24-5185 ORIGINAL

No.

In the Supreme Court of the United States

GEORGE GAIO MANO,

Petitioner,

v.

JANET YELLEN AS SECRETARY OF TREASURY, US DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE

Respondents.

On Petition for a Writ of Certiorari to the

U.S. Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

George Gaio Mano,

Pro se Petitioner, in forma pauperis

Questions Presented

1. Everyone needs a bank account, and most financial transactions take place on the internet nowadays. Yet, a 1970 statute, the Bank Secrecy Act, gives the US government (Foreign Bank Account Report, FBAR, 31 USC §5311 et seq.) authority to demand that all American citizens, including all 8.7 million expatriates, report to the Internal Revenue Service via the Financial Crimes Enforcement Network (FinCEN) their foreign banks accounts, the account numbers, the names and locations of the banks where the accounts are located, and the highest total balance of all accounts in the past year, every fiscal year in which the sum total of all accounts exceeds ten thousand US dollars.
The question presented is:
Does the US government's mass collection of private banking data violate the 4th, 5th, 9th, and 10th Amendments?

2. The original purpose of FBAR (the Bank Secrecy Act of 1970, Public Law 91-508) was to prevent organized crime using the bank secrecy laws of other countries to conceal illegal activities, but nowadays, most countries do not have bank secrecy laws, and countries like Japan tend to cooperate with US authorities. Then, in 2002 with passage of the USA PATRIOT ACT, FBAR was given a new purpose, a focus on terrorist financing, and enforcement was pursued more aggressively, despite the fact that a miniscule number of the 8.7 million Americans living overseas are involved in organized crime or terrorist financing.
The question presented is:
Does FBAR serve any legitimate purpose or compelling public interest?

3. Justice Goldberg, in a concurring opinion joined by Chief Justice Warren and Justice Brennan, argued that a Right to Privacy can be found in the Ninth Amendment. *Griswold v. Connecticut*, 381 U.S. 479 (1965) 484-492.
The question presented is:
Can a broad, fundamental Right to Privacy be found in the Ninth and Tenth Amendments of the US Constitution, or are those two Amendments merely empty words on paper?

The question presented is:
4. Should *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974) and *United States v. Miller*, 425 U.S. 435 (1976) be overturned?

PARTIES TO THE PROCEEDING

George Gaio Mano,
petitioner on review, was plaintiff-appellant below.

Janet Yellen as Secretary of Treasury, The Department of Treasury,
The Internal Revenue Service,
respondents on review, were defendants-appellees below.

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No. 23-2661,
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U.S. Court of Appeals for the Seventh Circuit,
No. 23-2661,
George Gaio Mano v. Janet Yellen, et al,
Appeal from Motion for Temporary Injunction denied September 22, 2023;
Motion for Temporary Injunction denied August 23, 2023;

U.S. District Court for the Southern District of Indiana,
Case No. 1:22-cv-01037-RLY-MJD,
George Gaio Mano v. Janet Yellen, et al,
Final judgment entered August 1, 2023.

U.S. District Court for the Southern District of Indiana,
Case No. 1:22-cv-01037-RLY-MJD,
George Gaio Mano v. Janet Yellen, et al,
On 16 April 2023 Plaintiff filed a Motion for Declaratory Judgment on the Constitutionality of FBAR under the 4th, 5th, 9th, and 10th Amendments. The Motion for Declaratory Judgment was dismissed on 1 August 2023

U.S. District Court for the Southern District of Indiana,
Case No. 1:22-cv-01037-RLY-MJD,
George Gaio Mano v. Janet Yellen, et al,
Case filed for permanent Injunction May 18, 2022.

Jurisdiction

The final judgment of the Seventh Circuit Court of Appeals was entered on May 6, 2024. The jurisdiction of the Court is invoked under 28 U.S. Code § 1254 (1).

Constitutional and Statutory Provisions Invoked

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Statement of the Case

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C. Proceedings Below

A. The Background and Purpose of the Bank Secrecy Act of 1970 and the Foreign Bank Account Report (FBAR)

The ultimate basis for this action is the Bank Secrecy Act of 1970 (BSA). It is the mother of several statutes requiring financial institutions or individuals to report private bank account information to the US government. These include FBAR (Foreign Bank Account Report, a.k.a. Report of Foreign Bank and Financial Accounts) 31 USC §5311 et seq., FATCA (Foreign Account Tax Compliance Act) 26 USC §1471 et seq., the US Department of Treasury's Financial Crime Report Network 31CFR1010.100 et seq., SAR (Suspicious Activity Report) 31 USC §5318(g), and Section 312 of the USA PATRIOT Act. 115 Stat. 304-306. Petitioner's case arises under FBAR.

The Bank Secrecy Act was conceived in a hearing of the House Committee on Banking and Currency on December 9, 1968. The focus was entirely on criminal

activity, and specifically on crimes committed by means of secret bank accounts, mainly in Switzerland. The chairman of the committee, Rep. Wright Patman of Texas, in his opening statement declared that the committee was concerned about "illicit financial manipulation of huge sums of money" and the "number of instances where the use of foreign bank accounts in countries with strong bank secrecy laws constitute an important phase of the illicit operation." He then lists some of the crimes which drew the committee's attention: tax evasion, a defense contract swindle, insider trading, fictitious bank loans to evade income tax, and avoidance of margin requirements on securities purchases. All of these cases involved Swiss bank accounts and most took advantage of Switzerland's bank privacy laws. *Legal and Economic Impact of Foreign Banking Procedures on the United States, Hearing before the H. Committee on Banking and Currency*, 90th Cong. (Dec. 9, 1968), US Govt. Printing Office, 1968, 1-2.

