UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTE SILVER, *et al.*, Plaintiffs, v. **INTERNAL REVENUE SERVICE, *et al.*,** Defendants.	Civil Action No.: 1:19-cv-00247-APM

MEMORANDUM OF LAW OF THE RO *AMICI CURIAE*
IN SUPPORT OF THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

J. William Eshelman (D.C. Bar No. 141317)
Alexander R. Green (D.C. Bar No. 1017781)
CLARK HILL PLC
1001 Pennsylvania Avenue, NW
Suite 1300 South
Washington, DC 20004
Telephone: (202) 552-2373
Facsimile: (202) 640-6691
weshelman@clarkhill.com
agreen@clarkhill.com

Counsel for Amici Curiae, Republicans Overseas, Inc., and several of its foreign-registered chapters

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Pursuant to the Court's June 2, 2020 Order [Dkt. No. 55], the RO *Amici Curiae* (as defined below) respectfully submit this Memorandum of Law in further support of Plaintiffs' Motion for Summary Judgment [Dkt. No. 47]. As used in this Memorandum, the term "RO *Amici Curiae*" shall refer collectively to Republicans Overseas, Inc. ("RO"), as well as several of its chapters, including without limitation Republicans Overseas Albania ("RO-Albania"), Association Republicans Overseas France ("RO-France"), Republicans Overseas Hellenic Republic ("RO-Greece"), Republicans Overseas Israel, A.R. ("RO-Israel"), Republicans Overseas North Macedonia, Republicans Overseas Sweden ("RO-Sweden"), Republicans Overseas Switzerland ("RO-Switzerland"), and Republicans Overseas United Kingdom ("RO-UK"). Since the Court granted leave to file this Memorandum, the RO chapters in Hong Kong and Singapore have submitted data which has been incorporated in the discussion below.

DISCLOSURE

Republican Overseas, Inc. ("RO")[1] is an Indiana not-for-profit corporation which advocates for and seeks to protect the interests of the millions of American citizens residing outside of the United States, with no parent corporation and no publicly traded stock. The other Republicans Overseas chapters listed as *amici curiae*, namely, Republicans Overseas Albania, Association Republicans Overseas France, Republicans Overseas Hellenic Republic, Republicans Overseas Israel, A.R., Republicans Overseas North Macedonia, Republicans Overseas Sweden, Republicans Overseas Switzerland, and Republicans Overseas UK, are each separately organized

[1] While obviously a supporter of the Republican Party, RO's participation in this action is far from partisan. The issues raised herein effect all U.S. citizens abroad who have interests in controlled foreign corporations ("CFCs"). To that end, the RO *Amici Curiae* note that an organization affiliated with the Democratic Party, "Democrats Abroad," has also challenged the Transition Tax. *See* Exhibit A (Declaration of Monte Silver) to Plaintiffs' Motion for Summary Judgment [Dkt. No. 47-2, pp. 8-12].

as not-for-profit entities under the laws of the jurisdiction in which they are active. These chapter organizations are not subsidiaries of RO. None of them has any parent corporation. All of them are non-stock entities which have no publicly traded stock. By way of example, Republicans Overseas Israel, A.R. is registered under the Israel Amutot Law, 5740-1980, as an *amuta reshuma*, registered *amuta* (not-for-profit organization). It has no parent entity (corporation or otherwise), and as an *amuta* is not authorized to register or issue shares.

Timely notice was provided to all parties to this action. Over the objections of Defendants (collectively referred to herein as the "Government"), the Court granted the RO *Amici Curiae* leave to file this Memorandum. No party's counsel authored this Memorandum in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this Memorandum. No person – other than the *amici curiae*, their members, or their counsel – contributed money that was intended to fund preparing or submitting this Memorandum.

