No. 21-1195

In the Supreme Court of the United States

ALEXANDRU BITTNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

RACHAEL E. RUBENSTEIN
FARLEY P. KATZ
CLARK HILL PLC
2301 Broadway Street
San Antonio, TX 78215

NATASHA BREAUX
RYAN PITTS
HAYNES AND BOONE, LLP
1221 McKinney Street, Ste. 4000
Houston, TX 77010

DANIEL L. GEYSER
Counsel of Record
HAYNES AND BOONE, LLP
2323 Victory Avenue, Ste. 700
Dallas, TX 75219
(303) 382-6219
daniel.geyser@haynesboone.com

ANGELA M. OLIVER
HAYNES AND BOONE, LLP
800 17th Street, N.W., Ste. 500
Washington, DC 20006

QUESTION PRESENTED

This case presents an important question of statutory construction under the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, which generally requires taxpayers to report their interests in foreign bank accounts.

Under the Act, Congress instructed the Treasury Secretary to "require a resident or citizen of the United States * * * to keep records, file reports, or keep records and file reports, when the * * * person makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. 5314(a). The Secretary's corresponding regulations require filing a single annual report (called an "FBAR") for anyone with an aggregate balance over $10,000 in foreign accounts. 31 C.F.R. 1010.350(a), 1010.306(c). The Act authorizes a $10,000 maximum penalty for any non-willful violation of Section 5314. See 31 U.S.C. 5321(a)(5)(A)-(B).

In the decision below, the Fifth Circuit held that there is a *separate* violation (with its own $10,000 penalty) for each foreign account not timely reported on an annual FBAR; it thus authorized a penalty on "a per-account, not a per-form, basis." In so holding, the Fifth Circuit expressly rejected a contrary decision of the Ninth Circuit, which held the failure to file an annual FBAR constitutes a *single* violation, "no matter the number of accounts."

The question presented is:

Whether a "violation" under the Act is the failure to file an annual FBAR (no matter the number of foreign accounts), or whether there is a separate violation for each individual account that was not properly reported.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statutory and regulatory provisions involved ... 1
Introduction ... 4
Statement ... 5
A. Statutory and regulatory background ... 5
B. Facts and procedural history ... 8
Summary of argument ... 14
Argument ... 17
The failure to file an annual FBAR gives rise to a single violation under the Bank Secrecy Act—no matter how many qualifying accounts a party might hold ... 17
A. According to the Act's plain and ordinary meaning, regulated parties are required to "file reports," not report each account—and any reporting failure thus gives rise to a single violation ... 17
B. The Act's history and purpose confirm that Congress authorized a single per-form penalty ... 29
C. Even if the Act were ambiguous, the Court should construe any doubts against heightened punishment and in favor of petitioner ... 33
Conclusion ... 35
Appendix — Statutory provisions ... 1a

TABLE OF AUTHORITIES

Cases:

California Bankers Ass'n v. *Shultz*,
416 U.S. 21 (1974)..12, 19, 23
Commissioner v. *Acker*, 361 U.S. 87 (1959) 33
Dep't of Homeland Sec. v. *MacLean*,
574 U.S. 383 (2015)... 24
Leocal v. *Ashcroft*, 543 U.S. 1 (2004)................................. 33
United States v. *Boyd*, 991 F.3d 1077
(9th Cir. 2021)...*passim*
United States v. *Boyd*, No. 18-803,
2019 WL 1976472 (C.D. Cal. Apr. 23, 2019).................. 12
United States v. *Kaufman*, No. 18-787, 2021 WL 83478
(D. Conn. Jan. 11, 2021).. 26
United States v. *Marshall*, 798 F.3d 296
(5th Cir. 2015).. 33
United States v. *Schwarzbaum*, 24 F.4th 1355
(11th Cir. 2022).. 34
United States v. *Toth*, 33 F.4th 1 (1st Cir. 2022)............... 33
Wooden v. *United States*, 142 S. Ct. 1063 (2022) 33

Statutes and regulations:

1 U.S.C. 1.. 27
28 U.S.C. 1254(1) 1
Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*...................*passim*
31 U.S.C. 5311(1)... 20
31 U.S.C. 5314(a)...*passim*
31 U.S.C. 5321(a)(1) 23
31 U.S.C. 5321(a)(3) 24
31 U.S.C. 5321(a)(5)(A)..*passim*
31 U.S.C. 5321(a)(5)(B)..*passim*
31 U.S.C. 5321(a)(5)(C)-(D)...................................*passim*
31 U.S.C. 5321(a)(5)(D)(ii).. 25
31 U.S.C. 5322.. 6

Page

Statutes and regulations—continued:

31 U.S.C. 5322(a) 33

American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418 .... 6, 29

Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, § 202, 84 Stat. 1114 5

Pub. L. No. 91-508, Tit. II, Ch. 4, § 241(a), 84 Stat. 1124 (1970) 20

31 C.F.R. 1010.306(c) .... *passim*

31 C.F.R. 1010.350(a) .... *passim*

31 C.F.R. 1010.350(b) 7

31 C.F.R. 1010.350(g) 6, 10

31 C.F.R. 1010.810(d) 6

31 C.F.R. 1010.810(g) 6

Miscellaneous:

8.7M Americans Abroad, The Association of Americans Resident Overseas <https://tinyurl.com/aaro-abroad> (last visited Feb. 27, 2022) 7

Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 81 Fed. Reg. 12617 (Mar. 10, 2016) 8

Hon. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010) 33

FinCEN, Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 75 Fed. Reg. 8844, 8854 (Feb. 26, 2010) 30

IRS, Offshore Income and Filing Information for Taxpayers with Offshore Accounts, FS-2014-7 (2014) <https://www.irs.gov/newsroom/offshore-income-and-filing-information-for-taxpayers-with-offshore-accounts> 30

David Jacobson et al., *A Million Votes, Here*, The Globe and Mail (July 4, 2016) <https://tinyurl.com/jacobson-million-votes> 8

Page

Miscellaneous—continued:

Niels Johannesen et al., *Taxing Hidden Wealth: The Consequences of US Enforcement Initiatives on Evasive Foreign Accounts*, 12 Am. Econ. J.: Econ. Pol'y 312 (Aug. 2020) 8

Michael D. Kummer et al., *The Non-Willful FBAR Per-Account/Per-Form Issue Deserves Closer Scrutiny*, 164 Tax Notes Federal 365 (July 15, 2019) 8

Charles P. Rettig, *Why the Ongoing Problem with FBAR Compliance?*, J. Tax Prac. & Proc., Aug.-Sept. 2016 at 37; National Taxpayer Advocate, *2012 Annual Report to Congress* 141-42 (Dec. 31, 2012) <https://tinyurl.com/TPA-2012-Report> 8

Staff of Joint Comm. on Taxation, 111th Congress, JCS-4-09, Description of Revenue Provisions Contained in the President's Fiscal Year 2010 Budget Proposal: Part Three, 2009 WL 2996021 (2009) 31

Susanne Steel, *Read Jim Flaherty's Letter on Americans in Canada*, Financial Post (Sept. 16, 2011) <https://tinyurl.com/steel-fbar> 8

U.S. Census Bureau, *Table DP02* (2019 data) <https://tinyurl.com/census-dp02> 7

U.S. Dep't of State, *Consular Affairs by the Numbers* (Jan. 2020) <https://tinyurl.com/csa-by-numbers> 7

In the Supreme Court of the United States

No. 21-1195

ALEXANDRU BITTNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 19 F.4th 734. The opinion of the district court (Pet. App. 27a-63a) is reported at 469 F. Supp. 3d 709.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2021. The petition for a writ of certiorari was filed on February 28, 2022, and granted on June 21, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 5314 of Title 31 of the United States Code provides in relevant part:

Records and reports on foreign financial agency transactions

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, 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. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

* * * * *

Section 5321(a) of Title 31 of the United States Code provides in relevant part:

(5) FOREIGN FINANCIAL AGENCY TRANSACTION VIOLATION.—

(A) PENALTY AUTHORIZED.—The 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.

