# No. 19-55585

**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee**

**v.**

**JANE BOYD,**

**Defendant-Appellant**

**ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA**

## BRIEF FOR THE APPELLEE

**RICHARD E. ZUCKERMAN**
***Principal Deputy Assistant Attorney General***

**FRANCESCA UGOLINI** **(202) 514-1882**
**DEBORAH K. SNYDER** **(202) 305-1680**
**KATHLEEN E. LYON** **(202) 307-6370**
***Attorneys***
***Tax Division***
***Department of Justice***
***Post Office Box 502***
***Washington, D.C. 20044***

***Of Counsel:***
**NICOLA T. HANNA**
***U.S. Attorney***

# TABLE OF CONTENTS

**Page**

Table of contents .......... i
Table of authorities .......... iii
Glossary .......... ix
Statement of jurisdiction .......... 1
Statement of the issue .......... 3
Statement of the case .......... 3

A. The FBAR penalty assessments .......... 4

B. Proceedings in the District Court .......... 10

1. The complaint and the parties' cross-motions for summary judgment .......... 10

2. The District Court's order .......... 12

Summary of argument .......... 14
Argument .......... 17

The District Court correctly held that the penalty for a non-willful violation of § 5314 may be imposed on a per-account basis .......... 17

Standard of review .......... 17

A. Statutory and regulatory background .......... 18

1. The Bank Secrecy Act and the foreign financial account reporting requirements .......... 18

2. Penalties for violations of the reporting requirements .......... 21

B. The District Court correctly held that a violation of § 5314 relates to a single account and that the penalty for a non-willful violation therefore may be imposed on a per-account basis .......... 25

Case: 19-55585, 03/09/2020, ID: 11622505, DktEntry: 33, Page 3 of 82



**Page**


1. Section 5314 and its implementing regulations create a substantive reporting requirement with respect to each account .......... 25

2. Boyd's arguments to the contrary are without merit .......... 30

C. The penalty for a non-willful violation, properly considered in context and in light of the statutory scheme, may be imposed on a per-account basis .......... 32

1. The text of the non-willful provision supports the District Court's determination .......... 32

2. The District Court correctly considered the related provisions in § 5321(a)(5) to determine how the penalty operates .......... 37

3. Boyd's form-based approach is not compatible with the application of the reasonable cause exception and the willful penalty provision .......... 41

D. Boyd's and the amici's remaining arguments do not bring the District Court's order into question .......... 46

1. Boyd's claims that the District Court's order leads to absurd results are without merit .......... 46

2. Claims that imposing the non-willful penalty on a per-account basis would lead to disparate treatment do not withstand scrutiny .......... 47

3. Boyd's reliance on the penalty for criminal violations of the reporting requirements is misdirected .......... 51

4. The rule of lenity does not apply here .......... 53

**Page(s)**

5. Decisions upon which ACTC relies are inapposite here....54

6. Secondary sources do not bring the District Court's order into question....56

7. The Patels raise no significant issues....58

8. Boyd's assertion that the IRS will misapply the mitigation guidelines in other cases is immaterial to the resolution of this case....59

Conclusion....61
Statement of related cases....62
Addendum....63
Certificate of compliance....72

## TABLE OF AUTHORITIES

**Cases:**

*Abdisalan v. Holder*,
774 F.3d 517 (9th Cir. 2015)....40
*ASARCO, LLC. V. Celanese Chemical Co.*,
792 F.3d 1203 (9th Cir. 2015)....33
*Barber v. Thomas*,
560 U.S. 474 (2010)....53
*Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*,
710 F.3d 946 (9th Cir. 2013)....33
*Commissioner of IRS v. Driscoll*,
669 F.3d 1309 (11th Cir. 2012)....41
*Commissioner v. Acker*,
361 U.S. 87 (1959)....54
*CSX Transp. Inc. v. Island Rail Terminal Inc.*,
879 F.3d 462 (2d Cir. 2018)....35, 40
*Fargo v. Commissioner*,
447 F.3d 706 (9th Cir. 2006)....60

**Cases (continued):** **Page(s)**

*Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ........ 32
*Gale v. First Franklin Loan Servs.*, 701 F.3d 1240 (9th Cir. 2012) ........ 32, 37, 53
*Hibbs v. Winn*, 542 U.S. 88 (2004) ........ 33
*In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) ........ 40
*Joffe v. Google, Inc.*, 746 F.3d 920 (9th Cir. 2013) ........ 53-54
*Kimble v. United States*, 141 Fed. Cl. 373 (Fed. Cl. 2018), *appeal pending*, Fed. Cir. No. 19-1950 ........ 39
*Moore v. United States*, No. C13-2063RAJ, 2015 WL 1510007 (W.D. Wash. April 1, 2015) ........ 56
*Norman v. United States*, 942 F.3d 1111 (Fed. Cir. 2019) ........ 23, 60
*Renz v. Grey Advert., Inc.*, 135 F.3d 217 (2d Cir. 1997) ........ 39
*Rizk v. Holder*, 629 F.3d 1083 (9th Cir. 2011) ........ 60
*Rojas v. Federal Aviation Admin.*, 941 F.3d 392 (9th Cir. 2019) ........ 17
*Rumsfeld v. Padilla*, 542 U.S. 426 (2004) ........ 39
*United States v. Gardner*, No. 2:18-cv-03536-CAS-E, 2019 WL 1767120 (C.D. Cal. April 22, 2019) ........ 29, 55

**Cases (continued):** **Page(s)**

*United States v. Markus*,
Civil No. 16-2133, 2018 WL 3435068
(D. N.J. July 17, 2018) ........ 28
*United States v. McBride*,
908 F. Supp. 2d 1186 (D. Utah 2012) ........ 39
*United States v. Ott*,
No. 18-cv-12174, 2019 WL 3714491
(E.D. Mich. Aug. 7, 2019) ........ 29, 55
*United States v. Shinday*,
No. 2:18-cv-06891-CAS-Ex, 2018 WL 6330424
(C.D. Cal. Dec. 3, 2018) ........ 55
*United States v. Town of Colorado City*,
935 F.3d 804 (9th Cir. 2019) ........ 17
*United States v. Wanland*,
830 F.3d 947 (9th Cir. 2016) ........ 60
*United States v. Williams*,
489 F. App'x 655 (4th Cir. 2012) ........ 22
*United States v. Williams*,
No. 1:09-CV-00437, 2014 WL 3746497
(E.D. Va. June 26, 2014) ........ 39

**Statutes:**

Internal Revenue Code (26 U.S.C.):
§ 61(a) ........ 18
§ 6699 ........ 36

28 U.S.C.:
§ 1291 ........ 2
§ 1331 ........ 2
§ 1345 ........ 2
§ 1355 ........ 2

**Statutes (continued): Page(s)**

31 U.S.C.:

§ 5311 .......... 18, 63-64
§§ 5311-32 .......... 18
§ 5313 .......... 58
§ 5313(a) .......... 58
§ 5314 .......... 2-3, 5, 7, 9-10, 14-19, 21-23, 25-26, 28, 30, 32-33, 35, 37-45, 49-51, 56-58, 63-67
§ 5314(a) .......... 19, 25, 27, 30
§ 5314(a)(1)-(3) .......... 26, 28
§ 5321 .......... 22, 50, 63, 65
§ 5321(a)(5) .......... 2, 6-7, 12, 23, 33-34, 37, 45-46, 53-54
§ 5321(a)(5)(A) .......... 3-4, 10, 14-15, 21, 23-25, 32, 34-36, 38-39, 48
§ 5321(a)(5)(B)(i) .......... 3-4, 7, 10-11, 13-15, 17, 24-25, 32, 34-37, 39, 49, 53, 55
§ 5321(a)(5)(B)(ii) .......... 10, 13, 22, 24, 37-38, 41, 43
§ 5321(a)(5)(C)(i)(II) .......... 24, 38
§ 5321(a)(5)(C)(ii) .......... 24
§ 5321(a)(5)(C) .......... 7, 33, 37, 44
§ 5321(a)(5)(D) .......... 7, 33, 37, 44
§ 5321(a)(5)(D)(ii) .......... 11, 13, 24, 38-40, 45
§ 5322 .......... 51-52, 63, 67
§ 5322(b) .......... 51

American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418 (2004) .......... 23

Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) .......... 18, 57-58

Dictionary Act, 1 U.S.C. § 1 .......... 40-41

USA Patriot Act, Pub. L. No. 107-56, § 361(b), 115 Stat. 272 (2001) .......... 22

**Miscellaneous:** **Page(s)**

Internal Revenue Manual (I.R.M.):
4.26.16-2 (July 1, 2008) .................... 9
4.26.16.4.6.2 (July 1, 2008) .................... 9
4.26.16.6 (Nov. 6, 2015) .................... 7
4.26.16.6.4.1(3) (Nov. 6, 2015) .................... 57
4.26.16-.17 .................... 46

