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

REPLY BRIEF FOR THE PETITIONER

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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

As previously established (Opening Br. 17-29), the Bank Secrecy Act "require[s]" regulated parties to "file reports," *not* report each account. 31 U.S.C. 5314(a). The Act draws a clear distinction between the substantive conduct ("filing reports") and its triggering condition ("maintain[ing] a relation"), which activates the reporting requirement. The only reference to "transaction[s]" or accounts appears in that *conditional* clause; there is no independent statutory duty to report each account.

Because the Act's single "require[ment]" is to "file reports," the Act's single violation is the *failure* to "file reports"—no matter how many accounts a person has or how many mistakes a person makes on that single form. Section 5314's text is clear: a party violates the provision, once, by not "keep[ing] records, fil[ing] reports, or keep[ing] records and fil[ing] reports"—whatever the reason for the failure. 31 U.S.C. 5314(a). The Fifth Circuit accordingly erred in holding that petitioner somehow violated the Act *272 separate times* by accidentally failing to file five annual forms.

In response, the government effectively concedes that "the penalty issue" turns on "the correct understanding of 'what constitutes a "violation" of section 5314.'" U.S. Br. 13 (quoting Pet. App. 14a). So it is fair to wonder why the government starts by focusing elsewhere, with oblique "presuppos[itions]" from subsidiary provisions found instead in 31 U.S.C. 5321(a). U.S. Br. 20. If the government's reading of Section 5314(a) made any sense, it would start with—Section 5314(a). It would not try to back into the proper reading of the operative section by

gleaning wishful inferences from side provisions (which it anyway misreads).

Because the Act's plain and ordinary meaning forecloses the government's position, 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. According to both the government and the Fifth Circuit below, Section 5314 imposes a "'statutory requirement to report each account.'" U.S. Br. 13 (quoting Pet. App. 18a-19a); see also, *e.g.*, *id.* at 19 ("Section 5314(a) directs the Secretary to impose reporting and record-keeping requirements that apply on a per-account basis * * * "); *id.* at 27 ("[t]he text of Section 5314(a) thus contemplates that the filer is required to 'report *each* qualifying transaction or relation with a foreign financial agency"); *id.* at 31 ("U.S. persons must report each qualifying foreign financial account").

Yet if there is a "statutory requirement to report each foreign financial account" (U.S. Br. 15), where is that requirement in the *actual statutory text*? The government never says. It cannot identify any statutory language directing parties to "report each account." Section 5314 instructs the Secretary to "require" parties to "keep records, file reports, or keep records and file reports." 31 U.S.C. 5314(a). It mentions accounts as the triggering condition for that substantive obligation ("when the resident, citizen, or person makes a transaction or maintains a relation"), but it does not say to "report each account." The two clauses are independent from each other and even separated by a comma. The government's contrary understanding requires dropping certain words from the statute, combining the two distinct clauses, adjusting the

grammar (including by erasing the comma), and adding other connective language.

Indeed, the government's theory best illustrates the type of language Congress *might* have used had it actually intended to require "persons [to] report each qualifying foreign financial account." U.S. Br. 31 (possible phrasing to match government's theory); contrast 31 U.S.C. 5314(a) (materially distinct phrasing: instructing 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 [qualifying] relation"). The government has no basis for asking this Court to rewrite the statute.

B. Next, the government makes much of the fact that Section 5314(a) "contemplates" that the "required" records and reports must have "account-specific" information. U.S. Br. 29. This confuses the substantive obligation ("filing reports") with the *content* of those reports. Even if the Secretary decides that parties have to list each account on the required report, the (singular) statutory directive remains *filing the report itself*. The failure to list each account (or any other required item) may be the *reason* the reporting requirement is violated, but each missing account does not constitute its own violation.

Indeed, the focus on reporting requirements (not reporting each account) is apparent from Section 5314(a)'s second sentence. After issuing the reporting requirement, the section continues to specify what "[t]he records and reports shall contain." 31 U.S.C. 5314(a). Congress focused on what to include *in the required report*—the obligation (as the plain text confirmed) was still "filing reports," not separately reporting each account. Contra U.S. Br. 26.

