No. 21-1195

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under 31 U.S.C. 5314 and its implementing regulations, a U.S. person who maintains an account with a foreign financial agency is required to report specified information about the account to the federal government each year on a reporting form prescribed by the Secretary of the Treasury. The prescribed form instructs a filer to report each of the filer's foreign financial accounts on a single form. The Secretary may impose a civil money penalty of up to $10,000 "on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(A); see 31 U.S.C. 5321(a)(5)(B)(i). Here, petitioner failed to report dozens of foreign financial accounts in multiple years, and the Secretary imposed a civil penalty of $10,000 for each unreported account each year. The question presented is as follows:

Whether the court of appeals correctly determined that 31 U.S.C. 5321(a)(5)(A) authorizes the Secretary of the Treasury to impose a civil money penalty of up to $10,000 for each foreign financial account that petitioner failed to report, for each year in which he failed to report that account, or whether the Secretary was instead limited to imposing a penalty of up to $10,000 for each annual form that petitioner failed to file to report his numerous foreign financial accounts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 19 F.4th 734. The opinion of the district court (Pet. App. 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 petition for a writ of certiorari was filed on February 28, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1970, after "extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability," *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 26 (1974), Congress enacted what is commonly known as the Bank Secrecy Act, Pub. L.

No. 91-508, 84 Stat. 1114. The Act was designed to reduce financial crime, tax evasion, and other violations of U.S. law by requiring the creation of records and the making of reports that Congress judged would have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." *California Bankers Ass'n*, 416 U.S. at 26 (citations omitted); see 31 U.S.C. 5311(1)(A).

This case concerns the Bank Secrecy Act's reporting requirements for U.S. persons who maintain financial interests in or signatory authority over foreign bank accounts. In Title II of the Act, as amended, Congress directed the Secretary of the Treasury to promulgate regulations to impose recordkeeping and reporting requirements on any U.S. resident or citizen who "makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. 5314(a); see Bank Secrecy Act § 241(a), 84 Stat. 1124. Congress specified that the records and reports "shall contain" certain information "in the way and to the extent the Secretary prescribes." 31 U.S.C. 5314(a).

The Secretary's regulations require each "United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country" to "report such relationship * * * for each year in which such relationship exists." 31 C.F.R. 1010.350(a).[1] The regulations further require each U.S. person who is obligated to report a foreign financial account to "provide such information as shall be specified in a reporting form" that has been

[1] The Secretary's regulations were renumbered during the years at issue here, 2007-2011. See 76 Fed. Reg. 10,234, 10,234 n.1, 10,245-10,246 (Feb. 23, 2011). The reporting requirements were previously found at 31 C.F.R. 103.24 (2010).

prescribed by the Secretary under Section 5314. *Ibid.* During the period relevant to this case (2007-2011), the prescribed form was Treasury Department Form 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), and it was to be filed with the Internal Revenue Service (IRS). *Ibid.*; see Pet. App. 4a.[2]

The reporting requirement in the Secretary's regulations applies when a U.S. person has a financial interest in or signatory or other authority over one or more foreign financial accounts, see 31 C.F.R. 1010.350(a), (e), and (f), and the aggregate balance of those accounts "exceed[ed] $10,000 * * * during the previous calendar year," 31 C.F.R. 1010.306(c). Cf. 31 C.F.R. 103.24(a), 103.27(c) (2010). The required report must be filed by a specific date each year—previously June 30, and now April 15. See Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006(b)(11), 129 Stat. 458-459 (mandating April 15 deadline); 31 C.F.R. 1010.306(c) (regulatory text reflecting prior June 30 deadline).

The FBAR prescribed for use during the years at issue here required basic identifying information about the filer, such as the person's name, address, and date of birth. See C.A. ROA 265-268, 269-276, 277-284 (reprinting versions of the form as revised in July 2000, October 2008, and January 2012, respectively); accord TD F 90-22.1, Report of Foreign Bank and Financial

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[2] The prescribed form for an FBAR is now FinCEN Report 114, which is filed electronically with the Financial Crimes Enforcement Network in the Department of the Treasury. See IRS, *Report of Foreign Bank & Financial Accounts (FBAR) Reference Guide* 1 (2022). The IRS continues to exercise the Secretary's delegated authority to enforce Section 5314 and its implementing regulations. See 31 C.F.R. 1010.810(g).

