

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ALEXANDRU BITTNER, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 21-1195  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
- - - - -

Pages: 1 through 84  
Place: Washington, D.C.  
Date: November 2, 2022

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ALEXANDRU BITTNER, )

Petitioner, )

v. ) No. 21-1195

UNITED STATES, )

Respondent. )

- - - - -

Washington, D.C.

Wednesday, November 2, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of the Petitioner.

MATTHEW GUARNIERI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-1195, Bittner versus United States.

Mr. Geysler.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice, and --

(Interruption.)

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

The Bank Secrecy Act instructs the Secretary of the Treasury to require parties to keep records, file reports, or keep records and file reports. The question here is whether the failure to file a report leads to one violation of the Act or potentially dozens, in this case, over 270 violations of federal law for each account not listed on five annual forms.

Under the Act's plain text, context, history, and purpose, the answer is clear: The Act requires parties to file reports, not report individual accounts. Any failure to file a

1 report thus gives rise to a single statutory  
2 violation.

3 (Interruption.)

4 MR. GEYSER: Any failure to file a  
5 report thus gives rise to a single statutory  
6 violation, no matter how many accounts a person  
7 has or how many mistakes a person might make on  
8 a single form. Because there is no independent  
9 duty to report each account, there is no  
10 independent violation every time an account is  
11 not reported. According --

12 (Interruption.)

13 MR. GEYSER: According to the  
14 government, Petitioner violated the Act 272  
15 times for unintentionally failing to file five  
16 annual forms. If Congress wanted to expose  
17 innocent parties to potentially dozens of  
18 violations of federal law for a single  
19 unintentional annual misstep, Congress would  
20 have said so expressly. Because the  
21 government's contrary position is wrong, this  
22 Court should reverse.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Mr. Geyser, you make  
25 -- you put quite an emphasis on the report

1 versus the account. What if the IRS simply said  
2 every account has to be on a separate report,  
3 and so, rather than having just a handful of  
4 reports, you had one per account? What would  
5 your argument be?

6 MR. GEYSER: I think our argument  
7 would be that would still be a single violation  
8 because the -- the way the Act is structured, it  
9 says that parties shall file reports as required  
10 by the Secretary. So, if the Secretary says I  
11 want a separate report for each account and you  
12 fail to do that, then the answer is -- did you  
13 follow the Secretary's instructions? The answer  
14 would be, no, you didn't. So, if you have 10  
15 accounts and you file five reports and you  
16 should have filed all 10, you violated the Act,  
17 but you violated it once because the only way to  
18 violate the Act is to -- is to fail to file the  
19 reports as required by the Secretary.

20 Now, to be very clear, in this case,  
21 the Court doesn't need to decide that here  
22 because the regulation in question only imposes  
23 a single annual reporting requirement. Parties  
24 have to file a single report. That's the way  
25 it's been for decades. That's the way the law

1 stood when Congress added the non-willful  
2 penalty in 2004. And I think it would be very  
3 unusual for the Secretary to go and change that  
4 -- that regulation after decades of practice to  
5 suddenly impose an individual report requirement  
6 for each separate account.

7 JUSTICE KAVANAUGH: Mr. Geysler, one of  
8 the contextual points that you raise and that I  
9 think has some force is that it's unusual for  
10 the government to impose draconian penalties on  
11 someone who is not willful, in other words, does  
12 not even perhaps know of the reporting  
13 obligation. And that's a powerful contextual  
14 point in your favor, I think.

15 But the government comes back and  
16 says, well, but the statute has a reasonable  
17 cause provision that, in essence, takes care of  
18 people who have reasonable cause for not knowing  
19 of the obligation or failing to file the report  
20 with the accounts listed.

21 Doesn't that reasonable cause  
22 provision take care of some of the concerns that  
23 you raise about people being penalized who  
24 didn't know about the reporting requirement or  
25 otherwise didn't know about their legal

1 obligation?

2 MR. GEYSER: Your Honor, it may take  
3 care of it to some extent but obviously not  
4 entirely because there are still non-willful  
5 violators of the Act. And the --

6 JUSTICE KAVANAUGH: True -- sorry to  
7 interrupt -- but, in that -- those instances,  
8 what I think the government will say is that in  
9 this case, the lower court says, well, it's in  
10 those instances where someone did -- was  
11 unreasonable in failing to make further inquiry  
12 to understand their legal obligations.

13 So there's a kind of gray area between  
14 willful and someone who didn't know at all and  
15 was -- reasonably didn't know at all and someone  
16 who didn't know but should have known because  
17 they should have done more to find out their  
18 legal obligations.

19 MR. GEYSER: Your Honor, I think  
20 saying it's a gray area is -- is exactly right.  
21 And the problem is these are truly draconian  
22 punishments for someone who does fit within that  
23 gray area. Petitioner here raised a reasonable  
24 cause defense. Now he lost. But the -- the  
25 penalty for losing shouldn't be increasing the



1 potential statutory maximum --

2 JUSTICE KAVANAUGH: But -- but --

3 MR. GEYSER: -- by an order of 50.

4 JUSTICE KAVANAUGH: -- maybe you have  
5 -- have a good argument that he should have  
6 prevailed on the reasonable cause, that's not  
7 the issue before us, but the point is, I think,  
8 that that is available for those people who  
9 reasonably or -- didn't know about the legal  
10 obligation.

11 MR. GEYSER: But, again, Your Honor,  
12 there are lots of ways that someone can make a  
13 mistake in submitting these forms, including,  
14 you know, in order to qualify the reasonable  
15 cause exception, you have to report the balance  
16 on the accounts.

17 And so it is possible that someone  
18 simply forgot that they had an account, so they  
19 submitted an incomplete or incorrect FBAR. And  
20 that happens often. We're talking about  
21 checking accounts, savings account, potentially  
22 investment accounts. You could have retirement  
23 accounts. You could even have safety deposit  
24 boxes.

25 It's very easy for someone to think

1 that they've complied and it turns out they  
2 haven't, they haven't submitted each account as  
3 they were required to do to qualify for the  
4 reasonable cause exception, and suddenly they're  
5 being penalized at an order of \$10,000 a clip  
6 for every single account that was accidentally  
7 not reported.

8 JUSTICE KAGAN: But, on the other  
9 hand, I mean, one might say that your version  
10 forces the -- the government to treat equally  
11 somebody who has a \$10,000 account and somebody  
12 who, like your client, has extreme wealth and  
13 many, many accounts and where he is depriving  
14 the government of much more information than,  
15 you know, the small I have a checking account  
16 for \$12,000 person does.

17 MR. GEYSER: Well, Your Honor, the --  
18 I -- I think, here, though, the relevant  
19 criteria, though, is what is the culpable  
20 conduct. And the culpable conduct under the Act  
21 is not filing a report.

22 Now, if you're doing that  
23 non-willfully, someone who accidentally doesn't  
24 file a report because they don't know that that  
25 reporting requirement even exists, whether they

1 have five accounts or 500 accounts, they are --  
2 they're engaged in the same conduct that  
3 Congress is targeting.

4 And I think increasing the punishment,  
5 especially for non-willful actors and especially  
6 those actors that aren't even aware that the  
7 FBAR requirement is a thing, you know, they  
8 don't know what they don't know.

9 Those are people who I think it would  
10 be pretty extreme to say suddenly it's a \$10,000  
11 penalty per account, and especially taking a  
12 step back and looking at the Act and what  
13 Congress was doing.

14 5314 is -- is a recordkeeping and  
15 reporting requirement. The Secretary has to  
16 come up with the regulations, and Congress  
17 framed this as a violation of the statute. So  
18 the real question is, if Congress is looking at  
19 that, what are they thinking?

20 And what they're thinking is, if you  
21 fail to do what the Secretary has required you  
22 to do, you're subject to a penalty that shall  
23 not exceed \$10,000.

24 If Congress wanted to impose a  
25 separate penalty for each individual account,

1 Congress would have said that. And if we look  
2 at other sections of 5321 --

3 JUSTICE KAGAN: Well, the government  
4 has an argument that Congress did say that, I  
5 mean, starting with 5321, which speaks over and  
6 over again with respect to individual accounts.

7 And the government's primary argument  
8 in its brief is that this shows that that's  
9 exactly what Congress was thinking of. When you  
10 have the reasonable cause provision and it  
11 speaks of specific accounts and the willful  
12 provision and it speaks of specific accounts and  
13 it's all in the structure of a statute which is  
14 speaking of a single violation and then trying  
15 to calibrate mens rea with respect to that  
16 violation, it would be very odd not to think  
17 that Congress meant for the basic provision,  
18 without reasonable cause, without willfulness,  
19 also to be speaking of individual accounts.

20 MR. GEYSER: Your Honor, I actually  
21 read it the -- exactly the opposite way.

22 JUSTICE KAGAN: I know.

23 MR. GEYSER: If I can explain why,  
24 though.

25 (Laughter.)

1           MR. GEYSER: So, because Congress was  
2 focused about account-specific issues -- now,  
3 again, these aren't single account-specific  
4 issues, it could be multiple accounts that they  
5 were focusing on -- Congress naturally would  
6 have said in defining the violation there's a  
7 separate violation for each account or each  
8 transaction not reported.

9           If -- if Your Honor would look at  
10 Section (a)(1) of the statute, you can find this  
11 on 4A of the appendix to the government's brief,  
12 the very last sentence of section -- subsection  
13 (a)(1) says specifically, for a violation of  
14 that section, a separate violation occurs for  
15 each day, and then it goes on and defines what a  
16 separate violation is.

17           If Congress really were thinking of an  
18 account itself giving rise to a separate \$10,000  
19 penalty, I think you'd see identical language  
20 here in (a)(5). You'd say as support for a  
21 violation of Section 5314 a separate violation  
22 occurs each time an account is not reported or  
23 each time a transaction is not reported.

24           Congress didn't use that language  
25 despite referencing accounts for other purposes

1 in the neighboring provision.

2 JUSTICE JACKSON: Counsel, could that  
3 possibly be because we're assuming that Congress  
4 was focused on accounts when it's possible that  
5 they were actually focused on the person?

6 So the -- the thing that I'm trying to  
7 get my mind around is the fact that in 5314 I  
8 don't even see the word "account." It -- it  
9 says -- you know, it refers to persons who make  
10 a transaction or maintain a relation.

11 So, first of all, we have no account  
12 word in this statute, and then, when I look at  
13 the history of it, it appears to me, and you  
14 might correct me if I'm wrong, that Section 5314  
15 originally directed the Secretary to require any  
16 resident or citizen who engages in any  
17 transaction or maintains any relationship to  
18 file this record.