The government responds that this argument "wrongly conflates the statutory obligation to report each

foreign financial account with the Secretary's administrative decision to permit those separate reporting obligations to be consolidated in a single form." U.S. Br. 33; see also *id.* at 19 (same). This reads Section 5314(a) upside down. As the plain text shows, the only "obligation" (U.S. Br. 33) is to "file reports" (31 U.S.C. 5314(a)); that is the duty placed upon regulated parties. See 31 U.S.C. 5314(a); see also 31 U.S.C. 5311(1) (the Act's objective was to "require certain reports or records"). If the mandatory content of those "reports" includes listing all foreign accounts, then that requirement is violated wherever a party fails to *list all foreign accounts*—no matter how many accounts were left off. The result is binary: a party listing half its accounts and a party listing none of its accounts each violates the statutory "require[ment]," once, in the same way—by not doing what the party was instructed to do. But the (singular) violation remains the failure to "file [the] report[]" as the Secretary "require[d]." 31 U.S.C. 5314(a).

This again comports with ordinary experience and common sense. If a statute says to list all your seven accounts on a single form, no one normally thinks you complied with the law five times and violated it twice if you only list four of six accounts. The natural response is you violated the law *once*—by not listing all seven accounts as directed. Contrary to the government's contention, the statutory "require[ment]" is to *file the required report* ("keep records, file reports, or keep records and file reports"), whatever those reports entail.[1]

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[1] While the government (at Br.33-34) now tries to walk back its position on *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21 (1974), this Court's decision still refutes the Fifth Circuit's view that there is a freestanding statutory duty to report each account (*e.g.*, Pet. App.

C. As previously explained (Opening Br. 19-20 & n.12), the proper reading of Section 5314(a) today is reinforced by the Act's original text, which was modified and reenacted "'without substantive change'" in 1982 (see U.S. Br. 30; Opening Br. 20 n.12). That provision made especially clear that the Act's substantive focus was the reporting requirement, with the existence of a qualifying account serving as the mere triggering condition: it instructed the Secretary to "require" any person "*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." Pub. L. No. 91-508, Tit. II, Ch. 4, § 241(a), 84 Stat. 1124 (1970) (emphasis added).

Again, the substantive obligation was "to file reports"; it mentioned accounts ("maintains *any* relationship") only to delineate and activate the *class of persons* subject to the reporting requirement—as opposed to some standalone duty to report each account. See, *e.g.*, U.S. Br. 14 (admitting that Section 5314 "instructs the Secretary to impose record-keeping and reporting requirements").

In response, the government has no answer for this core language. Instead, the government opts for misdirection, faulting petitioner for supposedly "omit[ting]" "an enumerated list of account-specific information" from the "block quotation." Br. 30 n.6. Yet petitioner "omitted" that

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18a), while also underscoring the nature of the Secretary's role: it "authorize[s]" the Secretary "to prescribe by regulation certain record-keeping and reporting requirements." 416 U.S. at 26. It necessarily follows that one violates Section 5314(a) by violating those "reporting requirements." Again, no one normally says that a party violates a requirement to file a 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 completed on the form.

language—from the end of the quotation, not somewhere in the middle—*because it was irrelevant*. As petitioner explained, the Act did "describe[] the 'information,' 'form,' and 'detail' of those reports" (Opening Br. 20), but that merely establishes *the reports' content*. The important point was the only substantive obligation imposed by the plain text was "to file reports"—and thus the only possible violation (in the singular) would be a *failure* to file those reports. *Ibid.* (so establishing).

Moreover, the original version of the Act further eviscerates the government's overreading of the word "when" in the current version. See U.S. Br. 29-30 (suggesting that Section 5314(a)'s triggering condition actually confirms that separate per-account reports are required—because "when" means "at any and every time"). The fact that Congress replaced "who" with "when"—without intending any substantive change—shows that Congress already understood the conditional clause to be just that: a *conditional* clause triggering the substantive reporting requirement. The government offers no meaning of "who" (or even "when") that would somehow multiply each person's obligations under the statute or specify a duty to "report each account."

As previously explained (Opening Br. 20 n.13), Congress phrased the conditional language so that *any* qualifying account would trigger the statute; but a party has the same reporting requirements (filing an annual FBAR as the Secretary "require[s]") whether that party retains one qualifying account or dozens.[2]

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[2] For similar reasons, the government is simply wrong that a distinct reporting requirement is activated each time a party "maintains" a qualifying account. U.S. Br. 29-30. Both the original and modified version of the Act are phrased to ensure *any* qualifying account

D. According to the government, nothing in the statute precludes the Secretary from requiring separate reports for each account, and thus petitioner's reading would permit the Secretary to dictate the number of "violations" under the Act. See U.S. Br. 31-32 (a "person's liability for failing to report multiple accounts should [not] vary based on the Secretary's decision" to "permit[] multiple accounts to be reported on a single form"). This misunderstands petitioner's position and the Act's operation.

