Government Seeks Reversal of Non-Willful FBAR Penalty Decision

JUN. 15, 2022

United States v. Zvi Kaufman

UNITED STATES OF AMERICA,
Plaintiff-Appellant
v.
ZVI KAUFMAN,
Defendant-Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

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GLOSSARY

Acronym	Definition
FBAR	Report of Foreign Bank and Financial Accounts (informally, Foreign Bank Account Report)
IRS	Internal Revenue Service

STATEMENT OF JURISDICTION

On September 12, 2017, the United States filed suit in the United States District Court for the Southern District of Florida to reduce to judgment civil penalties assessed by the Internal Revenue Service ("IRS") against appellee Zvi Kaufman for his non-willful failure to timely report his interests in foreign bank accounts for the years 2008-2010.[1] (JA.12.) On May 7, 2018, the case was transferred to the United States District Court for the District of Connecticut ("District Court"). (*See* Doc. 14.) The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1345, and 1355.

On January 11, 2021, the District Court granted in part and denied in part the Government's motion for summary judgment and granted Kaufman's motion for summary judgment. (JA.22.) The court entered a final judgment on January 4, 2022 (JA.43), and an amended final judgment on January 18, 2022 (JA.44). The Government timely filed a notice of appeal on March 4, 2022. (JA.45.) *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Under 31 U.S.C. § 5314 and its implementing regulations, a U.S. person who maintains an account with a foreign financial agency is required to report specified information about the account each year on a reporting form prescribed by the Secretary of the Treasury. The prescribed form instructs a filer to report each of the filer's foreign accounts on a single form.

The Secretary may impose a civil money penalty "on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. § 5321(a)(5)(A). The amount of any such penalty imposed with respect to a non-willful violation may not exceed $10,000. *Id*. § 5321(a)(5)(B)(i); *see id*. § 5321(a)(5)(C).

Appellee Kaufman failed to report twelve or more foreign accounts in multiple years. After determining that Kaufman's failures were non-willful, the Secretary imposed a civil penalty of $10,000 or less with respect to each unreported account each year.

The issue on appeal is whether the District Court erred in holding that 31 U.S.C. § 5321(a)(5)(A) does not authorize the Secretary of the Treasury to impose a penalty of up to $10,000 for each foreign account that Kaufman failed to report, for each year in which he failed to report that account, but rather limits the Secretary to imposing a penalty of up to $10,000 for each annual form that Kaufman failed to file to report his numerous foreign accounts.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Bank Secrecy Act and the foreign financial account reporting requirements

In 1970, after "extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability," *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 26 (1974), Congress enacted what is commonly known as the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970). The Act was designed to reduce financial crime, tax evasion, and other violations of U.S. law by requiring the creation of records and the making of reports that Congress believed would have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." *Shultz*, 416 U.S. at 26 (citations omitted); *see* 31 U.S.C. § 5311(1)(A).

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

The Secretary's regulations require each "United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country" to "report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists." 31 C.F.R. § 1010.350(a).[2] The regulations further require each such U.S. person to "provide such information as shall be specified in a reporting form prescribed under [Section] 5314 to be filed by such persons." *Id.* During the period relevant to this case (2008-2010), the prescribed form was Treasury Department Form 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"), which was filed with the IRS. *Id.*; *see* 31 C.F.R. § 1010.306(c) (2011).[3]

The reporting requirement in the Secretary's regulations applies only if the aggregate balance of the U.S. person's foreign accounts "exceed[ed] $10,000 . . . during the previous calendar year." 31 C.F.R. § 1010.306(c). The required reports must be filed by a specific date each year — previously June 30, and now April 15. *See* Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006(b)(11), 129 Stat. 443, 458-459 (mandating April 15 deadline); 31 C.F.R. § 1010.306(c) (regulatory text reflecting prior June 30 deadline).

The FBAR prescribed for use during the years at issue here required basic identifying information about the filer, such as the person's name, address, and date of birth. (*See* Docs. 64-5, 64-6, 64-7); *accord* TD F 90-22.1, Report of Foreign Bank and Financial Accounts (rev. Jan. 2012), https://go.usa.gov/xuG9X (last visited June 13, 2022). The FBAR also required information about each of the filer's foreign financial accounts, such as the name of the foreign financial institution at which the account was held, the account number, and the maximum value of the account during the reporting period. (*See* Docs. 64-5, 64-6, 64-7.) The form's first page contained space to report one account, with additional accounts to be reported as separate entries on the following pages (which could be duplicated as necessary to report all accounts). (*Id.*)

The Bank Secrecy Act directs the Secretary to consider "the need to avoid burdening unreasonably" U.S. persons who maintain foreign financial accounts for legitimate reasons. 31 U.S.C. § 5314(a). To that end, the Secretary's regulations set forth a "special rule for persons with a financial interest in" or signatory or other authority over " 25 or more" foreign financial accounts. 31 C.F.R. § 1010.350(a). Under that special rule, the filer "need only provide the number of financial accounts and certain other basic information" on the reporting form, 31 C.F.R. §§ 1010.350(g)(1) and (2), without also providing the more granular information about each account that would otherwise be required. The regulations specify, however, that the filer is "required to provide detailed information concerning each account when so requested by the Secretary or his delegate." 31 C.F.R. §§ 1010.350(g)(1) and (2); *see id.* § 1010.420 (recordkeeping requirements).

2. Penalties for violations of the reporting requirements

Congress authorized the Secretary to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. § 5321(a)(5)(A). In general, the "amount of any civil penalty" imposed under § 5321(a)(5)(A) "shall not exceed $10,000." 31 U.S.C. § 5321(a)(5)(B)(i). The statute also provides a reasonable-cause exception, under which the Secretary may not impose a penalty "with respect to any violation if . . . such violation was due to reasonable cause" and "the amount of the transaction or the balance in the account . . . was properly reported." 31 U.S.C. § 5321(a)(5)(B)(ii).

If the violation is willful, the maximum penalty increases from $10,000 to the greater of either $100,000 or 50% of "the amount determined under subparagraph (D)." 31 U.S.C. § 5321(a)(5)(C)(i). As relevant here, "in the case of a violation involving a failure to report the existence of an account," the amount determined under subparagraph (D) is "the balance in the account at the time of the violation." 31 U.S.C. § 5321(a)(5)(D)(ii). Moreover, the reasonable-cause exception does not apply to any willful violation. 31 U.S.C. § 5321(a)(5)(C)(ii).[4]

B. Kaufman's failure to report his foreign accounts

Appellee Kaufman, a former managing director of a pharmaceutical company, is a naturalized U.S. citizen who has lived in Israel since 1979. (JA.23; *see* Doc. 64-4 at 1-2; Doc. 65-1 at 1, 6.) In 2008, 2009, and 2010, Kaufman had a financial interest in thirteen, twelve, and seventeen financial accounts, respectively, with institutions located in Israel. (JA.23; *see* Doc. 65-1 at 2-4.) The aggregate high balance of the accounts (converted to U.S. dollars) ranged from approximately $2.5 million in 2008 to approximately $4.1 million in 2010. (JA.23; *see* Doc. 64-1 at 2-4; Doc. 65-1 at 2-4.) Kaufman did not timely report those accounts as required by 31 U.S.C. § 5314 and its implementing regulations. (JA.23.) In fact, he told his U.S. tax return preparers for the years at issue that he did not have any foreign accounts and that he used a brokerage account in the U.S. to pay his living expenses.[5] (JA.28; *see* Doc. 66-9 at 4-5.)