Four experts were invited to provide background information to the committee.

One of the experts, Robert Morgenthau, US Attorney for the Southern District of New York, stated, "Secret-numbered foreign bank accounts have become an ever-increasingly widespread and versatile tool for the evasion of our laws and regulations and for the commission of crimes by American citizens and for hiding the fruits of crimes already committed. *Ibid.* 11.

However, one of the experts, Fred M. Vinson, Jr., Assistant Attorney General of the US, Criminal Division, Dept. of Justice, reminded the committee that

Swiss privacy laws were "created to protect legitimate business secrets and to prevent piratical governments from plundering their own citizens... (The Swiss) cite their refusal to cooperate with the Third Reich, Adolph Hitler's regime, in its campaign to locate and seize private assets owned by German Jews and deposited in Swiss banks." *Ibid.* 9.

The question remained what to do about the swindles, tax evasion, and illegal assets of organized crime made possible by secret bank accounts overseas.

Committee chairman Patman suggested that the government should make it "a criminal offense for any U.S. citizen to have financial dealings with a foreign financial institution that does not allow bona fide inspection of its records by our various regulatory agencies concerning the transactions involving Americans." *Ibid.* 44-45. This proposal would eventually lead to the statute known at FATCA, although the criminal penalty for FATCA was applied to the foreign financial institution, not the American customer.

Almost a year later, on December 4, 1969, the committee proposed legislation (H.R. 15073) titled *A Bill to Amend the Federal Deposit Insurance Act, to Require Insured banks to Maintain Certain Records, To Require that Certain Transactions in U.S. Currency be Reported to the Department of the Treasury, and For Other Purposes, Hearing before the H. Committee on Banking and Currency*, 91st Cong. (Dec. 4, 10, 1969; Feb. 10, March 2 and 9, 1970) U.S. Gov't Printing Office, 1970. The proposed legislation introduced the concept of reporting requirements for banks—in §§221-223 for domestic currency

transactions, *Ibid.* 5-6, and in §§231-234 for exports and imports of currency exceeding $5000, *Ibid.* 6-7,—and in §§241-242 for any "resident or citizen" dealing with "a foreign financial agency which does not make its records available to duly constituted authorities of the United States." *Ibid.* 7. It also required in §101 that all FDIC, i.e., federally-insured banks, make copies of all transactions "in accordance with the regulations of the Secretary." *Ibid.* 1-2.

This proposed legislation may have been one of the first examples of the government creating process crimes where no other crime is evident. In other words, a person could be charged with violating the reporting requirements without actually or intending to commit fraud, tax evasion, securities margin violations, or any of the other offenses the legislation was created to stop.

On March 2, 1970, the committee heard from two bankers—Clifford C. Sommer, vice president of the American bankers Association; and Carl W. Desch, senior vice president of First National City Bank of New York, representing the New York Clearing House Association. Both bankers were critical of the enormous burdens and costs imposed on banks by the reporting and recordkeeping requirements of HR 15073, and by the potential harm done to the privacy of the banker-client relationship. On the subject of privacy, Sommers told the committee, "Banks have an obligation to their customers to maintain the privacy of their personal affairs except in response to subpoena or other regular legal process. He added, "(W)e urge that information made available to law enforcement agencies from bank records be confined to the

records of those persons who are subject to active investigation and only in response to subpoena or comparable legal process." *Ibid.* Strangely, Sommers, then, suggested an alternative to the current proposal, which sounded very similar to FBAR. He recommended a "requirement that each person filing an income tax return furnish information indicating whether he maintains an account in a foreign bank, giving the name and location of each such bank, and the balance therein." *Ibid.* 316. Apparently, Mr. Sommers did not consider the IRS to be a law enforcement agency.

Bank vice president Carl W. Desch sounded even more alarmed by the proposed legislation. He stated, "The records of a man's financial affairs may disclose almost as much about his attitudes and actions as his personal correspondence, and yet I am certain that all of us would be shocked by a proposal that law-enforcement authorities should have the right to enter people's homes and read their letters without proper warrants." *Ibid.* 318.

Senator William Proxmire, who submitted the Senate version of the bill that would become the BSA, admitted that the reporting provision would be unlikely to be a significant deterrent to the crimes the bill was created to stop, but "it is much easier for law-enforcement authorities to prove a failure to report a foreign bank account than it is to prove any substantive violations of law associated with the use of that account." *Congressional Record—Senate*, April 6, 1970, 10402.

So, whether anyone noticed or not, by April 1970 the focus had shifted. The

House and Senate were less concerned with stopping the crimes they had been asked to address, and more enthusiastic about making it easier for law enforcement to pin some crime, a process crime, on an undesirable party.

H.R. 15073 became PL 91-508 and was signed into law on October 26, 1970 by President Richard Nixon, and became known as the Bank Secrecy Act. It established the earliest version of FBAR, and included a minimum bank balance of $10,000 triggering the obligation to file; the same as today. In 1970 the median income of a family was $9870[1] and the average cost of a house was around $24,000.[2] Today the average salary of an individual is $59,428[3] and a house costs more than $420,000.[4] Yet, FBAR is still triggered with a bank balance of $10,000.