The entire question under Section 5314(a) is whether a party "filed reports" as "require[d]" by the Secretary. That question is binary: it focuses on satisfying the reporting requirements, whatever those requirements are. If the requirement is to file one report listing all accounts, a party violates that rule by failing to list all accounts on the form—but that party violates the rule *once*. If the requirement is instead to file a separate report for each account, a party violates that rule by failing to file each required report—but that party again violates the rule *once*. Each individual mistake may render a party's "reports" invalid, but those mistakes are not themselves *separate* violations; they simply explain the *single* overall failure to comply with the Secretary's complete directives.[3]

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triggers the statute—and the corresponding obligation to "keep records, file reports, or keep records and file reports." But nothing suggests this condition is re-activated with every new account—and the Secretary (who requires a *single* annual FBAR) obviously has not understood the Act any other way.

[3] This question anyhow is not presented by these facts. The Secretary requires a single annual form that lists all of a party's accounts. So the Court need not definitively resolve whether the same answer (a single violation for failing to properly follow the Secretary's real-world instructions) would apply to a hypothetical regulation requiring separate, independent reports for each separate qualifying account.

In any event, it is odd for the government to suggest that regulated parties are better off by *maximizing* their potential liability under a statute—and reading Section 5314(a) so that one violates federal law potentially *dozens* of times by failing to file a *single* form.[4]

In sum, the Act did not instruct the Secretary to require persons to "report each account"; it instructed the Secretary to require persons to "file reports." Any failure to follow the Secretary's instructions renders the report deficient and in violation of Section 5314(a); but consistent with the Act's plain text and common parlance, no one says that each misstep on an annual form is itself a separate and independent violation of federal law.

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

Because the government has no answer for the plain text of Section 5314(a) (the *actual* provision at issue), it instead attempts to back into an account-specific interpretation by teasing out certain implications from two neighboring provisions in Section 5321(a). This is far too thin a reed to support the government's unnatural and draconian construction.

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[4] The government says that "[p]etitioner concedes (Br. 21), however, that the statute imposes a duty to file a 'proper report,' and that a U.S. person is required to report each qualifying foreign financial account." Br. 28. Not exactly. Petitioner agrees that the statute imposes a duty to "file reports" as "require[d]" by the Secretary, whatever the contents of those reports. And petitioner agrees that a party violates that command if it fails to check off each box, accurately, as the Secretary requires. But petitioner does *not* agree that "the statute imposes * * * a 'duty to report each account.'" U.S. Br. 28 (quoting Opening Br. 19). Indeed, petitioner stated the opposite in the latter passage: "nothing in Section 5314 imposes an independent duty to report each account." Opening Br. 19.

The key question is the proper understanding of a "violation" of Section 5314(a), and the plain text of Section 5314(a) confirms that there is a *single* violation for failing to properly report all accounts on an annual FBAR—a construction that fits comfortably with Section 5321(a). In any event, the government misreads the side provisions in Section 5321(a), which (per the Dictionary Act) perfectly accommodate assigning Section 5314(a) its plain and ordinary meaning.

A. According to the government, Section 5321(a)(5)'s willful-penalty and reasonable-cause provisions both "necessarily use[] the term 'violation' in an account-specific way," and thus Section 5314 must also be separately "violated" for "each" account not properly reported. Br. 14-15; see also *id.* at 18-26. This is wrong. No one disputes that the term "violation" means the same thing in each of Section 5321's relevant provisions. But the government misunderstands the meaning of those provisions.

1. As petitioner already explained (Opening Br. 27), the Dictionary Act is indeed a full response to the government's theory. Under the Dictionary Act, "[i]n determining the meaning of any Act of Congress," courts should presume that "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; see, *e.g.*, *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1482 (2021).

Applying that presumption here, each side provision (willful-penalty and reasonable-cause) applies seamlessly once converted into the plural. Indeed, the same "rules" can "turn on the balance(s) of specific account(s)" (cf. U.S. Br. 19) without altering the meaning in any fashion whatsoever—and while avoiding a direct conflict with the natural reading of Section 5314.