During a conversation with his U.S. tax return preparers in September 2011, Kaufman finally revealed the existence of his foreign accounts. (JA.30; *see* Doc. 66-7 at 13-14.) In May 2012, Kaufman filed delinquent FBARs for 2008-2010. (JA.23; *see* Doc. 64-1 at 4; Doc. 65-1 at 6.) Those FBARs reported thirteen, twelve, and seventeen foreign accounts for the years 2008, 2009, and 2010 respectively. (*See* Docs. 64-5, 64-6, and 64-7.)

In September 2015, pursuant to § 5321(a)(5)(A), the IRS assessed penalties against Kaufman for non-willful violations of § 5314 with respect to 2008, 2009, and 2010, treating each unreported account in each year as a separate violation. (JA.23; *see* Doc. 64-1 at 4-5; Doc. 64-8.) Based on mitigation guidelines set forth in the Internal Revenue Manual, the IRS assessed aggregate penalties of $42,249 for 2008, $42,287 for 2009, and $59,708 for 2010. (JA.23; Doc. 64-1 at 5; Doc. 64-8.) The IRS demanded payment shortly thereafter. (JA.23; *see* Doc. 64-9.)

C. Proceedings in the District Court

On September 12, 2017, the Government filed suit to recover the assessed amounts, *see* 31 U.S.C. § 5321(b)(2)(A), and associated late-payment penalties and interest. (JA.12.) In his answer, Kaufman admitted that he had a financial interest and signatory authority over multiple foreign accounts in 2008, 2009, and 2010, but asserted (*inter alia*), that (1) he qualified for the reasonable cause exception in § 5321(a)(5)(B)(ii) as to all penalty amounts, and (2) the maximum penalty for non-willful violations of § 5314 is $10,000 for each unfiled FBAR, regardless of the number of undisclosed accounts at issue. (JA.17.)

The Government moved for summary judgment in December 2019, and Kaufman cross-moved for partial summary judgment "to the extent that the Government seeks penalties greater than . . . $30,000 — $10,000 per untimely filed FBAR form." (Doc. 65-2 at 1.) Kaufman also opposed the Government's motion on the ground that the applicability of the reasonable cause exception in § 5321(a)(5)(B)(ii)(I) "is a jury question." (*Id.*)

1. Kaufman's arguments

Kaufman argued that his "single 'violation' each year was his failure to timely file the FBAR form when due." (Doc. 65-2 at 17.) He acknowledged that the only court to have decided the issue at the time had sided with the Government, but he maintained that that case — which was then on appeal — had been wrongly decided. (*Id.* at 17-18.) *See United States v. Boyd*, No. CV 18-803(JEMX), 2019 WL 1976472 (C.D. Cal. Apr. 23, 2019) ("*Boyd I*"), *rev'd*, 991 F.3d 1077 (9th Cir. 2021) ("*Boyd II*"). Noting that "Section 5314 itself requires the filing of reports," Kaufman asserted that "the plain language of [§§ 5321(a)(5) and 5314] shows that the $10,000 penalty limitation applies per report rather than per account." (*Id.* at 19.)

Kaufman then argued that "important canons of statutory construction also lead to this conclusion." (Doc. 65-2 at 19.) He primarily relied on what is sometimes referred to as the "*Russello* presumption": "'Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.'" (*Id*. (quoting *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019)).) *See Russello v. United States*, 464 U.S. 16, 23 (1983). He noted that § 5321(a)(5)(D)(ii), which pertains to willful violations of § 5314, refers to "a violation involving a failure to report the existence of an account," whereas § 5321(a)(5)(B)(i), which pertains to non-willful violations of § 5314, "omits any reference to accounts at all." (Doc. 65-2 at 19.) That discrepancy, Kaufman reasoned, "require[s] the inference that . . . the non-willful . . . penalty amount does not turn on the number of accounts a taxpayer may have." (*Id*. at 19-20.)

Kaufman also invoked the "absurdity" canon and the rule of lenity. Regarding the former, he noted that "'[a] statute should be interpreted in a way that avoids absurd results.'" (Doc. 65-2 at 20 (quoting *SEC v. Rosenthal*, 650 F.3d 156, 162 (2d Cir. 2011) (alteration in original)).) And in his view, "[i]t is . . . absurd to interpret Section 5321(a)(5)(B)(i) to peg the non-willful FBAR penalty to the number of accounts a person just so happens to have." (Doc. 65-2 at 20.) As for the rule of lenity, he asserted that "[i]f the Court determines that Section 5321(a)(5)(B)(i) is anything but clear, the rule of lenity requires that the Court construe it against the Government and in favor of . . . Kaufman." (Doc. 65-2 at 20.) Relatedly, he cited *Bradley v. United States*, 817 F.2d 1400, 1402-03 (9th Cir. 1987), for the proposition that "'tax provision[s] which impose[ ] a penalty [are] to be construed strictly; a penalty cannot be assessed unless the words of the provision plainly impose it.'" (*Id*. at 20-21 (alterations in original).)

Finally, Kaufman asserted that Treasury's "own publications have, at times, supported Kaufman's view." (Doc. 65-2 at 21 (heading).) In that regard, he pointed to ambiguous language in (1) the instructions to an unspecified version of the FBAR reporting form, and (2) draft FBAR instructions that FinCEN attached to a 2010 notice of proposed rulemaking. (*Id*. at 21-22.)

2. The Government's arguments

The Government, in contrast, urged the District Court to follow *Boyd I*, arguing that "the failure to report each account is a separate violation subject to a penalty of up to $10,000." (Doc. 67 at 2.) It noted that under § 5314, the required "records and reports" must contain certain information — such as "the identity and address of participants in a . . . relationship," 31 U.S.C. § 5314(a)(1) — that can only be provided "on an account by account basis." (Doc. 67 at 3.) It then pointed to the implementing regulation, which provides that any person with an interest in a foreign financial account "shall report such relationship," 31 C.F.R. § 1010.350(a), and shall provide the information specified in the prescribed reporting form (FBAR). "In short," the Government concluded, "although the FBAR form has been designated for reporting foreign accounts, it is an undisclosed or improperly disclosed relationship that forms the basis of a violation of section 5314." (*Id.* at 4.)

The Government then argued (Doc. 67 at 4) that "[t]his conclusion is confirmed by the reasonable cause exception" in the statute, which can only apply to a violation if "the balance in the account . . . was properly reported." 31 U.S.C. § 5321(a)(5)(B)(ii)(II). It questioned how such an account-specific exception would apply if the failure to report multiple accounts for multiple reasons were deemed a single, indivisible "violation." (*Id.* at 4-5.) "A better reading" of the reasonable-cause exception," the Government contended, "is that each account stands on its own." (*Id.* at 5.)

Next, the Government noted that "the same singular language of 'account' and 'balance' appears in § 5321(a)(5)(C)-(D), which governs the calculation of the penalty for willful violations — which Mr. Kaufman concedes is calculated per account not disclosed." (Doc. 67 at 5.) Regarding Kaufman's argument that the absence of such language in § 5321(a)(5)(B)(i) "shows that Congress intended to differentiate the willful penalty from the non-willful penalty," the Government countered that under Kaufman's interpretation of the statute, the word "violation" would have different meanings in different subparagraphs of § 5321(a)(5). (*Id.* at 5-6.) As the Government argued, "[n]othing in the text indicates that the term 'violation' for purposes of [subparagraph (C)] has a meaning different from the meaning of 'violation' in [subparagraph (A)] and, indeed, the cross-referencing of those two subparagraphs in subparagraph (B)(i) confirms that the violation is the same." (*Id.* at 6.)

