No. 21-1195

In The Supreme Court of the United States

ALEXANDRU BITTNER, PETITIONER

v.

UNITED STATES

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of amicus to file this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Bank Secrecy Act requires U.S. taxpayers to report their interests in foreign bank accounts. Each non-willful violation of that reporting requirement carries a maximum penalty of $10,000. 31 U.S.C. § 5321(a)(5)(A). As Petitioner ably demonstrates, the decision below deepens an entrenched conflict over whether that statute authorizes such a penalty for each failure to file a required annual disclosure form—as the Ninth Circuit has recognized—or for each individual foreign account that was not reported—as the Fifth Circuit held here.

Amicus wishes to emphasize the importance of this Court's resolution of this question. Uniform, predictable tax laws are vital to the economy, providing businesses and individuals with the certainty they need to order their affairs and plan future transactions. The Fifth Circuit's reading of the Bank Secrecy Act creates a patchwork of federal law under which the same taxpayer could be subject to penalties that are an order of magnitude higher simply because of geographical happenstance. And without this Court's intervention, taxpayers outside the Fifth and Ninth Circuits will remain unsure of which drastically different penalty regime applies. That uncertainty provides the government with significant settlement leverage against taxpayers who may not have the resources to litigate this question.

The Fifth Circuit's decision not only sows uncertainty, but it also permits dramatic agency overreach. The government's reading of the Bank Secrecy Act creates a trap for the unwary, empowering the IRS to threaten unwitting taxpayers with multiple penalties for the *non-willful* failure to file even a single form. The potential for unfairness is apparent from the facts of this case—the Fifth Circuit's interpretation ballooned the allowable penalty from $50,000 to more than $2.7 million for an individual taxpayer. The stakes are even higher for American businesses, many of which must engage in a multitude of foreign transactions. Congress never intended to authorize such harsh penalties for non-willful violations.

This Court's intervention is also needed to reaffirm the bedrock principle that ambiguous tax penalty provisions should be construed in favor of the taxpayer, not the government. One perfectly reasonable construction of the Bank Secrecy Act's foreign account reporting provision—adopted by courts around the country—is that it authorizes penalties per annual filing, not per account. The Fifth Circuit turned this Court's precedent on its head by rejecting that common sense result, and instead adopting the government's draconian interpretation of the statute. This Court should grant the petition and reverse.

ARGUMENT

A. The Fifth Circuit's Decision Creates Unacceptable Disuniformity In Tax Administration

This Court's review is urgently needed to resolve an important question of tax law that has divided federal courts and left the rules covering U.S. taxpayers in limbo.

This Court has long recognized "the need for a uniform rule on" questions of tax law. *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962). Indeed, tax law "can give no quarter to uncertainty." *Thor Power Tool Co. v. Comm'r*, 439 U.S. 522, 543 (1979). That is because taxpayers—and businesses in particular—rely on clear and predictable rules to plan for the future. When courts undermine that certainty, taxpayers lose their ability to "rely with assurance on what appear to be established rules." *United States v. Byrum*, 408 U.S. 125, 135 (1972).

Tax uncertainty inflicts especially pernicious harm on businesses. Because "[a]voidance of risk and uncertainty are often the keys to a successful transaction," unpredictable tax rules deter businesses from making valuable investments. *Chapman v. Comm'r*, 618 F.2d 856, 874 (1st Cir. 1980). "When businesses are uncertain about taxes," they "adopt a cautious stance" because "it is costly to make a * * * mistake." Steven J. Davis et al., Am. Enter. Inst., *Business Class: Policy Uncertainty Is Choking Recovery* (Oct. 6, 2011). That defensive posture leads

businesses to withhold capital that would otherwise go to beneficial investments. Duanjie Chen & Jack Mintz, *New Estimates of Effective Corporate Tax Rates on Business Investment*, TAX & BUDGET BULL., no. 64, Feb. 2011, at 2. At the same time, uncertainty imposes higher compliance costs by requiring businesses to consult extensively with attorneys and accountants, thus adding to the hundreds of billions of dollars expended each year on tax compliance. Jason J. Fichtner & Jacob M. Feldman, Mercatus Ctr., *The Hidden Costs of Tax Compliance* 9 (2013).

These harms are not limited to directly affected taxpayers. To the contrary, "the fact that [tax] policy uncertainty adversely affects the economy is well established." Seth H. Giertz & Jacob Feldman, Mercatus Ctr., *The Economic Costs of Tax Policy Uncertainty: Implications for Fundamental Tax Reform* 15 (2012). Because capital investment is a critical engine of economic growth, Sarah Chaney Cambon, *Capital-Spending Surge Further Lifts Economic Recovery*, WALL ST. J. (June 27, 2021), deterring such investment acts as a drag on the entire economy. And that is to say nothing of the deadweight loss of compliance costs, which drain hundreds of billions of dollars from the economy each year. *See* Scott A. Hodge, Tax Foundation, *The Compliance Costs of IRS Regulations* 3 (June 2016).[2] As the Treasury Department itself has recognized, "[t]he cost of those lawyers and accountants adds to the price of every product, but

[2] https://files.taxfoundation.org/legacy/docs/TaxFoundation_FF512.pdf.