The constitutionality of the Bank Secrecy Act was first challenged in the Supreme Court case of *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974). The Court's majority opinion delivered by Justice William Rehnquist ruled that neither Title I nor Title II of the Bank Secrecy Act violated appellants' First, Fourth, or Fifth Amendment rights, *Ibid.* 22-25, and "the reporting requirements in Title II applicable to foreign financial dealings...do not abridge plaintiffs' Fourth Amendment rights and are well within Congress' powers to legislate with

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[1] Emmett F. Spiers and John F. Coder and Robert W. Cleveland, *Report Number P60-80*, US Census Bureau, https://www.census.gov/library/publications/1971/demo/p60-80.html , Oct. 4, 1971

[2] Fed Reserve Bank St. Louis, https://fred.stlouisfed.org/series/MSPUS

[3] Belle Wong, JD, Average Salary By State In 2024, *Forbes*, https://www.forbes.com/advisor/business/average-salary-by-state/ May 1, 2024

[4] Fed Reserve Bank St Louis, https://fred.stlouisfed.org/series/MSPUS

respect to foreign commerce." *Ibid.* 23.

In *Shultz*, however, the plaintiffs were financial institutions, not customers. Nevertheless, Justice Powell, in a concurring opinion joined by Justice Blackman, wrote, "Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process." *Ibid.* 78-79. Justice Douglas, in a dissenting opinion went even further. He focused on the "high degree of usefulness in criminal...proceedings" language of 12 USC §§ 1829b (a)(1)(A) and wrote sarcastically, "It would be highly useful to governmental espionage to have like reports from all our bookstores, all our hardware and retail stores, all our drugstores. These records too might be "useful" in criminal investigations," *Ibid.* 84-5.

Two years later, the Supreme Court had another opportunity to consider the constitutionality of the Bank Secrecy Act in the case of *United States v. Miller*, 425 U.S. 435 (1976). The issue in *Miller* was privacy under the Fourth Amendment protection against unreasonable search and seizure. In the majority opinion by Justice Powell, the Supreme Court ruled Miller possessed no Fourth Amendment interest in the bank records, because "There is no legitimate 'expectation of privacy' in the contents of the original checks and deposit slips" voluntarily conveyed to the banks and exposed to their employees in the

ordinary course of business.

The court's ruling in Miller came to represent two broad, controversial positions: one, there is no "expectation of privacy" in bank documents, and two, the relationship between banker and customer is a third-party relationship.

The *Miller* decision contradicts the statements of bank vice presidents Sommers and Desch who argued that American bank customers did expect privacy in their banking affairs, and it creates a fictional "third-party" relationship when there are only two parties—the banks and the customers. If there is a third-party relationship between banker and customer because bank employees handle the customer's checks and deposit slips, then there is also a third-party relationship between lawyer and client, when clerks, secretaries, and court officials handle the client's documents, and between doctor and patient, when nurses, aides, and receptionists handle the patient's files. Why is the lawyer-client relationship privileged and the doctor-patient relationship confidential, but the banker-customer relationship has "no expectation of privacy?"

The result of the *Miller* decision was that for a while the government had a free hand to look at financial documents without obtaining a warrant. Lorena Kern Davitt, *The Right to Financial Privacy Act: New Protection for Financial Records, Fordham Urban Law Journal, Vol. 8 No. 3*, 1980, 607.

Some members of Congress were so horrified by the *Miller* decision that they introduced bills to protect the privacy of the relationship between financial

institutions and their customers. *Ibid.* The bill known as H.R.8133 – The Right to Financial Privacy Act (RFPA)—was introduced by Rep. John J. Cavanaugh on June 30, 1977. The stated purpose of the act was "to protect and preserve the confidential relationship between financial institutions and their customers and the constitutional rights of those customers, and to promote commerce by prescribing policies and procedures to insure that customers have the same right to protection against unwarranted disclosure of customer records as if the records were in their possession." H.R.8133 - *Right to Financial Privacy Act, Summary*, Congress.gov, https://www.congress.gov/bill/95th-congress/house-bill/8133?s=1&r=40 .

RFPA was passed by Congress on November 10, 1978 and enacted, but it did not go far enough, and courts continue to cite *Miller* and issue rulings as though customers' financial affairs were in the public domain.

Eight years after RFPA, Congress went in a different direction. In 1986 Congress passed the Money Laundering Control Act. PL 99-570, 18 USC §1956, §1957. It is hard to believe it today, but there was no federal crime called "money laundering" before 1986.

On April 25, 1990, the Department of Treasury issued order 105-08 and established the Financial Crimes Enforcement Network (FinCEN). On September 26, 2002, following the enactment of the USA PATRIOT Act, Treasury Order 180-01 made FinCEN an official bureau of the Department of Treasury. According to the FinCEN website, its mission is "to safeguard the

financial system from illicit use, combat money laundering and its related crimes including terrorism, and promote national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence." *Mission, Financial Crimes Enforcement Network*, https://www.fincen.gov/about/mission . It is to FinCEN via the bureau's website that individual US taxpayers must file their FBAR reports. *Report of Foreign Bank and Financial Accounts (FBAR), IRS*, https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar

Also in 1992, Congress passed H.R.5334, the Housing and Community Development Act of 1992, as PL 102-550. Although mainly concerned with public housing, it also included Title XV - The Annunzio-Wylie Anti-Money Laundering Act, which eliminated the use of Criminal Referral Forms and required financial institutions to make Suspicious Activity Reports, known as SARs. 106 Stat. 4044-4074, 31 USC §5318(g). The SARs have essentially turned all domestic financial institutions into informers for the US government.

Then, after the terrorist attacks on the World Trade Center and the Pentagon, on October 25, 2001, with a 98-1 vote, the Senate passed the 130-page USA PATRIOT Act. It was signed into law by president George W. Bush the next day. Title III, sections 301-371, is The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001. 115 Stat. 296 – 342.