Accounts (rev. Jan. 2012), https://go.usa.gov/xuG9X. The FBAR also required information about each of the filer's foreign financial accounts, such as the name of the foreign financial institution at which the account was held, the account number, and the maximum value of the account during the reporting period. C.A. ROA 265, 269, 277. The form's first page contained space to report one account, with additional accounts to be reported as separate entries on the following pages (which could be duplicated as necessary to report all accounts). *Id.* at 265-266, 270-272, 278-280.

The Bank Secrecy Act directs the Secretary to consider "the need to avoid burdening unreasonably" U.S. persons who maintain foreign financial accounts for legitimate reasons. 31 U.S.C. 5314(a). To that end, the Secretary's regulations set forth a "special rule for persons with a financial interest in" or signatory or other authority over "25 or more" foreign financial accounts. 31 C.F.R. 1010.350(a). Under that special rule, the filer "need only provide the number of financial accounts and certain other basic information" on the reporting form, 31 C.F.R. 1010.350(g)(1) and (2), without also providing the more granular information about each account that would otherwise be required. Cf. 31 C.F.R. 103.24(a) (2010) ("Persons having a financial interest in 25 or more foreign financial accounts need only note that fact on the form."); C.A. ROA 265, 268 (prescribed form, as revised in July 2000, requiring filer with more than 25 accounts to report total number of accounts); *id.* at 269, 277 (similar requirements in later versions of FBAR form). The regulations specify, however, that the filer is "required to provide detailed information concerning each account when so requested by the Secretary or his delegate." 31 C.F.R. 1010.350(g)(1) and (2); see 31 C.F.R.

103.24(a) (2010) (same); 31 C.F.R. 1010.420 (record-keeping requirements).

b. Congress authorized the Secretary to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(A). Section 5314 is the provision, discussed above, under which U.S. persons who transact or maintain relations with foreign financial agencies must keep records and file reports in accordance with regulations promulgated by the Secretary. See p. 2, *supra*.

In general, the "amount of any civil penalty" imposed by the Secretary under Section 5321(a)(5)(A) "shall not exceed $10,000." 31 U.S.C. 5321(a)(5)(B)(i). The statute also provides a reasonable-cause exception, under which the Secretary may not impose a penalty "with respect to any violation if * ** such violation was due to reasonable cause" and "the amount of the transaction or the balance in the account at the time of the transaction was properly reported." 31 U.S.C. 5321(a)(5)(B)(ii). If the violation is willful, the maximum penalty increases from $10,000 to the greater of either $100,000 or 50% of "the amount determined under subparagraph (D)." 31 U.S.C. 5321(a)(5)(C)(i). As relevant here, "in the case of a violation involving a failure to report the existence of an account," the amount determined under Subparagraph (D) is "the balance in the account at the time of the violation." 31 U.S.C. 5321(a)(5)(D)(ii). The reasonable-cause exception also does not apply to any willful violation. 31 U.S.C. 5321(a)(5)(C)(ii).[3]

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[3] For violations occurring after November 2, 2015, the maximum penalties have been periodically adjusted to account for inflation. See 87 Fed. Reg. 3433, 3433-3434 & n.1 (Jan. 24, 2022). The current maximum penalty for a non-willful violation is $14,489. 31 C.F.R.

2. Petitioner immigrated to the United States from Romania in 1982 and became a naturalized U.S. citizen in 1987. Pet. App. 5a. In 1990, petitioner returned to Romania and became a successful businessman and investor, "earn[ing] millions of dollars and acquir[ing] interests in a diverse array of companies, including real estate, hotels, restaurants, construction, aquaculture, logging, and manufacturing." *Ibid.* Among other ventures, petitioner negotiated with the Romanian government to purchase government assets, and he used holding companies in London and Geneva to conduct his affairs. *Ibid.*; see *id.* at 28a. Petitioner had an ownership interest in at least 38 different companies while working in Romania, and he "generated over $70 million in total income through his various foreign businesses and investment ventures." *Id.* at 29a; see C.A. ROA 482-483, 689. "To manage his growing wealth," petitioner maintained "dozens of bank accounts in Romania, Switzerland, and Liechtenstein," in some instances "using numbered accounts to hide his name" as the account holder. Pet. App. 5a (brackets and internal quotation marks omitted); see C.A. ROA 676-678.

