No. 20-7820

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL J. LITTLE, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner was entitled to relief on his claim, raised for the first time on appeal, that the government's evidence and the district court's instructions constructively amended the indictment in his case.

2. Whether sufficient evidence supports the jury's finding that petitioner willfully failed to file Reports of Foreign Bank and Financial Accounts and individual income tax returns.

3. Whether the court of appeals erred in determining that the district court did not plainly err in providing conscious-avoidance instructions to the jury.

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## OPINION BELOW

The summary order of the court of appeals (Pet. App. A1-A9) is not published in the Federal Reporter but is reprinted at 828 Fed. Appx. 34.

## JURISDICTION

The judgment of the court of appeals was entered on September 30, 2020. A petition for rehearing was denied on November 19, 2020 (Pet. App. F1). The petition for a writ of certiorari was filed on April 19, 2021 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of one count of obstructing and impeding the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a); six counts of willfully failing to file individual income tax returns, in violation of 26 U.S.C. 7203; one count of willfully failing to file Reports of Foreign Bank and Financial Accounts (FBARs), in violation of 31 U.S.C. 5322(a); one count of conspiring to defraud the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371; and ten counts of aiding and assisting the preparation of false IRS forms related to foreign gift tax returns, in violation of 26 U.S.C. 7206(2). Judgment 1-2. The district court sentenced petitioner to 20 months of imprisonment, to be followed by one year of supervised release. Judgment 3-4. The court also ordered petitioner to pay $4,352,589.71 in restitution. D. Ct. Doc. 466, at 1 (Feb. 11, 2019). The court of appeals affirmed petitioner's convictions and the custodial portion of his sentence, but affirmed in part and vacated in part the restitution order and remanded for further restitution proceedings. Pet. App. A1-A9.

1. Petitioner, a lawful permanent resident of the United States, is a British national and trained barrister who is also admitted to the New York Bar. Pet. App. A5; Gov't C.A. Br. 2-3. From 2001 to 2010, petitioner participated in a conspiracy to conceal assets from the IRS that were previously held by an

American businessman, Henry Seggerman. See Pet. App. A2; Gov't C.A. Br. 2-3. Shortly after Seggerman's death, petitioner and a Swiss attorney assisted Seggerman's family in moving millions of dollars from undisclosed offshore accounts to accounts in Switzerland, without reporting those funds to the IRS. See ibid. Petitioner then assisted Anne Seggerman, Henry's widow, in funneling the unreported funds from Switzerland into the United States. Gov't C.A. Br. 3. After IRS agents served Anne with a grand jury subpoena, petitioner attempted to cover up the true nature of the transfers by helping Anne prepare and file gift tax returns that falsely claimed that the transfers were gifts from a European benefactor -- rather than Anne's own funds. Ibid.

Petitioner was paid hundreds of thousands of dollars for his role in the scheme. Gov't C.A. Br. 3; see Pet. App. D4. Petitioner deposited those profits in his offshore account with Barclay's Bank in Guernsey, Channel Islands; he then routed portions of that income to other bank accounts he controlled, including an account with Coutts Bank in London. Gov't C.A. Br. 3, 66-69. Petitioner did not report either his income or his offshore accounts to the United States government. Gov't C.A. Br. 3. Petitioner also did not report on any United States tax return the substantial income he earned while living in New York and working as an attorney between 2005 and 2008. Ibid. And, during that same period, petitioner did not file tax returns in the United Kingdom either. Ibid. As a result, he ultimately did not report over $670,000 in

income to any taxing authority between 2005 and 2010. Id. at 3-4.

2. A federal grand jury in the Southern District of New York returned an indictment charging petitioner with one count of obstructing and impeding the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a); six counts of willfully failing to file individual income tax returns, in violation of 26 U.S.C. 7203; one count of willfully failing to file FBARs, in violation of 31 U.S.C. 5322(a); one count of conspiring to defraud the IRS, in violation of 18 U.S.C. 371; and ten counts of aiding and assisting the preparation of false IRS forms related to foreign gift tax returns, in violation of 26 U.S.C. 7206(2). Second Superseding Indictment 1-18.

As part of the count charging that petitioner willfully failed to file FBARs, the indictment provided that

> [o]n or before * * * June 30, 2003, through on or before June 30, 2011, * * * [petitioner] knowingly and willfully did fail to file with the Commissioner of the IRS an FBAR disclosing that he had a financial interest in, and signature and other authority over, a bank, securities, and other financial accounts in a foreign country, to wit, at least one foreign bank, securities, and other financial account at Barclay's Bank, located in Guernsey, Channel Islands.