Before the USA PATRIOT Act, enforcement of FBAR was irregular. The

Secretary of Treasury reported to Congress on April 26, 2002, that 177,151 individuals filed FBAR in 2002 out of one million Americans with foreign bank accounts, a compliance rate of less than twenty percent. Secretary of Treasury, *A Report to Congress in Accordance with §361(b) of the USA PATRIOT Act of 2001.* 6. The Secretary called for stricter enforcement along with civil and criminal penalties, in addition to better education about FBAR and improved forms. *Ibid.* 7-10, 12-13.

New, stricter enforcement also included the passage of The Foreign Account Tax Compliance Act, a.k.a. FATCA, in 2010. FATCA shifted the focus from the US taxpayer to the foreign financial institution. FATCA requires foreign financial institutions to report American customers based on passports, place of birth, and prior residences to FinCEN to ensure that they comply with US income tax laws and FBAR. 26 USC §§ 1471-1474 The US government has persuaded 108 countries to comply with FATCA, so now all over the globe foreign financial institutions have become unpaid US law enforcement officers. *FATCA Countries 2023* https://worldpopulationreview.com/country-rankings/fatca-countries

Collateral damage from FATCA and the PATRIOT Act included ringing the death knell of the oldest private bank in Switzerland, Wegelin and Co., founded in 1741. Swiss Bank officials refused to reveal the names of Americans who held accounts, and the US brought criminal charges against the bank and bankers for conspiring to evade US taxes. Wegelin, however, "believed it would not be

prosecuted in the United States for this conduct because it had no branches or offices in the United States and because of its understanding that it acted in accordance with, and not in violation of, Swiss law and that such conduct was common in the Swiss banking industry." Eventually, the bankers plead guilty and paid a $57.8 million fine, before closing the bank forever and selling its assets. (Nate Raymond, Lynnley Browning, Swiss bank Wegelin to close after guilty plea, January 4, 2013, https://www.reuters.com/article/us-swissbank-wegelin-idUSBRE9020O020130104)

The simple rules created in the Bank Secrecy Act of 1970 to combat the use of secret foreign bank accounts by organized crime for large-scale fraud, tax evasion, skimming of casino profits, and securities violations, have evolved into many new rules, new crimes, a vast complex of thousands of law enforcement officials in various federal agencies and a worldwide network of financial surveillance, which is often used to punish ordinary Americans. No country in the world besides the United States requires its citizens to report their foreign bank accounts. No country in the world besides the United States forces financial institutions to search for and report on its nationals who have accounts. Even China and North Korea give their overseas citizens more financial freedom.

The recent case of *Bittner v. United States*, 21-1195. 598 U.S. _____ .(2023) illustrates how far we have moved away from the original intent of BSA. The majority opinion delivered by Justice Gorsuch begins by relating the analogous

Ninth Circuit case of Jane Boyd, an American citizen resided in the United Kingdom who ran afoul of FBAR when she inherited an amount exceeding $10,000 in 2009 upon the death of her father. Apparently, she was unaware that she needed to file FBAR in 2010, so she did not do so until 2012. "The government acknowledged that Ms. Boyd's violation of the law was 'non-willful.' Still, the government said, it had the right to impose a $130,000 penalty—$10,000 for each of her 13 late-reported accounts." *Ibid.* 3. "Ms. Boyd challenged the penalty in court where she argued that her failure to file a single timely FBAR subjected her to a single maximum penalty of $10,000. The district court rejected that argument and sided with the government. *United States v. Boyd*, 123 AFTR 2d 2019–1651 (CD Cal. 2019). But in time the Ninth Circuit vindicated Ms. Boyd's view, holding that the BSA authorizes 'only one non-willful penalty when an untimely, but accurate, FBAR is filed, no matter the number of accounts.' 991 F. 3d, at 1078." *Bittner v. United States*, 21-1195. 3.

The situation of Mr. Alexandru Bittner was similar.

> Born and raised in Romania, Mr. Bittner immigrated to the United States at a young age in 1982. He worked first as a dishwasher and later as a plumber and along the way became a naturalized citizen. After the fall of communism, Mr. Bittner returned to Romania in 1990 where he launched a successful business career. Like many dual citizens, he did not appreciate that U. S. law required him to keep the government apprised of his overseas financial accounts even while he lived abroad. 19 F. 4th 734, 739–740 (CA5 2021). Shortly after returning to the United States in 2011, Mr. Bittner learned of his reporting obligations and engaged an accountant to help him prepare the required reports—covering five years, from 2007 through 2011. *Id.*, at 739.
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> ...Under governing regulations, filers with signatory authority over or

> a qualifying interest in fewer than 25 accounts must provide details about each account, but individuals with 25 or more accounts need only check a box and disclose the total number of accounts. 31 CFR §1010.350(g). ... because Mr. Bittner's late-filed reports for 2007–2011 collectively involved 272 accounts, the government thought a fine of $2.72 million was in order. *Id.*, at 739–740. Like Ms. Boyd before him, Mr. Bittner challenged his penalty in court, arguing that the BSA authorizes a maximum penalty for nonwillful violations of $10,000 per report not $10,000 per account. As he put it, an individual's failure to file five reports in a timely manner might invite a penalty of $50,000, but it cannot support a penalty running into the millions. *Bittner*, 3-4

The court ruled in favor of Bittner, saying he owed $50,000, or $10,000 per report, as opposed to the government demand of $2.72 million. The Court reasoned, "Section 5314 does not speak of accounts or their number. The word 'account' does not even appear. Instead, the relevant legal duty is the duty to file reports. *Ibid.* 5

Strangely, none of the Justices or judges asked the big question: What do these two cases have to do with money laundering or international terrorism? Answer: Nothing. In these two cases, neither Boyd nor Bittner was engaged in any criminal activity. Neither was trying to avoid taxes, to launder money, to evade margin requirements on securities purchases, to defraud anyone, or to engage in terrorism. Yet, the US government pursued them as though they were Al Qaeda terrorists.

