No. 21-1195

In The
Supreme Court of the United States

ALEXANDRU BITTNER, PETITIONER

v.

UNITED STATES

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONER

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1 W. Blackstone, Commentaries on the Laws of England (1765), https://avalon.law.yale.edu/18th_century/blackstone_intro.asp (last visited Aug. 12, 2022) 4, 5, 14

Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, 1967-2011, 92 TEX. L. REV. 1317 (2014) 22

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John Locke, Second Treatise on Civil Government, https://press-pubs.uchicago.edu/founders/documents/v1ch17s5.html 6

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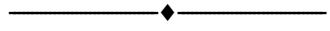
INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.



[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person aside from amicus, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Bank Secrecy Act authorizes a $10,000 penalty for each non-willful violation of its requirement that U.S. taxpayers report their interests in foreign accounts. 31 U.S.C. §§ 5314, 5321. Petitioner ably shows that under the statute's text and structure such a violation means a taxpayer's failure to file an annual disclosure form, not the failure to disclose each individual account. Amicus agrees, and wishes to emphasize a critical interpretative principle that also compels that result: the rule of lenity.

Originally known as the tenet that "penal laws should be construed strictly," *The Adventure*, 1 F. Cas. 202, 204 (No. 93) (C.C. Va. 1812) (Marshall, C.J.), the rule of lenity is deeply rooted in our legal traditions. Put simply, the rule requires courts, when faced with two plausible interpretations of a statute imposing a penalty, to favor liberty over punishment. A product of English common law embedded in American jurisprudence by Chief Justice Marshall, the rule of lenity rests on two pillars of our legal system: fair notice and the separation of powers. By refusing to read into the law a punishment that Congress has not clearly expressed, the rule ensures that citizens are fairly apprised of prohibited conduct, and that only Congress, not the courts, can make penal law.

Although most commonly invoked in criminal cases, the rule of lenity applies to the civil Bank Secrecy Act enforcement action here. The rule has long been

understood to apply to all statutes carrying civil penalties, not just those leading to imprisonment. *See*, *e.g.*, *Commissioner v. Acker*, 361 U.S. 87, 90-91 (1959). Because the law in question imposes a penalty, it must be strictly construed regardless of whether the defendant's physical liberty is at stake.

Properly subject to the rule of lenity, the government's maximalist reading of the Bank Secrecy Act must give way to Petitioner's less draconian interpretation. The best reading of the statute and its implementing regulations is that a "violation" of the reporting requirement means a failure to file an annual form. But at a minimum, the law fails to provide a clear statement that violators can be subject to a (quickly multiplying) per-account obligation. The rule of lenity requires Congress to speak plainly if it wishes to inflict such harsh penalties on U.S. taxpayers. Applying the rule of lenity here would serve the very interests the rule has protected for centuries: providing fair notice of the conduct triggering statutory penalties, while leaving it to Congress, not the courts, to fill any gaps in the statutory scheme.

This Court should reverse.

ARGUMENT

A. The Rule Of Lenity Is Grounded In Principles Fundamental To Our Historical Traditions And Legal System

"The rule that penal[] laws are to be construed strictly is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37 (1820) (Marshall, C.J.). As far back as Blackstone, English judges and scholars recognized that when a "[s]tatute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken [s]trictly." 1 W. Blackstone, Commentaries on the Laws of England 88 (1765).[2] And "[s]chooled in the English tradition, American judges applied the principle of lenity from the start." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 129 (2010). Indeed, after reviewing every federal decision from 1789 to 1840 involving "any kind of canon of interpretation," then-Professor Barrett found that the rule of lenity was by far "the most commonly applied" of all the "substantive canon[s] of construction." *Id.* at 127, 129 n.90; *see Wooden v. United States*, 142 S. Ct. 1063, 1082 n.1 (2022) (Gorsuch, J., concurring) (collecting cases from the period).

Lenity rests on two separate constitutional cornerstones: fair notice and the separation of powers. *See*

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[2] https://avalon.law.yale.edu/18th_century/blackstone_intro.asp (last visited Aug. 12, 2022).

Wooden, 142 S. Ct. at 1082-1083 (Gorsuch, J., concurring).

