No. 22-598

In the Supreme Court of the United States

ARTHUR BEDROSIAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
DAVID A. HUBBERT
Deputy Assistant Attorney General
FRANCESCA UGOLINI
MICHAEL J. HAUNGS
PAUL A. ALLULIS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under 31 U.S.C. 5314 and its implementing regulations, a U.S. person who maintains an account with a foreign financial agency is required to report specified information about the account to the federal government each year. 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." 31 U.S.C. 5321(a)(5)(A). The maximum amount of the civil penalty that the Secretary may impose is generally $10,000. 31 U.S.C. 5321(a)(5)(B)(i). The maximum penalty increases, however, "[i]n the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(C). For a willful violation involving a failure to report the existence of an account, the maximum penalty is $100,000 or 50% of the balance in the account at the time of the violation, whichever is greater. 31 U.S.C. 5321(a)(5)(C)(i) and (D)(ii). The question presented is as follows:

Whether the court of appeals correctly affirmed the district court's finding that, in failing to report a Swiss bank account in which he held the equivalent of millions of U.S. dollars, petitioner willfully violated Section 5314 because he acted with objectively reckless disregard for his reporting obligations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 22-598

ARTHUR BEDROSIAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 42 F.4th 174. An earlier opinion of the court (Pet. App. 44-61) is reported at 912 F.3d 144. The opinion of the district court (Pet. App. 29-43) is reported at 505 F. Supp. 3d 502. The court's order (Pet. App. 23-28) regarding the amount of the judgment is unreported. An earlier opinion of the court (Pet. App. 62-81) is not published in the Federal Supplement but is available at 2017 WL 4946433.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2022. A petition for rehearing was denied on September 27, 2022 (Pet. App. 21-22). The petition for a writ of certiorari was filed on December 27, 2022

(Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, after "extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability," *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 26 (1974), Congress enacted what is commonly known as the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114. The Act was designed to reduce financial crime, tax evasion, and other violations of U.S. law by requiring "the maintenance of records, and the making of certain reports, which 'have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.'" *California Bankers Ass'n*, 416 U.S. at 26 (citations omitted).

This case concerns provisions in the Bank Secrecy Act and its implementing regulations that "require certain individuals to file annual reports with the federal government about their foreign bank accounts." *Bittner* v. *United States*, 143 S. Ct. 713, 717 (2023). In Title II of the Act, as amended, Congress directed the Secretary of the Treasury to promulgate regulations imposing record-keeping and reporting requirements on any U.S. person who "makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. 5314(a); see Bank Secrecy Act § 241(a), 84 Stat. 1124. Congress specified that the records and reports "shall contain" certain categories of information "in the way and to the extent the Secretary prescribes." 31 U.S.C. 5314(a).

The Secretary's regulations require 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," to "report such relationship * * * for each year in which such relationship exists." 31 C.F.R. 1010.350(a).[1] The reporting requirements apply when a U.S. person has a financial interest in, or signatory or other authority over, one or more foreign financial accounts, see 31 C.F.R. 1010.350(a), (e), and (f), with an aggregate balance that "exceed[ed] $10,000 * * * during the previous calendar year," 31 C.F.R. 1010.306(c). Cf. 31 C.F.R. 103.24(a), 103.27(c) (2010) (analogous requirements in prior regulations). The Secretary's regulations further require each U.S. person who is obligated to report a foreign financial account to "provide such information as shall be specified in a reporting form" that has been prescribed by the Secretary under Section 5314. 31 C.F.R. 1010.350(a).

During the 2007 and 2008 reporting periods relevant to this case, the prescribed form was Treasury Department Form 90-22.1, Report of Foreign Bank and Financial Accounts, which is widely "known as [the] 'FBAR.'" *Bittner*, 143 S. Ct. at 718. At that time, the FBAR was required to be filed with the Internal Revenue Service (IRS) by June 30 to report foreign financial accounts maintained in the prior calendar year. See 31 C.F.R. 103.24(a), 103.27(c) (2010). As this Court has explained, the FBAR filing requirements serve important law-enforcement functions, including "help[ing] the government 'trace funds' that may be used for 'illicit purposes' and identify[ing] 'unreported income' that may be sub-

[1] The relevant regulations were renumbered, effective March 1, 2011, as part of a broader reorganization. See 75 Fed. Reg. 65,806, 65,806 (Oct. 26, 2010). The foreign-account reporting requirements were previously found at 31 C.F.R. Part 103, Subpart B (2010).

ject to taxation separately under the terms of the Internal Revenue Code." *Bittner*, 143 S. Ct. at 718 (citation omitted).

