No.

In the Supreme Court of the United States

ALEXANDRU BITTNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

In the decision below, the Fifth Circuit held that there is a *separate* violation (with its own $10,000 penalty) for each foreign account not timely reported on an annual FBAR; it thus authorized a penalty on "a per-account, not a per-form, basis." In so holding, the Fifth Circuit expressly rejected a contrary decision of the Ninth Circuit, which held the failure to file an annual FBAR constitutes a *single* violation, "no matter the number of accounts." This critical issue arises all the time, and the Act's penalties for identically situated parties will now turn on whether the taxpayer is from California or Texas.

The question presented is:

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

RELATED PROCEEDINGS

United States District Court (E.D. Tex.):

United States of America v. *Alexandru Bittner*, No. 4:19-CV-415 (June 29, 2020) (summary-judgment order)

United States of America v. *Alexandru Bittner*, No. 4:19-CV-415 (July 22, 2020) (final judgment)

United States Court of Appeals (5th Cir.):

United States of America v. *Alexandru Bittner*, No. 20-40597 (Nov. 30, 2021)

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Alexandru Bittner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

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

> **Records and reports on foreign financial agency transactions**
>
> (a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:
>
> (1) the identity and address of participants in a transaction or relationship.
>
> (2) the legal capacity in which a participant is acting.
>
> (3) the identity of real parties in interest.
>
> (4) a description of the transaction.
>
> * * * * *

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

> (5) FOREIGN FINANCIAL AGENCY TRANSACTION VIOLATION.—

(A) PENALTY AUTHORIZED.—The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.

(B) AMOUNT OF PENALTY.—

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

* * * * *

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

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

* * * * *

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

(c) Reports required to be filed by § 1010.350 shall be filed with FinCEN on or before June 30 of each calendar year with respect to foreign financial accounts

exceeding $10,000 maintained during the previous calendar year.

* * * * *

Other relevant statutory provisions are reproduced in the appendix to this petition (App., *infra*, 64a-66a).

INTRODUCTION

This case presents a clear and intractable conflict over a significant question under the Bank Secrecy Act: whether there is a single "violation" (and $10,000 maximum penalty) for the failure to file an annual FBAR, or whether there is a separate violation (with its own $10,000 penalty) for each individual foreign account not included on that single report. In the proceedings below, the Fifth Circuit held that the Act imposes a standalone duty on taxpayers to report each account—and thus "each failure to report a qualifying foreign account constitutes a separate reporting violation subject to a penalty." App., *infra*, 2a. In so holding, the Fifth Circuit expressly rejected a contrary 2-1 decision of the Ninth Circuit, calling it "unpersuasive." *Id.* at 2a & n.1. This issue was squarely resolved at each stage of this case and was dispositive below; it is a pure question of law, and there are no conceivable obstacles to resolving it here.

This case readily satisfies the traditional criteria for granting review. The conflict is obvious, acknowledged, and entrenched. The issue has broad significance for millions of individuals and businesses with foreign bank accounts, which is why it has captured industry attention and is being closely monitored by key stakeholders.[1] The

[1] See, *e.g.*, Natalie Olivo, *International Tax Cases To Watch In 2020*, Law360 (Jan. 3, 2022) (flagging *Bittner* as one of "eight key international tax cases to follow"); Federal Tax Coordinator, *Penalties*

express conflict at the circuit level tracks the same conflict in the lower courts. Further percolation is pointless: the arguments have been exhaustively developed on each side, and there is no realistic prospect that either faction will back down. The Fifth Circuit considered, and rejected, every aspect of the Ninth Circuit's rationale, and the IRS (who administers these penalties) has acquiesced in a "per-form" rule in the Ninth Circuit—while still aggressively pursuing a "per-account" position everywhere else. The resulting disuniformity frustrates the fair and proper administration of this nationwide scheme, and the conflict will not dissipate on its own.

The question presented raises legal and practical issues of surpassing importance. The conflicting circuit views do not produce similar results, as the facts here illustrate. Petitioner had dozens of qualifying foreign accounts, and failed to file five annual reports. His conduct was entirely non-willful: He was living overseas and was unaware of the filing requirement; most of the accounts were owned by operating Romanian companies; and he ultimately filed corrected, though untimely, FBARs once