STATEMENT OF INTEREST OF THE RO *AMICI CURIAE*

Republican Overseas, Inc. ("RO") is a non-profit corporation organized under the laws of the State of Indiana, with a principal office in Scottsdale, Arizona. RO is the umbrella organization for a network of Republican Overseas chapters spread across approximately 60 countries worldwide, which advocates for and seeks to protect the interests of approximately nine million (9,000,000) American citizens residing outside of the United States,[2] many of whom own and operate small businesses of various types. Of all the issues RO and its affiliated chapters around the world have dealt with, U.S. taxation of expatriates is by far the one that most concerns Americans abroad. Since its inception in 2012, RO has led the efforts to mollify the impact of the

[2] This figure is accurate as of 2016, which was when the Department of State, Bureau of Consular Affairs, last published figures for the number of American Citizens residing abroad. However, this publication appears to have been discontinued since that time.

Foreign Account Tax Compliance Act ("FATCA") both in Congress,[3] U.S. courts,[4] and in foreign tribunals[5].

RO-Albania, RO-France, RO-Greece, RO-Israel, RO-North Macedonia, RO-Sweden, RO-Switzerland, RO-UK, are foreign-registered non-profit organizations.[6] These RO chapters advocate for and seek to protect the interests of American citizens residing in their respective jurisdictions, many of whom own and operate small businesses of various types with connections to the United States.

The RO *Amici Curiae* possess intimate and expansive knowledge of the expatriate American community and have engaged extensively on that community's behalf both in legislative and judicial matters. On a daily basis, the RO *Amici Curiae* work closely with small business proprietors abroad and therefore bring a unique perspective as to the impact that the Final Regulations have had on that community.

In addition, the RO *Amici Curiae* submit this Memorandum on behalf of the American-based small businesses that qualify as CFCs.

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[3] *See* Tax Fairness for Americans Abroad Act of 2018, H.R. 7358 115th Congress (2nd Sess. 2018).

[4] *Crawford v. United States Dep't of Treasury*, 868 F.3d 438 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1441 (2018).

[5] *See Republicans Overseas Israel v. Government of Israel*, HCJ No. 8886/15 (Jan. 2, 2018).

[6] As previously disclosed, this Memorandum also includes information provided by RO-Hong Kong and RO-Singapore.

SUMMARY OF ARGUMENT[7]

The IRS violated the Regulatory Flexibility Act (RFA) and Administrative Procedure Act (APA) by imposing burdensome regulations under I.R.C. § 965, which sets a regulatory precedent that could indeed harm large numbers of U.S. taxpayers that reside outside of the United States in the future. Exacerbating the IRS's violation, the Treasury certified – without any factual support whatsoever – that the Proposed and Final regulations would not have "a significant economic impact on a substantial number of small entities." However, the Treasury's certifications were and are incorrect.

The Government's estimate regarding the small businesses that would be impacted by the Transition Tax and the Final Regulations ignores the over 150,000 small businesses owned and operated by American citizens residing outside of the United States. The Final Regulations have had and will continue to have a significant impact on a substantial number of small businesses owned by expatriate Americans. Had the Government even attempted to analyze the effect of the Final Regulations on small businesses – as it was required to do under the RFA – then it would have realized the scope and severity of this impact and possibly considered appropriate alternatives.

Permitting the Government to issue the Proposed and Final Regulations in the manner it issued them will serve as a dangerous precedent. The RFA does not permit the Government to ignore the unique burdens that its regulations could impose on small businesses. The Government, and particularly the IRS, is required to conduct regulatory flexibility analysis regarding the impact

[7] For convenience, the RO *Amici Curiae* adopt the acronyms and short titles referenced in the Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment [Dkt. No. 47-1].

of its regulations on small businesses. The RO *Amici Curiae* respectfully request that the Court hold the Government to its obligations.

DISCUSSION

A. The Government's Certification Fails to Account for Small Businesses Abroad. The Proposed and Final Regulations Have Had and Will Continue to Have a Significant Economic Impact on a Substantial Number of Small Entities.

