No. 22-598

In the Supreme Court of the United States

ARTHUR BEDROSIAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Congress wanted there to be a substantial penalty for a "willful" violation of 31 U.S.C. § 5314, but a much smaller penalty for a non-willful violation. Therefore, it cannot be the case that *every* violation is willful. That would undermine the plain language of the statute. Yet, the government's brief in opposition offers no meaningful distinction between willful and non-willful violations. That is the natural consequence of the "objective recklessness" standard adopted by the Third Circuit, as Mr. Bedrosian's case shows. But that is not what Congress envisioned.

The statutory text, history, and structure of 31 U.S.C. § 5321 makes plain that Congress used the word "willful" for a reason: to incorporate a subjective standard that imposes an enhanced penalty only on individuals who deliberately flout the requirement to file a Report of Foreign Bank and Financial Accounts ("FBAR"). Even if there were doubt about Congress's intent, the rule of lenity favors a strict construction. What Congress did not intend to do was leave the determination of what is willful versus non-willful conduct to the unbridled discretion of the Internal Revenue Service ("IRS"). Here, the IRS initially held that the violation was non-willful and then changed its mind and imposed a $1.3 million penalty.

Mr. Bedrosian's petition presents a question of wide import that affects the rights of millions of U.S. taxpayers who are required to file FBARs. The Court should grant certiorari and, as it recently did in *Bittner*, calibrate the penalty for willful violations consistently with Congressional intent.

I. The Government's Interpretation of the FBAR Statute is Overly Expansive and Contravenes Congressional Intent.

The government's analysis of the FBAR statute is perfunctory and tracks the reasoning of the Third Circuit: because this is a civil case, the "usual" civil standard of willfulness (i.e. objective recklessness) applies. According to the government, this result is preordained by *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007) and further supported by "prior tax cases." Opp'n at 9. Not so.

The government has put more weight on *Safeco* than it can bear. *Safeco* did not announce a blanket rule that the word "willful" in the civil context always means objective recklessness. If that were true, then a number of this Court's cases recognizing a subjective standard of recklessness in civil cases would be difficult to explain. *See* Pet'n at 22-23 (citing *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 105 (2016); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536-37 (1999); *Smith v. Wade*, 461 U.S. 30, 37, 41 (1983); *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273-76 (2013); *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998)). The government neither differentiates nor even mentions these cases.

Instead, *Safeco* clarifies that the standard for willfulness depends on the context. 551 U.S. at 57. That important disclaimer makes all the difference here. The FBAR statute is qualitatively different from

the Fair Credit Reporting Act, the statute at issue in *Safeco*. *See* Pet'n at 21-22. The FBAR statute's text, structure, and history all point in the direction of a subjective standard. *See id.* at 17-25. The statute, after all, does not speak in terms of "negligent" and "grossly negligent" actors. It speaks in terms of "willful" and "non-willful" actors. The dividing line is the subjective mental state of the individual taxpayer, not what a hypothetical objectively reasonable person should have known. And, in deciding what an objectively reasonable person should have known, Congress could not have intended that the taxpayer is responsible for reviewing every item and amount on a tax return and the failure to do so would make the conduct "willful." In other words, the use of the word "willful" in the FBAR statute means deliberate actions, in contrast to non-deliberate actions.

Such a construction is reinforced by the punitive nature of the FBAR statute. The purpose of the FBAR statute is to punish individuals for, and deter others from, failing to report a foreign account containing more than $10,000. *See* Pet'n at 18-19; *see also* Steven Toscher et al., *When Penalties Are Excessive—The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty*, 11 J. Tax Prac. & Proc. 69, 69 (2010) (FBAR reporting requirement "is separate and apart from the duty to report and pay tax on the income earned on the account"). The purpose is not to compensate the government for any pecuniary loss. In this way, the FBAR statute is much closer to the statutes at issue in civil cases like *Halo* (willful patent infringement) and *Kolstad* (punitive damages), in which the Court

applied a subjective standard of willfulness. *See* Pet'n at 23-24.