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For Failure To Meet FBAR Reporting Requirement On Interests In Foreign Bank And Financial Accounts, ¶ V-1813.4 (2d Ed. 2022) ("Caution: The Fifth Circuit's disagreement with the Ninth Circuit's taxpayer-friendly decision in *Boyd* * * * creates a circuit split. Taxpayers in the Fifth Circuit could potentially be exposed to larger penalties for non-willful violations than willful violations, based on the number of accounts involved * * * ."); KPMG, *Fifth Circuit: Penalty for FBAR violation applies on per-account basis, not on per-form basis*, TaxNewsFlash (Dec. 1, 2021) ("[t]he decision from the Fifth Circuit differs from the findings of the Ninth Circuit * * * , thus creating a split between these circuits"); Gray Reed, *Non-Willful FBAR Penalties Will be Much Higher in the Fifth Circuit*, Texas Tax Talk (Dec. 1, 2021) ("the decision creates a split in the circuits where taxpayers in the Ninth Circuit receive way more favorable treatment when facing non-willful FBAR penalties").

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

Because this case presents an ideal vehicle for resolving this important question of federal law, the petition should be granted.

STATEMENT

A. Statutory Background

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

The Secretary discharged that obligation with a series of regulations. Those regulations require that each person with a qualifying foreign account "shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons." 31 C.F.R. 1010.350(a). The Secretary further directed that "[t]he form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD-F 90-22.1)"—commonly known as an "FBAR." Finally, as relevant here, the Secretary also directed that "[r]eports required to be filed by § 1010.350 shall be filed * * * on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year." 31 C.F.R. 1010.306(c).[2]

2. The Act enforces these requirements with both civil and criminal penalties. See 31 U.S.C. 5321-5322.[3]

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

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

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

causes any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(A). But the Act sets a ceiling for non-willful conduct: "the amount of any civil penalty" for a non-willful violation "shall not exceed $10,000." 31 U.S.C. 5321(a)(5)(B). The maximum penalty for a willful violation, by contrast, is far higher: the greater of $100,000 or "50 percent" of either (i) "the amount of the transaction" or (ii) "in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation." 31 U.S.C. 5321(a)(5)(C)-(D).

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

B. Facts And Procedural History

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

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

While living abroad, petitioner had limited contact with the United States. Like many dual citizens, he was

unaware that he was required to file U.S. income tax returns reporting his foreign income. App., *infra*, 5a-6a; C.A. ROA 256, 442, 729-730. He was also unaware of the existence of FBARs or his duty to file them. App., *infra*, 5a-6a; C.A. ROA 255-256, 441-442, 732, 741. Shortly after returning to the United States in 2011, he discovered that he should have filed U.S. tax returns while living in Romania, reporting his world-wide income. C.A. ROA.256, 442, 729-730. He engaged a professional accountant to prepare and file those returns. C.A. ROA.256, 442, 729-730. The accountant also informed petitioner about the FBAR reporting requirement, and he likewise filed the required reports. App., *infra*, 6a; C.A. ROA.256, 1331.[4]

The IRS determined that petitioner failed to timely file FBARs for five years (2007-2011); during those years, because petitioner had over 25 foreign accounts, he was not required to detail those accounts but was allowed to merely state the total number of foreign accounts in which he had a financial interest. 31 C.F.R. 1010.350(g). (His corrected forms nevertheless volunteered the full information. App., *infra*, 6a.) The IRS concluded that petitioner's delinquency was non-willful, but it still sought to impose a maximum penalty under the Act. Although petitioner had only failed to submit five annual forms, the IRS asserted that petitioner had violated the Act a full 272 times—once for each account that was not reported in each of those five years. See, *e.g.*, App., *infra*, 6a, 34a. The

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

IRS accordingly assessed a $2.72 million penalty, representing a $10,000 fine for each account he ultimately reported on his untimely FBARs. *Ibid.*

2. The IRS filed suit against petitioner in Texas to reduce the penalty assessment to judgment. On cross-motions for summary judgment, the district court determined that the IRS's penalty assessment was unlawful and the proper amount was capped at $50,000—a $10,000 maximum penalty for each annual FBAR. App., *infra*, 38a-57a.[5]

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

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

applies per FBAR reporting violation rather than per account." *Id.* at 51a.

It accordingly held that "non-willful FBAR reporting deficiencies constitute a single violation within the meaning of § 5321(a)(5)(A) and (B)(i) and carry a maximum annual $10,000 civil money penalty, irrespective of the number of foreign financial accounts maintained." App., *infra*, 49a. In doing so, it expressly rejected a contrary decision in California that ruled in the government's favor: "After a careful analysis of the statute's text and purpose, the Court is left with no choice but to respectfully disagree with the outcome in [*United States* v. *Boyd*, No. 18-803, 2019 WL 1976472 (C.D. Cal. Apr. 23, 2019), rev'd, 991 F.3d 1077 (9th Cir. 2021)] and reach the opposite conclusion." *Id.* at 54a.[6]

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

The Fifth Circuit initially faulted the district court for "determining what constitutes a 'violation' under section 5314 by focusing on the regulations under section 5314 to

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

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

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

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

23a (reading the language of the reasonable-cause exception to support an "'account-specific'" construction).