1. Fair Notice

The notion that a person should be fairly apprised of prohibited conduct—and the penalty it carries—is core to American legal traditions. Indeed, it is as old as Western culture itself. *See Textualism As Fair Notice*, 123 HARV. L. REV. 542, 543 (2009) ("The concept [of fair notice] first gained prominence in Athenian Greece when popular demand led to publication of the law."); Roscoe Pound, *Theories of Law*, 22 YALE L.J. 114, 117 (1912) (explaining how "popular demand for publication of the law * * * resulted in a body of enacted law" in Ancient Greece). English jurists frequently invoked fair notice principles in explaining the proper contours of legislation. As Blackstone wrote, in "every law," "the rights to be ob[s]erved, and the wrongs to be e[s]chewed" should be "clearly defined and laid down." 1 W. Blackstone, Commentaries on the Laws of England 53; *see also* Sir Edward Coke, The Fourth Part of the Institutes of the Laws of England 42 (1817) ("[A]ll laws, especially penal" ones, should be "plainly and per[s]picuously penned.").

Likewise, the "Founders and the Enlightenment thinkers who influenced them viewed fair notice as a requirement for fairness, legitimacy, and social utility" in any free society. *Textualism*, 123 HARV. L. REV. at 543. John Locke—among the greatest sources of inspiration for the Framers—wrote that legislative authority "cannot assume to its self a power to Rule by

extemporary Arbitrary Decrees," and that citizens only entrust "Legislative Power into such hands as they think fit * * * that they shall be govern'd by *declared Laws*, or else their Peace, Quiet, and Property will" be "uncertain[]." John Locke, Second Treatise on Civil Government, § 136.[3] And as James Madison warned, if the laws are "so incoherent that they cannot be understood," the effect would be "calamitous"—"[i]t poisons the blessing of liberty itself." The Federalist No. 62.[4] Justice Livingston likewise recognized that "[i]t should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning." *The Enterprise*, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) (Livingston, Circuit Justice).

Fair notice principles are embedded in the Constitution itself. The Fifth and Fourteenth Amendments' guarantee that "life, liberty, or property" may not be taken "without due process of law" includes a prohibition on overly vague laws. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). This Court's "cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015).

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[3] https://press-pubs.uchicago.edu/founders/documents/v1ch17s5.html.

[4] https://avalon.law.yale.edu/18th_century/fed62.asp.

Lenity is a close cousin of the void-for-vagueness doctrine. *See* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 713 (2017) (discussing these "two basic doctrines" courts apply to "ambiguity or vagueness in the criminal law"). Both serve fair notice—the latter by constitutionally forbidding hopelessly unclear penal statutes, the former by providing guidance to courts faced with more than one plausible interpretation of penal statutes.

The importance of fair notice is likewise reflected in this Court's statutory interpretation jurisprudence. Courts have long recognized that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). That is because "[t]he citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 393 (1926). As Judge Friendly put it, lenity expresses our "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967)).

Of course, fair notice does not depend on *actual* notice. "[I]t is not likely that a criminal will carefully consider the text of the law before he murders or steals." *McBoyle*, 283 U.S. at 27. Even so, "[t]o make the warning fair, so far as possible the line should be clear." *Id.*

2. Separation of Powers

The rule of lenity also rests on another foundational principle: the separation of powers. The Constitution vests "[a]ll" federal legislative power in Congress, including the power to proscribe conduct and set penalties. Art. I, § 1. Courts have long recognized that the judiciary may not usurp that role by extending criminal prohibitions and penalties to conduct not clearly covered by a congressionally enacted statute.

In the 1800s, courts routinely held that criminal statutes could not be interpreted "beyond the plain meaning of [their] words" because judges should not usurp legislative authority, particularly in the realm of penal law. *United States v. Morris*, 39 U.S. 464, 475 (1840). "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95. And for this reason, "[i]t is more consonant to the principle of liberty * * * that a court should acquit when the legislature intended to punish, than that it should punish, when it was intended to discharge with impunity." *The Enterprise*, 8 F. Cas. at 734 (internal quotation marks omitted). As Chief Justice Marshall explained, the strict construction of penal laws thus serves "the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Wiltberger*, 18 U.S. at 95.