Second Superseding Indictment 12. That count also incorporated by reference the allegations in paragraphs 1-19 of the indictment. Ibid. In paragraph 18, the indictment alleged that petitioner was paid more than $400,000 between 2001 and 2009 for services to the Seggerman family, a portion of which he "routed to the Channel

Islands Account, and subsequently transferred to accounts he controlled in the United States and United Kingdom." Id. at 10. And the conspiracy charge in the indictment alleged multiple objects of the conspiracy, including assisting the Seggerman family in the preparation of fraudulent income and estate tax returns, in violation of 26 U.S.C. 7206(2). Id. at 13-14.

3. At trial, the government introduced evidence over petitioner's objection related to petitioner's account with Coutts Bank in the United Kingdom. Gov't C.A. Br. 66-67. At the close of trial, the district court instructed the jury that it could base a finding of guilt on the FBAR count on petitioner's failure to report his signatory authority "over a bank account * * * or accounts * * * in a foreign country." 4/6/18 Trial Tr. (Tr.) 2175. Petitioner informed the court that he had no objection to that instruction. Tr. 2174.

When instructing the jury on the conspiracy count, the district court stated that "the third alleged object of the conspiracy" is "that the defendant and others agreed to violate the law that makes it a crime to aid and assist the preparation of filing false tax returns -- the crime charged in Counts Ten through Nineteen." Tr. 2181. The court further instructed that "it suffices for present purposes to tell you that this crime occurs when a person willfully advises or assists in the preparation of a false tax return" and that the jury "should apply the instructions for Counts Ten through Nineteen when considering

whether the government proved this third object of the conspiracy." Ibid.

The district court also instructed the jury that it could consider whether petitioner consciously avoided learning of his legal obligations when deciding whether he willfully failed to file income tax returns and FBARs and whether he knew that the objects of the conspiracy were unlawful. See Gov't C.A. Br. 69-71. The court explained that "a defendant's knowledge of a fact may be inferred from willful blindness to the existence of that fact," but cautioned that "[i]f you find that the defendant was mistaken, foolish, or careless in not discovering the truth, or if you find that the defendant actually believed his conduct was lawful, then the defendant did not act knowingly." Tr. 2157. Petitioner did not object to those instructions. See Gov't C.A. Br. 69.

The jury found petitioner guilty on all counts. Judgment 1. The district court sentenced petitioner to 20 months of imprisonment, to be followed by one year of supervised release, and ordered him to pay $4,352,589.71 in restitution. Judgment 3-4; D. Ct. Doc. 466, at 1.

4. The court of appeals, in an unpublished summary order, affirmed petitioner's convictions and the custodial portion of his sentence but affirmed in part and vacated in part the restitution order and remanded for further restitution proceedings. Pet. App. A1-A9.

Reviewing for plain error, the court of appeals rejected petitioner's assertion, raised for the first time on appeal, that the district court constructively amended the conspiracy count by referring to the substantive counts of assisting the preparation of false IRS forms related to foreign gift tax returns in describing the third charged object of the conspiracy, in violation of 26 U.S.C. 7206(2), when the indictment alleged the third object of the conspiracy to be assisting in the preparation of fraudulent income and estate tax returns, in violation of 26 U.S.C. 7206(2). Pet. App. A3. The court found that "[i]t is neither clear nor obvious that there was a discrepancy between the indictment and the jury instructions," because the district court's references to its instruction for assisting the preparation of false IRS forms related to foreign gift tax returns "could be understood to incorporate that instruction's description of the elements of a [Section] 7206(2) violation rather than the conduct described in that instruction." Id. at A3-A4.

The court of appeals also found that the government did not constructively amend the FBAR-related count by offering proof of petitioner's interest in the Coutts account. Pet. App. A4. The court observed that the indictment had charged petitioner with failing to disclose "his interest in a foreign financial account, 'to wit, at least one foreign bank, securities, and other financial account at Barclay's Bank.'" Ibid. The court reasoned that any discrepancies "d[id] not rise to the level of a constructive

amendment because 'to wit' clauses do not modify essential elements of the offense." Ibid.

The court of appeals also found sufficient evidence to support petitioner's willfulness in failing to file income tax returns and FBARs. Pet. App. A4-A6. The court first explained that petitioner had a legal obligation to file both income tax returns and FBARs. Id. at A4-A5. The court then observed that petitioner is "a British-trained barrister admitted to the New York Bar with a quarter-century of experience in complex international financial transactions who, for much of his life, has claimed German domicile for tax purpose." Id. at A5. The court accordingly recognized that a "reasonable juror could easily conclude that the [income and FBAR reporting] failures of such a sophisticated professional * * * were willful acts." Ibid.