19 And, when they amended the statute,  
20 they said -- they changed it to the language  
21 that exists here but said this is really not a  
22 material change.

23 So, if that's kind of how we're  
24 looking at it, then I think maybe we're not even  
25 being directed by the statute to care so much

1 about the accounts because what Congress was  
2 trying to do is give the Secretary information  
3 about who was engaged in these kinds of  
4 activities, and then the Secretary could go  
5 afterwards and ask them for more information.

6           There's that provision about the 25  
7 accounts or whatever, you don't even have to  
8 give the information. So, as long as the  
9 Secretary knows who is involved in this, then  
10 they have the essential nub of information that  
11 they need to do further investigation. That's  
12 how I'm looking at it.

13           Am I wrong?

14           MR. GEYSER: Yeah, I -- I -- I don't  
15 think you are, and I actually think that the --  
16 the points Your Honor has made, I think, support  
17 our theory exactly. So the original version of  
18 the Act talked about who needs to file a report.  
19 It didn't say what you have to file.

20           So Congress is not trying to say in  
21 that -- in that language -- the only language,  
22 by the way, even in the old version or the  
23 current version that even debatably references  
24 "account" is that "maintains a relation"  
25 language. That -- that's -- that's what they're

1 referring to for the account.

2 But, when Congress did that, they  
3 didn't say you need to report each account.  
4 They're simply telling the Secretary there, by  
5 the way, Secretary, you figure this out, you  
6 figure out what rules we need. This is the  
7 regulated class. This is who you're regulating.  
8 It's not what that regulated class has to do.

9 And when Congress --

10 JUSTICE ALITO: Go ahead, finish your  
11 thought.

12 MR. GEYSER: I'm sorry. When -- when  
13 Congress said it premises the violation on the  
14 statute and it's not on the regulation, so --  
15 and, again, when -- when -- when the Secretary  
16 did make these regulations, it -- it's very odd  
17 to think that this was an account-specific focus  
18 when they're activated by an aggregate account  
19 balance.

20 You could have a hundred accounts that  
21 are under -- that's under the \$10,001 threshold.  
22 You don't have to report anything. And for  
23 people who have lots of accounts, you don't have  
24 to report what those accounts are.

25 So I think it shows the Secretary also



1 understood the statute as effectively looking at  
2 money in -- in foreign bank accounts and foreign  
3 transactions and not necessarily focused  
4 specifically on each individual account as  
5 giving rise to a separate \$10,000 violation.

6 JUSTICE ALITO: May I take you back to  
7 Justice Thomas's question? He asked you whether  
8 there would be multiple violations if the  
9 Secretary went back to requiring a separate  
10 report for each account. And you said no, that  
11 wouldn't, that's not what the statute provides,  
12 and then you made a second argument about the  
13 regulations.

14 But, to take you to the first part of  
15 that argument, aren't you reading into the  
16 statute there an annual reporting requirement?  
17 The statute, 5314, says nothing about the -- how  
18 many times per year or how many years. It  
19 doesn't say anything about when -- temporally  
20 when you have to file a report.

21 So suppose the Secretary said you have  
22 to file a report every six months or every  
23 quarter. Would -- would -- would -- under your  
24 theory, would those be multiple violations?

25 MR. GEYSER: I -- I think, in that

1 case, depending on the wording of the -- of the  
2 regulation, which is key, I think there would be  
3 multiple violations precisely because you -- you  
4 asked what requirements did the Secretary  
5 impose. I have to file reports as required by  
6 the Secretary. What are those requirements?

7 So you can pull out a list, write down  
8 every requirement, and you can just go and check  
9 it off. And if you check off every box, you're  
10 fine. If you miss a box, you violate the  
11 statute. But I don't think you can violate the  
12 statute more than once.

13 The -- the question is did you do what  
14 you were instructed to do. If the Secretary  
15 says, I want this quarterly, then every quarter  
16 you do need to file a separate report. That's  
17 the focus of the Secretary.

18 JUSTICE KAVANAUGH: You could --

19 CHIEF JUSTICE ROBERTS: Counsel, if  
20 you -- am I right that under your view, if you  
21 don't file any report at all, say you have 10 --  
22 10 accounts, that's a \$10,000 fine?

23 MR. GEYSER: That -- that's correct,  
24 Your Honor.

25 CHIEF JUSTICE ROBERTS: And if you

1 file a report but list only one account, that's  
2 also a \$10,000 fine?

3 MR. GEYSER: That -- that is also a  
4 \$10,000 fine.

5 CHIEF JUSTICE ROBERTS: Well, doesn't  
6 that seem -- I would think the failure to file  
7 at all is -- is more egregious. I mean, the  
8 Secretary doesn't even know, the Commissioner,  
9 that you have accounts or that you're out there,  
10 and yet the -- the listing only one account  
11 would seem to me to be, you know, a -- mistaken  
12 under your view, but at least the Secretary is  
13 aware that you're out there and have foreign  
14 accounts.

15 Don't you think it's a problem that  
16 not filing at all and filing incomplete have the  
17 same fine?

18 MR. GEYSER: No, Your Honor, and I  
19 actually think the government might flip it  
20 around and say the problem is in the reverse.  
21 And this is why. If you fail to file the  
22 report, the most likely explanation is you  
23 didn't know you had to file a report at all.  
24 You don't even know what an FBAR is. You didn't  
25 know you need to file anything.

1           If you filed a report, it at least  
2 shows that you're aware that the report is  
3 there. And if you do fail to list multiple  
4 accounts, this is where the government tends to  
5 get aggressive and say now this is a willful  
6 violation, where you're subject to even greater  
7 penalties because you knew about the FBAR  
8 requirement and, for some reason, you didn't  
9 manage to report all your accounts.

10           Now the reason that a lot of people  
11 don't report all their accounts is this is  
12 tricky stuff. When you read the statute, again,  
13 it doesn't even say "account." It says  
14 "maintains a relation." When you -- when people  
15 use software like TurboTax -- and the -- the  
16 Center for Taxpayer Rights points this out in  
17 their amicus brief -- if you -- in TurboTax,  
18 when you're filling out the tax return and you  
19 check the box saying that you have a foreign  
20 account, it doesn't prompt you to file the FBAR  
21 form. If you are not aware of the FBAR  
22 requirement that you have to file a separate  
23 form and you go and independently hit the  
24 prompts to -- to file that report, you don't  
25 even file the report. So it shows it's very

1 common for people not to file these things, not  
2 because they're -- they're reckless or  
3 lawbreakers; they simply don't know that this is  
4 something they have to do.

5 JUSTICE BARRETT: What --

6 JUSTICE ALITO: What if they do it  
7 willfully? What -- is it your position that the  
8 willful failure to file a report by a person  
9 with multiple accounts is one violation per  
10 year?

11 MR. GEYSER: Yes, Your Honor, it's --  
12 it's the same definition of violation, I think,  
13 carries throughout the statute, both in 5321 and  
14 in 5322, by the way, which is why, in our case,  
15 had Petitioner acted willfully in a criminal  
16 sense, under the government's reading, he would  
17 be exposed to a prison sentence of 1300 years in  
18 jail, which seems pretty egregious for what is  
19 really a prophylactic paperwork error.

20 JUSTICE BARRETT: What if --

21 MR. GEYSER: Now --

22 JUSTICE BARRETT: Sorry.

23 MR. GEYSER: No. It -- it -- it's --  
24 it is a requirement that serves important  
25 functions, but this isn't a malum in se offense.

1 There's nothing inherently wrong with not filing  
2 a document listing your accounts. This is only  
3 to prevent other criminal conduct or other  
4 substantive misconduct. And it's pretty unusual  
5 to see a draconian punishment of millions of  
6 dollars of fines for not filing, accidentally in  
7 our case, and even in a willful violation doing  
8 it on purpose, you know, a single document.

9 Now I will point out that for a  
10 willful violation, given the way that the  
11 penalty is structured, it's still a single  
12 violation, but the penalty can go up based on  
13 the balances in the accounts that you didn't  
14 report.

15 JUSTICE GORSUCH: Well, that's what I  
16 wanted to explore with you and to follow up on  
17 the Chief Justice's question. I -- I just want  
18 to make sure I understand how you read -- is it  
19 3521? Right. So we have a violation for  
20 failing to file or for misreporting one account,  
21 many accounts, whatever. And if -- if we're in  
22 willful land, as I understand your position, in  
23 (C), then the government may look at the amount  
24 in the accounts and take a considerable portion  
25 of the balance of those accounts, is that right?

1                   MR. GEYSER: That -- that is right,  
2 Your Honor.

3                   JUSTICE GORSUCH: Okay. And if we're  
4 in non-willful land, then we're in (5)(A), and  
5 it's the \$10,000, and there's an opportunity,  
6 that's (a)(1), but then there's a reasonable  
7 cause exception, and this one got me a little  
8 tripped up, and I just want to make sure I  
9 understand your response because there the  
10 willful cause exception does reference the  
11 amount in accounts again. We go back to that.

12                   But the -- as I understand your  
13 position -- and the American College helped me a  
14 little bit here, I think -- is that the -- that  
15 the balance in the account might become relevant  
16 as part of an affirmative defense that the  
17 taxpayer has to present if it wishes to avoid  
18 the non-willful violation on the basis of a  
19 reasonable excuse. Is that -- have I got it  
20 about right?

21                   MR. GEYSER: That is about right.

22                   JUSTICE GORSUCH: Okay.

23                   MR. GEYSER: And so, in order to take  
24 advantage of the reasonable cause exception, a  
25 taxpayer has to report correctly the balances in

1 the accounts that they have. So, if they have  
2 10 accounts and they report nine of those  
3 accounts and they fail to report one, they  
4 cannot take advantage of --

5 JUSTICE GORSUCH: They still get --

6 MR. GEYSER: -- the reasonable cause.

7 JUSTICE GORSUCH: -- they still get  
8 zapped for the non-willful violation?

9 MR. GEYSER: Exactly.

10 JUSTICE GORSUCH: Okay. All right.

11 And, again, for the willful violation, whether  
12 it's one, zero, or 50, you go account by  
13 account, and the government can take a whole lot  
14 of it?