The government takes a contrary position despite having previously come close to agreeing that the FBAR statute does not serve a compensatory purpose. *See* Mem. Supp. U.S. Mot. for Summ. J. at 8, *United States v. Simonelli*, No. 6-cv-653 (D. Conn. Jan. 29, 2008) (Doc. 20-2) (acknowledging that "[t]he FBAR penalty does not compensate the government for actual pecuniary loss"); *Toth v. United States*, Pet'n for Certiorari at 18-19 & n.5, 29 (collecting examples where the IRS has noted the "deterrent" nature of FBAR penalties). But whether the FBAR penalty is punitive in a "criminal-law sense" (Opp'n at 17 n.3) or a "civil" sense is beside the point. The FBAR penalty is intended to punish, not to make the government whole for a loss. It is punitive in any meaningful sense of the word. *See Toth v. United States*, 598 U.S. __ (2023) (Gorsuch, J., dissenting from denial of certiorari) ("[T]he notion of 'nonpunitive penalties' is a 'contradiction in terms.'") (citation omitted).

The government also asserts that the objective recklessness standard is supported by "prior tax cases." Opp'n at 9. Yet, it does not discuss those cases at all. *See United States v. Carrigan*, 31 F.3d 130, 134 (3d Cir. 1994); *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989). The omission is telling. *Carrigan* and *Vespe* serve only to demonstrate why an objective standard is *not* appropriate when it comes to the FBAR statute. *See* Pet'n at 24-25. It makes no sense to import a near-strict-liability standard from a responsible officer tax penalty provision to a statute

that directs the IRS to distinguish between "non-willful" and "willful" violations, with draconian penalties reserved only for the latter category.

Even if there were doubt about the proper construction of the willfulness provision in the FBAR statute, "a venerable principle supplies a way to resolve it": the rule of lenity. *Bittner v. United States*, 598 U.S. __, 143 S. Ct. 713, 724 (2023). Like *Bittner*, this case is "a particularly appropriate candidate for the rule of lenity." *Id.* at 725. The IRS itself previously took the position that because Congress used the same word in both the criminal and civil provisions, "[s]tatutory construction rules would suggest that the same word used in related sections should be consistently construed." Pet'n at 19. The IRS had it right then, not now. But if the IRS itself believed this at one time, it is difficult to "see how 'the common world' [would have] had fair notice" of the IRS's new, self-serving interpretation that willfulness means something different in the civil context. *Bittner*, 143 S. Ct. at 725 (citation omitted).

In any event, the government's interpretation of the willfulness provision here is just as wrong as its interpretation of the non-willfulness provision in *Bittner*. The government argues that "willfulness" means something different in the civil context because "'willfully' has a specialized meaning in criminal law, 'in contrast to its civil law usage[.]'" Opp'n at 18 (citation omitted). But that interpretation ignores *Safeco*'s admonition that the meaning of "willfulness" depends on the context. 551 U.S. at 57. It also is hard to square with the fact that the Court read the civil

and criminal provisions of the FBAR statute harmoniously in *Bittner*. *See Bittner*, 143 S. Ct. at 725 (explaining that "if the government were right that violations accrue on a per-account rather than a per-report basis under § 5321 [the civil provision], the same rule would apply under § 5322 [the criminal provision]"). Thus, "the rule of lenity, not to mention a dose of common sense, favors a strict construction" of the willfulness provision of the FBAR statute. *Bittner*, 143 S. Ct. at 725.

