No. 22-_____

In The
Supreme Court of the United States

ARTHUR BEDROSIAN,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 31 U.S.C. § 5321(a)(5), any U.S. person who fails to report a foreign account containing more than $10,000 at any point in the calendar year is subject to a civil penalty. If the individual acted non-willfully, the penalty is capped at $10,000. If the individual acted "willfully," the maximum penalty is increased to the greater of $100,000 or half the balance of the undisclosed account(s) at the time of the violation, for each year the violation continues.

For the year at issue, Petitioner disclosed one of his offshore accounts on the required form, but not the other held at the same bank. He later amended his filing to voluntarily disclose the omitted account. After a bench trial to determine the appropriate penalty, the district court found that the omission was merely negligent, triggering the lesser penalty.

On appeal, the Third Circuit expansively redefined "willfully" and remanded. Applying the new standard, the district court reversed itself and found—based on the exact same evidence—that Petitioner acted willfully after all, imposing the maximum penalty of $975,789 plus interest. The Third Circuit affirmed.

The question presented is:

Whether willfulness under 31 U.S.C. § 5321(a)(5)(C) should be determined according to a subjective, rather than objective, standard that focuses on an individual's knowledge and intent in failing to disclose a foreign account.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Arthur Bedrosian was plaintiff in the district court and appellant in the court of appeals. Pursuant to Supreme Court Rule 29.6, Petitioner discloses the following: Petitioner has no parent company, and no publicly held company owns 10% or more of Petitioner's stock.

Respondents are the United States of America, the Department of the Treasury, and the Internal Revenue Service. Respondents were defendants in the district court and appellees in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner provides the following statement of related cases:

U.S. District Court for the Eastern District of Pennsylvania, No. 2:15-cv-05853, *Bedrosian v. United States et al.*, judgment entered September 20, 2017.

U.S. Court of Appeals for the Third Circuit, No. 17-3525, judgment entered December 21, 2018 (vacating September 20, 2017 judgment and remanding).

U.S. District Court for the Eastern District of Pennsylvania, No. 2:15-cv-05853, *Bedrosian v. United States et al.*, order entered December 4, 2020 (post-remand decision on liability).

STATEMENT OF RELATED PROCEEDINGS
—Continued

U.S. District Court for the Eastern District of Pennsylvania, No. 2:15-cv-05853, *Bedrosian v. United States et al.*, judgment entered January 29, 2021 (post-remand decision on penalty amount).

U.S. Court of Appeals for the Third Circuit, No. 21-1583, judgment entered July 22, 2022 and petition for rehearing denied September 27, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Arthur Bedrosian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on July 22, 2022.

OPINIONS BELOW

The district court's initial order entering judgment in favor of Petitioner is unreported but is reprinted in the appendix hereto ("App.") at App. 62-82. The decision of the Third Circuit vacating the district court's order is reported at 912 F.3d 144 and reprinted at App. 44-61.

The orders of the district court following remand entering judgment in favor of Respondents are unreported but are reprinted at App. 23-43. The decision of the Third Circuit affirming the district court's post-remand orders is reported at 42 F.4th 174 and is reprinted at App. 1-20. The subsequent order of the Third Circuit denying Mr. Bedrosian's petition for rehearing is unreported but is reprinted at App. 21-22.

STATEMENT OF JURISDICTION

On September 20, 2017, the district court entered judgment in favor of Petitioner and against Respondents. Respondents appealed to the Third Circuit Court of Appeals. The Third Circuit vacated the

district court's order on December 21, 2018 and remanded for further proceedings. Following remand, the district court issued two orders: on December 4, 2020, the district court found Petitioner liable, and on January 29, 2021, the district court entered judgment in favor of Respondents and against Petitioner in the amount of $1,371,371.43. Petitioner appealed to the Third Circuit Court of Appeals. The Third Circuit affirmed the district court's post-remand orders on July 22, 2022. On September 6, 2022, Petitioner filed with the Third Circuit a petition for rehearing *en banc*. The Third Circuit denied the petition on September 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13(3).

STATUTORY PROVISION INVOLVED

Section 5321 of Title 31 of the United States Code provides in relevant part that:

> **(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.

(ii) REASONABLE CAUSE EXCEPTION.—No penalty shall be imposed under subparagraph (A) with respect to any violation 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.

(C) WILLFUL VIOLATIONS.—In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—

(i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of

(I) $100,000, or

(II) 50 percent of the amount determined under subparagraph (D), and

(ii) subparagraph (B)(ii) shall not apply.

(D) AMOUNT.—The amount determined under this subparagraph is—

> (i) in the case of a violation involving a transaction, 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.