The Fifth Circuit finally rejected petitioner's remaining arguments. It held that there was no need to construe a tax provision "strictly" against the government—as that canon had been "amply criticized" and the text anyway "leaves no doubt that each failure to report an account is a separate violation of section 5314." App., *infra*, 23a-24a. It likewise rejected petitioner's reliance on the rule of lenity, stating that "the statute is not ambiguous and the non-willful penalty provision has no criminal application." *Id.* at 24a. And it disagreed that the government's reading would produce "'absurd results.'" *Id.* at 24a-25a. On the contrary, the Fifth Circuit reasoned, "[i]t is not absurd—it is instead quite reasonable—to suppose that Congress would penalize each failure to report each foreign account." *Id.* at 25a.

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

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Over A Significant Question Under The Bank Secrecy Act

The decision below creates a square conflict over a significant question regarding non-willful penalties under the Bank Secrecy Act. The Fifth Circuit acknowledged and rejected a split decision by the Ninth Circuit—disavowing the majority's position and embracing the contrary views of the dissent. The same conflict had already

been deepening in extensive decisions in lower courts. And there is no reason to think the conflict will disappear on its own: the IRS is applying one rule in the Ninth Circuit and a different rule everywhere else, leaving the conflict entrenched—and ensuring that tax penalties vary greatly based entirely on the happenstance of where a taxpayer is located. That disparate treatment of identically situated parties undermines the proper administration of the tax system and interferes with sound tax policy. There is an obvious reason the issue is being closely tracked by key stakeholders and expert commentators who recognize the issue's overwhelming importance.

The circuit conflict is undeniable and entrenched, and it should be resolved by this Court.

1. a. The decision below directly conflicts with settled law in the Ninth Circuit. In *United States* v. *Boyd*, 991 F.3d 1077 (9th Cir. 2021), the Ninth Circuit confronted the identical question presented here, and a split panel adopted the opposite holding: "[we] conclude that § 5321(a)(5)(A) authorizes the IRS to impose only one non-willful penalty when an untimely, but accurate, FBAR is filed, no matter the number of accounts." 991 F.3d at 1078.

The *Boyd* court confronted a fact-pattern materially indistinguishable from this case. The taxpayer had 13 qualifying foreign accounts, and non-willfully failed to file a timely FBAR. 991 F.3d at 1078-1079.[7] The IRS characterized the taxpayer's failure to submit a single report as 13 *separate* violations—one violation for each account, rather than a single violation of Section 5314's reporting requirement. The IRS accordingly sought 13 penalties, all

[7] The taxpayer also had a fourteenth account, but the IRS did not impose a separate penalty for that account because it was only "used to fund several other accounts." 991 F.3d at 1079 n.2.

based on the taxpayer's one-time failure to file a single form. Even without imposing a maximum penalty per violation, the IRS still "assessed a total penalty of $47,279" (991 F.3d at 1079)—more than quadrupling the $10,000 limit under Section 5321(a)(5)(A).

The IRS then sued the taxpayer to obtain a judgment for $47,279 "plus additional late-payment penalties and interest." 991 F.3d at 1079. In her defense, the taxpayer argued that "she had committed only one non-willful violation, not thirteen," and "the maximum penalty allowed by the statute for that single non-willful violation was $10,000." *Ibid.* The government responded with the same position it asserted here: "the relevant statutes and regulations authorized the IRS to assess one penalty for each non-reported account." *Ibid.* The district court sided with the government, finding that "§ 5321(a)(5)(A) authorized the government to impose multiple non-willful penalties—up to $10,000 for each foreign bank account that was required to be listed on the FBAR." *Id.* at 1078.[8]

A divided panel of the Ninth Circuit reversed: "[t]he statute, read with the regulations, authorizes a single non-willful penalty for the failure to file a timely FBAR." *Id.* at 1079-1080. The majority initially examined this Court's decision in *Shultz* to frame the analysis. As the majority explained, *Shultz* confirmed that the Act's penalties "'attach only upon violation of [the Secretary's] regulations; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone.'" *Id.* at 1081 (quoting *Shultz*, 416 U.S. at 26). The majority thus concluded the

