

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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ALEXANDRU BITTNER,)

Petitioner,)

v.) No. 21-1195

UNITED STATES,)

Respondent.)

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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: -- 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: -- no matter how many
5 accounts a person has or how many mistakes a
6 person might make on a single form. Because
7 there is no independent duty to report each
8 account, there is no independent violation every
9 time an account is not reported.

10 (Interruption.)

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

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Mr. Geyser, you make
23 -- you put quite an emphasis on the report
24 versus the account. What if the IRS simply said
25 every account has to be on a separate report,

1 and so, rather than having just a handful of
2 reports, you had one per account? What would
3 your argument be?

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

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

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

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

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

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

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

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

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

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

1 JUSTICE KAVANAUGH: But -- but --

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

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

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

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

24 It's very easy for someone to think
25 that they've complied and it turns out they

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

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

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

21 Now, if you're doing that
22 non-willfully, someone who accidentally doesn't
23 file a report because they don't know that that
24 reporting requirement even exists, whether they
25 have five accounts or 500 accounts, they are --

1 they're engaged in the same conduct that
2 Congress is targeting.

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

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

13 5314 is -- is a recordkeeping and
14 reporting requirement. The Secretary has to
15 come up with the regulations, and Congress
16 framed this as a violation of the statute. So
17 the real question is, if Congress is looking at
18 that, what are they thinking?

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

23 If Congress wanted to impose a
24 separate penalty for each individual account,
25 Congress would have said that. And if we look

1 at other sections of 5321 --

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

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

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

22 JUSTICE KAGAN: I know.

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

25 (Laughter.)

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

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

14 Am I wrong?

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

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

1 language. That -- that's -- that's what they're
2 referring to for the account.

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

10 And when Congress --

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

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

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

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

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

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

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

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

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

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

19 JUSTICE KAVANAUGH: Could --

20 CHIEF JUSTICE ROBERTS: Counsel, if
21 you -- am I right that under your view, if you
22 don't file any report at all, say you have 10 --
23 10 accounts, that's a \$10,000 fine?

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

1 CHIEF JUSTICE ROBERTS: And if you
2 file a report but list only one account, that's
3 also a \$10,000 fine?

4 MR. GEYSER: That -- that is also a
5 \$10,000 fine.

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

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

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

1 know you need to file anything.

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

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

1 even file the report. So it shows it's very
2 common for people not to file these things, not
3 because they're -- they're reckless or
4 lawbreakers; they simply don't know that this is
5 something they have to do.

6 JUSTICE BARRETT: What --

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

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

21 JUSTICE BARRETT: What if --

22 MR. GEYSER: Now --

23 JUSTICE BARRETT: Sorry.

24 MR. GEYSER: No. It -- it -- it --
25 it's -- it's -- it is a requirement that serves

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

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

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

1 in the accounts and take a considerable portion
2 of the balance of those accounts, is that right?

3 MR. GEYSER: That -- that is right,
4 Your Honor.

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

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

23 MR. GEYSER: That is about right.

24 JUSTICE GORSUCH: Okay.

25 MR. GEYSER: And so, in -- in order to

1 take advantage of the reasonable cause
2 exception, a taxpayer has to report correctly
3 the balances in the accounts that they have.
4 So, if they have 10 accounts and they report
5 nine of those accounts and they fail to report
6 one, they cannot take advantage of --

7 JUSTICE GORSUCH: They still get --

8 MR. GEYSER: -- the reasonable cause.

9 JUSTICE GORSUCH: -- they still get
10 zapped for the non-willful violation?

11 MR. GEYSER: Exactly.

12 JUSTICE GORSUCH: Okay. All right.

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

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

19 JUSTICE GORSUCH: Sure.

20 MR. GEYSER: So it's --

21 JUSTICE GORSUCH: Sure. No.

22 MR. GEYSER: -- it's just accounts and
23 not --

24 JUSTICE GORSUCH: But it's the willful
25 violation --

1 MR. GEYSER: Yes.

2 JUSTICE GORSUCH: -- portions? Okay.

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

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

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

24 JUSTICE BARRETT: So, if I timely file
25 -- file an FBAR and report only three of my 25

1 accounts, 24 accounts, so I haven't triggered
2 the -- the other more lenient reporting method,
3 so I have 24 accounts, I only report three, you
4 say \$10,000 as long as it's non-willful?

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

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

23 JUSTICE KAVANAUGH: But doesn't --

24 MR. GEYSER: Well --

25 JUSTICE KAVANAUGH: -- doesn't -- I --

1 I come back to Justice Gorsuch's question and my
2 earlier question. Doesn't the reasonable cause
3 provision take care of that? And then I had one
4 question specifically on the reasonable cause
5 provision. I understand the first clause of it,
6 "such violation was due to reasonable cause,"
7 and then it says "the amount of the transaction
8 or the balance in the account at the time of the
9 transaction was properly reported."

10 I didn't really understand in context
11 what that's getting at.

12 MR. GEYSER: I -- I --

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

16 MR. GEYSER: I -- I think the best
17 reading of this language is they're saying that
18 if you have correctly reported the balances in
19 the account, then --

20 JUSTICE KAVANAUGH: Where?

21 MR. GEYSER: On --

22 JUSTICE KAVANAUGH: And when?

23 MR. GEYSER: On your annual FBAR. Now
24 I think that the most common scenario, and it's
25 -- actually, it's hard for me to think of

1 ordinary cases where this would otherwise
2 apply -- is where you fail to file an FBAR and
3 then you file a corrected FBAR that then
4 eventually gets it right, but then it's
5 untimely, or you don't file anything and you
6 file a late FBAR that correctly lists your
7 accounts.