INTRODUCTION

Any U.S. person who has a financial interest in or signature or other authority over a foreign account containing more than $10,000 at any point during a calendar year must report that account to the United States Treasury Department on a Report of Foreign Bank and Financial Accounts ("FBAR"). There are criminal and civil penalties for failing to do so. A two-tier civil penalty structure exists. If the individual did not act "willfully" in failing to report an account, the maximum penalty is capped at $10,000.[1] If the individual acted "willfully," he or she is subject to an enhanced penalty: the greater of $100,000 or 50% of the account balance at the time of the violation. The penalty may be imposed for each year the violation occurred. This

[1] Whether the penalty is per account or per form is currently being considered by this Court. *See* Pet'n for Certiorari, *Bittner v. United States* (No. 21-1195) (filed Feb. 28, 2022) (cert. granted June 21, 2022).

petition presents the question of what it means to "willfully" violate the FBAR statute in a civil case.

The Third Circuit equated "willfulness" with objective recklessness, importing a standard from a civil tax penalty statute into the FBAR context. Under that test, a taxpayer acts willfully if he or she "(1) clearly ought to have known that (2) there was a grave risk that [the FBAR filing requirement was not being met] and . . . (3) he [or she] was in a position to find out for certain very easily." App. 59 (citing *United States v. Carrigan*, 31 F.3d 130, 134 (3d Cir. 1994) and *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989)).

The Third Circuit found support for its objective test in this Court's decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007). There, this Court interpreted the word "willful" in the Fair Credit Reporting Act ("FCRA") to include objective recklessness. Yet, *Safeco* also cautioned that "willful" is a "word of many meanings whose construction is often dependent on the context in which it appears." *Id.* at 57 (citation omitted).

Here, that context makes all the difference. The FBAR civil penalty statute "point[s] another way" than the FCRA for the right reading of the word. *Id.* at 58. For one, Congress did not define the word "willfully," so the term must be given its ordinary meaning—a "deliberate" or "intentional" act. That reading of the word is reinforced by other textual and historical clues, including that Congress amended the statute in 2004 to make it more punitive. The statutory text and history indicate that Congress intended willfulness in the civil

context to mean something more than objective recklessness.

The Third Circuit's standard of objective recklessness was further expanded by adoption of a standard addressing civil tax penalties under 26 U.S.C. § 6672. *See Carrigan*, 31 F.3d at 134; *Vespe*, 868 F.2d at 1335. That statute imposes penalties against any person required by law to collect or pay taxes on behalf of others who willfully fails to collect or pay those taxes to the government. Again, the context makes all the difference. A willfulness standard from a statute imposing payroll tax penalties on fiduciaries should not have been imported to the civil FBAR statute, which imposes a reporting obligation on millions of U.S. persons with foreign accounts.

Even if a standard of recklessness may be adopted, the standard should be subjective not objective. Reading "willful" to include objective recklessness as defined by the Third Circuit makes no sense against the FBAR statutory backdrop. With that broad a definition, the willfulness penalty would apply in almost every FBAR case and, in essence, destroys the distinction Congress drew between "willful" and "non-willful" conduct. After all, *every* taxpayer "ought to have known" about his own bank accounts or could have "easily" determined as much. Without a subjective standard, there is no meaningful way to distinguish between a negligent violation and a reckless, willful, one. That is the opposite of what Congress envisioned when it amended the statute in 2004.

The Third Circuit's objective-recklessness test was outcome determinative here, and it will continue to be outcome determinative in countless other civil FBAR cases. The Court should grant certiorari to consider the standard for determining willfulness under the FBAR statute, and this case is an ideal vehicle for doing so. It would also serve as an appealing companion case to *Bittner*, in which this Court has granted certiorari to calibrate the proper penalty for a non-willful FBAR violation. Granting certiorari in this case would provide the Court with the opportunity to do the same in the context of a willful violation, and calibrate both penalties consistent with Congressional intent.

STATEMENT OF THE CASE

A. Statutory Background

Under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, and its implementing regulations, any U.S. person who has a financial interest in or signature or other authority over a foreign account containing more than $10,000 at any point in the calendar year must file a "Report of Foreign Bank and Financial Accounts," often called an "FBAR."[2] *See* 31 U.S.C. § 5314; 31 C.F.R. § 1010.350. The FBAR is filed with the Financial Crimes Enforcement Network ("FinCEN"), a bureau in the Department of the Treasury. FinCEN is separate

[2] At the time relevant to this case, an FBAR was then published on a form "TD F 90-22.1." It has since been renumbered and is now filed on a "Form 114."

from the Internal Revenue Service. At the time relevant to this case, an FBAR was required to be filed with FinCEN by June 30 of each calendar year. 31 C.F.R. § 1010.306(c).[3] The authority to enforce the FBAR statute has been delegated to the Internal Revenue Service ("IRS"). 31 C.F.R. § 1010.810(g).

There are civil and criminal penalties for failing to file or filing an inaccurate FBAR. In the civil context, the maximum penalty for a non-willful violation is $10,000. 31 U.S.C. § 5321(a)(5)(B)(i). The maximum penalty for a willful violation is the greater of $100,000 or 50% of the undisclosed foreign account balance at the time of the violation. 31 U.S.C. § 5321(a)(5)(C)(i).