The court of appeals also rejected petitioner's unpreserved claim that the conscious-avoidance instruction was improper, finding no plain error. Pet. App. A6. The court stated that such an instruction is appropriate only when the defendant raises a lack-of-knowledge defense and "a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." Ibid. (citation omitted). The court found that those conditions were satisfied here, where petitioner had "defended himself by claiming ignorance of his obligations under the Tax Code," but his "legal education and the

relative straightforwardness of his obligations" permitted a reasonable juror to conclude that he was aware of a high probability that his actions were unlawful. Ibid.

ARGUMENT

Petitioner renews his contentions (Pet. 9-26) that the indictment was constructively amended; that insufficient evidence supported the jury's finding that he acted willfully in failing to file income tax returns and FBARs; and that the district court erred in instructing the jury on conscious avoidance. The court of appeals correctly rejected those fact-bound contentions, and its unpublished summary order does not conflict with any decision of this Court or another court of appeals. No further review of petitioner's claims is warranted.

1. Petitioner first reasserts (Pet. 9-19) his claims that both the FBAR count and the conspiracy count were constructively amended. Even assuming that the issue is properly before the Court on both counts -- only the former of which is the subject of the relevant question presented, Pet. i -- petitioner raises no issues that warrant this Court's review.

a. The Grand Jury Clause states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. This Court has held that every element of a criminal offense must be charged in an indictment. See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998). Although an

indictment need not similarly allege all of the facts that the government intends to prove at trial, a violation of the Grand Jury Clause may result where the indictment specifies particular facts underlying an element of the offense, the government proves different facts at trial to establish that element, and the jury may have found guilt on that distinct basis. See, e.g., Stirone v. United States, 361 U.S. 212, 219 (1960).

Not all deviations between the theory of guilt specified in the indictment and the government's trial evidence constitute "constructive amendments." Where the divergence does not substantially alter the charged theory of guilt, lower courts have characterized the discrepancy as a mere "variance" from the indictment, which affords no grounds for reversal unless the divergence "is likely to have caused surprise or otherwise been prejudicial to the defense." 5 Wayne R. LaFave et al., Criminal Procedure § 19.6(c), at 396 (4th ed. 2015). In contrast, where the divergence places before the jury an entirely new basis for conviction and the jury finds guilt on that new basis, lower courts treat the divergence as a "constructive amendment" of the indictment that violates the Grand Jury Clause. See ibid.

The court of appeals correctly rejected petitioner's unpreserved claims that the indictment in this case was constructively amended. The FBAR-related count, while referring to petitioner's control over the Barclay's account, also incorporated by reference the allegation that, after petitioner

routed funds to the Barclay's account, he "subsequently transferred" his funds "to accounts he controlled in the United States and United Kingdom." Second Superseding Indictment 10. In context, therefore, the "to wit" clause did not limit the charge of willful failure to disclose "a financial interest in, and signature and other authority over, a bank, securities, and other financial accounts in a foreign country" solely to a specific Barclay's Bank account. Id. at 12. Accordingly, during discovery the government provided petitioner with all the documents related to his Coutts account (which was located in the United Kingdom) and provided a bill of particulars specifying petitioner's use of that account. Gov't C.A. Br. 68. Permitting the jury to consider both the Coutts and Barclay's accounts as potential bases for the FBAR charge therefore did not permit "convict[ion] [on] an offense not charged in the indictment." Stirone, 361 U.S. at 213. And the court of appeals' resolution of that unpreserved claim accords with decisions from other courts of appeals on similar facts. See, e.g., United States v. Broadnax, 601 F.3d 336, 341 (5th Cir.) (finding that an indictment that charged that the defendant "did knowingly possess, in and affecting interstate commerce, a firearm, to wit: a RG Industries, Model RG 31, .38 caliber revolver, serial number 019420," simply charged that a "firearm" had been transported in interstate commerce), cert. denied, 562 U.S. 883 (2010); United States v. Garcia-Paz, 282 F.3d 1212, 1216 (9th Cir.) (finding that the inclusion of a "to wit" clause in the

indictment was "mere surplusage"), cert. denied, 537 U.S. 938 (2002).