During the years he lived in Romania, petitioner—who remained a U.S. citizen—sometimes filed a U.S. income tax return, but he failed to file a return in many of the years. Pet. App. 28a; see 26 C.F.R. 1.1-1(b) (federal income tax obligations generally apply to "all citizens of the United States, wherever resident * * * whether the income is received from sources within or without the United States"). Petitioner did not file an FBAR to report any of his foreign bank accounts for any year while he was living in Romania. Pet. App. 6a.

1010.821(b). This brief uses the non-adjusted amount that was applicable to each of petitioner's violations.

Petitioner returned to the United States in 2011 and maintains that he first learned of his foreign-account reporting obligations after his return. Pet. App. 6a; see C.A. ROA 437. In May 2012, petitioner filed untimely FBARs for calendar years 1996-2010 and a timely FBAR for 2011. C.A. ROA 420-435. Each of those forms was inaccurate and incomplete: "[T]hey listed only his largest account," rather than all of his foreign financial accounts, and they "incorrectly stated he did not have an interest in twenty-five or more qualifying accounts." Pet. App. 6a. After hiring a new accountant, petitioner "filed corrected FBARs for the years 2007 to 2011, as penalties for prior years were time-barred." *Ibid.* (citing the six-year limitations period in 31 U.S.C. 5321(b)(1)).

On petitioner's corrected FBARs, he reported having a financial interest in more than 50 foreign financial accounts for each year from 2007 to 2011. Pet. App. 6a. Petitioner's previously unreported foreign accounts had the following high balances during the years at issue:

Year	# Accts.	Aggregate High Balance
2007	61	$10,127,860
2008	51	$10,420,152
2009	53	$ 3,053,884
2010	53	$16,058,319
2011	54	$15,137,405

Pet. App. 34a; see C.A. ROA 607.

In 2017, the IRS assessed a civil penalty of $10,000 against petitioner for each of the unreported foreign financial accounts listed above, for each year in which petitioner failed to report the account. Pet. App. 6a. The total assessed penalty was $2,720,000. *Ibid.* In as-

sessing those penalties, the IRS invoked the Secretary's authority to assess a civil penalty of up to $10,000 for each non-willful violation of Section 5314. *Id.* at 34a; see 31 U.S.C. 5321(a)(5)(A) and (B)(i).

The IRS explained to petitioner that it had chosen to impose the maximum available civil penalty for non-willful violations based on a number of factors, including that petitioner appeared to be using nominee account holders to "hid[e] receipt of cash of unknown sources from Romanian authorities and/or U.S. authorities"; petitioner did not cooperate fully with the IRS's investigation; and petitioner had taken other steps that indicated an effort "to intentionally conceal the reporting of income, assets, or foreign activities." C.A. ROA 587, 591; see *id.* at 570-594. Although petitioner claimed to have first learned of his obligation to report his foreign accounts upon returning to the United States in 2011, the IRS observed that he was a "sophisticated businessman" and that he "had the means to hire competent advisors knowledgeable in U.S. taxation." *Id.* at 585, 586. Moreover, the IRS noted that petitioner had filed U.S. income tax returns for six of the taxable years in which he was living in Romania, and the Form 1040 that he filed for those years had required him to answer a question "regarding whether he had foreign financial accounts and whether he had a requirement to file an FBAR." *Id.* at 577.

3. In 2019, the government brought this civil action in the Northern District of Texas to recover the penalties assessed against petitioner, along with associated late-payment penalties and interest. Pet. App. 6a; see 31 U.S.C. 5321(b)(2)(A). "During discovery, [petitioner] admitted that he was obligated to report 51 accounts in 2007, 43 in 2008, 42 in 2009, 41 in 2000, and 43 in 2011,"

while disputing his interest in other accounts. Pet. App. 6a. The government moved for partial summary judgment with respect to the assessed penalties for the accounts that petitioner conceded he was obligated to report. *Id.* at 6a-7a. Petitioner filed a cross-motion for summary judgment, arguing in relevant part that the statute capped the amount of penalties that could be assessed against him for a non-willful violation at $10,000 per FBAR form that he failed to file. *Ibid.* Petitioner also argued that he had reasonable cause for failing to report his foreign accounts. *Ibid.*