B. Factual Background

1. Petitioner began working in the pharmaceutical industry in May 1968 and, by 1970, his job was taking him overseas to Europe. App. 47. In 1972, he opened a savings account with Swiss Bank Corp. to help pay for expenses while traveling internationally. *Id.* In the late 1990s, Swiss Bank Corp. was acquired by the Union Bank of Switzerland ("UBS"), and Petitioner's account was automatically transferred to UBS. *Id.*

2. In 2005, UBS proposed to Mr. Bedrosian that he participate in an investment vehicle, whereby UBS

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[3] In 2015, Congress changed the filing deadline to April 15. *See* Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006(b)(11) (2015).

would invest 750,000 Swiss francs (at the time equivalent to approximately $900,000) of UBS funds on Mr. Bedrosian's behalf, with Mr. Bedrosian paying 1.75% interest to UBS on the "loan," but otherwise retaining the gains on the investments. App. 48. UBS told Mr. Bedrosian that UBS would invest those loan proceeds for him. As part of UBS providing this loan, but unbeknownst to Mr. Bedrosian at the time, UBS opened a second account in Mr. Bedrosian's name. *Id.*

3. In late 2008, the United States instructed UBS to close all accounts held by U.S. citizens. App. 64. UBS thus required Petitioner to return the loan proceeds to UBS and close the account holding them. *Id.* Petitioner did so, and transferred the remaining funds held in the UBS account with the original loan proceeds to Hyposwiss. *Id.*

4. From 1972 through 2007, Petitioner engaged an accountant, Seymour Handleman, to prepare his tax returns. App. 47. In the mid-1990s, Petitioner told Mr. Handleman that he had a Swiss bank account. *Id.* Mr. Handleman advised Petitioner that he did not have to disclose the account on his tax returns because his children would be the ones responsible for paying any taxes when they repatriated the money to the United States following Petitioner's death. *Id.* Petitioner relied on Mr. Handleman's advice, and they had no further discussions regarding the Swiss bank account. *Id.*

5. After Mr. Handleman passed away in 2007, his widow turned over Petitioner's files to another accountant, Sheldon Bransky, who then began preparing

Petitioner's returns. App. 48. In 2008, Mr. Bransky prepared Petitioner's 2007 tax return. *Id.* During the preparation of that return, Petitioner provided Mr. Bransky information about his UBS account in Switzerland. *Id.* Based on the information provided by Petitioner, Mr. Bransky truthfully and accurately reported the Swiss bank account on Petitioner's 2007 tax return. *Id.*

6. Mr. Bransky also prepared and filed an FBAR on Petitioner's behalf for tax year 2007. *Id.* The 2007 FBAR reported that Petitioner had one account and that the account was at UBS in Switzerland, which is what Petitioner believed to be true, as he was unaware that UBS had issued him a second account number for the 2005 loan. *Id.* The 2007 FBAR also reported that Petitioner had between $100,000 and $1,000,000 of his own funds in the account, which is what Mr. Bedrosian believed to be true. *Id.*

7. Mr. Bransky also filed an FBAR (and tax return) for tax year 2008 disclosing the UBS account and that it had been closed. App. 65.

8. In 2009, Petitioner grew concerned that Mr. Bransky was giving him different advice, and recommending different disclosures, than Mr. Handleman. App. 65-67. Petitioner hired a tax lawyer, Paul Ambrose, to advise him further. App. 66. Petitioner also engaged a forensic accountant, Stewart Farber, and a lawyer in Switzerland, Christian Meyer. After conferring with Mr. Ambrose, Petitioner decided to amend his prior tax returns and FBARs. By the summer of 2010,

Petitioner's accountant had filed amended tax returns and original or amended FBARs dating back to 2003. *Id.* This included an amended 2007 FBAR, which reported the second UBS account. Petitioner paid all back taxes and penalties associated with his amended tax filings.

9. In September 2010, Petitioner also filed a "voluntary disclosure" with the IRS, explaining the oversight in his filings and the steps that he had taken to fix the errors. The IRS rejected the voluntary disclosure and notified Petitioner that it would be auditing his returns. App. 48-49. Petitioner cooperated with the audit and provided all requested documents to the IRS.

10. After investigation, including a voluntary interview of Petitioner, the original IRS revenue agent assigned to the investigation was satisfied that Mr. Bedrosian did not act willfully in failing to disclose the second UBS account on his 2007 FBAR. The IRS thus informed Mr. Bedrosian that his case was going to be closed with only non-willful FBAR penalties.

11. Before the case was closed, however, the original revenue agent went on extended sick leave. A new revenue agent was assigned. Rather than close the file and proceed with the non-willful determination that had been made by the agents who had performed the investigation (and interviewed Petitioner), the new revenue agent instead caused the IRS to reverse itself. The new agent determined that Petitioner did act willfully in failing to disclose the second account and that Petitioner was subject to the maximum statutory

penalty. The IRS imposed a penalty of $975,789 against Petitioner, which allegedly represented half of the undisclosed account balance. App. 49.