The court of appeals likewise did not err in denying relief on petitioner's claim of constructive amendment of the conspiracy count. Applying plain-error review, the court found that "[i]t is neither clear nor obvious that there was a discrepancy between the indictment and the jury instructions" because the district court's references to its instruction on assisting the preparation of false IRS forms related to foreign gift tax returns "could be understood to incorporate that instruction's description of the elements of a [Section] 7206(2) violation rather than the conduct described in that instruction." Pet. App. A3-A4 (emphasis added). Petitioner fails to show that it is clear or obvious that the jury would have understood it to mean the latter. The district court did not discuss the facts underlying the substantive counts that it referenced, but merely instructed the jury to "apply the instructions for Counts Ten through Nineteen" when considering the conspiracy charge. Tr. 2181 (emphasis added).

b. Petitioner is incorrect in asserting (Pet. 11-19) that the court of appeals' resolution of his constructive-amendment claims conflicts with decisions of this Court and other courts of appeals.

Contrary to petitioner's assertion (Pet. 11-12), the court of appeals' resolution of his constructive-amendment challenge to his FBAR conviction does not conflict with this Court's decision in

Stirone. In Stirone, the indictment charged that the defendant had obstructed interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951, by interfering with a concrete supplier's shipments of sand into Pennsylvania. 361 U.S. at 213-214. At trial, however, the government presented evidence that the defendant had obstructed interstate commerce because concrete made from the sand was to be used to build a steel plant, which would then export steel from Pennsylvania to other States. Id. at 214. The district court subsequently instructed the jury that it could find the defendant guilty of the crime charged based either on a finding that he obstructed the interstate market for sand shipped into Pennsylvania or on a finding that he obstructed the interstate market for steel shipped out of Pennsylvania. Ibid. This Court concluded that, by allowing the jury to rely on the defendant's alleged interference with the market for steel shipped out of Pennsylvania, the district court had unconstitutionally broadened the indictment, thereby potentially allowing the defendant to be "convicted on a charge the grand jury never made against him." Id. at 219.

Stirone does not compel the conclusion that petitioner's indictment was constructively amended in the circumstances of this case. The indictment in Stirone did not include allegations supporting the steel-market theory, but the indictment here contained allegations that petitioner had an offshore account in the United Kingdom and failed to file FBARs disclosing that account

-- and those allegations were expressly incorporated into the FBAR count. And while the jury instructions in Stirone permitted a conviction based on an entirely different legal theory than that charged by the grand jury, that is not the case here, where the indictment alleged that petitioner used his offshore accounts with Coutts and Barclay's as part of a single course of conduct designed to conceal income.

Petitioner contends (Pet. 15-17) that the standard governing constructive-amendment claims employed by the Second Circuit conflicts with the standards articulated by the Third, Fourth, Seventh, Tenth, and Eleventh Circuits. This Court has repeatedly declined to review petitions asserting that the courts of appeals apply different standards to constructive-amendment claims. See, e.g., Benitez v. United States, 139 S. Ct. 788 (2019) (No. 18-5464); D'Amelio v. United States, 569 U.S. 968 (2013) (No. 12-780). It should follow the same course here.

Petitioner has not shown any disagreement among the circuits that warrants this Court's intervention. Although not every circuit articulates the constructive-amendment standard in precisely the same way, those courts all agree with the court of appeals here that not every divergence between allegation and proof is a constructive amendment; that the question is one of degree; and that a constructive amendment occurs only when the circumstances permit conviction on a significantly different set

of facts or for a different offense.[1] Slight variances in how the circuits phrase their constructive-amendment analysis do not suggest any meaningful differences in the application of that analysis or that different circuits would come to a different

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[1] See Pet. App. A4 (explaining that constructive amendment occurs when "the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment") (citation and emphasis omitted); see also United States v. Centeno, 793 F.3d 378, 389-390 (3d Cir. 2015) (explaining that constructive amendment occurs when "the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged") (citation omitted); United States v. Burfoot, 899 F.3d 326, 338 (4th Cir. 2018) (explaining that constructive amendment occurs "when the court 'broadens the possible bases for conviction beyond those presented by the grand jury,'" or, "[i]n other words, * * * when the indictment is effectively altered 'to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment'") (citations omitted); United States v. Haldorson, 941 F.3d 284, 297 (7th Cir. 2019) (explaining that constructive amendment "occurs when either the government * * * , the court * * * , or both, broadens the possible bases for conviction beyond those presented by the grand jury") (citation omitted), cert. denied, 140 S. Ct. 1235 (2020); United States v. Farr, 536 F.3d 1174, 1180 (10th Cir. 2008) (Gorsuch, J.) (explaining that "[i]n assessing a claim of an impermissible constructive amendment, our ultimate inquiry is whether the crime for which the defendant was convicted at trial was charged in the indictment" and "to decide that question, we therefore compare the indictment with the district court proceedings to discern if those proceedings broadened the possible bases for conviction beyond those found in the operative charging document"); United States v. Madden, 733 F.3d 1314, 1318 (11th Cir. 2013) ("A constructive amendment 'occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment.'") (citation omitted).