[8] See also *United States* v. *Boyd*, No. 18-803, 2019 WL 1976472, at *4 (C.D. Cal. Apr. 23, 2019) (finding the issue "somewhat unclear" but concluding "the Government has advanced the more reasonable interpretation").

relevant "focus" was on the Secretary's regulations themselves. *Ibid.*

Turning to those regulations, the majority "h[e]ld" the taxpayer only "committed a single non-willful violation." 991 F.3d at 1082. As the majority explained, the regulations impose a single duty on qualifying taxpayers: *filing the annual FBAR*. *Id.* at 1081-1082. A taxpayer may have to list all foreign accounts to satisfy that unitary obligation, but each missing account does not constitute its own violation—it simply means the taxpayer violated the rules, once, by failing to submit a full and accurate report. See *id.* at 1082 n.7 (rejecting the dissent's view that the relevant "report" is the *disclosure of each account*, not the FBAR itself—"[b]ecause a taxpayer must make the reports on the FBAR, *it is the FBAR* that must be filed") (emphasis added). This is reinforced by the regulation's core requirements: "only one yearly FBAR is required," and the duty to file "does not turn on the number of accounts, only on the[ir] aggregate value." *Id.* at 1082 n.6. Outside the FBAR itself, there is no freestanding duty to "report" each account, "whether there are twenty accounts with an aggregate value of $10,000, or one account with a value of $10,000,000." *Ibid.* Thus, the majority "h[e]ld," "under the statutory and regulatory scheme," a taxpayer's sole violation is "the failure to timely file the FBAR." *Id.* at 1082.[9]

[9] Indeed, in underscoring this point, the majority quoted the district court's position in *this* case, which the Fifth Circuit later reversed: "'[I]t is the failure to file an annual FBAR that is the violation contemplated and that triggers the civil penalty provisions of § 5321.'" 991 F.3d at 1082 n.7 (quoting 469 F. Supp. 3d at 718). This further confirms that petitioner would have prevailed had his case arisen in California instead of Texas.

The majority next declared the government's contrary theories "unpersuas[ive]." 991 F.3d at 1083-1085. The majority, for example, rejected the government's theory that the "willful-violation provisions"—"which explicitly base[] the penalty amount on the balance of any account willfully misreported"—show that non-willful penalties must also be "[account]-base[d]." *Id.* at 1083. The majority found this exactly backwards: unlike the provision for willful penalties, the non-willful provision is "silent" as to accounts and "does not expressly authorize (or forbid) * * * penalties on a per account basis." *Ibid.* As the majority explained, that contrast is telling: "we presume that Congress purposely excluded the per-account language from the non-willful penalty provision * * * because it included such language in the willful penalty provision." *Id.* at 1084; see also *id.* at 1083-1084 ("'Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.'") (quoting *Dep't of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 391 (2015)). While "Congress could very easily have written" the statute to declare a violation for "'each failure to timely report the existence of an account,'" the majority noted that "Congress [instead] wrote the statute it did." *Id.* at 1084. The majority thus "decline[d] to read into the statute language that Congress wrote in the willful penalty provision but omitted from the non-willful penalty provision." *Id.* at 1084.

The majority further rejected the dissent's "erroneous[] claims" that it was "'defin[ing] the word 'violation' differently" in the various penalty provisions. 991 F.3d at 1084 n.10. As the majority explained, it was applying the same concept of "violation" but "giv[ing] effect" to Congress's "two different schemes of *punishment*": "'Concluding that the manner of calculating the statutory cap

for a willful violation is different than for a non-willful violation does not mean that the conduct underlying the violation differs. Under both scenarios, the violation flows from the failure to file a timely and accurate FBAR.'" *Ibid.* (quoting *United States* v. *Kaufman*, No. 18-787, 2021 WL 83478, at *10 (D. Conn. Jan. 11, 2021) (emphasis added). Indeed, the majority observed, it was the *dissent* "ignor[ing] the import of Congress's explicit choice to omit the per-account language from the non-willful penalty provision." *Ibid.*

The majority likewise rejected the government's reliance on the "per-account language in the reasonable cause exception." 991 F.3d at 1084. "[C]ontrary to the government's argument," the majority again found, "the inclusion of per-account language in the reasonable cause exception supports that Congress *intentionally* omitted per-account language from the non-willful penalty provision." *Ibid.* (favorably citing, *e.g.*, *Kaufman*, *supra*, and the district court's decision in this case).