15 MR. GEYSER: They -- they can. Now --  
16 now, again, unless you reported those accounts.

17 JUSTICE GORSUCH: Sure.

18 MR. GEYSER: So it's --

19 JUSTICE GORSUCH: Sure. No.

20 MR. GEYSER: -- it's just the accounts  
21 and not --

22 JUSTICE GORSUCH: But it's the willful  
23 violation --

24 MR. GEYSER: Yes.

25 JUSTICE GORSUCH: -- portions? Okay.



1 JUSTICE BARRETT: And that's how you  
2 would answer because, presumably, this section  
3 applies if you file a timely report. I mean, I  
4 think your -- your reading has more force if  
5 you're thinking of someone who just didn't file  
6 a report at all, like your client, and then  
7 filed it later.

8 What about somebody who files a timely  
9 report but omits some of the account information  
10 on it? I assume that you would say that then  
11 that's evidence of a willful violation and so  
12 we're in willful land, as Justice Gorsuch calls  
13 it?

14 MR. GEYSER: Well, not -- not --  
15 you're not necessarily in willful land. It  
16 depends on the circumstances. Now the  
17 government will often say that's a willful  
18 violation because they -- they'll go and say,  
19 why were you reckless in not finding each of  
20 your accounts? You're in the best position to  
21 know that --

22 JUSTICE BARRETT: So, if I timely file  
23 -- file an FBAR and report only three of my 25  
24 accounts, 24 accounts, so I haven't triggered  
25 the -- the other more lenient reporting method,

1 so I have 24 accounts, I only report three, you  
2 say \$10,000 as long as it's non-willful?

3 MR. GEYSER: As long as it's  
4 non-willful, it's a \$10,000 violation. You have  
5 once, in a binary on/off way, failed to file  
6 reports as required by the Secretary. And even  
7 if it's willful, you have still violated that  
8 statute once. You failed to file a report  
9 that's compliant.

10 Now the penalty can go up, and in --  
11 when you're in willful land, you're facing a  
12 potential \$100,000 minimum penalty. So the  
13 question is just, will it go even higher based  
14 on the accounts that you didn't report? But,  
15 again, that's why this is a \$10,000 hit when  
16 you're looking at someone who's acting  
17 innocently. They're not doing this on purpose.  
18 Maybe they -- they didn't know the -- the  
19 requirement existed. They made a mistake.

20 JUSTICE KAVANAUGH: But doesn't --

21 MR. GEYSER: Well --

22 JUSTICE KAVANAUGH: -- doesn't -- I --  
23 I come back to Justice Gorsuch's question and my  
24 earlier question. Doesn't the reasonable cause  
25 provision take care of that? And then I had one

1 question specifically on the reasonable cause  
2 provision. I understand the first clause of it,  
3 such violation was due to reasonable cause, and  
4 then it says the amount of the transaction or  
5 the balance in the account at the time of the  
6 transaction was properly reported.

7 I didn't really understand in context  
8 what that's getting at.

9 MR. GEYSER: I -- I --

10 JUSTICE KAVANAUGH: And I didn't find  
11 a lot of help in the briefs. So I want both  
12 sides to tell me what that's talking about.

13 MR. GEYSER: I think the best reading  
14 of this language is they're saying that if you  
15 have correctly reported the balances in the  
16 accounts --

17 JUSTICE KAVANAUGH: Where?

18 MR. GEYSER: On --

19 JUSTICE KAVANAUGH: And when?

20 MR. GEYSER: On your annual FBAR. Now  
21 I think that the most common scenario, and it's  
22 -- actually, it's hard for me to think of  
23 ordinary cases where this would otherwise  
24 apply -- is where you fail to file an FBAR and  
25 then you file a corrected FBAR that then

1 eventually gets it right, but then it's  
2 untimely, or you don't file anything and you  
3 file a late FBAR that correctly lists your  
4 accounts.

5 JUSTICE KAVANAUGH: Let me just ask my  
6 concern. If you fail to file at all, are you  
7 eligible for the reasonable cause provision?

8 MR. GEYSER: If -- if -- if you never  
9 file, then, no, you're not because you haven't  
10 reported, properly reported, the balances in the  
11 accounts. So it's only when you have actually  
12 gotten around to filing something, and, again, I  
13 think it normally will apply for a correct  
14 submission that is untimely, so -- but, again --

15 JUSTICE KAVANAUGH: If you haven't  
16 filed originally, you say because you didn't  
17 know, you file later and you file correctly  
18 later in terms of the amounts and accounts,  
19 you're eligible then for the reasonable cause  
20 provision?

21 MR. GEYSER: You -- you are if, again,  
22 you can -- you can convince the IRS that you  
23 have acted reasonably in not filing on time.

24 JUSTICE KAVANAUGH: Right. And -- and  
25 you would say it's reasonable -- if I didn't

1 know about it and, you know, I'm a immigrant to  
2 the country, I didn't know about this  
3 requirement, I guess that's one class of people  
4 who often are caught up in this, then you get  
5 the reasonable cause --

6 MR. GEYSER: You do --

7 JUSTICE KAVANAUGH: -- you would say?

8 JUSTICE JACKSON: Maybe. Maybe. I  
9 mean, if --

10 JUSTICE KAVANAUGH: Yeah. Well,  
11 that's the question.

12 JUSTICE JACKSON: Right. Isn't -- and  
13 isn't that the problem, that the safety valve  
14 that you're pointing to in this case to get the  
15 person out of the obligation is in -- still in  
16 the control of the government.

17 MR. GEYSER: It's --

18 JUSTICE JACKSON: Right?

19 MR. GEYSER: -- it's in control of the  
20 IRS, who often says, you know, maybe  
21 unsurprisingly, I don't think this was  
22 reasonable cause.

23 JUSTICE JACKSON: Exactly.

24 MR. GEYSER: So --

25 JUSTICE KAGAN: Well, on the other

1 hand --

2 (Laughter.)

3 MR. GEYSER: Yeah.

4 JUSTICE KAGAN: -- I mean, willfulness  
5 is an awfully hard standard in contexts like  
6 this for the government to meet, and we know  
7 that in -- in -- in countless contexts.

8 Now we're dealing here with a  
9 statute -- I mean, I sort of suggested what --  
10 that I think 5321 is very clear in its  
11 account-specific nature. I think 5314 is also  
12 pretty clear in its account-specific nature.  
13 And you're coming in and you're making an  
14 equitable argument, and the equitable argument  
15 has a kind of force. But I think the questions  
16 here are: Is that force mitigated when one  
17 realizes that there is a reasonable cause  
18 exception? And that, on the other hand of this  
19 equitable argument, is that there is a real  
20 difference between a person with not much  
21 wealth, not knowing that he should be filing  
22 something about his checking account, and a  
23 person who has hundreds of millions of dollars  
24 in many, many accounts, is constantly making  
25 transactions, is constantly opening and closing

1       them, maybe doing it to evade taxes, maybe doing  
2       it to finance terrorism. And, you know, in that  
3       case, the equities go against you, and that  
4       suggests, well, let's just look at the statute,  
5       and the statute, as I said, is very  
6       account-specific.

7                   MR. GEYSER: Well, Your Honor, first,  
8       I want to be clear. Our primary argument is not  
9       equitable; it's textual. We just read the  
10      statute in a very different way. And I would  
11      like to try to convince you of that textual  
12      reading because, again, there is nothing in the  
13      statute that says you have to report each  
14      account. It says you have to file reports as  
15      required by the Secretary. If the Secretary  
16      doesn't promulgate a regulation, you don't have  
17      to do anything at all. The only obligation  
18      imposed on anyone that's regulated under this  
19      provision is to do whatever the Secretary has  
20      told you to do.

21                   JUSTICE KAGAN: I don't know how that  
22      helps you because, obviously, you're saying that  
23      there is an obligation on the account holder  
24      anyway, so whether the obligation has to do with  
25      a particular account or not, you run into that

1 same problem.

2 MR. GEYSER: Oh, I -- I don't think  
3 so, Your Honor, because the problem you run into  
4 is you haven't filed the proper report. That's  
5 one violation. The government's trying to say  
6 there is an independent --

7 CHIEF JUSTICE ROBERTS: You can  
8 finish.

9 MR. GEYSER: Thank you.  
10 That there's an independent  
11 stand-alone obligation to report each individual  
12 account grounded in the statute itself, because,  
13 remember, 5321 is specifically limited to  
14 statutory violations. It's not a violation of  
15 the regulation. And when Congress wanted to  
16 extend this to not doing what the regulation  
17 says, they said so expressly. They do that in  
18 (a)(2) and (a)(3) of 5321.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas?

22 JUSTICE THOMAS: Mr. Geyser, I am  
23 still not understanding how, if you conflate the  
24 obligation to file a report with the account,  
25 that it's one account, one report, how that



1 doesn't change your argument, because if you say  
2 you have to do what the Secretary says to do,  
3 the Secretary said file a report, and it's one  
4 account per report, and now you violated that by  
5 not filing the report on that specific account.

6           And what I hear you arguing now is  
7 that all of the accounts are on several reports  
8 and simply not filing the report is a problem.  
9 I don't know why, if you file one report per  
10 account, each failure is not a violation.

11           MR. GEYSER: Well, Your Honor, I  
12 think, first, just to be very clear, the -- the  
13 regulation we have requires a single report that  
14 lists all your accounts, so the --

15           JUSTICE THOMAS: No, this was -- I  
16 understand that, but I'm saying -- what I'm  
17 asking you, the Secretary tomorrow morning can  
18 change the regulation and say one report per  
19 account.

20           MR. GEYSER: And I think, if the  
21 Secretary tomorrow morning departed from decades  
22 of settled practice of requiring an annual  
23 report where all the accounts are listed  
24 specifically to try to multiply the statutory  
25 violations, I'd be very curious how an APA

1 challenge would come out to that change.

2 But, to answer your question directly,  
3 I -- the reason we think that it is still a  
4 single violation is Congress did not write  
5 account-specific rules directly in the statute.  
6 They basically delegated this problem to the  
7 Secretary. They said you figure out what  
8 reporting requirements are -- are there, you  
9 figure out what people are required to do.

10 And then they turned around and said  
11 to the regulated parties in 5321, did you comply  
12 with whatever the Secretary required? So, if  
13 the Secretary says, here's a piece of paper,  
14 list all your accounts, if you list seven of 10,  
15 that's a violation.

16 If they said here's a stack of paper,  
17 I want you to write down each account on a  
18 different piece of paper, and you turn in seven  
19 pieces instead of 10 pieces, you have again not  
20 followed the Secretary's instructions. But it  
21 really is a question sort of at a higher level  
22 of generality based on the way the statute is  
23 structured.