conclusion on the facts of this case -- let alone on the facts of any other case. And while petitioner further contends (Pet. 13-15) that the court of appeals' resolution of his constructive-amendment challenge to his FBAR conviction conflicts with specific decisions from other circuits, none of the cited decisions demonstrates that another court would have resolved petitioner's claim differently.

In United States v. Farr, 536 F.3d 1174 (2008) (Gorsuch, J.), the Tenth Circuit found that an indictment was constructively amended where the district court instructed the jury that a defendant, who had been charged with attempting to evade the payment of corporate employment taxes, could be convicted on that charge if the jury instead found that she had attempted to evade the payment of a trust fund recovery penalty assessed against her personally. Id. at 1177-1179. Trial evidence demonstrated that the defendant was not responsible for corporate employment taxes. Id. at 1180. Because the district court's instructions permitted the jury to convict on either an invalid basis (evading corporate employment taxes) or one not charged by the grand jury (evading trust-fund recovery penalties), the court of appeals found that constructive amendment had occurred. Ibid. This case, in contrast, involves broader allegations and no such invalidity. See pp. 10-12, supra.

In United States v. Willoughby, 27 F.3d 263 (7th Cir. 1994), the indictment charged the defendant with the use of a firearm

"during and in relation to a drug trafficking crime, to wit: the distribution of cocaine." Id. at 266 (emphasis omitted). The court of appeals observed that the indictment "narrowed the legitimate scope of the weapons charge to [the defendant's] use of a firearm in connection with the distribution of cocaine, not the mere possession with intent to distribute cocaine." Ibid. The court further observed that "[d]istribution and possession with intent to distribute are two separate trafficking offenses." Ibid. And the court accordingly concluded that because "no evidence linked the gun to [the defendant's] actual distribution of cocaine," as opposed to his possession of it with intent to distribute, constructive amendment had occurred. Id. at 267. Here, in contrast, the FBAR charge used the phrase "to wit," but also incorporated by reference a discussion of petitioner's United Kingdom accounts, and the evidence proved that petitioner failed to disclose any of his accounts, which he used as part of a single course of conduct to hide his earnings. Indeed, in a more recent case, the Seventh Circuit found -- consistent with the decision below -- that no constructive amendment occurred when the fraud allegation in the indictment "pinpointed a particular step in the payment process" but "the proof at trial * * * established another." United States v. Ratliff-White, 493 F.3d 812, 822 (2007), cert. denied, 552 U.S. 1141 (2008).

The remaining decisions on which petitioner relies (Pet. 14-15) likewise merely reached different outcomes on different facts.[2]

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[2] See United States v. Ward, 747 F.3d 1184, 1192-92 (9th Cir. 2014) (concluding that constructive amendment of identity-theft charges occurred when the government offered evidence regarding the defendant's theft of the identities of four individuals in addition to the two named in the indictment and where the victims' identity "was necessary to satisfy an element of the offense"); United States v. Narog, 372 F.3d 1243, 1246, 1249 (11th Cir. 2004) (concluding that constructive amendment occurred when the indictment charged the defendants "with conspiracy to possess and distribute pseudoephedrine 'knowing and having reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance, that is, methamphetamine'" but the instructions provided that the jury "only needed to find that defendants knew or had reasonable cause to believe that the pseudoephedrine would be used to make any controlled substance") (emphasis added); United States v. Choy, 309 F.3d 602, 607 (9th Cir. 2002) (concluding that constructive amendment occurred when the defendant was charged with bribery by giving "a thing of value" to a public official but was convicted on the theory that giving "a thing of value" to a private individual indirectly conferred value on a public official, and the defendant "could not have anticipated" the theory of conviction); United States v. Randall, 171 F.3d 195, 203-210 (4th Cir. 1999) (applying Willoughby to a similar situation to reach the same result); United States v. Leichtnam, 948 F.2d 370, 380 (7th Cir. 1991) (concluding that constructive amendment occurred when the indictment charged the defendant with knowingly using or carrying a firearm during and in relation to drug trafficking and the government made a "deliberate" decision to identify a particular rifle in the indictment, but the government then presented evidence regarding two other firearms); United States v. Weissman, 899 F.2d 1111, 1114 (11th Cir. 1990) (concluding that constructive amendment occurred when "the trial court's supplemental instructions * * * actually amended the charges to allow the jury to convict appellants of a RICO conspiracy other than the one detailed by the grand jury in the indictment"). Petitioner also relies (Pet. 14) on United States v. Hitt, 249 F.3d 1010 (D.C. Cir. 2001). But the D.C. Circuit in that case did not consider a constructive-amendment claim; rather the court reviewed the indictment's language to determine whether a charge was brought within the statute of limitations. Id. at 1015-1026.