Bittner's lawyers did not challenge BSA/FBAR, so the government's aggressive prosecution of two apparently law-abiding citizens went unchallenged.

B. Mass data collection, compelling public interest, and the Fourth, Fifth, Ninth, and Tenth Amendments

The original stated purpose of the Bank Secrecy Act of 1970 of fighting big crimes by large criminal organizations can no longer be taken seriously. Since 2002 the government focuses on the FBAR filing requirement, and, after 2010, also on bank disclosures under FATCA. BSA and FBAR are now the tools of the US government for pursuing non-criminals like Jane Boyd, who inherited some money from her father, and Alexandru Bittner, a businessman of Rumanian heritage who ran a legitimate business. Lip service is paid to fighting international terrorism,[5] but there is no evidence that FBAR is more effective at fighting terrorism than simply going to court and obtaining a search warrant. Furthermore, in the past decade, there have been less than two dozen terrorist incidents in the United States, and only one may have involved international banking.[6]

The effect of FBAR today is to grant the government authority to control ordinary Americans with the filing requirements. "A United States person that

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[5] 31 USC §5311 (2) (to) prevent the laundering of money and the financing of terrorism through the establishment by financial institutions of reasonably designed risk-based programs to combat money laundering and the financing of terrorism;

[6] Jonathan Dienst, et al., Staten Island Man, 21, Arrested in Alleged ISIS-Related Conspiracy, Knife Attack on FBI Agent: Court Papers, *NBC New York.com*, June 17, 2015

has a financial interest in or signature authority over foreign financial accounts must file an FBAR if the aggregate value of the foreign financial accounts exceeds $10,000 at any time during the calendar year."[7] The information filed with the IRS includes the name on the account, the account number, the name and address of the foreign bank, the type of account, and the maximum value during the year.[8] These may seem like harmless bits of information, and they would have been fifty years ago, but in the internet age, they are not. Today, bank accounts are an absolute necessity and most transactions are done electronically; except for small purchases, most payments are by bank transfer, check, credit card, or debit card.

Respondents' Department of Justice lawyers wrote in their response to Petitioner's Appellant Brief in the Seventh Circuit, "The reports are not publicly disclosed and are generally exempt from disclosure under the Freedom of Information Act, and may not be disclosed under any State, local, tribal, or territorial analogue of the Freedom of Information Act."[9] The DOJ lawyers admitted, however, "The information collected pursuant to the BSA's reporting and recordkeeping requirements may, however, be shared with other government agencies for purposes consistent with the BSA."[10]

Such a declaration of bureaucratic rules regarding the handing of private

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[7] https://www.fincen.gov/report-foreign-bank-and-financial-accounts

[8] https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar

[9] 23-2661, Appellees Brief at 9, (7th Cir. 2023)

[10] *Ibid.*

data provides little comfort. Thousands of government employees will have access to that data. Plus, in 2021 a website called ProPublica published an article saying it had, "obtained a vast trove of Internal Revenue Service data on the tax returns of thousands of the nation's wealthiest people, covering more than 15 years."[11] Surely, the people whose tax information was leaked to ProPublica were not comforted by knowing that the data were "exempt from disclosure under the Freedom of Information Act, and may not be disclosed under any State, local, tribal, or territorial analogue of the Freedom of Information Act."

Bank accounts reveal information about lifestyle, health, habits, political inclinations—things normally considered private. Yet, with the data from FBAR, government employees can rummage through an individual's bank accounts without a warrant, seemingly trampling on several protected rights—the protection against illegal search and seizure, the protection against self-incrimination, and the right to privacy.

The government's justification is that FBAR is necessary for law enforcement. Unfortunately, all too often, the magic words "law enforcement" are invoked with specious claims. More than 8.7 million Americans live overseas and 63,408 Americans lived in Japan in 2023, not including military personnel.[12]

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[11] Jesse Eisinger, Jeff Ernsthausen and Paul Kiel, "The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax," *ProPublica*, https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax , June 8, 2021

[12] https://www.moj.go.jp/isa/publications/press/13_00040.html

Japan is a low-crime country, and Americans living there are not known for terrorist connections; Japan is not Lebanon.[13] Yet, the magic words "law enforcement" are invoked for FBAR there as in Lebanon.

Furthermore, mass collection of data relating to people's daily financial affairs does not benefit the American people; it can only benefit a police state. Recently, Americans saw an example of how a government can abuse access to private financial information in an unlikely country—Canada—when the government in Ottawa, using an expansive interpretation of laws designed to fight money-laundering and terrorism, froze the bank accounts of truckers who were protesting the government's COVID policy.[14]

The idea of collecting everyone's private data for the benefit of law enforcement is new. At the time the US Constitution was being debated, the word "privacy" was seldom used. Instead, people like John Adams or James Otis would refer to a private realm and a public realm. The major privacy issues at the time concerned trespass and unwarranted search-and-seizure of property. John Adams, for example, as the principal author of the Massachusetts Constitution wrote, "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his

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[13] Rare exceptions: The Japanese translator of Salmon Rushdie's novel Satanic Verses was stabbed to death in 1991 after Ayatollah Khomeini issued a fatwa. Also, in 2003 a Frenchman linked to Al Qaeda was arrested in Germany and it was revealed that he had resided temporarily in Japan with other members of an extremist group.