The core issue in this action is whether the Government's certification under 5 U.S.C. § 605(b) meets the requirements set forth in the RFA for avoiding the performance of the regulatory flexibility analyses mandated by 5 U.S.C. §§ 603 and 604. Pursuant to 5 U.S.C. § 605(b), the Government can avoid these crucial analyses by issuing a two-prong certification – namely, that the regulation will not, if promulgated:

(i) "[H]ave a significant economic impact[;]"

(ii) "[O]n a substantial number of small entities."

As the ensuing data collected by only a few RO chapters demonstrates, neither prerequisite for certification in lieu of regulatory flexibility analysis existed at the time the Government published their Section 605(b). In short, the Government shirked its obligations by failing to engage in the analyses mandated by 5 U.S.C. §§ 603 and 604.

The first flaw in the Government's "certification" is its complete detachment from reality. The Government contends that the Proposed and Final Regulations would not have "a significant economic impact on a substantial number of small entities." This is absurd. First, the data below show that the number of "small entities" owned by U.S. citizens residing abroad is very substantial, numbering in the hundreds of thousands. The Government's certification as to the number of affected small businesses thus lacks any cognizable empirical basis. This kind of "shoot-from-the-hip" certification is clearly not what Congress had in mind when it first included the certification alternative in the original 1980 RFA legislation and particularly after the 1996

Amendments which significantly bolstered the right of small business owners to challenge adverse action by the Government. *See* Small Business Regulatory Enforcement Fairness Act--Joint Managers Statement of Legislative History and Congressional Intent, 142 CONG. REC. S3245 (daily ed. Mar. 29, 1996). Those Amendments expressly authorize judicial review of agency certification under 5 U.S.C. § 605, dealing specifically with the substitute certification at issue in the present case.

The Government might argue that small businesses, unlike their larger counterparts, are not likely to own or operate CFCs and that therefore it was not necessary to assess the impact of the Final Regulations (or the proposed regulations for that matter) upon small businesses.[8] This is

[8] Indeed, the Government offers this explanation in its initial analysis of the RFA in the Notice of Proposed Rulemaking for the Proposed Regulations for Guidance Regarding the Transition Tax Under Section 965 and Related Provisions:

> It is hereby certified that these collection of information requirements will not have a significant economic impact on a substantial number of small entities. Accordingly, an initial regulatory flexibility analysis is not required. This certification is based on several facts. […] Third, the collections of information apply to the owners of specified foreign corporations. Because it takes significant resources and investment for a foreign business to be operated incorporate form by a United States person, specified foreign corporation will infrequently be small entities. Moreover, because the collection of information requirements apply to the owners of specified foreign corporations rather than the specified foreign corporations themselves, a specified foreign corporation that was a small entity would not be subject to the collections of information. Fourth, the collection of information requirements in this regulation apply primarily to persons that are United States shareholders of specified foreign corporations. The ownership of sufficient stock in specified foreign corporations in order to constitute a United States shareholder generally entails significant resources and investment, such that businesses that are United States shareholders are generally not small businesses.

AR 3581; 83 FED. REG. 39541 (Aug. 9, 2018).

precisely why the RO *Amici Curiae* have requested (and received) leave to submit this Memorandum. Businesses owned and operated by American expatriates, with whom the RO *Amici Curiae* have a long and close familiarity, in contrast to the typical stateside small business, commonly involve the use of CFCs and consequently will fall potentially within the ambit of the Final Regulations at issue here. Hundreds of thousands of U.S. citizens living abroad maintain businesses, have interests in small CFCs and are subject to the Transition Tax. Where an expatriate American owns or controls a small business that is either incorporated or headquartered in the United States and is administered by the owner/operator abroad, the Transition Tax Regulations may well apply. Moreover, even if it is ultimately determined that such Regulations may not apply in a particular case, our experience shows that in each jurisdiction the small business expatriate owner must nevertheless expend substantial time and resources over and above her or his ordinary U.S. tax compliance efforts to determine whether the owner/operator is liable for Transition Tax and/or must submit the appropriate documentation. In most cases, the small business owner/operator will not even know where to begin to answer these questions and must therefore engage accountants or other tax professionals (typically in the United States) to assist in the preparation of the annual returns. The Government improperly ignores these obvious facts and should have engaged in a proper empirical analysis as required by 5 U.S.C. §§ 603-604.