24 But, again, you can disagree with  
25 every single thing I've just said and still

1 reverse because, in this case, the regulation is  
2 a single annual report and all you need to do as  
3 a regulated party is to file reports as required  
4 by the Secretary. It does not say to report  
5 each account.

6 CHIEF JUSTICE ROBERTS: Justice Alito?  
7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: You know, the  
9 problem I'm having is that you seem to be  
10 equating report with a form. And my problem is  
11 that as I read everything in the statute, the  
12 report, you say it's not as to an account,  
13 and -- and Justice Jackson says not to an  
14 account either.

15 But the whole structure says every  
16 time you make a transaction or maintain a  
17 relationship for any person with a foreign  
18 financial agency, you have to tell the  
19 government about that. That's what the word  
20 "report" means.

21 Whether you do it on one form or 10  
22 forms is irrelevant to me. I think the essence  
23 as set forth in the plain language of the  
24 statute is, if you have a relationship, an  
25 account, tell me about it. That's what the

1 government -- I thought that was the whole  
2 purpose of this Act, was that wealthy people  
3 were squirreling away millions of dollars in  
4 foreign accounts all over the world and the  
5 government wanted to know where these accounts  
6 were. That's the whole purpose of the statute.

7 All of the transactions that are being  
8 set are in the singular, in the case of a -- of  
9 a violation involving a failure to report the  
10 existence of an account. I'm taking out things  
11 that are irrelevant.

12 The amount of the penalty is the  
13 balance in that account. So, to me, where am I  
14 missing your argument?

15 MR. GEYSER: So I -- I --

16 JUSTICE SOTOMAYOR: Yours seem to be  
17 equating report with a form. I'm equating  
18 report with what the statute talks about, the  
19 transaction.

20 MR. GEYSER: Well --

21 JUSTICE SOTOMAYOR: The account.

22 MR. GEYSER: -- a few -- a few points,  
23 Your Honor. First, what -- what the statute  
24 actually says, the only thing that -- that is  
25 imposed on the regulated party is to file

1 reports.

2 Now file, I think, there is a very  
3 important verb. That -- that is -- that is a  
4 formal submission, you're taking a report and  
5 you are filing it.

6 Now the only reference to accounts is  
7 in that triggering conditional language, and,  
8 again, it -- it does not say that you need to  
9 report each account. That's not the statutory  
10 language.

11 The statute defines when the Secretary  
12 -- and, again, this is directed ultimately to  
13 the Secretary -- Secretary, you figure out what  
14 reporting requirements are necessary. And then  
15 the regulated party has to file reports as the  
16 Secretary requires.

17 The Secretary could say, I'm not going  
18 to have reporting requirements at all. I'm just  
19 going to have recordkeeping requirements. It's  
20 entirely up to the Secretary how to frame this.

21 But the violation is of the statute,  
22 and the only statutory duty is to file reports.  
23 And I think this is especially clear going back  
24 to the original version of the Act, which --  
25 which is framed in terms of who -- who needs to

1 file reports. It's identifying the class that  
2 the Secretary's supposed to regulate. That who  
3 clause in the original version is the only  
4 reference to specific accounts or specific  
5 transactions. And, again, the targeted conduct  
6 is filing reports.

7 Now, as for the -- the part about  
8 Congress trying to prevent people from -- from  
9 doing bad things with foreign accounts and doing  
10 money laundering and tax evasion, Congress  
11 originally was focused on the willful violator,  
12 which is why for decades under the Act there was  
13 no penalty whatsoever for a non-willful  
14 violation.

15 So it'd -- it'd be pretty  
16 extraordinary in 2004 if Congress went after  
17 decades of no penalty to suddenly millions and  
18 millions of dollars for -- for failing to file,  
19 again, non-willfully a single report that  
20 happened to list multiple accounts. So I -- I  
21 -- I hope I'm answering Your Honor's question.

22 JUSTICE SOTOMAYOR: I'm not sure, but  
23 that's okay.

24 MR. GEYSER: All right.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Justice Kagan?  
2 Justice Gorsuch?

3 JUSTICE GORSUCH: Two things that  
4 haven't come up but I just want your -- an  
5 opportunity to -- to react to. One was that --  
6 that on the form, as I understand it, if an  
7 individual has 25 or more accounts, they don't  
8 have to disclose anything about the accounts.  
9 They just tick -- tick a box saying I have 25 or  
10 more.

11 How does that influence your argument?

12 MR. GEYSER: I -- I think it  
13 influences it positively because it suggests,  
14 first, the Secretary really isn't concerned  
15 about seeing every individual account because  
16 you would think that someone who has even more  
17 accounts would be the person who you're most  
18 concerned about doing something that might be  
19 otherwise nefarious.

20 And I think the other way that it  
21 really does help us is it's pretty extraordinary  
22 to say, I filed -- let's say you file that  
23 report and it's accurate. You list -- you check  
24 the box correctly. You say, I have 30 accounts,  
25 but you file it a day late.

1 Under the government's view, you've  
2 just committed 30 separate violations of federal  
3 law by filing a single form one day late because  
4 you didn't report those 30 accounts in a timely  
5 fashion.

6 I think that is an extraordinary  
7 reading of the statute, especially when it has  
8 nothing at all that says there is a specific  
9 requirement to report each account.

10 JUSTICE GORSUCH: Then, secondly,  
11 there was some discussion in the briefs about  
12 the government's guidance documents in this  
13 area, which seemed to favor your position.

14 The government isn't asking for  
15 Chevron deference for its interpretations of the  
16 statute and argues that you shouldn't be allowed  
17 to use them to estop the government either.

18 What do we make of all of that?

19 MR. GEYSER: Well, I -- I think there  
20 are a couple things you can make of it. The  
21 first is that when the government itself is  
22 reading the statute, even if they're doing it as  
23 they suggest kind of in a casual way, they come  
24 to our interpretation of the statute. They've  
25 said repeatedly over time that the failure to



1 file an FBAR is subject to a maximum \$10,000  
2 penalty.

3 Now the government's correct that they  
4 didn't go on and say, oh, by the way, if you  
5 have multiple accounts, it's the same rule. But  
6 the fact that they're reading the statute when  
7 they're simply giving notice to the regulated  
8 stakeholders the same way that we're reading the  
9 statute, I think that's a point in our favor on  
10 the plain text.

11 I think it's certainly a suggestion  
12 that it's a reasonable construction that would  
13 be entitled to the rule of lenity if the Court  
14 thinks that our -- our readings are actually in  
15 equipoise, although I -- I'd like to say that we  
16 have a better textual reading than they do.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Two -- two  
21 questions. First, the hypothetical asked by  
22 Justice Thomas is a problem for you, as you're  
23 aware, and in your reply brief, page 7, Footnote  
24 3, you say we don't necessarily -- you don't  
25 necessarily have to answer that question.

1                   Can you win this case if you lose  
2 Justice Thomas's hypothetical, or is that it?

3                   MR. GEYSER: We -- we absolutely win  
4 this case.

5                   JUSTICE KAVANAUGH: How?

6                   MR. GEYSER: Well, because Justice --

7                   JUSTICE KAVANAUGH: Even if under the  
8 new reg, hypothetical reg -- go ahead.

9                   MR. GEYSER: So -- well, I -- I just  
10 want to make sure I -- I -- I'm answering the  
11 question correctly. The -- under the current  
12 regulation, the regulation that actually exists,  
13 we can win the case even if you disagree with my  
14 analysis of the hypothetical future regulation  
15 that doesn't exist, and that's because the  
16 current regulatory scheme requires a single  
17 report where you list all the accounts. So  
18 Justice Thomas's hypothetical is dealing with  
19 the scenario where you actually have to file  
20 multiple reports.

21                   Now I admit that that's a slightly  
22 harder case for us because, in the statute --

23                   JUSTICE KAVANAUGH: Analytically, how  
24 would we draw the line between that hypothetical  
25 case and this case? Just write the sentence for

1 us.

2 MR. GEYSER: Well, I -- I think the  
3 easiest way to write it is that hypothetical  
4 case would only apply because there's a  
5 requirement to file multiple reports.

6 JUSTICE KAVANAUGH: Got it.

7 MR. GEYSER: So each time you fail to  
8 file a report, you violate the statute. Here,  
9 you file a single report. That's it. So --

10 JUSTICE KAVANAUGH: Got that. So the  
11 second question is you talked about the original  
12 Act, but, of course, the broad context of this  
13 is September 11, the post-September 11 efforts  
14 to ferret out terrorist financing, and the  
15 government's and Congress -- the PATRIOT Act,  
16 and then this Act in terms of going after  
17 terrorist financing. Not surprisingly,  
18 therefore, the statute is -- has substantial  
19 penalties and is very broad and puts the duty,  
20 in essence, on people to know their legal  
21 obligations.

22 You want to respond at all to that  
23 context? It's not a surprise it changes after  
24 September 11, 2001.

25 MR. GEYSER: I agree, Your Honor, it's

1 not a surprise, but I would say that a \$10,000  
2 penalty for most people for a paperwork error  
3 that they've done unwittingly, they haven't done  
4 -- they're not trying to hide anything, it's not  
5 accompanied by any substantive misconduct, a  
6 \$10,000 hit for the average person who's unaware  
7 of the FBAR requirement is a pretty substantial  
8 hit. And, again, this is -- the change there is  
9 from zero, no penalty whatsoever for a  
10 non-willful violation.

11 JUSTICE KAVANAUGH: Right. So unaware  
12 but should have known, I think, on the  
13 reasonable cause. But I've explored that, so  
14 I'll let you go. Thank you.

15 MR. GEYSER: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Barrett?

18 JUSTICE BARRETT: Yes. So we're  
19 talking about the reporting requirement in the  
20 case, but I just want to focus for a moment on  
21 5314's requirement. It says to keep records,  
22 file reports, or keep records and file reports.  
23 So, on recordkeeping, is it your position that  
24 the recordkeeping requirement is  
25 account-specific?

1                   MR. GEYSER: No, Your Honor. I think  
2 we would say it's the same thing. You either  
3 comply with the -- you've either kept the  
4 records the Secretary has required you to keep  
5 or you haven't. And so I --

6                   JUSTICE BARRETT: So, if I have 20  
7 accounts and I only keep records on one, I've  
8 only violated it once?

9                   MR. GEYSER: Well, you -- you've only  
10 violated it once for -- for the recordkeeping  
11 and, again, in a non-willful way. So, if we're  
12 talking about a non-willful violation, you  
13 didn't keep records because you didn't know you  
14 should have kept records.