The district court held that Section 5321(a)(5)(B)(i)'s $10,000 ceiling on civil penalties for a non-willful violation applies "to each FBAR form not timely or properly filed rather than to each foreign financial account maintained but not timely or properly reported." Pet. App. 39a. The court observed that Section 5321(a)(5)(A) authorizes a penalty of up to $10,000 "on any person who violates" Section 5314, which in turn requires the Secretary to adopt implementing regulations. *Id.* at 40a (citation omitted). The court therefore reasoned that the civil penalties authorized in Section 5321(a)(5) "attach" to "violations of the * * * implementing regulations." *Ibid.* But the court nonetheless concluded that the only violation for which civil penalties are "contemplated" is the "failure to file an annual FBAR," *id.* at 41a, which the court viewed as constituting a single violation no matter how many foreign accounts a filer fails to disclose, see *id.* at 41a-49a. The court separately concluded that petitioner lacked reasonable cause for failing to comply with his reporting obligations for 2007 to 2010. *Id.* at 57a-63a.

The district court's summary-judgment decision did not resolve petitioner's asserted reasonable-cause defense for 2011. See C.A. ROA 1647. After petitioner withdrew that defense, *id.* at 1648, the court entered a final judgment requiring him to pay a penalty of $10,000 for each of the five FBARs that he failed to file from 2007 to 2011, plus late-payment penalties and interest. Judgment 1-3. Petitioner appealed, and the government cross-appealed. Pet. App. 7a.

4. The court of appeals affirmed in part and reversed, vacated, and remanded in part. Pet. App. 1a-26a. It affirmed the district court's grant of summary judgment against petitioner on his reasonable-cause defense, *id.* at 8a-14a, concluding that petitioner "did not exercise ordinary business care and prudence" because he "conceded he put no effort into ascertaining and fulfilling his reporting obligations," *id.* at 12a. With respect to the amounts of the assessed penalties, the court of appeals disagreed with the district court and held that "each failure to report a qualifying foreign account constitutes a separate * * * violation" for which the Secretary may assess a civil penalty of up to $10,000. *Id.* at 2a; see *id.* at 14a-25a.

The court of appeals viewed the penalty issue as turning on a proper assessment of "what constitutes a 'violation' of section 5314: the failure to file an FBAR * * * or the failure to report an account." Pet. App. 14a. After reviewing the "text, structure, history, and purpose" of Section 5314, the court determined that "the 'violation' of section 5314 contemplated by section 5321(a)(5)(A) is the failure to report a qualifying account, not the failure to file an FBAR." *Id.* at 25a. The court explained that both Section 5314 and the Secre-

tary's regulations distinguish between the "substantive" obligation of U.S. persons to "'report[]'" any relations they maintain "'with a foreign financial agency,'" *id.* at 17a (quoting 31 U.S.C. 5314(a)), and "procedural" obligations about the format, timing, and content of the reports, *ibid.*—which Congress largely left to the Secretary's discretion. See 31 U.S.C. 5314(a) (stating that the required reports "shall contain [certain] information in the way and to the extent the Secretary prescribes"). The court therefore concluded that the term "violation" in 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." Pet. App. 18a-19a.

The court of appeals explained that its reading of "violation" in Section 5321(a)(5)(A) is also supported by the use of that term in adjacent provisions. Pet. App. 20a. For example, the maximum penalty for a willful failure to report a foreign account is the greater of $100,000 or 50% of "the balance in the account at the time of the violation." 31 U.S.C. 5321(a)(5)(D)(ii); see 31 U.S.C. 5321(a)(5)(C)(i). As the court explained, that "language plainly describes a 'violation' in terms of a failure to report * * * an account," not failure to file an FBAR. Pet. App. 20a-21a. Invoking "the presumption of consistent usage," the court reasoned that "[i]f a willful violation of section 5314 in subsection (C) involves failing to report a transaction or an account, then presumably so too does a non-willful violation of section 5314 in subsection (A)." *Id.* at 21a; see *id.* at 22a-23a (discussing similar account-specific usage of the term "violation" in the reasonable-cause provision).