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

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

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

24 MR. GEYSER: You -- you are if, again,
25 you can -- you can convince the IRS that you

1 have acted reasonably in not filing on time.

2 JUSTICE KAVANAUGH: Right. And -- and
3 you would say it's reasonable -- if I didn't
4 know about it and, you know, I'm a immigrant to
5 the country, I didn't know about this
6 requirement, I guess that's one class of people
7 who often are caught up in this, then you get
8 the reasonable cause --

9 MR. GEYSER: You do --

10 JUSTICE KAVANAUGH: -- you would say?

11 JUSTICE JACKSON: Maybe. Maybe. I
12 mean, if --

13 JUSTICE KAVANAUGH: Yeah. Well,
14 that's the question.

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

20 MR. GEYSER: It's --

21 JUSTICE JACKSON: Right?

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

1 JUSTICE JACKSON: Exactly.

2 MR. GEYSER: So --

3 JUSTICE KAGAN: Well, on the other
4 hand --

5 (Laughter.)

6 MR. GEYSER: Yeah.

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

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

1 person who's -- has hundreds of millions of
2 dollars in many, many accounts, is constantly
3 making transactions, is constantly opening and
4 closing them, maybe doing it to evade taxes,
5 maybe doing it to finance terrorism. And, you
6 know, in that case, the equities go against you,
7 and that suggests, well, let's just look at the
8 statute, and the statute, as I said, is very
9 account-specific.

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

24 JUSTICE KAGAN: I don't know how that
25 helps you because, obviously, you're saying that

1 there is an obligation on the account holder
2 anyway, so whether the obligation has to do with
3 a particular account or not, you run into that
4 same problem.

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

10 CHIEF JUSTICE ROBERTS: You can
11 finish.

12 MR. GEYSER: Thank you.

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 JUSTICE THOMAS: Mr. Geyser, I am

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

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

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

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

23 MR. GEYSER: And -- and I think, if
24 the Secretary tomorrow morning departed from
25 decades of settled practice of requiring an

1 annual report where all the accounts are listed
2 specifically to try to multiply the statutory
3 violations, I'd be very curious how an APA
4 challenge would come out to that change.

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

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

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

1 structured.

2 But, again, you can disagree with
3 every single thing I've just said and still
4 reverse because, in this case, the regulation is
5 a single annual report and all you need to do as
6 a regulated party is to file reports as required
7 by the Secretary. It does not say to report
8 each account.

9 CHIEF JUSTICE ROBERTS: Justice Alito?
10 Justice Sotomayor?

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

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

24 Whether you do it on one form or 10
25 forms is irrelevant to me. I think the essence

1 as set forth in the plain language of the
2 statute is, if you have a relationship, an
3 account, tell me about it. That's what the
4 government -- I thought that was the whole
5 purpose of this Act, was that wealthy people
6 were squirreling away millions of dollars in
7 foreign accounts all over the world and the
8 government wanted to know where these accounts
9 were. That's the whole purpose of the statute.

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

15 The amount of the penalty is the
16 balance in that account. So, to me, where am I
17 missing your argument?

18 MR. GEYSER: So I -- I --

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

23 MR. GEYSER: Well, Your --

24 JUSTICE SOTOMAYOR: The account.

25 MR. GEYSER: -- a few -- a few points,

1 Your Honor. First, what -- what the statute
2 actually says, the only thing that -- that is
3 imposed on the regulated party is to file
4 reports.

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

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

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

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

24 But the violation is of the statute,
25 and the only statutory duty is to file reports.

1 And I think this is especially clear going back
2 to the original version of the Act, which --
3 which is framed in terms of who -- who needs to
4 file reports. It's identifying the class that
5 the Secretary's supposed to regulate. That who
6 clause in the original version is the only
7 reference to specific accounts or specific
8 transactions. And, again, the targeted conduct
9 is filing reports.

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

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

25 JUSTICE SOTOMAYOR: I'm not sure, but

1 that's okay.

2 MR. GEYSER: All right.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Gorsuch?

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

14 How does that influence your argument?

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

23 And I think the other way that it
24 really does help us is it's pretty extraordinary
25 to say, I filed -- let's say you file that

1 report and it's accurate. You list -- you check
2 the box correctly. You say, I have 30 accounts,
3 but you file it a day late.

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

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

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

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

21 What do we make of all of that?

22 MR. GEYSER: Well, I -- I think there
23 are a couple things you can make of it. The
24 first is that when the government itself is
25 reading the statute, even if they're doing it as

1 they suggest kind of in a casual way, they come
2 to our interpretation of the statute. They've
3 said repeatedly over time that the failure to
4 file an FBAR is subject to a maximum \$10,000
5 penalty.

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

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

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: Two -- two
24 questions. First, the hypothetical asked by
25 Justice Thomas is a problem for you, as you're

1 aware, and in your reply brief, page 7, Footnote
2 3, you say we don't necessarily -- you don't
3 necessarily have to answer that question.

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

6 MR. GEYSER: We -- we absolutely win
7 this case.

8 JUSTICE KAVANAUGH: How?

9 MR. GEYSER: Well, because Justice --

10 JUSTICE KAVANAUGH: Even if the --
11 under the new reg, hypothetical reg -- go ahead.

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

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

1 JUSTICE KAVANAUGH: Analytically, how
2 would we draw the line between that hypothetical
3 case and this case? Just write the sentence for
4 us.

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

9 JUSTICE KAVANAUGH: Got it.

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

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

25 You want to respond at all to that

1 context? It's not a surprise it changes after
2 September 11, 2001.

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

15 JUSTICE KAVANAUGH: Right. So unaware
16 but should have known, I think, on the
17 reasonable cause. But I've explored that, so
18 I'll let you go. Thank you.