Finally, while the majority stated it "ha[d] no difficulty" finding only a single violation based on the statute's "language" and "the regulations as a whole," it alternatively found any ambiguity had to be construed in favor of the taxpayer: "we must strictly construe a 'tax provision which imposes a penalty * * * ; [it] cannot be assessed unless the words of the provision plainly impose it.'" 991 F.3d at 1085-1086. This independently foreclosed the government's position: "Even if the government's reading of the statutory scheme were reasonable (and we think it is not), that reading does not arise from the plain words of either the statute or the regulations." *Id.* at 1086. Because the

taxpayer's "reading, even if it is not compelled, is reasonable," the majority "would strictly construe the statute against the government." *Ibid.*[10]

b. Judge Ikuta dissented. 991 F.3d at 1086-1091. She found the majority's "interpretation" "contrary to the language of the relevant statutes and regulations" and "implausible in context." *Id.* at 1087. In her view, the statute's "most natural reading" "requires Americans to report each foreign account and imposes a penalty for each failure to do so." *Ibid.* (rejecting the majority's conclusion "that it is the failure to provide the reporting form (not the failure to report the individual foreign financial accounts) that constitutes the statutory violation").

Like the Fifth Circuit (and unlike the majority), Judge Ikuta found that "§ 5314(a) has both a substantive and procedural element." 991 F.3d at 1088; compare App., *infra*, 17a. In her view, the "substantive element" "directs the Secretary of the Treasury to require a person to 'file reports' when that person * * * 'maintains a relation * * * with a foreign financial agency.'" 991 F.3d at 1088. "Procedurally," she found, "the report must contain certain information 'in the way and to the extent the Secretary prescribes.'" *Ibid.* Looking to the Secretary's implementing regulations, she found that "the obligation to report each account" is thus "independent of the obligation to file a reporting form"; accordingly, "[t]he 'reports required to be filed' are distinct from the form that must be used for filing the reports." *Id.* at 1088 & n.6 (construing 31 C.F.R. 1010.350(a) and 1010.306(d)).

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[10] The majority also flagged the staggering practical consequences of the government's position. Because "[t]he regulations and FBAR require a person to report much more information than the number of accounts," "[t]aken to its 'logical' conclusion, the government's argument could permit many more non-willful violations than those tied just to the number of [missing] accounts." 991 F.3d at 1082 n.8.

Contrary to the majority's position, Judge Ikuta also found that the "'reasonable cause'" exception "indicates that the failure to report a single transaction, or the balance in a single account, constitutes a violation." 991 F.3d at 1089. And she likewise disagreed with the majority's reading of the willful-penalty provision, which she asserted "makes clear that a violation may involve 'a failure to report the existence of an account.'" *Ibid.* "Reading these provisions together," she concluded, "the applicable statute and regulations make clear that any failure to report a foreign account is an independent violation, subject to independent penalties." *Ibid.*

Judge Ikuta then directly attacked the "majority's arguments." 991 F.3d at 1090. She argued that "[t]he majority's analysis is wrong because the majority conflates the 'report' that a person must make, with the 'reporting form' required by the regulations." *Ibid.* Instead, she declared, "the statute and regulations make clear that the requirement to report an account and the requirement to file a reporting form are distinct." *Ibid.* (rejecting, by name, the district court's decision in this case) (citing 469 F. Supp. 3d at 718). She further insisted that the majority's analysis necessarily requires "the word 'violation'" to have "different meaning[s]" in the same statutory section, contrary to "[t]he 'normal rule of statutory construction.'" *Id.* at 1090-1091.

"Finally," Judge Ikuta asserted, the majority was wrong to "strictly construe a tax provision that imposes a penalty." 991 F.3d at 1091. She declared the court should "'not mechanically resolve doubts in favor of the taxpayer but instead resort to the ordinary tools of statutory interpretation.'" *Ibid.* In applying those tools here, Judge Ikuta maintained "the most natural reading of the relevant statutes and regulations" is that "each failure to re-

port a foreign account is a separate violation," and the majority's contrary view was "strained and unpersuasive." *Ibid.*

She accordingly would have held that the taxpayer "committed thirteen violations" by untimely filing a single form that happened to list thirteen accounts. 991 F.3d at 1091. Because she felt "the IRS could have assessed penalties of up to $130,000," she would have affirmed. *Ibid.*

2. As the above readily reflects, the Fifth and Ninth Circuits emphatically disagree over every core aspect of the analysis. After considering virtually identical arguments, the circuits, for example, reached opposite conclusions over this Court's decision in *Shultz* (991 F.3d at 1081-1082; contra App., *infra*, 15a-16a); the proper reading of Section 5314 (991 F.3d at 1081-1082; contra App., *infra*, 16a-20a); the proper reading of Section 5321 (991 F.3d at 1082-1083; contra App., *infra*, 20a-23a); the implications of the reasonable-cause defense (991 F.3d at 1084-1085; contra App., *infra*, 22a-23a); the contextual clues from the willful-penalty provisions (991 F.3d at 1083-1084; contra App., *infra*, 20a-22a); the plain-text construction of the regulations (991 F.3d at 1081-1082 & nn.6-8; contra App., *infra*, 17a-19a); and the role of the rule of lenity and strict-construction principles for tax penalties (991 F.3d at 1085-1086; contra App., *infra*, 23a-24a).

