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SEVERITY UNDER SCRUTINY: THE U.S. SUPREME COURT BATTLE OVER THE FBAR PENALTY

Beckett Cantley¹
Geoffrey Dietrich²

Abstract

In recent years, Congress strengthened federal regulation of foreign bank accounts held by United States citizens. In 1970, Congress passed the Bank Secrecy Act (BSA), requiring U.S. citizens to report their foreign bank accounts using a form called the Foreign Bank Account Report, or “FBAR.” However, the Treasury Department rarely enforced this requirement. After the Patriot Act’s passage came the Bank Secrecy Act 2004 amendment, allowing the Treasury Department to delegate enforcement of U.S. foreign bank account reporting to the Internal Revenue Service (IRS) through the FBAR. The amendment’s major change to the law concerned new penalties for non-willful FBAR non-compliance. The language of the amendment created ambiguity concerning how the IRS should penalize taxpayers whose non-compliance was not willful. The BSA language failed to specify whether the failure to report penalties should be calculated per account or per unreported FBAR form. The United States government argued for the calculation of penalties to be per account, and those faced with the penalties argued the calculation should be done per form. The Ninth and Fifth U.S. Circuit Courts of Appeal differed on this issue, with the Ninth Circuit ruling in favor of per form and the Fifth Circuit ruling in favor of per account. The Supreme Court ultimately granted certiorari of the case from the Fifth Circuit and ruled in favor of per form. This article examines: (1) the history of U.S. taxpayer foreign bank account reporting requirements; (2) the changes to reporting requirements over the years; (3) the decision on what penalties

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the IRS could impose passed down by both the U.S. Ninth and Fifth Circuit Court of Appeals; (4) the Ninth and Fifth Circuits’ arguments regarding per form versus per account; (5) an overview of the Supreme Court’s decision in *Bittner v. United States*; and (6) the future effects of the Supreme Court’s decision.

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I. INTRODUCTION

Many United States citizens hold interests in financial accounts in foreign countries, but up until recently many of those account holders preferred not to disclose those holdings.³ In fact, this has been a major source of frustration for the U.S. Treasury Department.⁴ However, no one in the Treasury Department is more frustrated than the department tasked with enforcing the regulation, the IRS.⁵ When Congress passed the BSA in 1970, they thought they solved this problem.⁶ The BSA required U.S. taxpayers to report their foreign financial accounts using the FBAR.⁷ The

³ See *infra* note 24, at 2.

⁴ See *infra* note 24, at 2.

⁵ See *infra* note 24, at 2.

⁶ See *infra* note 24, at 2.

⁷ 31 U.S.C. § 5314(a) (1994).

BSA also required taxpayers to keep records of their foreign accounts.⁸ Willful failure to comply could lead to both civil and criminal penalties.⁹ Most taxpayers knew of, but rarely complied with, this requirement through the early 2000s.¹⁰ All that was about to change.¹¹

In 2004, Congress amended the BSA to include new penalties for non-willful violations and increased penalties for willful violations.¹² Before this amendment, there had been no penalties for non-willful non-compliance.¹³ After the amendment's passage, the Treasury Department tasked the IRS with enforcing these regulations, including the new requirement from the amendment.¹⁴ Since then, IRS efforts to penalize non-willful FBAR noncompliance have come under judicial review in at least two U.S. circuit courts.¹⁵ Both cases centered around whether the IRS could assess its annual penalty for non-willful violations (1) per bank account the taxpayer failed to report or (2) per FBAR form not properly filed.¹⁶ Imposing penalties per account can produce very large aggregate penalties.¹⁷ Penalized taxpayers argue that penalties thus imposed can quickly become excessive.¹⁸ However, the IRS argues that the statute requires the reporting of each foreign bank account and, therefore, imposing penalties per FBAR is far too narrow an interpretation.¹⁹ Such a narrow reading of the statute would—in the eyes of the IRS—reduce compliance penalties to the point of defeating Congress's intention to deter tax evasion and fraud.²⁰ The Ninth Circuit held with the taxpayer, ruling in favor of a per-form penalty.²¹ However, the Fifth Circuit later held with the IRS, ruling in favor of per-account penalties.²² The United States

⁸ 31 U.S.C. § 5314(c).

⁹ 31 U.S.C. § 5321–22.

¹⁰ See *infra* note 24, at 2.

¹¹ See generally *infra* note 24, at 2.

¹² See *infra* note 24, at 17–18.

¹³ See *infra* note 24, at 2.

¹⁴ See *infra* note 24, at 2.

¹⁵ See *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021); see also *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021), *rev'd and remanded*, *Bittner v. United States*, 143 S. Ct. 713 (2023).

¹⁶ *Boyd*, 991 F.3d at 1079; *Bittner*, 19 F.4th at 737.

¹⁷ *Boyd*, 991 F.3d at 1079; *Bittner*, 19 F.4th at 739.

¹⁸ *Bittner*, 19 F.4th at 739.

¹⁹ *Boyd*, 991 F.3d at 1079.

²⁰ Brief for the Respondent at 36–37, *Bittner v. United States*, No. 21-1195 (U.S. filed Sept. 30, 2022).

²¹ *Boyd*, 991 F.3d at 1086.

²² *Bittner*, 19 F.4th at 749.

Supreme Court ultimately agreed with the Ninth Circuit and ruled in favor of a per-form penalty.²³

Part I of this article provides the history of the FBAR filing requirement and the statute authorizing the requirement. Part II explains current FBAR statutory regulations and details the filing requirements more specifically. Part III discusses the analysis behind the Ninth Circuit's ruling that the IRS can only penalize non-willful noncompliance on a per-FBAR basis. Part IV discusses the Fifth Circuit's disagreement with the Ninth Circuit, the reasoning behind its holding, and its subsequent ruling, which favored per-account penalties as the correct interpretation of 31 U.S.C. § 5314. Part V explains the arguments behind the Fifth Circuit and Ninth Circuits' arguments regarding per form versus per account. Part VI outlines the Supreme Court's decision in *Bittner v. United States* and the implications of the Court's decision going forward.

II. THE HISTORY OF THE BSA OF 1970 AND ITS FBAR REPORTING REQUIREMENTS

A. *The Inception and Intent of the BSA of 1970*

The BSA of 1970—codified in Title 31 (Money and Finance) of the U.S. Code—contains the statutory language establishing the filing requirement that U.S. citizens must report their foreign bank accounts and financial interests.²⁴ With the BSA of 1970, Congress sought to require taxpayers to file disclosure reports and retain financial records that might later help the Treasury Department successfully prosecute criminal, tax, and regulatory investigations.²⁵ These reports are included as part of the FBAR.²⁶ The BSA, as codified in 31 U.S.C. § 5314, provides, in pertinent part:

[T]he Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen,

²³ *Bittner v. United States*, 143 S. Ct. 713, 725 (2023) (*Bittner II*).

²⁴ Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, and Why It Matters*, 7 HOUS. BUS. & TAX L.J. 1, 3 (2006), https://www.chamberlainlaw.com/assets/htmldocuments/FBAR_Article_in_HB_TLJ.pdf.

²⁵ *Id.*

²⁶ *Id.* at 2.

or person makes a transaction or maintains a relation for any person with a foreign financial agency.²⁷

Essentially, § 5314 creates two requirements: (1) filing an annual report detailing each foreign bank account and financial interest held by U.S. citizens,²⁸ and (2) retaining those financial account records for five years.²⁹ Each requirement brings its own mandates. The first reads, in pertinent part:

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 shall report such relationship . . . for each year . . . and shall provide such information as shall be specified in a reporting form . . . to be filed by such persons.³⁰

While the requirement to retain records reads, in pertinent part:

Records of accounts . . . shall be retained by each person having a financial interest in or signature or other authority over any such account. Such records shall contain the name in which each such account is maintained, the number . . . of such account, the name and address of the foreign bank . . . with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years³¹

31 CFR § 1010.306(c) says: “Reports required to be filed by § 1010.350 shall be filed . . . on or before June 30 of each calendar year with respect to foreign financial accounts exceeding \$10,000 maintained during the previous calendar year.”³² Thus, according to the above statute and regulations, a person must file an FBAR if the person is a U.S. person with any financial interest in—or signature or other authority over—any financial accounts located outside the United States with an aggregate value exceeding \$10,000 at any time during any calendar year.³³

²⁷ 31 U.S.C. § 5314(a).

²⁸ 31 C.F.R. § 1010.350 (2021).

²⁹ *Id.* § 1010.420 (2021).

³⁰ *Id.* § 1010.350 (2021).

³¹ *Id.* § 1010.420 (2021).