19 MR. GEYSER: Okay. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: Yes. So we're
23 talking about the reporting requirement in the
24 case, but I just want to focus for a moment on
25 5314's requirement. It says to keep records,

1 file reports, or keep records and file reports.
2 So, on recordkeeping, is it your position that
3 the recordkeeping requirement is
4 account-specific?

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

10 JUSTICE BARRETT: So, if I have 20
11 accounts and I only keep records on one, I've
12 only violated it once?

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

19 Now, if Congress is concerned about
20 that, they can use language in (5) -- in (a)(5)
21 that mimics the language in (a)(1) and say, for
22 -- for a violation of 5314, there is a separate
23 violation for each record not kept. That's the
24 kind of language I think you would expect to
25 see, especially when Congress is using other

1 account-specific language. They're thinking
2 about it in some cases as I'm going to look at
3 an individual account and how it complies with
4 whether there's a heightened penalty or not.

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

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 Justice Alito?

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

19 MR. GEYSER: There -- there is a
20 five-year requirement under the regulation, and
21 so I -- I think that for that five-year period
22 you could have a single violation. I think the
23 alternative under the government's view would, I
24 guess, be an infinite number of violations for
25 every minute or every second that you haven't

1 kept a record, which I -- I think is obviously
2 an unworkable standard.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Guarnieri.

6 ORAL ARGUMENT OF MATTHEW GUARNIERI

7 ON BEHALF OF THE RESPONDENT

8 MR. GUARNIERI: Mr. Chief Justice, and
9 may it please the Court:

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

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

1 balance in that particular account.

2 Petitioner's reliance on the
3 Dictionary Act is therefore misplaced. The
4 background rules in that Act don't apply if the
5 context of a particular statute indicates
6 otherwise. Here, the text of Section -- of
7 Section 5321(a)(5) demonstrates that Congress
8 used the singular precisely and with care to
9 establish a one-to-one relationship, the
10 relationship I just described: one account, one
11 violation, one potential civil penalty.

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

24 When a U.S. person fails to report
25 multiple qualifying accounts, the person

1 violates Section 5314 multiple times. And that
2 remains true even if the Secretary permits the
3 required reports about each account to be
4 consolidated on a single annual form.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: One of the things
7 that -- that seemed problematic to me is you
8 cite 5314, but it doesn't mention accounts.

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

15 JUSTICE THOMAS: Well, it doesn't say
16 that, though.

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

24 JUSTICE JACKSON: Can I ask you --

25 MR. GUARNIERI: -- with a foreign bank

1 --

2 JUSTICE JACKSON: -- why -- why -- why
3 isn't that relationship established by the
4 existence of a single account? In other words,
5 you -- you know if a person has one account that
6 they have a relationship for foreign purposes,
7 and there's nothing in the statute that makes
8 clear that Congress intended this statutory
9 provision to be the mechanism by which the
10 United States would get all of the information
11 about the full extent of that person's
12 relationship with any bank.

13 And let me just while I have a moment
14 tell you what really concerns me about your
15 position. You said it's a matter of distinct
16 concern that the United States has with respect
17 to any particular transaction. But it's not
18 illegal, as far as I can understand, for people
19 to have foreign bank accounts. It's not an
20 independent legal problem. And they can
21 structure those accounts in any way they want.
22 So they can put their million dollars in a
23 single account, they can have 10 accounts with,
24 right, of -- of -- of however much, you know,
25 \$100,000 apiece or whatever, but you're

1 extracting different penalties from them for
2 this purpose based on this totally lawful
3 behavior. It -- it seems to me to make more
4 sense that Congress was talking about wanting to
5 just know who was doing this kind of thing for
6 the purpose of this statute.

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

17 And if you look at that enumerated
18 list of information, this is an -- a list that
19 dates to the original Bank Secrecy Act of 1970.
20 It is a list that Congress said, look, the
21 reports and records that we are going to
22 require -- we are directing the Secretary to --
23 to require should address this information, and
24 the information there --

25 JUSTICE JACKSON: Yeah, but this

1 information doesn't say specifically accounts.
2 In fact, three of the four things are exactly
3 what I'm talking about, the identity and address
4 of the participants, the capacity in which the
5 participant is acting, the identity of the
6 parties in interest -- we just want to know who
7 you're involved with -- and a "description of
8 the transaction."

9 MR. GUARNIERI: Well, I -- Justice
10 Jackson, respectfully, I disagree, particularly
11 subparagraph (2), the legal capacity in which a
12 participant is acting. The -- the capacity in
13 which you hold these accounts can vary. You may
14 be the beneficial owner of one account at a
15 financial institution. You may be -- you may
16 have signatory authority over a second account
17 --

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

1 MR. GUARNIERI: Well, I -- I think --
2 I think the text here is specific enough to
3 convey that Congress was concerned about each
4 one of these accounts.

5 I would also point out, Justice
6 Jackson, the question before this Court is not
7 about whether the Secretary should have
8 implemented this in a different manner to
9 require reporting your relationship with a given
10 foreign financial institution as distinct from
11 the various accounts you have with that
12 financial institution.

13 Certainly, this list illustrates that
14 the per-form approach that Petitioner has
15 championed can't be correct --

16 JUSTICE ALITO: Suppose someone --

17 MR. GUARNIERI: -- because the
18 identity -- excuse me.

19 JUSTICE ALITO: -- suppose someone
20 reports multiple accounts, lists all that
21 person's accounts but messes up the address as
22 to each account. How many violations?

23 MR. GUARNIERI: Well, the -- the
24 violation here is the failure to report the
25 account as required by the Secretary in the

1 regulations in the form. So, if you misstate
2 the address of the bank for each one of 10
3 accounts, you've committed 10 violations.