15                   Now, if Congress is concerned about  
16 that, they can use language in (5) -- in (a)(5)  
17 that mimics the language in (a)(1) and say, for  
18 -- for a violation of 5314, there is a separate  
19 violation for each record not kept. That's the  
20 kind of language I think you would expect to  
21 see, especially when Congress is using other  
22 account-specific language. They're thinking  
23 about it in some cases as I'm going to look at  
24 an individual account and how it complies with  
25 whether there's a heightened penalty or not.

1                   But yet, when it comes to the basic  
2 violation, I'm looking at a statute that -- that  
3 tells the Secretary: You figure this out. You  
4 impose whatever requirements you think are  
5 appropriate in the manner and to the extent that  
6 you see fit. And I'm --

7                   CHIEF JUSTICE ROBERTS: Justice  
8 Jackson?

9                   Justice Alito?

10                  JUSTICE ALITO: In answer, following  
11 up on Justice Barrett's question, is there a  
12 temporal requirement for the reporting, failure  
13 to -- to -- I'm sorry, not reporting --  
14 recordkeeping?

15                  MR. GEYSER: There is a five-year  
16 requirement under the regulation, and so I think  
17 that for that five-year period you could have a  
18 single violation. I think the alternative under  
19 the government's view would, I guess, be an  
20 infinite number of violations for every minute  
21 or every second that you haven't kept a record,  
22 which I -- I think is obviously an unworkable  
23 standard.

24                  CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Mr. Guarnieri.

2 ORAL ARGUMENT OF MATTHEW GUARNIERI

3 ON BEHALF OF THE RESPONDENT

4 MR. GUARNIERI: Mr. Chief Justice, and  
5 may it please the Court:

6 The Bank Secrecy Act authorizes the  
7 Secretary of the Treasury to assess a separate  
8 civil penalty for each foreign financial account  
9 that a U.S. person fails to report. Petitioner  
10 violated the Act 272 times, not just five times,  
11 when he failed to report dozens of foreign  
12 financial accounts in each of five years. That  
13 understanding of the statutory scheme flows  
14 straightforwardly from the text.

15 As Justice Kagan illustrated this  
16 morning, Section 5321(a)(5) sets up a one-to-one  
17 correspondence in which each undisclosed account  
18 is a separate violation. We know that because  
19 the rules in Section 5321(a)(5) for determining  
20 the maximum penalty for a given violation  
21 involving an undisclosed account turn on the  
22 balance in that particular account.

23 Petitioner's reliance on the  
24 Dictionary Act is therefore misplaced. The  
25 background rules in that Act don't apply if the

1 context of a particular statute indicates  
2 otherwise. Here, the text of Sixtion -- of  
3 Section 5321(a)(5) demonstrates that Congress  
4 used the singular precisely and with care to  
5 establish a one-to-one relationship, the  
6 relationship I just described: one account, one  
7 violation, one potential civil penalty.

8 Reading the statute's references to a  
9 single account to mean one or more accounts  
10 would defeat Congress's deliberate design. And  
11 there is a good reason that Congress set the  
12 penalty scheme up this way. Each time a U.S.  
13 person maintains an account with a foreign bank,  
14 that relationship is a matter of distinct  
15 concern to the United States. That is why the  
16 text of Section 5314 directs the Secretary to  
17 adopt recordkeeping and recording -- reporting  
18 requirements that capture account-specific  
19 information, such as the account number.

20 When a U.S. person fails to report  
21 multiple qualifying accounts, the person  
22 violates Section 5314 multiple times. And that  
23 remains true even if the Secretary permits the  
24 required reports about each account to be  
25 consolidated on a single annual form.



1 I welcome the Court's questions.

2 JUSTICE THOMAS: One of the things  
3 that seemed problematic to me is you cite 5314,  
4 but it doesn't mention accounts.

5 MR. GUARNIERI: Well, Justice Thomas,  
6 Section 5314 is phrased in terms of filing  
7 reports and keeping records about a relation  
8 between a U.S. person and a foreign financial  
9 institution. The relation the statute is  
10 discussing is an account relationship, and so --

11 JUSTICE THOMAS: But it doesn't say  
12 that, though.

13 MR. GUARNIERI: It's true that it does  
14 not use the precise word "relation" -- "account"  
15 -- excuse me -- but we have always understood it  
16 that way. The implementing regulations  
17 demonstrate that the -- the relationships that  
18 we are concerned here are banking relationships.  
19 It's your customer or depository relationship --

20 JUSTICE JACKSON: Can I ask you --

21 MR. GUARNIERI: -- with a foreign bank  
22 --

23 JUSTICE JACKSON: -- why -- why -- why  
24 isn't that relationship established by the  
25 existence of a single account? In other words,

1 you -- you know if a person has one account that  
2 they have a relationship for foreign purposes,  
3 and there's nothing in the statute that makes  
4 clear that Congress intended this statutory  
5 provision to be the mechanism by which the  
6 United States would get all of the information  
7 about the full extent of that person's  
8 relationship with any bank.

9           And let me just while I have a moment  
10 tell you what really concerns me about your  
11 position. You said it's a matter of distinct  
12 concern that the United States has with respect  
13 to any particular transaction. But it's not  
14 illegal, as far as I can understand, for people  
15 to have foreign bank accounts. It's not an  
16 independent legal problem. And they can  
17 structure those accounts in any way they want.  
18 So they can put their million dollars in a  
19 single account, they can have 10 accounts with,  
20 right, however much, you know, \$100,000 apiece  
21 or whatever, but you're extracting different  
22 penalties from them for this purpose based on  
23 this totally lawful behavior. It seems to me to  
24 make more sense that Congress was talking about  
25 wanting to just know who was doing this kind of

1 thing for the purpose of this statute.

2 MR. GUARNIERI: Well, Justice Jackson,  
3 I think the statutory text in 5314 directly  
4 answers your question about whether we care just  
5 about the fact that you have a relationship with  
6 a financial institution, even if that  
7 encompasses multiple accounts, or whether we  
8 care about each account individually. And it  
9 answers that in the enumerated list of  
10 information that is at the end of 5314(a), which  
11 is reproduced at page 2a of the gray brief.

12 And if you look at that enumerated  
13 list of information, this is a list that dates  
14 to the original Bank Secrecy Act of 1970. It is  
15 a list that Congress said, look, the reports and  
16 records that we are going to require -- we are  
17 directing the Secretary to -- to require should  
18 address this information, and the information  
19 there --

20 JUSTICE JACKSON: Yeah, but this  
21 information doesn't say specifically accounts.  
22 In fact, three of the four things are exactly  
23 what I'm talking about, the identity and address  
24 of the participants, the capacity in which the  
25 participant is acting, the identity of the

1 parties in interest -- we just want to know who  
2 you're involved with -- and a "description of  
3 the transaction."

4 MR. GUARNIERI: Well, Justice Jackson,  
5 respectfully, I disagree, particularly  
6 subparagraph (2), the legal capacity in which a  
7 participant is acting. The -- the capacity in  
8 which you hold these accounts can vary. You may  
9 be the beneficial owner of one account at a  
10 financial institution. You may be -- you may  
11 have signatory authority over a second account  
12 --

13 JUSTICE JACKSON: But that doesn't  
14 compel the list that you say is required. You  
15 -- why couldn't you just have a paragraph that  
16 says that? I have a number of accounts, and  
17 here is the capacity in which I hold them. And  
18 the description of them is they're all bank  
19 accounts. It doesn't say give me an enumerated  
20 list of each account or transaction.

21 MR. GUARNIERI: Well, I -- I think --  
22 I think the text here is specific enough to  
23 convey that Congress was concerned about each  
24 one of these accounts.

25 I would also point out, Justice

1 Jackson, the question before this Court is not  
2 about whether the Secretary should have  
3 implemented this in a different manner to  
4 require reporting your relationship with a given  
5 foreign financial institution as distinct from  
6 the various accounts you have with that  
7 financial institution.

8 Certainly, this list illustrates that  
9 the per-form approach that Petitioner has  
10 championed can't be correct --

11 JUSTICE ALITO: Suppose someone --

12 MR. GUARNIERI: -- because the  
13 identity -- excuse me.

14 JUSTICE ALITO: -- suppose someone  
15 reports multiple accounts, lists all that  
16 person's accounts but messes up the address as  
17 to each account. How many violations?

18 MR. GUARNIERI: Well, the -- the  
19 violation here is the failure to report the  
20 account as required by the Secretary in the  
21 regulations in the form. So, if you misstate  
22 the address of the bank for each one of 10  
23 accounts, you've committed 10 violations.

24 Now, of course, the reasonable cause  
25 exception would probably operate in those

1 circumstances to prevent the Secretary from  
2 actually assessing a penalty, but we would -- we  
3 would think about that as 10 accounts if you've  
4 made 10 errors would -- excuse me, 10 violations  
5 if you made 10 errors for 10 accounts.

6 JUSTICE ALITO: What is the  
7 government's position as to whether reasonable  
8 cause includes ignorance of the law?

9 MR. GUARNIERI: No. And we wouldn't  
10 accept that in this circumstance or -- or -- or  
11 -- or ordinarily in terms of, you know, parties  
12 aren't excused from satisfying their legal  
13 obligations merely by claiming that they're  
14 ignorant of them.

15 JUSTICE ALITO: Well, we are told --  
16 maybe you'll dispute this fact -- that many,  
17 many people who have foreign bank accounts of  
18 over -- over \$10,000 are unaware of this  
19 regulation, unaware of this law and these  
20 regulations and, even if they're aware of it,  
21 they're pretty hard to parse.

22 So all those people are committing  
23 violations, and they -- if they come in and they  
24 say I didn't know anything about this, doesn't  
25 matter. That's not reasonable cause.

1 MR. GUARNIERI: That could be an  
2 important part of the reasonable cause analysis.  
3 It's not sufficient standing alone.

4 The standard for reasonable cause that  
5 the agency applies and that the lower courts  
6 have adopted is that you have reasonable cause  
7 for your failure to report an account if you  
8 fail to report it despite exercising ordinary  
9 business care and prudence.

10 Now, if you can really demonstrate  
11 that you were wholly unaware of these  
12 obligations and also that if you had been acting  
13 prudently you wouldn't have discovered these  
14 obligations, I think that's a powerful case for  
15 reasonable cause.

16 CHIEF JUSTICE ROBERTS: Counsel --

17 MR. GUARNIERI: Now Petitioner in this  
18 case tried to make that case, and his view was  
19 roundly rejected by the lower courts.