This venerable rationale has enduring benefits. A rule of strict construction restrains judges from injecting their own views into statutory interpretation and from engaging in arbitrary or even discriminatory

application of the law. Chief Justice Marshall had the measure of the rule when he observed that "[i]t would be dangerous, indeed," to "punish a crime not enumerated in the statute" simply because it "is within the reason or mischief of" the law. *Wiltberger*, 18 U.S. at 96. In this sense, the rule of lenity also prevents Congress from attempting to impermissibly delegate its criminal lawmaking authority to the courts. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000). As Justice Gorsuch has put it, lenity thus protects "a distinctly American version of the rule of law—one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring).

B. Consistent With Its History, The Rule Of Lenity Is A Meaningful Rule Of Interpretation

At the Founding and for more than a century after, the rule that penal laws should be strictly construed carried real and consistent force as an interpretative canon. *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 921 (2020). The Court should make clear that this historical understanding of the doctrine's impact is the correct one. That understanding supports a clear statement rule: to prohibit or penalize conduct "the language" of the statute in question must "'plainly and unmistakably' cover" it. *Dowling v. United States*, 473 U.S. 207, 228 (1985) (quoting *United States v. Lacher*,

134 U.S. 624, 628 (1890)); *see* Hopwood, 54 AM. CRIM. L. REV. at 711 (viewing rule of lenity as a "criminal-law clear-statement rule").

1. Lenity has been historically applied as a robust interpretive tool

Historically, courts applied the rule of lenity in the ordinary course of statutory construction, not at its bitter end. Statutory text was of course the starting place. But if the text and structure left the reader uncertain on the statute's application to the defendant, then the defendant prevailed. *See* Hopwood, 54 AM. CRIM. L. REV. at 738-39. A "court would *not* contemplate the likely purpose of the statute or its legislative history in resolving ambiguity." Hopwood, 95 N.Y.U. L. REV. at 928 (emphasis added). And all that was required to trigger lenity was a "reasonable doubt" (not a "grievous ambiguity"). *Id.* at 921.

Chief Justice Marshall's opinion for the Court in *Wiltberger* is illustrative. The defendant there had been convicted of manslaughter for killing a fellow sailor while their ship was on a river in China. 18 U.S. at 77. The part of the statute addressing manslaughter referenced only conduct on the "high seas," but another section extended to "a river, haven, basin, or bay." *Id.* at 94. The Court acknowledged that, given the statute's purpose, it was "extremely improbable" that Congress intended to limit the manslaughter prohibition to the high seas. *Id.* at 105. Indeed, the Court could "conceive" of "no reason" for doing so. *Id.*

Relying on the rule that "penal laws are to be construed strictly," however, the Court reversed the conviction. *Id.* at 95. The Court acknowledged that the "intention of the law maker must govern," but stressed that any intention must be made clear in the statutory text. *Id.* ("The intention of the legislature is to be collected from the words they employ."). And absent a clear textual indication that Congress intended to extend the statute to manslaughter on foreign rivers, it was not the Court's role to do so. *Id.* ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

Harrison v. Vose, 50 U.S. 372 (1850), provided another example of the early Court's muscular use of the rule of strict construction. The statute there required a ship commander to make certain deposits with a consul at a foreign port upon his vessel's "arrival" there or else suffer a civil penalty. *Id.* at 378. The defendant had "arrived temporarily at the port of Kingston," and the government imposed a penalty on him for failure to make the required deposits. *Id.* at 378-79. The statute did not define "arrival," and the Court acknowledged that it could easily mean "coming into a port from any cause, or for any purpose, and for any period," an interpretation that would cover the defendant. *Id.* at 379. Indeed, that was "the literal and general meaning of the term with lexicographers." *Id.* But, the Court explained, the term could also be more narrowly construed to mean "coming in" to the port "for certain special objects of business, and to be

followed by remaining there so long as to render an entry of the vessel proper." *Id.*

Relying principally on the strict construction canon, the Court chose the narrow interpretation and vacated the penalty. "In the construction of a penal statute, it is well settled * * * that all reasonable doubts concerning its meaning ought to operate in favor" of the defendant. *Id.* Indeed, the Court observed, "[i]t would be highly inconvenient, not to say unjust, to make every doubtful phrase a drag-net for penalties." *Id.* (quoting *United States v. Shackford*, 5 Mason 445, 450 (C.C. D. Me. 1830) (Story, J.)). The Court noted that if its construction was not the one Congress preferred, "another [statute] can at once be passed" expanding the statute's scope. *Id.* at 385.