Congress authorized the Secretary to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of Section 5314." 31 U.S.C. 5321(a)(5)(A). In general, the amount of any such civil penalty "shall not exceed $10,000" for each failure to file a legally compliant FBAR. 31 U.S.C. 5321(a)(5)(B)(i); see *Bittner*, 143 S. Ct. at 725. The statute also provides a reasonable-cause exception, under which the Secretary may not impose a penalty "with respect to any violation if * * * such violation was due to reasonable cause" and "the amount of the transaction or the balance in the account * * * was property reported." 31 U.S.C. 5321(a)(5)(B)(ii).

The statute authorizes the Secretary to assess a greater maximum civil penalty "[i]n the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(C). Specifically, for a willful violation, the maximum penalty is the greater of either $100,000 or 50% of "the amount determined under subparagraph (D)." 31 U.S.C. 5321(a)(5)(C)(i). Subparagraph (D) in turn states that, "in the case of a violation involving a failure to report the existence of an account," the amount determined under that provision is "the balance in the account at the time of the violation." 31 U.S.C. 5321(a)(5)(D)(ii). The reasonable-cause exception does not apply in the case of a willful violation. 31 U.S.C. 5321(a)(5)(C)(ii).[2]

---

[2] For violations occurring after November 2, 2015, the maximum civil penalty amounts have been periodically updated to account for inflation. See 88 Fed. Reg. 3311, 3312 & n.1 (Jan. 19, 2023).

2. Petitioner is a U.S. citizen and a "successful businessman who has spent his career in the pharmaceutical industry." Pet. App. 63. In the 1970s, his work as a pharmaceutical salesman required him to travel frequently to Europe, and he opened a savings account with a bank in Switzerland that was later acquired by Union Bank of Switzerland (UBS). *Ibid.* Although petitioner opened the account to facilitate his business travel, over time he began to use it differently. *Ibid.* In the 1980s, petitioner converted the savings account into an account through which he could also make investments. Gov't C.A. Br. 6. Petitioner came to hold the equivalent of more than $2 million in his UBS account. Pet. App. 65. Petitioner did not file an FBAR to report the existence of that account at any time until 2010, as described below.

In the 1990s, petitioner read in the *Wall Street Journal* that the federal government was attempting to trace mail entering the United States from Swiss banks. Pet. App. 32-33. The article prompted petitioner to tell his long-time accountant about his UBS account. C.A. J.A. A96-A97. Petitioner's accountant told him that he had been "breaking the law for 20 years" by failing to disclose the existence of the UBS account on his individual income tax returns. *Id.* at A98. For decades, individuals have been required to answer questions on their income tax returns regarding whether they hold any foreign financial accounts, with instructions to consult the FBAR filing requirements for more information. See, *e.g.*, 42 Fed. Reg. 63,774, 63,774 (Dec. 20, 1977). U.S. citizens are also generally required to pay U.S. taxes on income they earn outside the United States. 26 C.F.R. 1.1-1(b).

According to petitioner, his accountant advised him that he could not "'unbreak the law'" and that, as long as he did not need to repatriate the funds in his UBS account, "his estate could deal with" the problem after his death. Pet. App. 64 (citation omitted). At that time, petitioner took no steps to remedy his failure to report the existence of his UBS account on his tax returns, his failure to pay any associated income taxes, or his failure to file an FBAR. Petitioner did, however, instruct UBS not to send him any further mail. *Id.* at 33.

In 2005, petitioner converted his UBS account into a "managed" account—*i.e.*, an account in which UBS actively managed investments on his behalf. C.A. J.A. A89-A90. Petitioner also accepted an offer from the bank for a loan of 750,000 Swiss francs, which the bank then invested for him. *Ibid.* In connection with those transactions, petitioner opened a second account at UBS, also in Switzerland. Pet. App. 64. By 2007, his main account held the equivalent of approximately $2.3 million, while his second, newly opened account held the equivalent of approximately $240,000. Gov't C.A. Br. 9.