The court of appeals acknowledged that, in construing Section 5321(a)(5) to authorize a penalty of up to

$10,000 for each unreported foreign account, the court was "part[ing] ways with a recent Ninth Circuit panel." Pet. App. 2a (citing *United States* v. *Boyd*, 991 F.3d 1077, 1080-1086 (9th Cir. 2021)). The court indicated that it instead agreed with the dissenting opinion in that case, which had urged a similar "per-account view" of the penalty provision. *Ibid.* (citing *Boyd*, 991 F.3d at 1086-1091 (Ikuta, J., dissenting)); see *id.* at 17a, 18a, 21a (citing Judge Ikuta's dissenting opinion in *Boyd*).

The court of appeals remanded the case to the district court for further proceedings consistent with the per-account interpretation of the penalty provision. Pet. App. 26a. The district court in turn has stayed further proceedings pending the disposition of the instant petition for a writ of certiorari. D. Ct. Doc. 101 (Apr. 6, 2022).

DISCUSSION

The court of appeals correctly determined that the Bank Secrecy Act authorizes the Secretary of the Treasury to impose a civil penalty of up to $10,000 on a U.S. person for each foreign financial account that the person fails to report as required by the Act and its implementing regulations, because each failure to report a qualifying account is a separate "violation," 31 U.S.C. 5321(a)(5)(A), for which the Secretary may impose a separate penalty. Yet, as petitioner explains (Pet. 13-25), the decision below conflicts with a recent decision by a divided panel of the Ninth Circuit in *United States* v. *Boyd*, 991 F.3d 1077 (2021). The question presented is important and will often recur, and this case would be an appropriate vehicle in which to address it. Accordingly, the petition for a writ of certiorari should be granted.

1. a. The decision below is correct. As the court of appeals recognized, "the text of sections 5321(a)(5) and 5314 and of the regulations leaves no doubt that each failure to report an account is a separate violation of section 5314 subject to penalty." Pet. App. 23a-24a.

Section 5321(a)(5)(A) authorizes the Secretary to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314," and Section 5321(a)(5)(B)(i) specifies that "the amount of any civil penalty imposed under" that provision "shall not exceed $10,000." 31 U.S.C. 5321(a)(5)(A) and (B)(i). Section 5314 directs the Secretary to adopt regulations to require U.S. persons to report financial accounts that they maintain abroad, and the Secretary's implementing regulations require those reports to be made using a single annual form (the FBAR) for all of the filer's accounts. See 31 U.S.C. 5314(a); 31 C.F.R. 1010.350(a); see also pp. 2-4, *supra*. The question presented therefore turns on whether failing to report multiple accounts by failing to file a single annual form constitutes only the single "violation" of failing to file the form or instead multiple distinct "violation[s]" for each unreported account. 31 U.S.C. 5321(a)(5)(A).

The court of appeals correctly determined that the phrase "violat[ing] * * * any provision of section 5314," 31 U.S.C. 5321(a)(5)(A), is "most naturally read[]" to mean that each unreported foreign account is a separate violation. Pet. App. 18a. Section 5314 directs the Secretary to require a U.S. person to file a report if the person engages in "a transaction" or maintains "a relation" with a foreign financial agency. 31 U.S.C. 5314(a). Congress's use of the singular ("a relation") indicates that each foreign financial account maintained by a U.S.

person is a distinct and separate matter of federal concern, and the Secretary's implementing regulations confirm that each qualifying account must be reported. 31 C.F.R. 1010.350(a). Treating the failure to file a timely FBAR as a single violation when a U.S. person fails to report multiple foreign accounts would be inconsistent with the statutory and regulatory requirements to report each foreign account.

The essence of the statutory "violation" contemplated by Section 5321(a)(5)(A) is failing to inform the government of the existence of any foreign financial account to which the reporting obligation applies, not failing to file the FBAR form. Indeed, Section 5314 does not specify whether multiple accounts should be reported on a single form or multiple forms. Congress instead left the precise format, timing, and content of the reports to the Secretary's discretion. Pet. App. 19a; see 31 U.S.C. 5314(a) (stating that the required reports "shall contain [certain] information in the way and to the extent the Secretary prescribes"). If the Secretary's regulations had required petitioner to submit a separate FBAR for each of his foreign accounts, the Secretary would have been authorized to impose a separate civil penalty of up to $10,000 for each undisclosed account even under petitioner's own preferred per-form interpretation. The result should be no different when the Secretary, for administrative convenience, directs that multiple accounts be reported on a single form.