³² *Id.* § 1010.306(c) (2021).

³³ Sheppard, *supra* note 24, at 5.

U.S. citizens who willfully fail to comply with the FBAR filing requirement could face steep penalties.³⁴ However, proving willfulness in court has historically been difficult³⁵ and thus has limited the ability of the IRS to enforce these penalties.³⁶ As the U.S. Supreme Court noted in *Cheek v. United States*, the government must overcome a high evidentiary standard to prove willfulness.³⁷ It requires proving (1) “the law imposed a duty on the [taxpayer],” (2) “the [taxpayer] knew of this duty,” and (3) the taxpayer “voluntarily and intentionally violated that duty.”³⁸ Carrying this burden requires defeating any claim of ignorance, misunderstanding of the law, or “a good-faith belief that [the taxpayer] was not violating any of the provisions of the tax laws.”³⁹

If the IRS can prove willfulness, increased legal penalties become available.⁴⁰ In the case of willful transactional violations, the maximum penalty is the greater of \$100,000 or fifty percent of the amount of the transaction (not to exceed \$100,000).⁴¹ Similarly, when a taxpayer willfully “fail[s] to report the existence of an account or any [of the] identifying information required,” the maximum penalty is the greater of \$100,000 or fifty percent of “the balance in the account at the time of the violation.”⁴² In summary, if the IRS can establish willful noncompliance with § 5314, the penalty could range from \$100,000 to fifty percent of a theoretically unlimited amount.⁴³ While the BSA codified these provisions, the IRS rarely enforced them.⁴⁴

There were numerous reasons for the lack of enforcement.⁴⁵ “First, the government found it difficult to gather sufficient admissible

³⁴ *Id.* at 2.

³⁵ *Id.* at 11.

³⁶ A REPORT TO CONGRESS IN ACCORDANCE WITH § 361(B) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT), U.S. DEP’T OF THE TREASURY (Apr. 26, 2002), at 10 [hereinafter Treasury Report 2002].

³⁷ 498 U.S. 192, 201–02 (1991).

³⁸ *Id.* at 201.

³⁹ *Id.* at 202.

⁴⁰ Sheppard, *supra* note 24, at 18.

⁴¹ 31 U.S.C. § 5321(a)(5)(C)–(D).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See TREASURY REPORT 2002, *supra* note 36, at 8.

⁴⁵ Sheppard, *supra* note 24, at 13.

evidence of undisclosed foreign financial accounts.”⁴⁶ Taxpayers hiding money overseas often put their money in financial “institutions located in countries with [very] strong [bank] secrecy laws and no tax treaty with the United States.”⁴⁷ This creates a thoroughly difficult discovery process.⁴⁸ Second, even if a foreign country has “a mutual legal assistance arrangement in place with the United States,” obtaining the right information is a “cumbersome, time-consuming process.”⁴⁹ Third, the target taxpayers who avoid filing FBARs often commit other violations, such as “money laundering, tax evasion, and fraud.”⁵⁰ Prosecutors often bring these other charges rather than FBAR violations in court.⁵¹ In many cases, prosecutors could charge taxpayers with both fraud and failing to file an FBAR, but only pursue a fraud charge because it is easier to prove in court.⁵² Prosecutors find it too difficult to meet the evidentiary standard established in *Cheek*.⁵³ Simply put, proving a taxpayer acted “willfully” in not filing an FBAR is incredibly difficult, so prosecutors often do not prosecute FBAR violations.⁵⁴ Therefore, the Treasury Department estimated FBAR compliance at less than twenty percent before the 2004 changes.⁵⁵ Between 1993 and 2002, the U.S. government only considered imposing monetary penalties in twelve cases.⁵⁶ Of this dozen, only two taxpayers received penalties.⁵⁷

B. *The 2004 Amendment and Its Impact on BSA and FBAR*

Enforcement

After the terrorist attacks of September 11, 2001 and the subsequent passage of the Patriot Act, everything changed.⁵⁸ The U.S. government expanded its powers in every direction and decided to address the deficiencies in the Executive Branch’s enforcement abilities.⁵⁹ With

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ TREASURY REPORT 2002, *supra* note 36, at 9.

⁵² *See* Sheppard, *supra* note 24, at 13.

⁵³ *Id.* at 11, 13–14; TREASURY REPORT 2002, *supra* note 36, at 10.

⁵⁴ *See* Sheppard, *supra* note 35, at 13–14; TREASURY REPORT 2002, *supra* note 36, at 9–10.

⁵⁵ TREASURY REPORT 2002, *supra* note 36, at 6.

⁵⁶ *Id.* at 9.

⁵⁷ *Id.*

⁵⁸ *See* Sheppard, *supra* note 24, at 2.

⁵⁹ *Id.* at 2, 12.

this expansion of powers came the ability to enforce FBAR violations.⁶⁰ First, in April 2003, the U.S. Treasury Department Financial Crimes Enforcement Network (FinCEN) delegated enforcement of civil violations (such as failing to properly file an FBAR) to the IRS.⁶¹ Then, on October 22, 2004, Congress passed the American Jobs Creation Act of 2004 (Jobs Act).⁶² Under the Jobs Act, the Treasury Secretary (and the IRS) may impose a civil penalty on any person who violates § 5314.⁶³ As discussed, this violation encompasses both failures to file an FBAR properly and failures to retain all of the necessary records concerning those foreign financial accounts.⁶⁴

In the case of non-willful violations, the IRS may now impose a maximum penalty of \$10,000 per violation.⁶⁵ However, the IRS cannot impose such a penalty if both of the following conditions are met: (1) the “violation was due to reasonable cause”; and (2) “the amount of the transaction or the balance in the account at the time of the transaction was properly reported.”⁶⁶ The new law also allows for a higher maximum penalty for willfulness.⁶⁷ For willful violations, the IRS could now impose a penalty of \$100,000 or fifty percent of the transaction amount, whichever is greater.⁶⁸ In situations “involving a failure to report the existence of an account” or any required account information, the IRS may assess a penalty of \$100,000 or 50% of the account balance when the violation occurred, whichever is greater.⁶⁹

The 2004 amendment made three changes.⁷⁰ First, it added a new penalty for cases involving non-willful violations of 31 U.S.C. § 5314.⁷¹ Second, it changed the burden of proof in certain situations.⁷² Previously,

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 15–16.

⁶² American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (codified as amended at 31 U.S.C. § 5321).

⁶³ 31 U.S.C.A. § 5321(a)(5)(A) (West 2004).

⁶⁴ See Sheppard, *supra* note 24, at 2; see also cases cited, *supra* note 15.

⁶⁵ 31 U.S.C.A. § 5321(a)(5)(B)(i) (West 2021).

⁶⁶ *Id.* § 5321(a)(5)(B)(ii)(I)–(II).

⁶⁷ Compare Boyd, 991 F.3d at 1079, with 31 C.F.R. § 1010.420 (2011).

⁶⁸ 31 U.S.C.A. § 5321(a)(5)(C)(i)(I)–(II) (West 2021).

⁶⁹ *Id.* § 5321(a)(5)(C)–(D)(ii).

⁷⁰ See 31 U.S.C.A. § 5321 (West 2004).

⁷¹ United States v. Boyd, CV 18-803-MWF (JEMx), 2019 U.S. Dist. LEXIS 68863, *14 (C.D. Cal., Apr. 23, 2019), *rev'd*, 991 F.3d 1077 (9th Cir. 2021).

⁷² *Id.* at 1083.

the IRS needed to demonstrate the violator's willfulness.⁷³ Under the new law, the IRS could assess a penalty anytime a taxpayer failed to properly file an FBAR or maintain the required records.⁷⁴ Third, the amendment increased the maximum assessable penalty for willful violations.⁷⁵ The previous penalty ranged from \$25,000 to \$100,000, depending upon the transaction amount or the account balance.⁷⁶ Now, the lower limit of the penalty range has increased to \$75,000 per violation, and the range has no monetary ceiling—just a cap of half the account balance.⁷⁷ The amendment made failing to file an FBAR a serious offense with major financial consequences for taxpayers holding large sums of money in undisclosed foreign financial accounts.⁷⁸ Congress's intent is clear: "taxpayers must disclose, disclose, disclose, or suffer the consequences."⁷⁹

III. NINTH CIRCUIT INTERPRETATION OF THE IRS ABILITY TO ASSESS PENALTIES

A. *United States v. Boyd*

On September 1, 2020, the U.S. Ninth Circuit Court of Appeals heard *United States v. Boyd*.⁸⁰ Jane Boyd, an American citizen, held financial interests in fourteen accounts in the United Kingdom.⁸¹ After her father died in 2009, she deposited her inheritance into those various accounts, increasing the balances significantly.⁸² Boyd then received interest and dividend income from those accounts but did not report the income on her 2010 return, file the required 2010 FBAR, or disclose the accounts to the IRS.⁸³ In 2012, she disclosed her income from those accounts and filed an accurate FBAR for each of the years and accounts the IRS required her to report.⁸⁴ The filed FBAR for 2010 listed fourteen

⁷³ *Id.*

⁷⁴ *Id.* at 1096.