Petitioner's long-time accountant died in 2007, and petitioner retained a new accountant. Pet. App. 64. The new accountant prepared petitioner's individual income tax return for the 2007 tax year, which was filed in 2008. *Id.* at 64-65. On that return, petitioner "for the first time" disclosed that he held a financial interest in one or more Swiss bank accounts. *Id.* at 65. Petitioner also filed an FBAR for the first time, prepared by the same new accountant. *Ibid.* On the FBAR, petitioner reported the existence of the smaller UBS account that he had opened in 2005, but not the main account in which he held the large majority of his assets. *Ibid.* Petitioner signed the FBAR on October 14, 2008. C.A. J.A. A267.

Petitioner's decision to disclose one of his two Swiss bank accounts coincided with a large-scale investigation by U.S. authorities into UBS's role in helping U.S. taxpayers evade U.S. taxes. Gov't C.A. Br. 9. In 2008, a federal district court authorized the enforcement of a "John Doe" summons to UBS for certain account records of U.S. clients suspected of tax fraud. *Ibid.* UBS subsequently informed petitioner that he would need to close his accounts at the bank within 60 days. *Ibid.*; see Pet. App. 64. On November 14, 2008, petitioner sent a letter to UBS directing the bank to close his main account and to transfer the assets in the account to a different Swiss bank, Hyposwiss Private Bank. C.A. J.A. A258. On December 2, 2008, petitioner sent a second letter to UBS directing the bank to close his newer, smaller account and to transfer the assets in the account to a bank in the United States. *Id.* at A483.

In 2009, petitioner was advised by counsel to file amended tax returns going back to 2004 in order to correct his prior failures to report and pay taxes on income from his Swiss bank accounts. Pet. App. 66. After receiving that advice, petitioner nonetheless filed an FBAR in October 2009, for the 2008 reporting period, that again reported only the existence of his smaller account at UBS. Gov't C.A. Br. 12. On that FBAR, petitioner did not disclose his main UBS account, nor did he disclose the new Hyposwiss account into which he had transferred the assets from his main UBS account. *Ibid.* Petitioner did not report his main UBS account to the IRS until approximately a year later, in 2010, when he filed amended FBARs for 2007 and 2008 (along with FBARs for 2003 to 2006). *Id.* at 12-13.

In 2015, the IRS assessed a civil penalty against petitioner for his violation of Section 5314 with respect to

his main UBS account. C.A. J.A. A374-A376. Although petitioner had failed to report that account in multiple years within the limitations period, the IRS assessed only a single penalty covering the 2007 reporting period—the period for which petitioner had filed an FBAR in October 2008, reporting only his newer, smaller UBS account. Gov't C.A. Br. 14; see pp. 6-7, *supra*. The IRS determined that petitioner's violation was willful, and the agency assessed the maximum available penalty of 50% of the account balance at the time of the violation, or $979,589.17. Pet. App. 4.

3. Petitioner paid a small portion of the civil penalty assessed against him and then brought this suit in the Eastern District of Pennsylvania under the so-called Little Tucker Act, 28 U.S.C. 1346(a)(2), to obtain judicial review of the assessment. Pet. App. 50. The government counterclaimed for the unpaid amount of the assessment, along with associated interest and late-payment penalties. *Id.* at 49.

The case proceeded to a bench trial, after which the district court ruled for petitioner. Pet. App. 62-81. The court observed that the "key question" in the case was whether petitioner's violation in failing to report his main UBS account on the FBAR that he filed in 2008 was "willful." *Id.* at 67. The court found that petitioner's violation was not willful, stating that petitioner lacked "the requisite voluntary or intentional state of mind" for a finding of willfulness. *Id.* at 74.