C. The Proceedings Below

1. Petitioner paid 1% of the assessed penalty ($9,757.89) and subsequently filed a complaint in the district court seeking to recover the payment as an unlawful exaction. *Id.* The government filed a counterclaim seeking the full penalty amount. *Id.* The district court held a one-day bench trial to determine whether Petitioner acted "willfully" in failing to disclose the second UBS account on his 2007 FBAR. *Id.* The district court concluded that the only evidence supporting a potential finding of willfulness was: (i) the inaccurate FBAR form itself; (ii) the fact that Mr. Bedrosian may have learned of the existence of a second account after meeting with a UBS representative and having sent two separate letters closing the accounts; (iii) Mr. Bedrosian's sophistication as a businessman; and (iv) Mr. Handleman having told Mr. Bedrosian in the mid-1990s that he was breaking the law by not reporting the UBS accounts. App. 33. The district court ultimately ruled in Petitioner's favor, concluding that he did not willfully violate 31 U.S.C. § 5314. App. 68-79. In particular, the district court found that Petitioner's conduct was "unintentional" and "at most negligent." App. 74. The district court did not reach the issue of whether the government sustained its burden of proof regarding the penalty amount in light of its finding that Petitioner did not act willfully. The district court

entered judgment in favor of Petitioner and against the government. App. 82. The government appealed.

2. On the initial appeal, a panel of the Third Circuit used the case as a vehicle for enunciating its standard for willfulness for civil FBAR violations. The Third Circuit held that "the usual civil standard of willfulness applies for civil penalties under the FBAR statute" and that this includes "both knowing and reckless conduct." App. 58, 61. According to the Third Circuit, this is an "objective standard" that is satisfied when a person takes an "action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" App. 59. The Third Circuit then looked to prior cases involving civil penalties assessed by the IRS under responsible officer employment tax laws and held that a person "recklessly" fails to comply with the FBAR filing requirement if he or she "(1) clearly ought to have known that (2) there was a grave risk that [the filing requirement was not being met] and if (3) he [or she] was in a position to find out for certain very easily." *Id.* (relying on *Carrigan*, 31 F.3d at 134, a case arising under 26 U.S.C. § 6672). The Third Circuit vacated the judgment and remanded for further proceedings because it was "not sure" whether the District Court evaluated the evidence under the precise standard it had just enunciated. App. 61.

3. On remand, the district court did not receive any additional evidence. It nonetheless reversed its prior finding and held that Mr. Bedrosian had willfully violated the FBAR statute. App. 29-43. The district

court determined that the *exact same evidence* it had previously found to show that Mr. Bedrosian's conduct was "at most negligent" now showed that his conduct was objectively reckless under the newly enunciated standard. It reached that conclusion after making five "supplemental" findings, based on the same evidence: (i) Mr. Bedrosian's cooperation only began after he was exposed as having hidden foreign accounts; (ii) shortly after filing the 2007 FBAR, Mr. Bedrosian sent two letters to UBS directing the closure of two accounts, but only one of the accounts had been disclosed on his FBAR; (iii) Mr. Bedrosian saw an article in the Wall Street Journal about the federal government tracing mail coming into the United States and therefore was alerted to the possibility of the United States finding out about his foreign bank accounts; (iv) Mr. Bedrosian's accounts were subject to a "mail hold"; and (v) Mr. Bedrosian was aware of the significant amount of money held in his foreign bank accounts. App. 32-33. The district court subsequently considered whether the government had met its burden as to the penalty amount of $975,789. The district court rejected the government's argument that Petitioner's counsel conceded the penalty amount in his opening statement. However, the district court upheld the penalty based on unauthenticated summary documents purportedly showing "monthly balances" for Petitioner's undisclosed Swiss account. *See* App. 14. Those documents included: "Exhibit R" (the record the Government claims established the balance in Petitioner's Swiss account); "Exhibit S" (showing the exchange rates for Swiss Francs to U.S. Dollars for 2006 through 2011); and

"Exhibit T" (converting the account balances in Exhibit R into U.S. Dollars using the Exhibit S exchange rates). The district court entered judgment in favor of the government for the full amount of the penalty ($975,789), plus statutory interest and additions thereon, totaling $1,371,371.43. Petitioner appealed.