20 CHIEF JUSTICE ROBERTS: Counsel, does  
21 the United States agree, as the Fifth Circuit  
22 put it, that there is a longstanding canon of  
23 construction that if the words of a tax statute  
24 are doubtful, the doubt must be resolved against  
25 the government and in favor of the taxpayer?

1 MR. GUARNIERI: No, Mister --

2 CHIEF JUSTICE ROBERTS: Now I know  
3 your position is that you dispute that this is a  
4 tax statute, but --

5 MR. GUARNIERI: Mr. Chief Justice,  
6 I -- I don't think that there is a legitimate  
7 sort of pro tax avoidance canon. This Court  
8 hasn't applied a canon like that in -- in  
9 decades.

10 CHIEF JUSTICE ROBERTS: Your -- your  
11 friends --

12 MR. GUARNIERI: Again, of course, our  
13 first line --

14 CHIEF JUSTICE ROBERTS: Oh.

15 MR. GUARNIERI: -- our first line  
16 response here is that, you know, this is not a  
17 tax case anyway. These penalties are authorized  
18 by the Bank Secrecy Act. So, even if there were  
19 such a canon, it wouldn't apply to this case.

20 JUSTICE KAVANAUGH: In response to  
21 Justice Alito's question, you were initially, I  
22 thought, a little blasé about the ignorance of  
23 the law is no defense if you truly don't know a  
24 legal requirement given the numerous regulatory  
25 requirements imposed on someone, and it's true,



1 I believe, that a significant percentage of  
2 people who have these accounts have no idea  
3 they're supposed to do a reporting. That's a --  
4 that's a little bit problematic.

5 Now you then said the reasonable cause  
6 provision can take care of that. And I think  
7 you said, if someone truly did not know about  
8 their legal obligation and had exercised prudent  
9 care, I suppose, in trying to be aware of their  
10 legal obligations, you -- you said that's a  
11 powerful case.

12 That should be a definitive case,  
13 shouldn't it?

14 MR. GUARNIERI: It -- it is -- it is a  
15 very powerful case certainly. I -- I -- you  
16 know, it's -- it's a --

17 JUSTICE KAVANAUGH: You added "a  
18 very," that's good.

19 (Laughter.)

20 MR. GUARNIERI: Well, Justice  
21 Kavanaugh, I -- I don't -- it's hard to give  
22 categorical answers because this is a  
23 fact-specific test, so, you know, we would want  
24 to sort of take the facts as given in a -- in a  
25 particular case.

1                   The other thing that, you know, you  
2                   just talk about --

3                   JUSTICE KAVANAUGH: Can you just help  
4                   me on the second paragraph of the reasonable  
5                   cause provision? Because I had trouble.

6                   MR. GUARNIERI: Sure.

7                   JUSTICE KAVANAUGH: I spent a lot of  
8                   time trying to parse that and had trouble  
9                   finding an answer to that in the briefs, what --  
10                  what that's getting at.

11                  MR. GUARNIERI: Sure. And, candidly  
12                  --

13                  JUSTICE KAVANAUGH: Top of -- top of  
14                  6a there.

15                  MR. GUARNIERI: Yeah. Candidly,  
16                  Justice Kavanaugh, I tripped over that language  
17                  too when I first read the statute.

18                  JUSTICE KAVANAUGH: Good.

19                  MR. GUARNIERI: So we understand that  
20                  to mean that the balance in the account has to  
21                  have been properly reported at the time the  
22                  reasonable cause exception is being invoked.

23                  And so, ordinarily, what would happen  
24                  in these cases --

25                  JUSTICE KAVANAUGH: Got it.

1           MR. GUARNIERI: -- is that you would  
2 file a delinquent FBAR that accurately reports  
3 the balance in a particular account and that  
4 would satisfy that.

5           I think it was written that way  
6 because there's some suggestion in the history  
7 that, you know, at the time, legislators  
8 contemplated that the balance in these accounts  
9 might be reported in other ways as well, for  
10 example, through the income tax system.

11           JUSTICE GORSUCH: Why --

12           MR. GUARNIERI: That's not true,  
13 but --

14           JUSTICE GORSUCH: -- why isn't that a  
15 strike against your interpretation? That when  
16 we talk about penalties for failing to file the  
17 report, in -- in 5321, (5)(a) talks about  
18 non-willful violations and it's any violation,  
19 period, no account mentioned, \$10,000.

20           And then willful violations down in  
21 (c), which is what you -- your brief really  
22 heavily focuses on, does talk heavily about  
23 accounts and says that it's \$100,000 or 50  
24 percent of the account, whichever is greater.  
25 And it goes on and on and on about accounts.

1                   That isn't mentioned in the  
2 non-willful violation. That language doesn't  
3 appear. The only place it appears was the  
4 reasonable cause exception, which is, as -- as  
5 was pointed out to me in -- in -- in the  
6 American College brief, an affirmative defense.  
7 It's not what the government has to prove to  
8 establish a violation.

9                   So the one place where you need it you  
10 don't seem to have it. What do we do about  
11 that?

12                   MR. GUARNIERI: Justice Gorsuch, I  
13 think, certainly, the language in subparagraph  
14 (c), the willful violations, I think --

15                   JUSTICE GORSUCH: Yeah. But we --  
16 we -- we're not in will -- we're not in willful  
17 land, okay?

18                   MR. GUARNIERI: Sure. I --

19                   JUSTICE GORSUCH: So we put that  
20 aside.

21                   MR. GUARNIERI: Well --

22                   JUSTICE GORSUCH: And one could easily  
23 understand --

24                   MR. GUARNIERI: -- I am -- I --

25                   JUSTICE GORSUCH: Let me just finish.

1 MR. GUARNIERI: Sure.

2 JUSTICE GORSUCH: One could easily  
3 understand that Congress would say with respect  
4 to willful violations, we're really going to  
5 whack you, right, and we're going to take 50  
6 percent of every account where there's a willful  
7 violation, and -- and that was the law as  
8 originally drafted.

9 But, with respect to non-willful  
10 violations, that language just doesn't appear.

11 MR. GUARNIERI: Well, Justice Gorsuch,  
12 two points. First, all of these subparagraphs  
13 are talking about the exact same violation.  
14 Subparagraph (a) is --

15 JUSTICE GORSUCH: Right. But if we --

16 MR. GUARNIERI: -- the only provision  
17 in this statute --

18 JUSTICE GORSUCH: -- accept the view  
19 that 5314, the violation is the failure to file  
20 the report, that's the violation. Spot me that,  
21 okay? Now you may disagree with that, but spot  
22 me that for purposes of understanding 5321's  
23 penalty provision.

24 Shouldn't -- shouldn't the absence of  
25 the word "account" in the very provision where

1 you need it count for something?

2 MR. GUARNIERI: I -- I -- I don't  
3 think that's right, Justice Gorsuch, because all  
4 of these are talking about the exact same  
5 violation. So there is only one part of  
6 5321(a)(5) that authorizes the Secretary to  
7 assess a civil penalty for a violation. That's  
8 subparagraph (a).

9 Everything that comes after  
10 subparagraph (a) is a set of rules for  
11 determining the penalty that may apply for that  
12 particular violation. And we know that the  
13 rules in subparagraphs (c) and (d) for willful  
14 violations are explicitly account-specific  
15 because they turn on the balance in the account.

16 JUSTICE GORSUCH: Everything below  
17 the --

18 MR. GUARNIERI: The other thing,  
19 Justice --

20 JUSTICE GORSUCH: Sorry. Go ahead.

21 MR. GUARNIERI: Well, Justice Gorsuch,  
22 the other thing I -- I think might be relevant  
23 here to -- to help get -- convey our -- our  
24 reading of the statute, if you look at  
25 subparagraph (c), it also says that --

1 JUSTICE GORSUCH: I'm -- I'm -- I'm --  
2 put -- put (c) aside. That's willful.

3 MR. GUARNIERI: Well, I -- I --

4 JUSTICE GORSUCH: And I'm trying  
5 to ask you --

6 MR. GUARNIERI: Sure. I'm trying to  
7 make a --

8 JUSTICE GORSUCH: -- about the  
9 non-willful.

10 MR. GUARNIERI: -- I'm trying to make  
11 a point about how the different paragraphs  
12 relate to one another.

13 JUSTICE GORSUCH: All right.

14 MR. GUARNIERI: Subparagraph (c) says  
15 that you can't get the reasonable cause  
16 exception if it's a willful violation. And so  
17 what that means is that the reasonable cause  
18 exception only applies in cases of non-willful  
19 violations.

20 JUSTICE GORSUCH: Right.

21 MR. GUARNIERI: And the reasonable  
22 cause exception is itself account-specific. It  
23 uses language that refers to balances in the  
24 account.

25 JUSTICE GORSUCH: Yes. Again, I think

1 that what was pointed out to me -- maybe you  
2 have a response to this, I'd like to hear it if  
3 you do -- is that's a defense that the taxpayer  
4 then has to come forward with. That's not what  
5 the government has to prove to establish a  
6 non-willful violation.

7 MR. GUARNIERI: Well, I -- I agree  
8 with that, but we're making a point about the  
9 way the text is written, Justice Gorsuch.

10 JUSTICE GORSUCH: Okay. All right.

11 MR. GUARNIERI: And in certain --

12 JUSTICE GORSUCH: If I can -- if I can  
13 shift then. I -- I think I understand your  
14 point.

15 What do we do with the government's  
16 guidance documents, which I would -- if -- if it  
17 favored the government, I would fully expect the  
18 government to have an argument about Chevron  
19 deference before us, or maybe it wouldn't these  
20 days, I don't know. But we would at least be  
21 asked to give it Skidmore deference.

22 And -- and, here, you -- you're --  
23 you're -- they're like garlic to a vampire for  
24 the government. You don't want to -- you don't  
25 want to touch them. What do we do with that?



1                   MR. GUARNIERI: Well, I -- there's  
2 a -- there's a logical explanation for that,  
3 Justice Gorsuch, and that is that, you know, the  
4 penalty -- the -- the specific question this  
5 Court is being asked to resolve in this case is  
6 what is the meaning of the phrase "violation  
7 of Section 5314" --

8                   JUSTICE GORSUCH: But if the  
9 government's telling taxpayers --

10                  MR. GUARNIERI: -- as that phrase is  
11 used in Section 5321(a)(5). The Secretary has  
12 not promulgated a regulation interpreting --

13                  JUSTICE GORSUCH: It's -- it's going  
14 to lead -- no -- nobody promulgates regulations  
15 anymore. It's too troublesome. They issue  
16 guidance documents.