The government appealed, and the court of appeals unanimously reversed and remanded. Pet. App. 44-61. The court determined that "the usual civil standard of willfulness applies for civil penalties under the FBAR statute." *Id.* at 58. Under that standard, a person "will-

fully" violates the foreign-account reporting requirements imposed under Section 5314 when the person "either knowingly or recklessly fails" to comply with those requirements. *Ibid.* (citation omitted). The court further determined that "a person commits a reckless violation of the FBAR statute by engaging in conduct that violates 'an objective standard,'" *id.* at 59 (quoting *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 68 (2007))—*i.e.*, where the person's violation is objectively reckless because it involves "an unjustifiably high risk of harm that is either known or so obvious that it should be known," *ibid.* (quoting *Safeco*, 551 U.S. at 68). Drawing on prior tax cases, the court observed that a person recklessly fails to comply with an IRS filing requirement at least when the person "clearly ought to have known" that "there was a grave risk that the filing requirement was not being met" and the person "was in a position to find out for certain very easily." *Ibid.* (brackets and citation omitted).

The court of appeals noted that its construction of the willfulness standard was "in line with other courts that have addressed civil FBAR penalties." Pet. App. 59. The district court itself had recited a similar standard. See *id.* at 70-71. But the district court's opinion as a whole left the court of appeals "unsure" whether the district court had correctly construed the willfulness standard. *Id.* at 61. The court of appeals therefore remanded for further consideration. *Ibid.*

4. On remand, the district court found that petitioner's violation of Section 5314 was willful and entered judgment for the government. Pet. App. 29-43. The court stated that its "prior analysis" had wrongly focused "almost entirely on [petitioner's] subjective

intent," and that the court had not "adequately consider[ed] whether the evidence warranted a conclusion, from an objective point of view," that petitioner had acted recklessly in failing to report his main UBS account for the 2007 reporting period. *Id.* at 34. Petitioner had asserted in the litigation that he was unaware that he held two accounts at UBS, rather than just one, when he filed his 2007 FBAR disclosing the existence only of his smaller, newer account. After a "further review of the evidence," however, the court found that "[s]hortly after filing the 2007 FBAR," petitioner had sent two separate letters to UBS to direct the closure of the two separate accounts, and that petitioner had moved the funds from his main account to another Swiss bank account. *Id.* at 32. As further evidence of willfulness, the court also noted that petitioner had directed UBS to hold his mail to "prevent correspondence from the foreign bank being tracked by the IRS." *Id.* at 33.

In view of the record as a whole, the district court determined that petitioner's "actions were willful because he recklessly disregarded the risk that his FBAR was inaccurate." Pet. App. 40. The court emphasized that petitioner "knew about the FBAR requirement because his prior accountant told him about it," *id.* at 41; that petitioner's main UBS account held assets valued at around $2 million that "were not easily overlooked," *ibid.*; and that, even if petitioner did not know that he had two accounts at UBS rather than one, the inaccurate account balance listed on his 2007 FBAR "should have prompted him to investigate further," *id.* at 42.

After additional briefing and argument, the district court entered judgment for the United States for the amount of the unpaid penalty, plus interest and late-payment penalties. Pet. App. 23-28.

5. The court of appeals affirmed. Pet. App. 1-20. As relevant here, the court held that the district court "properly determined [that petitioner] acted willfully by failing to disclose his second Swiss bank account on the FBAR" that he filed in 2008. *Id.* at 10. The court of appeals described the district court's analysis on remand as "thorough," "well-reasoned," and "grounded in credible evidence." *Id.* at 8. Like the district court, the court of appeals was unpersuaded by petitioner's theory that he was at most negligent in supposedly forgetting that he "had two accounts" at UBS. *Id.* at 10. The court of appeals noted that petitioner had "checked a box on the FBAR reflecting there was less than $1 million in his account," but he acknowledged at trial that he "knew his main account had 'over a million dollars in it.'" *Ibid.* (citation omitted). The account-balance discrepancy "should have prompted him to investigate," which he "could have done easily." *Ibid.* (citation omitted). The court also emphasized that petitioner "was warned by his accountant that he was breaking the law by not disclosing his [UBS] accounts to the Government, yet he made no change." *Ibid.*

Petitioner had urged the court of appeals to revisit its prior holding that reckless conduct can satisfy Section 5321(a)(5)'s willfulness standard. Pet. App. 11. The court declined to do so on law-of-the-case grounds. *Ibid.* The court also observed that petitioner had failed to identify any conflict between the court's prior decision and any other "on-point binding precedent." *Ibid.*

The court of appeals denied rehearing without any noted dissent. Pet. App. 21-22.