⁷⁵ See 31 U.S.C. § 5321(a)(5) (explaining the foreign financial agency violation penalties).

⁷⁶ *Boyd*, 991 F.3d at 1080.

⁷⁷ 31 U.S.C. § 5321(a)(5)(C–D).

⁷⁸ *Boyd*, 991 F.3d at 1083.

⁷⁹ RIA's COMPLETE ANALYSIS OF THE AM. JOBS ACT OF 2004, at 361 (2004) (comment by Jasper L. Cummings, Jr. and Robert P. Hanson).

⁸⁰ *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021).

⁸¹ *Id.* at 1078–79.

⁸² *Id.* at 1079.

⁸³ *Id.*

⁸⁴ *Id.*

foreign accounts, with a total balance exceeding \$10,000.⁸⁵ The IRS concluded Boyd committed thirteen non-willful violations of the reporting requirement under 31 U.S.C. § 5314, and assessed one violation per account she failed to timely disclose for 2010.⁸⁶

The issue in *Boyd* was whether the IRS should assess non-willful violations of 31 U.S.C. § 5314 per FBAR (i.e., per noncompliant year) or per undisclosed account on the incorrectly filed FBAR.⁸⁷ In this instance, the IRS counted the violations per account the taxpayer failed to disclose for that particular year.⁸⁸ The taxpayer argued the IRS should assess the penalties only per FBAR, so she would only be noncompliant for filing the 2010 FBAR untimely.⁸⁹ Although she accurately completed the form, she filed it late.⁹⁰ The Ninth Circuit ultimately held that the IRS could not count violations per undisclosed account.⁹¹ Instead, the Court held that the IRS could only penalize the taxpayer per FBAR improperly or untimely filed for each year, and not per account the taxpayer failed to properly disclose.⁹²

B. *Parties' Arguments of Per Account v. Per Form and the Ninth*

Circuit's Analysis

Boyd argued that the statutory language of 31 U.S.C. § 5314 did not support a separate penalty for each account on the 2010 FBAR she filed untimely.⁹³ Rather, Boyd argued that the statutory language provides that a non-willful, untimely, but accurate FBAR constitutes a single violation subject to the maximum penalty of \$10,000.⁹⁴ As such, Boyd asserted the IRS's \$47,279 penalty was incorrect and the IRS should have assessed a \$10,000 penalty.⁹⁵ The government disagreed, arguing that a single late but accurate FBAR may generate multiple non-willful violations since the 31 U.S.C. § 5314 reporting requirements extend to

⁸⁵ *Id.* at 1078–79.

⁸⁶ *United States v. Boyd*, 991 F.3d 1077, 79 (9th Cir. 2021).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1079–80.

⁹² *United States v. Boyd*, 991 F.3d 1077, 1082–83 (9th Cir. 2021).

⁹³ *Id.* at 1079.

⁹⁴ *Id.*

⁹⁵ *Id.*

each foreign account.⁹⁶ In the government’s view, Boyd’s interpretation of the 31 U.S.C. § 5314 amendment is incompatible with the original statute’s language.⁹⁷ Even in relation to the penalties for non-willful violations, the language addresses the specific accounts held, and not simply the filing of the FBAR.⁹⁸

The court opined that while the language of the penalties for willful violations is clear, the language used for penalties of non-willful violations is vague.⁹⁹ The language in 31 U.S.C. § 5321(a)(5)(A) provides for the assessment of a monetary penalty on any person “who violates, or causes any violation of[,] any provision of section 5314.”¹⁰⁰ The court contends that “Congress did not define ‘provision.’”¹⁰¹ The court thereby interpreted “provision” as meaning the regulatory mechanisms by which § 5314 would be enforced.¹⁰² The language says that a U.S. citizen with foreign financial accounts must report them to the IRS and maintain records. The mechanism for doing so is the FBAR, which discloses these accounts; without the FBAR, there is no way for the taxpayer to comply with the statute.¹⁰³

The court then reviewed the nature of Boyd’s violation.¹⁰⁴ Though she had failed to disclose her foreign financial accounts in a timely manner, she did disclose them, and her FBAR was accurate.¹⁰⁵ The court stated that Boyd did not violate 31 C.F.R. § 1010.350(a), the regulation that delineates the content of the report (FBAR).¹⁰⁶ Though she was not timely in filing her 2010 FBAR, the FBAR and its contents were accurate.¹⁰⁷ The court thereby disagreed that she had committed multiple non-willful violations of § 5314, simply because she failed to file the 2010 FBAR in a timely manner.¹⁰⁸

The government then argued that the word “any” before “violation” in § 5321(a)(5)(A) indicates that several violations may

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *United States v. Boyd*, 991 F.3d 1077, 1081, 1083 (9th Cir. 2021).

⁹⁹ *Id.* at 1083–84.

¹⁰⁰ *Id.* at 1080; 31 U.S.C. § 5321(a)(5)(A).

¹⁰¹ *Boyd*, 991 F.3d at 1081.

¹⁰² *Id.*; *see also* 31 U.S.C. § 5314.

¹⁰³ *Boyd*, 991 F.3d at 1082.

¹⁰⁴ *Id.* at 1082–83.

¹⁰⁵ *Id.* at 1079–80, 1083.

¹⁰⁶ *Id.* at 1082; *see* 31 C.F.R. § 1010.350(a) (2011).

¹⁰⁷ *Boyd*, 991 F.3d at 1082.

¹⁰⁸ *Id.* at 1083; *see* 31 U.S.C. § 5314.

occur.¹⁰⁹ The court was unpersuaded, and again referred to the provision prescribing the FBAR as the mechanism for enforcing § 5314.¹¹⁰ The court found that since the statute cannot be enforced without filing the FBAR, the violation the taxpayer committed was the failure to use the mechanism to comply with § 5314.¹¹¹ The new penalty provision in § 5321(a)(5)(B)(i) does not expressly authorize multiple non-willful violations, while the willful violation language is very clear.¹¹² The court therefore held that if non-willful violations were meant to be enforced in the same manner as willful violations, then the language authorizing that would be plainly stated, as it was for willful violations.¹¹³

The court stated, “Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”¹¹⁴ Therefore, the court “presume[d] that Congress purposely excluded [any] per-account language from the non-willful penalty provision” while keeping per-account language in the willful violation section of § 5314.¹¹⁵ Based upon that presumption, the court further presumed that Congress acted intentionally in omitting that language.¹¹⁶ Therefore, the IRS did not follow the statutory intent of Congress when it penalized Boyd per account.¹¹⁷ As the court said, “[w]e decline to read into the statute language that Congress wrote in the willful penalty provision but omitted from the non-willful penalty provision.”¹¹⁸

C. *The Dissent*

Of the Ninth Circuit panel’s three judges, two judges held in favor of Boyd and one judge dissented.¹¹⁹ The dissent argued that the creators of the Bank Secrecy Act and 31 U.S.C. § 5314 intended to combat the “widespread use of foreign financial institutions . . . [to violate or evade]

¹⁰⁹ *Boyd*, 991 F.3d at 1082; see 31 U.S.C. § 5321(a)(5)(A).

¹¹⁰ *Boyd*, 991 F.3d at 1082.

¹¹¹ *Id.*

¹¹² *Id.* at 1083; see also 31 U.S.C. § 5321(a)(5)(B)(i).

¹¹³ *Id.* at 1083–1084.

¹¹⁴ *Id.* (quoting *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015)).

¹¹⁵ *Id.* at 1084.

¹¹⁶ *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021).

¹¹⁷ *Id.* at 1085.

¹¹⁸ *Id.* at 1084.