4. On appeal, a panel of the Third Circuit upheld the district court's post-remand decision. App. 1-20. As to liability, the panel first held that the District Court did not exceed the scope of remand by making supplemental factual findings. App. 6-8. Next, the panel determined that it was bound to apply *Bedrosian I*'s objective test for willfulness, App. 11 n.4, and it concluded that the district court did not err in finding that Petitioner acted willfully in failing to disclose the second UBS account. App. 8-10. As to the penalty amount, the panel concluded that the district court abused its discretion in admitting and relying on summary documents (Trial Exhibits R, S, T) to support the $975,789 penalty because the government failed to offer a foundation tying those exhibits to Petitioner's UBS account. App. 14-17. The panel, however, upheld the penalty amount on a ground the district court considered but did not adopt—that Mr. Bedrosian's counsel supposedly made a "concession" during his opening statement that "there was about 2 million U.S. dollars" in the undisclosed account. App. 17-20. Petitioner timely moved for rehearing *en banc*. His petition for rehearing was denied on September 27, 2022. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Resolve an Important Question of Federal Law that Affects All Americans Who Hold Foreign Accounts.

A. The Objective Recklessness Test Contravenes Congressional Intent and is a Poor Fit in the Context of Civil FBAR Violations.

1. Under the objective recklessness test adopted by the Third Circuit, a "willful" FBAR violation can be established no matter the offender's subjective intent. Specifically, the Third Circuit held that a person acts willfully if he or she "(1) clearly ought to have known that (2) there was a grave risk that [the FBAR filing requirement was not being met] and . . . (3) he [or she] was in a position to find out for certain very easily." App. 5. The Third Circuit's objective test, adopted from the civil tax responsible officer penalty statute, is unsuitable for civil FBAR violations. As applied, this test fails to follow Congress' vision of a two-tier penalty structure for "non-willful" and "willful" offenses, with draconian penalties reserved only for significantly more culpable offenders. This Court's review is necessary to clarify the proper standard for willful FBAR violations.

2. The Third Circuit imported the objective recklessness test from *Safeco*, 551 U.S. 47. In *Safeco*, this Court considered whether liability for "willfully fail[ing] to comply" with the Fair Credit Reporting Act

(FCRA) went only to knowing acts, or whether it also encompassed "reckless disregard" of statutory duty. *Id.* at 56-57. After analyzing the text and history of the FCRA, the Court concluded that Congress intended the word "willfully" to have its common-law meaning of both knowing and reckless conduct. *Id.* at 56-60. It then adopted an objective standard for evaluating willfulness in the context of an FCRA violation. *Id.* at 68-69.

3. Looking to *Safeco*, the Third Circuit imported the objective recklessness test to civil FBAR violations with little analysis. Because courts generally apply an objective standard of willfulness in civil cases, the court reasoned, an objective standard should likewise apply to civil FBAR violations. App. 58-59. In doing so, the Third Circuit—and the other Circuits applying the same test[4]—failed to heed this Court's warning in *Safeco* that "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears[.]'" *Safeco*, 551 U.S. at 57 (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998)). The Court cautioned in *Safeco* that "a common law term in a statute" like "willfully" generally "comes with a common law meaning, *absent anything pointing another way*." *Id.* at 58 (emphasis added).

4. The Third Circuit made the precise error this Court cautioned against in *Safeco*. It adopted an

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[4] *See Norman v. United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019); *United States v. Horowitz*, 978 F.3d 80, 88 (4th Cir. 2020); *United States v. Rum*, 995 F.3d 882, 889 (11th Cir. 2021).

objective recklessness test without adequately considering the factors "pointing" in the direction of a subjective standard. Chief among those is the text of the statute. The statute does not define the term "willfully." In such a situation, the term should be construed "in accordance with [its] ordinary meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) (citation omitted). In common parlance, the word "willful" means "something bad[]" that is "done intentionally" or something done by "a person[] determined to do exactly as [he or she] want[s], even if [they] know it is wrong." Cambridge Advanced Learner's Dictionary & Thesaurus <https://tinyurl.com/2p9ybbns> (accessed Dec. 5, 2022); *see also* Merriam-Webster's <https://tinyurl.com/5n8faucu> (accessed Dec. 5, 2022) (defining "willful" as something done "obstinately" or "deliberately"); Oxford Advanced Learner's Dictionary <https://tinyurl.com/3yx62h6r> (defining "willful" as "a bad or harmful action" that is "done deliberately, although the person doing it knows that it is wrong"). The Third Circuit conducted no such textual analysis; accordingly, it failed to give the word "willfully" its ordinary meaning of something that is done deliberately or intentionally. *See* David Welkowitz, *Willfulness*^{TM}, 79 Alb. L. Rev. 509, 518 (2016) (noting that the "dominant relevant understanding of the term willful is an action that is deliberate or intentional").

5. There are additional textual clues in the statute that point in the direction of something other than the low bar of an objective recklessness standard.