4 Now, of course, the reasonable cause
5 exception would probably operate in those
6 circumstances to prevent the Secretary from
7 actually assessing a penalty, but we would -- we
8 would think about that as 10 accounts if you've
9 made 10 errors would -- excuse me, 10 violations
10 if you made 10 errors for 10 accounts.

11 JUSTICE ALITO: What is the
12 government's position as to whether reasonable
13 cause includes ignorance of the law?

14 MR. GUARNIERI: No. And we wouldn't
15 accept that in this circumstance or -- or -- or
16 -- or ordinarily in -- in terms of, you know,
17 parties aren't excused from satisfying their
18 legal obligations merely by claiming that
19 they're ignorant of them.

20 JUSTICE ALITO: Well, we are told --
21 maybe you'll dispute this fact -- that many,
22 many people who have foreign bank accounts of
23 over -- over \$10,000 are unaware of this
24 regulation, unaware of this law and these
25 regulations and, even if they're aware of it,

1 they're pretty hard to parse.

2 So all those people are committing
3 violations, and they -- if they come in and they
4 say I didn't know anything about this, doesn't
5 matter. That's not reasonable cause.

6 MR. GUARNIERI: I -- that could be an
7 important part of the reasonable cause analysis.
8 It's not sufficient standing alone.

9 The standard for reasonable cause that
10 the agency applies and that the lower courts
11 have adopted is that you have reasonable cause
12 for your failure to report an account if you
13 fail to report it despite exercising ordinary
14 business care and prudence.

15 Now, though, if -- if you can really
16 demonstrate that you were wholly unaware of
17 these obligations and also that if you had been
18 acting prudently you wouldn't have discovered
19 these obligations, I think that's a powerful
20 case for reasonable cause.

21 CHIEF JUSTICE ROBERTS: Counsel --

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

25 CHIEF JUSTICE ROBERTS: Counsel, does

1 the United States agree, as the Fifth Circuit
2 put it, that there is a longstanding canon of
3 construction that if the words of a tax statute
4 are doubtful, the doubt must be resolved against
5 the government and in favor of the taxpayer?

6 MR. GUARNIERI: No, Mister --

7 CHIEF JUSTICE ROBERTS: Now I know
8 your position is that you dispute that this is a
9 tax statute, but --

10 MR. GUARNIERI: Mr. Chief Justice,
11 I -- I don't think that there is a legitimate
12 sort of pro tax avoidance canon. This Court
13 hasn't applied a canon like that in -- in
14 decades.

15 CHIEF JUSTICE ROBERTS: Your -- your
16 friends --

17 MR. GUARNIERI: Again, of course, our
18 first line --

19 CHIEF JUSTICE ROBERTS: Oh.

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

25 JUSTICE KAVANAUGH: In response to

1 Justice Alito's question, you were initially, I
2 thought, a little blasé about the ignorance of
3 the law is no defense if you truly don't know a
4 legal requirement given the numerous regulatory
5 requirements imposed on someone, and it's true,
6 I believe, that a significant percentage of
7 people who have these accounts have no idea
8 they're supposed to do a reporting. That's a --
9 that's a little bit problematic.

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

17 That should be a definitive case,
18 shouldn't it?

19 MR. GUARNIERI: It -- it is -- it is a
20 very powerful case certainly. I -- I -- you
21 know, it's -- it's a --

22 JUSTICE KAVANAUGH: You added "a
23 very," that's good.

24 (Laughter.)

25 MR. GUARNIERI: Well, Justice

1 Kavanaugh, I -- I don't -- it's hard to give
2 categorical answers because this is a
3 fact-specific test, so, you know, we would want
4 to sort of take the facts as given in a -- in --
5 in a particular case.

6 The other thing that, you know, you
7 just talk about --

8 JUSTICE KAVANAUGH: Can you just help
9 me on the second paragraph of the reasonable
10 cause provision? Because I had trouble.

11 MR. GUARNIERI: Sure.

12 JUSTICE KAVANAUGH: I spent a lot of
13 time trying to parse that and had trouble
14 finding an answer to that in the briefs, what --
15 what that's getting at.

16 MR. GUARNIERI: Sure. And, candidly
17 --

18 JUSTICE KAVANAUGH: Top of -- top of
19 6a there.

20 MR. GUARNIERI: Yeah. Candidly,
21 Justice Kavanaugh, I tripped over that language
22 too when I first read the statute.

23 JUSTICE KAVANAUGH: Good.

24 MR. GUARNIERI: So we understand that
25 to mean that the balance in the account has to

1 have been properly reported at the time the
2 reasonable cause exception is being invoked.

3 And so, ordinarily, what would happen
4 in these cases --

5 JUSTICE KAVANAUGH: Got it.

6 MR. GUARNIERI: -- is that you would
7 file a delinquent FBAR that accurately reports
8 the balance in a particular account and that
9 would satisfy that.

10 I think it was written that way
11 because there's some suggestion in the history
12 that, you know, at -- at the time, legislators
13 contemplated that the balance in these accounts
14 might be reported in other ways as well, for
15 example, through the income tax system.

16 JUSTICE GORSUCH: Why -- why --

17 MR. GUARNIERI: That's not true,
18 but --

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

25 And then willful violations down in

1 (c), which is what you've -- your brief really
2 heavily focuses on, does talk heavily about
3 accounts and says that it's \$100,000 or 50
4 percent of the account, whichever is greater.
5 And it goes on and on and on about accounts.