Take the reasonable-cause defense. This provision reads and functions equally well by simply including the plural—asking whether "the balance(s) in the account(s)" were "properly reported." 31 U.S.C. 5321(a)(5)(B)(ii). The language thus hardly "presupposes" that a violation "relates to a *single*, specific account." U.S. Br. 20 (emphasis added). It may relate to "specific" accounts, but not inexorably to a "single" one.[5]

And take the willful-penalty provision. The provision again reads and functions equally well in the plural: the heightened penalty targets "the balance(s) in the account(s) at the time of the violation." 31 U.S.C. 5321(a)(5)(D)(ii). That provision, like the reasonable-cause defense, operates soundly where a violation involves multiple misreported accounts.[6]

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[5] The government contends that petitioner's "approach" would "leave the application of the reasonable-cause provision entirely unclear" where a party has multiple qualifying accounts. Br. 25. But there is nothing "unclear" about it: "the balance(s) in the account(s)" must be "properly reported." 31 U.S.C. 5321(a)(5)(B)(ii)(II). Any failure to report *any* account bars the reasonable-cause defense: "Even if this hypothetical individual had reasonable cause not to disclose one or more accounts, absent reasonable cause for failing to report ALL accounts, the individual would still have violated Section 5314." *United States* v. *Kaufman*, No. 18-787, 2021 WL 83478, at *9 (D. Conn. Jan. 11, 2021) ("In that case, the individual would be liable for civil monetary penalties because he does not have a complete reasonable cause defense as to every account that needed to be reported on the single form."); see also, *e.g.*, *United States* v. *Giraldi*, No. 20-2830, 2021 WL 1016215, at *7 (D.N.J. Mar. 16, 2021).

[6] The government says Section 5321(a)(5) "requires determining the 'balance in *the* account,'" and petitioner "has no explanation of that statutory language." Br. 25 (quoting 31 U.S.C. 5321(a)(5)(D)(ii)). The explanation is not difficult: just as the provision can require determining the "balance in the account" when one missing account ex-

2. The government attempts to brush aside the Dictionary Act, but its explanation is entirely circular. According to the government, the Act does not apply when "the context indicates otherwise" (1 U.S.C. 1), and the government says the context here indicates otherwise because these two provisions "necessarily contemplate that each violation corresponds one-to-one with a specific account and account balance." U.S. Br. 26. Yet it is entirely possible for a violation involving multiple accounts *also* to correspond with specific accounts and account balances. The government's "one-to-one" theory is rooted in "words importing the singular," but under the Act, those "words" are properly read to also "include and apply to several * * * things." 1 U.S.C. 1.

Put simply: the government's position appears premised on the fact that the statutory language *appears in the singular*—which is *always* true where the Dictionary Act might apply. Because the same language applies seamlessly when read in the plural—were the balances in the accounts properly reported?—this is a routine case for the Dictionary Act's application.

The government also notes parenthetically that this Court has "rare[ly]" had occasion to apply the Dictionary Act's "rule allowing singular words to include plurals." U.S. Br. 26 (quoting *United States* v. *Hayes*, 555 U.S. 415, 422 n.5 (2009)). But the Dictionary Act is a federal law entitled to the same force and effect as any other provision in the U.S. Code. It textually sets the default for "deter-

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ists, it can also determine the "balance(s) in the account(s)" when multiple missing accounts exist. The "words importing the singular include and apply to [the] several," and nothing in the Act's context "indicates" otherwise—indeed, the surrounding provisions (especially Section 5314) confirm this is the only natural reading of all the provisions.

mining the meaning of any Act of Congress," with an express exception only where "the context indicates otherwise." 1 U.S.C. 1. This Court (and Members of this Court) have previously applied the Act unless circumstances foreclose it. See, *e.g.*, *Hayes*, 555 U.S. at 430 (Roberts, C.J., dissenting); *Rowland* v. *California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 212 (1993) (Kennedy, J., dissenting). There is no reason to discount its applicability here.[7]

B. The government's reading suffers from another textual flaw: As previously established, the willful-penalty provision does not say a "violation" *is* "a failure to report * * * an account" (contra Pet. App. 20a-21a); it says a violation "*involv[es]* a failure to report" an account. 31 U.S.C. 5321(a)(5)(D)(ii). See Opening Br. 27. Because a single violation could "involve" failing to report multiple accounts, this language supports petitioner's position.