The Government went on to criticize Kaufman's reliance on the "absurdity" canon, rejecting the premise that "determining penalties per account does not take into account the 'blameworthiness'" of the conduct. (Doc. 67 at 8; *see* Doc. 65-2 at 20.) And it likewise rejected the applicability of the rule of lenity, noting that the rule applies only where there is a "'grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended,'" which was not the case here. (Doc. 67 at 8 (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)).) Finally, the Government dismissed Kaufman's "selective reading" of the instructions (and draft instructions) to the FBAR form, which, in any event, "cannot overcome the plain language of the statute and regulations." (*Id*. at 8-9.)

3. The District Court's opinion

After holding that the Government was entitled to summary judgment on the reasonable cause issue, the District Court ruled in favor of Kaufman on the penalty calculation issue, largely following an intervening district court decision on this issue that had been rendered after the parties' summary-judgment briefing (and which was later reversed by the Fifth Circuit). *See United States v. Bittner*, 469 F. Supp. 3d 709 (E.D. Tex. 2020) ("*Bittner I*"), *rev'd*, 19 F.4th 734 (5th Cir. 2021) ("*Bittner II*"), *petition for cert. filed* (U.S. Mar. 2, 2022) (No. 21-1195).

Like the *Bittner I* court, the District Court here relied heavily on the *Russello* presumption. In particular, the court concluded that "[t]he reference to 'balance in the account' in the willfulness penalty provision shows that 'Congress clearly knew how to make FBAR penalties account specific, . . . and the fact that it did not do so for non-willful violations is persuasive evidence that it intended for the non-willful penalties not to relate to specific accounts.'" (JA.37-38 (quoting *Bittner I*, 469 F. Supp. 3d at 719).) The court found "[t]he reference to 'balance in the account' in the reasonable cause defense" — but not in the non-willful provision to which that exception applies — to be "similarly meaningful." (JA.38.)

The District Court also found significant the observation in *Shultz*, 416 U.S. at 26, that penalties under the Bank Secrecy Act "attach only upon violation of regulations promulgated by the Secretary." (JA.38-39.) *See Bittner I*, 469 F. Supp. 3d at 718. Turning to the implementing regulations under § 5314, the court found it further "[s]ignificant[ ] [that] the trigger for the reporting obligation is the aggregate account balance in a person's foreign financial account(s)," not the number of accounts. (JA.39 (citing 31 C.F.R. § 1010.306(c)).) The court agreed with the *Bittner I* court that "'it would make little sense to read § 5321(a)(5)(A) and (B)(i) to impose per-account penalties for non-willful FBAR violations when the number of foreign financial accounts an individual maintains has no bearing whatsoever on that individual's obligation to file an FBAR in the first place.'" (JA.39 (quoting *Bittner I*, 469 F. Supp. 3d at 720).)

Despite having referred to the willful-violation provision as "account specific" (JA.37), the court denied that under its interpretation of the statute, the word "violation" would have one meaning in the context of willful conduct (failure to report an account) and another meaning in the context of non-willful conduct (failure to file the FBAR). According to the court, "[u]nder both scenarios, the violation flows from the failure to file a timely and accurate FBAR." (JA.39) "The only difference," the court continued, "is that the manner for calculating the statutory cap for penalties for willful violations involves an analysis that includes consideration of the balance in the accounts, while no such analysis is required for non-willful violations." (JA.39-40.)

The court also dismissed the Government's concern regarding how, in a "form centric world," the reasonable-cause exception would apply in the context of multiple foreign accounts. (JA.40.) The court posited that, "absent reasonable cause for failing to report ALL accounts, . . . the individual would be liable for civil monetary penalties because he does not have a complete reasonable cause defense as to every account that needed to be reported on the single form." (JA.40.)

The court then cited two hypotheticals posited by the *Bittner I* court that, in the court's view, demonstrate that the Government's position "could readily result in disparate outcomes among similarly situated people." (JA.40.) Under the first hypothetical, two non-willful violators who have the same aggregate account balance "are exposed to drastically different penalties simply because one violator has [18] more financial accounts than the other." (JA.40 (citing *Bittner I*, 749 F. Supp. 3d at 721).) Under the second hypothetical, a "non-willful violator is exposed to $200,000 in penalties while [a] willful violator with the same number of accounts and a higher aggregate account balance is exposed to $100,000 in penalties." (JA.40-41 (citing *Bittner I*, 749 F. Supp. 3d at 722).)[6]

Finally, the court "respectfully decline[d] to follow the approach taken in *Boyd* [*I*]." (JA.42.) In particular, the court found it "unclear whether the *Boyd* [*I*] court considered the general presumption that Congress acts intentionally when it includes disparate language in different sections of the same statute." (JA.42 (citing *Russello*, 464 U.S. at 23).)

Due to the parties' dispute regarding interest and late-payment penalties, the District Court did not enter judgment until approximately one year after issuing its opinion on the merits. (JA.43 (judgment); JA.44 (amended judgment).) In the meantime, a divided panel of the Ninth Circuit rejected the Government's per-account interpretation of the non-willful penalty provision, *see Boyd II*, 991 F.3d 1077, while the Fifth Circuit embraced it (thus rejecting the reasoning of *Bittner I* on which the District Court relied here), *see Bittner II*, 19 F.4th 734.

SUMMARY OF ARGUMENT

The District Court incorrectly held that Kaufman was subject to a maximum penalty of only $10,000 per annual FBAR that he failed to file to report his numerous foreign bank accounts. Section 5314 mandates an account-specific reporting requirement, and it necessarily follows that a violation of § 5314 relates to each failure to report each foreign account, not to the failure to file the FBAR form on which such accounts are to be collectively reported. Consequently, the penalty authorized by § 5321(a)(5)(A) may be imposed with respect to each undisclosed or insufficiently disclosed account, subject to the maximum amounts per violation set forth in § 5321(a)(5)(B)(i) and (C)(i).

The District Court erred in its analysis of § 5321(a)(5). In particular, the court erred in holding that Congress's use of "account specific" language in the "willfulness provision," but not the "non-willfulness provision," is "persuasive evidence" that Congress intended the penalty for willful violations to relate to specific accounts and the penalty for non-willful violations not to. (JA.38.) Contrary to that statement, there is only one penalty authorized by § 5321(a)(5), and it applies to "any violation of[ ] any provision of section 5314," *i.e.*, there is a single penalty that applies to both willful and non-willful violations. That the maximum *amount* of the penalty is determined (in part) by reference to the "balance in the account" in the context of willful violations, but not in the context of non-willful violations, does not alter the unitary nature of the penalty.

Yet in relying on the presence of account-based language in the willful provision and the absence of such language in the non-willful provision to conclude that the penalty as applied to non-willful conduct pertains to the failure to file an FBAR rather than the failure to report an account, the District Court necessarily implied that the opposite is true in the case of willful conduct, *i.e.*, that the penalty as applied to willful conduct pertains to the failure to report an account rather than the failure to file an FBAR. Thus, notwithstanding the District Court's insistence to the contrary, its reasoning requires the term "violation of[ ] any provision of section 5314" in § 5321(a)(5)(A) to mean one thing in the context of non-willful violations (failure to file the consolidated reporting form prescribed by Treasury under § 5314) and another thing in the context of willful violations (failure to report an account covered by that filing requirement).

The text, structure, and context of § 5321(a)(5) establish that the "violation of[ ] any provision of section 5314" to which the unitary penalty authorized by § 5321(a)(5)(A) applies is the failure to report an account (not the failure to file the form on which all such accounts are to be reported), regardless whether the failure is willful or non-willful. Moreover, the District Court's contrary interpretation is problematic in terms of how the statutory maximums for non-willful and willful violations could be applied coherently when an individual non-willfully fails to report some accounts while willfully failing to report others. And the hypotheticals that the court relied upon are inapposite (and, in one case, erroneous). The court's holding that the relevant violation in the context of non-willful conduct is the failure to file the FBAR, as opposed to each failure to report each foreign account, and that the penalty therefore applies on a per-form basis in that situation, is erroneous and should be reversed.

