical restrictions.** The FAST Act's passport revocation regime only confines tax debtors to the United States; whereas *ne exeat* can be applied to require even narrower geographical restrictions, such staying within a court's jurisdiction, or under house arrest, or even jail (absent posting a bond to secure payment of the judgment). Answer Brief at 56-57.
- **Procedural safeguards**. The FAST Act's statutory passport revocation regime only applies after the taxpayer has been assessed with a final money judgment; whereas writs of *ne exeat* can be issued through a preliminary injunction framework where the Government need only provisionally prove a likelihood that the debtor owes money and is at risk of secreting assets beyond the court's jurisdiction. Answer Brief at 57-58.

These potential, theoretical (and in the scheme of things trivial) differences are irrelevant here because Mr. Maehr is bringing an *as applied* challenge. Potential minor differences in the way that *ne exeat* might be applied in *other* situations (especially non-tax collection situations) have no bearing on this Court's analysis. What matters here is that the perfectly apposite tax collection *ne exeat* cases balance the Government's interest in collecting tax debts against the debtors' substantive due process right to travel internationally. That is the analysis establishing how constitutional right to international travel may be "regulated within the bounds of due process," and the analysis that matters and controls in this as applied challenge – not whether a court in some other case found, *e.g.*, good cause to confine the debtor more restrictively than just staying in the country.

In **every** case where the Government has sought a writ of *ne exeat* to aid in the collection of a tax debt, the courts have ruled, based on common law principles or the substantive due process status of the right of international travel (which are really the same thing, since substantive due process rights emerge from our common law

traditions), that the Government may not prevent the tax debtor from leaving the country as a matter of course, but must establish that the tax debtor is trying to secrete assets abroad, or is refusing to repatriate assets already secreted abroad.

The earliest *ne exeat* tax collection case, *United States v. Robbins,* 235 F.Supp. 353, 355-58 (E.D.Ark. 1964), used a common law rather than constitutional substantive due process analysis to reach this conclusion.

The next case of *Shaheen*, authored by Justice Stevens in 1971 when he was still on the Seventh Circuit, lays out the constitutional analysis that has been followed by all subsequent tax collection *ne exeat* cases. *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971). There, Thomas Shaheen tried to impede tax investigations, and then started moving his assets to England, borrowed against his U.S. property, and moved with his family to London. 445 F.2d at 8. The Government made jeopardy assessments against him. *Id.* When the Government learned that Shaheen was back in Illinois (for a bail hearing on a criminal charge), the Government sought and obtained an *ex parte* writ

of *ne exeat*. *Id.* Shaheen moved to quash the writ, and the district court held a preliminary injunction hearing to determine whether Shaheen was trying to leave the country with his assets. *Id.* at 9. The district court denied Shaheen's motion to quash the writ without making any findings of fact or conclusions of law. *Id.* The Seventh Circuit reversed because (1) the Government had failed to support its jeopardy assessment with facts establishing a likelihood that it would obtain a proper tax assessment; and (2) the evidence regarding absconding and secreting assets was disputed, but the district court had made no findings to support a conclusion that Shaheen's constitutional right to travel internationally warranted restriction. *Id.* at 9-12. Justice Stevens expanded on *Robbins*' common law analysis by discussing how the writ impinged on a constitutionally established right, and therefore required the Government to establish a commensurately important (or compelling) reason for its infringement:

> When the relief impinges upon a constitutionally protected personal liberty, … the Government has the burden of demonstrating that the restraint of liberty is a necessary, and not merely coercive and convenient, method of enforcement.

Id. at 10-11.[7] As a result, collecting a judgment from a tax debtor's assets may not be accomplished through equitable compulsion, but must proceed by regular legal means. *Id. Accord McKenzie v. Cowing*, 4 Cranch CC 479, 16 F.Cas. 202 (1834) (courts may not use *ne exeat* to compel payment of a money judgment; rather, creditors must pursue ordinary legal remedies and collection methods). The appellate court gave the Government ten days to put a proper case together (by delaying its mandate for that long), so it could ask the district court to reinstate the writ on remand per the Seventh Circuit's constitutional analysis. *Id.* at 12.