2. Modern misconceptions of lenity have not altered the rule's true meaning

To be sure, certain "misunderstandings" of lenity "have crept into" this Court's law in a few modern decisions. *Wooden*, 142 S. Ct. at 1083-84 (Gorsuch, J., concurring). For example, some decisions suggest that lenity is triggered only when "a court confronts a '*grievous*' statutory ambiguity," *id.* at 1084 (quoting *Shaw v. United States*, 137 S. Ct. 462, 469 (2016)) (emphasis added), suggesting an exceedingly narrow application. But other recent decisions correctly omit the "grievous" qualifier. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 410 (2010) (invoking "the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity' ")

(quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). That second group of cases is more consistent with historical practice—as noted above, the "Court's early cases did not require a 'grievous' ambiguity before applying the rule of lenity," and it "does not derive from any well-considered theory about lenity." *Wooden*, 142 S.Ct. at 1084 (Gorsuch, J., concurring); *see*, *e.g.*, *Harrison*, 50 U.S. at 378 (applying a "reasonable doubt[ ]" standard).

Likewise, some modern decisions suggest that courts must resort to legislative history or notions of statutory purpose to resolve ambiguity before going to the rule of lenity. *Wooden*, 142 S. Ct. at 1085 (Gorsuch, J., concurring). But "[r]anking lenity 'last' among interpretive conventions all but guarantees its irrelevance." Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 386 (1994). Other recent decisions thus correctly recognize that lenity "preclude[s]" courts' "resolution of the ambiguity against [a defendant] on the basis of general declarations of policy in the statute and legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990); *see United States v. Campos-Serrano*, 404 U.S. 293, 299 (1971) ("The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute."). That view is true to lenity's history and the rationales underlying it. "Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed

purposes. The next step is to lenity." *Wooden*, 142 S. Ct. at 1085-1086 (Gorsuch, J., concurring).

C. The Rule Of Lenity Applies To 31 U.S.C. § 5314 Because It Is A Penal Law

With these historically grounded interpretative principles in mind, amicus turns to the case at hand. The parties' core disagreement is over what constitutes a "violation" of the Bank Secrecy Act's foreign account reporting provision—each failure to file an annual form, or each unreported account. Petitioner's position on this question is correct without any use of the rule of lenity. *See* Pet. Br. 17-29. At the very least, however, the statute is ambiguous on that question, so the rule of lenity requires reversal. That is so even though this is a civil case.

As explained above, the rule of lenity is a modern name for the ancient precept that penal statutes are to be strictly construed. *See supra* p. 4. That rule has long been understood to apply to *all* statutes imposing penalties, including civil ones. *See* Barrett, 90 B.U. L. REV. at 130 n.92 (collecting examples from early American history); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2498 (2016) (explaining history of proceedings to recover civil penalties "as 'penal' but not 'criminal,'" and subject to strict construction). As Blackstone explained, the rule of strict construction applies where a law "inflicts a penalty, as the pillory *or a fine*." 1 W. Blackstone, Commentaries 88 (emphasis added). This Court's decisions likewise make clear that this "well-established" rule

applies regardless of whether the penalty sought to be imposed is civil or criminal. *See*, *e.g.*, *Harrison*, 50 U.S. at 378 (applying rule of strict construction to civil maritime statute imposing monetary penalty).

Consistent with this general approach, this Court has thus applied the rule of strict construction to tax and other revenue-related penalties. For example, in *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. 453 (1833), not unlike here, revenue collection officials sought to impose a harsh penalty for alleged misreporting—the government seized and sold imported sugar because it had been declared "as brown, on which a duty of three cents per pound is paid," instead of "as white, on which a duty of four cents per pound is paid." *Id*. at 461. In granting mandamus to the importers, the Court noted that "[t]he statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly." *Id*. at 462-63.