¹¹⁹ *Id.* at 1086 (Ikuta, J., dissenting).

domestic criminal, tax, and regulatory enactments.”¹²⁰ The dissent went on to state that IRS penalties are an extremely effective enforcement tool, and that the majority’s interpretation of the statute narrows the scope to the point of limiting the statute’s ability to deter these criminal acts.¹²¹ The dissenting judge opined that the clearest interpretation of 31 U.S.C. § 5314 was that a non-willful violation could be penalized per account, and declared “[the majority’s] interpretation is contrary to the language of the relevant statutes and regulations as well as being implausible in context”¹²²

The dissent believed the court should consider the source of the penalties to be the language of 31 U.S.C. § 5314, as opposed to the provision which created the mechanism for enforcing it.¹²³ The statute clearly states that it addresses U.S. taxpayers hiding foreign financial accounts, not violating the reporting requirement.¹²⁴ Since penalties arise from the government’s interest in the accounts rather than the mechanism for reporting them, the statute should take precedence over the provision.¹²⁵ As such, the IRS should assess penalties per account instead of per form.¹²⁶ The dissent also disagreed on the relevance of whether a violation is willful or non-willful.¹²⁷ Regardless, the violation is the same: the failure to report a single account or a single transaction.¹²⁸ As the court noted, “the applicable statute and regulations make clear that any failure to report a foreign account is an independent violation, subject to independent penalties.”¹²⁹ In the dissent’s view, the majority conflates the reporting form (the FBAR) with the contents that are required to be reported (the foreign bank accounts themselves).¹³⁰

¹²⁰ *Id.* (quoting *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 27 (1974)).

¹²¹ *Id.* at 1087.

¹²² *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021).

¹²³ *Id.*

¹²⁴ *Id.* at 1088.

¹²⁵ *Id.* at 1089.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1090.

IV. FIFTH CIRCUIT INTERPRETATION

A. *United States v. Bittner*

On November 30, 2021, the Fifth Circuit Court of Appeals decided *United States v. Bittner*.¹³¹ Bittner, a Romanian-American dual citizen, moved back to Romania in 1990 and lived there until 2011 after living in the United States for eight years.¹³² He never renounced his American citizenship.¹³³ While living in Romania, Mr. Bittner generated considerable income and opened numerous foreign bank accounts.¹³⁴ His investment ventures revealed him to be a sophisticated businessman.¹³⁵ In addition, the district court highlighted that “Mr. Bittner demonstrated at least some level of awareness about his tax obligations as a United States citizen, as he filed United States income tax returns for 1991, 1997, 1998, 1999, and 2000” despite living in Romania during those years.¹³⁶ The government assessed \$2.72 million in civil penalties against him—\$10,000 for each of the 272 bank accounts he had failed to disclose for all the years he had not filed an FBAR.¹³⁷ However, Bittner did not return to the United States until 2011.¹³⁸ Upon learning of his § 5314 obligations, he hired a CPA, who then filed his FBARs for the years 2007–2011.¹³⁹

Bittner, at first, argued in court for a reasonable-cause defense.¹⁴⁰ The BSA imposes no penalty for a non-willful violation of § 5314 if the violation results from reasonable cause and the individual filed the FBAR accurately.¹⁴¹ However, the court rejected his reasonable-cause defense, as Bittner was a sophisticated businessman with businesses all over the world.¹⁴² He even admitted he did not see a reason to file an FBAR while he was living in Romania.¹⁴³ That admission confirmed his awareness of

¹³¹ *United States v. Bittner*, 19 F.4th 734, 737 (5th Cir. 2021), *rev'd and remanded*, *Bittner v. United States*, 143 S. Ct. 713 (2023).

¹³² *Id.* at 739.

¹³³ *United States v. Bittner*, 469 F. Supp. 3d 709, 713 (E.D. Tex. 2020), *rev'd and remanded*, *Bittner v. United States*, 143 S. Ct. 713 (2023).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Bittner*, 19 F.4th at 737.

¹³⁸ *Id.* at 739.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 738.

¹⁴¹ *Id.* at 738–39.

¹⁴² *Id.* at 739, 742–43.

¹⁴³ *Bittner*, 19 F.4th at 742.

the FBAR requirement and directly refuted any possible claim of reasonable cause.¹⁴⁴ The court saw through this argument, rejected his reasoning, and affirmed that it was unreasonable for Bittner to claim he had reasonable cause for not filing his FBARs for the five years in question.¹⁴⁵ After rejecting his reasonable-cause defense, the issue became whether the IRS should penalize non-willful violations of § 5314 on a per account or per FBAR basis.¹⁴⁶

B. *The Fifth Circuit's Reasoning and Analysis in Bittner*

Just as in the Ninth Circuit case, the Fifth Circuit debated which portion of § 5314 should take precedence when applying penalties.¹⁴⁷ In this case, the Fifth Circuit held that the IRS could penalize per account, rejecting the Ninth Circuit's per form interpretation.¹⁴⁸ The Fifth Circuit instead agreed with the Ninth Circuit's dissenting judge and held that each failure to report a qualifying foreign account constitutes a separate reporting violation subject to its own penalty.¹⁴⁹ The court began its proceeding by looking at the statutory text of § 5314.¹⁵⁰ The court used a stricter interpretation, opining that “[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”¹⁵¹

In court, the Department of Justice argued against the Ninth Circuit's position, disputing that the regulations take precedence over the statutory language of 31 U.S.C. § 5314.¹⁵² The Fifth Circuit agreed, finding the per-form interpretation inconsistent with the text of the BSA and its regulations.¹⁵³ Because § 5321(a)(5)(A) penalizes a violation of any provision of § 5314, the court analyzed application of the penalty.¹⁵⁴ The Fifth Circuit once more affirmed that the language of the statute should

¹⁴⁴ *Id.* at 743.

¹⁴⁵ *Id.* at 742–43.

¹⁴⁶ *Id.* at 743.

¹⁴⁷ *United States v. Boyd*, 991 F.3d 1077, 1088 (9th Cir. 2021) (Ikuta, J., dissenting); *Bittner*, 19 F.4th at 745.

¹⁴⁸ *Bittner*, 19 F.4th at 745–56; *Boyd*, 991 F.3d at 1079–80.

¹⁴⁹ *Boyd*, 991 F.3d at 1089 (Ikuta, J., dissenting); *Bittner*, 19 F.4th at 749.

¹⁵⁰ *Bittner*, 19 F.4th at 743–45.

¹⁵¹ *Id.* at 743–44 (quoting *Calogero v. Shows, Cali & Walsh, L.L.P.*, 970 F.3d 576, 584–85 (5th Cir. 2020)).

¹⁵² *Id.* at 744.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 743.

take precedence by stating, “Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”¹⁵⁵ The filing of reports only comes after one has foreign financial accounts exceeding \$10,000.¹⁵⁶ The Fifth Circuit opined, “The regulations themselves distinguish (1) the substantive obligation to file reports disclosing each account from (2) the procedural obligation to file the appropriate reporting form.”¹⁵⁷ It continued, “The regulations thus consistently implement the distinction between the reports themselves (substance) and the reporting forms (procedure).”¹⁵⁸

The Fifth Circuit went further in clarifying its argument that the statutory provisions of § 5314, rather than its corresponding regulations, are the source of penalties.¹⁵⁹ “The district court reasoned that a violation of section 5314 attach[es] directly to the obligation that the statute creates”, which is the filing of a single report.¹⁶⁰ The Fifth Circuit disagreed, stating that 31 U.S.C. § 5314 “does not create the obligation to file ‘a single report.’”¹⁶¹ “Rather, it gives the Secretary discretion to” determine how best “to fulfill the statute’s requirement of reporting [all] qualifying accounts.”¹⁶² By the Fifth Circuit’s logic, the U.S. government could replace the FBAR entirely with another instrument.¹⁶³ The statute requiring U.S. citizens to disclose foreign accounts held overseas remains intact, regardless of what method or form the IRS determines best fulfills the statute’s intended purpose.¹⁶⁴

C. *Bittner’s Arguments Addressed on Appeal*

The Fifth Circuit affirmed that Bittner’s reasonable-cause defense lacked merit.¹⁶⁵ Bittner argued that a per-account reading would lead to exorbitant fees, which would be an absurd result.¹⁶⁶ The Fifth Circuit

¹⁵⁵ *Id.* at 744 (quoting *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015)).

¹⁵⁶ *Bittner*, 19 F.4th. at 738.

¹⁵⁷ *Id.* at 745.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 746.

¹⁶¹ *Bittner*, 19 F.4th at 746.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 738.

¹⁶⁵ *Id.* at 742.