We recognize that a divided panel of the Ninth Circuit issued an opinion agreeing with the District Court's holding here. *See Boyd II*, 991 F.3d 1077. But the majority there committed the same analytical errors as the District Court here. And more recently, the Fifth Circuit issued an opinion agreeing with the dissent in *Boyd II*. *See Bittner II*, 19 F.4th 734. As explained more fully *infra*, the dissent's analysis in *Boyd II* and the Fifth Circuit's analysis in *Bittner II* reflect the most natural reading of the statutes, are more faithful to principles of statutory interpretation, and are consistent with the policies underlying the Bank Secrecy Act.

ARGUMENT

The District Court erred in holding that the penalty authorized by 31 U.S.C. § 5321(a)(5)(A) applies on a per-form basis in the context of non-willful violations of § 5314

Standard of review

This Court "review[s] a district court's grant or denial of summary judgment de novo." *Fisher v. Aetna Life Ins. Co.*, 32 F.4th 124, 135 (2d Cir. 2022). "For issues concerning statutory interpretation, . . . the standard of review is also de novo." *Id.*

* * * * * * *

Section 5321(a)(5)(A), Title 31, authorizes the Secretary of the Treasury to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. § 5321(a)(5)(A). In the case of a non-willful violation, "the amount of any civil penalty imposed under" that provision "shall not exceed $10,000." 31 U.S.C. § 5321(a)(5)(B)(i); *see id*. § 5321(a)(5)(C) (providing a different cap for willful violations). Section 5314 directs the Secretary to adopt regulations to require U.S. persons to report financial accounts that they maintain abroad, and the Secretary's implementing regulations require those reports to be made using a single annual form (the FBAR) for all of the filer's accounts. *See* 31 U.S.C. § 5314(a); 31 C.F.R. § 1010.350(a). The resolution of this case turns on whether the "violation of[ ] any provision of section 5314" contemplated in § 5321(a)(5) is the failure to file the annual form on which all reportable accounts are to be collectively reported, or the failure to report each reportable account.

The District Court erred in holding that the relevant violation is form-based. As the Fifth Circuit explained in *Bittner II*, "the text of sections 5321(a)(5) and 5314 and of the regulations leave no doubt that each failure to report an account is a separate violation of section 5314 subject to penalty." 19 F.4th at 748; *see also United States v. Solomon*, No. 20-82236-CIV, __ F. Supp. 3d __, 2021 WL 5001911, at *9 (S.D. Fla. Oct. 27, 2021) ("[T]he plain meaning of the term "violation" in 31 U.S.C. § 5321(a)(5)(A) is the failure to report each foreign financial account on the FBAR form — not simply the failure to file the FBAR form itself."); *United States v. Hadley*, No. 8:21-cv-1357, 2022 WL 899701 (M.D. Fla. Mar. 28, 2022) (same). That conclusion flows from the text and context of both Sections 5314 and 5321(a)(5)(A).

A. The inquiry regarding what constitutes a "violation" of § 5314 begins with the text of § 5314, not the regulations thereunder

In determining what constitutes a "violation" of § 5314 for purposes of § 5321(a)(5)(A), the District Court paid scant attention to the language of § 5314 itself. Instead, it found "significant" that § 5314 "largely defers to the Secretary to determine how the reporting requirement for financial accounts will operate." (JA.38.) That is the context in which the court quoted the Supreme Court's observation in *Shultz* that civil and criminal penalties under the Bank Secrecy Act "'attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone.'" (*Id.* (quoting *Shultz*, 416 U.S. at 26).) Although the court did not expressly conclude that "[i]t is therefore violations of the . . . implementing regulations to which § 5321(a)(5)'s civil penalties attach," *Bittner I*, 469 F. Supp. 3d at 718, that is the necessary implication. *See also Boyd II*, 991 F.3d at 1081 (quoting the *Shultz* language and stating that "[c]onsequently, our focus must be on the directives the Secretary had in place").

As the Fifth Circuit recognized in *Bittner II*, *Shultz* is inapposite. *See* 19 F.4th at 744 ("The *Shultz* snippet does not help define a 'violation of[ ] any provision of section 5314' under section 5321(a)(5)(A)."). The quoted "snippet" simply prefaced the Supreme Court's conclusion later in the opinion that, because penalties were dependent on the issuance of regulatory reporting requirements, the relevant constitutional analysis should focus on the reporting requirements that were actually promulgated rather than those that "might have been imposed by the Secretary under the broad authority given him in the Act." *Shultz*, 416 U.S. at 64; *see Bittner II*, 19 F.4th at 744 (noting that "*Shultz* did not interpret any penalty provision of the [Bank Secrecy Act]," and that "[t]he quoted sentence [merely] corrected the district court's ripeness analysis"). The bottom line is that "[b]ecause section 5321(a)(5)(A) penalizes a 'violation of[ ] any provision of section 5314,' [the proper] analysis begins with section 5314, not the regulations" thereunder. *Id.*

In addition to lacking any support from *Shultz*, the District Court's focus on the § 5314 regulations in determining what constitutes a violation of § 5314 is undercut by other (earlier enacted) penalty provisions of § 5321(a) that specifically reference regulations. *See* 31 U.S.C. § 5321(a)(1) (imposing a penalty for "violating this subchapter or a regulation prescribed . . . under this subchapter"); *see also id*. § 5321(a)(2) (authorizing the imposition of a penalty on any person "not filing a report . . . under section 5316 . . . or a regulation prescribed [there]under"); *id*. § 5321(a)(3) (imposing a penalty on any person "not filing a report under a regulation prescribed under section 5315"). Citing the *Russello* presumption, *see supra* p. 12-13, the Fifth Circuit found the omission of any similar reference in § 5321(a)(5) "instructive." *Bittner II*, 19 F.4th at 745 ("We thus focus on the text of section 5314.").

B. Section 5314 mandates an account-specific reporting requirement and commits the procedure for satisfying that requirement to the discretion of the Secretary

As explained by the Fifth Circuit, "Section 5314(a) 'has both a substantive and procedural element.'" *Bittner II*, 19 F.4th at 745, quoting *Boyd II*, 991 F.3d at 1088 (Ikuta, J., dissenting). "Substantively, it directs the Secretary to require a person to 'file reports' when the person 'makes a transaction or maintains a relation . . . with a foreign financial agency.'" *Id.*, quoting 31 U.S.C. § 5314(a) (first sentence). "Procedurally, 'reports shall contain [certain] information in the way and to the extent the Secretary prescribes.'" *Id.*, quoting 31 U.S.C. § 5314(a) (second sentence) (alteration in original quotation). "[T]he requirement to submit a form to reflect that information does not alter the substantive nature of the underlying duty to report financial interests/relationships to the IRS." *Solomon*, 2021 WL 5001911, at *7.

1. Section 5314 contemplates account-specific reports

Contrary to Kaufman's suggestion below (Doc. 65-2 at 19), the word "reports" in § 5314 is not a reference to the "reporting form," 31 C.F.R. § 1010.350(a), that Treasury subsequently prescribed under § 5314 for use in reporting one or more foreign accounts. *See Bittner II*, 19 F.4th at 745 (noting the distinction in the regulations between "reports" and "forms"); *accord Boyd II*, 991 F.3d at 1088 (Ikuta, J., dissenting). Rather, Congress's use of the singular ("a relation") in § 5314 indicates that the "reports" contemplated in the statute are account-specific.