(B) AMOUNT OF PENALTY.—

(i) IN GENERAL.—Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.

* * * * *

31 C.F.R. 1010.350 provides in relevant part:

(a) *In general.* Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. The form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD-F 90-22.1), or any successor form. *See* paragraphs (g)(1) and (g)(2) of this section for a special rule for persons with a financial interest in 25 or more accounts, or signature or other authority over 25 or more accounts.

* * * * *

(g) *Special rules*—(1) *Financial interest in 25 or more foreign financial accounts.* A United States person having a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

* * * * *

31 C.F.R. 1010.306 provides in relevant part:

> (c) Reports required to be filed by § 1010.350 shall be filed with FinCEN on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year.

* * * * *

Other relevant statutory provisions are reproduced in the appendix to this brief (Pet. App. 1a-3a).

INTRODUCTION

This case presents an important and straightforward question of statutory construction under the Bank Secrecy Act: whether there is a single "violation" (and $10,000 maximum penalty) for the failure to file an annual FBAR, or whether there is a separate violation (with its own $10,000 penalty) for each individual foreign account not included on that single report. In the proceedings below, the Fifth Circuit held that the Act imposes a standalone duty on taxpayers to report each account—and thus "each failure to report a qualifying foreign account constitutes a separate reporting violation subject to a penalty." Pet. App. 2a. The Fifth Circuit was wrong. Its position is directly at odds with the Act's plain text, context, purpose, and history, and it invites a perplexing rule incompatible with ordinary experience and common sense.

The background facts illustrate this issue's significance. Petitioner had dozens of qualifying foreign accounts, and failed to file five annual reports. His conduct was entirely non-willful: He was living overseas and was unaware of the filing requirement; most of the accounts were owned by operating Romanian companies; and he ultimately filed corrected, though untimely, FBARs once

properly advised of his duty to do so. Under the district court's position, he committed 5 violations and was subject to a $50,000 fine; under the Fifth Circuit's contrary approach, he committed *272 violations* and was subject to a $2.72 million penalty—for the same five reports and (concededly) non-willful conduct. Pet. App. 34a. The IRS is using this type of leverage to pressure taxpayers into resolving these issues at the agency level—and few taxpayers have the resources to devote to extensive litigation challenging the IRS's position.

Because the Fifth Circuit has misconstrued the Act and embraced an implausible result, the judgment below should be reversed.

STATEMENT

A. Statutory And Regulatory Background

1. In 1970, Congress enacted the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, § 202, 84 Stat. 1114. To implement that objective, Congress instructed the Secretary of the Treasury to "require a resident or citizen of the United States * * * to keep records, file reports, or keep records and file reports, when the * * * person makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. 5314(a). Congress further instructed that "[t]he records and reports shall contain" specified "information in the way and to the extent the Secretary prescribes." *Ibid.*

The Secretary discharged that obligation with a series of regulations. Those regulations require that each person with a qualifying foreign account "shall report such relationship to the Commissioner of Internal Revenue for

each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons." 31 C.F.R. 1010.350(a). The Secretary further directed that "[t]he form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD-F 90-22.1)"—commonly known as an "FBAR." Finally, as relevant here, the Secretary also directed that "[r]eports required to be filed by § 1010.350 shall be filed * * * on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year." 31 C.F.R. 1010.306(c). The regulations accordingly did not focus on the number of foreign accounts; they focused instead on aggregate value.[1]

2. The Act enforces these requirements with both civil and criminal penalties. See 31 U.S.C. 5321-5322.[2]

Although only willful violations were initially subject to penalty, Congress amended the Act in 2004 to add penalties for non-willful violations. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418. Under this new version, the Secretary "may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31

---

[1] The regulations also create a special rule for persons with more than 25 qualifying accounts; rather than listing all the relevant account information, such persons "need only provide the number of financial accounts and certain other basic information on the report," and "will be required to provide detailed information concerning each account" only "if requested by the Secretary or his delegate." 31 C.F.R. 1010.350(g).

[2] Although the penalties are imposed under Title 31, the Treasury Secretary delegated the authority for enforcing these provisions to the IRS. See 31 C.F.R. 1010.810(d), (g). Consistent with most decisions in this area, we accordingly refer to the penalty as a tax penalty (even though the Act has a broader application).

U.S.C. 5321(a)(5)(A). But the Act sets a ceiling for non-willful conduct: "the amount of any civil penalty" for a non-willful violation "shall not exceed $10,000." 31 U.S.C. 5321(a)(5)(B). The maximum penalty for a willful violation, by contrast, is far higher: the greater of $100,000 or "50 percent" of either (i) "the amount of the transaction" or (ii) "in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation." 31 U.S.C. 5321(a)(5)(C)-(D).

The Act also includes a limited defense for non-willful conduct: "No penalty shall be imposed" if "(I) such violation was due to reasonable cause, and (II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported." 31 U.S.C. 5321(a)(5)(B).

3. The FBAR requirements apply to a broad swath of U.S. "person[s]" and foreign "account[s]"—covering citizens, residents, corporations, partnerships, estates, and trusts, and their interests in checking accounts, savings accounts, brokerage accounts, mutual funds, commodity-futures accounts, and certain life-insurance policies. 31 C.F.R. 1010.350(a), (b). There are approximately 9 million U.S. citizens living abroad;[3] 2 million current U.S. residents did not live in the country a year ago; 13 million returned within the past 12 years; and 45 million U.S. residents are foreign-born.[4] Canada alone is home to about 1

---

[3] U.S. Dep't of State, *Consular Affairs by the Numbers* (Jan. 2020) <https://tinyurl.com/csa-by-numbers>; 8.7M Americans Abroad, The Association of Americans Resident Overseas <https://tinyurl.com/aaro-abroad> (last visited Feb. 27, 2022).