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

14 So the one place where you need it you
15 don't seem to have it. What do we do about
16 that?

17 MR. GUARNIERI: Justice Gorsuch, I
18 think, certainly, the language in subparagraph
19 (c), the willful violations, I think --

20 JUSTICE GORSUCH: Yeah. But we --
21 we -- we're not in will -- we're not in willful
22 land, okay?

23 MR. GUARNIERI: Sure. I --

24 JUSTICE GORSUCH: So we put that
25 aside.

1 MR. GUARNIERI: Well --

2 JUSTICE GORSUCH: And one could easily
3 understand --

4 MR. GUARNIERI: -- I -- I am -- I --

5 JUSTICE GORSUCH: Let me just finish.

6 MR. GUARNIERI: Sure.

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

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

16 MR. GUARNIERI: Well, Justice Gorsuch,
17 two points. First, all of these subparagraphs
18 are talking about the exact same violation.
19 Subparagraph (a) is --

20 JUSTICE GORSUCH: Right. But if we --

21 MR. GUARNIERI: -- the only provision
22 in this statute --

23 JUSTICE GORSUCH: -- accept the view
24 that 5314, the violation is the failure to file
25 the report, that's the violation. Spot me that,

1 okay? Now you may disagree with that, but spot
2 me that for purposes of understanding 5321's
3 penalty provision.

4 Shouldn't -- shouldn't the absence of
5 the word "account" in the very provision where
6 you need it count for something?

7 MR. GUARNIERI: I -- I -- I don't
8 think that's right, Justice Gorsuch, because all
9 of these are talking about the exact same
10 violation. So there is only one part of
11 5321(a)(5) that authorizes the Secretary to
12 assess a civil penalty for a violation. That's
13 subparagraph (a).

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

21 JUSTICE GORSUCH: Everything below
22 the --

23 MR. GUARNIERI: The other thing,
24 Justice --

25 JUSTICE GORSUCH: Sorry. Go ahead.

1 MR. GUARNIERI: Well, Justice Gorsuch,
2 the other thing I -- I think might be relevant
3 here to -- to help get -- convey our -- our
4 reading of the statute, if you look at
5 subparagraph (c), it also says that --

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

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

9 JUSTICE GORSUCH: And I'm trying
10 to ask you --

11 MR. GUARNIERI: Sure. I'm trying to
12 make a --

13 JUSTICE GORSUCH: -- about the
14 non-willful.

15 MR. GUARNIERI: -- I'm trying to make
16 a point about how the different paragraphs
17 relate to one another.

18 JUSTICE GORSUCH: All right.

19 MR. GUARNIERI: Subparagraph (c) says
20 that you can't get the reasonable cause
21 exception if it's a willful violation. And so
22 what that means is that the reasonable cause
23 exception only applies in cases of non-willful
24 violations.

25 JUSTICE GORSUCH: Right.

1 MR. GUARNIERI: And the reasonable
2 cause exception is itself account-specific. It
3 uses language that refers to balances in the
4 account.

5 JUSTICE GORSUCH: Yes. Again, I think
6 that what was pointed out to me -- maybe you
7 have a response to this, I'd like to hear it if
8 you do -- is that's a defense that the taxpayer
9 then has to come forward with. That's not what
10 the government has to prove to establish a
11 non-willful violation.

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

15 JUSTICE GORSUCH: Okay. All right.

16 MR. GUARNIERI: And in certain --

17 JUSTICE GORSUCH: If I can -- if I can
18 shift then. I -- I think I understand your
19 point.

20 What do we do with the government's
21 guidance documents, which I would -- if it -- if
22 it favored the government, I would fully expect
23 the government to have an argument about Chevron
24 deference before us, or maybe it wouldn't these
25 days, I don't know. But we would at least be

1 asked to give it Skidmore deference.

2 And -- and, here, you -- you're --
3 you're -- they're like garlic to a vampire for
4 the government. You don't want to -- you don't
5 want to touch them. What do we do with that?

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

13 JUSTICE GORSUCH: But if the
14 government's telling taxpayers --

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

18 JUSTICE GORSUCH: It's -- it's going
19 to lead -- no -- nobody promulgates regulations
20 anymore. It's too troublesome. They issue
21 guidance documents.

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

1 them.

2 MR. GUARNIERI: Sure. The -- the --
3 the critical guidance document here is the
4 Internal Revenue Manual, which is the guidance
5 document that IRS examiners apply in assessing
6 penalties in these cases. It is publicly
7 available to taxpayers. If you look at the
8 Internal Revenue Manual, it expresses the same
9 per-account view that we are defending in this
10 case.

11 JUSTICE GORSUCH: What about --

12 MR. GUARNIERI: The documents that
13 Petitioner --

14 JUSTICE GORSUCH: -- what about all
15 the other materials?

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

21 JUSTICE GORSUCH: Up to 10,000.

22 MR. GUARNIERI: There is -- there is
23 no -- he -- the Petitioner has not identified a
24 single instance in which the government has ever
25 endorsed his view that you -- if you fail to

1 report multiple accounts, you can only be liable
2 for a single penalty.

3 And I'd just -- I'd -- I'd also like
4 to talk a little bit about exactly what
5 Petitioner's view is. Petitioner asks this
6 Court --

7 JUSTICE ALITO: Well, before you move
8 off that, the -- the March 2011 version of
9 Letter 3709 says, "For the failure to file TDF
10 90-22.1 due on or after June 30, 20" -- "2005,
11 the penalty cannot exceed \$10,000."

12 Do you think that's unclear?

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

1 JUSTICE ALITO: Well, your -- your
2 messaging to the public has certainly changed
3 over time, hasn't it?

4 MR. GUARNIERI: Well, the -- the -- as
5 I said, the key document here is the Internal
6 Revenue Manual, which has not changed over time.
7 Since 2008, that has articulated the -- the same
8 view that -- that we are defending in this
9 Court.