17                  And so the government has issued  
18 legions of guidance documents. We've got them  
19 all over the briefs, and -- and I just want to  
20 hear on the merits what's your response to them.

21                  MR. GUARNIERI: Sure. The -- the --  
22 the critical guidance document here is the  
23 Internal Revenue Manual, which is the guidance  
24 document that IRS examiners apply in assessing  
25 penalties in these cases. It is publicly

1 available to taxpayers. If you look at the  
2 Internal Revenue Manual, it expresses the same  
3 per-account view that we are defending in this  
4 case.

5 JUSTICE GORSUCH: What about --

6 MR. GUARNIERI: The documents that  
7 Petitioner --

8 JUSTICE GORSUCH: -- what about all  
9 the other materials?

10 MR. GUARNIERI: -- and his amici are  
11 pointing to are some other places in which, in  
12 isolated statements, the IRS has said things  
13 like, if you fail to file the FBAR, the penalty  
14 can be up to \$10,000.

15 JUSTICE GORSUCH: Up to 10,000.

16 MR. GUARNIERI: There is -- there is  
17 no -- the Petitioner has not identified a single  
18 instance in which the government has ever  
19 endorsed his view that you -- if you fail to  
20 report multiple accounts, you can only be liable  
21 for a single penalty.

22 And I'd just -- I'd also like to talk  
23 a little bit about exactly what Petitioner's  
24 view is. Petitioner asks this Court --

25 JUSTICE ALITO: Well, before you move

1 off that, the -- the March 2011 version of  
2 Letter 3709 says, "For the failure to file TDF  
3 90-22.1 due on or after June 30, 20" -- "2005,  
4 the penalty cannot exceed \$10,000."

5 Do you think that's unclear?

6 MR. GUARNIERI: I think it was not  
7 precisely phrased. I think it would have been  
8 more helpful if the agency had gone on to say  
9 that, actually, if you fail to report more than  
10 one account, the penalty per unreported account  
11 is \$10,000. That has been the agency's  
12 institutional position for many years. This is  
13 not a case in which there is any legitimate  
14 suggestion the agency has shifted positions over  
15 time. This is at best a kind of attack on the  
16 agency's messaging to the public, which maybe  
17 could have been better, but I don't think that  
18 that should decide the question here.

19 JUSTICE ALITO: Well, your -- your  
20 messaging to the public has certainly changed  
21 over time, hasn't it?

22 MR. GUARNIERI: Well, the -- the -- as  
23 I said, the key document here is the Internal  
24 Revenue Manual, which has not changed over time.  
25 Since 2008, that has articulated the -- the same

1 view that -- that we are defending in this  
2 Court.

3 JUSTICE ALITO: What about criminal  
4 violations? Do you have the same reading?

5 MR. GUARNIERI: Yes, we do. We think  
6 that each -- if you satisfy the other elements  
7 of the criminal offense in Section 5322(a), that  
8 each failure -- or each willful failure to  
9 disclose to the United States one of your  
10 foreign bank accounts could be the basis for a  
11 separate criminal prosecution.

12 I know, you know, Petitioner has made  
13 a big deal about that, including this morning  
14 repeating this fantastical figure about 1300  
15 years in prison. I think the Court should be  
16 assured that there are other significant  
17 constraints on the scope of the criminal  
18 prohibition in the Bank Secrecy Act, including,  
19 in particular, this Court's decision in Ratzlaf  
20 against the United States, which interpreted  
21 that provision and construed it to require  
22 willfulness in the heightened criminal law  
23 sense. We can only bring a Bank Secrecy Act  
24 criminal prosecution if we can prove beyond a  
25 reasonable doubt that the defendant knew that

1 when he was acting what he was doing was  
2 unlawful.

3 So those are rare cases, and that's  
4 certainly not this case. We're not making an  
5 allegation in this case that Petitioner had  
6 satisfied that -- that heightened willfulness.  
7 This is a -- a non-willful case, and I don't  
8 think the criminal statute really has anything  
9 to do with the question before this Court.

10 CHIEF JUSTICE ROBERTS: Well, you're  
11 not making the allegation here, but your brief  
12 recites facts that suggest that you think you  
13 could.

14 MR. GUARNIERI: That's right, Mr.  
15 Chief Justice. I think this case came pretty  
16 close to the line, and I -- I think that's why  
17 the agency chose to go up to the maximum  
18 available civil penalty in this case. I mean,  
19 Petitioner earned more than \$70 million in his  
20 time in Romania. He filed multiple Form 1040s  
21 that -- multiple individual income tax returns  
22 during the period that he was living in Romania.

23 If you had read carefully the  
24 instructions to the Form 1040 during the years  
25 in which he filed those forms, there are

1 instructions in -- in the Form 1040 process  
2 about your foreign account reporting  
3 requirements. There is a question on Schedule B  
4 of 1040 that asks, do you have foreign bank  
5 accounts? And I'm paraphrasing here, but in  
6 substance, it says, if you have foreign bank  
7 accounts, please see Treasury Department Form  
8 90-22.1 for your FBAR filing obligations.

9           And I think that's actually another  
10 piece of -- of the puzzle here in terms of the  
11 equities of the case. We are not trying to trip  
12 people up in the Form 1040 individual income tax  
13 return filing process. There is -- there are  
14 instructions there about the FBAR. We are  
15 trying to bring it to people's attention so that  
16 they are aware of these filing requirements and  
17 they can comply with them.

18           Petitioner was -- has tried to make  
19 the case that his violations here were -- were  
20 inadvertent. But there was substantial evidence  
21 to the contrary. The district court rejected  
22 his reasonable cause -- his assertion of the  
23 reasonable cause defense. The Fifth Circuit  
24 affirmed that on de novo review. And -- and he  
25 didn't seek this Court's review on that issue.

1 JUSTICE KAVANAUGH: That all makes  
2 sense as to this case. The amicus briefs make a  
3 point that there are a number of different  
4 categories of people who are not going to fit  
5 that -- that description of this case,  
6 immigrants in the United States and Americans  
7 abroad who don't have this kind of knowledge.  
8 And the statistics were, at least in the amicus  
9 briefs, that there's a sizable percentage of  
10 people who still don't know about this reporting  
11 obligation.

12 Do you just want to respond to that  
13 and try to explain who -- who the populations  
14 are who are not reporting and the knowledge that  
15 they might have about the requirement?

16 MR. GUARNIERI: Sure. We don't have  
17 precise figures or data about the current rates  
18 of compliance with -- with the foreign account  
19 reporting obligation, so I can't tell the Court  
20 what percentage of Americans living abroad  
21 actually have a reportable foreign account,  
22 meaning they have accounts outside the United  
23 States that have an aggregate balance that  
24 exceeds \$10,000. I know that's actually a  
25 significant amount of money for many Americans.

1 So you're talking about the small slice of  
2 people who have that much money in their  
3 aggregate accounts and those accounts are  
4 abroad.

5           You know, certainly, I don't think  
6 adopting Petitioner's view in this case will  
7 solve that problem. I mean, the whole Congress  
8 authorized the Secretary to adopt -- excuse  
9 me -- to assess penalties for non-willful  
10 violations of the Act in 2004 after amassing  
11 abundant evidence that, in the absence of those  
12 penalties, the rates of compliance with these  
13 foreign account reporting obligations were  
14 relatively anemic. And that was a problem, and  
15 that was a problem that Congress solved by  
16 authorizing the penalties to assess -- excuse me  
17 -- authorizing the Secretary to assess penalties  
18 for non-willful violations.

19           In that same 2004 enactment, Congress  
20 also created the reasonable cause exception,  
21 which I think, again, speaks to an effort to  
22 sort of make sure that the truly blameless have  
23 an out here. And Congress also -- also  
24 increased the penalties for willful violations  
25 in that 2004 law.



1 JUSTICE ALITO: Well, I didn't  
2 understand --

3 MR. GUARNIERI: So I think the whole  
4 history demonstrates that this is really a  
5 serious matter.

6 JUSTICE ALITO: Could you return once  
7 again to your understanding of the relationship  
8 between the reasonable cause requirement and  
9 ignorance of the law? Your first answer, when I  
10 asked that, was ignorance of the law is not  
11 reasonable cause. But then you -- you seemed to  
12 say, if someone isn't aware of -- of the -- of  
13 the reporting requirement, that makes a powerful  
14 case, a very powerful case, for reasonable  
15 cause. So what is the relationship exactly?

16 MR. GUARNIERI: Sure. The standard  
17 here is that you -- whether you were acting with  
18 ordinary business care and prudence. If you --  
19 if you -- if you were, in fact, aware of your  
20 FBAR reporting obligations, you're out. There  
21 is no way you could qualify for the reasonable  
22 cause. So ignorance -- it's sort of a -- you  
23 know, you're -- you're only talking about people  
24 who have a colorable claim to not knowing about  
25 their filing obligations.

1           And then, with respect to that group  
2 of individuals, the question is, well, should  
3 they have known about their filing obligations?  
4 And the conclusion of the lower courts here was  
5 that Petitioner should have known about his  
6 filing obligations.

7           JUSTICE ALITO: No, I understand -- I  
8 understand the -- the facts of this case, but  
9 I'm -- I'm thinking of other cases.

10           MR. GUARNIERI: Sure. Well -- and  
11 it's hard to generalize because whether you  
12 should have known about your filing obligations  
13 is going to depend on lots of factors that might  
14 vary from one American to the next living  
15 abroad. You know, were you a person of business  
16 sophistication? Did you have the means to  
17 retain professional tax and accounting advisors?  
18 Were you filing the Form 1040, in which, if you  
19 had read the instructions, you would have been  
20 informed about your foreign bank account  
21 reporting obligations? Is this your first  
22 violation? You know, is it really credible to  
23 say that you had 50 or 60 foreign bank accounts  
24 with millions of dollars in them, you had  
25 numbered accounts in Switzerland and

1 Liechtenstein, you were paying professional  
2 Romanian tax lawyers and accountants, but you  
3 made no inquiry into your obligations in the  
4 United States? That -- that's not plausible in  
5 this case, but, you know, the reasonable cause  
6 exception remains available to those individuals  
7 who would like to seek to invoke it.

8           The other part of that, I -- you know,  
9 I understood from some of the Court's questions  
10 earlier there was some skepticism that the  
11 reasonable cause exception is -- is a -- sort of  
12 a sufficient answer here because it's applied by  
13 the agency in the first instance.