Rather than directly confront that specific language, the government instead changes the subject—focusing on "the rest of Subparagraph (D)" and the government's same argument that the singular terms in the provision suggest "that the 'violation' corresponds to a particular account with a particular balance." U.S. Br. 24. But this reading fails for the same reasons above: once converted into the plural, the same "violation' could also "correspond[]" to "particular account[s]" with "particular balance[s]." The government simply neglects to apply the Dictionary Act to permit the terms to operate in the plural.

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[7] In the past, the government has been less reluctant to read the Act to mean what it plainly says: "The use of the singular does not alter the provision's meaning, because, as a general matter, 'words importing the singular include and apply to several persons, parties, or things.'" Resp. Br., *Mellouli* v. *Holder*, No. 13-1034, at 18 (filed Nov. 20, 2014).

C. Petitioner also explained that Congress's use of account-specific terms elsewhere in Section 5321(a) stands out given Congress's choice not to use account-specific language in defining Section 5321(a)(5)(A)'s baseline violation: "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." Opening Br. 26; see also, *e.g.*, *United States* v. *Boyd*, 991 F.3d 1077, 1084 (9th Cir. 2021). If Congress wanted to separately punish each missing account—a decision carrying extraordinary penalties—it necessarily would have directly said the punishment applies to each missing account. It would not have legislated such an unexpected result in such an indirect and opaque fashion.

The government's response is mostly non-responsive. U.S. Br. 23-24. The government first says that "the term 'violation' must bear a consistent account-specific meaning throughout Section 5321(a)(5) to make the statute coherent." *Id.* at 24. But petitioner has already demonstrated that "violation" in Section 5321(a)(5) can also support a consistent *non-account-specific* meaning. Coherency runs in both directions. The government next suggests that the "omission" of account-specific language simply reflects a "policy" decision about appropriate penalties. *Ibid.* But the point is that Congress does not usually smuggle in such vast changes without speaking more clearly—which it failed to do here. If Congress wanted to expose innocent parties to potentially *dozens* of violations of federal law for a single non-willful mistake, Congress presumably would have said so expressly.

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

A. As petitioner explained (Opening Br. 28-29), both the Secretary's implementing regulations and Section 5314 focus on filing reports, not reporting each account. Opening Br. 28-29. This is supported by multiple features of those regulations: they require only a single form on an annual basis; the filing obligation is activated by the aggregate account balance, not the number of accounts; the regulations do not even require *listing each account* for filers with 25 or more accounts; and outside the FBAR, there is no freestanding duty to "report" each account. See *id.* at 28 (citing regulations).

In sum, there is something "incongruous" about thinking Section 5314 applies "on a per account basis" when the core regulations are "completely independent of how many accounts an individual maintains." *United States* v. *Giraldi*, No. 20-2830, 2021 WL 1016215, at *7 (D.N.J. Mar. 16, 2021); see also, *e.g.*, *United States* v. *Kaufman*, No. 18-787, 2021 WL 83478, at *9 (D. Conn. Jan. 11, 2021) ("Significantly, the trigger for the reporting obligation is the aggregate account balance in a person's foreign financial account(s). It does not matter 'whether an individual maintains 5, 25, or 500 accounts,' and '[p]ersons having a financial interest in 25 or more financial accounts need only note that fact on the form.'") (quoting the district court in this case).

B. The government resists this contention, but its arguments lack merit.

First, while the regulations "requir[e] accurate reports about each foreign financial account," that merely describes the *substance* of the reporting requirement—which is satisfied (as the government agrees) by an "annual form on which those reports must be made." Br. 41.

Second, the government is correct that the Secretary can request filers subject to the 25+ account rule to provide information about their accounts. Br. 42. But the more fundamental point is that the Secretary does not automatically request that information, and it is not required upfront—factors undercutting the government's view of the scheme as requiring parties to "report each account."

Third, the government says that the aggregate-account threshold is "consistent" with the Act's "account-specific focus" because filers must "take account of *each* of the filer's foreign financial accounts in determining whether the $10,000 threshold is met." Br. 42-43. But the fact that the rules turn on account *balance*—rather than *number of accounts*—casts doubt on the Act's supposed "account-specific focus." Cf., *e.g.*, *Giraldi*, 2021 WL 1016215, at *8 (rejecting the government's argument: "because the number of accounts has no bearing on whether an individual must file an FBAR form, it defies logic to impose penalties on a per account basis without clear Congressional intent to the contrary").