b. Any doubt that each unreported account constitutes a separate "violation" for purposes of Section 5321(a)(5)(A) is dispelled by two adjacent provisions, which use the term "violation" in account-specific ways. First, Section 5321(a)(5)(B)(ii) provides that the Secretary may not impose a civil penalty under Section

5321(a)(5)(A) "with respect to any violation" if "such violation" was due to reasonable cause and "the balance in the account" was properly reported. 31 U.S.C. 5321(a)(5)(B)(ii)(I) and (II). That language "equates a 'violation' with failing to report * * * the balance" in a discrete account. Pet. App. 22a. If a U.S. person had reasonable cause for failing to report two accounts but only properly reported the balance of one of them, the statute would provide a reasonable-cause defense with respect to one unreported account (*i.e.*, one violation) but not the other—even if both accounts should have been reported on the same FBAR. Second, Subparagraphs (C) and (D) of Section 5321(a)(5) prescribe a maximum penalty for a willful "violation involving a failure to report the existence of an account" that depends on "the balance in the account at the time of the violation." 31 U.S.C. 5321(a)(5)(D)(ii). That language "plainly describes a 'violation' in terms of a failure to report * * * an account," not a failure to file an FBAR. Pet. App. 21a.

Congress's use of the term "violation" in those other provisions in a manner that presupposes that each unreported account is a separate violation confirms that "violation" carries a similar account-specific connotation in Section 5321(a)(5)(A). "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994); see, *e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005) (invoking "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning"). Indeed, the reasonable-cause provision not only uses the same term ("violation") in an account-specific way but also uses it to refer to *the very*

same violation for which a penalty is authorized under Section 5321(a)(5)(A). Reading the two provisions as a whole, the Secretary may impose a civil penalty for "any violation" of Section 5314, but not if "such violation" was due to reasonable cause and the "balance in the account" was properly reported. 31 U.S.C. 5321(a)(5)(A) and (B)(ii)(I)-(II).

c. The purpose and history of the statute point in the same direction. See Pet. App. 25a. Congress enacted what is now Section 5314 as part of the Bank Secrecy Act, after hearing extensive evidence that the unavailability of foreign bank records to U.S. law enforcement was facilitating civil and criminal violations of U.S. law. See *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 26 (1974). The Act's reporting requirements were designed to ensure the availability of information that Congress viewed as "highly useful in * * * criminal, tax, or regulatory investigations." 31 U.S.C. 5311(1)(A). Petitioner's crabbed understanding of the Secretary's authority to impose civil penalties for violations of Section 5314 would contravene those purposes by significantly curtailing the deterrent effect of the penalties.

Petitioner's contrary interpretation also makes little practical sense. His approach would treat a failure to report one foreign account the same way as his own failure to report dozens of such accounts, as long as the failures occur in a single year and therefore involve only a single deficient FBAR. Under the government's interpretation, by contrast, the statute gives the Secretary appropriate leeway to calibrate civil penalties to reflect the more serious failure to report multiple accounts. The Secretary may also choose, in appropriate cases, to impose a penalty of less than $10,000 when a person

commits multiple violations by failing to disclose multiple accounts, as Section 5321(a)(5)(B)(i) prescribes only the *maximum* penalty for each non-willful violation.

2. Petitioner is correct in contending (Pet. 13-25) that the decision in this case conflicts with a recent decision by a divided panel of the Ninth Circuit in *United States* v. *Boyd*, *supra*, as the decision below acknowledged, see Pet. App. 2a ("we part ways with [*Boyd*]"). The Ninth Circuit case involved a U.S. citizen who filed an untimely but accurate FBAR to report her financial interest in multiple foreign bank accounts. *Boyd*, 991 F.3d at 1079. The IRS determined that she had committed 13 non-willful violations—"one violation for each account she failed to timely report"—and imposed civil penalties totaling about $47,000. *Ibid.* The district court in that case agreed with the government that the Secretary may impose "one penalty for each non-reported account," *ibid.*, but the Ninth Circuit reversed. The majority concluded that "[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; see *id.* at 1083 ("In sum, under the statutory and regulatory scheme, Boyd's conduct amounts to one violation, which the IRS determined was non-willful. * * * Because Boyd committed a single non-willful violation, the IRS may impose only one penalty not to exceed $10,000.").