10 JUSTICE ALITO: What about criminal
11 violations? Do you have the same reading?

12 MR. GUARNIERI: Yes, we do. We think
13 that each -- if you satisfy the other elements
14 of the criminal offense in -- in Section
15 5322(a), that each failure -- or each willful
16 failure to disclose to the United States one of
17 your foreign bank accounts could be the basis
18 for a separate criminal prosecution.

19 I -- I -- I know, you know, Petitioner
20 has made a big deal about that, including this
21 morning repeating this fantastical figure about
22 1300 years in prison. I think the Court should
23 be assured that there are other significant
24 constraints on the scope of the criminal
25 prohibition in the Bank Secrecy Act, including,

1 in particular, this Court's decision in Ratzlaf
2 against the United States, which interpreted
3 that provision and construed it to require
4 willfulness in the heightened criminal law
5 sense. We can only bring a Bank Secrecy Act
6 criminal prosecution if we can prove beyond a
7 reasonable doubt that the defendant knew that
8 when he was acting what he was doing was
9 unlawful.

10 So those are rare cases, and that's
11 certainly not this case. We're not making an
12 allegation in this case that Petitioner had
13 satisfied that -- that heightened willfulness.
14 This is a -- a non-willful case, and -- and I
15 don't think the criminal statute really has
16 anything to do with the question before this
17 Court.

18 CHIEF JUSTICE ROBERTS: Well, you're
19 not making the allegation here, but your brief
20 recites facts that suggest that you think you
21 could.

22 MR. GUARNIERI: That's right, Mr.
23 Chief Justice. I -- I think this case came
24 pretty close to the line, and I -- I think
25 that's why the agency chose to go up to the

1 maximum available civil penalty in this case. I
2 mean, Petitioner earned more than \$70 million in
3 his time in Romania. He filed multiple Form
4 1040s that -- multiple individual income tax
5 returns during the period that he was living in
6 Romania.

7 If you had read carefully the
8 instructions to the Form 1040 during the years
9 in which he filed those forms, there are
10 instructions in -- in the Form 1040 process
11 about your foreign account reporting
12 requirements. There is a question on Schedule B
13 of 1040 that asks, do you have foreign bank
14 accounts? And I'm paraphrasing here, but in
15 substance, it says, if you have foreign bank
16 accounts, please see Treasury Department Form
17 90-22.1 for your FBAR filing obligations.

18 And I -- I think that's actually
19 another piece of -- of the puzzle here in terms
20 of the equities of the case. We are not trying
21 to trip people up in the 10 -- Form 1040
22 individual income tax return filing process.
23 There is -- there are instructions there about
24 the FBAR. We are trying to bring it to people's
25 attention so that they are aware of these filing

1 requirements and they can comply with them.

2 Petitioner was -- has -- had tried to
3 make the case that his violations here were --
4 were inadvertent. But there was substantial
5 evidence to the contrary. The district court
6 rejected his reasonable cause -- his assertion
7 of the reasonable cause defense. The Fifth
8 Circuit affirmed that on de novo review. And --
9 and he didn't seek this Court's review on that
10 issue.

11 JUSTICE KAVANAUGH: That's -- that all
12 makes sense as to this case. The amicus briefs
13 make a point that there are a number of
14 different categories of people who are not going
15 to fit that -- that description of this case,
16 immigrants in the United States and Americans
17 abroad who don't have this kind of knowledge.
18 And the statistics were, at least in the amicus
19 briefs, that there's a sizable percentage of
20 people who still don't know about this reporting
21 obligation.

22 Do you just want to respond to that
23 and try to explain who -- who the populations
24 are who are not reporting and the knowledge that
25 they might have about the requirement?

1 MR. GUARNIERI: Sure. We don't have
2 precise figures or data about the current rates
3 of compliance with -- with the foreign account
4 reporting obligation, so I can't tell the Court
5 what percentage of Americans living abroad
6 actually have a reportable foreign account,
7 meaning they have accounts outside the United
8 States that have an aggregate balance that
9 exceeds \$10,000. I know that's actually a
10 significant amount of money for many Americans.
11 So you're talking about the small slice of
12 people who have that much money in their
13 aggregate accounts and those accounts are
14 abroad.

15 You know, certainly, I don't think
16 adopting Petitioner's view in this case will
17 solve that problem. I mean, the whole Congress
18 authorized the Secretary to adopt -- excuse
19 me -- to assess penalties for non-willful
20 violations of the Act in 2004 after amassing
21 abundant evidence that, in the absence of those
22 penalties, the rates of compliance with these
23 foreign account reporting obligations were
24 relatively anemic. And that was a problem, and
25 that was a problem that Congress solved by

1 authorizing the penalties to assess -- excuse me
2 -- authorizing the Secretary to assess penalties
3 for non-willful violations.

4 In that same 2004 enactment, Congress
5 also created the reasonable cause exception,
6 which I think, again, speaks to an effort to
7 sort of make sure that the truly blameless have
8 an out here. And Congress also -- also
9 increased the penalties for willful violations
10 in that 2004 law.

11 JUSTICE ALITO: Well, I didn't
12 understand --

13 MR. GUARNIERI: So I -- I think the
14 whole history here demonstrates that this is
15 really a serious matter. And --

16 JUSTICE ALITO: No. Could you return
17 once again to your understanding of the
18 relationship between the reasonable cause
19 requirement and ignorance of the law? Your
20 first answer, when I asked that, was ignorance
21 of the law is not reasonable cause. But then
22 you -- you seemed to say, if someone isn't aware
23 of -- of the -- of the reporting requirement,
24 that makes a powerful case, a very powerful
25 case, for reasonable cause. So what is the

1 relationship exactly?