[does] nothing to make our factories more efficient, our computers faster or our cars more durable." Sec. Paul O'Neil, Dep't of the Treasury, Statement on Treasury's Plan to Combat Abusive Tax Avoidance Transactions (Mar. 20, 2002).[3]

All these factors support granting review here. As Petitioner explains, courts nationwide are sharply divided over the proper interpretation of the Bank Secrecy Act. Pet. 13-25. Taxpayers in the Fifth Circuit are subject to one rule, while those in the Ninth Circuit are subject to another. All other taxpayers are left uncertain about which rule applies. This conflict is expressly acknowledged in the decision below, which "part[ed] ways" with the Ninth Circuit's decision in *United States v. Boyd*, 991 F.3d 1077, 1080-86 (9th Cir. 2021), and recognized that a host of district courts have "taken diverging views on this issue." *See* Pet. App. 2a & n.1 (collecting cases). The arguments for these conflicting interpretations have been fully aired, and further percolation would only allow uncertainty to continue to be a drain on our economy. There is no good reason to delay review.

B. The Fifth Circuit's Decision Permits Draconian Penalties Congress Never Intended

The decision below not only muddies the waters of tax law, but it also embraces a fundamentally misguided rule that is ripe for agency abuse. Penalties for non-willful violations of the Bank Secrecy Act's

[3] https://home.treasury.gov/news/press-releases/po2019.

foreign account reporting provision were a modest addition to a highly reticulated statutory scheme. It is implausible that Congress intended to give the IRS overwhelming leverage over unsuspecting taxpayers without a clear statutory directive.

Penalties for non-willful violations of the Bank Secrecy Act's foreign account reporting provision are a relatively recent phenomenon. Congress first authorized foreign account disclosure regulations in 1982, providing that "the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. § 5314(a); Pub. L. No. 97-258, § 5314, 96 Stat. 877 (Sept. 13, 1982). But for more than two decades, only willful violations could trigger penalties. It was not until 2004 that Congress permitted penalties for non-willful violations, providing that "[t]he Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. § 5321(a)(5)(A); Pub. L. No. 108-357, § 821, 118 Stat. 1418 (Oct. 22, 2004). Even then, Congress limited the sting of such penalties in two different ways, capping "the amount of any civil penalty imposed" for non-willful violations at $10,000, and creating an exception for "reasonable cause." 31 U.S.C. § 5321(a)(5)(B).

The Fifth Circuit and the government read into this modest statutory change a harsh trap for the unwary. Under their interpretation, the non-willful failure to file even a single annual disclosure form can trigger millions of dollars in penalties because they count each foreign account, rather than each filing, as subject to a separate penalty. Pet. App. 25a. That reading exponentially increases the exposure of unwitting taxpayers who fail to disclose multiple accounts. Consider Petitioner's very first missed filing: the Fifth Circuit's reading permits the IRS to demand $610,000 in penalties for 2007 alone. Pet. App. 6a. And even though Petitioner failed to submit only five forms, the IRS maintained he violated the statute *272* separate times, resulting in a $2.72 million penalty. *Ibid.*

Complex businesses that engage in a multitude of foreign transactions are even more vulnerable. Indeed, the Bank Secrecy Act's reporting requirement applies to foreign subsidiaries of U.S. entities, and requires disclosure of not just bank accounts but also securities accounts and other financial accounts. *See* 31 C.F.R. § 1010.350. Faced with a draconian penalty for a single mistake, many taxpayers—even large businesses—will likely fold and settle with the IRS, which extracts thousands of such agreements from taxpayers each year. *See* Dep't of the Treasury, Internal Revenue Service, *2020 Data Book* 57 (2021).[4]

[4] https://www.irs.gov/pub/irs-pdf/p55b.pdf.

It is precisely that overwhelming pressure to settle that will allow the IRS to evade review on this important issue in many cases. Imagine a case outside the Fifth or Ninth Circuits: a taxpayer receives a notice from the IRS that it is being penalized for a missing or inaccurate foreign account reporting form. Even though it is a first-time, non-willful violation, the penalty is in the hundreds of thousands of dollars because the IRS used a per-account penalty calculation. The taxpayer could chance litigation, but the outcome would be unknowable, with no binding precedent in the relevant court of appeals. Given that uncertainty and the costs of litigation, the taxpayer has an overwhelming incentive to try to settle with the IRS and accept a penalty that may still be many times larger than what the statute in fact authorizes.

As Petitioner shows, Congress never intended such an unfair result. Pet. 28-29. It would have spoken with far more clarity if it wanted to impose such a harsh penalty for non-willful violations.