None of those fact-bound decisions indicates that any other court of appeals would reach a different result on petitioner's constructive-amendment challenge to his FBAR conviction. In such a context- and fact-dependent area, the different outcomes in different cases are overwhelmingly likely to reflect their different circumstances. And review by this Court of petitioner's factual scenario here would be a difficult context in which to provide guidance across such a wide spectrum of scenarios.

Petitioner additionally asserts (Pet. 17-19) that the decision below implicates a conflict of authority on whether a court reviewing a constructive-amendment claim for plain error must find prejudice in order to conclude that an error affected a defendant's substantial rights. See Fed. R. Crim. P. 52(b). For the reasons explained on pages 10 to 14 of the government's brief in opposition to the petition for a writ of certiorari in Pierson v. United States, 141 S. Ct. 1371 (2021) (No. 20-401), petitioner has failed to demonstrate that any conflict in the circuits is more than academic and thus worthy of this Court's review.[3] This Court has recently and repeatedly denied petitions for writs of certiorari raising this and similar conflicts. See Pierson, supra (No. 20-401); see also Br. in Opp. at 14, Pierson, supra (No. 20-401) (collecting cases). The same result is warranted here -- particularly because petitioner counts (Pet. 18) the court of

[3] We have served petitioner with a copy of the government's brief in opposition in Pierson. That brief is also available on the Court's electronic docket.

appeals below among the "circuits [that] do not require prejudice in this setting" and thus already following the rule that he favors.

c. At all events, this case would be a poor vehicle to address any constructive-amendment issue. Both of petitioner's constructive-amendment claims are at most subject to plain-error review because petitioner failed to press them in the district court. Petitioner has not suggested that he could demonstrate that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected his "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted).

2. Petitioner separately contends (Pet. 20-23) that the court of appeals erred in determining that sufficient evidence supported the jury's finding that he acted willfully in failing to file FBARs and individual income tax returns. The court of appeals correctly resolved those claims as well, and its resolution of them does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's fact-bound contentions is unwarranted.

a. The court of appeals correctly recognized that the record contained sufficient evidence for the jury to find that petitioner willfully failed to comply with his legal obligation to file FBARs. Because petitioner was charged with a single count of

willfully failing to file an FBAR between 2007 and 2010, Second Superseding Indictment 12, the conviction would be valid so long as sufficient evidence supported his commission of that offense during any of those years.

As a threshold matter, the evidence showed that petitioner had a clear legal duty to file FBARs during that entire period. For the 2007 to 2009 filings, the applicable regulation provided that any "person subject to the jurisdiction of the United States" was subject to the FBAR filing requirements, 31 C.F.R. 103.24 (2007), and the FBAR instructions in effect for those years noted that this included a "resident of the United States," Dep't of the Treasury, Form TD F 90-22.1: Report of Foreign Bank and Financial Accounts (OMB No. 1506-0009) (July 2000), General Instructions. Under any commonsense understanding of the term, petitioner was "a resident of the United States" for all of 2007 and most of 2008, during which time he not only had status as a United States permanent resident but also lived in New York full-time and worked in New York as an attorney for two different New York law firms. See Gov't C.A. Br. 11, 42, 63-64. For the 2010 filings, the regulation provided that the FBAR requirements applied to any "United States person," which included a "resident of the United States" -- a term that included permanent "resident alien[s]." 31 C.F.R. 1010.350(b)(2); see 26 U.S.C. 7701(b). Petitioner does not dispute that definition's applicability to him. Pet. 22.