Treasury Regulations (26 C.F.R.):
§ 1.1-1(b) .................... 18

Treasury Regulations (31 C.F.R.):
§ 103.56 (April 14, 2010) .................... 2
§ 1010 .................... 2
§ 1010.306(c) .................... 2-3, 5, 10, 20, 27, 37, 47
§§ 1010.310-.314 .................... 58
§ 1010.350(a) .................... 2-3, 5, 10, 19-20, 26, 28, 47
§ 1010.350(c) .................... 27
§ 1010.350(g) .................... 21
§ 1010.350(g)(1)-(2) .................... 47
§ 1010.810(d), (g) (March 1, 2011) .................... 2

Fed. R. App. P. 4(a)(4) .................... 2

Bank Secrecy Act Regulations - Reports of Foreign Financial Accounts, 75 FR 8844-01, 2010 WL 667290, (Feb. 26, 2010) .................... 57

H.R. Rep. No. 91-975 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4394 .................... 48

H.R. Rep. No. 108-548(I), 2004 WL 1380512 (June 6, 2004) .................... 23

**Miscellaneous (continued):** **Page(s)**

IRS FBAR Reference Guide, *available at* https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf ..... 57

Joint Committee of Taxation, 114th Cong., *Description of Chairman's Mark of the "Taxpayer Protection Act of 2016,"* JCX-30-16 (April 18, 2016) ..... 57

Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress*, JCS-5-05 No. 32, 2005 WL 5783636 (May 2005) ..... 23

*Manafort Verdict: How the Jury Found on Each Count*, WALL ST. J., Aug. 21, 2018, available at https://graphics.wsj.com/table/manafort_0821 (last checked on March 6, 2020) ..... 52

Ninth Circuit Rule 28-2.6 ..... 62

Report of Foreign Bank and Financial Accounts ("FBAR") Form TD F 90-22.1 (Rev. January 2012), available at https://www.irs.gov/pub/irs-pdf/f90221.pdf ..... 20, 28

Secretary of the Treasury, Report to Congress (Apr. 26, 2002), available at https://www.treasury.gov/press-center/press-releases/Documents/fbar.pdf ..... 22

S. Rep. No. 108-192 (2003), 2003 WL 22668223 (Nov. 7, 2003) ..... 23, 38, 50

## GLOSSARY

| Acronym | Definition |
|---|---|
| ACTC | American College of Tax Counsel, amicus curiae in support of appellant Jane Boyd |
| Boyd | Jane Boyd, appellant |
| FBAR | Report of Foreign Bank and Financial Accounts |
| IRS | Internal Revenue Service |
| The Patels | Laxman, Jashua, Hiten, and Anita Patel, amici curiae in support of appellant Jane Boyd |

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

**No. 19-55585**

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee**

**v.**

**JANE BOYD,**

**Defendant-Appellant**

---

**ON APPEAL FROM THE ORDER OF THE**
**UNITED STATES DISTRICT COURT FOR THE**
**CENTRAL DISTRICT OF CALIFORNIA**

---

**BRIEF FOR THE APPELLEE**

---

## STATEMENT OF JURISDICTION

On January 31, 2018, the United States filed suit to reduce to judgment $47,279 in civil penalties assessed by the Internal Revenue Service ("IRS") against appellant Jane Boyd for her non-willful failure to timely report her interests in foreign bank accounts on a Report of

Foreign Bank and Financial Accounts ("FBAR") for 2010.[1] (Complaint, SER 1-5.)[2] The United States also sought interest and late-payment penalties as provided by law. (SER 4.) The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1345, and 1355.

On April 23, 2019, the District Court granted the Government's motion for summary judgment and denied Boyd's cross-motion for summary judgment. (ER 17-25.) The court entered a final judgment the same day. (ER 15-16.) On May 22, 2019, Boyd timely filed a notice of appeal. (ER 1.) *See* Fed. R. App. P. 4(a)(4). This Court has jurisdiction under 28 U.S.C. § 1291.

---

[1] The FBAR-related statutes and regulations are not part of the Internal Revenue Code (26 U.S.C.) or its related regulations. *See* 31 U.S.C. §§ 5314, 5321(a)(5); 31 C.F.R. § 1010.350(a), 1010.306(c). In 2003, the Secretary of the Treasury delegated civil enforcement of the foreign account reporting requirements and associated penalties to the IRS. 31 C.F.R. § 103.56 (April 14, 2010); 31 C.F.R. § 1010.810(d), (g) (March 1, 2011). In 2011, the relevant regulations were reorganized to 31 C.F.R. § 1010.

[2] "SER" refers to the supplemental excerpts of record filed with this brief. "ER" refers to the excerpts of record filed with the appellant's brief. "Br." refers to appellant's opening brief. "ACTC Br." and "Patel Br." refer to the respective briefs filed by the American College of Tax Counsel ("ACTC") and members of the Patel family, appearing as amici curiae in support of Boyd.

## STATEMENT OF THE ISSUE

United States persons must report their interests in foreign bank accounts on a timely filed FBAR form for any year in which the aggregate balance exceeds $10,000. 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.350(a), 1010.306(c). The amount of "any civil penalty" for a non-willful "violation" of § 5314 "shall not exceed $10,000." 31 U.S.C. § 5321(a)(5)(A), (B)(i). The question presented is whether the District Court correctly held that a separate "violation" occurs for each account not properly reported and that the penalty therefore may be imposed on a per-account basis.

## STATEMENT OF THE CASE

Appellant Jane Boyd held foreign accounts in the United Kingdom for many years and was required to report her interest in each of them annually on an FBAR form. She did not report any such interests until 2012 as part of her participation in an IRS voluntary disclosure program. The IRS determined that Boyd's compliance failures were non-willful and that penalties only with respect to 2010 were sufficient to promote future compliance. Consistent with applicable mitigation guidelines set forth in the Internal Revenue Manual, the IRS assessed

non-willful penalties under 31 U.S.C. § 5321(a)(5)(A) with respect to each of 13 foreign accounts, in the total amount of $47,279.

Boyd did not pay the assessed penalties and the Government filed suit to reduce the penalties, statutory interest, and a late-payment penalty to judgment. The parties filed cross-motions for summary judgment. The Government argued that the $10,000 maximum penalty in § 5321(a)(5)(B)(i) for a non-willful violation of reporting requirements may be imposed on a per-account basis. Boyd argued that the IRS is limited to a single, maximum $10,000 penalty per FBAR (*i.e.*, per year), regardless of the number of undisclosed or improperly disclosed foreign accounts involved.

The District Court granted the Government's motion for summary judgment, denied Boyd's cross-motion, and entered a judgment for the Government. (ER 17-25; ER 15-16.) Boyd now appeals.

**A. The FBAR penalty assessments**

The relevant facts in this case are undisputed. (SER 52-57, 68; *see also* SER 10-18, 19-20.)

Jane Boyd is a U.S. citizen residing in California. (SER 53 ¶ 4). From at least 2004 through 2011, Boyd had a financial interest in,

signatory authority over, or otherwise controlled various financial accounts at financial institutions in the United Kingdom that had, either individually or collectively, account balances in excess of $10,000. (*Id.* ¶ 5; SER 11; SER 34-35.) Boyd was required to disclose her interests in the foreign accounts on an annual FBAR form by June 30 of the year following the year in which the accounts were held. I.R.C. § 5314; 31 C.F.R. §§ 1010.350(a), 1010.306(c). Boyd did not file FBARs reporting the accounts for at least 2004 through 2010.[3] (SER 11, 14, 16; SER 53-54 ¶¶ 3, 11.) Boyd also did not report income or dividends from those accounts on her federal income tax returns (Form 1040, Schedule B) for those years. (SER 11, 14, 16; SER 54.)

As relevant here, in 2010, Boyd had 14 foreign accounts, including bank, securities, and bond accounts, held across eight different financial institutions with an aggregate balance of $1,020,414, as measured by the high balance in each account. (SER 11-12; SER 53-54 ¶¶ 5-6.)

In 2011, the State of California sent Boyd a letter pursuant to a state compliance initiative informing her that it was aware of a foreign

---

[3] The IRS determined that Boyd also filed a delinquent FBAR for 2011, which Boyd disputed below. (SER 11, 15; SER 34.) The 2011 FBAR has no effect on this case.

account or accounts based on a transfer of funds from the United Kingdom. (ER 32 ¶ 12.) In September 2012, Boyd entered the IRS's Offshore Voluntary Disclosure Program ("OVDP"), a federal disclosure initiative intended to provide a uniform and predictable penalty structure for U.S. persons who wished to voluntarily report previously undisclosed offshore financial accounts. (SER 54 ¶ 10.)

In October 2012, as part of her participation in the OVDP, Boyd submitted delinquent FBARs for all relevant years, but she "opted out" of the OVDP in March 2014. (ER 33-36; SER 15-16; SER 54-55 ¶¶ 11, 13-14.) By opting out, she became subject to a full examination and to the potential assessment of FBAR penalties. (SER 16; SER 55 ¶¶ 15-16.) *See* 31 U.S.C. § 5321(a)(5). After an examination, the IRS proposed adjustments to Boyd's federal income tax returns for all years reflecting interest and dividend income attributable to the accounts, to which Boyd consented. (SER 16.)