[4] U.S. Census Bureau, *Table DP02* (2019 data) <https://tinyurl.com/census-dp02>.

million U.S. citizens.[5] Many of these persons have never heard of an FBAR. See Michael D. Kummer et al., *The Non-Willful FBAR Per-Account/Per-Form Issue Deserves Closer Scrutiny*, 164 Tax Notes Federal 365, 365 & n.1 (July 15, 2019); Susanne Steel, *Read Jim Flaherty's Letter on Americans in Canada*, Financial Post (Sept. 16, 2011) <https://tinyurl.com/steel-fbar>. Only 1.3 million FBARs were filed in 2019 (*Agency Information Collection Activities*, 85 Fed. Reg. 73130 n.9 (Nov. 16, 2020)), and experts estimate that instances of FBAR non-compliance likely run into the millions.[6]

Many instances of non-compliance also involve multiple accounts. In 2009, 65% of FBARs listed multiple foreign accounts. Niels Johannesen et al., *Taxing Hidden Wealth: The Consequences of US Enforcement Initiatives on Evasive Foreign Accounts*, 12 Am. Econ. J.: Econ. Pol'y 312, 324 (Aug. 2020). Roughly 900,000 FBARs listed more than 9.5 million total accounts in 2013, averaging more than 10 accounts per FBAR. *Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts*, 81 Fed. Reg. 12617 & n.26 (Mar. 10, 2016); Rettig, *supra*, at 37.

B. Facts And Procedural History

1. Petitioner was born in Romania and immigrated to the United States in his youth. He lived here for nine years, working as a dishwasher and later as a plumber. He eventually became a naturalized U.S. citizen and has

---

[5] David Jacobson et al., *A Million Votes, Here*, The Globe and Mail (July 4, 2016) <https://tinyurl.com/jacobson-million-votes>; Rettig, *supra*, at 38.

[6] See Charles P. Rettig, *Why the Ongoing Problem with FBAR Compliance?*, J. Tax Prac. & Proc., Aug.-Sept. 2016 at 37; National Taxpayer Advocate, *2012 Annual Report to Congress* 141-42 (Dec. 31, 2012) <https://tinyurl.com/TPA-2012-Report>.

retained dual Romanian-United States citizenship ever since.

Petitioner returned to Romania after the fall of communism in 1990; he lived there for over 20 years until late 2011. C.A. ROA 115, 255, 441. He was a successful businessman and had multiple non-U.S. personal bank accounts (8 or fewer each year) and owned stock in a number of Romanian corporations that also owned foreign bank accounts. C.A. ROA 257, 441, 446-481.

While living abroad, petitioner had limited contact with the United States. Like many dual citizens, he was unaware that he was required to file U.S. income tax returns reporting his foreign income. Pet. App. 5a-6a; C.A. ROA 256, 442, 729-730. He was also unaware of the existence of FBARs or his duty to file them. Pet. App. 5a-6a; C.A. ROA 255-256, 441-442, 732, 741. Shortly after returning to the United States in 2011, he discovered that he should have filed U.S. tax returns while living in Romania, reporting his world-wide income. C.A. ROA.256, 442, 729-730. He engaged a professional accountant to prepare and file those returns. C.A. ROA.256, 442, 729-730. The accountant also informed petitioner about the FBAR reporting requirement, and he likewise filed the required reports. Pet. App. 6a; C.A. ROA.256, 1331.[7]

The IRS determined that petitioner failed to timely file FBARs for five years (2007-2011); during those years, because petitioner had over 25 foreign accounts, he was not required to detail those accounts but was allowed to

[7] Petitioner's original accountant did not prepare the FBARs correctly for their initial submission; petitioner subsequently engaged a new accountant to file corrected forms. Pet. App. 6a. Those new FBARs—which were correct in substance but nevertheless untimely—were the subject of the IRS's penalties. See, *e.g.*, C.A. ROA 15 (seeking penalties for petitioner's "non-willful failure to timely report his financial interest in foreign bank accounts").

merely state the total number of foreign accounts in which he had a financial interest. 31 C.F.R. 1010.350(g). (His corrected forms nevertheless volunteered the full information. Pet. App. 6a.) The IRS concluded that petitioner's delinquency was non-willful, but it still sought to impose a maximum penalty under the Act. Although petitioner had only failed to submit five annual forms, the IRS asserted that petitioner had violated the Act a full 272 times—once for each account that was not reported in each of those five years. See, *e.g.*, Pet. App. 6a, 34a. The IRS accordingly assessed a $2.72 million penalty, representing a $10,000 fine for each account he ultimately reported on his untimely FBARs. *Ibid.*[8]

2. The IRS filed suit against petitioner in Texas to reduce the penalty assessment to judgment. On cross-motions for summary judgment, the district court determined that the IRS's penalty assessment was unlawful and the proper amount was capped at $50,000—a $10,000

[8] The government has accused petitioner of multiple acts of misconduct, based on its one-sided view of the facts. See, *e.g.*, Br. in Opp. 20. Suffice it to say that petitioner thoroughly refuted the government's misleading allegations in the proceedings below; the government's statements are largely based on the initial views of its own IRS examiner; the government ultimately concluded to pursue petitioner for solely non-willful violations—and defended petitioner's reasonable-cause defense under an *objective* standard (because it could not controvert petitioner's honest statement that he was unaware of the filing requirements), see C.A. ROA 1092; J.A. 26-28; and, finally, while the government alleged petitioner underpaid his U.S. income taxes for certain years in question, the government ultimately settled for *under 5%* of the total amount it initially claimed (C.A. ROA 257, 1103-1104, 1105-1107)—which says everything necessary about the government's vast overreach in this case.

maximum penalty for each annual FBAR. Pet. App. 38a-57a.[9]

In directly confronting the question presented here, the district court "conclude[d] that non-willful FBAR violations relate to each FBAR form not timely or properly filed rather than to each foreign financial account maintained but not timely or properly reported." Pet. App. 38a-39a. The court supported that conclusion with a careful examination of the Act's "text" and "the statutory and regulatory framework as a whole." *Id.* at 39a-40a. For example, it compared Section 5321(a)(5)(A) with the Act's provisions for "willful FBAR violations" and its "reasonable cause exception," and flagged that the non-willful penalties alone lacked any reference to accounts—"and the Court will presume that Congress acted intentionally in doing so." *Id.* at 41a-43a. It declared the government's counterarguments "unpersua[sive]," and explained that petitioner's interpretation alone "avoid[ed] absurd outcomes that Congress could not have intended in drafting the statute." *Id.* at 44a, 46a. Indeed, it found that "the text, structure, and purpose of the statute unambiguously point to the conclusion that the non-willful civil penalty applies per FBAR reporting violation rather than per account." *Id.* at 51a.

It accordingly held that "non-willful FBAR reporting deficiencies constitute a single violation within the meaning of § 5321(a)(5)(A) and (B)(i) and carry a maximum annual $10,000 civil money penalty, irrespective of the number of foreign financial accounts maintained." Pet. App. 49a. In doing so, it expressly rejected a contrary decision in California that ruled in the government's favor: "After

---

[9] The court also addressed other issues such as petitioner's reasonable-cause defense. Pet. App. 57a-62a. Petitioner is not advancing any other issue before this Court.

a careful analysis of the statute's text and purpose, the Court is left with no choice but to respectfully disagree with the outcome in [*United States* v. *Boyd*, No. 18-803, 2019 WL 1976472 (C.D. Cal. Apr. 23, 2019), rev'd, 991 F.3d 1077 (9th Cir. 2021)] and reach the opposite conclusion." *Id.* at 54a.[10]

3. The Fifth Circuit reversed. Pet. App. 1a-26a. It acknowledged that "[d]istrict courts have taken diverging views on this issue," and the Ninth Circuit went the other way in *United States* v. *Boyd*, 991 F.3d 1077 (9th Cir. 2021). *Id.* at 2a & n.1. But it declared those views "unpersuasive" and reached the opposite conclusion: "We hold that each failure to report a qualifying foreign account constitutes a separate reporting violation subject to penalty," and "[t]he penalty therefore applies on a per-account, not a per-form, basis." *Ibid.* (openly "part[ing] ways" with the 2-1 Ninth Circuit). It thus restored the government's claim for the full $2.72 million in penalties. *Id.* at 1a-2a, 25a-26a.