[14] Katherine Fung, Banks Have Begun Freezing Accounts Linked to Trucker Protest, *Newsweek*, https://www.newsweek.com/banks-have-begun-freezing-accounts-linked-trucker-protest-1680649 , Feb 18, 2022

possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." John Adams, *Massachusetts Declaration of Rights*, Article 14, 1780.

A few years later, the new US government dealt with the issues of trespass and unwarranted search-and-seizure of property in the first session of Congress by adding the 3rd, 4th, and 5th Amendments to the Constitution.

The Framers had foreseen, however, that a Bill of Rights could never specifically identify all rights belonging to the citizens, and that some rights were difficult to define and new ones would emerge in the future. To provide for these rights, they included the 9th and 10th Amendments, to wit:

> Amendment IX - The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
> Amendment X - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Privacy is not specifically mentioned in the Bill of Rights. Except for an 1890 Harvard Law review article co-authored by future Supreme Court justice Louis Brandeis, the issue of privacy went almost 200 years without drawing

much of anyone's attention. Telephones, cameras, and audio recordings—the subjects of the Brandeis article—were not prevalent until the 1890s. And, until the 1980s, banking was done mainly at one's local bank with transactions on pieces of paper. Going online to verify one's account balance did not exist before 1994 and was not common before 2006.[15] Privacy as we understand it--"the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[16]—is a modern issue.

The Supreme Court first tackled the question of privacy head on in the 1960s. In a landmark decision concerning the right to privacy in the context of marriage, Justice Douglas found privacy in the penumbras of the 1st, 3rd, 4th, 5th, and 9th Amendments of the Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965) 484. Although he was writing for the majority, Justice Douglas was alone. In the same case, in a concurring opinion joined by Chief Justice Warren and Justice Brennan, Justice Goldberg focused almost exclusively on the 9th Amendment, suggesting it is there where the court can find the Right to Privacy.

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments... The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him, and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed

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[15] https://fintechmagazine.com/banking/fintech-timelines-and-the-story-of-online-banking
[16] Alan Westin, *Privacy and Freedom*, New York: Atheneum, 1967, p. 7

> fears that a bill of specifically enumerated rights [Footnote 3] could not be sufficiently broad to cover all essential rights, and that the specific mention of certain rights would be interpreted as a denial that others were protected. [Footnote 4] 488
>
> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment, and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment... 491

At the time the Griswold opinion was issued, Justice Goldberg had only been on the bench for two and a half years. By contrast, by that date Justice Douglas had been on the bench for 26 years. It is possible that Chief Justice Warren assigned the majority opinion to Justice Douglas because of his seniority, and that had Justice Goldberg been assigned the duty of writing the court's opinion, the 9th Amendment would have been given its rightful full effect, and there would have been challenges to FBAR fifty years ago on the basis of the 9th Amendment.

C. Proceedings Below

In forma pauperis Petitioner George Gaio Mano, a US citizen living and working in Japan since 2013, found himself obligated to file a Foreign Bank Account Report (FBAR) in 2022, when, for the first time, the sum total of his foreign bank accounts exceeded the $10,000 limit established by the Bank

Secrecy Act of 1970 (BSA). The large sum on deposit was the result of a retirement bonus paid by Mano's university on the occasion of him having attained sixty years of age. The university also rehired him that year at a salary thirty percent lower than his previous salary.

On May 18, 2022, Mano, proceeding pro se, initiated suit in Federal District Court for Southern Indiana, seeking a permanent injunction prohibiting enforcement of FBAR by US Secretary of Treasury Janet Yellen, who has discretion under the Bank Secrecy Act to waive or alter the BSA requirements; the Treasury Department, where filing takes place and which enforces noncompliance; and the Internal Revenue Service, which requires FBAR reporting along with yearly tax filing. The basis for the suit was that the reporting requirement violates Petitioner's rights under the 4th, 5th, 9th, and 10th Amendments of the United States Constitution, specifically, the 4th Amendment protection against unlawful search and seizure, the 5th Amendment protection against self-incrimination (added later) and the Right to Privacy in the 9th and 10th Amendments.

On March 28, 2023, Respondents/Defendants moved to dismiss Plaintiff's Complaint under Federal Rules of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction), 12(b)(4) (insufficient process), 12(b)(5) (insufficient service of process), and 12(b)(6) (failure to state a claim), citing *California Bankers Assn* and *Miller* and making the untenable claims of "no expectation of privacy in a banking relationship" and a third-party relationship between banker and

customer. (See *supra*)

On April 16, 2023, Petitioner Mano filed a Motion for Declaratory Judgement in the District Court, specifically asking the Court:

> (1) Does the US Constitution protect a fundamental Right to Privacy, separate and independent from all other rights?
> (2) Does the Report of Foreign Bank and Financial Accounts, otherwise known as FBAR, violate the Right to Privacy which is protected by the US Constitution?
> (3) Does the Report of Foreign Bank and Financial Accounts, otherwise known as FBAR, violate the Fourth Amendment protection against unlawful searches and seizures as well as the Fifth Amendment right against self-incrimination?[17]

On August 1, 2023, Richard L. Young of the federal court of the Southern District of Indiana issued a Final Order, ruling that subject matter jurisdiction was secure, but that Petitioner/Plaintiff had failed to state a claim upon which relief can be granted. The Court granted Respondent/Defendant's Motion to Dismiss. The Court also issued a summary rejection all of Petitioner's claims to rights under the 4th, 5th, 9th, and 10th Amendments.[18]

Petitioner Mano filed a timely Notice of Appeal to the Seventh Circuit on August 21, 2023, along with a Temporary Injunction asking the District Court to enjoin the US Government from requiring Appellant to provide Appellant's foreign bank account details under FBAR until the Seventh Circuit rendered a verdict. The District Court ruled against the Motion for Temporary Injunction,

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[17] 1:22-cv-01037-RLY-MJD, Motion for Declaratory Judgment, April 16, 2023

[18] 1:22-cv-01037-RLY-MJD

not on its content, but on procedural grounds, saying it was the wrong venue, since Petitioner/Plaintiff was now an Appellant and had filed a Notice of Appeal.