The account-specific nature of the reports required by § 5314 is confirmed by the types of information such "reports shall contain": the identity and address of the participants in the relationship; the legal capacity in which a participant is acting; and the identity of any real parties in interest. 31 U.S.C. § 5314(a)(1)-(3). That information may, of course, vary across multiple accounts maintained by one U.S. person. For example, a U.S. person who maintains three accounts at one foreign bank might own one account individually, might own another account jointly, and might have signature authority over (but no financial interest in) the third account. Or a person may own two accounts, each held at a different foreign bank. The point is that each required "report" necessarily corresponds to a single account.

In short, treating the failure to file a timely FBAR as a single "violation" of § 5314 when a U.S. person fails to report multiple foreign accounts would be inconsistent with the account-specific nature of § 5314's reporting requirement, as evidenced by the language of that provision. The essence of the statutory "violation of[ ] any provision of section 5314" contemplated by Section 5321(a)(5)(A) thus is failing to inform the government of the existence of any reportable foreign account, not failing to file the FBAR form prescribed by the regulations for collectively reporting all such accounts. Indeed, § 5314 does not specify whether multiple accounts should be reported on a single form or multiple forms. Congress instead left the procedural reporting method, *i.e.*, the precise format, timing, and content of the account-specific reports, to the Secretary's discretion. *See* 31 U.S.C. § 5314(a) (stating that the required reports "shall contain [certain account-specific] information in the way and to the extent the Secretary prescribes"); *see also Bittner II*, 19 F.4th at 746.

2. The regulations under § 5314 do not — and cannot — alter the account-specific nature of the statutory reporting requirement

The Secretary's determination to allow the use of a single FBAR form each year for the submission of multiple foreign-account reports does not alter the conclusion that the failure to file an FBAR in that situation results in multiple violations of § 5314. *See Bittner II*, 19 F.4th at 746 ("Streamlining the process in this way, however, cannot redefine the underlying reporting requirement imposed by section 5314."). The single-FBAR approach is certainly not mandated by the statute. To be sure, the Secretary's choice of that less burdensome approach is entirely *consistent with* the introductory clause of § 5314(a) (referring to "the need to avoid burdening [foreign-account holders] unreasonably"). But it is not mandated by that language.

By the same token, nothing in the text of § 5314 precludes the Secretary from requiring holders of multiple foreign accounts to submit a separate FBAR for each such account. Had the Secretary taken that approach, Kaufman would be subject to a separate civil penalty of up to $10,000 for each undisclosed account under the District Court's per-form interpretation. The result should be no different when the Secretary, for administrative convenience, directs that multiple account-reports be submitted by means of a single form. Indeed, as explained by the Fifth Circuit, the interpretation adopted by the District Court here "would lead to a result unmoored from the text of section 5314: it would give the Secretary discretion not only to define the reporting mechanism, but also to define the *number of violations* subject to penalty," *Bittner II*, 19 F.4th at 746, by simply requiring the use of a separate form for each foreign-account report.

Nor does the Secretary's determination to provide a *de minimis* filing exemption that is based on the aggregate account balance — rather than the number of accounts — undermine the conclusion that violations of § 5314 are account-based rather than form-based. (*See* JA.39.) That regulatory exemption — like the regulatory single-FBAR approach — simply implements Congress's desire (as expressed in the introductory clause of § 5314(a)) that the mandated reporting requirement be administered in a way that is not overly burdensome. The Secretary's exercise of discretion in that regard does not affect the determination of what constitutes a violation of § 5314. *See* 31 U.S.C. § 5314(b)(1) (authorizing the Secretary to prescribe "a reasonable classification of persons . . . exempt from a requirement under this section").[7]

The District Court correctly observed that "Section 5314 largely defers to the Secretary to determine *how* the reporting requirement for financial accounts will operate." (JA.39 (emphasis added).) Regulations implementing § 5314 rightly prescribe *how* the requirement to report a foreign account may be violated — for instance, by prescribing the timing and frequency of compliance — but they cannot redefine the subject of the violation. "By authorizing a penalty for 'any violation of[ ] any provision of section 5314,' as opposed to the regulations prescribed under section 5314, section 5321(a)(5)(A) most naturally reads as referring to the statutory requirement to report each account — not the regulatory requirement to file FBARs in a particular manner." *Bittner II*, 19 F.4th at 745. In other words, § 5314 directs the Secretary to adopt regulations to implement the statutory requirement *to report each foreign financial account*. The implementing regulations effectuate that command and provide the procedures for complying with it, but they do not alter the account-specific statutory obligation.

C. Section 5321(a)(5)(A) authorizes a penalty for each violation of Section 5314's account-specific reporting requirement

The District Court found "reasonable" the Government's interpretation of the term "violation" as used in § 5321(a)(5)(A) (JA.36), but nevertheless concluded that the penalty authorized by that section applies on a per-form basis, largely by erroneously applying the *Russello* presumption in its analysis of § 5321(a)(5) as a whole. (*See* JA.37-42.) As explained below, however, the text and structure of § 5321(a)(5) align with the account-specific language of § 5314.

1. The District Court's reliance on the *Russello* presumption is misplaced

Relying on the *Russello* presumption, *see supra* pp. 17-19, and referring to the "reference to 'balance in the account' in the willfulness penalty provision [31 U.S.C. § 5321(a)(5)(D)(ii)]," the District Court concluded that Congress "'had a template for how to relate an FBAR reporting penalty to specific financial accounts, and the fact that it did not do so for non-willful violations is persuasive evidence that it intended for the non-willful penalties not to relate to specific accounts.'" (JA.37-38, quoting *Bittner I*, 469 F. Supp. 3d at 719, *rev'd*, 19 F.4th 734.) The court's reliance on the *Russello* presumption, however, is misplaced for multiple reasons.

First, there is an alternative, more straightforward explanation for why the word "account" appears in § 5321(a)(5)(D)(ii) but not in § 5321(a)(5)(B)(i), "and it has nothing to do with the definition of a 'violation.'" *Bittner II*, 19 F.4th at 747. As the Fifth Circuit explained:

The amount of a willful penalty may depend on the "balance" in the unreported account, *see* 31 U.S.C. § 5321(a)(5)(C)(i), (D), unlike a non-willful penalty, which is capped at $10,000, *see id.* § 5321(a)(5)(B)(i). So, Congress had no reason to refer to the "account" in the non-willful penalty provision. . . .

Id. In other words, Congress decided that the quantum of unreported financial assets should be part of the calculus for determining the *amount* of the maximum penalty in the context of willful violations, but not in the context of non-willful violations.[8] It does not follow that Congress intended "'to make FBAR penalties account specific'" as applied to willful violations but "'intended for the . . . penalt[y] not to relate to specific accounts'" as applied to non-willful violations. (JA.37-38 (quoting *Bittner I*, 469 F. Supp. 3d at 719).)

Second, the District Court's reliance on the *Russello* presumption to draw a distinction between willful violations and non-willful violations is undercut by the fact that the word "account" appears not only in the "willful" portion of § 5321(a)(5), but also in a provision of § 5321(a)(5) dealing solely with non-willful conduct: the reasonable-cause exception. *See* 31 U.S.C. § 5321(a)(5)(B)(ii)(II) (conditioning availability of the exception on the "proper[ ] report[ing]" of "the balance in the account"), (C)(ii) (providing that the exception does not apply in the context of willful violations). At the very least, the use of the word "account" in subparagraph (B)(ii) weakens any inference that, based on the presence of that word in subparagraph (D)(ii) but not in subparagraph (B)(i), Congress intended a per-account regime to apply to willful violations and a per-form regime to apply to non-willful violations.