The Fifth Circuit initially faulted the district court for "determining what constitutes a 'violation' under section 5314 by focusing on the regulations under section 5314 to the exclusion of section 5314 itself." Pet. App. 15a. The Fifth Circuit recognized that the district court had relied on this Court's decision in *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21 (1974), for support, but it found *Shultz* inapposite. *Id.* at 15a-16a (declaring the "snippet" from *Shultz* "inconsistent with the text of the [Act] and corresponding regulations"). The Fifth Circuit instead declared that any "violation" has to be determined by "focus[ing] on the text of section 5314." *Id.* at 17a.

---

[10] The court stated it was "dubious" that the rule of lenity applied, but that the rule would support petitioner's reading if it did. Pet. App. 50a-51a.

In doing so, the Fifth Circuit found that "Section 5314(a) 'has both a substantive and a procedural element.'" Pet. App. 17a (quoting *Boyd*, 991 F.3d at 1088 (Ikuta, J., dissenting)). It reasoned that the core substantive obligation was reporting each qualifying transaction or account; the submission of an FBAR form was merely the "procedural" mechanism for satisfying that statutory duty. *Id.* at 17a-19a. And the Fifth Circuit further read "[t]he regulations themselves" as drawing a similar line. *Id.* at 17a-18a. Accordingly, the court concluded, "[b]y authorizing a penalty for 'any violation of[] any provision of section 5314,'" "section 5321(a)(5)(A) most naturally reads as referring to the statutory requirement to report each account—not the regulatory requirement to file FBARs in a particular manner." *Id.* at 18a-19a.

The Fifth Circuit stated its understanding was reinforced by the Act's "willful penalty provision[]" and "the reasonable-cause exception." Pet. App. 20a-23a (acknowledging that the district court "drew the opposite inference" from these provisions, but rejecting its views). The court found that those provisions "plainly describe[] a 'violation' in terms of a failure to report a transaction or an account"; it reasoned that the same term ("violation") thus must carry the same meaning for "a non-willful violation of section 5314." *Id.* at 21a-22a; see also *id.* at 22a-23a (reading the language of the reasonable-cause exception to support an '"account-specific"' construction).

The Fifth Circuit finally rejected petitioner's remaining arguments. It held that there was no need to construe a tax provision "strictly" against the government—as that canon had been "amply criticized" and the text anyway "leaves no doubt that each failure to report an account is a separate violation of section 5314." Pet. App. 23a-24a. It likewise rejected petitioner's reliance on the rule of lenity, stating that "the statute is not ambiguous and the non-

willful penalty provision has no criminal application." *Id.* at 24a. And it disagreed that the government's reading would produce "'absurd results.'" *Id.* at 24a-25a. On the contrary, the Fifth Circuit reasoned, "[i]t is not absurd—it is instead quite reasonable—to suppose that Congress would penalize each failure to report each foreign account." *Id.* at 25a.

The Fifth Circuit consequently held that "[t]he text, structure, history, and purpose of the relevant statutory and regulatory provisions show that the 'violation' * * * is the failure to report a qualifying account, not the failure to file an FBAR." Pet. App. 25a. It declared "[t]he $10,000 penalty cap therefore applies on a per-account, not a per-form, basis." *Ibid.*

SUMMARY OF ARGUMENT

The failure to file a single FBAR gives rise to a single violation under the Bank Secrecy Act, and the government's contrary position is squarely at odds with the Act's text, context, history, and purpose.

A. 1. Section 5314 imposes a single duty on regulated parties: "to keep records, file reports, or keep records and file reports." The section draws a clear distinction between that substantive obligation and its triggering condition, which says *when* that conduct is required: "when the [person] makes a transaction or maintains a [qualifying] relation." That condition thus *activates* the legal requirement to "file reports," but the legal requirement is *filing the report*. There is no standalone obligation to report each qualifying account under the statute.

Because there is no independent duty to report each account, there is no independent violation every time an account is not reported. Section 5314's reporting requirement is binary—it simply asks whether a report was properly filed. Any mistake means the required report

was not made, not that each mistake gives rise to its own statutory violation. And that plain-text view comports with common sense. If the government tells a party to list each of its accounts on a form, the failure to list each account violates that directive—but it is a *single* violation. No one ordinarily thinks that each mistake on a single reporting form gives rise to its own independent violation of federal law.

The government insists that there nevertheless is a freestanding duty to report each account, but it misreads the statute. The Act's plain text instructs the Secretary to "require[]" the necessary reports; until the Secretary acts, there is nothing for any regulated party to do. The government cannot explain how there is a *statutory* duty to file reports when the statute requires *nothing* until the Secretary implements the Act. And because the Act premises penalties solely on *statutory* (not regulatory) violations, the government cannot look to the regulations to multiply violations premised on flaws with a single annual form.

2. The operative section's surrounding provisions further confirm that Congress did not intend to impose account-specific penalties. Congress included account-specific language in multiple provisions accompanying Section 5321, yet Congress conspicuously elected against a clear directive in the relevant provision. Congress would not have vaguely referenced Section 5314 (to define a "violation") if it truly intended a draconian scheme where parties inadvertently commit *dozens* of violations for failing to file a single form.

3. Even looking to the Secretary's regulations, it is clear that a single invalid report gives rise to a single violation. The regulations require only a single form on an annual basis; the obligation to file is tethered to the aggregate account balance, not the number of accounts; and

the regulations exempt account-specific reporting for filers with 25 accounts or more. Each one of those central features is incompatible with the government's attempt to tease out a standalone, account-specific reporting duty.

B. 1. The Act's history and purpose reinforce Congress's imposition of a single per-form penalty. The Act operated for decades without *any* punishment for non-willful violations. In adding a modest $10,000 penalty in 2004, it is perplexing to think Congress intended to characterize a single reporting failure as potentially *dozens* of statutory violations—transforming a $10,000 ceiling into potential six- and seven-figure liability. And, indeed, when the government has referenced the penalty in the past, it has (correctly) recognized the cap as applying on a per-form basis.

2. The government's contrary view would frustrate the Act's purpose in multiple ways. The government says its position is necessary for deterrence; but if a person is unaware of the FBAR requirements, that same person is most certainly unaware of the FBAR penalties. Additional punishment cannot properly deter someone unaware that the FBAR rules even exist.

Nor does the Act function properly by vesting the IRS with vast discretion to impose per-form or per-account penalties. The difference between those two metrics is not slight; just as it has in the past, this "discretion" would permit the IRS to wield improper leverage and strongarm settlements by threatening parties with *dozens* of statutory violations for accidentally neglecting a single form.