14           But judicial review is also available.  
15 If a -- if the agency determines that you lacked  
16 reasonable cause and you disagree with that, you  
17 can obtain judicial review of the agency's  
18 determination. And -- and this case again  
19 illustrates that. The Petitioner sought that.

20           JUSTICE KAVANAUGH: Am I right that  
21 you can get judicial review before you're forced  
22 to pay, unlike in some tax situations?

23           MR. GUARNIERI: That's absolutely  
24 correct, Justice Kavanaugh. There is no  
25 requirement in this scheme that you fully pay

1 the penalties before you get review in federal  
2 district court. And that's an important  
3 difference between these penalties and tax  
4 penalties.

5 JUSTICE KAGAN: Can I --

6 JUSTICE JACKSON: But, presumably, you  
7 would have to have a lawyer to do so. So there  
8 is some cost to seeking to -- to get out of  
9 this, right?

10 MR. GUARNIERI: That -- that's  
11 absolutely true, Justice Jackson, although we're  
12 talking about the small portion of people who  
13 have foreign bank accounts abroad with a balance  
14 greater than \$10,000, and the question  
15 presented here really only impacts those  
16 individuals who have more than one foreign bank  
17 account. So, you know, I --

18 JUSTICE JACKSON: But, realistically,  
19 that's anybody who's living overseas? I mean,  
20 you -- this applies to people who are living  
21 overseas and have more than \$10,000 in a bank  
22 account, a foreign bank -- it's a foreign bank  
23 account because they're living there, but --

24 MR. GUARNIERI: Yes, I agree, with --  
25 with the slight amendment it's -- it's U.S.

1 citizens. It's a --

2 JUSTICE JACKSON: Right. So any U.S.  
3 citizen --

4 MR. GUARNIERI: -- it's an obligation  
5 incumbent on U.S. citizens. That's right.

6 JUSTICE JACKSON: -- any U.S. citizen  
7 living abroad who has more than \$10,000 in a  
8 bank account, wherever they're living, is  
9 subject to this?

10 MR. GUARNIERI: That's correct.

11 JUSTICE GORSUCH: Counsel, I -- I'd  
12 like to just understand your -- how -- how the  
13 -- the form interacts with -- with your  
14 understanding of the penalties.

15 As I understand it, on the form, if --  
16 if you have 25 or more bank accounts, and we're  
17 talking about in aggregate \$10,000, not one bank  
18 account, in aggregate. But, if -- if -- if it's  
19 over 25, you -- you tick a box and you're done.

20 Is that right?

21 MR. GUARNIERI: No, Justice Gorsuch.  
22 Under the 25 account rule, you have -- there  
23 is a -- a box that you would check saying that  
24 you satisfy the 25 account rule. You also have  
25 to list the precise number of accounts that you

1 have.

2 JUSTICE GORSUCH: Okay. The number,  
3 okay.

4 MR. GUARNIERI: Under the current  
5 regulation --

6 JUSTICE GORSUCH: So -- so -- so long  
7 as I tick the box and say I have 25, it would  
8 seem pretty hard to accumulate non-willful  
9 violation -- non-willful violations, whereas, if  
10 it's under 25 and you have the wrong address of  
11 the bank 12 times, that's a \$120,000 fine.

12 Is there some incongruity there that  
13 people with more bank accounts are actually less  
14 susceptible to penalty than those with fewer?

15 MR. GUARNIERI: Well, I -- I take the  
16 point, Justice Gorsuch, you -- you certainly  
17 have to provide less information in the first  
18 instance if you qualify for one of these 25  
19 account rules.

20 You are under a continuing obligation  
21 to provide that information to the Secretary,  
22 and in that sense, if you misstate the  
23 information when the Secretary requests it, you  
24 are in the same position as the individual who  
25 is required to provide that information up front

1 on the form.

2 As we've explained in our brief, the  
3 Financial Crimes Enforcement Net -- Network has  
4 published a Notice of Proposed Rulemaking to  
5 eliminate the 25 account rule. It is a vestige  
6 of an era before word processing and electronic  
7 filing in which, you know, the -- the agency's  
8 judgment at the time was that individuals who  
9 had a very large number of accounts, the  
10 administrative burden of reporting all of those  
11 accounts in the first instance rather than just  
12 providing information when requested exceeded  
13 the value to the department of receiving that  
14 information on the form itself.

15 I think we might strike a different  
16 balance now, but, again, that -- there's an  
17 ongoing rulemaking addressing that.

18 And I certainly don't think the 25  
19 account rule helps Petitioner in this case  
20 because it doesn't undermine our position that  
21 each one of these accounts is a matter of  
22 distinct concern, and if you fail to report any  
23 one of them, you have committed a distinct  
24 violation.

25 JUSTICE SOTOMAYOR: There is some

1 basic information besides just checking the box,  
2 isn't there?

3 MR. GUARNIERI: That's absolutely  
4 right, Justice Sotomayor. You are required to  
5 fill out the other portion of the form  
6 identifying information about the filer of the  
7 form.

8 Also, to -- to be precise, there  
9 are -- there are two 25 account rules in the  
10 current regulations, and they require you to  
11 account -- to -- to report the -- the  
12 relationship that you have to the accounts, so  
13 do you have a financial interest in those  
14 accounts or do you have signatory or other  
15 authority over the accounts but not a financial  
16 interest. That information is provided even if  
17 you invoke one of these rules.

18 If you have signatory authority over  
19 one of these accounts, you are required to  
20 identify the beneficial owner of the account  
21 even if you qualify for one of these 25 account  
22 rules.

23 So -- so there is certainly additional  
24 information.

25 JUSTICE SOTOMAYOR: I guess the



1 question is, you don't have to identify the  
2 account number?

3 MR. GUARNIERI: You don't have to  
4 provide some of the granular information that  
5 would have otherwise been required if you don't  
6 qualify, like the account number and the address  
7 and things like that.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Anything further here?

11 Okay. Anything further?

12 Okay. Thank you.

13 MR. GUARNIERI: Thanks, Chief Justice.

14 CHIEF JUSTICE ROBERTS: Mr. Geysler,  
15 rebuttal?

16 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

17 ON BEHALF OF THE PETITIONER

18 MR. GEYSER: Thank you, Mr. Chief  
19 Justice. A -- a few short points.

20 First, for the reasonable cause  
21 exception, I think, when my friend says that  
22 ignorance of the law is no excuse, what this is  
23 showing is exactly what Justice Jackson pointed  
24 out. This is inviting regulated parties to have  
25 to spend money on lawyers to litigate first at

1 the agency level, hope they win, and then, if  
2 they lose, litigate in court to try to  
3 establish, as my friend suggested, is a  
4 fact-specific defense.

5 That is quite the burden on the  
6 average person, especially with the cudgel of  
7 per-account penalties hanging over their head if  
8 they lose. Anyone with 10 or 20 accounts could  
9 be facing massive fines if it turns out that  
10 they can't prevail on the reasonable cause  
11 defense, and yet, just so you know how extreme  
12 this can be, if you look to pages 104 and 106 of  
13 the Joint Appendix, you'll see that some of  
14 these \$10,000 penalties in this case were  
15 premised on accounts that had \$24 in them for  
16 the year, \$31, \$25.

17 This is -- this is very unlikely what  
18 Congress would have actually been thinking, is  
19 this isn't an appropriate calibrated punishment  
20 for a non-willful violation.

21 Now, for the avoidance canons, I think  
22 it's interesting that my friend concedes that  
23 5322 defines "violation" the same way as 5321.  
24 And I know he said that it -- it is, in fact, a  
25 fantastical number to suggest that Congress

1 thought that there would be a 1,300-year prison  
2 sentence for a -- a -- a reporting error.

3           And I know my friend says, well,  
4 willfulness is a very high bar, and it certainly  
5 is, but the point -- that misses the point. Was  
6 Congress in looking at this saying, if you  
7 willfully violate a reporting requirement with  
8 no other criminal misconduct, a prison sentence  
9 in the -- in the thousands is an appropriate  
10 punishment?

11           I think that casts doubt that what  
12 Congress was thinking a violation is really a  
13 per-account measure as opposed to a per-report  
14 measure. And I think that follows specifically  
15 when the language of the actual statute talks  
16 about filing reports.

17           It does not say reporting accounts.  
18 It uses the word "file." You have to submit the  
19 document. And under the current regulations,  
20 which is all that really matters for this case,  
21 you file a single annual report listing all of  
22 your accounts.

23           Just to correct a minor factual point  
24 which I know isn't really critical to the  
25 statutory question, but just to be clear for

1 this case, Petitioner did file some U.S. tax  
2 returns while he was living abroad. He did so  
3 because he had invested in a relative's  
4 restaurant in California. The relative prepared  
5 the tax returns for him. And the reason he  
6 thought those were required is because the money  
7 was earned in the United States.

8 He misunderstood United States tax  
9 law, which I think a lot of people do. And when  
10 you're dealing with -- my friend says too it's  
11 very unusual to have foreign accounts with  
12 \$10,000 or more. Again, not for people living  
13 abroad. Any U.S. resident or U.S. citizen  
14 living abroad is subject to these requirements.

15 For those U.S. citizens, this isn't a  
16 foreign bank account, this is your bank account  
17 or it could be your investment account or your  
18 retirement account or your safety deposit box or  
19 your checking account. And you need to find an  
20 accountant in wherever you're living that's  
21 knowledgeable in U.S. Bank Secrecy Act law that  
22 knows you need to -- need to file an FBAR.

23 To even know to ask that question is  
24 pretty extraordinary when accountants in the  
25 U.S., as the Center For Taxpayer Rights pointed

1 out, were -- in the United States accounts were  
2 unaware of these requirements dating back about  
3 a decade ago.

4 So, again, the question really in this  
5 case is what was Congress thinking when they  
6 imposed a specific requirement to file reports  
7 or keep records. And they did not say do this  
8 by account. As Justice Gorsuch pointed out,  
9 there is no language in (a)(5) defining the  
10 violation that is phrased in account-specific  
11 language even though Congress took care to  
12 specify what a separate violation is in other  
13 sections of 5321.

14 I think, when they didn't do that with  
15 (a)(5) and when you look at the extraordinary  
16 consequences of adopting the government's  
17 approach, where you're effectively giving the  
18 IRS discretion to decide between a range of zero  
19 and many multiples of the statutory ceiling, I  
20 think it becomes pretty clear what Congress had  
21 in mind.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 11:15 a.m., the case  
25 was submitted.)

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