The IRS also determined that Boyd was subject to civil FBAR penalties for 2004 through 2011, but that her failures to report the U.K. accounts were not willful. (SER 55 ¶ 17; SER 38-39, 41.) The IRS further determined that Boyd was eligible for mitigation because she

satisfied four threshold conditions set forth in the Internal Revenue Manual ("I.R.M."). (SER 55-56 ¶¶ 17, 19.)

Under 31 U.S.C. § 5321(a)(5)(B)(i), the maximum penalty for non-willful violations of the reporting requirements is $10,000 per violation. Applying the mitigation guidelines to each account, the revenue agent calculated that Boyd was subject to non-willful penalties[4] for 2004 through 2011 in the total amount of $203,123, including $47,279 for 2010. (SER 38-39, 41.) He determined, however, that imposing the non-willful penalty with respect to only one year – 2010 – was appropriate under the facts and circumstances of the case and that it "would be as effective in promoting future compliance as a penalty for all of the years" for which Boyd failed to report the accounts. (SER 41.) *See* I.R.M. 4.26.16.6 (Nov. 6, 2015) ("Penalties should be determined to promote compliance with the FBAR reporting and recordkeeping requirements.")

---

[4] Although § 5321(a)(5) does not provide separate penalties for non-willful and willful violations of § 5314, the statutory maximum penalty *amounts* applicable to such violations are often referred to as the "non-willful penalty" (§ 5321(a)(5)(B)(i)) and the "willful penalty" (§ 5321(a)(5)(C)-(D)). We sometimes use those terms in this brief as shorthand. *See generally* pp. 23-24.

On February 3, 2015, the IRS proposed penalties in the total amount of $47,279 for 2010. (SER 43-49.) Boyd contested the proposed assessment in the IRS Office of Appeals, which sustained the penalties. (SER 24, 50 (entries tracing process in Appeals).)

On June 9, 2016, the IRS assessed $47,279 in non-willful FBAR penalties against Boyd for 2010 in the following manner:

| | Financial Institution | Account Type | Account No. (last 4 digits) | High Balance (USD) | FBAR Penalty Amount |
|---|---|---|---|---|---|
| 1 | NS&I Bonds | Bonds | 7712 | $ 34,251 | $ 3,425 |
| 2 | Invesco Perpetual | Securities | 1187 | $ 11,022 | $ 1,102 |
| 3 | Henderson Global Investors | Securities | 6613 | $ 2,531 | $ 253 |
| 4 | Henderson Global Investors | Securities | 2526 | $ 1,911 | $ 191 |
| 5 | Baille Gifford | Securities | 3389 | $ 23,232 | $ 2,323 |
| 6 | Halifax | Bank | 2144 | $ 49,845 | $ 4,985 |
| 7 | Halifax | Bank | 6282 | $ 70,322 | $ 5,000 |
| 8 | HSBC | Bank | 3099 | $ 234,398 | $ 5,000 |
| 9 | HSBC | Bank | 5957 | $ 76,562 | $ 5,000 |
| 10 | HSBC | Bank | 5841 | $ 76,562 | $ 5,000 |
| 11 | HSBC | Bank | 5930 | $ 76,562 | $ 5,000 |
| 12 | HSBC | Bank | 1743 | $ 229,688 | N/A |
| 13 | Northern Rock | Bank | 4249 | $ 78,460 | $ 5,000 |
| 14 | Santander | Bank | 1566 | $ 55,068 | $ 5,000 |
| | | | TOTAL: | **$ 1,020,414** | **$ 47,279** |

(SER 56 ¶ 20.)[5]

In assessing the FBAR penalties, the IRS treated Boyd's failure to report each of the 13 accounts as separate violations of the reporting requirements in 31 U.S.C § 5314 and its implementing regulations. (SER 55 ¶ 17.) On June 10, 2016, the IRS sent Boyd a letter demanding payment of the FBAR penalties. (SER 57 ¶ 24.) Boyd did not pay the balance due.

[5] The IRS determined that Boyd qualified for "Level II" non-willful mitigation because each of her accounts contained less than $250,000. (SER 56 ¶ 19.) I.R.M. 4.26.16.4.6.2 (July 1, 2008); 4.26.16-2 (July 1, 2008). Consistent with the guidelines, the amount of each penalty was computed based on the highest balance contained in the relevant account during 2010. (SER 57 ¶ 21). For accounts containing $50,000 or more, the IRS assessed a $5,000 penalty. (*Id.* ¶ 22). For accounts containing less than $50,000, the IRS assessed a penalty equal to 10% of the high balance in the account. (*Id.* ¶ 23).

No penalty was asserted with respect to Boyd's HSBC account ending in -1743 because the IRS determined that funds in that account were used to fund her accounts ending in -5957, -5841, and -5930 during 2010. (SER 55 ¶ 17; SER 33, 39.) Accordingly, although it is undisputed that Boyd failed to properly report all 14 accounts in 2010, the IRS declined to impose a penalty on the account ending in -1743.

## B. Proceedings in the District Court

### 1. The complaint and the parties' cross-motions for summary judgment

On January 31, 2018, the Government filed suit seeking to reduce to judgment the penalty assessment, interest, and a late-payment penalty. (SER 1-5.) The parties filed cross-motions for summary judgment. (ER 44 (entries 31, 32).)

As relevant here, U.S. persons with a financial interest in, or signature or other authority over, one or more foreign bank, securities or other financial account(s) with an aggregate balance exceeding $10,000 must report each interest annually on an FBAR form. 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.350(a), 1010.306(c). The amount of "any civil penalty" for a non-willful "violation" of § 5314 "shall not exceed $10,000." 31 U.S.C. § 5321(a)(5)(B)(i), (a)(5)(A).

The Government argued that a "violation" of § 5314 and its implementing regulations relates to each single foreign account and not to the FBAR form on which the accounts are reported. (SER 6-8; SER 63-67; SER 69-71.) The Government pointed out that the statutory context – the provision allowing for a reasonable cause exception to the non-willful penalty (31 U.S.C. § 5321(a)(5)(B)(ii)), and the provision for

a penalty for willful violations of reporting requirements (§ 5321(a)(5)(D)(ii)) – both refer to "the balance in the account," indicating that a violation relates to a single account. (SER 65-66; SER 70-71.) Consequently, the Government argued, Boyd violated the reporting requirements with respect to each account untimely reported on the 2010 FBAR form and the IRS therefore properly imposed penalties in the total amount of $47,279 under § 5321(a)(5)(B)(i). (SER 9; SER 63-67; SER 69-71.)

Boyd did not dispute that a non-willful penalty applied, but argued that filing an untimely FBAR is "a single statutory violation." (SER 60, 61; *see also* SER 58, 72.) She argued that the penalty for a single non-willful violation is capped at $10,000 per year and, absent express language otherwise, the penalty has "no relationship to the number of financial accounts required to be listed on the FBAR form." (SER 61, 62.) Boyd also argued that the non-willful penalty provision should be interpreted in her favor because "penal statutes are to be construed strictly" and no penalty should be applied "unless the words of a statute plainly impose it." (SER 59 (quotation and citation omitted).)

Boyd did not argue that the IRS had abused its discretion in applying the mitigation guidelines, but contended that if she were to prevail, the IRS would be required to reduce the penalty to $5,000 – which the Government disputed. (SER 67 ($10,000 penalty applied if Boyd were to prevail); ER 27-31.)

During a hearing on the cross-motions for summary judgment, the District Court asked the parties whether a rule of lenity akin to that used in the criminal context applied in the civil FBAR context. (SER 73, 75.) Boyd contended that it would apply to resolve uncertainty about how the non-willful penalty applies. (SER 74.) The Government argued that it did not apply here because the statutory and regulatory scheme was clear that the penalty could be imposed on a per-account basis. (SER 75.)

### 2. The District Court's order

On April 23, 2019, the District Court issued an order granting the Government's motion and denying Boyd's motion. (ER 17-25.) Although the court viewed § 5321(a)(5) as "somewhat unclear" (ER 23) regarding whether a penalty applies per account or per year, it determined the Government's position to be the more reasonable

interpretation of the statute. (ER 23, 24.) The court agreed with the Government that Congress's use of the terms "account" and "balance" in the singular form in both the reasonable cause exception (§ 5321(a)(5)(B)(ii)) and in a provision relating to willful violations (§ 5321(a)(5)(D)(ii)) "contemplates that the relationship with each foreign financial account constitutes the non-willful FBAR violation." (ER 24; *see also* ER 23.) Consequently, the court held that the IRS may impose the penalty for non-willful violations of the reporting requirements on a per-account basis. (ER 17, 24-25.)

With respect to Boyd's argument that § 5321(a)(5)(B)(i) should be strictly construed against the Government because no penalty should apply unless the provision clearly imposes it, the District Court found the argument inapposite because there was no dispute that Congress provided a penalty for violations of the reporting requirements. (ER 24.) The court determined that the rule of lenity did not apply because the penalty statute provided an answer to the legal question raised in this case. (ER 24.)