2 MR. GUARNIERI: Sure. The -- the
3 standard here is that you -- whether you were
4 acting with ordinary business care and prudence.
5 If you fit -- if you -- if you were, in fact,
6 aware of your FBAR reporting obligations, you're
7 out. There is no way you can qualify for the
8 reasonable cause. So ignorance -- it's sort of
9 a -- you know, you're -- you're only talking
10 about people who have a colorable claim to not
11 knowing about their filing obligations.

12 And then, with respect to that group
13 of individuals, the question is, well, should
14 they have known about their filing obligations?
15 And the conclusion of the lower courts here was
16 that Petitioner should have known about his
17 filing obligations.

18 JUSTICE ALITO: No, I understand -- I
19 -- I understand the -- the facts of this case,
20 but I'm -- I'm thinking of other cases.

21 MR. GUARNIERI: Sure. Well -- and
22 it's hard to generalize because whether you
23 should have known about your filing obligations
24 is going to depend on lots of factors that might
25 vary from one American to the next living

1 abroad. You know, were you a person of business
2 sophistication? Did you have the means to
3 retain professional tax and accounting advisors?
4 Were you filing the Form 1040, in which, if you
5 had read the instructions, you would have been
6 informed about your foreign bank account
7 reporting obligations? Is this your first
8 violation? You know, is it really credible to
9 say that you had 50 or 60 foreign bank accounts
10 with millions of dollars in them, you had
11 numbered accounts in Switzerland and
12 Liechtenstein, you were paying professional
13 Romanian tax lawyers and accountants, but you
14 made no inquiry into your obligations in the
15 United States? I -- that -- that's not
16 plausible in this case, but, you know, the
17 reasonable cause exception remains available to
18 those individuals who -- who would like to seek
19 to invoke it.

20 The -- the other part of that, I --
21 you know, I -- I understood from some of the
22 Court's questions earlier there was some
23 skepticism that the reasonable cause exception
24 is -- is a -- sort of a sufficient answer here
25 because it's applied by the agency in the first

1 instance.

2 But judicial review is also available.
3 If a -- if the agency determines that you lacked
4 reasonable cause and you disagree with that, you
5 can obtain judicial review of the agency's
6 determination. And -- and this case again
7 illustrates that. The Petitioner sought that.

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

11 MR. GUARNIERI: That's absolutely
12 correct, Justice Kavanaugh. There is no
13 requirement in this scheme that you fully pay
14 the penalties before you get review in federal
15 district court. And that's an important
16 difference between these penalties and tax
17 penalties.

18 JUSTICE KAGAN: Can I --

19 JUSTICE JACKSON: But, presumably, you
20 would have to have a lawyer to do so. So there
21 is some cost to seeking to -- to get out of
22 this, right?

23 MR. GUARNIERI: That -- that's
24 absolutely true, Justice Jackson, although we're
25 talking about the small portion of people who

1 have foreign bank accounts abroad with a balance
2 greater than \$10,000, and the question
3 presented here really only impacts those
4 individuals who have more than one foreign bank
5 account. So, you know, I --

6 JUSTICE JACKSON: But, realistically,
7 that's anybody who's living overseas? I mean,
8 you -- this applies to people who are living
9 overseas and have more than \$10,000 in a bank
10 account, a foreign bank -- it's a foreign bank
11 account because they're living there, but --

12 MR. GUARNIERI: Yes, I agree, with --
13 with the slight amendment it's -- it's U.S.
14 citizens. It's a --

15 JUSTICE JACKSON: Right. So any U.S.
16 citizen --

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

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

23 MR. GUARNIERI: That's correct.

24 JUSTICE GORSUCH: Counsel, I -- I'd
25 like to just understand your -- how -- how it --

1 the form interacts with -- with -- with your
2 understanding of the penalties.

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

8 Is that right?

9 MR. GUARNIERI: No, Justice Gorsuch.
10 Under the 25 account rule, you have -- there
11 is a -- a box that you would check saying that
12 you satisfy the 25 account rule. You also have
13 to list the precise number of accounts that you
14 have.

15 JUSTICE GORSUCH: Okay. The number,
16 okay.

17 MR. GUARNIERI: Under the current
18 regulation --

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

25 Is there some incongruity there that

1 people with more bank accounts are actually less
2 susceptible to penalty than those with fewer?

3 MR. GUARNIERI: Well, I -- I take the
4 point, Justice Gorsuch, you -- you certainly
5 have to provide less information in the first
6 instance if you qualify for one of these 25
7 account rules.

8 You are under a continuing obligation
9 to provide that information to the Secretary,
10 and in that sense, if you misstate the
11 information when the Secretary requests it, you
12 are in the same position as the individual who
13 is required to provide that information up front
14 on the form.

15 As we've explained in our brief, the
16 Financial Crimes Enforcement Net -- Network has
17 published a Notice of Proposed Rulemaking to
18 eliminate the 25 account rule. It is a vestige
19 of an era before word processing and electronic
20 filing in which, you know, the -- the agency's
21 judgment at the time was that individuals who
22 had a very large number of accounts, the
23 administrative burden of reporting all of those
24 accounts in the first instance rather than just
25 providing information when requested exceeded

1 the value to the department of receiving that
2 information on the form itself.

3 I -- I think we might strike a
4 different balance now, but, again, that --
5 there's an ongoing rulemaking addressing that.

6 And I certainly don't think the 25
7 account rules helps Petitioner in this case
8 because it doesn't undermine our position that
9 each one of these accounts is a matter of
10 distinct concern, and if you fail to report any
11 one of them, you have committed a distinct
12 violation.