Finally, the government's position will often elevate non-willful penalties to extraordinary heights—even exceeding the penalty for willful violations whenever the non-willful filer has dozens of qualifying accounts. There is no indication that Congress intended such harsh and uneven punishment for accidental missteps.

C. The government's position fails independently for a final reason: multiple canons of construction require construing the Act against the government's draconian reading of the statute. Under traditional lenity and strict-construction principles, courts will not presume that Congress intended to impose extreme punishments without saying so clearly in the law itself. This law is at least ambiguous; it does not define "violation," and the government would read into that silence a license to impose *dozens* of statutory penalties based on an unintentional failure to file a single form.

Numerous courts have declared the government's position not just wrong, but unreasonable. This is a classic situation for invoking lenity principles and refusing to presume Congress intended harsh punishments without saying so clearly in the enacted text.

ARGUMENT

THE FAILURE TO FILE AN ANNUAL FBAR GIVES RISE TO A SINGLE VIOLATION UNDER THE BANK SECRECY ACT—NO MATTER HOW MANY QUALIFYING ACCOUNTS A PARTY MIGHT HOLD

A. According To The Act's Plain And Ordinary Meaning, Regulated Parties Are Required To "File Reports," Not Report Each Account—And Any Reporting Failure Thus Gives Rise To A Single Violation

Under every ordinary interpretive metric, any failure to file a "require[d]" report is a single violation under the Act—no matter how many accounts a person has or how many mistakes a person makes on that single form. The Fifth Circuit reached the opposite conclusion by insisting the Act imposes a standalone duty to report each qualifying account—meaning any party failing to file a single report commits potentially dozens of statutory violations.

The Fifth Circuit applied that position to find petitioner violated the Act 272 *separate* times by inadvertently failing to file five annual forms.

The Fifth Circuit was mistaken. The Act requires parties to *file reports*, not report individual accounts. And any failure to file a report thus gives rise to a single statutory violation—just as Congress plainly intended. Because the Fifth Circuit's contrary position flouts the Act's plain text, the judgment below should be reversed.

1. The Act's plain text confirms that there is a single violation for a single failure to file an annual report

A. 1. The Act instructs the Secretary to "require[]" parties "to keep records, file reports, or keep records and file reports, when the [party] makes a transaction or maintains a relation" with "a foreign financial agency." 31 U.S.C. 5314(a).

The Act accordingly focuses on "fil[ing] *reports*," *not* reporting individual accounts. It imposes a single substantive obligation: "to keep records, file reports, or keep records and file reports." The existence of an account ("maintain[ing] a relation") is merely the *triggering condition* that activates the reporting requirement. And the textual line between those two categories is clear. The section first directs what conduct is "require[d]" ("filing reports"), before the triggering condition says *when* that conduct is required: "when the [person] makes a transaction or maintains a [qualifying] relation." The two clauses are independent from each other and separated by a comma. And the upshot is unmistakable: if a party has a qualifying account (condition), then the party is required

to file reports (obligation). But nothing in Section 5314 imposes an independent duty to report each account.[11]

This same focus on reporting requirements (not reporting each account) continues in the very next sentence, which explains what those "records and reports shall contain." 31 U.S.C. 5314(a). The focus, again, is on what to include *in the report*—the obligation is the filing of the report, not separately reporting each account.

And this same emphasis was present in the original version of the Act, which again looked at the existence of an account as the mere triggering condition for a reporting requirement, which was otherwise the focus of the Act:

> The Secretary of the Treasury * * * shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, *who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency* to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require * * * .

---

[11] In fact, as a textual matter, the only person explicitly required to do *anything* under the Act is *the Secretary*, who is obligated to prescribe regulations; the provision does not otherwise impose any direct obligation on anyone. See 31 U.S.C. 5314(a) ("the Secretary of the Treasury *shall require*") (emphasis added). That means (in a technical sense) the Secretary alone is the only person who could ever "violate" the statute. For everyone else, at very best, the provision *indirectly* instructs parties to do what the Secretary "require[s]" (*ibid.*)—and that requirement is limited "to maintain[ing] records and fil[ing] reports." *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 36-37 (1974). "[I]f the Secretary were to do nothing, the Act itself would impose no penalties." *Id.* at 26.

Pub. L. No. 91-508, Tit. II, Ch. 4, § 241(a), 84 Stat. 1124 (1970) (emphasis added). This language again shows Congress's concern was filing reports. It directed the Secretary to require persons "to file reports"; it described the "information," "form," and "detail" of those reports; and it mentioned accounts ("maintains *any* relationship") as merely the triggering condition for the reporting requirement—as opposed to some freestanding duty to report individual accounts. Indeed, Congress's use of the term "any" underscores the point: if *any* account was present, the party had to file a report; the concern was thus activating the reporting requirement, not imposing a direct, statutory duty to disclose each account.[12]

Section 5314 accordingly does not say to report "each" account; it says to *file reports*, and says when that condition is activated. And it draws a clear distinction between the substantive conduct ("filing reports") and the triggering condition ("maintain[ing] a relation"). Consistent with the Act's declaration of purpose, the objective was to "require certain reports or records" (31 U.S.C. 5311(1)); there is no independent statutory duty to report each account. Contra Pet. App. 18a (holding otherwise below).[13]

---

[12] This language was replaced with the modern version in a 1982 statutory recodification that "revise[d], codif[ied], and enact[ed] *without substantive change*" certain provisions of Title 31. See Pub. L. No. 97-258, 96 Stat. 877 (emphasis added).

[13] The government accordingly errs in placing any weight on Section 5314's "use of the singular"—as in asking "if the person engages in 'a transaction' or maintains 'a relation' with a foreign financial agency." Br. in Opp. 13. Congress had no need to phrase these concepts in the plural (or say "one or more") because *any* qualifying account triggers the statute: a party has the same reporting requirements whether that party retains one account or dozens. The government simply overlooks that this language appears in the *conditional* clause; had Congress wished to impose a direct requirement to report "each" account, it would have said exactly that.

2. Because there is no independent duty to report each account, there is no independent violation every time an account is not reported. On the contrary, Section 5314's prescription is clear: a party violates the provision, once, by not "keep[ing] records, fil[ing] reports, or keep[ing] records and fil[ing] reports." 31 U.S.C. 5314(a). A "violation" "attach[es] directly to the obligation that the statute creates—the filing of a single report—rather than attaching to each individual foreign financial account maintained." Pet. App. 43a.

This conclusion follows directly as a matter of ordinary usage and common sense. If the *requirement* is to "file reports," a party violates that requirement by *not* filing a proper report—whatever the reason(s) for the failure. The reporting requirement is binary: a party either files the required report or not. If the requirement is to list all foreign accounts on a single form, that requirement is violated whenever a party fails to *list all foreign accounts*—no matter how many accounts were left off. A party listing 10% of its foreign accounts and a party listing 90% of its foreign accounts each violates the statutory requirement, once, in the same way—by not doing what the party was told to do. Multiple errors might explain *why* there is a violation; but the "violation" (in the singular) is still the failure to "file [the] report[]" as the Secretary "require[d]." 31 U.S.C. 5314(a).