## SUMMARY OF ARGUMENT

Under § 5314 of Title 31 and its implementing regulations, U.S. persons must report their interests in foreign bank accounts on an FBAR form for any year in which the aggregate balance exceeds $10,000. Under § 5321(a)(5)(A), the Secretary is authorized to impose a penalty for a violation of § 5314, with the amount of the penalty varying based on whether the violation is non-willful or willful. Where the violation is non-willful, as Boyd's was, § 5321(a)(5)(B)(i) limits the Secretary to a maximum $10,000 penalty per violation, subject to a reasonable cause exception. That statutory maximum is significantly increased where the violation is willful, and no reasonable cause exception is available for willful violations.

The District Court correctly determined that by non-willfully failing to timely report her accounts on the 2010 FBAR, Boyd was subject to a maximum $10,000 penalty for each of the accounts that was not properly reported. Section 5314 and the relevant regulations create a reporting requirement that extends to each foreign account. It necessarily follows that a violation of § 5314 and the regulations relates to a single account and not to the FBAR form on which accounts are

reported. That the Secretary exercised his discretion to require reporting of foreign accounts on a single, annual FBAR form does not change the nature of the violation, which relates to a single account. Consequently, the penalty authorized in § 5321(a)(5)(A) may be imposed on each undisclosed or improperly disclosed account, subject (as relevant here) to the $10,000 statutory maximum set forth in § 5321(a)(5)(B)(i) for non-willful violations.

The District Court correctly held that § 5321(a)(5)(B), properly viewed in light of its context and the statutory scheme, indicates that the penalty for a non-willful violation of § 5314 may be imposed on a per-account basis. Indeed, § 5321(a)(5)(B)(i) provides that "any civil penalty" imposed under § 5321(a)(5)(A) for a non-willful violation cannot exceed $10,000, indicating that more than one penalty may be at issue with respect to a single "report" under § 5314(a). The District Court correctly rejected Boyd's argument below that the text of § 5321(a)(5)(B) clearly supports her position.

The District Court also properly looked to the willful penalty provision and to the reasonable cause exception to the non-willful penalty to inform its determination. On its face, the phrase "the

balance in the account" in both provisions is directed to accounts and not to the FBAR form on which they are reported. Further, the court's conclusion was sound that the use of singular terms in that phrase indicates that a violation of § 5314 relates to a single account.

Further, Boyd's position that a violation of § 5314 occurs per FBAR and not per account is incompatible with how the reasonable cause exception and the willful penalty provision must operate. The reasonable cause exception must apply on a per-account basis because a person may have reasonable cause for one account and not for others. Similarly, the penalty as applied to a willful violation must apply per account to avoid penalizing properly-reported accounts on the same FBAR. And Boyd's position does not resolve how the statutory maximums for non-willful and willful violations could be applied coherently when an FBAR reflects both non-willful and willful violations.

Boyd's claims that the District Court's holding would lead to absurd results rest on baseless assumptions about how the non-willful penalty applies. Hypotheticals offered to show that the court's holding leads to disparate treatment do not compare similarly-situated persons

and rely for effect on the amount of assets held by the U.S. persons being compared – even though the penalty amount under § 5321(a)(5)(B)(i) is not based on the balance in the account. Boyd's theory that the IRS is limited to assessing a single penalty in the maximum amount of $10,000 per FBAR form, regardless of the number of undisclosed or improperly disclosed accounts involved, is erroneous. It also is inconsistent with Congress's purpose of amending § 5321(a)(5) to add the non-willful penalty to improve compliance with reporting requirements.

## ARGUMENT

### The District Court correctly held that the penalty for a non-willful violation of § 5314 may be imposed on a per-account basis

### Standard of review

This Court reviews de novo a district court's grant of summary judgment. *Rojas v. Federal Aviation Admin.*, 941 F.3d 392, 401-02 (9th Cir. 2019). Questions of statutory interpretation are reviewed de novo. *United States v. Town of Colorado City*, 935 F.3d 804, 807 (9th Cir. 2019).

## A. Statutory and regulatory background

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

United States citizens and residents are subject to U.S. income taxation on their worldwide income, regardless of where the income is earned. *See* 26 U.S.C. § 61(a); 26 C.F.R. § 1.1-1(b). Concerned about the use of foreign accounts to (*inter alia*) evade taxes, Congress in 1970 passed the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 31 U.S.C. §§ 5311-32), to require "certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311.

In § 5314 of Title 31, Congress provided that, "[c]onsidering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States . . . to keep records, file reports, or keep records and file reports when the

[person] makes a transaction or maintains a relation for any person with a foreign financial agency."

Section 5314 does not delineate precisely how compliance with the reporting obligation occurs. Congress directed that the "records and reports shall contain the following information in the way and to the extent the Secretary prescribes: (1) the identity and address of participants in a transaction or relationship[;] (2) the legal capacity in which a participant is acting[;] (3) the identity of real parties in interest[;] [and] (4) a description of the transaction." 31 U.S.C. § 5314(a).

As relevant here, the Secretary promulgated regulations providing that "[e]ach 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 to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C § 5314 to be filed by such persons." 31 C.F.R. § 1010.350(a).

At all relevant times, the prescribed form for doing so was the Report of Foreign Bank and Financial Accounts, Form TD F 90-22.1, or "FBAR." *See* 31 C.F.R. § 1010.350(a); ER 33-36; FBAR (Rev. January 2012), available at https://www.irs.gov/pub/irs-pdf/f90221.pdf. A United States citizen had to file an FBAR form on or before June 30 if the aggregate value of his or her foreign accounts exceeded $10,000 at any time during the previous calendar year. 31 C.F.R. § 1010.306(c). Similarly, at all relevant times, the U.S. individual income tax return (IRS Form 1040, Schedule B) required taxpayers to disclose whether they had "an interest in or a signature or other authority over a financial account in a foreign country," and directed taxpayers to consult the "filing requirements for Form TD F 90-22.1." *See, e.g.*, 2010 Schedule B, Part III, Line 7a, available at https://www.irs.gov/pub/irs-prior/f1040sb--2010.pdf.

As relevant here, U.S. persons must report the account number or other designation for the foreign account, the name and address of the foreign financial institution where the account is maintained, the type of the account, and the maximum value of the account during the reporting period. *See* FBAR, Parts II, IV, Items 15-23, available at

https://www.irs.gov/pub/irs-pdf/f90221.pdf. With respect to accounts for which the filer has signature or other authority, the filer also must provide information about each owner of an account on whose behalf the U.S. person has signature authority. *Id.*, Part IV, Items 34-43.

As relevant here, U.S. persons must complete a separate entry on the FBAR for each account owned separately and each account for which they have signature authority (but no financial interest). *Id.*, Parts II, IV. A limited exception exists for U.S. persons with either a financial interest in, or signature or other authority over, 25 or more accounts, who need indicate only the number of accounts, or list the persons for whom they have authority, as applicable. *Id.*, Part I, Item 14; Part IV Items 34-43, Instructions at 7, 8; *see* ER 39, 40. But filers qualifying for that exception must produce detailed account information to the IRS upon request. 31 C.F.R. § 1010.350(g); *see also id.*, § 1010.420 (recordkeeping requirements).

#### 2. Penalties for violations of the reporting requirements

Congress has authorized the Secretary of the Treasury to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. § 5321(a)(5)(A).

Prior to October 23, 2004, the Secretary had authority to impose a civil penalty only for willful violations of 31 U.S.C. § 5314, and the maximum penalty (for each violation) was limited to the greater of (1) an amount equal to the balance in the account at the time of the violation (up to $100,000), or (2) $25,000. 31 U.S.C. § 5321(a)(5)(B)(ii) (2003). *See United States v. Williams*, 489 F. App'x 655 (4th Cir. 2012).

After the terrorist attacks of September 11, 2001, Congress directed that attempts be made to improve compliance with the reporting requirements. *See* USA Patriot Act, Pub. L. No. 107-56, § 361(b), 115 Stat. 272, 332 (2001). In response, the Treasury Department studied the issue and reported that the compliance rate with the FBAR requirement could be as low as 20 percent, meaning that as many as 800,000 individuals each year failed to comply with the requirement. Secretary of the Treasury, A Report to Congress 6 (Apr. 26, 2002), available at https://www.treasury.gov/press-center/press-releases/Documents/fbar.pdf.

Against this backdrop, in 2004 Congress amended 31 U.S.C. § 5321 to cover all failures to comply with the reporting requirement in § 5314, whether willful or not, and increased the maximum penalty for

willful violations. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418, 1586; *Norman v. United States*, 942 F.3d 1111, 1114 (Fed. Cir. 2019). In doing so, Congress understood that the problem of tax evasion through the use of foreign accounts had "grown significantly in recent years" and therefore believed that improving compliance with the reporting requirement in 31 U.S.C. § 5314 was "vitally important to sound tax administration, to combating terrorism, and to preventing the use of abusive tax schemes and scams." S. Rep. No. 108-192, at 108 (2003), 2003 WL 22668223 (Nov. 7, 2003); *see also* Joint Comm. on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* ("2005 Joint Committee Report"), JCS-5-05 No. 32, 2005 WL 5783636, *34 (May 2005) (same). It further believed that "[a]dding a new civil penalty that applies without regard to willfulness will improve compliance with this reporting requirement." S. Rep. No. 108-192, at 108; *see also* H.R. Rep. No. 108-548(I), at 276, 2004 WL 1380512 (June 16, 2004) (same); 2005 Joint Committee Report, 2005 WL 5783636, *34 (same).