A century later, this Court again applied the rule of strict construction to a revenue disclosure penalty scheme. *Commissioner of Internal Revenue v. Acker* presented the question whether a tax statute "authorize[d] the treatment of a taxpayer's failure to file a declaration of estimated tax as, or the equivalent of, a declaration estimating his tax to be zero." 361 U.S. 87, 90-91 (1959). Noting that it was "here concerned with a taxing Act which imposes a penalty," this Court applied the rule of strict construction: "The law is settled that 'penal statutes are to be construed strictly,'" and "that one 'is not to be subjected to a penalty unless

the words of the statute plainly impose it.'" *Id*. at 91. Viewing the statute "in the light of this rule," the Court "fail[ed] to find any expressed or necessarily implied provision or language that purport[ed] to authorize the" government's proposed reading of the statute. *Id*. More recently, the United States Tax Court has relied on *Acker* to hold that the rule of lenity applies in tax penalty cases. *Mohamed v. Comm'r.*, 106 T.C.M. (CCH) 537 (T.C. 2013) ("Any inclination that we might have to read section 6651(f) expansively must give way to the rule of lenity.").

Here, there can be no dispute that the Bank Secrecy Act is a "penal" statute within the well-established meaning of that term. Because Petitioner was subject to a "a civil money penalty" for violating "any provision of section 5314," 31 U.S.C. § 5321(a)(5)(A), the rule of lenity applies in construing the meaning of those provisions.

But even if that were not the case, section 5314 would still be subject to the rule of lenity for another reason: it is a hybrid statute with both criminal and civil applications. As this Court has long recognized, "[b]ecause [the Court] must interpret [a] statute consistently, whether [it] encounter[s] its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004). *See also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality op.); *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). And as Petitioner correctly points out, "the operative question [here] is how to define 'violation,' which is a

constant in the Act's civil and criminal context." *See* Pet. Br. 33 & n.15. For that reason, too, the rule of lenity applies.

D. The Rule Of Lenity Requires A Plain Statement Of Proscribed Conduct, Which Is Lacking Here

As noted previously, amicus agrees with Petitioner that section 5314 unambiguously supports his per-form reading and forecloses the government's per-account alternative. But to the extent the Court disagrees, it should apply the rule of lenity because, at the very least, the statute is ambiguous in light of the absence of a clear statement imposing penalties on a per-account basis.

1. Section 5314 lacks any plain statement of a per-account "violation"

The most apparent problem with the government's (and the Fifth Circuit's) reading of section 5314 is that it has no firm footing in the text of the statute (or even its implementing regulations). *See United States v. Boyd*, 991 F.3d 1077, 1086 (9th Cir. 2021) (noting that "[e]ven if the government's reading of the statutory scheme were reasonable," that court would reject that reading because it "does not arise from the plain words of either the statute or the regulations").

Nowhere does the statute give fair notice that each failure to disclose an account, rather than file a form, triggers statutory penalties. *See id.*; Pet. App. 52a. Section 5321 subjects to a $10,000 penalty "any person who violates" section 5314. 31 U.S.C. §§ 5321(a)(5)(A),

(B). But section 5314 directly imposes no obligations on taxpayers at all, much less a clear per-account obligation. 31 U.S.C. § 5314; *see Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 26 (1974) ("[I]f the Secretary were to do nothing, the Act itself would impose no penalties on anyone."). Instead, the provision addresses the Treasury Secretary, directing her to impose requirements related to "transaction[s]" and "relation[s]" with a "foreign financial agency." 31 U.S.C. § 5314(a). And far from requiring the Secretary to impose any particular reporting requirements, section 5314 allows the Secretary to require taxpayers *either* "to keep records," to "file reports," or to do both. *Id.* Congress remained silent even as to the contents of those records or reports, instead directing information to be included merely "in the way and to the extent the Secretary prescribes." *Id.* (listing "the identity and address of participants in a transaction or relationship," "the legal capacity in which a participant is acting," "the identity of real parties in interest," and "a description of the transaction"). None of these provisions so much as hints that each failure to list an account on an annual filing is a "violation" triggering its own $10,000 penalty.

The regulations are no help to the government either. Even assuming regulations alone could provide the clarity demanded by the rule of lenity, they would not do so here because they are every bit as opaque as the statute. 31 C.F.R. § 1010.350(a) requires a taxpayer to disclose "a financial interest in * * * a bank, securities, or other financial account in a foreign

country * * * for each year in which such relationship exists and * * * provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314." And 31 C.F.R. § 1010.306(c) provides that "[r]eports 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." Like the statute, these regulatory provisions, too, provide no plain indication that the Bank Secrecy Act's penalties may be imposed on a per-account basis.