This understanding comports with normal experience and natural expectations. When a statute creates an annual reporting requirement, it is exceedingly odd to think one violates federal law potentially *dozens* of times by failing to file a *single* form. And if a statute, for example, says to list all your accounts on this piece of paper—and you only list eight of ten accounts—few typically respond that you complied with the law eight times and violated the law

two times. One naturally says you violated the law *once*—by not listing all your accounts as directed.

In sum: the entire question is whether a party filed a proper report. That question is binary: it focuses on satisfying the reporting requirement. Nothing in Section 5314 imposes a freestanding duty to report each account (as its own separate legal obligation); it simply requires parties to "file reports." And if the single "require[ment]" is "[to] file reports," then the single violation is the *failure to file those reports*. Each individual mistake may render a report invalid, but those mistakes are not themselves *separate* violations; they simply explain the *single* overall failure to comply.

B. In response, the government argues that Section 5314 imposes a standalone duty on parties "to report each foreign account." Br. in Opp. 14; see also Pet. App. 18a (holding, incorrectly, that "the text of the BSA and its regulations impose * * * a statutory requirement to report each qualifying transaction or relation with a foreign financial agency"). And because the government believes there is such a freestanding statutory duty, it also believes a party violates the Act each time it fails to report a qualifying account: the "essence" of "the statutory 'violation' * * * is failing to inform the government of the existence of any foreign financial account," "not failing to file the FBAR form." *Ibid.* The government is wrong.

1. Statutes are construed according to their text, not their "essence," and the government's theory is entirely atextual. As explained above, Section 5314 does not impose a direct obligation on anyone; until the Secretary acts, there *are* no reporting requirements—much less a distinct, freestanding duty to report each foreign account. And Congress gave the Secretary broad leeway to decide how best to implement the statute. That discretion includes the option to require parties "to keep records, file

reports, *or* keep records and file reports"—in other words, there was never any guarantee that the Secretary would impose a *reporting requirement at all*. The Act certainly nowhere commands that a party is independently "required" to report each foreign account.

And, in fact, this Court has already rejected the government's position. As *California Bankers Association* established, the Act "authorize[s]" the Secretary "to prescribe by regulation certain recordkeeping and reporting requirements," but "if the Secretary were to do nothing, the Act itself would impose no penalties on anyone." 416 U.S. at 26. It is a mystery how the government (or the Fifth Circuit below) identified a "*statutory requirement* to report each qualifying [account]" (Pet. App. 18a (emphasis added)) when the statute itself does nothing. Put simply: if there cannot even be a statutory violation until the Secretary promulgates regulations, how can there be a *freestanding statutory duty* to report each account? The government never says.

In any event, the true "essence" of Section 5314—per its actual text—is not reporting individual accounts but *filing reports*. The government simply confuses the Act's triggering condition with its reporting requirement—and the government's logic, if adopted, would require judicially rewriting Section 5314.

2. Nor can the government look to the Secretary's implementing regulations to fill the statutory void. Unlike other penalty provisions of the Bank Secrecy Act, Section 5321(a)(5)(A) penalizes anyone "who violates, or causes any violation of, *any provision of section 5314*." 31 U.S.C. 5321(a)(5)(A) (emphasis added). The "violation" thus must be of Section 5314 itself; it does *not* extend to "violation[s] of *a regulation* prescribed under" that section—"even though earlier-enacted penalty provisions in section 5321 do." Pet. App. 16a-17a; see, *e.g.*, 31 U.S.C. 5321(a)(1) ("a

violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2)"); 31 U.S.C. 5321(a)(3).

"Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 391 (2015). Because Congress opted to limit Section 5321(a)(5)(A) to statutory violations alone, the government cannot premise the imposition of multiple violations on petitioner's (alleged) failure to comply with any regulation-only requirements.[14]

3. The government's textual theory would also produce absurd results. If a party commits a *separate* statutory violation for every account not listed on a single form, the government cannot explain why *every* missing piece of information on that form would not likewise give rise to its own statutory violation. Take a missing name; a missing address; the failure to list "the legal capacity in which a participant is acting"; the failure to include "a description of the transaction"; and so on. Compare 31 U.S.C. 5314(a). The government's view invites a separate violation *for each blank on the form*—threatening *dozens* of statutory violations (with six- or seven-figure liability) under a penalty provision textually capped at $10,000. See, *e.g.*, *Boyd*, 991 F.3d at 1082 n.8 ("The regulations and FBAR require a person to report much more information than the number of accounts. Taken to its 'logical' conclusion, the government's argument could permit many more non-willful violations than those tied just to the number of

---

[14] Of course, as explained above, the fact that a regulation is violated could establish that *the statute* was violated, once, for not following the reporting requirements as "require[d]" by the Secretary. But the statutory violation would remain both binary and singular in nature.

accounts that should have been listed on an FBAR that was not timely filed.").

Nor is there any doubt that potential violations would extend beyond the mere failure to list each account. The government obviously believes that an untimely, but accurate, FBAR produces a statutory violation (and, in fact, that it bizarrely produces a *separate* violation *for each accurate but untimely-disclosed account* included on that form). See, *e.g.*, C.A. ROA 15. Likewise, Section 5321 itself contemplates "violation[s] involving a failure to report the existence of an account *or any identifying information required to be provided with respect to an account*"—confirming that missing "identifying information" alone can give rise to a violation. 31 U.S.C. 5321(a)(5)(D)(ii) (emphasis added). If the government truly believes that a single improper FBAR can support multiple penalties, it has no workable basis for cabining the inevitable staggering liability to missing accounts alone. Every missing blank would now be its own statutory violation.

Finally, the government's construction is as unnatural as its results. No one normally says that a party violates a requirement to file one form *multiple* times for each error on the submission; failing to file a single form is usually a single violation, not dozens of violations for every item that was not properly filled out. And even (artificially) limited to missing accounts, the government's contemplated liability is truly jaw-dropping: Suppose, for example, that a person has one account worth $10,000 and a dozen accounts with nominal amounts. Under the government's position, that person (by not filing a single FBAR) would commit *thirteen statutory violations* and face a $130,000 fine—for holding effectively $10,000 in foreign accounts and inadvertently failing to file a single form. Even if Congress has the option of imposing that kind of disproportionate liability, one would expect to see such an unusual

directive expressed in textual language far clearer than this.

2. The statutory context further confirms that there is a single violation for the failure to file a single report

Section 5321(a)(5)(A)'s surrounding provisions confirm that Congress did not intend to impose any account-specific penalties.

A. Section 5321 sets out a reasonable-cause defense for non-willful errors and heightened penalties for willful violations. See 31 U.S.C. 5321(a)(5)(B)(ii)(II), (a)(5)(D)(ii). Each provision has particular language that focuses on specific accounts. This language underscores that "'Congress clearly knew how to make FBAR penalties account specific.'" *United States* v. *Kaufman*, No. 18-787, 2021 WL 83478, at *9 (D. Conn. Jan. 11, 2021) (quoting the district court here, see 469 F. Supp. 3d at 719). Yet Congress conspicuously chose not to use any account-specific language in defining Section 5321(a)(5)(A)'s baseline violation.