Consequently, Congress amended § 5321(a)(5) to extend the penalty authorized in § 5321(a)(5)(A) to both non-willful and willful

violations of 5314, with the maximum amount of the penalty differing based on the U.S. person's intent. Thus, Congress provided in § 5321(a)(5)(B)(i) that "[i]n general," and "[e]xcept as provided in subparagraph (C) [relating to willful violations], the amount of any civil penalty imposed under [§ 5321(a)(5)(A)] shall not exceed $10,000." The penalty for a non-willful violation may be avoided, however, if "such violation was due to reasonable cause" and "the amount of the transaction or the balance in the account at the time of the transaction was properly reported."[6] 31 U.S.C. § 5321(a)(5)(B)(ii). Where the violation is willful, "the maximum penalty under subparagraph (B)(i) [*i.e.*, $10,000] shall be increased to" the greater of (1) $100,000 or, (2) "in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account," 50 percent of "the balance in the account at the time of the violation." 31 U.S.C. § 5321(a)(5)(C)(i)(II), (D)(ii). Willful violations are excluded from the reasonable cause exception. 31 U.S.C. § 5321(a)(5)(C)(ii).

---

[6] In the District Court, Boyd expressly waived any argument that the penalties assessed here should be excused based on reasonable cause. (SER 20.)

### B. The District Court correctly held that a violation of § 5314 relates to a single account and that the penalty for a non-willful violation therefore may be imposed on a per-account basis

#### 1. Section 5314 and its implementing regulations create a substantive reporting requirement with respect to each account

As explained above, Section § 5321(a)(5)(A), Title 31, authorizes the Secretary to impose "a civil money penalty on any person who violates, or causes any violation of, any provision of [31 U.S.C. § ] 5314." Congress did not expressly define a "violation" of § 5314 for purposes of the penalty provision of § 5321(a)(5)(A). But as we will show, § 5314 and its implementing regulations create a reporting requirement that extends to each foreign account. It necessarily follows that each account that is not reported in compliance with those requirements represents a separate violation for which a penalty is authorized in § 5321(a)(5)(A). The District Court correctly held that a violation relates to a single account and that the penalty for a non-willful violation in § 5321(a)(5)(B)(i) therefore may be imposed on a per-account basis.

a. As relevant here, 31 U.S.C. § 5314(a) provides that the Secretary of the Treasury "shall require" a U.S. citizen or resident to

file reports when he or she "makes a transaction or maintains a relation for any person with a foreign financial agency." Although Congress did not define what constitutes a "relation" with a foreign financial agency, the implementing regulations make clear that a "relationship" is a U.S. person's "financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country." 31 C.F.R. § 1010.350(a).

Although Congress granted the Secretary broad authority to determine how a U.S. person must comply with the reporting obligation set forth in § 5314, it indicated that reporting of foreign accounts (*i.e.*, relations) is to occur on an account-by-account basis. In § 5314(a), Congress directed that the report must contain the identity and address of participants in a "relationship," the legal capacity in which a participant is acting, and the identity of the real parties in interest. 31 U.S.C. § 5314(a)(1)-(3).

Compliance with Congress's directive could not occur *except* by reporting the required information on a per-account basis. That Congress contemplated reporting on a per-account basis is seen most clearly where a U.S. person has multiple foreign accounts, with a

different relationship to different accounts. For example, a U.S. person may have three accounts at one foreign bank, with one account owned individually, one account owned jointly, and one for which she has signature authority.[7] Or a person may own two accounts, each held at a different foreign bank. In such circumstances, anything less than reporting on a per-account basis would be wholly inadequate to disclose the participants in a given relationship, the legal capacity in which the U.S. person is acting with respect to the account, or the real parties in interest. 31 U.S.C. § 5314(a).

b. The regulations promulgated by the Secretary implement Congress's directive that reporting occur on an account-by-account basis. The regulations provide that "[e]ach 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* to the Commissioner of Internal Revenue for each year in which such relationship exists and *shall provide such*

[7] Throughout this brief, the Government's discussion of foreign accounts presumes that the accounts being discussed are "reportable accounts" within the meaning of 31 C.F.R. § 1010.350(c) and that they meet the $10,000 threshold in 31 C.F.R. § 1010.306(c).

*information* as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 [*i.e.*, the FBAR] to be filed by such persons." 31 U.S.C. § 1010.350(a) (emphasis added). Thus, the regulations make explicit what was implicit in § 5314(a), that is, that the "relationship" (*id.*) pertains to each foreign account with respect to which the U.S. person has the requisite financial interest or authority. The U.S. person must disclose, or "provide . . . information" (*id.*) about, these relationships on the FBAR form. *Id.* In turn, the information required to be disclosed through the FBAR includes the information Congress directed be reported about each account. *See* 31 U.S.C. § 5314(a)(1)-(3); FBAR Parts II-IV, available at https://www.irs.gov/pub/irs-pdf/f90221.pdf.

Section 5314 and 31 U.S.C. § 1010.350(a) therefore create a substantive reporting requirement with respect to each foreign account. Necessarily, then, a violation of the reporting requirements in § 5314 and its implementing regulations relates to a single account and not to the FBAR form as a whole. Thus, a person submitting a timely FBAR form that accurately reports some accounts while omitting others is noncompliant with reporting requirements with respect to the omitted accounts. *See United States v. Markus*, Civil No. 16-2133, 2018 WL

3435068 (D. N.J. July 17, 2018) (granting Government's motion for summary judgment regarding, *inter alia*, assessment of a penalty for defendant's willful omission of one account from timely 2008 FBAR). We do not understand Boyd to argue, nor could she, that a timely FBAR that omits accounts does not violate reporting requirements.

It is equally true that when a person files an untimely but accurate FBAR, as Boyd did here, she has violated the reporting requirements with respect to each account required to be reported by the deadline. *See United States v. Ott*, No. 18-cv-12174, 2019 WL 3714491 (E.D. Mich. Aug. 7, 2019) (upholding assessment of non-willful penalties for each of two accounts untimely reported over three years, and stating that when noncompliance with reporting requirements is non-willful, "the Secretary may impose a penalty of up to $10,000 per account per year"); *United States v. Gardner*, No. 2:18-cv-03536-CAS-E, 2019 WL 1767120 (C.D. Cal. April 22, 2019) (granting Government's motion for default judgment in suit to reduce assessments to judgment where IRS assessed $10,000 for each account reported on non-willfully delinquent FBARs over four years and stating that "the IRS is

authorized to assess an FBAR penalty not exceeding $10,000 for each foreign account [Gardner] failed to disclose").

The Secretary's determination to require U.S. persons to report foreign accounts on a single FBAR form each year (Br. 24) casts no doubt on the principle that a violation relates to a single account. Nothing in § 5314 prescribes the number of forms the Secretary may use to carry out Congress's directives. Congress granted the Secretary broad discretion on that score, directing that reporting occur "in the way and to the extent the Secretary prescribes." 31 U.S.C. § 5314(a). The Secretary's choice of the less burdensome means of a single, annual FBAR for the reporting of foreign accounts therefore does not change the nature of a violation of the reporting requirements, which relates to a single account.

**2. Boyd's arguments to the contrary are without merit**

Boyd errs in contending (Br. 9, 24) that because only one FBAR form per year is required to be filed, then it follows logically that the failure to timely file an accurate FBAR is a single violation of the reporting requirements, regardless of how many foreign accounts are involved. If violations of the reporting requirements were form-based

rather than account-based, as Boyd and the amici contend, then a U.S. person who fails to report one account on an FBAR form has committed the same violation as someone who fails to report 20 accounts on an FBAR. For that matter, if a U.S. person does not file an FBAR at all regarding 20 accounts, that, too, would be a single violation of the reporting requirements. That position cannot be correct. Each account that is not reported by the filing deadline is an account the IRS (and other federal agencies) lacks information about, and each account may represent thousands or even millions of dollars in unreported income.

Contrary to Boyd's contention (Br. 8, 9, 23), filing an untimely, but accurate FBAR does not mean that the filer has "complied with the law with one exception: they filed late" (Br. 8). It means the filer has not complied with the law. Late filing of even accurate FBARs undermines, at a minimum, the tax administration purposes Congress sought to advance in the BSA. Boyd's position that a violation of the reporting requirements relates to the form on which accounts are required to be reported, and not the accounts required to be disclosed on it, is without merit.

### C. The penalty for a non-willful violation, properly considered in context and in light of the statutory scheme, may be imposed on a per-account basis

As noted above, the Secretary may "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. § 5321(a)(5)(A). In turn, § 5321(a)(5)(B)(i) provides that, except with respect to willful violations addressed in § 5321(a)(5)(C), "the amount of any civil penalty imposed under [§ 5321(a)(5)(A)] shall not exceed $10,000." The District Court correctly held (ER 23, 24) that the penalty for a non-willful violation of § 5314, properly considered in light of statutory context, may be imposed on a per-account basis.