Then, on September 13, 2023, after filing a Docketing Statement, Petitioner/Appellant Mano filed a Motion for a Temporary Injunction (later corrected to a Preliminary Injunction) in the Seventh Circuit to enjoin the US Government from enforcing FBAR until the court rendered a verdict. (The due date for filing FBAR is October 15.) Petitioner/Appellant did not expect Respondents/Appellees to file an Opposition to the Motion, because no harm could come to the government or Respondent's case were the Court to grant Petitioner/Appellant's Motion. Nevertheless, Respondents/Appellees submitted a lengthy brief under the title *Motion for Summary Affirmation and Opposition to Temporary Injunction,* arguing the Balance of Harm test favored the government and that the Required Records Doctrine applied.[19]

Petitioner/Appellant believed the DOJ lawyers were being mendacious. "The balance of harms" tips entirely in Petitioner/Appellant's direction, and Respondent/Appellant's *Motion* demonstrated that it is so. Petitioner/Appellant would lose his privacy—permanently. That is a harm. Everyone wants privacy. People close the curtains on their home windows and use passwords and VPNs for their electronic devices for privacy. Billionaires spend untold millions to build walls around their houses and to scour the internet for unpleasant leaks.

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[19] 23-2661, Appellee's Motion for Summary Affirmation and Opposition to Temporary Injunction, at 7, 10, (7th Cir. 2023) Sept. 20, 2023

The DOJ lawyers do not post their addresses, social security numbers, bank account numbers on the internet, because they want privacy. By contrast, the temporary injunction would bring no harm to the US government. The only "harm" Respondents/Appellees could claim is a loss of statistical data, unless they want to admit to the loss of government control over an individual.

Likewise, Respondents/Appellees' Required Records defense against violations of the 5th Amendment is suspect. Respondent/Appellees italicized the words "tax" and "regulatory investigations" as though to say, "these are our justifications for violating Petitioner's Right to Privacy." Yet, highlighting the word "tax" is odd, because Petitioner Mano files income tax forms every year, without the threat of FBAR, and the phrase "regulatory investigations" contradicts the 2002 USA PATRIOT ACT's stated purpose in enforcing FBAR, which is the war on terror.

Nonetheless, on Sept. 22, 2023, the 7th Circuit Court denied Petitioner's Motion for Temporary Injunction, citing *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 763 (7th Cir. 2021), and *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006).

Petitioner appealed the Seventh Circuit's ruling on the Motion for Temporary Injunction, and again the court denied the Motion, compelling Petitioner to file FBAR with FinCENT, thereby losing all privacy in his foreign bank accounts.

On November 12, 2023, Petitioner filed Appellant's Opening Brief in the

Seventh Circuit.[20] Petitioner argued that the District Court had jurisdiction under the Report of Foreign Bank and Financial Accounts – FBAR, 31 USC §5311 et seq., and the 4th, 5th, 9th, and 10th Amendments of the Constitution, and the Seventh Circuit had jurisdiction under the Bank Secrecy Act – BSA (1970) H.R. 15073, PL 91-508, 84 Stat. 1124; the Report of Foreign Bank and Financial Accounts – FBAR, 31 USC §5311 et seq.; the Right to Financial Privacy Act - RFPA (1978), H.R. 8133, P.L. 95-630, 92 Stat. 3697; the Right to Privacy and other fundamental rights; and the 4th, 5th, 9th, and 10th Amendments of the Constitution. Petitioner also argued that because the case concerned fundamental rights under the Constitution, Strict Scrutiny is the proper standard of review.

On May 6, 2024, the Seventh Circuit's issued its Nonprecedential Disposition stating, "Because Mano fails to raise a claim arising under federal law and lacks standing, we modify the district court's judgment to reflect that Mano's complaint is dismissed for lack of jurisdiction."[21]

> Before evaluating the substance of Mano's claims, we must first assure ourselves that our jurisdiction is proper. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998). This requires, among other things, that Mano "point to an underlying source of federal law that supplies [him] with a cause of action" to bring his claim in federal court. *Okere v. United States*, 983 F.3d 900, 902–03 (7th Cir. 2020); see also *Gunn v. Minton*, 568 U.S. 251, 257 (2013). He fails to do so. The statute conferring jurisdiction over federal questions, 28 U.S.C. § 1331, does not itself supply a cause of action. And neither side asserts

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[20] 23-2661, Appellant's Opening Brief, (7th Cir. 2023) Nov. 12, 2023

[21] 23-2661, Nonprecedential Disposition, at 2, (7th Cir. 2024) May 6, 2024

> that the Bank Secrecy Act creates a privately enforceable claim. While Mano's suit implicates several constitutional amendments, "[c]onstitutional rights do not typically come with a built in cause of action to allow for private enforcement in courts." *De Villier v. Texas*, 144 S. Ct. 938, 943 (2024). And Mano does not allege that this is one of the rare instances where the Constitution implies a cause of action. See *Egbert v. Boule*, 596 U.S. 482, 490–93 (2022).