13 JUSTICE SOTOMAYOR: There is some
14 basic information besides just checking the box,
15 isn't there?

16 MR. GUARNIERI: That's absolutely
17 right, Justice Sotomayor. You are required to
18 fill out the other portion of the form
19 identifying information about the filer of the
20 form.

21 Also, to -- to be precise, there
22 are -- there are two 25 account rules in the
23 current regulations, and they require you to
24 account -- to -- to report the -- the
25 relationship that you have to the accounts, so

1 do you have a financial interest in those
2 accounts or do you have signatory or other
3 authority over the accounts but not a financial
4 interest. That information is provided even if
5 you invoke one of these rules.

6 If you have signatory authority over
7 one of these accounts, you are required to
8 identify the beneficial owner of the account
9 even if you qualify for one of these 25 account
10 rules.

11 So -- so there is certainly additional
12 information.

13 JUSTICE SOTOMAYOR: I guess the
14 question is, you don't have to identify the
15 account number?

16 MR. GUARNIERI: You don't have to
17 provide some of the granular information that
18 would have otherwise been required if you don't
19 qualify, like the account number and the address
20 and things like that.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Anything further here?

24 Okay. Anything further?

25 Okay. Thank you.

1 MR. GUARNIERI: Thanks, Chief Justice.

2 CHIEF JUSTICE ROBERTS: Mr. Geysler,
3 rebuttal?

4 REBUTTAL ARGUMENT OF DANIEL L. GEYSER
5 ON BEHALF OF THE PETITIONER

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

8 First, for the reasonable cause
9 exception, I think, when my friend says that
10 ignorance of the law is no excuse, what this is
11 showing is exactly what Justice Jackson pointed
12 out. This is inviting regulated parties to have
13 to spend money on lawyers to litigate first at
14 the agency level, hope they win, and then, if
15 they lose, litigate in court to try to
16 establish, as my friend suggested, is a
17 fact-specific defense.

18 That is quite the burden on the
19 average person, especially with the cudgel of
20 per-account penalties hanging over their head if
21 they lose. Anyone with 10 or 20 accounts could
22 be facing massive fines if it turns out that
23 they can't prevail on the reasonable cause
24 defense, and yet, just so you know how extreme
25 this can be, if you look to pages 104 and 106 of

1 the Joint Appendix, you'll see that some of
2 these \$10,000 penalties in this case were
3 premised on accounts that had \$24 in them for
4 the year, \$31, \$25.

5 This is -- this is very unlikely what
6 Congress would have actually been thinking, is
7 this isn't an appropriate calibrated punishment
8 for a non-willful violation.

9 Now, for the avoidance canons, I think
10 it's interesting that my friend concedes that
11 5322 defines "violation" the same way as 5321.
12 And I know he said that it -- it is, in fact, a
13 fantastical number to suggest that Congress
14 thought that there would be a 1,300-year prison
15 sentence for a -- a -- a reporting error.

16 And I know my friend says, well,
17 willfulness is a very high bar, and it certainly
18 is, but the point -- that misses the point. Was
19 Congress in looking at this saying, if you
20 willfully violate a reporting requirement with
21 no other criminal misconduct, a prison sentence
22 in the -- in the thousands is an appropriate
23 punishment?

24 I think that casts doubt that what
25 Congress was thinking a violation is really a

1 per-account measure as opposed to a per-report
2 measure. And I think that follows specifically
3 when the language of the actual statute talks
4 about filing reports.

5 It does not say reporting accounts.
6 It uses the word "file." You have to submit the
7 document. And under the current regulations,
8 which is all that really matters for this case,
9 you file a single annual report listing all of
10 your accounts.

11 Just to correct a minor factual point
12 which I know isn't really critical to the
13 statutory question, but just to be clear for
14 this case, Petitioner did file some U.S. tax
15 returns while he was living abroad. He did so
16 because he had invested in a relative's
17 restaurant in California. The relative prepared
18 the tax returns for him. And the reason he
19 thought those were required is because the money
20 was earned in the United States.

21 He misunderstood United States tax
22 law, which I think a lot of people do. And when
23 you're dealing with -- my friend says too it's
24 very unusual to have foreign accounts with
25 \$10,000 or more. Again, not for people living

1 abroad. Any U.S. resident or U.S. citizen
2 living abroad is subject to these requirements.

3 For those U.S. citizens, this isn't a
4 foreign bank account, this is your bank account
5 or it could be your investment account or your
6 retirement account or your safety deposit box or
7 your checking account. And you need to find an
8 accountant in -- in wherever you're living
9 that's knowledgeable in U.S. Bank Secrecy Act
10 law that knows you need to -- need to file an
11 FBAR.

12 To even know to ask that question is
13 pretty extraordinary when accountants in the
14 U.S., as the Center For Taxpayer Rights pointed
15 out, were -- in the United States accounts were
16 unaware of these requirements dating back about
17 a decade ago.

18 So, again, the question really in this
19 case is what was Congress thinking when they
20 imposed a specific requirement to file reports
21 or keep records. And they did not say do this
22 by account. As Justice Gorsuch pointed out,
23 there is no language in (a)(5) defining the
24 violation that is phrased in account-specific
25 language even though Congress took care to

1 specify what a separate violation is in other
2 sections of 5321.

3 I think, when they didn't do that with
4 (a)(5) and when you look at the extraordinary
5 consequences of adopting the government's
6 approach, where you're effectively giving the
7 IRS discretion to decide between a range of zero
8 and many multiples of the statutory ceiling, I
9 think it becomes pretty clear what Congress had
10 in mind.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 11:15 a.m., the case
14 was submitted.)

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