#### 1. The text of the non-willful provision supports the District Court's determination

In interpreting statutory language, this Court "start[s] with the premise that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" with the goal of "understand[ing] the statute 'as a symmetrical and coherent regulatory scheme' and to 'fit, if possible, all parts into a . . . harmonious whole.'" *Gale v. First Franklin Loan Servs.*, 701 F.3d 1240, 1244 (9th Cir. 2012) (quoting *Food and Drug Admin. v. Brown & Williamson*

*Tobacco Corp.*, 529 U.S. 120, 133 (2000) (other internal quotations and citations omitted)). This Court looks first to the language of the statute to determine whether it has a plain meaning. *ASARCO, LLC. V. Celanese Chemical Co.*, 792 F.3d 1203, 2010 (9th Cir. 2015). Because words "necessarily derive meaning from their context," however, interpretation 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." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013) (quotation and citation omitted). A statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted).

Contrary to Boyd's position (Br. 21; *see also* ACTC Br. 9), § 5321(a)(5) does not provide two separate penalties. Section 5321(a)(5) provides for one penalty per "violation" of § 5314. Subparagraph (B)(i) provides that the amount of the penalty cannot exceed $10,000, except where the violation is willful. In that circumstance, the increased maximum penalty amounts in § 5321(a)(5)(C) and (D) apply.

Congress did not expressly state in § 5321(a)(5)(A) whether the penalty for a non-willful (or willful) violation may be imposed on a per-account basis, as the Government contends, or on a per-FBAR (or per "filing") basis, as Boyd contends. *See* Br. 8-9, 15, 28-30; *see also* ACTC Br. 3, 20-21. The District Court therefore concluded that § 5321(a)(5) is "somewhat unclear" (ER 23) regarding how the penalty for a non-willful violation applies. As explained above, however, by statute and regulation, Congress and the Secretary have made clear that the reporting requirements apply to each foreign account, and a separate violation of the reporting requirements occurs for each account that was not properly reported. It follows that the maximum amounts specified in § 5321(a)(5) are determined per account. In any event, the District Court (ER 23) did not err in rejecting Boyd's argument below (SER 58-59) that the plain language of § 5321(a)(5)(B) limits the Secretary to a single, maximum $10,000 penalty per FBAR.

Boyd errs in arguing (Br. 11, 20, 28-30) that the text of §§ 5321(a)(5)(A) and (B)(i) "strongly suggests" (Br. 29) that the Secretary is limited to a single $10,000 penalty per FBAR. As an initial matter, Boyd ignores that § 5321(a)(5)(B)(i) provides that "the amount

of *any* civil penalty" imposed under § 5321(a)(5)(A) "shall not exceed $10,000." (Emphasis added.) The use of the indefinite article "any" (or "a" or "an") before a noun generally indicates that one of multiple potential items are being referenced. *See CSX Transp. Inc. v. Island Rail Terminal Inc.*, 879 F.3d 462, 471 (2d Cir. 2018) (considering the term "the court" in a state statute and finding that "[t]he use of the definite article "the" indicates a singular court, whereas the indefinite article "any" or "a" denotes multiple courts.") On the same principle, § 5321(a)(5)(A), which authorizes a civil penalty against any person who violates § 5314 or any person who causes "any violation" of § 5314, suggests that more than one violation may occur with respect to a particular "report" (§ 5314(a)) required to be filed. Although the District Court did not address § 5321(a)(5)(A) and (B)(i) in this regard, the language of both provisions supports its ultimate holding (ER 23-24) that the IRS may impose the penalty for a non-willful violation on a per-account basis because a violation of the reporting requirements relates to a single account.

Contrary to Boyd's contention (Br. 11, 28-30), Congress need not expressly provide in § 5321(a)(5)(B)(i) that the Secretary may impose

penalties for non-willful violations on a per-account basis. As explained above, the text indicates that the Secretary is not limited to a single $10,000 penalty per FBAR. Similarly (Br. 28; ACTC Br. 3, 6, 9-10), the absence of the word "account" in § 5321(a)(5)(B)(i) is immaterial because the statutory maximum penalty for a non-willful violation (unlike for a willful violation) applies without regard to the balance in the account at issue.

Relatedly, Boyd errs in asserting (Br. 11, 30-31) that Congress must have intended for a single penalty for a non-willful violation to apply per FBAR because Congress "knows how to impose a late-filing penalty" (Br. 11) based on the number of "things" (*id.*) to which a form or report relates. Boyd looks far afield to an unrelated provision, 26 U.S.C. § 6699, for support. Boyd's suggestion that Congress must be held to convey its intentions in the same way across different titles of the U.S. Code is wholly without merit. Further, Congress had no need to spell out a "late-filing penalty" (Br. 11) in § 5321(a)(5)(A) where untimely filing is not the only way to violate the reporting requirements.

Similarly, Boyd errs in arguing (Br. 27-28; *see also* ACTC Br. 8) that it "makes no sense" (Br. 27) to impose the non-willful penalty on a per-account basis when the threshold for filing an FBAR is based on an aggregate $10,000 balance in the account(s), rather than on the number of accounts. 31 C.F.R. § 1010.306(c). Section 5314(a) cautions the Secretary to require reporting in a way that is not overly burdensome, and the aggregate $10,000 balance threshold is a *de minimis* exception serving that purpose. The Secretary's exercise of discretion on that score does not affect how the non-willful penalty in § 5321(a)(5)(B)(i) operates.

#### 2. The District Court correctly considered the related provisions in § 5321(a)(5) to determine how the penalty operates

Contrary to Boyd's assertion (Br. 31), the court properly looked to the reasonable cause exception to the non-willful penalty (§ 5321(a)(5)(B)(ii)), and to the willful penalty provision (§ 5321(a)(5)(C)-(D)), in determining that a violation of § 5314 relates to a single account and that the non-willful penalty therefore applies on a per-account basis. *See Gale*, 701 F.3d at 1244.

a. The reasonable cause exception to the non-willful penalty provides that "[n]o penalty shall be imposed under [§ 5321(a)(5)(A)] with respect to any violation if – (I) such violation was due to reasonable cause, and (II) the amount of the transaction or *the balance in the account* at the time of the transaction was properly reported." 31 U.S.C. § 5321(a)(5)(B)(ii) (emphasis added.) *See also* S. Rep. No. 108-192, at 108 (penalty for a non-willful violation "may be waived if any income *from the account*" was properly reported) (emphasis added). For willful violations of § 5314, Congress provided that the amount of the maximum penalty is the greater of $100,000 or, "in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account," 50 percent of "*the balance in the account* at the time of the violation." 31 U.S.C. § 5321(a)(5)(C)(i)(II), (D)(ii) (emphasis added).

As an initial matter, the reference to "the balance in the account" in both provisions indicates that they are directed to accounts and not to the form on which accounts are reported. The willful penalty provision makes this reading even more explicit by noting that a violation may involve a "failure to report the existence of an account" or

to provide required information "with respect to an account." 31 U.S.C. § 5321(a)(5)(D)(ii). The penalty for a willful violation may be imposed on a per-account basis. *See Kimble v. United States*, 141 Fed. Cl. 373 (2018), *appeal pending*, Fed. Cir. No. 19-1950; *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012); *United States v. Williams*, No. 1:09-CV-00437, 2014 WL 3746497 (E.D. Va. June 26, 2014) (remand op.). Nothing in the 2004 amendments suggests that in extending the Secretary's authorization to impose the penalty in § 5321(a)(5)(A) to include non-willful violations, Congress intended § 5321(a)(5)(B)(i) to apply on a per-form basis, while the willful penalty applies with respect to each account.

In any event, as the District Court held (Op. 7, 8), the use of the singular "account" and "balance" in the phrase "the balance in the account" in both provisions indicates that a violation of § 5314 relates to a single account. Indeed, "[p]lacing the article 'the' in front of a word connotes the singularity of the word modified," while "[i]n contrast, the use of the indefinite article 'a' implies that the modified noun is but one of several of that kind." *Renz v. Grey Advert., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997). *Accord Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004)

explaining that the "use of the definite article . . . indicates that there is generally only one" proper respondent to a petitioner's habeas petition); *Abdisalan v. Holder*, 774 F.3d 517, 523 (9th Cir. 2014) (interpreting Congress's use of "the" in reference to a removal order under the Immigration and Naturalization Act as "suggest[ing] that Congress contemplated that an alien's removal proceedings would typically culminate in one final order of removal"); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013) (interpreting statutory term "the" to mean "singular"); *see also CSX Transp.*, 879 F.3d at 471. The same holds true for the term "the violation" in the phrase "the balance in the account at the time of the violation" in the willful penalty provision. 31 U.S.C. § 5321(a)(5)(D)(ii).

In light of that principle, the District Court correctly held that a violation of § 5314 relates to a single account and not to the FBAR form on which foreign accounts are reported. Boyd's conclusory assertion (Br. 33, 34-35; *see also* ACTC Br. 5 n.4, 11-12) that the Dictionary Act, 1 U.S.C. § 1, requires a different result is without merit. To be sure, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the singular include and apply

to several persons, parties, or things." *Id.* But as we have shown, the "context indicates otherwise" here. *Id.* *See, e.g.*, *Commissioner of IRS v. Driscoll*, 669 F.3d 1309, 1311 (11th Cir. 2012) (rejecting taxpayer's reliance on Dictionary Act to expand scope of tax exemption beyond what the "context of [the statute] reasonably supports").