The Seventh Circuit's ruling raises interesting questions. If the Seventh Circuit does not have federal question jurisdiction for a constitutional challenge of FBAR, which federal court does? Moreover, does the Seventh Circuit ruling mean that nobody has the right to challenge the constitutionality of FBAR?

The Seventh Circuit also ruled against Petitioner by arguing that Petitioner lacks Article III standing, that Petitioner lacks an "injury in fact" that is "concrete and particularized," "actual or imminent, not conjectural or hypothetical," and redressable by a favorable verdict, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) and that "Such injury must persist throughout the life of a case." See *Camreta v. Greene*, 563 U.S. 692, 701 (2011).

The Seventh Circuit supported its argument with a false claim:

> **While this appeal was pending, Mano chose to file his FBAR.** (Petitioner's emphasis.) In doing so, he mooted any privacy-related harms he might have suffered from the initial filing, confining his injury to that which might arise from the government's continued possession of his information and the risk that he may have to file again. Any potential harm from having to file a second FBAR is entirely speculative...[22]

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[22] *Ibid.* 3

Petitioner responds to the Seventh Circuit by noting Petitioner Mano did not CHOOSE to file FBAR. He was COERCED into filing FBAR. Petitioner Mano filed a suit in federal district court in order NOT to file FBAR. Petitioner Mano filed two temporary injunctions—one in the district court, one in the Seventh Circuit—in order NOT to file FBAR. It is only because the Seventh Circuit denied his Motion for a Temporary Injunction—twice—that he had to file FBAR. Petitioner's choice was either file FBAR or break the law.

The mendacity of the Seventh Circuit continues:

> Mano also cannot point to any continuing injury from having filed an FBAR. He asserts that because he filed the FBAR, the government now can "rummage through" and monitor his financial transactions. But this misapprehends the effect of filing the report. While the information in an FBAR may be used to help trace funds used for illicit purposes, *Bittner v. United States*, 598 U.S. 85, 89 (2023), nothing suggests that the government uses the information to actively monitor a bank account. Mano intimates that the information about his bank accounts could be used in a future criminal investigation, but that would be contingent upon him committing a crime—another speculative assumption. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102–03 (1983).[23]

On the topic of speculative assumptions, the Seventh Circuit sees federal officials as angels always operating within the bounds of the law and the Constitution, and acting as careful custodians of private information. (Recall recently that both Presidents Trump and Biden had classified documents at their homes.) As mentioned above, Respondents admitted, "The information

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[23] *Ibid.* 3-4

collected pursuant to the BSA's reporting and recordkeeping requirements may, however, be shared with other government agencies for purposes consistent with the BSA."[24] And what are "purposes consistent with the BSA?" Almost anything imaginable, and the words "other government agencies" mean that thousands of government employees can have access to this information. In other words, filing FBAR is an actual, concrete, immediate, particularized injury in fact; it is an unconstitutional invasion of privacy. It is comparable to the government demanding that individuals hand over a list of all their internet accounts and their passwords, and it does not matter whether the government intends to use that information only when an individual commits a crime; the coercive collection of that information is an unconstitutional violation of privacy. John Adams would be appalled.

Furthermore, although Petitioner Mano can reduce his foreign bank holdings below ten thousand dollars and change his accounts to other banks, that will not bring back the privacy he has already lost. What court would say, "The victim is dead. Making murder illegal won't bring the victim back."? The threat to take away Petitioner's privacy exists as long as FBAR exists.

Lastly, the Seventh Circuit's Final Judgment in favor of the US government's scheme to collect private financial information on millions of Americans is only possible because the court ignored the standard of review.

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[24] 23-2661, Appellees Brief, at 9, (7th Cir. 2023)

Strict Scrutiny is the proper standard of review in cases of fundamental rights, *Johnson v. California*, 543 U.S. 499 (2005), and *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) and in cases in which a governmental policy or statute seemingly violates the Constitution. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002). Using Strict Scrutiny, the government must demonstrate that the policy or statute is narrowly tailored to a compelling public interest. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003), and "(i)n every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). Also, see *Speiser v. Randall*, 357 U.S. 513, 528-529 (1958).

The Respondents have never demonstrated that the BSA or FBAR is narrowly-tailored to a compelling public interest; merely saying the magic words "law enforcement" does not qualify. Nor can Respondents pretend that the BSA and FBAR do not unduly infringe on protected freedoms under the 4th, 5th, 9th, and 10th Amendments, when, in fact, they kill financial privacy.

Reasons for Granting the Petition

The Court should grant certiorari because

1. FBAR bears no relationship to the original intent of the Bank Secrecy Act of 1970 and now only serves to intimidate and control US citizens who have committed no crimes.

2. Banking is on the internet today, and the US government's mass collection of private banking data under the Bank Secrecy Act of 1970 and FBAR violates fundamental rights protected by the 4th, 5th, 9th, and 10th Amendments.

3. The Court needs to recognize an independent, fundamental Right of Privacy in the 9th and 10th Amendments in order to protect that right in the age of the internet, and to breathe life into those two dying amendments.

4. *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974) and *United States v. Miller*, 425 U.S. 435 (1976) are two of the most egregious decisions of the 20th century and justice demands that they be overturned.

5. The Seventh Circuit erred in claiming it did not have jurisdiction in a federal question case involving a challenge to a federal statute brought by a US citizen.

6. The Seventh Circuit erred in not applying strict scrutiny review to a case involving fundamental rights under the Constitution.

Certificate of Compliance with Rule 33.2

Statement of the Case and *Reasons for Granting the Petition* word total – 7765 words—excluding footnotes.