The District Court, however, concluded that the use of the word "account" in the reasonable-cause exception (subparagraph (B)(ii)), but not in the non-willful provision to which that exception applies (subparagraph (B)(i)), actually *strengthens* the inference that Congress intended a per-form regime to apply to non-willful violations. That is, like the *Bittner I* court, the District Court concluded that the reasonable-cause exception should be read separately from the penalty provision to which it is an exception. But as the Fifth Circuit explained, "[n]either the statute's text nor its structure separates the excuse from the violation." *Bittner II*, 19 F.4th at 747. "To the contrary, if the exception for non-willful violations applies on a per-account basis, then logically the violations the exception forgives must arise on a per-account basis too." *Id.* at 747-48. Indeed, there is a straightforward explanation for why the word "account" appears in subparagraph (B)(ii) but not in subparagraph (B)(i). Subparagraph (B)(ii) describes what must be "properly reported" in due course in order to qualify for the exception (*i.e.*, the "amount of" the transaction or the "balance in" the account). In contrast, there simply was no need to make those references in subparagraph (B)(i); the maximum penalty for either type of non-willful violation is $10,000, regardless of the amount of the transaction or the balance in the account.[9]

Finally, the District Court's *Russello*-based conclusion — *viz.*, that the non-willful portion of § 5321(a)(5) (which, unlike the willful portion, does not contain the word "account") does not penalize each failure to report an account — necessarily implies that the *willful* portion of § 5321(a)(5) *does* penalize each failure to report an account. In other words, reliance on a wording difference between two provisions to draw a substantive conclusion about one of the provisions necessarily implies that the conclusion does not apply to the other provision. That is the whole point of drawing the distinction in the first place.

But an interpretation resulting in such internal disparity is untenable in light of the structure of § 5321(a)(5).[10] Specifically, there is only one penalty authorized by § 5321(a)(5), and it applies to "any violation of[ ] any provision of section 5314." 31 U.S.C. § 5321(a)(5)(A); *see id.* § 5321(a)(5)(B)(i) (setting the maximum amount of the "penalty imposed under subparagraph (A)," "[e]xcept as provided in subparagraph (C)"), (C)(i) (increasing "the maximum penalty under subparagraph (B)(i)" in the case of "[w]illful violations"). Given the unitary nature of the penalty, the penalizable conduct must be the same regardless of the accompanying state of mind. *See Bittner II*, 19 F.4th at 747 ("[N]othing in section 5321 suggests Congress meant to define 'violation' one way where a person acts willfully and another way where a person does not."); *Boyd II*, 991 F.3d at 1090 (Ikuta, J., dissenting) ("[E]ven though subparagraphs (B) and (D) refer to different mens rea, the actus reus (the violation itself) is defined the same way — as 'any violation of, any provision of section 5314' — for violations that are both willful and non-willful.").

The question remains whether the unitary "violation" of § 5314 dictated by the structure of § 5321(a)(5) pertains to the filing of the (one) required form or to the reporting of each reportable account. As demonstrated in the next section, the text of § 5321(a)(5) establishes that the referenced violation is account-based.

2. The presumption of consistent usage carries the day for the Government's interpretation of § 5321(a)(5)(A)

Since the term "violation of[ ] any provision of section 5314" (or the shorthand "violation") appears not only in § 5321(a)(5)(A), but in § 5321(a)(5)(B), (C), and (D) as well, any definitional clues from those other subparagraphs are highly relevant to the § 5321(a)(5)(A) inquiry. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (referring to "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning"); *United States v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring) (referring to this principle as the "presumption of consistent usage"). As the Fifth Circuit explained, "[t]he use of the term 'violation' in other parts of section 5321(a)(5) confirms that the 'violation' contemplated by section 5321(a)(5)(A) is the failure to report an account, not the failure to file an FBAR." *Bittner II*, 19 F.4th at 746; *see also Boyd II*, 991 F.3d at 1090 (Ikuta, J., dissenting) ("Nothing in the language of § 5321 suggests that Congress wanted the word 'violation' to have a different meaning in different subparagraphs.").

The clearest textual clue comes from subparagraph (D), which refers to a willful "violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account." 31 U.S.C. § 5321(a)(5)(D)(ii); *see id.* § 5321(a)(5)(C) (referring to "willful violations" in the heading), (C)(i)(II) (incorporating subparagraph (D) by cross-reference). "This language plainly describes a 'violation' in terms of a failure to report a transaction or an account." *Bittner II*, 19 F.4th at 746; *see also Boyd II*, 991 F.3d at 1089 (Ikuta, J., dissenting). That this provision describes the relevant violation in terms of a failure to report (or accurately report) an account rather than a failure to file (or accurately file) the required form indicates that the word "violation" therein refers to account-based failures rather than form-based failures. It follows that, under the presumption of consistent usage, the word "violation" in § 5321(a)(5)(A) — the provision encompassing both willful and non-willful violations — likewise refers to account-based failures rather than form-based failures. *See Bittner II*, 19 F.4th at 747 ("If a willful violation of section 5314 in subsection (C) involves failing to report a transaction or an account, then presumably so too does a non-willful violation of section 5314 in subsection (A)."); *Boyd II*, 991 F.3d at 1091 (Ikuta, J., dissenting) ("If subparagraph (D) explicitly establishes that the word 'violation' refers to the failure to report the existence of an account, we must use that definition through the entire section.").

Further textual support for the Government's interpretation of § 5321(a)(5)(A) is found in § 5321(a)(5)(B)(ii), which provides that the penalty imposed by subparagraph (A) does not apply to any non-willful "violation" that is attributable to reasonable cause. *See* 31 U.S.C. § 5321(a)(5)(C)(ii) (providing that the reasonable-cause exception does not apply in the case of willful violations). In particular, subparagraph (B)(ii) limits the availability of the reasonable-cause exception (as relevant here) to situations where "the amount of the transaction or the balance in the account . . . was properly reported." 31 U.S.C. § 5321(a)(5)(B)(ii)(II). This language plainly "equates a 'violation' with failing to report the amount of the transaction or the balance in an account." *Bittner II*, 19 F.4th at 747; *see Solomon*, 2021 WL 5001911, at *9 ("By its terms, this exception speaks in account-specific terms — not form-specific terms.").

Moreover, the use of the singular "account" and "balance" in the phrase "the balance in the account" here indicates that the "violation" excused for reasonable cause relates to a single account. *See Bittner II*, 19 F.4th at 747 ("the definite article 'the' before the singular 'transaction' and 'account' suggests that the 'violation' excused for reasonable cause relates to a single transaction or account"); *see also* § 5321(a)(5)(D)(ii) (determining the amount of the penalty in the case of a willful violation by reference, in part, to "the balance in the account at the time of the violation"). Indeed, "[p]lacing the article 'the' in front of a word connotes the singularity of the word modified." *Renz v. Grey Advert., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997); *accord Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (explaining that the "use of the definite article . . . indicates that there is generally only one" proper respondent to a petitioner's habeas petition). Again, if the word "violation" in subparagraph (B)(ii) refers to account-based failures, then under the presumption of consistent usage, the word "violation" in subparagraph (A) likewise refers to account-based failures. *See Bittner II*, 19 F.4th at 747 ("If 'violation' in section (a)(5)(B)(ii) is transaction- or account-based, then 'violation' in section (a)(5)(A) presumably is too.").