Finally, it is of no moment that four out of the thirteen U.S. Courts of Appeals have announced an objective standard relying on *Safeco*. Far from being "a sufficient reason to deny the petition," Opp'n at 20, that actually underscores the importance of granting certiorari in this case. None of those courts analyzed the question closely, and the standard they adopted will unduly expand liability for millions of U.S. taxpayers who are subject to the FBAR filing requirement. *See* Pet'n at 16-17, 26-28. Moreover, the government is wrong to suggest that a split among the circuits is a prerequisite to obtaining Supreme Court review. It is not. *See* Sup. Ct. R. 10 (noting that the reasons set forth in Rule 10(a) are "neither controlling nor fully measuring the Court's discretion" in determining whether to grant a certiorari petition); John S. Summers & Michael J. Newman, "Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions," 80 U.S.L.W. 393 (2011) (noting that, of the 435 merits decisions the Supreme Court issued in the 2005 through 2010 Terms, only "176 (37.8 percent) presented circuit splits").

Congress chose the word "willfully" for a reason. It intended that the much higher penalties for willful violations only be available against those individuals who deliberately flout the FBAR filing requirement.

II. The Importance of Defining the Proper Standard for Willful Violations is Only Heightened After *Bittner*.

The government minimizes the importance of the question presented by insisting that Mr. Bedrosian's case is fact-bound.[1] Yet, it would be difficult to think of underlying facts that *more* squarely present the pure question of law than these. Mr. Bedrosian checked the box on his tax return disclosing a foreign account and filed an FBAR showing what he believed to be his only offshore account with a balance of up to one million dollars. When he discovered that he was mistaken, he filed an amended tax return, an amended FBAR, and a voluntary disclosure with the IRS. The district court held a bench trial and concluded that Mr. Bedrosian did not willfully fail to report his second offshore account. It only reversed

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[1] The government invokes the "two-court rule," which provides that certiorari is generally unwarranted where "the district court and court of appeals are in agreement as to what conclusion the record requires.'" Opp'n at 16 (citing *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949)). The government's error is principally one of framing. The petition does not ask this Court to pass on whether the Third Circuit analyzed the facts correctly. It asks this Court to consider the legal standard that should govern that analysis at the outset. And that is a question that affects not just Mr. Bedrosian, but millions of others U.S. taxpayers who hold foreign accounts.

itself after the Third Circuit remanded and directed the district court to apply a purely objective standard that disregarded Mr. Bedrosian's mental state. Thus, Mr. Bedrosian's penalty turned directly on the changed standard for "willfulness."

The issue is particularly acute following this Court's decision in *Bittner*. In *Bittner*, this Court rejected the government's expansive reading of the provision of the FBAR statute setting forth the penalties for non-willful violations, finding instead that Congress intended the penalty to be assessed on a per-form rather than per-account basis. After *Bittner*, there can be no doubt that the government's power to penalize non-willful violations is circumscribed. The government is now limited to a maximum $10,000 penalty in situations where it previously may have chosen to assess millions of dollars of penalties. *See Bittner*, 143 S. Ct. at 719, 725. But the government currently has an escape hatch: if it can recast a "non-willful" violation as a "willful" one—as it did in Mr. Bedrosian's case—then its power is no longer so limited. The maximum $10,000 penalty transforms into the greater of $100,000 or half the balance in the account at the time of the violation. *See* 31 U.S.C. § 5321(a)(5)(C). The difference can be substantial. *See* Pet'n at 28-29. But the dividing line for whether an individual acted willfully or non-willfully should not be drawn by the IRS agent assigned to an investigation.[2] The enhanced penalty

[2] Mr. Bedrosian's case provides an example of why bureaucrats should not wield such power. The original IRS revenue agent assigned to the case, much like the district court in its original decision, concluded that Mr. Bedrosian did not act willfully. *See*

should be, as Congress intended, only applicable to those individuals who deliberately violated the FBAR filing requirement.

The Court properly calibrated the penalty for non-willful violations in *Bittner*, and this case provides an ideal vehicle for doing the same when it comes to willful violations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 26, 2023

Pet'n at 11. The original revenue agent went on extended sick leave and was then replaced by a new agent who decided that Mr. Bedrosian should be subject to a willfulness penalty after all. *Id.* Congress could not have intended that willfulness hinge so freely on the whims of the IRS.