### 3. Boyd's form-based approach is not compatible with the application of the reasonable cause exception and the willful penalty provision

Boyd cabins her arguments to the narrow circumstances of this case, that is, the untimely filing of an accurate FBAR. *See* Br. 8, 11, 12, 20, 24, 25, 29-33, 38; *see also* ACTC Br. 4, 9, 20-21. Boyd's position that a violation of § 5314 and its implementing regulations relates to the FBAR form *in toto* (or the "filing" of it, *see* Br. 8, 24; *see also* ACTC Br. 15), and therefore that only a single, maximum $10,000 penalty may apply to her non-willful failure to file the 2010 FBAR form, even though she failed to report multiple accounts, cannot be reconciled with the operation of the reasonable cause exception and the willful penalty in other circumstances.

a. The incompatibility of Boyd's position with respect to the operation of the reasonable cause exception in § 5321(a)(5)(B)(ii) is most

clearly seen where different factual bases support non-willful failures to comply with reporting requirements. For example, suppose a U.S. person files a timely FBAR reporting one foreign account accurately, but non-willfully omitting three foreign accounts. For the omitted accounts, suppose that the person did not know that she was a co-owner of the first account, that her accountant advised her she did not have to report the second account, and that she did not tell her accountant about the third account because it generated no income and she mistakenly believed that such accounts did not have to be reported. The question whether any of those proffered explanations would satisfy the reasonable cause exception is beyond the scope of this case. It is clear, however, that the U.S. person in that scenario would have to prove reasonable cause separately with respect to each of the three omitted accounts because satisfying reasonable cause for one of the omitted accounts would not satisfy reasonable cause with respect to the other two omitted accounts.

If a non-willful violation of § 5314 were a single, form-based violation even where multiple noncompliant accounts are at issue, then it is incongruous that the person in the scenario above must prove three

separate reasonable cause defenses to avoid a single maximum $10,000 non-willful penalty. Instead, the more natural interpretation of the reasonable cause exception in § 5321(a)(5)(B)(ii) is that it applies on a per-account basis because a violation of § 5314 relates to one account.

This conclusion is the same when a U.S. person offers the same factual bases to justify multiple compliance failures. For example, a person who non-willfully fails to file a timely FBAR reporting multiple accounts may assert that she did not know she was listed as a co-owner of the foreign accounts. It does not follow that because all accounts went unreported for the same reason that she therefore committed a single violation by filing the FBAR late. Instead, and assuming the requirements for reasonable cause are satisfied in that scenario, it simply means that she is excused by the reasonable cause exception from each non-willful penalty that may be imposed for failing to report each account as required.

b. Boyd errs in asserting (Br. 12, 32-33) that because the reasonable cause exception operates to relieve persons from penalties for non-willful compliance failures, it should not be read to support an interpretation that allows large non-willful penalties to be imposed in

the first instance. Boyd's illogical position ignores that the language in § 5321(a)(5)(B)(i) and (ii) must be read consistently.

Boyd's approach also creates a perverse incentive. If a person failing to properly report one account and another person failing to properly report (for example) 20 accounts have committed the same, single violation – and therefore are subject to the same statutory maximum penalty amount – then there is less incentive for persons with multiple accounts to properly report them. That result is the opposite of what Congress intended when it amended § 5321(a)(5) to add the non-willful provision (including the reasonable cause exception) to improve compliance with reporting requirements.

c. Boyd's form-based approach also cannot be applied coherently with respect to penalties for willful violations. 31 U.S.C. § 5321(a)(5)(C), (D). Boyd fails to explain how her position – that a violation occurs per FBAR form instead of per account – would operate where a U.S. person timely files an FBAR accurately reporting one account, but willfully omitting another. Under Boyd's form-based approach, the U.S. person in that scenario violated § 5314 by filing a willfully erroneous FBAR. Under that interpretation of a violation,

however, the willful penalty would appear to apply to *both* accounts on the FBAR. That nonsensical outcome is only underscored by Boyd's position (Br. 33, 34-35; *see also* ACTC Br. 5 n.4, 11-12) that the word "account" in the phrase "the balance in the account at the time of the violation" in § 5321(a)(5)(D)(ii) must be viewed in the plural sense. Surely Congress did not intend to penalize the proper reporting of a foreign account on an FBAR because a different account on the form was improperly reported.

Boyd's position also does not provide a resolution when an FBAR presents both willful and non-willful noncompliance with reporting requirements. For example, suppose a U.S. person files a timely FBAR accurately reporting one account, non-willfully omitting one account for which she was not able to show reasonable cause, and willfully omitting a third account she wanted to conceal. If a violation of § 5314 and its implementing regulations were related to the FBAR form itself, instead of to each account required to be reported on it, then it is unclear which penalty – and therefore which statutory maximum – would apply in that scenario. The District Court correctly rejected Boyd's unworkable interpretation of § 5321(a)(5).

### D. Boyd's and the amici's remaining arguments do not bring the District Court's order into question

#### 1. Boyd's claims that the District Court's order leads to absurd results are without merit

Boyd erroneously contends (Br. 9-10, 24-25) that the District Court's holding that the non-willful penalty may be imposed on a per-account basis, taken to its logical end, would allow the IRS to impose a non-willful penalty of up to $10,000 for each *field* of information required to be completed on the FBAR. Besides extending far beyond the actual holding of the court, Boyd's hypothetical makes little sense. If an account is improperly reported, then the filer is not in compliance with FBAR reporting requirements with respect to that account whether the noncompliance occurs with respect to one field or multiple fields relating to that account. In any event, Boyd fails to point to any example in which the IRS has imposed any penalty under § 5321(a)(5) in that manner or to any IRS procedure that would permit it. *See* I.R.M. 4.26.16-.17.

Similarly, Boyd errs in arguing (Br. 26; *see also* ACTC Br. 16-17) that under a per-account interpretation of the non-willful penalty, a person with 25 or more foreign accounts – who does not have to provide

account-specific information on the FBAR, *see* p.21, *supra* – would face a "significantly" (Br. 26) lower maximum penalty than most persons with fewer foreign accounts, an "absurd" (*id.*) result. Boyd's position rests on the faulty premise that a person with 25 or more foreign accounts is somehow immune from a per-account imposition of penalties, a premise for which she offers no authority. To the contrary, the regulations clearly provide that such persons must, upon the request of the IRS, provide the same detailed information for each account as persons with fewer than 25 accounts. 31 C.F.R. § 1010.350(a), (g)(1)-(2). The Secretary's designation of a less burdensome way for persons with numerous accounts to report them does not mean that penalties apply differently to them.

#### 2. Claims that imposing the non-willful penalty on a per-account basis would lead to disparate treatment do not withstand scrutiny

Boyd (Br. 35-36) and ACTC (ACTC Br. 15-16) posit hypothetical scenarios which they claim show that imposing the non-willful penalty on a per-account basis would unfairly "result[ ] in disparity among accountholders engaged in non-willful conduct" (ACTC Br. 16). None of the proffered scenarios cast any doubt on the District Court's holding.

a. Boyd (Br. 36) and ACTC (Br. 16) offer scenarios comparing two persons who non-willfully fail to comply with reporting requirements. In both scenarios, a person who non-willfully failed to comply with respect to a single, high-value account is subject to a single, maximum $10,000 penalty, while the other person is subject to a maximum $10,000 penalty for each of multiple low-value accounts.

These scenarios do not indicate inconsistent treatment. First, the persons in each scenario did not commit the same "violation" of reporting requirements. 31 U.S.C. § 5321(a)(5)(A). Instead, one person violated the reporting requirements with respect to one account, and the other person violated them with respect to numerous accounts. As explained above, it is untenable to assert that someone who non-willfully fails to report one account commits the same violation as someone who non-willfully fails to report two accounts, or 20 accounts, or more. Indeed, it may be more difficult and time-consuming for the Government to locate assets secreted in many separate undisclosed foreign accounts than in just one. *Cf.* H.R. Rep. No. 91-975, at 12-13 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4394, 4397-98, 1970 WL 5667 (March 28, 1970). Second, both scenarios rely for their effect on a sharp

difference in the amount of total assets held by the persons being compared. This distinction is irrelevant because the penalty amount in § 5321(a)(5)(B)(i) is not based on the balance in an account.[8]

b. For the same reasons, Boyd's alternate scenario (Br. 35-36), in which persons with "identical amounts of money" (Br. 35) in foreign accounts are subject to a different total maximum non-willful penalty amount for filing an untimely FBAR, depending on the number of accounts in which the assets are maintained, also fails to show disparate treatment. Each U.S. person's total potential statutory maximum penalty amount depends upon a variety of factors: whether the person violated reporting requirements willfully or non-willfully, the number of undisclosed or improperly disclosed accounts at issue, whether reasonable cause excuses an account from bearing a penalty (for non-willful violations), and, sometimes, the balance in the account at the time of the violation at issue (for willful violations).