C. The Fifth Circuit's Decision Violates Bedrock Principles Of Fair Notice

There is another compelling reason to grant review: The Fifth Circuit's decision undermines the fundamental precept that a taxpayer "is not to be subjected to a penalty unless the words of the statute plainly impose it." *Comm'r v. Acker*, 361 U.S. 87, 91 (1959) (citation omitted).

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person

receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Such fairness considerations are not limited to the criminal context. Indeed, "[t]he fair notice requirement applies to civil statutes when penalties or drastic sanctions are at stake," and "courts have generally found fair notice applicable to civil penalties" levied by administrative agencies. Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991, 995-97 (2003). One application of that fair notice requirement is that statutes that impose tax penalties are "penal statutes [that] are to be construed strictly" in the taxpayer's favor. *Acker*, 361 U.S. at 91 (citation omitted).

The Fifth Circuit's decision turns this principle on its head. At bare minimum, Section 5314 is ambiguous. One court of appeals and a number of district courts have read that provision to authorize a penalty for each non-compliant filing, not every foreign account. *See Boyd*, 991 F.3d at 1083 n.9. Nowhere does the statute give clear notice of a per-account statutory penalty. *See id.* at 1086 (noting that "[e]ven if the government's reading of the statutory scheme were reasonable," court would reject that reading because it "does not arise from the plain words of either the statute or the regulations"); Pet. App. 52a (district court here relying on principle that "tax penalties are to be strictly construed" to confirm its reading of the statute).

Instead, Section 5321 subjects to a $10,000 penalty "any person who violates" Section 5314. 31 U.S.C. § 5321(a)(5)(A). But Section 5314 directly imposes no obligations on taxpayers at all, much less a clear per-account obligation. 31 U.S.C. § 5314; *see Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 26 (1974) ("[I]f the Secretary were to do nothing, the Act itself would impose no penalties on anyone."). The provision directs only the Treasury Secretary, who must impose requirements related to "transaction[s]" and "relation[s]" with a "foreign financial agency." 31 U.S.C. § 5314(a). And far from prescribing that the Secretary impose any particular reporting requirements, Section 5314 allows the Secretary to require taxpayers *either* "to keep records," to "file reports," or to do both. *Ibid.* Nor did Congress micro-manage the contents of those records or reports, instead listing information to be included only "in the way and to the extent the Secretary prescribes." *Ibid.* (listing "the identity and address of participants in a transaction or relationship," "the legal capacity in which a participant is acting," "the identity of real parties in interest," and "a description of the transaction"). Nowhere does the statute plainly state that the failure to list an account on an annual filing is a "violation" triggering its own $10,000 tax penalty.

Despite this dense statutory language and the acknowledged conflict over its meaning, the Fifth Circuit shrugged off fair-notice principles as an irrelevant afterthought. *See* Pet. App. 23a-24a (asserting that the statutory text "leaves no doubt" and rejecting

reliance on *Acker* because its articulation of fair notice "has been amply criticized"). The court likewise rejected any reliance on the rule of lenity because, the court said, "the statute is not ambiguous and the non-willful penalty provision has no criminal application." Pet. App. 24a.

Such a cramped view of fair notice is irreconcilable with this Court's precedents and the principles underlying them. The rule that tax penalties should be interpreted in favor of the taxpayer is based on the time-honored maxim in American law that "'penal statutes are to be construed strictly,' and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Acker*, 361 U.S. at 91 (citations omitted). As Justice Gorsuch (joined by Justice Sotomayor) recently observed, that same rule of strict construction lies at the root of "a number of judicial doctrines that seek to protect fair notice and the separation of powers" in both civil and criminal contexts. *Wooden v. United States*, 142 S. Ct. 1063, 1086 & n.5 (2022) (Gorsuch, J., concurring).[5]

[5] While *Wooden* was a criminal case, it is instructive here. In *Wooden*, this Court held that ten offenses arising from a single criminal episode did not occur on different "occasions," and thus counted as only one prior conviction for purposes of the Armed Career Criminal Act. *Wooden*, 142 S. Ct. at 1069. The question here is essentially whether the failure to report multiple accounts on a single form—like multiple offenses on a single occasion—counts as only one "violation" of the Bank Secrecy Act, as the Ninth Circuit has held, or more, as the Fifth Circuit concluded here.

Those principles carry no less force here. As in *Acker*, the statutory provision here "contains no words or language" warning taxpayers that they could be subject to harsher per-account penalties. *Acker*, 361 U.S. at 91. And it makes no difference that the penalty here is for non-willful violations. Fair notice principles apply whether or not someone is aware of the relevant statutory language. That is because they "protect[] an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring).

"[W]here uncertainty exists, the law gives way to liberty." *Id.* at 1082. (Gorsuch, J., concurring). "[B]efore [courts] choose the harsher alternative," it is necessary that "Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). The Fifth Circuit's decision failed to follow that straight path. Granting review here would provide an opportunity for this Court to clarify the proper role of fair notice in statutory interpretation generally and tax penalty cases in particular.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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