Sufficient evidence likewise supported the jury's finding that petitioner's failure to file FBARs was willful. The evidence showed that petitioner had previously filed United States income tax returns that asked whether he owned a foreign bank account. Gov't C.A. Br. 66; see United States v. Sturman, 951 F.2d 1466, 1476-1477 (6th Cir. 1991) (finding that knowledge of the foreign-account question on a defendant's income tax return supported the conclusion that he willfully failed to file FBARs), cert. denied, 504 U.S. 985 (1992). As the court of appeals observed, the government also introduced evidence that petitioner was a highly sophisticated taxpayer: an experienced, British-trained barrister admitted to the New York State Bar, with more than 25 years' experience in complex international financial transactions, whose personal financial arrangements included a considered decision to claim German domicile for tax purposes for much of his life. Pet. App. A5; see United States v. MacKenzie, 777 F.2d 811, 818 (2d Cir. 1985) (relying on the defendants' background and education to support the inference that they willfully violated tax laws), cert. denied, 476 U.S. 1169 (1986). And it also contained evidence of efforts to use his knowledge and sophistication to conceal tax-generating activities.

The evidence established, in particular, that petitioner held his Barclay's account through a nominee entity. Gov't C.A. Br. 65-66; see United States v. Quiel, 595 Fed. Appx. 692, 694 (9th Cir. 2014) (noting that the defendants' use of nominees to

hold offshore accounts was evidence that their failure to file FBARs was willful), cert. denied, 575 U.S. 1011 (2015). It also showed extensive efforts to help the Seggerman family establish -- and hide from the IRS -- Swiss bank accounts, which allowed them to evade income tax and other reporting obligations. See Gov't C.A. Br. 65; see also United States v. Kalai, 696 Fed. Appx. 228, 231 (9th Cir. 2017) (finding that the defendant's efforts "helping wealthy clients evade tax liability" by opening foreign accounts supported the finding that he willfully failed to file an FBAR). Particularly when taken together, petitioner's background, history, and illicit tax activities provided ample basis for the jury to infer that, during at least one of the tax years in question, petitioner "knew of th[e] duty" to file FBARs and "voluntarily and intentionally violated that duty." Cheek v. United States, 498 U.S. 192, 201 (1991).

Petitioner offers (Pet. 20-21) no sound reason for this Court to review the court of appeals' fact-bound sufficiency determination. Contrary to petitioner's assertion (Pet. 20), the jury's finding of willfulness is supported by a significant amount of evidence in addition to evidence that petitioner was a "sophisticated professional." See pp. 22-23, supra. And petitioner's suggestion (Pet. 21-23) that statutory-interpretation tools such as the rule of lenity and the presumption against extraterritoriality apply here is misplaced. Petitioner does not challenge the fact that he was under a legal obligation to file

FBARs, and thus does not raise any statutory-interpretation issues in this Court. There are therefore no interpretive issues to which those doctrines could even apply, and they have no bearing on petitioner's sufficiency-of-the-evidence challenge to the jury's finding of willfulness.

b. Petitioner also asserts (Pet. 23) that this Court should review the court of appeals' finding of sufficient evidence supporting his convictions for willfully failing to file income tax returns from 2005 to 2010. Petitioner's case-specific arguments are outside the scope of the question presented, see Pet. i, and their inclusion in the body of the petition is insufficient to preserve them for this Court's review. Sup. Ct. R. 14.1(a); see Wood v. Allen, 558 U.S. 290, 304 (2010).

In any event, the court of appeals correctly determined that, as a lawful permanent resident, petitioner was required to file United States income tax returns during the relevant period. United States citizens and residents are generally required to file tax returns reporting their income if they meet the threshold filing requirements. See 26 C.F.R. 1.6012-1. That obligation applies to any "resident alien," including any "lawful permanent resident." 26 U.S.C. 7701(b)(1)(A)(i); see 26 U.S.C. 7701(b)(6)(A)-(B); 26 C.F.R. 1.1-1(b). Lawful permanent resident status continues unless it has been "revoked" or "administratively or judicially determined to have been abandoned," or, beginning in 2008, if a resident "commences to be treated as a resident of a

foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment." 26 U.S.C. 7701(b)(6). That notice must be given by filing a specific form with the IRS. See 26 C.F.R. 301.7701(b)-7(b) and (c)(1).