ARGUMENT

The Bank Secrecy Act directs the Secretary of the Treasury to impose reporting requirements for U.S.

persons who maintain bank accounts at foreign financial institutions. 31 U.S.C. 5314. The Act authorizes the Secretary to assess a civil money penalty "on any person who violates * * * section 5314," and the maximum amount of the penalty increases "[i]n the case of any person willfully violating * * * section 5314." 31 U.S.C. 5321(a)(5)(A) and (C). Petitioner contends (Pet. 16-26) that the court of appeals erred in construing the term "willfully" in Section 5321(a)(5)(C) to include acting in an objectively reckless manner. That contention does not warrant this Court's review. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. This Court has recently denied petitions for writs of certiorari seeking review of similar questions. See *Rum* v. *United States*, 142 S. Ct. 591 (2021) (No. 21-589); *Kimble* v. *United States*, 142 S. Ct. 98 (2021) (No. 20-1697). The same course is warranted here. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that, for purposes of imposing civil money penalties under Section 5321(a)(5) for willful violations of Section 5314, "willfulness includes not only knowing, but reckless, conduct," and that recklessness can be measured using "an objective standard." Pet. App. 5. The court also correctly affirmed the district court's "thorough and well-reasoned" finding that petitioner acted in an objectively reckless manner when he failed to report his main UBS account on the FBAR that he filed in 2008. *Id.* at 8.

a. The Bank Secrecy Act authorizes the Secretary to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(A). Section 5314, in turn, directs the Secretary to adopt regulations to require

U.S. persons to report financial accounts that they maintain abroad, and the Secretary's implementing regulations require those reports to be made on an annual form known as the FBAR. See 31 U.S.C. 5314(a); 31 C.F.R. 1010.350(a); see also *Bittner* v. *United States*, 143 S. Ct. 713, 718 (2023). In general, the amount of the civil penalty imposed by the Secretary "shall not exceed $10,000" per violation. 31 U.S.C. 5321(a)(5)(B)(i). But the maximum civil penalty increases "[i]n the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(C). For a willful violation "involving a failure to report the existence of an account," the maximum amount of the civil penalty that may be imposed by the Secretary rises from $10,000 to the greater of $100,000 or 50% of the balance in the account at the time of the violation. 31 U.S.C. 5321(a)(5)(D)(ii); see 31 U.S.C. 5321(a)(5)(C)(i).

The court of appeals correctly determined that a person acts willfully for purposes of Section 5321(a)(5)(C) if the person "either knowingly or recklessly" violates the foreign-account-reporting obligations imposed under Section 5314. Pet. App. 58. The court described that formulation as "the usual civil standard of willfulness," *ibid.*, as distinct from the greater showing required for a finding of willfulness in the criminal context. The court also correctly concluded that recklessness for these purposes can be measured by an "objective standard." *Id.* at 59 (quoting *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 68 (2007)). Thus, a person willfully violates Section 5314 for these purposes when the person's failure to properly report a foreign bank account entails "an unjustifiably high risk of harm that is either

known or so obvious that it should be known." *Ibid.* (quoting *Safeco*, 551 U.S. at 68).

The court of appeals drew that standard directly from this Court's precedent, particularly *Safeco*. See Pet. App. 58-59. In *Safeco*, this Court addressed a willfulness standard for civil liability under the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* FCRA requires any person who takes "adverse action" against a consumer "based * * * on any information contained in a consumer [credit] report" to provide notice to the affected consumer. 15 U.S.C. 1681m(a). The statute permits a consumer to bring suit to recover actual damages for negligent violations. 15 U.S.C. 1681*o*(a). But for "willful[]" violations, FCRA permits a consumer to seek either actual damages or statutory damages of up to $1000, plus "such amount of punitive damages as the court may allow." 15 U.S.C. 1681n(a)(1)(A) and (2).