Unlike the FCRA, the FBAR statute is punitive in nature.[5] Its intent is to punish and deter covered individuals who fail to report foreign accounts, not compensate the government for any loss suffered. In accordance with that purpose, not only did Congress provide for the availability of civil penalties, it explicitly provided that "[a] civil money penalty may be imposed under subsection (a) with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation." 31 U.S.C. § 5321(d). Congress simply could not have enacted or envisioned a system whereby lofty penalties could be levied at the IRS's sole discretion against what are, in reality, negligent actors. Moreover, it is notable that the IRS itself previously took the position that because Congress used the same word in both the criminal and civil provisions, "[s]tatutory construction rules would suggest that the same word used in related sections should be consistently construed." "Service Discusses Foreign Bank and Financial Accounts Report Penalty," Tax Notes (Sept. 1, 2005) <https://tinyurl.com/2s4aym4u>.[6] Under that view, "willful" in the civil provision should mean the same thing as it does in the criminal provision: something done deliberately or intentionally. *Compare* 31

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[5] The IRS itself has acknowledged the punitive nature of the sanction. *See Toth*, Pet'n for Certiorari at 18-19 & n.5, 29 (collecting examples where the IRS has noted the "deterrent" nature of FBAR penalties).

[6] Although a Private Letter Ruling is only binding as to the taxpayer who sought the ruling, the IRS's conclusion in the 2005 ruling is, nonetheless, correct. 26 C.F.R. § 601.201(l)(1).

U.S.C. § 5321(a)(5)(C) (setting forth civil penalties for anyone "willfully violating" Section 5314), *with* 31 U.S.C. § 5322(a) (setting forth criminal penalties for anyone "willfully violating" Section 5314). *Safeco* does not counsel otherwise. Although *Safeco* notes that the word "willful" as used in the civil context typically means something different than in the criminal context, *see Safeco*, 551 U.S. 60 & n.9, it says that the ultimate meaning of the word depends on the statutory context. That context here points in the direction of a subjective, not objective, standard of willfulness.

6. The Third Circuit also failed to consider the statutory history. Prior to October 22, 2004, the FBAR statute did not draw a distinction between "willful" and "non-willful" violations. *See* 31 U.S.C. § 5321(a)(5)(A) (2000). Instead, any person who willfully violated Section 5314 was subject to a penalty of the larger of $25,000 or the amount of the balance in the account at the time of the violation not to exceed $100,000. *Id.* In large part due to low compliance rates and "widespread disobedience," Congress amended the statute in 2004. Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, and Why It Matters*, 7 Hous. Bus. & Tax L. J. 1, 17 (2006); *see* American Jobs Creation Act of 2004, Pub. L. No. 108-357 § 821, 118 Stat. 1418, 1586 (Oct. 22, 2004). Through those amendments, Congress created a distinction between "willful" and "non-willful" violations and substantially increased the punishment for "willful" violations. Under the amended statute, there is no monetary ceiling whatsoever on the penalty for a "willful" violation, only

a percentage cap. *See* Sheppard, 7 Hous. Bus. & Tax L. J. at 19 (citing 31 U.S.C. § 5321(a)(5)(C), (D)). It is no surprise then that commentators have ranked the maximum FBAR penalty as "among the harshest civil penalties the government may impose," with "[s]ome . . . hav[ing] suggested the penalty is so severe that it might violate the U.S. Constitution's prohibition against excessive fines."[7] National Taxpayer Advocate, 2022 Purple Book at 77 (Dec. 31, 2021) <https://tinyurl.com/2022-Purple-Book>.

7. The Third Circuit's analysis should have begun and ended with the statutory text and history. If it had, the Third Circuit would have observed the contextual clues "pointing" in the direction of a subjective standard that focuses on the offender's knowledge and intent. *Safeco*, 551 U.S. at 58. The plain text of the statute, the overlap between the criminal and civil penalties, and the fact that Congress amended the statute in 2004 to require substantially higher punishments for "willful" violations are all strong indicators of Congressional intent that "willful" means what it says: a deliberate or intentional act. *See supra* ¶¶ 4-6; *cf. Cheek v. United States*, 498 U.S. 192 (1991); *Ratzlaf v. United States*, 510 U.S. 135 (1994). Some lower courts have taken this view. *See*, *e.g.*, *United States v. Hughes*, No. 18-CV-05931-JCS, 2021 WL 4768683, at *13 (N.D. Cal. Oct. 13, 2021) (noting that "[a] handful of cases

[7] The Eighth Amendment question is presented in another petition that is currently pending before the Court. *See* Pet'n for Certiorari, *Toth v. United States* (No. 22-177) (filed Aug. 26, 2022).

have held or implied that the higher standard of a defendant's 'knowledge that his conduct was unlawful,' meaning he intentionally violated 'a known legal duty,' applies equally in criminal and civil cases addressing failure to file FBARs") (citing *United States v. Pomerantz*, No. C16-689 MJP, 2017 WL 4418572, at *3 (W.D. Wash. Oct. 5, 2017) & *United States v. Zwerner*, No. 13-22082-CIV, 2014 WL 11878430, at *3 & n.3 (S.D. Fla. Apr. 29, 2014)).