¹⁶⁶ *Id.* at 748.

disagreed.¹⁶⁷ The court again pointed to Congress’s original intent: for the U.S. government to fight the use of foreign financial accounts as a means to evade taxes and hide wealth.¹⁶⁸ The court affirmed “[i]t is not absurd—it is instead quite reasonable—to suppose that Congress would penalize each failure to report each foreign account.”¹⁶⁹ Finally, “[a]s a last resort, Bittner turn[ed] to legislative history,” which, according to the court, is “highly disfavored in the Fifth Circuit.”¹⁷⁰ The court concluded:

The text, structure, history, and purpose of the relevant statutory and regulatory provisions show that the “violation” of section 5314 contemplated by section 5321(a)(5)(A) is the failure to report a qualifying account, not the failure to file an FBAR. The \$10,000 penalty cap therefore applies on a per-account, not a per-form, basis.¹⁷¹

V. THE FIFTH AND NINTH CIRCUITS’ ARGUMENTS TO THE SUPREME COURT

While the Fifth Circuit favored per account and the Ninth Circuit favored per FBAR, both circuits raised important reasons for siding with its preferred method.¹⁷² Understanding the arguments for per FBAR versus per account will clarify how the Supreme Court arrived at its decision.¹⁷³

A. *The Argument for Punishment Per FBAR and Deference to Provision*

The central question in *Bittner* is how a non-willful violation of 31 U.S.C. § 5314 should be penalized.¹⁷⁴ Failure to disclose foreign financial accounts may result in a non-willful violation of 31 U.S. § 5314, for which willfulness is not required.¹⁷⁵ To prove willfulness, the

¹⁶⁷ *Bittner*, 19 F.4th at 748.

¹⁶⁸ *Id.* at 747–48.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 749 (citing *Thomas v. Reeves*, 961 F.3d 800, 817 n.45 (5th Cir. 2020) (en banc) (Willett, J., concurring) (emphasis omitted) (collecting cases)).

¹⁷¹ *Id.*

¹⁷² See *infra* notes 195–215 and accompanying text.

¹⁷³ See *infra* notes 216–33 and accompanying text.

¹⁷⁴ See *Bittner*, 19 F.4th at 749.

¹⁷⁵ The courts have consistently held the term “willfulness” means a “voluntary, intentional violation of a known legal duty.” *Cheek v. United States*,

government must show the defendant committed a “voluntary, intentional violation of a known legal duty” beyond mere ignorance.¹⁷⁶ That is likely why Congress amended the BSA and expanded its enforcement powers.¹⁷⁷ A taxpayer who commits a non-willful violation can still be penalized, even if they claim ignorance.¹⁷⁸ The penalties for willful violations are far greater than for non-willful violations, so Congress likely did not decide to replace one word with another when the punishment is the same.¹⁷⁹ Presumably, Congress intended to make a distinction between willful and non-willful violations. However, the penalties for willfully violating § 5314 are clearly spelled out, and taxpayers can be penalized per account.¹⁸⁰ That is presumably why the Ninth Circuit held that if Congress intended for non-willful violations to be penalized in the same manner, the amendment would state as much.¹⁸¹ Since it did not, the Ninth Circuit seemingly inferred that the penalty must be different.¹⁸² The only determinable difference would be if the non-willful violators were penalized per FBAR rather than per account, as willful violations would be.¹⁸³ Punishment per account would make non-willful violations no different from willful violations, which the Ninth Circuit found to be contrary to Congress’s intent.¹⁸⁴

One also must consider the mechanism of action. In both the Fifth and Ninth Circuit cases, the defendants disclosed their foreign financial accounts to the IRS.¹⁸⁵ While they filed the FBAR late, they still provided an accurate assessment of their foreign accounts.¹⁸⁶ Non-willful violators are presumably not often tax evaders, terrorists, or money launderers, as these individuals do not intend to break the law.¹⁸⁷ The purpose of non-willful disclosures is to promote unwilling compliance through required

498 U.S. 192, 201 (1991); *United States v. Bishop*, 412 U.S. 346, 360 (1973); *United States v. Sturman*, 951 F.2d 1466, 1476 (6th Cir. 1991).

¹⁷⁶ *Cheek*, 498 U.S. at 201.

¹⁷⁷ See generally *infra* note 221.

¹⁷⁸ *Cheek*, 498 U.S. at 201; *Bishop*, 412 U.S. at 360; *Sturman*, 951 F.2d at 1476.

¹⁷⁹ Compare 31 U.S.C. § 5321(a)(5)(C) with 31 U.S.C. § 5321(a)(5)(B).

¹⁸⁰ See 31 U.S.C. § 5321(a)(5)(C).

¹⁸¹ *Boyd*, 991 F.3d at 1083–84.

¹⁸² *Id.*

¹⁸³ Compare 31 U.S.C. § 5321(a)(5)(C) with 31 U.S.C. § 5321(a)(5)(B).

¹⁸⁴ *Boyd*, 991 F.3d at 1083–84.

¹⁸⁵ *Id.* at 1079; see also *Bittner*, 19 F.4th at 738.

¹⁸⁶ *Boyd*, 991 F.3d at 1079; *Bittner*, 19 F.4th at 739.

¹⁸⁷ *Cheek*, 498 U.S. at 202 (highlighting that willful violations must be voluntary and intentional).

disclosure.¹⁸⁸ Criminals, terrorists, and tax evaders likely have no interest in complying.¹⁸⁹ Since willful and non-willful violators are viewed differently, one can infer that their penalties should be viewed as separate and based upon a different standard.¹⁹⁰ It may make more sense to penalize willful violators per account because they are willfully defying 31 U.S.C. § 5314.¹⁹¹ Non-willful violators ultimately comply through disclosure; therefore, it is just a matter of when compliance occurs, as in *Boyd* and *Bittner*.¹⁹² While non-willful violators have accounts subject to the § 5314 filing requirements, they have limited interactions with actual regulations because of the requirement to file their annual FBAR.¹⁹³ Non-willful violators need not fear IRS investigation, as they are generally not tax evaders, terrorists, or money launderers, for whom the law was presumably intended to deter.¹⁹⁴

B. *Argument for Per Account Penalties and the Expansion of*

Executive Power

The Fifth Circuit disagreed with the Ninth Circuit's reasoning, holding that U.S.C. § 5321(a)(5) is the origination of the penalties for both willful and non-willful violators.¹⁹⁵ If Congress intended willful and non-willful violators to have different penalty standards, Congress would have stated as much.¹⁹⁶ Since Congress did not, the Fifth Circuit followed precedent and used the statute as the basis for the penalties.¹⁹⁷ If holding foreign financial accounts are the basis of the statute's regulatory power, then any penalty should be based on the holding of undisclosed foreign financial accounts rather than the single FBAR.¹⁹⁸ To interpret the statute to mean that the single FBAR determines the penalties, and not the holding of undisclosed foreign financial accounts is to read the statute too narrowly.¹⁹⁹

¹⁸⁸ See *Bittner*, 19 F.4th 738–39.

¹⁸⁹ See *Boyd*, 991 F.3d at 1079.

¹⁹⁰ See *Boyd*, 991 F.3d at 1084.

¹⁹¹ See *id.* at 1083–84.

¹⁹² *Boyd*, 991 F.3d at 1079; see also *Bittner*, 19 F.4th at 738.

¹⁹³ See *Boyd*, 991 F.3d at 1082.

¹⁹⁴ See *id.* at 1079.

¹⁹⁵ See *Bittner*, 19 F.4th at 737–39.

¹⁹⁶ See *id.* at 746–47.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* at 746.

¹⁹⁹ See *id.*

When Congress amended the BSA in 2004, its focus was broad, not narrow.²⁰⁰ Congress added the non-willful violation and expanded the enforcement powers of the IRS, specifically to reach individuals taking advantage of the difficulty in proving willfulness in court.²⁰¹ Before this, the IRS tried enforcing the regulation with one proverbial hand tied behind its back.²⁰² Now, it possessed the tools to do its job.²⁰³ There is a serious and contentious debate over the congressional intent behind the language used in the 2004 amendment.²⁰⁴

Those on the side of the provisions say that if Congress intended non-willful violations to be punished the same way as willful violations, the statute would state so clearly.²⁰⁵ Those with this position grapple with the fact that Congress likely added the non-willful violation language to expand the Executive Branch's enforcement powers and tools.²⁰⁶

As the Fifth Circuit opined, “[t]he government argues the district court erred in determining what constitutes a ‘violation’ under [§] 5314 by focusing on the regulations under [§] 5314 to the exclusion of [§] 5314 itself. We agree.”²⁰⁷ This goes straight to the core of the penalty per account argument.²⁰⁸ The per FBAR penalty circumvents § 5314 itself, essentially rendering it toothless. The sole purpose of the penalty per account interpretation could then be attributed to the FBAR itself and its filing as opposed to the foreign financial accounts disclosed through the FBAR.²⁰⁹ To penalize per FBAR is to exclude § 5314 altogether and assume the regulation stemming from it is a self-standing statute, instead of a regulation deriving its power from § 5314.²¹⁰ As the Fifth Circuit further enumerated, “A per-form interpretation is inconsistent with the text

²⁰⁰ See 31 U.S.C. § 5321(a)(5)(A) (2004) (amended 2021).