This Court held in *Safeco* that a person "willfully" fails to comply with FCRA if the person acts knowingly or with "reckless disregard of statutory duty." 551 U.S. at 57. The Court observed that the term "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears.'" *Ibid.* (quoting *Bryan* v. *United States*, 524 U.S. 184, 191 (1998)). The Court explained, however, that "where willfulness is a statutory condition of civil liability," the term generally "cover[s] not only knowing violations of a standard, but reckless ones as well." *Ibid.* (citing examples). The Court further held that Safeco had not recklessly violated FCRA where the company's position that notice was not required under the circumstances at issue was "not objectively unreasonable." *Id.* at 69. The Court stated that, "in the sphere of civil liability," recklessness can generally be measured with "an objective

standard." *Id.* at 68. Under that approach, a person acts recklessly if the person's conduct "entail[s] 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Ibid.* (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994)).

b. Petitioner's violation was "willful" as this Court has understood that term in the civil-liability context. In failing to report his main UBS account on the FBAR that he filed in October 2008, petitioner either knowingly violated his legal obligations—his long-time accountant had already told him that failing to disclose the account was unlawful—or, at the very least, he acted in reckless disregard of those obligations. Petitioner's claim (Pet. 10) that he was "unaware" in October 2008 that he held two accounts at UBS rather than just one is belied by his conduct. In November and December 2008, petitioner sent two separate letters to UBS to close his two accounts. Pet. App. 9-10. In doing so, he directed that the assets in the two accounts be transferred to different places. He repatriated the assets in the smaller account that he had just disclosed, while transferring the assets in his main UBS account to an account at Hyposwiss Private Bank (which he then failed to disclose on the FBAR that he filed in 2009). *Ibid.*; see pp. 6-7, *supra*. And, even if petitioner was somehow confused about having one or two UBS accounts, he should have known that his 2007 FBAR was inaccurate and incomplete because the maximum account balance reported on the form was far smaller than the roughly $2 million in assets that he knew he held at UBS at the time. Pet. App. 41-42.

At a minimum, the district court did not clearly err in finding that petitioner acted recklessly on the particular facts of this case. That fact-bound determination,

which the court of appeals already reviewed and affirmed, does not warrant this Court's review. Cf. *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (observing that, under what this Court has called "the 'two-court rule,'" certiorari is especially unwarranted when the "district court and court of appeals are in agreement as to what conclusion the record requires") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

c. Petitioner contends that the term "willfully" in Section 5321(a)(5)(C) means "intentionally" or "deliberately," Pet. 18 (citing online dictionaries), and that proof of objectively reckless conduct is not sufficient to show a willful violation of Section 5314. Petitioner is correct (*ibid.*) that Section 5321(a)(5) does not define the term "willfully." But when Congress uses a term that has an established meaning, this Court ordinarily presumes that the term carries that meaning, "absent anything pointing another way." *Safeco*, 551 U.S. at 58; see, *e.g.*, *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (invoking the "longstanding interpretive principle" that, "[w]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it") (citation and internal quotation marks omitted). That principle applies with particular force here because, as the Court explained in *Safeco*, both the common law and this Court's precedent support construing the term "willfully" to encompass reckless conduct when the term is used to specify a condition of civil liability. 551 U.S. at 57.

Petitioner emphasizes (Pet. 17) this Court's statement in *Safeco* that willful is a "word of many meanings" and that the term must be construed in the context in

which it appears. *Safeco*, 551 U.S. at 57 (citation omitted). But the court of appeals acknowledged that teaching of *Safeco* and gave appropriate consideration to the overall context of these civil penalties. See Pet. App. 58 (stating that "'willfulness' may have many meanings," but determining that "the usual civil" meaning is the appropriate one here). In particular, the court emphasized that "willfulness" is used here to define "an element of civil liability," *ibid.*, comparable to the civil liability imposed under FCRA for willful violations.

Petitioner further contends (Pet. 19) that the civil penalties authorized under Section 5321(a)(5)(C) for willful violations are "punitive in nature," supposedly "[u]nlike the FCRA" provision at issue in *Safeco*. But the civil penalties authorized under Section 5321(a)(5) are remedial, not punitive. The purpose and effect of the civil penalties is to compensate the government for the harms that occur when U.S. persons fail to disclose their secret foreign bank accounts, including the costs of investigation. See, *e.g.*, *United States* v. *Toth*, 33 F.4th 1, 18-19 (1st Cir. 2022), cert. denied, 143 S. Ct. 552 (2023).[3] And Section 5321(a)(5)(C) is no more punitive in nature than the civil liability provision at issue in *Safeco*, which expressly authorized "punitive" damages for certain willful violations. 15 U.S.C. 1681n(a)(2).