The Ninth Circuit debated these issues in an exhaustive split decision; the Fifth Circuit then surveyed that panel's competing views, explicitly "part[ed] ways" with the Ninth Circuit majority, and instead adopted the opposite position of the Ninth Circuit dissent. App., *infra*, 2a; see also, *e.g.*, *id.* at 15a n.7 (rejecting the views of "[t]he Ninth Circuit and the other courts taking a per-form view"); *id.* at 17a, 18a, 21a (expressly endorsing Judge Ikuta's conflicting analysis).

This is not merely some inadvertent or indirect tension between courts; this is as square, concrete, and deliberate as conflicts get. Each court considered, and carefully rejected, the opposing analysis, and the circuits have indisputably adopted opposite positions on a significant issue that now imposes vastly different penalties for identical conduct under the same federal statute. This direct circuit conflict is serious and entrenched.

3. Multiple lower courts have also recognized the sharp conflict over this question. See, *e.g.*, App., *infra*, 2a n.1 ("District courts have taken diverging views on this issue."); *United States* v. *Solomon*, No. 20-82236, 2021 WL 5001911, at *5 n.4, *9 n.10 (S.D. Fla. Oct. 27, 2021) (explicitly flagging ongoing "confusion" and the lower-court split); *United States* v. *Giraldi*, No. 20-2830, 2021 WL 1016215, at *4-*8 (D.N.J. Mar. 16, 2021) (flagging "express[] disagree[ment]" among courts); *United States* v. *Stromme*, No. 20-24800, Doc. 18, at 3-4 (S.D. Fla. Jan. 25, 2021) (acknowledging the conflict between the district court in *Boyd*, *supra*, and *Kaufman*, *supra*, and the district court here).

These courts have likewise split (often after extensive analysis) over which approach to follow. One side has squarely rejected the government's position. See, *e.g.*, *Giraldi*, 2021 WL 1016215, at *4-*8 (after examining all sides of the question, holding that "penalties for non-willful reporting violations attach to each FBAR form rather than any undisclosed foreign financial account"); *United States* v. *Kaufman*, No. 18-787, 2021 WL 83478, at *8-*11 (D. Conn. Jan. 11, 2021) (canvassing every major argument on both sides and "conclud[ing] that Congress did not intend for the statutory cap for non-willful violations to be determined on a per account basis"; "recogniz[ing] that the *Boyd* [district] court endorsed the [government's] approach," but "find[ing] its reasoning unpersuasive").

The other side has confronted the same arguments and accepted the government's views. See, *e.g.*, *Solomon*, 2021 WL 5001911, at *5 n.4, *6-*9 & n.10 ("find[ing] persuasive Judge Ikuta's dissent" and adopting the government's position after "a full review of the statutory and regulatory structure"; "[t]he Court acknowledges the contrary authority on this subject but respectfully reaches a different view"); *Stromme*, Doc. 18, at 3-4 ("each unreported relationship with a foreign financial agency constitutes an FBAR violation and 'the IRS may penalize each such violation with a penalty not to exceed $10,000'"); *United States* v. *de Forrest*, 463 F. Supp. 3d 1150, 1155 (S.D.N.Y. 2020) ("Each failure to report each bank account for each year an FBAR is required is a separate violation of 31 U.S.C. § 5321."); *United States* v. *Hughes*, No. 18-5931, 2020 WL 1536509, at *6 (N.D. Cal. Mar. 31, 2020) (adopting the district court's decision in *Boyd*: "[e]ach failure to report each bank account for each year an FBAR is required is a separate violation of 31 U.S.C. § 5321"); *United States* v. *Gardner*, No. 18-3536, 2019 WL 1767120, at *2-*3 (C.D. Cal. Apr. 22, 2019) ("the IRS is authorized to assess an FBAR penalty not exceeding $10,000 for each foreign account defendant failed to disclose"); see also, *e.g.*, *United States* v. *Ott*, No. 18-12174, 2019 WL 3714491, at *2 (E.D. Mich. Aug. 7, 2019) ("When a violation is non-willful, 31 U.S.C. § 5321 provides that the Secretary may impose a penalty of up to $10,000 per account per year.").[11]