Finally, we note that, aside from lacking any support in the text of § 5321(a)(5), a unitary form-based approach would create problems in the situation where an FBAR presents both willful and non-willful violations. For example, suppose a U.S. person files a timely FBAR accurately reporting one account, non-willfully omitting one account for which she was not able to show reasonable cause, and willfully omitting a third account she wanted to conceal. Under a unitary form-based approach, it is unclear which penalty — and therefore which statutory maximum — would apply in that scenario.

D. Other problems with the District Court's decision

1. The District Court's reliance on the *Bittner I* hypotheticals — one of which posits an erroneous outcome — is misplaced

According to the District Court, the Government's account-based interpretation of § 5321(a)(5)(A) "could readily result in disparate outcomes among similarly situated people." (JA.40.) In support of this statement, the court cited two hypotheticals posed by the district court in *Bittner I*. (*Id.*) Those hypotheticals, however, do not support the court's conclusion.

In the first hypothetical, two individuals each hold $1 million in foreign accounts, one in 2 such accounts and one in 20 such accounts. (JA.40, citing *Bittner I*, 749 F. Supp. 3d at 721.) Both non-willfully fail to report their accounts. Under an account-based reading of the statute, the first individual would be liable for a maximum penalty of $20,000, while the second individual would be liable for a maximum penalty of $200,000. (*Id.*) The District Court saw no reason to impose "drastically different penalties simply because one violator has [18] more [reportable] accounts than the other." (*Id.*) But the increase in investigation costs associated with multiple hidden accounts provides a perfectly reasonable basis for treating the two individuals differently, especially where the accounts are spread over multiple countries or even multiple foreign financial institutions. In the absence of an accurate reporting of each foreign account, the Government may be required to conduct time-consuming investigations around the globe, including in countries that do not have tax-information-sharing treaties with the United States. Such a state of affairs would contravene Congress's intent in enacting the Bank Secrecy Act in general and extending the application of the § 5321(a)(5) penalty to non-willful reporting violations in particular. *See* S. Rep. No. 108-192, at 108 (2003), 2003 WL 22668223 (Nov. 7, 2003); 2005 Joint Committee Report, JCS-5-05, 2005 WL 5783636, at *34.

Moreover, the provisions at issue here prescribe the *maximum* monetary penalties that the Secretary may assess for each violation. Under the correct, account-specific interpretation, the Secretary may determine in an appropriate case that a filer who fails to report 20 foreign accounts (*e.g.*, at a transparent institution in a cooperative country) should be assessed the same civil penalties as a filer who fails to report a single account involving the same aggregate account balance (*e.g.*, at a secretive institution in a tax haven). But the statutory scheme does not require that parity. It instead permits the Secretary to determine that failing to report numerous foreign accounts represents more serious misconduct, meriting more serious penalties.

The *Bittner I* court was therefore wrong to describe the result in its first hypothetical as an "absurd outcome[ ] that Congress could not have intended in drafting the statute." 469 F. Supp. 3d at 721. The Fifth Circuit's response, 19 F.4th at 748-49, is instructive:

[W]e see no absurdity here. Congress's central goal in enacting the BSA was to crack down on the use of foreign financial accounts to evade taxes. It is not absurd — it is instead quite reasonable — to suppose that Congress would penalize each failure to report each foreign account. *See Shultz*, 416 U.S. at 27-29, 94 S. Ct. 1494 (noting the 'debilitating effects' of secret offshore accounts on the American economy, including hundreds of millions in lost tax revenue).

In the second hypothetical, which the District Court found "more troubling" (JA.40), A maintains twenty foreign accounts with an aggregate balance of $180,000 and B maintains twenty foreign accounts with an aggregate balance of $100,000. *See Bittner I*, 749 F. Supp. 3d at 722. The *Bittner I* court correctly noted that under the Government's position, if B *non-willfully* failed to report his twenty accounts, he would be subject to a maximum penalty of $200,000 (20 x $10,000). However, it erroneously switched to a per-form approach in positing that if A *willfully* failed to report *his* twenty accounts, he would be subject to a maximum penalty of only $100,000 (*i.e.*, the greater of (I) $100,000, or (II) 50% of $180,000). *See* 31 U.S.C. § 5321(a)(5)(C)(i), (D)(ii). As correctly applied on a per-account basis, the maximum penalty for A's willful failure to report his twenty accounts would be $2 million (20 x $100,000) rather than the $100,000 determined by the court (*see* JA.40-41.)[11]

Thus, neither of the *Bittner I* hypotheticals relied upon by the District Court supports its holding that the penalty under § 5321(a)(5)(A) applies on a per-form basis in the case of non-willful violations. To the contrary, they further confirm what the text, structure, and context of that section demonstrate: the penalty under § 5321(a)(5)(A) applies on a per-account basis, regardless whether the violation of § 5314 is willful or non-willful.

2. The District Court's reliance on the history of § 5321 is likewise misplaced

The District Court also found support for its form-based approach in the history of § 5321. (JA.41.) If anything, that history supports the Government's account-based reading of the statute.

The District Court explained that the statute originally penalized only willful violations, and that when Congress amended the statute in 2004 to allow for the imposition of penalties for non-willful violations, "it did so with full awareness of" the existing statute, which "expressly use[d] the balance of the account as a benchmark for assessing the statutory cap." (JA.41.) But the District Court failed to appreciate that the existing statute also expressly defined the violation subject to penalty as "involving a failure to report the existence of *an account* or any identifying information required to be provided with respect to *such account*." *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, Subtit. H, 100 Stat. 3207, § 1357(a)(5)(B)(2) (emphasis added). And nothing in the legislative history of the 2004 amendment suggests that Congress intended to change the violation subject to penalty — whether willful or non-willful — from the failure to report the existence of *an account* or any identifying information required to be provided with respect to *such account*.

Indeed, when Congress extended the penalty to non-willful violations of § 5314 in 2004, the relevant House conference report explained that the then-present law required U.S. persons "to keep records and file reports when that person makes a transaction or maintains an account with a foreign financial entity." H.R. Conf. Rep. 108-755, *reprinted in* 2004 U.S.C.C.A.N. 1341, 1667; *see also* 2005 Joint Committee Report JCS-5-05, 2005 WL 5783636 at *34. The amendment, the report explained, "add[ed] an additional civil penalty that may be imposed on any person who violates *this reporting requirement* (without regard to willfulness)." H.R. Conf. Rep. 108-755, *reprinted in* 2004 U.S.C.C.A.N. 1341, 1667 (emphasis added); *see also* 2005 Joint Committee Report JCS-5-05, 2005 WL 5783636 at *34. That report continued: "The penalty may be waived if any income from *the account* was properly reported on the income tax return and there was reasonable cause for the failure to report." *Id.* (emphasis added). Thus, if anything, the legislative history suggests that Congress understood § 5314 to require the reporting of *each* foreign transaction or account, that penalties had previously been imposed for each willful failure to report a foreign transaction or account, and that the penalty should be extended similarly to each *non*-willful failure to report a foreign transaction or account.

E. The majority opinion in *Boyd II* — like the decision below — is incorrect

We recognize that a divided panel of the Ninth Circuit rejected the Government's interpretation of the statutes at issue here. *See Boyd II*, 991 F.3d 1077. We submit that the Fifth Circuit's interpretation in *Bittner II*, as well as Judge Ikuta's dissent in *Boyd II*, reflects the most natural reading of the statutes, is more faithful to principles of statutory interpretation, and is consistent with the policies underlying the Bank Secrecy Act. *See also Solomon*, 2021 WL 5001911, at *7-*9 (relying extensively on Judge Ikuta's dissent in *Boyd II* and expressly "incorporat[ing] . . . [its] reasoning," *id.* at *7).