The fact that the Bank Secrecy Act makes it a crime to "willfully" violate specified provisions of the Act, 31 U.S.C. 5322(a) (Supp. III 2021), is also not a persuasive basis for distinguishing *Safeco*. Contra Pet. 19-20. This

---

[3] Petitioner is wrong to suggest (Pet. 19 n.5) that the government has ever "acknowledged" that the civil penalties authorized under Section 5321(a)(5) are "punitive" in the criminal-law sense. See Gov't Br. in Opp. at 17-18, *Toth* v. *United States*, 143 S. Ct. 552 (2023) (No. 22-177).

Court has construed the Bank Secrecy Act's criminal provision to require proof that "the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994). But FCRA contains similar criminal prohibitions on "knowingly and willfully" obtaining credit information under false pretenses, 15 U.S.C. 1681q, or "knowingly and willfully" disclosing credit information, 15 U.S.C. 1681r. In *Safeco*, this Court considered those provisions and rejected the same inference that petitioner urges here—*i.e.*, that "willfully" should bear the same meaning in both the civil-liability and criminal-liability provisions. 551 U.S. at 60. The Court observed that "willfully" has a specialized meaning in criminal law, "in contrast to its civil law usage," and that the "vocabulary of the criminal side of FCRA is consequently beside the point in construing the civil side." *Ibid.* The same is true here.[4]

Petitioner also errs in seeking to distinguish *Safeco* as having involved a "two-tier structure for punishing willful offenders," Pet. 22, under which some willful violations that involved "knowingly" obtaining a credit report under false pretenses were subject to more significant sanctions than other willful violations, 15 U.S.C. 1681n(a)(1)(B). Petitioner is correct that this Court relied on that feature of FCRA as an additional reason not to equate the term "willfully" with "knowingly." See *Safeco*, 551 U.S. at 59. But the Court described that textual inference as merely a further "clue * * * which points to" Congress's having incorporated into FCRA "the traditional understanding of willfulness in the civil

---

[4] The internal IRS memorandum cited by petitioner (Pet. 19 & n.6) pre-dated the additional guidance that this Court provided in *Safeco* and in any event does not reflect the position of the IRS or bind the agency. See 26 U.S.C. 6110(i)(1) and (k)(3).

sphere." *Ibid.* The court of appeals reviewed the same traditional understanding here and correctly applied it to Section 5321(a)(5)(C).

Finally, petitioner's reliance (Pet. 20-21) on the statutory history is misplaced. Congress has authorized the Secretary to impose civil penalties for willful violations of Section 5314 since 1986. See Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1357(c), 100 Stat. 3207-25. The maximum amount of the penalty for a willful violation involving a failure to report an account has always been determined in part by the balance in the account at the time of the violation, but the statute formerly capped the penalty at $100,000. See 31 U.S.C. 5321(a)(5)(B)(ii)(I) (1988). Congress removed that limitation in 2004, in part to respond to concerns about tracing terrorist financing. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1586; see S. Rep. No. 257, 108th Cong., 2d Sess. 32 (2004); cf. *Bittner*, 143 S. Ct. at 730 (Barrett, J., dissenting) (observing that, "[w]hen analyzing complex webs of money laundering or funding for international terrorism, knowing about every account matters"). Nothing about the sequence of amendments suggests that Congress sought to limit civil penalties for willful violations in the manner that petitioner advocates.

2. Petitioner does not identify any sound basis for further review. The Third Circuit correctly observed that its construction of Section 5321(a)(5)(C)'s willfulness standard "is in line with" decisions by "other courts that have addressed civil FBAR penalties." Pet. App. 59. Indeed, every court of appeals to have considered the question has held that the willfulness standard encompasses reckless conduct. See *United States* v. *Rum*, 995 F.3d 882, 889 (11th Cir.) (per curiam) ("[W]e hold

that willfulness in § 5321 includes reckless disregard of a known or obvious risk."), cert. denied, 142 S. Ct. 591 (2021); *Kimble* v. *United States*, 991 F.3d 1238, 1242 (Fed. Cir.) ("[W]e have held that 'willfulness in the context of § 5321(a)(5)(C) includes recklessness.'") (quoting *Norman* v. *United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019)), cert. denied, 142 S. Ct. 98 (2021); *United States* v. *Horowitz*, 978 F.3d 80, 88 (4th Cir. 2020) ("[W]e conclude that, for the purpose of applying § 5321(a)(5)'s civil penalty, a 'willful violation' of the FBAR reporting requirement includes both knowing and reckless violations, even though more is required to sustain a criminal conviction for a willful violation of the same requirement under § 5322."). The absence of any current division of authority within the courts of appeals is itself a sufficient reason to deny the petition. Sup. Ct. R. 10(a).