In the end, the specific regulatory contours are relatively insignificant as only a *statutory* violation is relevant under Section 5321(a)(5)(A). But the non-account-specific focus of parts of the regulatory scheme suggest that Section 5314 is focused on what it says: filing reports, not reporting accounts.

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

The history and purpose confirm that Congress authorized a maximum $10,000 penalty for a non-willful FBAR violation (Opening Br. 29-32), and the government's contrary contention is meritless.

1. According to the government, when Congress added a penalty for non-willful violations in 2004, "Congress

used the same term ('violation') that already had an account-specific connotation in the 1986 amendments, and Congress presumably meant to incorporate that same meaning." Br. 16; see also *id.* at 35-37. Not exactly.

This argument is predicated directly on the government's (mis)reading of the statutory scheme. If the government's textual argument is right, its "historical" argument is right. If its textual argument is wrong, its "historical" argument is wrong. This accordingly does nothing to advance the government's position. The government has no basis for simply presuming that anyone in 2004 (much less a majority of Congress) understood the statute to operate in the extreme way the government suggests today.

Quite the contrary, the most natural reading of the 2004 amendment is that it imposes a strict $10,000 cap—as the maximum any potential violator might face. There is no indication that Congress "intend[ed] for the statutory cap * * * to be determined on a per account basis." *United States* v. *Kaufman*, No. 18-787, 2021 WL 83478, at *9 (D. Conn. Jan. 11, 2021). Nor is it likely that Congress, without express acknowledgement, would go from no penalties to predictably *millions* in penalties overnight.

2. The government faults petitioner's reading as "wrongly treat[ing] failing to report dozens of accounts in a single year the same way as failing to report just one." Br. 17. But this ignores the *substantive obligation* at issue. If the Act requires parties to file reports, the relevant conduct is the failure to file the required report. A party with dozens of accounts and a party with one account each failed in the same way to perform the same mandatory obligation under the statute (and each party is thus similarly culpable).

The government likewise says the failure to list each account "deprive[s]" the government "of timely infor-

mation about that particular account." Br. 38. Yet the government does not explain how its drastic penalty scheme will avoid those problems for *non-willful actors*—who by definition are not "depriving" the government of information on purpose. Anyone unaware of the FBAR requirement will also be unaware of the FBAR penalties—and Congress evidently felt that a $10,000 cudgel was a sufficient hit for those making unintentional mistakes.[8]

3. The government says its "per-account approach" gives the agency "appropriate leeway to assess penalties." Br. 17; see also *id.* at 39 (touting that its construction of the Act "gives the Secretary leeway to calibrate civil penalties").

This is not appropriate "leeway"—this is seeking boundless discretion to unilaterally decide punishments ranging on a massive scale involving *multiples* of the statutory baseline. Here, for example, the government was apparently choosing between $2.72 million and $50,000 (1.8% of the government's view of the maximum amount). Limiting that kind of discretion (and its predictable misuse) is a feature, not a bug.

Nor does the government acknowledge the examples of agency abuse, including in seeking full penalties on accounts with de minimis balances. See, *e.g.*, Am. Coll. of Tax Counsel Amicus Br. 15 & n.22. Indeed, this very case serves as a useful illustration. According to the government, "[t]he IRS chose to impose [maximum $2.72 million]

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[8] The government says that petitioner "provides no support" for the common-sense proposition that those unaware of the Act's reporting requirements will also be unaware of the Act's punishment. U.S. Br. 39. Yet petitioner did indeed provide support for that proposition (Opening Br. 8), and the topside amici did as well (see, *e.g.*, Ctr. For Taxpayer Rights Amicus Br. 20-27)—based on their own broad experience dealing with communities who are prone to such inadvertent mistakes.

penalties based on a number of factors detailed in a revenue agent's report." Br. 9. Yet as petitioner established below, that report was riddled with flaws—which shows precisely why deferring to the IRS's discretion is so dangerous. The "agent's report" was the IRS's initial take—before petitioner had a chance to refute the agent's one-sided allegations.[9]

4. Petitioner showed (Opening Br. 30-31) that his reading of the law has been repeated by a variety of government entities over time. In response, the government says these statements are irrelevant because "the agencies did not go on to address the distinct question" whether "additional penalties may be imposed when a person fails to report multiple accounts." Br. 43. Fair enough, but this misses the point. The fact that multiple agencies casually (or otherwise) read the statute as reflecting petitioner's common-sense interpretation underscores the extraordinary nature of the government's unusual reading.