Judge Ikuta dissented. *Boyd*, 991 F.3d at 1086-1091. She would have held that "any failure to report a foreign account is an independent violation, subject to independent penalties." *Id.* at 1089-1090; see *id.* at 1090 (stating that "the requirement to report an account and the requirement to file a reporting form are distinct, and the violation of § 5314 described in § 5321 includes

the failure to report the existence of an account"). And Judge Ikuta emphasized that adjacent provisions of the same statute use the term "violation" to refer to a failure to disclose a specific account. See *id.* at 1090-1091 ("Nothing in the language of § 5321 suggests that Congress wanted the word 'violation' to have a different meaning in different subparagraphs.").

Boyd involved the filing of a single "late but accurate FBAR," 991 F.3d at 1079—unlike this case, where petitioner's initial FBARs were untimely, incomplete, and inaccurate, see Pet. App. 6a. The majority in *Boyd* stated that it was "not presented" with the "different factual scenario" in which "an individual first fail[s] to timely file an FBAR, and then file[s] an inaccurate one." 991 F.3d at 1083. But the decision does not appear to be distinguishable on that basis. In stating that it was not presented with a circumstance in which a person fails to file a timely FBAR and then files an inaccurate one, the majority appears to have been leaving open the possibility that those facts might give rise to two separate violations rather than one. See *ibid.* The majority elsewhere made clear that it was conclusively rejecting the per-account interpretation of the term "violation" that the Fifth Circuit adopted here. Compare *Boyd*, 991 F.3d at 1080, 1082, 1083-1084, with Pet. App. 2a.

3. The division of authority between the Fifth and Ninth Circuits on the question presented is recent, and no other court of appeals has yet addressed whether the Secretary may assess a civil penalty of up to $10,000 for each foreign account that a U.S. person fails to report on a single FBAR.[4] Nonetheless, the question pre-

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[4] The decision below stated (Pet. App. 2a n.1) that the Fourth Circuit has "suggested that it would take a per-form view" in *United*

sented is important and likely to recur, and the government agrees with petitioner that the issue—a fairly straightforward and discrete question of statutory construction—warrants this Court's review at this time.

In enacting the Bank Secrecy Act, Congress determined that bringing to light offshore bank accounts in which U.S. persons hold a financial interest is an important means of deterring tax evasion, money laundering, and other financial misdeeds. See *California Bankers Ass'n*, 416 U.S. at 27 (noting Congress's animating concern "about a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments"). In turn, the Secretary's "power to impose penalties on Americans who fail to keep records and file reports on transactions or accounts with foreign financial agencies" is an important means of ensuring compliance with the Act's reporting and recordkeeping requirements. *Boyd*, 991 F.3d at 1087 (Ikuta, J., dissenting). The erroneous decision in *Boyd* threatens to significantly weaken the deterrent effect of the penalty provisions within the Ninth Circuit.

States v. *Horowitz*, 978 F.3d 80 (2020). In the opening paragraph of its decision in *Horowitz*, the Fourth Circuit observed that "[a]ny person who fails to file an FBAR is subject to a maximum civil penalty of not more than $10,000." *Id.* at 81. But the court was merely contrasting the available penalties for willful and non-willful violations, to set the stage for its discussion about issues of willfulness. The court did not resolve the question presented here, nor did it intimate any view on that question. Several district courts in different circuits, however, have addressed the question and adopted contrary readings. See Pet. App. 2a n.1; Pet. 22-23.

This case would also be a suitable vehicle in which to address the question presented, the practical consequences of which are illustrated by the facts of this case. After determining that petitioner had failed to cooperate fully with the IRS's investigation, had apparently used nominee account holders "to hid[e] receipt of cash," and had taken other steps to "intentionally conceal the reporting of income, assets, or foreign activities," C.A. ROA 587, 590, the IRS chose to assess the maximum available civil penalty for non-willful violations against petitioner for his failure to report over 200 accounts across five years. See pp. 7-8, *supra*. Had the same case arisen in the Ninth Circuit, the IRS would have been limited to imposing a penalty of up to $10,000 for each of petitioner's five untimely FBARs, which is far short of the amount the agency found to be justified. Further review is warranted to ensure that the Secretary may impose appropriate penalties on individuals, such as petitioner, who fail to disclose numerous foreign financial accounts in a given reporting period.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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