8. *Safeco* does not call for a different conclusion. The statute at issue in *Safeco*, the FCRA, is qualitatively different from the FBAR statute. Most notably, the FCRA has a two-tier structure for punishing willful offenders who are entities that are required to provide notice to consumers of adverse credit actions (*see* 15 U.S.C. § 1681n(a)(1)(A), (B)), and a separate, third tier for penalizing "negligent" offenders (*see* 15 U.S.C. § 1681o(a)). Under the FCRA, a person who acts "knowingly" is subject to an enhanced willfulness penalty, whereas a person who acts willfully but not knowingly is subject to a lower willfulness penalty. But in both situations, the FCRA classifies the offender as having acted willfully. *See* 15 U.S.C. § 1681n. Incorporating a subjective recklessness standard to determine willfulness would have made little sense in the context of the FCRA because it would have rendered the word "knowingly" superfluous. *See Safeco*, 551 U.S. at 59-60. That is, if all "willful" violations of the FCRA required a showing of knowledge, there would be no way to distinguish between the lower penalty and the enhanced one.

9. But the same is not true of the FBAR statute. Unlike the FCRA, the FBAR statute establishes a single-tier penalty structure for willful offenders. *See* 31 U.S.C. § 5321(a)(5). The qualifier "knowingly" does not appear in the statute to direct the IRS to the more culpable "willful" cases deserving of higher punishment. Instead, all "willful" offenders are punished with the same enhanced (and often draconian) penalty. There is therefore every reason to consider whether the word "willful" should be construed as incorporating a subjective recklessness standard in the context of an FBAR violation.

10. In keeping with the Court's disclaimer in *Safeco* that willfulness is context-dependent, there are numerous civil cases in which this Court has applied a subjective, rather than objective, standard of willfulness. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 105 (2016) (willful patent infringement); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (libel actions); *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (civil case involving prison conditions); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536-37 (1999) (civil case under 42 U.S.C. § 1981 involving punitive damages); *Smith v. Wade*, 461 U.S. 30, 37, 41 (1983) (civil case under 42 U.S.C. § 1983 involving punitive damages); *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273-76 (2013) (dischargeability of debt in bankruptcy proceeding under 11 U.S.C. § 523(4)); *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998) (dischargeability of debt in bankruptcy proceeding under

11 U.S.C. § 523(6)). Clearly, then, this Court has applied a subjective standard in numerous civil contexts.

11. This Court's application of a subjective willfulness standard in other civil cases provides additional support for applying that standard in FBAR cases. In *Halo*, for instance, this Court rejected an objective standard of recklessness in the context of willful patent infringement. Like the FBAR statute, the statute at issue in *Halo* authorizes substantial enhanced penalties for willful offenders. *See* 35 U.S.C. § 284 (authorizing treble damages). This Court adopted a subjective standard in *Halo*, noting that the appropriate focus should be on an individual's state of mind given that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Halo*, 579 U.S. at 105. Similarly, the Court has applied a subjective standard in cases involving punitive damages. *See Kolstad*, 527 U.S. 526; *Smith*, 461 U.S. 30. FBAR penalties—which are often draconian and intended to deter and punish offenders rather than compensate the government—are much closer to the punitive damages side of the line than they are to the FCRA penalties side.

12. Finally, the Third Circuit further expanded the recklessness standard by its adoption of an objective recklessness standard in "prior cases addressing civil penalties assessed by the IRS under the tax laws." App. 59 (citing *Carrigan*, 31 F.3d at 134 & *Vespe*, 868 F.2d at 1335). *Carrigan* and *Vespe* are inapposite. Both of those cases involved the question of whether a person was liable for the Trust Fund Recovery Penalty

("TFRP") for unpaid payroll taxes under 26 U.S.C. § 6672. The TFRP contains a threshold requirement that is absent from the FBAR statute: a person can only be liable under § 6672 if he or she is a "responsible person," *i.e.* a person who has a duty under the law to collect, truthfully account for, and pay federal payroll taxes. In such a situation, it may make sense to hold that person liable where further inquiry would have been required because that person acts as a fiduciary to collect and pay federal payroll taxes to the IRS. In effect, the responsible officer penalty provision creates a form of strict liability for corporate officers. This should not be the case with respect to the FBAR statute, which establishes a reporting requirement that is applicable to all persons who have a financial interest in or signature or other authority over a foreign account containing more than $10,000 at any point in a calendar year. In any event, all Circuits do not even agree with the Third Circuit's essentially strict liability view of the TFRP penalty. The Second, Fifth, Sixth, and Tenth Circuits recognize a "reasonable cause" defense whereby a responsible person under the TFRP can establish that he or she did not act willfully if he or she reasonably believed that taxes were being paid to the government as required. *See United States v. Liddle*, No. 14-CV-04761-BLF, 2017 WL 282894, at *4 (N.D. Cal. Jan. 23, 2017) (citing *Winter v. United States*, 196 F.3d 339, 345 (2d Cir. 1999); *Newsome v. United States*, 431 F.2d 742, 748 (5th Cir. 1970); *Smith v. United States*, 555 F.3d 1158, 1170 (10th Cir. 2009)); *see also Byrne v. United States*, 857 F.3d 319, 329 (6th Cir. 2017). The First, Eighth, and Ninth Circuits have

explicitly rejected such a defense. *See Harrington v. United States*, 504 F.2d 1306, 1315-16 (1st Cir. 1974); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *Phillips v. IRS*, 73 F.3d 939, 942 (9th Cir. 1996). Recognition of the scope of the TFRP and the attempts by several Circuits to ameliorate it by permitting a reasonable cause exception further highlights the inappropriateness of importing the *Carrigan/Vespe* standard to the FBAR statute.