Initially, the *Boyd II* majority set out to determine what "provisions" of Section 5314 were encompassed by Section 5321(a)(5)(A)'s phrase "violation[ ] of any provision of section 5314." 991 F.3d at 1081. And it identified two such provisions: "(1) filing a report when maintaining a relationship with a foreign financial agency, and (2) ensuring the filed report contains specified information as prescribed by the Secretary." *Id.* Thus, the *Boyd II* majority appeared to recognize the account-based nature of the required "report."

Like the District Court, however, the *Boyd II* majority then went astray by relying on the *Shultz* "snippet," *Bittner II*, 19 F.4th at 744, to conclude that a "violation" of Section 5314's reporting requirement could only be determined by reference to the Secretary's implementing regulations. *Boyd II*, 991 F.3d at 1082. It identified two requirements in the regulations: (1) a requirement to file a single FBAR form that provides all requested account information, and (2) a requirement to file the form by a certain date. In the majority's view, Boyd's accurate FBAR for 2010 violated only the second of these regulatory requirements and therefore was subject to a single $10,000 penalty. *Id.* The majority, however, conflated the statutory obligation to report each account with the regulatory procedure for doing so. As Judge Ikuta correctly explained in her dissent,

there is no language in the relevant statutes or regulations providing that it "is the failure to file an annual FBAR that is the violation contemplated and that triggers the civil penalty provisions of § 5321." Maj. at 12 [991 F.3d at 74] n.7 (quoting [*Bittner I*], 469 F. Supp. 3d [at] 718. . . . Rather, . . . the statute and regulations make clear that the requirement to report an account and the requirement to file a reporting form are distinct, and the violation of § 5314 described in § 5321 includes the failure to report the existence of an account before June 30, as required by [31 C.F.R.] § 1010.306(c).

Boyd II, 991 F.3d at 1090 (Ikuta, J., dissenting).

Moreover, Judge Ikuta correctly explained that the *Boyd II* majority opinion cannot be reconciled with the fact that the acts giving rise to a violation of § 5314 are the same whether the conduct is willful or non-willful: "Nothing in the language of § 5321 suggests that Congress wanted the word 'violation' to have a different meaning in different subparagraphs. * * * [E]ven though subparagraphs (B) and (D) refer to different mens rea, the actus reus (the violation itself) is defined the same way — as 'any violation of, any provision of section 5314' — for violations that are both willful and not willful." *Boyd II*, 991 F.3d at 1090 (Ikuta, J., dissenting). Thus, Judge Ikuta correctly rejected the notion that the failure to timely report a single account is an independent violation of § 5314 in the context of willful conduct, but not in the context of non-willful conduct.

Judge Ikuta concluded her dissent in *Boyd II* by positing that the majority had interpreted the statute and regulations "in a manner that unfairly favors the tax evader." 991 F.3d at 1091 (Ikuta, J., dissenting); *see also Bittner II*, 19 F.4th at 748 (concluding that the "amply criticized" canon that tax statutes should be interpreted in favor of the taxpayer is inapplicable because "the text of sections 5321(a)(5)(A) and 5314 and of the regulations leaves no doubt that each failure to report an account is a separate violation of section 5314 subject to penalty"). Indeed, when it enacted the Bank Secrecy Act, Congress was particularly concerned with the "impossible position" in which law enforcement personnel are placed when "confronted with the secret foreign bank account or the secret financial institution." H.R. Rep. No. 91-975, at 12-13 (1970), *reprinted in* U.S.C.C.A.N. 4394, 4397-98. Each and every secret foreign account creates its own "impossible position," and investigation of each and every secret foreign account requires "a time consuming and oftimes fruitless foreign legal process." *Id.* The *Boyd II* majority's minimizing of this concern ignores that foreign accounts are maintained at not just one foreign bank, or in one foreign country, but are often spread around the world.

We submit that the majority decision in *Boyd II* is wrong and that the dissent and the unanimous Fifth Circuit decision in *Bittner II* are correct. Section 5321(a)(5)(A) authorizes the imposition of a $10,000 penalty for each unreported account, and for each year in which the account is not reported, as required by § 5314.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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FOOTNOTES

[1]The statutes and regulations relating to the foreign-account reporting requirements are not part of the Internal Revenue Code (26 U.S.C./I.R.C.) or its related regulations. *See* 31 U.S.C. §§ 5314, 5321(a)(5); 31 C.F.R. §§ 1010.350(a), 1010.306(c). In 2003, however, the Secretary of the Treasury delegated civil enforcement of these requirements and associated penalties to the IRS. *See* 68 Fed. Reg. 26489 (May 16, 2003); 31 C.F.R. § 103.56(g) (2010); 31 C.F.R. § 1010.810(d), (g).

[2]We cite to the Secretary's regulations as renumbered effective March 1, 2011. *See* 75 Fed. Reg. 65,806 (Oct. 26, 2010). The reporting requirements were previously found at 31 C.F.R. Part 103, Subpart B (2010).

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

[4]For violations occurring after November 2, 2015, the maximum penalties are periodically adjusted to account for inflation. *See* 87 Fed. Reg. 3433, 3433-3434 & n.1 (Jan. 24, 2022). The current maximum penalty for a non-willful violation is $14,489. 31 C.F.R. § 1010.821(b).

[5]U.S. citizens — regardless where they live — are generally subject to U.S. tax on their worldwide income (*see* I.R.C. § 61(a); Treas. Reg. § 1.1-1(b)), but Kaufman typically owed little U.S. tax due to the application of foreign tax credits reflecting his payment of Israeli income taxes (*see* Doc. 65-1 at 7-8).

[6]As explained more fully below at p.49, the District Court reached an erroneous conclusion in its second hypothetical due to its application of the “willful” statutory cap on a per-form basis rather than a per-account basis.

[7]The Secretary has exercised the discretion granted under § 5314(b)(1) to cover situations, not presented here, at the opposite end of the foreign-account spectrum as well. *See* 31 C.F.R. § 1010.350(g)(1), (2) (providing that persons with a financial interest in, or signature authority over, 25 or more foreign accounts need not report certain account-specific information).

[8]The District Court seemed to recognize this point, remarking that “the only difference [between the penalty as applied to willful and non-willful violations under the statute] is that the manner for calculating the statutory cap for penalties for willful violations involves an analysis that includes consideration of the balance in the accounts, while no such analysis is required for non-willful violations.” (JA.39-40.). But that statement completely undermines the court's reliance elsewhere on the *Russello* presumption to conclude that there is another “difference” between the penalty as applied to willful and non-willful violations, *i.e.*, its conclusion that non-willful violations pertain to the failure to file an FBAR rather than the failure to report an account.

[9]As explained more fully *infra* at 44-45, the reference to the “account” in the reasonable-cause exception actually supports the Government's reading of the statute.

[10]The District Court denied that any such disparity results from its reliance on the *Russello* presumption: "Under both [the willful and non-willful] scenarios, the violation flows from the failure to file a timely and accurate FBAR." (JA.39.) The court failed to explain how that result can be reconciled with the fact that its conclusion regarding the form-based nature of non-willful violations of the statute is premised on the *difference* between the wording of the willful provision and the non-willful provision, *i.e.*, the presence of the word "account" in the former but not the latter.

[11]More specifically, the maximum penalty for each willful failure to report an account would be the greater of (I) $100,000, or (II) 50% of the balance of the account in question. Since the *aggregate* balance of A's 20 accounts is only $180,000, the first figure ($100,000) would be greater than the second figure for all twenty violations.

END FOOTNOTES