²⁰¹ See *id.* Cf. Internal Revenue Serv., *Modify the Definition of ‘Willful’ for Purposes of Finding FBAR Violations and Reduce the Maximum Penalty Amounts*, *National Taxpayer Advocate 2021 Purple Book* (Dec. 31, 2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_04_ReformPenInts_35.pdf (noting taxpayer difficulty in proving that a violation was not willful).

²⁰² See, e.g., *Bittner*, 19 F.4th at 737.

²⁰³ See *id.*

²⁰⁴ See *id.*; See also *United States v. Boyd*, 991 F.3d 1077, 1081 (9th Cir. 2021).

²⁰⁵ See *Bittner*, 19 F.4th at 737, 740–41.

²⁰⁶ See *id.* at 738, 744.

²⁰⁷ *Id.* at 744.

²⁰⁸ *Id.*

²⁰⁹ See *id.*

²¹⁰ See *id.* at 744–45.

of the BSA and corresponding regulations.²¹¹ Here, the Court rejected the “contention that [a] single statement by the Supreme Court, taken out of context, should be used . . . to reject the clear and express provisions of the [statute].”²¹²

VI. THE SUPREME COURT’S DECISION OF BITTNER AND FUTURE IMPLICATIONS

On February 28, 2023, the Supreme Court released the decision to answer the contentious issue over whether non-willful violators are penalized on a per account or per FBAR basis.²¹³ In a 5-4 decision, the Court held for per FBAR.²¹⁴ The slight majority used the tools of plain language, administrative guidance documents, the history of the BSA, and the rule of lenity.²¹⁵ However, the dissenters argued for per account using plain language and alluding briefly to the administrative documents but avoided any discussion over the history of the BSA and the rule of lenity.²¹⁶

A. *Majority Decision*

The majority looked at four factors: (1) the plain language of §§ 5314 and 5321; (2) the government’s handling of the BSA to the public; (3) the history of the non-willful provision and the BSA’s purpose; and (4) the rule of lenity.²¹⁷ While most of the Court agreed with these principles, Justice Gorsuch and Jackson were the only justices to join the rule of lenity portion of the opinion.²¹⁸

1. Plain Language of §§ 5314 and 5321

Beginning with the language of §§ 5314 and 5321, the Court kept it plain and simple.²¹⁹ The word “reports” appears in § 5314, not

²¹¹ See *United States v. Yankowski*, 184 F.3d 1071, 1074 (9th Cir. 1999).

²¹² *United States v. Bittner*, 19 F.4th 734, 744 (5th Cir. 2021), *rev’d and remanded*, *Bittner v. United States*, 143 S. Ct. 713 (2023).

²¹³ *Bittner v. United States*, 143 S. Ct. 713 (2023) (*Bittner II*).

²¹⁴ *Id.* at 725.

²¹⁵ *Id.* at 719–25.

²¹⁶ *Id.* at 726–31.

²¹⁷ *Id.* at 719–25.

²¹⁸ *Id.* at 716.

²¹⁹ *Bittner II*, 143 S. Ct. at 719.

“accounts.”²²⁰ There is not a single mention of “accounts” until § 5321(B)(ii) under the reasonable cause exception within the non-willful provision.²²¹ The lack of the word “accounts” and inclusion of “reports” demonstrates that a § 5314 violation is binary, dependent on the filing of a report.²²² The information regarding the accounts is irrelevant for purposes of violating § 5314 under its filing requirement.²²³ Therefore, a taxpayer is a violator for failing to file a report, not incorrectly reporting information over an account.²²⁴ Whether a taxpayer makes a mistake on the account information or does not file willfully or non-willfully is not a determining factor.²²⁵ The only consideration under § 5314 for the filing requirement is the FBAR filing.²²⁶

The majority furthered this argument by noting that § 5321 lays out the potential types of violators for incompliance with § 5314—the non-willful and willful violators.²²⁷ Before discussing the types of violators, the Court pointed out how Congress in § 5321(a)(5) allows civil penalties for “any violation. . . of Section 5314.”²²⁸ If “any violation” under § 5314 depends on “reports,” then the exact language of “any violation” under § 5321 would also depend on reports unless stated otherwise.²²⁹ Further, the non-willful provision does not change the violations of § 5314 by tailoring penalties per account; however, the willful provision does tailor penalties per account.²³⁰ Therefore, the non-willful provision would remain per FBAR as in § 5314, while the willful provision would change to per account.²³¹

However, the dissent harped on how the language of “accounts” is mentioned in the reasonable exception under the non-willful provision specifically to tailor penalties per account.²³² The majority rejected the dissent’s argument using “*expressio unius est exclusio alterius*.”²³³ This common law principle echoes that Congress uses different and particular

²²⁰ *See id.*

²²¹ *Id.* at 720.

²²² *Id.* at 719.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Bittner II*, 143 S. Ct. at 719.

²²⁶ *Id.* at 719–20.

²²⁷ *Id.* at 720.

²²⁸ *Id.* (quoting 31 U.S.C. § 5321(a)(5)(A) (2004) (amended 2021)).

²²⁹ *See id.*

²³⁰ *Id.*

²³¹ *See Bittner II*, 143 S. Ct. at 720.

²³² *Id.* at 721; *see* 31 U.S.C. § 5321(B)(ii)(II).

²³³ *Bittner II*, 143 S. Ct. at 720.

language in sections of the same statute “to convey a difference in meaning. . . .”²³⁴ Notably, Congress did not use the word “accounts” in the same manner under non-willfulness as it did in the willful provision.²³⁵ The willful provision looks to Subsection (D)(ii) to tailor penalties upon the amount dependent on the balance of the foreign “accounts.”²³⁶ Under the non-willful provision, Congress uses “accounts” to demonstrate that giving accurate information will prove there was no intended deception, allowing taxpayers to use the reasonable cause exception.²³⁷ Ultimately, the majority finds the language of these two statutes as plain in its similarities and differences, and thus the majority cannot ignore them.²³⁸

2. The Government’s Handling of the BSA to the Public

The majority then looked at how the Government has handled the enforcement of the BSA through its issuance of public documents.²³⁹ While the majority admitted that these documents are not controlling in statutory interpretation, the Court could use the agency’s interpretation to find an undermining by its inconsistent application “with [an agency’s] earlier pronouncements.”²⁴⁰ The Court looked at several public documents such as an IRS letter, IRS tax form, and issuance of notice from the Department of the Treasury.²⁴¹ Each document had language that signified to the public that failure to file an FBAR could lead to a penalty not exceeding \$10,000.²⁴² The Court reasoned that the government’s now-interpretation of a per-account basis for failure to file an FBAR is incongruent with how they have previously handled the current penalties for non-willful violation.²⁴³ Therefore, the government’s prior publication of non-willful violations demonstrated that there has always been a different penalty structure depending on the type of violator.²⁴⁴

²³⁴ *Id.*

²³⁵ *See id.* at 720–21.

²³⁶ *Id.* at 720; *see* § 31 U.S.C. 5321(a)(5)(D)(ii).

²³⁷ *Bittner II*, 143 S. Ct. at 720–21.

²³⁸ *See id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 722, n. 5 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

²⁴¹ *See id.* at 721 (discussing the IRS, Letter 3709, p. 1 (Mar. 2011), IRS, Form TD F 90–22.1, p. 8 (Mar. 2011), and 75 Fed. Reg. 8854 (2010)).

²⁴² *Bittner II*, 143 S. Ct. at 721.

²⁴³ *See id.* at 722.