Congress would not have vaguely referenced Section 5314 if it truly intended a draconian scheme where parties accidentally commit *dozens* of violations for failing to file a single form. These neighboring provisions show that Congress knew precisely how to legislate in a clear fashion to specify the precise nature of its intended relief. Its decision not to frame "violation" in overtly account-specific terms (one violation for every improperly reported account or transaction) undercuts the government's aggressive theory. Indeed, it is implausible that Congress would have relied on oblique references to unspecified violations of Section 5314 (and its *reporting requirements*) to impose a separate $10,000 penalty on every single account unintentionally omitted in each annual FBAR filing.

B. 1. In response, the government maintains that the surrounding provisions support its view—by supposedly lining up "discrete" accounts (in the singular) with discrete violations. See Br. in Opp. 13-15. Although it is assuredly true that these provisions are phrased in the singular, it is just as assuredly irrelevant: as the Dictionary Act confirms, "[i]n determining the meaning of any Act of Congress," the default rule is "words importing the singular include and apply to several persons, parties, or things," just as "words importing the plural include the singular." 1 U.S.C. 1.

The fact that Congress used singular terms (in provisions that make just as much sense when read in the plural) says exceedingly little to support the government's position.

2. In the decision below, the Fifth Circuit reasoned that the willful-violation provision "plainly describes a 'violation' in terms of a failure to report a transaction or an account." Pet. App. 20a-21a (describing 31 U.S.C. 5321(a)(5)(D)(ii)). The Fifth Circuit misread that provision. The section's plain text does *not* say that the "violation" *is* the failure to report an account (contra Pet. App. 20a-21a)—it says the violation "*involv[es]*" the failure to report an account. 31 U.S.C. 5321(a)(5)(D)(ii). That makes a world of difference: the *violation* is the failure to file a report in the manner and way specified by the Secretary. That is the single violation identified in Section 5314. That this violation might *involve* a failure to list an account (as opposed to "involving" any other defect) does not mean that *each* failure to report an account is its own violation. On the contrary, a single violation could "involve" failing to report multiple accounts—which, of course, is precisely how the situation is ordinarily understood in everyday experience.

3. The Secretary's implementing regulations again confirm that a single violation exists for each missing annual report

Consistent with a proper understanding of Section 5314, the Secretary's implementing regulations further confirm that the Act's focus is on filing a single report, not reporting each account.

The regulations impose a single duty on qualifying taxpayers: *filing the annual FBAR*. *Boyd*, 991 F.3d at 1081-1082; 31 C.F.R. 1010.306(c). A taxpayer may have to list all foreign accounts to satisfy that unitary obligation, but each missing account does not constitute its own violation—it simply means the taxpayer violated the rules, once, by failing to submit a full and accurate report. See *Boyd*, 991 F.3d at 1082 n.7 (rejecting the dissent's view that the relevant "report" is the *disclosure of each account*, not the FBAR itself—"[b]ecause a taxpayer must make the reports on the FBAR, *it is the FBAR* that must be filed") (emphasis added).

This is reinforced by the regulations' core requirements. The regulations require only a single form on an annual basis. 31 C.F.R. 1010.306(c); 31 C.F.R. 1010.350(a). The obligation to file is activated by the aggregate account balance, not the number of accounts. *Boyd*, 991 F.3d at 1082 n.6; see 31 C.F.R. 1010.306(c). The regulations do not even require *listing each account* for filers with 25 of more accounts (31 C.F.R. 1010.350(g)(1))—again suggesting the lack of focus or concern with reporting *each* account. And outside the FBAR, there is no freestanding duty to "report" each account, "whether there are twenty accounts with an aggregate value of $10,000, or one account with a value of $10,000,000." *Boyd*, 991 F.3d at 1082 n.6; 31 C.F.R. 1010.306(c)-(e); 31 C.F.R. 1010.350(a).

This general scheme is incompatible with the government's view that Section 5314 imposes a standalone duty

to report each account. Thus even if the regulations themselves (and not the statute) were controlling, a party's sole violation would remain "the failure to [properly] file the FBAR." *Boyd*, 991 F.3d at 1082.

* * *

If Congress actually wanted to impose a $10,000 penalty for every missing account—as opposed to every missing report—it would have said exactly that. It knows how to draft account-specific language. It knows it would be inviting draconian results, given the number of innocent filers with dozens of foreign accounts. It would not merely reference a statute that requires the Secretary to require parties to "keep records, file reports, or keep records and file reports"—without *any* express directive to report every account.

Section 5314's only debatable reference to accounts appears in the *conditional* clause that *triggers* the actual reporting requirement. Because the government's contrary view is at odds with the Act's plain text, the judgment below should be reversed.

B. The Act's History And Purpose Confirm That Congress Authorized A Single Per-Form Penalty

The Act's history and purpose readily confirm what the text already makes clear: Congress authorized a maximum $10,000 penalty for a non-willful FBAR violation.

1. As described above, the Act operated for over three decades without any penalty for non-willful reporting violations. It was not until 2004 that Congress imposed any penalty in this area, and it subjected non-willful violations to a modest $10,000 cap. See Pub. L. No. 108-357, *supra*, § 821(a). It is astounding to think that Congress intended to characterize a single reporting failure as potentially *dozens* of independent statutory violations—leading to possible six- and seven-figure penalties (not $10,000) in

cases where a taxpayer merely failed to file a single report without any other wrongdoing.

And, in fact, apparently not even the government itself has always viewed the statute in such an extraordinary manner. In a variety of contexts, government entities have stated that the $10,000 maximum penalty applies to the failure to file an FBAR—not the failure to report each individual qualifying account:

*IRS: "*For the failure to file the FBAR* due on or after June 30, 2005, the penalty cannot exceed $10,000." *Boyd*, 991 F.3d at 1085 n.11 (quoting a "form letter" sent by the IRS to taxpayers).

*IRS: "Separately, taxpayers with foreign *accounts* whose aggregate value exceeds $10,000 any time during the year *must file a[n] [FBAR]. * * * For the FBAR,* the penalty may be up to $10,000, *if the failure to file* is non-willful * * * ." IRS, Offshore Income and Filing Information for Taxpayers with Offshore Accounts, FS-2014-7 (2014) <https://www.irs.gov/newsroom/offshore-income-and-filing-information-for-taxpayers-with-offshore-accounts> (emphases added).

*Financial Crimes Enforcement Network (FinCEN), Department of the Treasury: "A person who is *required to file an FBAR and fails to properly file* may be subject to a civil penalty not to exceed $10,000." FinCEN, Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 75 Fed. Reg. 8844, 8854 (Feb. 26, 2010) (emphasis added).

*Joint Congressional Committee on Taxation: "*Failure to file the FBAR* is subject to both criminal and civil penalties. Since 2004, the civil sanctions have included a penalty of up to $10,000 *for failures* that are not willful * * * ." Staff of Joint Comm. on Taxation, 111th Congress, JCS-4-09, at 190, Description of Revenue Provisions Contained in the President's Fiscal Year 2010

Budget Proposal: Part Three, 2009 WL 2996021, at *4 (2009) (emphases added) (footnotes omitted).

The government's prior guidance thus reflected a more "logical read of the statute and regulations" than its new litigation position before this Court. *Boyd*, 991 F.3d at 1085 n.11.