The following chart summarizes the information several of the RO *Amici Curiae* chapters has collected which clearly demonstrates that the burden to small U.S. businesses abroad is real and that the Government's failure to account for them should be fatal to their defense in this action. The RO *Amici Curiae* have used their best efforts to collect the information below. What the RO *Amici Curiae* have done for the purposes of this Memorandum is precisely what the Government should have done under the RFA and PRA. The significance of the information below lies not in

its absolute accuracy, but rather to show the Court the breadth of the expatriate American community of business owners. The numbers below are necessarily a small fraction of the expatriate small business data. It also does not include the large number of American-owned small businesses that hold interests in CFCs. *See, e.g.*, fn. 11, *infra*. The data collected below is *prima facie* evidence that the Government's certification as to the number of affected small entities is simply wrong.

Country	**Number of American Citizens**	**Number of American-Owned Businesses**	**Description of Businesses**
Albania	~13,000	~6,000	Banking; health care/hospital; fast food franchises; car rental; soft drink bottling; real estate brokers; tobacco importation and resale; software; audit/advisory firms
France	~200,000	~50,000	A significant proportion of Americans residing in France who own and/or manage businesses in the USA are in the service industries
Greece / Cyprus	~177,500	~3,000	Law firms; accounting firms; political consultancies; financial consulting; educational consulting; medical practices; dental practices; radiological services and consulting; telemedical services; agro-tech consulting; engineering services (electrical and electronic; civil; mechanical, etc.); restaurants and food preparation; real estate brokerage and investment firms
Hong Kong S.A.R.	~70,000[9]	~1,200[10]	Americans in Hong Kong own and manage businesses covering almost every imaginable industry and sector, including financial services, accounting, law, trading and marketing of consumer goods and services, hospitality, consulting, and education at every level

[9] Includes children of American citizens.

[10] Based on data provided by the U.S. Chamber of Commerce in Hong Kong. It is estimated that around 3,000 Americans are owners of such businesses, while around 12,000 are managers.

Israel	~200,000-400,000[11]	~10,000[12]	Law firms; accounting firms; political consultancies; high-tech startups; export sales services; public relations firms; advertising (including digital marketing); fintech services; financial consulting; educational consulting; medical practices; dental practices; radiological services and consulting; telemedical services; agro-tech consulting; engineering services (electrical and electronic; civil; mechanical, etc.); aviation and avionics; architectural and construction; pharmaceutical manufacture; military equipment manufacture; international procurement services and contract administration; etc.; restaurants and food preparation; real estate brokerage and investment firms (assisting Israelis to invest in U.S. residential and commercial real estate and assisting U.S. residents in purchasing and developing commercial, industrial, agricultural and residential real estate in Israel)
Switzerland	~19,439 (as of 2018)	~900 (as of 2017)	Law firms; banking services; finance services; etc.
Singapore	~40,000-50,000	~100[13]	Technology; consulting; finance services; etc.

[11] Based on estimates including from the United States Embassy and includes second and third generation Americans holding U.S. passports. In 2012, one source estimated the number of U.S. citizens in Israel to be around 300,000. Michele Chabin, "American Citizens Living in Israel, abroad cast votes," USA TODAY (Oct. 31, 2012), https://www.usatoday.com/story/news/world/2012/10/31/israel-ex-pats/1669543/. This figure does not include the roughly 600,000 Israeli citizens residing in the United States as U.S. citizens or permanent residents, many of whom own small businesses in the United States which have CFCs dealing with Israel and other parts of the world. *See* Pini Herman, "Rumors of mass Israeli emigration are much exaggerated," Jewish Journal (Apr. 25, 2012) (citing Danny Gadot, then of the Israeli Consulate in Los Angeles and estimating the number to be as high as 750,000). According to the Jewish Agency for Israel, the number of American citizens who have immigrated to Israel is approximately 160,000, which does not include second and third U.S. citizens born in Israel.