Under those rules, petitioner was required to file United States income tax returns from 2005 to 2010. He had income above the filing threshold, his permanent resident status was never revoked or abandoned, and he never filed the required form notifying the IRS of his election to be treated as a resident of the United Kingdom under the applicable tax treaty. See Gov't C.A. Br. 51-59. And ample evidence supported the jury's finding of willfulness. Petitioner both was sophisticated in international tax transactions, see pp. 22-23, supra, and had a history of filing income tax returns in the United States, Gov't C.A. Br. 59. Indeed, petitioner filed extension-to-file requests for two of the relevant tax years -- but failed to file tax returns in the United States for those years. Id. at 43. And even assuming that petitioner could identify a possible case-specific error in the willfulness analysis on any of the challenged counts, such an asserted error would not warrant this Court's review. See Sup. Ct. R. 10.

3. Finally, petitioner challenges (Pet. 24-26) the court of appeals' rejection of his plain-error challenge to the district

court's conscious-avoidance instructions. Again, the court of appeals correctly resolved that issue, and its fact-bound decision does not conflict with any decision of this Court or another circuit.

As this Court explained in Global-Tech Appliances, Inc. v. SEB S. A., 563 U.S. 754 (2011), "[w]hile the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." Id. at 769. The Court found that "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." Ibid. In the course of distilling those requirements from existing law, Global-Tech cited a number of illustrative decisions, see id. at 769 n.9, including the Second Circuit's decision in United States v. Svoboda, 347 F.3d 471 (2003), cert. denied, 541 U.S. 1044 (2004). In Svoboda, the Second Circuit stated that a willful blindness instruction is appropriate if the evidence shows that the defendant "was aware of a high probability of the disputed fact" and "deliberately avoided confirming that fact." Id. at 480. Nothing in Global-Tech suggests that this Court intended to abrogate the Second Circuit's formulation.

The court of appeals' discussion and application of the standards governing a conscious-avoidance instruction in this case

was correct and consistent with Global-Tech and Svoboda. The court stated that conscious-avoidance instructions "are permissible only when the defendant mounts a defense that he lacked some specific aspect of knowledge required for conviction" and "a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." Pet. App. A6 (citation and internal quotation marks omitted). The court found that "each predicate [wa]s met" because petitioner "defended himself by claiming ignorance of his obligations under the Tax Code, and, because of [petitioner's] legal education and the relative straightforwardness of his obligations, a reasonable juror could conclude that [petitioner] was aware of a high probability that his actions were unlawful." Ibid.[4] Petitioner's claim (Pet. 24-25) that the court failed to engage in the conscious-avoidance portion of the inquiry thus has no support in the record.

Petitioner suggests (Pet. 25-26) that the Second Circuit applies a different conscious-avoidance standard than other circuits do. But the standards applied by the courts of appeals are not meaningfully different.

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[4] Contrary to petitioner's suggestion (Pet. 25), additional evidence that was presented to the jury supports the inference that he was aware of a high probability that his actions were unlawful but took deliberate actions to avoid confirming that fact. See Gov't C.A. Br. 74.

The court of appeals' resolution of petitioner's conscious-avoidance claim is consistent with the decisions from other circuits on which petitioner relies (Pet. 25-26), all of which engaged in analysis similar to that applied by the court below. See, e.g., United States v. Sorensen, 801 F.3d 1217, 1233 (10th Cir. 2015) (quoting Global-Tech's recitation of the basic requirements for a finding of deliberate indifference), cert. denied, 577 U.S. 1138 (2016); United States v. Poole, 640 F.3d 114, 122 (4th Cir.) (explaining that a jury can find the existence of willful blindness "in a criminal tax prosecution[] when the evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts pointing to such liability"), cert. denied, 565 U.S. 884 (2011). At most, petitioner has identified "slightly different" formulations of the same "basic requirements" that the Court adopted in Global-Tech, 563 U.S. at 769, which is not a sound basis for certiorari.

This Court has repeatedly denied petitions raising similar arguments regarding the conscious-avoidance standard in the wake of Global-Tech, see, e.g., Bourke v. United States, 569 U.S. 917 (2013) (No. 12-531); Brooks v. United States, 568 U.S. 1085 (2013) (No. 12-218), including a recent petition from the Second Circuit, see Dambelly v. United States, 139 S. Ct. 787 (2019) (No. 18-5251), and it should do so again here. Indeed, this case would be a poor vehicle for considering petitioner's conscious-avoidance

claim given his admitted failure (Pet. 24) to raise the issue in the district court. Petitioner does not demonstrate that providing the jury with conscious-avoidance instructions was clear or obvious error under Global-Tech, that the instructions prejudiced his substantial rights, or that he meets the remaining requirements for a showing of plain error, see p. 20, supra, -- particularly in light of the evidence of petitioner's willfulness with or without a conscious-avoidance instruction, see pp. 22-23, 25, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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