²⁴⁴ *See id.*

3. History of the Non-willful Provision, the BSA's Purpose, and Logical Implications

The majority then examined the history of the BSA's willful provision, Congress' statement of purpose, and several illustrations with implications for the BSA.²⁴⁵ Congress adopted the BSA in 1970, but willful violations for failure to file FBARs were not per-account. Congress did not even implement per-account penalties until 1986 for the willful provision.²⁴⁶ Yet, the non-willful provision did not manifest until 2004, which did not replicate the language of per-account penalties in the willful provision.²⁴⁷ Since Congress already knew how to create a per-account penalty, Congress could have simply mirrored the same 1986 language for the non-willful provision.²⁴⁸ Since Congress did not do so, the majority argued that Congress did so intentionally.²⁴⁹

Additionally, the Court looked at Congress' statement of purpose under 31 U.S.C. § 5311.²⁵⁰ Congress declared "that the BSA's 'purpose' is 'to require' certain 'reports' or 'records' that may assist the government in everything from criminal and tax to intelligence and counterintelligence investigations.'"²⁵¹ Since Congress' purpose was filing the "reports," § 5314 should be per FBAR as this would be congruent to the goal in § 5311.²⁵²

Finally, the majority had several illustrations to denote that a per-account basis under the non-willful provision would hurt the BSA's purpose due to illogical implications.²⁵³ However, one of the examples seems to demonstrate the confusing consequences.²⁵⁴ If one individual had 12 million dollars in one account and another individual had an aggregate of \$10,001 over 12 accounts and both non-willfully violated by failing to file an FBAR, the individual with \$12 million would be subject to a \$10,000 fine.²⁵⁵ In contrast, the individual with \$10,001 would be subject

²⁴⁵ *See id.* at 722–24.

²⁴⁶ *See id.* at 722 (citations omitted).

²⁴⁷ *Bittner II*, 143 S. Ct. at 722 (citations omitted).

²⁴⁸ *See id.* (citations omitted).

²⁴⁹ *See id.* (citations omitted).

²⁵⁰ *See id.*

²⁵¹ *Id.* (quoting 31 U.S.C. § 5311).

²⁵² *See id.* (quoting 31 U.S.C. § 5311).

²⁵³ *See Bittner II*, 143 S. Ct. at 723–24.

²⁵⁴ *See id.* at 723.

²⁵⁵ *See id.*

to a potential \$120,000 penalty.²⁵⁶ Logic would seem to insinuate that Congress would not attribute penalties in a fashion whereby the smaller taxpayer is paying exorbitantly more solely because of more accounts.²⁵⁷ Therefore, Congress' purpose of the BSA on "reports" would only be furthered per FBAR to avoid illogical penalties.²⁵⁸

4. Rule of Lenity

Finally, Justice Gorsuch, joined by only Justice Jackson in the majority, agreed to use the rule of lenity, which justices use to construe a statute "imposing penalties . . . 'strictly' against the government and in favor of individuals."²⁵⁹ The Court gave two reasons for rejecting per account under the rule of lenity.²⁶⁰ First, the rule of lenity protects taxpayers' due process by giving them a fair warning with clarity to understand the law.²⁶¹ Second, the government's ability to impose civil penalties in § 5321 and criminal penalties in § 5322 leads to higher scrutiny to ensure fair penalties for the taxpayer.²⁶²

With the principle of fair notice, the Court discussed the public guidance documents.²⁶³ The issued guidance demonstrated that non-willful violators would face penalties per FBAR.²⁶⁴ However, professional tax accountants were confused and unaware of the FBAR penalties.²⁶⁵ This confusion showed that an ordinary individual would not have received fair notice since professional accountants did not even understand the penalties from the public tax documents.²⁶⁶

With § 5322, this Section handles criminal penalties and uses "violation" in the same manner as § 5321.²⁶⁷ Therefore, the violations would be focused on filing reports unless stated otherwise.²⁶⁸ With the criminal penalties under § 5322, the Court used the facts of *Bittner* to

²⁵⁶ *See id.*

²⁵⁷ *See id.* 723–24.

²⁵⁸ *See id.* at 724.

²⁵⁹ *Bittner II*, 143 S. Ct. at 724 (quoting *Commissioner v. Acker*, 361 U.S. 87, 91, 80 (1959)).

²⁶⁰ *See id.* at 725.

²⁶¹ *See id.*

²⁶² *See id.*

²⁶³ *See id.*; *supra* note 262 and accompanying text.

²⁶⁴ *See id.*; *supra* note 262 and accompanying text.

²⁶⁵ *See Bittner II*, 143 S. Ct. at 725 (citations omitted).

²⁶⁶ *See id.* (citations omitted).

²⁶⁷ *See id.*; *see* 31 U.S.C. § 5311.

²⁶⁸ *See Bittner II*, 143 S. Ct. at 725.

demonstrate the ramifications of a per-account basis creating impossible criminal penalties.²⁶⁹ For each misstated or late-reported account rather than a late or deficient FBAR, this per-account basis would give rise to the “possibility of a \$250,000 fine and five years in prison.”²⁷⁰ In the facts of *Bittner*, which involved five reports and 272 accounts, that would mean that he would face “a \$68 million fine and 1,360 years in prison rather than a \$1.25 million fine and 25 years in prison.”²⁷¹ The Court opined that 25 years of prison alongside the \$1.25 million fine would be more aligned with “common sense” in penalizing a non-willful violator.²⁷² Therefore, this type of reading of § 5322 would require an interpretation that follows the suit of § 5321 to favor the taxpayer and ensure common sense penalties.²⁷³

B. *The Dissenting Opinion*

The four dissenting justices conclusively agreed that the plain language of § 5314 should lead any reader of the BSA that a per-account basis is also for non-willful violators.²⁷⁴ The dissenters understood the requirements under § 5314 to attach to each account.²⁷⁵ Section 5314 requires firstly filing when there is a “relation to” a foreign individual account, which means each separate account acts as a trigger to file an FBAR.²⁷⁶ And if any particular account is missing, the taxpayer fails the reporting requirement because they missed a trigger for filing, which, in the eyes of the dissenters, is the sole concern of § 5314—the foreign accounts.²⁷⁷ The dissent also looked at the second requirement for record-keeping under § 5314.²⁷⁸ The dissenting justices noted that taxpayers can only record-keep per account because there are records for each account.²⁷⁹ And if record keeping is per account, then the other requirement under § 5314 should follow suit.²⁸⁰ Since the duties are parallel, each requirement begins once a “relation” exists to an individual foreign account.²⁸¹

²⁶⁹ *See id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* (citations omitted).

²⁷³ *See id.*

²⁷⁴ *See Bittner II*, 143 S. Ct. at 726 (Barrett, J., dissenting).

²⁷⁵ *See id.*

²⁷⁶ *See id.*; 31 U.S.C. § 5314.

²⁷⁷ *See Bittner II*, 143 S. Ct. at 726 (Barrett, J., dissenting).

²⁷⁸ *See id.* at 726–27.

²⁷⁹ *See id.* at 727.

²⁸⁰ *See id.*

²⁸¹ *See id.*

C. *The Effects of the Supreme Court's Decision in Bittner*

The implications of the *Bittner* decision are seemingly advantageous for non-willful violators but also lead to new questions. While there is an immediate answer for non-willful violators, there are questions regarding refunds for wrongfully penalized non-willful violators, the standard for willfulness, and the potential higher scrutiny from the IRS on FBAR filings.²⁸²

1. The Immediate Effect and the Continued Issue of Per-Account

Immediately, non-willful violators of the BSA will solely be penalized on a per-FBAR basis regardless of the account number.²⁸³ However, the government argued how the Treasury could turn the now-per-FBAR analysis for non-willful violators into a per-account basis.²⁸⁴ The government noted how, theoretically, the Treasury could request that a taxpayer file an FBAR filing per bank account.²⁸⁵ If an individual had ten accounts, the Treasury could make a new rule requiring ten FBAR filings.²⁸⁶ This new rule would essentially be the Treasury disguising per account under per FBAR. While the Court side-stepped this potential issue, this interesting hypothetical opens the door for a potential per-account basis under the non-willful provision.²⁸⁷

Additionally, there may be a potential argument for per FBAR in the willful provision due to its two-prong requirement where the first prong does not mention “accounts.”²⁸⁸ Theoretically, taxpayers could

²⁸² See *infra* notes 304–323 and accompanying text.

²⁸³ *Bittner II*, 143 S. Ct. at 725.

²⁸⁴ See *id.* at 724.

²⁸⁵ See *id.*

²⁸⁶ See *id.* There is also an argument that the Treasury adding more FBAR filings would raise an Administrative Procedure Act claim based on the legislative interpretation. See Scott S. Ahroni, Erika L. Colangelo, & Alexandra G. Brooks, *Major Win For Taxpayers: SCOTUS Limits FBAR Penalties to Per Report Not Per Financial Account*, NATIONAL LAW REVIEW (Mar. 10, 2023), <https://www.natlawreview.com/article/major-win-taxpayers-scotus-limits-fbar-penalties-to-report-not-financial-account>.

²⁸⁷ See *Bittner II*, 143 S. Ct. at 724.