[12] Based on a survey conducted by a private marketing company for RO-Israel.

[13] This data is based Singapore's American Chamber of Commerce and only accounts for businesses that are members of that organization.

To summarize, there are approximately 900,000 U.S. citizens living in the above-mentioned jurisdictions.[14] There are approximately 71,000 small businesses owned or managed by U.S. citizens in those jurisdictions. Section 605(b) requires an issuing agency to certify that the number of small businesses affected by the regulation to be promulgated is not substantial. It also requires an issuing agency to certify that the subject regulation will not have a significant economic impact on those entities. The sheer magnitude and complexity of the Transition Tax Regulations support an inference of significant economic impact.

Some of the RO *Amici Curiae* have shared testimonials from members regarding their personal experience with the Transition Tax Regulations. The following testimonials from small business owners demonstrate that the impact on small businesses is no theoretical matter. It is real; it is palpable; and it is considerable. Yet, the Government offers no believable explanation for why it was not considered.

For example, Tariq Dennison with RO- Hong Kong, summarizes the primary complaint he receives from American citizens in Hong Kong that attempt to own and operate small businesses:

> [T]he main complaint / concern seems to be on the one-time tax on accumulated retained earnings, which forms an important part of the working capital of many American-owned businesses overseas. Most non-tax professionals still also have a limited understanding of the CFC rules and what else may be required to comply with our tax obligations, even after the TCJA.

Facing similar complaints, Jonathan Constantine, chairman of RO-Greece, further explains:

> For those who file taxes in the US, based upon my experience as an attorney, as well as that of the accountant that shares my office, as well as the feedback that we have from running the help desk of the Republicans Overseas Hellenic Chapter since last May, all US citizens are extremely frustrated by the complexity and the US tax laws and forms. The worse is that the US Embassy in Athens does

[14] Notably, the information provided does not include jurisdictions that have a large number of American expatriates, including Canada (~400,000), Mexico (~1.5 million) and India (~750,000).

> not have a tax counsellor, and all dealings must be made via accountants in the United States.

Edward Patrick Flaherty, a citizen in the U.S. and the Swiss Confederation that is licensed to practice law in both jurisdictions, expresses his owns struggles with the TCJA and the Final Regulations:

> [E]ach year I incur substantial accounting expenses and spend in excess of 100 hours of my own time in order to comply with my IRS tax obligations, and it is my […] belief that many of my US citizen acquaintances and clients incur similar expenses and expend the same [] amount of time as I do complying with their IRS tax obligations. Such IRS tax obligations have also caused me to incur additional expenses and to spend substantial amounts of my time each year interacting with Swiss financial institutions which send additional inquiries to me on account of my status as a US citizen.

Similarly, Randy Yaloz, President of RO-France notes:

> Based on my personal experience, I and my accountant have spent long hours being frustrated and struggling to understand and prepare the information and data required by the IRS [Transition Tax] regulations implementing and interpreting the complex tax laws.

Accordingly, based on the experience of the RO *Amici Curiae*, both before and after the enactment of the TCJA and the Final Regulations, the Government's statement that the Proposed and Final Regulations would not have "a significant economic impact on a substantial number of small entities" is simply wrong.

B. Permitting the Government to Issue the Final Regulations as It Did Will Incentive Future Violations of the RFA.

It is no secret that the Government, particularly the IRS, has a knack for ignoring the RFA. According to a 2015 GAO report, the Government routinely circumvents the RFA in 99.5% of the cases. *See* Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Act: An Early Examination of When and Where Judges are using their Newly Granted Power over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425, 1437 (2000) (discussing how the

IRS and other agencies simply ignore the RFA). The agency's practice of disregarding the RFA has by now evolved into policy which directly contravenes both the letter and spirit of the RFA, as amended by Title II of the Small Business Regulatory Enforcement Fairness Act of 1996.