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[11] As the Fifth Circuit recognized below, the Fourth Circuit has also "suggested it would take a per-form view" (App., *infra*, 2a n.1): "[a]ny person who fails to file an FBAR is subject to a maximum civil penalty of not more than $10,000." *United States* v. *Horowitz*, 978 F.3d 80, 81 (4th Cir. 2020). That observation is incompatible with the Fifth Circuit's contrary position. See App., *infra*, 2a n.1 ("we find the decisions taking the per-form view unpersuasive").

This wide disconnect underscores the deep confusion this issue has generated, and the obvious need for this Court's urgent intervention.

* * *

This entrenched conflict calls out for immediate review. The arguments have been fully ventilated. The square conflict at the circuit level mirrors the same conflict in the lower courts. There is no point to further percolation. The relevant arguments have been exhaustively examined at the circuit level and vetted at length by multiple district courts—with decisions drawing starkly opposite conclusions after considering the identical arguments. The IRS refuses to back down from its aggressive theory everywhere but the Ninth Circuit—where it has acquiesced after losing in *Boyd*.[12] That eliminates any realistic prospect of this conflict somehow resolving itself (as this issue will not return to the Ninth Circuit even in the improbable event that circuit were willing to reconsider its views).

In the meantime, taxpayers engaged in identical conduct will receive preferred treatment in the nation's largest circuit (the Ninth), staggering penalties in another significant region (the Fifth), and an uncertain outcome everywhere else—skewing agency settlements as the IRS pressures taxpayers with jaw-dropping penalties for nonwillful errors. There is an overriding importance of national consistency as a bedrock of our tax system. That system does not work where penalties turn exclusively on

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[12] See Tax Notes, *IRS Following* Boyd *FBAR Interpretation in Ninth Circuit Only* (Feb. 7, 2022) <https://tinyurl.com/tax-notes-boyd> ("With two circuits split on whether non-willful foreign bank account reporting penalties apply per account or per form, the IRS is begrudgingly and quietly following the latter interpretation in the Ninth Circuit.").

whether the IRS can seek enforcement in Texas instead of California.

This Court alone can resolve the embedded conflict on this important question. Immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. The question presented is of obvious legal and practical importance. It presents a clear, entrenched conflict over a significant question with profound real-world stakes. The IRS is applying different rules for identically situated taxpayers nationwide. And it is abusing its extraordinary leverage to pressure taxpayers (under an incorrect legal theory) to pay extreme penalties that far exceed proper statutory bounds. Congress did not add a $10,000 maximum penalty in 2004 so that non-willful mistakes on a single form could lead to potential seven-figure liability. This issue will continue generating conflicts and uncertainty until this Court provides a definitive answer. Certiorari should be granted.[13]

a. The sheer number of cases potentially affected by this issue is stunning. The FBAR requirements apply to a broad swath of U.S. "person[s]" and foreign "account[s]"—covering citizens, residents, corporations, partnerships, estates, and trusts, and their interests in checking accounts, savings accounts, brokerage accounts, mutual funds, commodity-futures accounts, and certain life-insurance policies. 31 C.F.R. 1010.350(a), (b). There

[13] This Court often grants review in similar cases with comparable splits. See, *e.g.*, *PPL Corp.* v. *Comm'r of Internal Revenue*, 569 U.S. 329, 331, 334 (2013) (1-1 split); *Boeing Co.* v. *United States*, 537 U.S. 437, 440, 445-446 (2003) (1-1 split); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 86-88 (2001) (1-1 split); *United Dominion Indus., Inc.* v. *United States*, 532 U.S. 822, 824, 828-829 (2001) (1-1 split).

are approximately 9 million U.S. citizens living abroad;[14] 2 million current U.S. residents did not live in the country a year ago; 13 million returned within the past 12 years; and 45 million U.S. residents are foreign-born.[15] Canada alone is home to about 1 million U.S. citizens.[16] And many people have simply never heard of an FBAR. See Michael D. Kummer et al., *The Non-Willful FBAR Per-Account/Per-Form Issue Deserves Closer Scrutiny*, 164 Tax Notes Federal 365, 365 & n.1 (July 15, 2019); Susanne Steel, *Read Jim Flaherty's Letter on Americans in Canada*, Financial Post (Sept. 16, 2011) <https://tinyurl.com/steel-fbar>. It is wholly unsurprising that only 1.3 million FBARs were filed in 2019 (*Agency Information Collection Activities*, 85 Fed. Reg. 73130 n.9 (Nov. 16, 2020)), and experts estimate that instances of FBAR non-compliance likely run into the millions.[17]