²⁸⁸ See Todd Lady & Benjamin Hager, *In Bittner v. United States, Supreme Court Delivers Non-Willful FBAR Penalty Relief*, TAFT LAW (Mar. 16, 2023) <https://www.taftlaw.com/news-events/law-bulletins/in-bittner-v-united->

argue the majority's analysis to demonstrate that "accounts" was not mentioned to keep the per FBAR basis.²⁸⁹ While the Supreme Court would presumably echo that Congress created per account specifically for the willful provision, there is still, nonetheless, an argument available.

2. Refunds for Past Non-Willful Violators

Past non-willful violators who have already paid any amount exceeding the \$10,000 penalty for the annual FBAR filing are left wondering if they will be refunded.²⁹⁰ While the IRS may create a refund program, the IRS may not have the authority or be obligated to do so.²⁹¹ Yet, the answer remains likely a yes to refunds for two reasons. First, the Supreme Court has held that States have had to remedy incorrect tax impositions due to basic due process.²⁹² Second, the taxpayers may make claims under the Tucker Act of 1887.²⁹³

In *Harper v. Virginia Dep't of Taxation*, the Supreme Court held that when a State imposed an impermissible tax, "the Due Process Clause of the Fourteenth Amendment obligate[d] the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."²⁹⁴ The States have discretion in handling the process for this remedy, but a remedy is required.²⁹⁵ Similarly, the federal government would likely have to rectify this issue because the government imposed an impermissible tax.²⁹⁶

With the Tucker Act, taxpayers who paid these excessive taxes may file a claim in the Court of Federal Claims, arguing that the government collected money illegally.²⁹⁷ Unfortunately, this pathway of recovery would be barred unless the taxpayer made a claim within six

states-supreme-court-delivers-non-willful-fbar-penalty-relief; 31 U.S.C. § 5321(a)(5)(C)(i).

²⁸⁹ See generally *supra* notes 240–259 and accompanying text.

²⁹⁰ See Aysha Bagchi, *IRS Penalty Refund Options for Foreign Account Holders Uncertain*, BLOOMBERG TAX (Mar. 20, 2023), <https://news.bloombergtax.com/daily-tax-report/irs-penalty-refund-options-for-foreign-account-holders-uncertain>.

²⁹¹ See Bagchi, *supra* note 310.

²⁹² *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 101 (1993).

²⁹³ See 28 U.S.C. § 1491.

²⁹⁴ 509 U.S. at 101 (citations omitted).

²⁹⁵ See *id.* at 101–02.

²⁹⁶ See *id.*

²⁹⁷ See 28 U.S.C. § 1491.

years of accrual.²⁹⁸ Therefore, non-violators making a claim under the Tucker Act before 2017 may have an issue with statutory limitations.²⁹⁹

Ultimately, the handling of refunds remains an issue whereby the IRS has not given any sense of how they may handle these overpaid penalties. Time will tell how the IRS may address the potential problems with statutory of limitations and who may be entitled to a refund.

3. Higher Scrutiny on “Willful” Violators

The IRS will have lost money due to the inability to penalize non-willful violators at more than \$10,000 per FBAR compared to per account.³⁰⁰ The IRS will seemingly become more stringent in finding willfulness in violators to recover some of the lost money. However, how will the IRS handle the standard for “willfulness”? The Federal Circuit has already found willfulness by failing to review one’s tax returns that would reveal the FBAR requirement.³⁰¹ Further, in *Bedrosian v. United States Department of Treasury*, the Third Circuit expanded willfulness where a taxpayer “ought to have known” or “was in a position to find out for certain very easily.”³⁰² How the IRS will judge willfulness will be an interesting aspect to focus upon going forward.

VII. CONCLUSION

With the 2004 BSA Amendment, the Legislative Branch chose to expand the Executive Branch’s power to enforce compliance with 31 U.S.C. § 5314.³⁰³ Before this change, the Secretary of Treasury estimated that less than 20% of U.S. citizens complied with § 5314.³⁰⁴ Many U.S. citizens did not comply due to the government’s difficulty in proving willful non-compliance in court.³⁰⁵ After the September 11, 2001 terrorist attacks, the Patriot Act gave the government a way to enforce § 5314

²⁹⁸ See 28 U.S.C. § 2501.

²⁹⁹ See *id.*

³⁰⁰ See Jim Dawson, Chad Vanderhoef, & Alexander Olama, *Supreme Court’s FBAR Ruling Skips Crucial Legal Question for Now*, BLOOMBERG TAX (Mar. 7, 2023), <https://news.bloombergtax.com/tax-insights-and-commentary/supreme-courts-fbar-ruling-skips-crucial-legal-question-for-now>.

³⁰¹ *Kimble v. United States*, 991 F.3d 1238, 1242–43 (Fed. Cir. 2021).

³⁰² 42 F.4th 174, 178 (3d Cir. 2022).

³⁰³ See 31 U.S.C. § 5321 (2004).

³⁰⁴ TREASURY REPORT 2002, *supra* note 36.

³⁰⁵ See *generally* *Cheek v. United States*, 498 U.S. 192, 199–201 (1991).

compliance.³⁰⁶ They simply created a new kind of violator: the non-willful.³⁰⁷ The non-willful violator is now compelled to reveal himself through their disclosures or face penalties.³⁰⁸ However, Congress failed to clearly spell out penalties for the non-willful violator.³⁰⁹ The statute could be interpreted to read that non-willful violations should be penalized according to the number of foreign accounts the non-willful violators hold or the number of FBARs that they fail to file; however, the latter potentially leads to serious and far-reaching consequences.³¹⁰

In *Boyd*, the Ninth Circuit decided upon the per FBAR interpretation of the debate.³¹¹ The Court opined that the statute did not express penalties for non-willful violations, so if Congress intended to have the same penalty (per account) as willful violations, Congress would state such clearly.³¹² They decided upon enforcement of the provision of § 5314, permitting penalties according to their failure to file the document maintaining compliance with the IRS rather than to the accounts you held that would make you a party to § 5314.³¹³ The Court's narrow focus limited the ability of the IRS to execute its newfound power.³¹⁴

In *United States v. Bittner*, the Fifth Circuit held that the per account side of the argument should apply and struck down the reasoning in *Boyd*.³¹⁵ The Court used precedent to determine that the statute must take precedence over the statutory provision.³¹⁶ A provision cannot exist without first having a statute from which it arises.³¹⁷ A penalty should be determined by the statute from which it arises, as the statute is the point of origin in the matter at hand.³¹⁸ The provision, FBAR, is only a means of

³⁰⁶ See 31 U.S.C. § 5321 (2004).

³⁰⁷ *United States v. Boyd*, 991 F.3d 1077, 1083 (9th Cir. 2021).

³⁰⁸ 31 U.S.C. § 5321 (2004).

³⁰⁹ *Boyd*, 991 F.3d 1077 at 1083–84.

³¹⁰ *United States v. Bittner*, 19 F.4th at 740–42 (5th Cir. 2021) (holding that non-willful violators are penalized according to the number of foreign financial accounts they hold); *Boyd*, 991 F.3d at 1079 (holding that non-willful violators are penalized according to the number of FBARs they fail to file), *rev'd and remanded*, *Bittner v. United States*, 143 S. Ct. 713 (2023).

³¹¹ See generally *Boyd*, 991 F.3d at 1079.

³¹² *Id.* at 1084.

³¹³ *Id.* at 1085.

³¹⁴ See *id.*

³¹⁵ 19 F.4th at 737.

³¹⁶ *Id.* at 743–46.

³¹⁷ *Boyd*, 991 F.3d 1077, 1083.

³¹⁸ *Id.*

enforcing the statute.³¹⁹ The Fifth Circuit also clarified the intent of Congress.³²⁰ Congress intended the 2004 BSA amendment to solve the problems preventing BSA enforcement.³²¹ Narrowing the focus of the new penalties subverts the Congressional intent of the amendment.³²²

The Supreme Court decision in *Bittner* has ultimately clarified the ongoing disagreement between assessing penalties per account versus per FBAR.³²³ Finally, the fate of non-willful penalties has been decided. The Supreme Court favored the per FBAR assessment of penalties. One would think that this decision would clear all problems for non-willful violators. Yet, new questions have arisen. The main question for past non-willful violators will be when they get refunds, if any. While past non-willful violators may not receive refunds soon, all non-willful violators will receive safety from a per-account basis.³²⁴

³¹⁹ *Bittner*, 19 F.4th at 738.

³²⁰ *Id.* at 744–45.

³²¹ *Id.* at 748.

³²² *Id.* at 747–48.

³²³ *Bittner v. United States*, 142 S. Ct. 2833 (2022) (*Bittner II*).

³²⁴ *See generally Bittner II*, 143 S. Ct. at 725.