2. The government's per-account theory undermines the Act's purpose and is otherwise bad policy.

First, the government maintains that its position is necessary for proper deterrence. Yet these are *non-willful* penalties; most violators (like petitioner) are unaware of the filing requirement—which necessarily means they are also unaware of any heightened punishment. Imposing a draconian penalty out of the blue to someone who had no clue they had to file will not obviously lead to greater compliance with the Act's reporting scheme. And to the extent the government believes that a person is intentionally trying to hide assets, the IRS always has the option of pursuing *willful* penalties—which are appropriately calibrated for deliberate misconduct.

Second, the government contends that the agency can exercise discretion to reduce punishment where appropriate. Yet IRS discretion is hardly an adequate failsafe. Leaving the agency with unbounded power to apply vastly disparate penalties is not a hallmark of the fair administration of any statutory scheme. And the existence of discretion is cold comfort to a taxpayer confronted with $10,000 per-account penalties for potentially dozens of accounts after a single innocent filing mistake.

Third, the very threat of the government's (overwhelming) penalties creates unfair leverage over regulated parties. The system is skewed toward resolution at the agency level. Penalties (as here) can be significant, but the amounts will not always justify full-blown litigation—with clients surviving the internal agency process and

fighting the government in court. And threats of late-payment penalties and interest further reduce the average taxpayer's incentive and ability to protect their rights via extended litigation. This often will lead to taxpayers capitulating to the IRS via settlement or simply failing to contest the government's demands. See, *e.g.*, *Gardner*, 2019 WL 1767120, at *1 (default judgment over $100,000 penalty); *Stromme*, Doc. 18, at 4 (default judgment over $189,554.47 "civil FBAR penalties," "interest," and "statutory additions"). And giving the IRS the cudgel of staggering per-account penalties will only increase the agency's power to strongarm unfair settlements.

Fourth, the government's theory often invites upside-down treatment of non-willful and willful violators. It is not hard to imagine hypotheticals where the party knowingly violating the law pays less than the party who had no idea of the filing requirements—and where the punishment for the non-willful violation might greatly exceed the aggregate balance in the parties' foreign accounts. Congress does not usually impose harsher punishments on unintentional conduct—yet that could well be the outcome here.

In the end, the government's position would dramatically expand agency power. It authorizes penalties in non-willful cases that might readily exceed those in cases involving willful misconduct. See, *e.g.*, *Kaufman*, 2021 WL 83478, at *10. It offers staggering punishments ($2.7 million versus $50,000) that are poorly calibrated to deter violations or achieve compliance among a class generally unaware of basic FBAR rules in the first place.

In short, if Congress truly wished to impose massive penalties for non-willful conduct, one would expect Congress to have spoken far more clearly than this. The Court should cabin the IRS to the penalty scheme actually authorized by Congress.

C. Even If The Act Were Ambiguous, The Court Should Construe Any Doubts Against Heightened Punishment And In Favor Of Petitioner

Although a proper reading of the Act forecloses the government's position, any doubt should be strictly construed against the government's draconian reading of the statute. See, *e.g.*, *Wooden* v. *United States*, 142 S. Ct. 1063, 1082-1083 & n.1 (2022) (Gorsuch, J., concurring). Indeed, three separate principles require avoiding harsh penalties where Congress has failed to speak clearly.

First, Section 5321 imposes tax-related penalties, and it is a "'longstanding canon of construction' that if 'the words of a tax statute are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.'" *United States* v. *Marshall*, 798 F.3d 296, 318 (5th Cir. 2015) (collecting authority); see also *Comm'r* v. *Acker*, 361 U.S. 87, 91 (1959). Second, similar strict-construction principles have traditionally applied to all penal statutes, including civil ones. See, *e.g.*, Hon. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 130 n.92 (2010). Finally, the same rules again apply in civil cases, as here, with "both criminal and noncriminal applications." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004); see 31 U.S.C. 5322(a) (imposing criminal penalties for willful violations of the Act's reporting requirements, including under Section 5314).[15]

---

[15] The Fifth Circuit suggested this last rule does not apply because "the non-willful penalty provision has no criminal application." Pet. App. 24a. Yet the operative question is how to define "violation," which is a constant in the Act's civil and criminal context. If the government is right that each missing foreign account gives rise to its own penalty under Section 5321, then the same rule also applies when assessing criminal punishment under Section 5322. See, *e.g.*, *United States* v. *Toth*, 33 F.4th 1, 18 n.17 (1st Cir. 2022); *United States* v.

These rules collectively doom the government's position. The question presented is the subject of a circuit conflict. Multiple courts (including the Ninth Circuit) found the government's position not just wrong but "[un]reasonable." *Boyd*, 991 F.3d at 1086. Other courts and commentators have flagged the disparate views and confusion over the proper reading of the Act. See, *e.g.*, Pet. 4-5 & n.1. While petitioner submits that the government's theory is plainly wrong, petitioner's position is (at a bare minimum) a reasonable interpretation of the Act.

The government is attempting to read the Act's penalty scheme to give rise to *dozens* of statutory violations for unintentionally failing to submit a single annual form—increasing petitioner's penalty by over a factor of *fifty*. This is a paradigmatic case for lenity and strict-construction principles, and those principles should independently resolve the question presented in petitioner's favor.

Schwarzbaum, 24 F.4th 1355, 1359 (11th Cir. 2022). There is no textual basis for adopting different rules for the same terms in those related settings. See, *e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005) ("identical words used in different parts of the same statute are generally presumed to have the same meaning").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DANIEL L. GEYSER
Counsel of Record
HAYNES AND BOONE, LLP
2323 Victory Avenue, Ste. 700
Dallas, TX 75219
(303) 382-6219
daniel.geyser@haynesboone.com

RACHAEL E. RUBENSTEIN
FARLEY P. KATZ
CLARK HILL PLC
2301 Broadway Street
San Antonio, TX 78215

ANGELA M. OLIVER
HAYNES AND BOONE, LLP
800 17th Street, N.W., Ste. 500
Washington, DC 20006

NATASHA BREAUX
RYAN PITTS
HAYNES AND BOONE, LLP
1221 McKinney Street, Ste. 4000
Houston, TX 77010

AUGUST 2022

APPENDIX

APPENDIX

1. Section 5314 of Title 31 of the United States Code provides:

Records and reports on foreign financial agency transactions

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, 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. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe—

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary

decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

2. Section 5321(a) of Title 31 of the United States Code provides in relevant part:

(5) FOREIGN FINANCIAL AGENCY TRANSACTION VIOLATION.—

(A) PENALTY AUTHORIZED.—The 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.

(B) AMOUNT OF PENALTY.—

(i) IN GENERAL.—Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.

(ii) REASONABLE CAUSE EXCEPTION.—No penalty shall be imposed under subparagraph (A) with respect to any violation if—

(I) such violation was due to reasonable cause, and

(II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported.

(C) WILLFUL VIOLATIONS.—In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—

(i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—

(I) $100,000, or

(II) 50 percent of the amount determined under subparagraph (D), and

(ii) subparagraph (B)(ii) shall not apply.

(D) AMOUNT.—The amount determined under this subparagraph is—

(i) in the case of a violation involving a transaction, the amount of the transaction, or

(ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

* * * * *