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

As petitioner and the topside amici demonstrated, multiple legal principles require construing the Act to

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[9] The government asserts that "[t]he IRS later determined that, in several instances, even the information that petitioner provided on his 'corrected' FBARs and accompanying account schedule was not complete and accurate because *petitioner failed to disclose the existence of a foreign account held for his benefit by a nominee*." Br. 9 (emphasis added). In other words, despite petitioner *volunteering* specific account information for over *fifty* accounts (which he was not required to do), he should be additionally punished because he allegedly failed to include a *single* borderline account (in an area that is notoriously difficult to understand). This casts more doubt on the agency's judgment and fairness than it does on petitioner's integrity or good-faith effort to comply.

avoid harsher penalties where Congress has failed to speak clearly. Opening Br. 33-34 & n.15; U.S. Chamber Amicus Br. 4-23; NFIB Amicus Br. 7-13. The government's response is underwhelming.[10]

1. The government initially had no response to petitioner's contention that strict-construction principles apply to all penal statutes, including civil ones. Section 5321 itself describes the punishment as a "civil monetary *penalty*." 31 U.S.C. 5321(a)(5)(A) (emphasis added). As this Court has confirmed, "[t]he law is settled 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.'" *Comm'r* v. *Acker*, 361 U.S. 87, 91 (1959) (citations omitted); see also *Wooden* v. *United States*, 142 S. Ct. 1063, 1082-1083 & n.1 (2022) (Gorsuch, J., concurring). That principle squarely applies here.

The government separately argued that "the rule of lenity fails" because "Section 5321(a)(5) authorizes civil money penalties, not criminal sanctions." Br. 45. But while the government is correct that Section 5321(a)(5) does not authorize criminal penalties, it ignored petitioner's argument that the term "violation" is "a constant in the Act's civil and criminal context," which includes 31 U.S.C. 5322(a): "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." Opening Br. 33 n.15.

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[10] The government argues that any pro-taxpayer canon is "inapplicable here because Section 5321(a)(5) is not * * * a [tax] statute." Br. 44-45. The Act may not strictly be a tax statute, but the FBAR penalties have an obvious connection to taxes and tax-related enforcement by the IRS. Nevertheless, it is likely unnecessary for the Court to resolve this point because at least two other strict-construction principles apply and point in the same direction—against the government's draconian reading of the statute.

The government cannot explain (and has not even tried to explain) how its view of a "violation" would differ between those two sections.

2. Either principle independently dooms the government's position. The government's reading of the Act threatens to skyrocket potential punishment for non-willful conduct—all based on the government's atextual understanding of a "violation" of Section 5314(a). Under the government's interpretation, parties face *dozens* of statutory violations for unintentionally failing to submit a single annual form—whereas petitioner's competing interpretation properly caps punishment to what Congress facially wrote in the statute: a $10,000 maximum penalty. The difference in exposure in this case weighs in at a factor of *fifty* ($2.72 million versus $50,000).

The difference is even starker on the criminal side. Under Section 5322(a), any person "willfully violating" the Act "shall be fined not more than $250,000, or imprisoned for not more than five years, or both." 31 U.S.C. 5322(a). If the government is correct that each missing account on a *single* report is its own violation, willful violators face astronomical punishments. Take a defendant with the same core facts as petitioner: had he engaged in willful misconduct, the government's understanding (272 violations) would subject petitioner to 1,360 years in prison and a $68 million fine—rather than 25 years in prison and a $1.25 million fine—for not filing five annual forms (unaccompanied by any other criminal or substantive violations).

Again, this is a paradigmatic case for the rule of lenity. It is astounding to believe that Congress intended to authorize hundreds or thousands of years in jail, coupled with 8- and 9-figure fines, for an individual's reporting violation. If Congress wishes to test the limits of the Eighth Amendment, it should at least legislate clearly.

3. The government argues in response that the statute is not sufficiently ambiguous, and "the existence of judicial disagreement [cannot] establish[] an ambiguity that must be resolved in [petitioner's] favor." Br. 45.

Yet this scheme is not merely ambiguous because other courts have rejected the government's theory as unreasonable—although they have. *E.g.*, *Boyd*, 991 F.3d at 1086. This scheme is ultimately (at least) ambiguous because the text, context, history, and purpose strongly favor petitioner's reading, and the government's lead counter-argument is a mistaken attempt to tease indirect inferences out of subsidiary provisions that (in any event) stand at odds with the government's aggressive interpretation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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