Allowing the Government to get away with the haphazard and negligent manner[15] in which it issued the Proposed and Final Regulations, will serve as a dangerous precedent for the future. The Government will have received court-mandated authorization to continue promulgating complicated and burdensome tax regulations without the need to seriously take into consideration the impact these regulations have on small U.S. businesses with CFCs all over the world.

In fact, the Government has already taken the cue and issued regulations to the Transition Tax's sister tax, the so-called GILTI Tax,[16] without considering the major (even catastrophic) impacts this would have on small businesses. GILTI requires U.S. shareholders who own an interest in their foreign subsidiary to treat their pro rata shares of the annual taxable income as income on their U.S. tax return. The GILTI regime is significantly more burdensome and complex than that of the Transition Tax because: (1) GILTI is annual and has significant compliance costs; (2) GILTI is arguably more complex; (3) GILTI tax rates can be up to 37 percent; (4) major tax deductions are available to *corporate* shareholders only.

This action is obviously not about the GILTI regime. However, should the Government be given the judicial "green light" to circumvent the RFA's small business protections as to the Transition Tax, nothing stands in its way to continue its illegal and insensitive approach to future

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[15] Given the Government's longstanding practice of ignoring the RFA, describing their conduct in this case as "haphazard and negligent" is probably too generous. It would probably be more accurate to describe Defendants' policy as "deliberate."

[16] 26 U.S.C. § 951A, added by TCJA; Global Intangible Low-Taxed Income Regulations, "Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits, 84 FED. REG. 29288 (Jun. 21, 2019).

regulation enactments effecting small businesses, such as GILTI and similar regulations. This, in turn, will naturally burden the millions of U.S. citizens residing abroad, as well as U.S. residents with interests in foreign entities.

CONCLUSION

The Government failed to do its due diligence as required by the RFA and PRA. Had the Government done its homework, it could never have issued its certification the way it did. This is no mere procedural flaw. Congress enacted the RFA with the goal to help American small businesses – both on U.S. soil and abroad – deal with the burden of big government. The Government's failure to adhere to Congress' RFA/PRA mandate has and will cause significant burdens (to put it lightly) on U.S.-based businesses all over the world. The Government should be held accountable for failing to discharge its duties under the RFA and PRA. If the Government is not stopped now, nothing will prevent it from continuing its negligent rule-making process for the foreseeable future.

Dated: June 9, 2020

Respectfully Submitted,
REPUBLICANS OVERSEAS, INC., REPUBLICANS OVERSEAS ALBANIA, **ASSOCIATION REPUBLICANS OVERSEAS FRANCE**, **REPUBLICANS OVERSEAS HELLENIC REPUBLIC**, **REPUBLICANS OVERSEAS ISRAEL, A.R., REPUBLICANS OVERSEAS NORTH MACEDONIA, REPUBLICANS OVERSEAS SWEDEN, REPUBLICANS OVERSEAS SWITZERLAND, and REPUBLICANS OVERSEAS UK**,
By Counsel

/s/ Alexander R. Green

J. William Eshelman (D.C. Bar No. 141317)
Alexander R. Green (D.C. Bar No. 1017781)
CLARK HILL PLC
1001 Pennsylvania Avenue, NW
Suite 1300 South

Washington, DC 20004
Telephone: (202) 552-2373
Facsimile: (202) 640-6691
weshelman@clarkhill.com
agreen@clarkhill.com

Counsel for Amici Curiae, Republicans Overseas, Inc., and several of its foreign-registered chapters

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2020, a copy of the foregoing document was filed via the CM/ECF system, which will send out a notification of filing thereof to all counsel of record in this matter.

/s/ Alexander R. Green
Alexander R. Green (D.C. Bar No. 1017781)
CLARK HILL PLC
1001 Pennsylvania Avenue, NW
Suite 1300 South
Washington, DC 20004
Telephone: (202) 552-2373
Facsimile: (202) 640-6691
agreen@clarkhill.com

Counsel for Amici Curiae, Republicans Overseas, Inc., and several of its foreign-registered chapters