Petitioner does not dispute that his interpretation of the statute has been uniformly rejected by the courts of appeals. He maintains (Pet. 21) that "[s]ome lower courts" have endorsed his preferred approach, but the only two examples that he identifies are unpublished and non-precedential district court decisions, which could not establish any conflict warranting this Court's review. Those decisions are also unpersuasive. In one, the district court found that the allegations in the government's complaint adequately alleged willfulness by showing that the defendant "understood the reporting requirements" that he violated. *United States* v. *Pomerantz*, No. 16-cv-689, 2017 WL 4418572, at *3 (W.D. Wash. Oct. 5, 2017). Although the court stated that willfulness "requires" proof that the defendant acted knowingly, *ibid.*, the case did not squarely present any question about recklessness because the complaint alleged knowing misconduct. And petitioner's second example,

United States v. *Zwerner*, No. 13-cv-22082, 2014 WL 11878430 (S.D. Fla. Apr. 29, 2014), has already been abrogated by the Eleventh Circuit in *United States* v. *Rum*, *supra*.

Petitioner's remaining arguments (Pet. 26-29) for granting further review are unavailing. The decision below does not, as petitioner contends (Pet. 27), equate willfulness with "a form of negligence." To sustain an assessment of civil penalties for a willful violation of Section 5314, the government must prove that the violation was more than merely "accidental." Pet. App. 58. The "essence" of recklessness for these purposes is disregard for an objectively high risk of harm—a risk that is "'substantially greater than that which is necessary to make [the person's] conduct negligent.'" *Safeco*, 551 U.S. at 69 (citation omitted). Nor does the decision below support petitioner's claim (Pet. 27) that it would be "difficult" for him (or anyone else) to avoid committing a willful violation of Section 5314 if willfulness encompasses objectively reckless conduct. To the contrary, one of the key findings below, emphasized by both lower courts, is that petitioner could have "very easily" ascertained and complied with his reporting obligations, even giving credence to his claim to have been unaware that he had two UBS accounts rather than one. Pet. App. 8 (quoting the district court's findings).

3. When the petition for a writ of certiorari was filed, this Court had granted review in *Bittner* v. *United States*, *supra*, but had not yet resolved that case. See Pet. 4 n.1, 7. The question presented in *Bittner* was whether the Secretary may assess a civil penalty of up to $10,000 for each foreign financial account that a person non-willfully fails to disclose on a single FBAR, or whether the $10,000 cap instead applies to each FBAR

on which a person non-willfully fails to disclose any number of accounts. 143 S. Ct. at 717. The Court held in *Bittner* that the "$10,000 penalty for nonwillful violations accrue[s] on a per-report" basis, rather than a "per-account basis." *Id.* at 719.

This case does not implicate the question the Court resolved in *Bittner*, and a remand for further consideration in light of *Bittner* would therefore be unwarranted. First, this case involves the penalty provisions for *willful* violations, 31 U.S.C. 5321(a)(5)(C) and (D), which the Court expressly distinguished from the nonwillful penalty provision at issue in *Bittner*, 31 U.S.C. 5321(a)(5)(B)(i). See *Bittner*, 143 S. Ct. at 720 (explaining that the language of the willful penalty provisions "tailor[s] penalties to accounts" but that similar language does not appear in the provision applicable in "cases like [*Bittner*] that involve only nonwillful violations"). Second, in any event, the Secretary assessed only a single civil penalty under Section 5321(a)(5) in this case, predicated on a single FBAR on which petitioner willfully failed to report a single account—his main UBS account. See pp. 7-8, *supra*. The case therefore does not involve any exercise of the Secretary's authority to assess multiple penalties for multiple willful violations on a single FBAR.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
DAVID A. HUBBERT
Deputy Assistant Attorney General
FRANCESCA UGOLINI
MICHAEL J. HAUNGS
PAUL A. ALLULIS
Attorneys

MAY 2023