13. Moreover, the TFRP differs from the FBAR penalty in another material respect: the TFRP is compensatory. *See* 26 U.S.C. § 6672(a) (penalty is "equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over"). Unlike the TFRP, the FBAR statute is intended to punish and deter, not compensate the government for any loss. *See supra* ¶ 5. An objective recklessness standard may make sense in the context of the TFRP, but it does not follow that Congress intended a similarly low bar of willfulness in the FBAR context. To the contrary, in amending the FBAR statute in 2004, Congress intended there to be a bright line between "non-willful" conduct and "willful" conduct deserving of higher punishment.

B. The Third Circuit's Objective Test Would Unreasonably Expand Liability.

1. The issue presented is important to millions of individuals living both in the United States and abroad. The FBAR statute applies to any U.S. "person" (including citizens, residents, corporate and other legal

entities) and any foreign "accounts" (including bank accounts, securities accounts, or other financial accounts) holding more than $10,000 in the aggregate at any point in the calendar year. *See* 31 C.F.R. § 1010.350(a), (b). It is estimated that approximately nine million U.S. citizens live abroad,[8] and that approximately forty-five million U.S. residents are foreign-born.[9] Each one of those individuals who has a financial interest in or signature or other authority over a foreign account containing more than $10,000 must file an FBAR or face civil and/or criminal penalties.

2. Under the Third Circuit's test, the IRS's boundless discretion would yield an improper result: nearly every FBAR violation could be deemed a willful one, regardless of whether an individual actually intended to circumvent (or even knew about) the filing requirement. After all, if recklessness includes situations where a high risk of harm "should have been known," it is a form of negligence standard—one under which massive penalties can be assessed for innocent, but mistaken conduct. *See* Welkowitz, 79 Alb. L. Rev. at 554 ("Ignoring a risk that 'should be known' is generally accepted as a negligence standard.").

3. It is difficult to see how anyone in Petitioner's position could avoid a willfulness finding under the Third Circuit's test. His case provides a clear example:

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[8] U.S. Dep't of State, *Consular Affairs by the Numbers* (Jan. 2020) <https://tinyurl.com/csa-by-numbers>.

[9] U.S. Census Bureau, *Table DP02* (2021 data) <https://tinyurl.com/census-dp02>.

Petitioner checked the box on his tax return indicating he had a foreign bank account and filed an FBAR—albeit for one, rather than two, accounts. The district court initially determined that he did not act willfully, but then reversed itself *based on the exact same evidence* simply because the Third Circuit expanded the standard. But erasing the line between negligence and recklessness cannot be what Congress intended when it established a two-tier civil penalty structure.

4. The Third Circuit's objective standard will be outcome determinative in a broad swath of other cases. For instance, individuals who accurately report a foreign account on their tax return but fail to learn about the separate FBAR filing requirement will have no meaningful way to defend against a willfulness penalty should the IRS choose to impose one. In essence, "the government might reasonably argue (and a court might reasonably find) that *any* failure to file an FBAR form is willful where a taxpayer filed a federal tax return that included Schedule B [of Form 1040], which directs taxpayers to the FBAR filing requirement." National Taxpayer Advocate, 2022 Purple Book at 78 (Dec. 31, 2021) <https://tinyurl.com/2022-Purple-Book>. And that has already proven to be the case. *See*, *e.g.*, *Hughes*, 2021 WL 4768683, at *15-16 (finding a willful violation where the taxpayer was "on notice" of the FBAR requirement based on her filing of Schedule B for certain tax years).

5. The civil willfulness penalty for FBAR violations can be severe, as there is no monetary cap on the amount of penalty imposed. *See* National Taxpayer

Advocate, 2022 Purple Book at 77 (Dec. 31, 2021) <https://tinyurl.com/2022-Purple-Book> (FBAR penalty "is among the harshest civil penalties the government may impose"). No one disputes Congress's intent to remove the penalty cap for willful offenders. But that only strengthens the inference that Congress did not intend such boundless sanctions to apply to everyone.

6. This Court should intervene and consider whether the Third Circuit's objective recklessness standard is appropriate in light of the text and structure of the FBAR statute. This case would be an ideal vehicle for doing so, as the issue turns on a pure question of federal law, it was outcome determinative, and there are no factual or procedural hurdles standing in the way of resolving an important question that affects the rights of millions of Americans who hold foreign accounts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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