It is also predictable that many instances of non-compliance involve multiple accounts. In 2009, 65% of FBARs listed multiple foreign accounts. Niels Johannesen et al., *Taxing Hidden Wealth: The Consequences of US Enforcement Initiatives on Evasive Foreign Accounts*, 12 Am. Econ. J.: Econ. Pol'y 312, 324 (Aug. 2020). Roughly

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

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

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

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

900,000 FBARs listed more than 9.5 million total accounts in 2013, averaging more than 10 accounts per FBAR. *Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts*, 81 Fed. Reg. 12617 & n.26 (Mar. 10, 2016); Rettig, *supra*, at 37. And, of course, the very fact that the FBAR regulations have a special rule for filers with 25+ accounts confirms the issue's frequent recurrence. See 31 C.F.R. 1010.350(g)(1)-(2).

There is no basis for leaving an issue with such a broad sweep to the happenstance of where an enforcement suit might ultimately be brought; the IRS—and taxpayers and their advisors—should have clear rules to resolve non-willful mistakes in this important context. See, *e.g.*, Golding & Golding, *FBAR Penalty Rulings Diverge in Boyd & Bittner* <https://tinyurl.com/hg-boyd-bittner> ("split circuits on FBAR can be dangerous"; "depending on which circuit the taxpayer is in, it can significantly impact the outcome of a non-willful FBAR case").

b. A clear answer is especially important in light of the relevant dynamics. The system is skewed toward resolution at the agency level. Penalties (as here) can be significant, but the amounts will not always justify full-blown litigation—with clients surviving the internal agency process and fighting the government in court. And threats of late-payment penalties and interest further reduce the average taxpayer's incentive and ability to protect their rights via extended litigation. This often will lead to taxpayers capitulating to the IRS via settlement or simply failing to contest the government's demands. See, *e.g.*, *Gardner*, 2019 WL 1767120, at *1 (default judgment over $100,000 penalty); *Stromme*, Doc. 18, at 4 (default judgment over $189,554.47 "civil FBAR penalties," "interest," and "statutory additions").

Until this issue is resolved, the IRS has made perfectly clear that it intends to pursue its aggressive theory in jurisdictions outside the Ninth Circuit. See, *e.g.*, Tax Notes, *supra*. That position creates significant and unfair leverage over taxpayers (who might be facing a substantial multiple of Section 5321's statutory maximum), and unduly permits the government to set excessive penalties notwithstanding the palpable legal uncertainty over the correctness of its position. This Court's urgent guidance is needed to resolve this critical baseline issue.

c. Review is also essential to restore Congress's checks on agency overreach and abuse. The IRS still insists on asserting a breathtaking expansion of Section 5321's statutory cap despite losing before multiple courts and failing to identify any clear statutory authority for its position. And the only legislative directive here cuts exactly the other way. Non-willful violations were not even *subject to punishment* until 2004. The new $10,000 cap is a significant change and a serious penalty. It is astounding to think that Congress intended to characterize a single reporting failure as potentially *dozens* of independent statutory violations—leading to possible six- and seven-figure penalties (not $10,000) in cases where a taxpayer merely failed to file a single report without any other wrongdoing.

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

In short, if Congress truly wished to impose massive penalties for non-willful conduct, one would expect Con-

gress to have spoken far more clearly than this. The correct disposition of this issue is essential to cabin the IRS to the penalty scheme authorized by Congress.

2. This case is an optimal vehicle for deciding this important question. The dispute turns on a pure question of law. It was squarely raised and resolved at each stage below, and both courts thoroughly addressed the question and treated it as dispositive. Nor is there any doubt that this issue was outcome-determinative. The district court applied the per-form standard adopted by the Ninth Circuit majority and petitioner won; the Fifth Circuit applied the opposite standard from the Ninth Circuit dissent and petitioner lost. The stark division over this fundamental legal issue drives the decision.

Nor are there any factual or procedural obstacles to resolving the question presented. The case was resolved on cross-motions for summary judgment. The relevant facts are undisputed and directly implicate the circuit conflict: It is uncontested that petitioner acted non-willfully, filed an untimely FBAR, and had multiple foreign accounts. Petitioner would have prevailed under the established rule in the Ninth Circuit but instead lost because this case arose in Texas. This clean presentation is the perfect backdrop for deciding this significant statutory question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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