It is in this sort of textual void that the rule of lenity is at its strongest. It has long served to guide courts "where the intention [of the legislature] is not distinctly perceived." *The Adventure*, 1 F. Cas. at 204 (Marshall, C.J.). And even those decisions most hesitant to apply it—reserving lenity for cases of "grievous ambiguity or uncertainty"—acknowledge its potency where courts "can make 'no more than a guess as to what Congress intended.'" *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (citations omitted). Any reasonable doubt about the Bank Secrecy Act's application should favor liberty, not punishment.

2. Applying lenity here is necessary to vindicate the important justifications underlying the rule

This case well illustrates the virtues of a robust rule of lenity. *See supra* pp. 4-9 (discussing lenity's grounding in fair notice principles and separation of

powers). Strictly interpreting section 5314 ensures that taxpayers have fair notice of potential penalties for failing to disclose foreign accounts, and that Congress, not the courts, fills any gap in the statutory scheme.

Consider the fair notice implications of the government's position. Under a per-account reading of the statute, a first-time, non-willful violator could face hundreds of thousands of dollars in penalties for even a single missing or incomplete form. Indeed, the facts of this case show just that: the government demanded $610,000 in penalties for Petitioner's first missed filing alone, and insisted that he violated the statute *272 separate times* in just five years of unwitting noncompliance. Pet. App. 6a. That sort of draconian penalty would surely be a bolt from the blue for even a sophisticated taxpayer. As explained above, *supra* pp. 17-19, the statute here "contains no words or language" warning taxpayers that they could be subject to such harsh per-account penalties. *Acker*, 361 U.S. at 91. Applying lenity here thus reinforces the longstanding principle that a taxpayer "is not to be subjected to a penalty unless the words of the statute plainly impose it." *Id*. And it ensures that taxpayers will not be caught off guard by penalties an order of magnitude higher than anything plainly described in the statute. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will

subject him to punishment, but also of the severity of the penalty.").

Section 5314's failure to give reasonable notice of a per-account penalty is not only fundamentally unfair, but also counterproductive. The government insists that rejecting a per-account reading would "significantly curtail[] the deterrent effect of the penalties." Br. of Resp't 16. But there can be little effective deterrence achieved by a law that fails to provide a clear indication of the conduct it prohibits or the penalty it imposes. To the contrary, "[a] potential offender is more likely to believe that a clear and specific law, as compared to a vague or ambiguous law, will cover her conduct." Hopwood, 54 AM. CRIM. L. REV. at 732. And far from deterring bad actors, the government's reading would nonsensically impose *lower* penalties for willful violations in some circumstances—such as where a non-willful violator's funds are spread across multiple accounts. *See* 31 U.S.C. § 5321(a)(5)(C)-(D) (capping penalties for willful violations at the greater of $100,000 or 50 percent of "the balance in the account at the time of the violation").[5]

Applying the rule of lenity to section 5314 also serves to safeguard the separation of powers. At best, the statutory and regulatory scheme imposing penalties for a taxpayer's failure to report foreign accounts

[5] For example, under the government's reading, a willful violator with $150,000 in a single account would face a $100,000 penalty, while a non-willful violator with $150,000 divided among 20 accounts would face a $200,000 penalty—more than the non-willful violator's entire aggregate balance.

is a muddle. *See supra* pp. 17-19. To the extent the government's per-account reading of the statute is even plausible, it is only because the text gives no clear indication of what constitutes a "violation." Rather than fill that void with judicial conjecture about tax enforcement policy or legislative intent, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

If the government favors a per-account tax penalty, it should ask Congress, not this Court, to write that rule into the Bank Secrecy Act. The Department of Justice "is usually able to secure a congressional hearing and often an override" when it is on the losing end of a rule of lenity decision from this Court. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, 1967-2011, 92 TEX. L. REV. 1317, 1466 (2014). Meanwhile, an error in the opposite direction is much less likely to be corrected, as criminal defendants and other individuals subject to governmental sanction obviously "do not enjoy the same influence." Lane Shadgett, *A Unified Approach to Lenity: Reconnecting Strict Construction With Its Underlying Values*, 110 GEO. L.J. 685, 697 (2022).

For all these reasons, the rule of lenity provides a simple and neutral principle that resolves this case, while avoiding the "dangerous" idea that judges may "punish" what is "not enumerated in the statute."

Wiltberger, 18 U.S. at 96. To protect these time-honored principles, this Court should apply the rule of lenity and reverse.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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