Shaheen thus held that the common law restrictions on *ne exeat* were of constitutional dimension, which is exactly why the Government cannot bypass these restrictions by enacting a statute like the FAST Act – the presumption of constitutionality has been decisively rebutted here.

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[7] While *Shaheen* did not classify the right of international travel in the yet-to-be-adopted binary categories of fundamental or less than (per *Reno* and *Glucksberg*), its use of the constitutionally significant term "necessary" supports treating the right as a fundamental right.

Every tax collection case where the government has sought to restrict the tax debtor's right to travel internationally in aid of debt collection has followed *Shaheen*'s constitutional analysis. *United States v. Clough*, 1977 WL 1196 (N.D.Cal.); *IRS v. Mathewson,* 1993 WL 113434 (S.D.Fla.); *United States v. Barrett*, 2014 WL 321141 (D.Colo.). Because *ne exeat* is an equitable remedy rather than a one-size-fits-all statute, each *ne exeat* case naturally takes into account the procedural posture (*e.g.* jeopardy assessment versus final money judgment) and degree of restraint warranted for the tax debtor at bar. But these details do not impact the constitutional analysis of what the Government must establish to justify impairing a tax debtor's right to travel internationally.

The Government offers some additional *ne exeat* cases, but they also support Mr. Maehr. *See* Answer brief at 56-58. In *United States v. Lipper*, 1981 WL 1762 (N.D. Cal.) the Government caught the tax debtor (a San Francisco real estate mogul) in the act of liquidating his assets and fleeing to France. The court approved the requested *ne exeat* writ confining Lipper to the court's jurisdiction (the Northern

District of California), but simultaneously warned the Government to proceed expeditiously in establishing its collection case, since abridging Lipper's right to travel was a serious constitutional deprivation per *Shaheen* and its progeny. *Id.* at *6-8, esp. ¶¶ 53-58. *Aetna Casualty & Surety Co. v. Markarian*, 114 F.3d 346, 349 (1st Cir. 1997), was a non-tax case that reversed a writ of *ne exeat* issued to a private judgment creditor based on the controlling state law of Massachusetts. Both cases support Mr. Maehr's position. Indeed, all of the *ne exeat* authority does. *See* 57 Am.Jur.2d Ne Exeat; *Atherton v. Gopin*, 355 P.3d 804, 808-09 (N.M.App. 2015) (reviewing history of *ne exeat*, collecting cases and authorities).

As set forth in the Opening Brief, caselaw upholding the prior passport revocation regime of 42 U.S.C. § 652(k) for deadbeat parents is wrong,[8] and not binding. The Government naturally offers these non-binding decisions, Answer Brief at 49-55; but the Government does not address the reason why they are profoundly distinguishable: because

[8] The dissent in *Eunique v. Powell*, 302 F.3d 971, 979-85 (9th Cir. 2002), is the best-reasoned analysis from the child-support cases. And none of the child-support cases considers *ne exeat.*

our common law traditions permit courts to use their extraordinary equitable powers to coerce payment of child support debts, but not to coerce payment of other money judgments. *McKenzie*, *supra*; Opening Brief at 61-64.

Because the Government has not established *ne exeat* predicates as to Mr. Maehr, the Secretary of State may not revoke his passport under 26 U.S.C. § 7345. The FAST Act's passport revocation regime is unconstitutional as applied to him.

CONCLUSION

Depriving people of their constitutional rights can be a very effective way of motivating them to pay debts, or do anything else the Government wants them to do. That is why the judicial branch guards constitutional rights against infringement and overreach by the executive and legislative branches, and why lawsuits like this one are necessary to maintain a free society.

The Government may not compel citizens to pay debts by revoking their constitutional rights until they pay up. This Court should strike down this unconstitutional statute, or save it by applying *ne exeat* as a

limiting construction; and order the State Department to reinstate Mr. Maehr's passport.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Opening Brief was served on August 12, 2020 via ECF to all counsel of record through the ECF system.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with F.R.A.P. 32 because it is presented in 14-point Century font and contains 6,463 of the 6,500 words permitted by F.R.A.P. 32(a)(7)(B)(ii).

s/ Bennett L. Cohen
Bennett L. Cohen

CERTIFICATE OF DIGITAL SUBMISSION

I certify that:

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