[8] ACTC's speculation regarding how the penalty for willful violations would apply where a U.S. person drains the account (ACTC Br. 15-16) has no place here. Section 5321(a)(5)(B)(i) authorizes a maximum $10,000 penalty for any non-willful violation of § 5314, regardless of the balance in the account.

c. Boyd's and ACTC's position cannot be reconciled with the statutory and regulatory scheme. As explained above, the reporting requirements in § 5314 and its implementing regulations extend to each account, and a violation of those requirements necessarily relates to a single account. There is nothing irrational or inconsistent, let alone "improper" (Br. 36), in that statutory and regulatory scheme.

Insofar as Boyd and ACTC raise broader equity concerns, they are not presented in this case. Boyd asserts (Br. 29) without support that Congress limited the non-willful penalty to a single, maximum $10,000 penalty per year because it viewed non-willful violations as "relatively minor infractions." (*id.*). To the contrary, Congress amended § 5321 in 2004 to add the non-willful provision precisely because it believed that the reporting of foreign accounts was "vitally important to sound tax administration" and believed that the non-willful penalty would improve compliance with reporting requirements. S. Rep. No. 108-192, at 108.

### 3. Boyd's reliance on the penalty for criminal violations of the reporting requirements is misdirected

Boyd errs in asserting (Br. 36-39) that the District Court's holding cannot be reconciled with the Government's practice of charging a criminal defendant with one count for the failure to file an FBAR under 31 U.S.C. § 5322 even where multiple accounts are involved. Section 5322(a) provides a statutory maximum of $250,000 in criminal fines and up to 5 years' imprisonment for each criminal violation of § 5314. *See also* 31 U.S.C. § 5322(b) (providing higher statutory maximums where the violation is part of a pattern of illegal activity).

Looking to the criminal penalty in § 5322 to determine how the civil *non-willful* penalty operates is misdirected. The criminal penalty applies to criminally willful violations of § 5314. In any event, nothing in the language of 31 U.S.C. §§ 5314 or 5322 limits the Government to one criminal count where a person has willfully failed to report multiple accounts.

There also is no merit to Boyd's claim that it "makes no sense" (Br. 38) that a criminal defendant may face a potentially significant prison term if the government separately charged the failure to report each account. Congress plainly believed that substantial penalties were warranted in the *civil* context for willful violations pertaining to each account because it provided for penalties in the maximum amount of 50 percent of the balance in the foreign account when that figure exceeds $100,000. In any event, decisions with respect to criminal charging and sentencing depend upon a multiplicity of factors that are not present in the civil context. Boyd also has not pointed to any case in which a defendant received a sentence approaching the statutory maximum available under 31 U.S.C. § 5322.[9]

[9] To use Boyd's example (Br. 37-38), Paul Manafort received a sentence of (*inter alia*) 30 months in prison for the willful failure to file a 2012 FBAR relating to more than 20 accounts. *See USA v. Manafort*, No. 1:18-cr-00083-TSE (E.D. Va.), Docket entry 320 (March 17, 2019) (Count 12s). The jury deadlocked on three FBAR counts relating to 2011, 2013, and 2014. *See, e.g.*, *Manafort Verdict: How the Jury Found on Each Count*, WALL ST. J., Aug. 21, 2018, available at https://graphics.wsj.com/table/manafort_0821 (last checked on March 9, 2020).

#### 4. The rule of lenity does not apply here

Contrary to Boyd's contention (Br. 39-41; *see also* ACTC Br. 12-15), the District Court correctly determined that the rule of lenity did not apply to resolve this case. (ER 24.) The rule has no application in the context of the "civil penalty" authorized by § 5321(a)(5)(B)(i). And even where statutes give rise to criminal penalties, a court "do[es] not resort to the rule of lenity every time a difficult question of statutory interpretation arises." *Joffe v. Google, Inc.*, 746 F.3d 920, 935 (9th Cir. 2013). Instead, "'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute.'" *Id.* (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)). Here, the District Court concluded that § 5321(a)(5) was "somewhat unclear" (ER 23) regarding how the penalty applies to non-willful violations. The court then properly looked to the reasonable cause exception and the willful penalty provision to determine whether they resolved the question, and held that they did. *Gale,* 701 F.3d at 1244 ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (citation and internal quotations omitted). Consequently, there was no "grievous

ambiguity" in the statute, nor does Boyd argue that there is. *See Joffe*, 746 F.3d at 936 ("We need not resort to the rule of lenity where, as here, the ambiguity can be fairly resolved.")

Boyd's reliance (Br. 39-40) on *Commissioner v. Acker*, 361 U.S. 87 (1959), is similarly misguided. In that case, the Supreme Court addressed whether a taxpayer's failure to file a declaration of estimated income tax subjected him not only to an addition to tax for the failure to file the declaration, but also to a further addition to tax for a substantial underestimate of tax. 361 U.S. at 87. To be sure, in answering this question in the negative, the Supreme Court noted the established principle that "one is not to be subjected to a penalty unless the words of the statute plainly impose it." *Id.* at 91 (citation omitted). As the District Court held (ER 24), however, there is no dispute here that § 5321(a)(5) provides for a penalty.

#### 5. Decisions upon which ACTC relies are inapposite here

ACTC (ACTC Br. 10-11) points to two cases for its assertion that "where the conduct is non-willful, the number of unreported accounts or balances in those accounts are irrelevant." ACTC Br. 10. As an initial matter, ACTC overlooks its earlier citation to two cases showing that

the non-willful penalty may be applied per account. *See* ACTC Br. 3 n.2, 7-8 n.6; *Ott*, No. 18-cv-12174, 2019 WL 3714491, at *2; *Gardner*, No. 2:18-cv-03536-CAS-E, 2019 WL 1767120, at *3.

In any event, neither case ACTC relies upon demonstrates that only a single non-willful penalty may be imposed even where multiple noncompliant accounts are at issue. In *United States v. Shinday*, No. 2:18-cv-06891-CAS-Ex, 2018 WL 6330424 (C.D. Cal. Dec. 3, 2018), a husband and wife owned or otherwise controlled numerous foreign accounts over several years, but did not file FBARs reporting the accounts. As relevant here, the IRS imposed a single $10,000 non-willful penalty against the wife for each of five years that the accounts went unreported. *Id.* at *2. The district court denied the defendants' motion to dismiss the Government's suit to reduce assessments to judgment. *Id.* at *5. Nothing in *Shinday* indicates that the district court or the IRS believed that only a single $10,000 non-willful penalty could be imposed. And plainly the IRS may assess *less* than the maximum penalty permitted in § 5321(a)(5)(B)(i) – as it did in Boyd's case.

Similarly, ACTC errs in relying on *Moore v. United States*, No. C13-2063RAJ, 2015 WL 1510007 (W.D. Wash. April 1, 2015). Moore owned one foreign account for 20 years but did not file any FBARs reporting the account until 2010. *Id.* at *1. The IRS assessed a $10,000 non-willful penalty for each of four years at issue in the examination, or $40,000 total, and Moore filed suit contesting the assessment. *Id.* at *2-3. On the Government's motion for summary judgment, the court determined that a non-willful penalty applied, but directed further briefing on the IRS's basis for applying the maximum amount of the penalty. *Id.* at *13-14. Because only one foreign account was at issue in *Moore*, the decision does not show that only a single non-willful penalty may apply when multiple noncompliant accounts are involved.

#### 6. Secondary sources do not bring the District Court's order into question

ACTC misplaces its reliance on several secondary sources (ACTC Br. 17-21), none of which says that only a single $10,000 penalty for a non-willful violation may be imposed per FBAR. In addition, none of the sources purports to be comprehensive or to define what constitutes a violation for purposes of 31 U.S.C § 5314.

Further, all three documents either restate, or refer to, the reasonable cause exception, which, as explained above, indicates that the non-willful penalty may be imposed on a per-account basis. *See* FBAR Instructions (Rev. January 2012), at 8 ("Penalties"), *available at* https://www.irs.gov/pub/irs-pdf/f90221.pdf; Bank Secrecy Act Regulations - Reports of Foreign Financial Accounts, 75 FR 8844-01, 2010 WL 667290, *8854 (Feb. 26, 2010); Joint Committee of Taxation, 114th Cong., *Description of Chairman's Mark of the "Taxpayer Protection Act of 2016,"* at 8, JCX-30-16 (April 18, 2016); IRS FBAR Reference Guide, at 7, *available at* https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf. None of the secondary sources is entirely clear on the legal question before this Court. In any event, they cannot change the meaning of § 5314 or 5321(a)(5).

Finally, ACTC (ACTC Br. 19-20) suggests that an Internal Revenue Manual provision reflecting a per-account imposition of the non-willful penalty is interpretive guidance which the IRS lacked authority to issue. I.R.M. 4.26.16.6.4.1(3) (Nov. 6, 2015). ACTC cites no authority for that proposition and, in any event, Boyd makes no challenge on that score.

### 7. The Patels raise no significant issues

The Patels do not raise significant issues for consideration here. Their chief argument (Patel Br. 4, 11, 13-15) appears to be that three other Bank Secrecy Act provisions requiring the filing of reports support their argument that a violation of § 5314 relates to the filing of an FBAR and not to the accounts reported on it. *See* 31 U.S.C. §§ 5313 (reports of cash withdrawals and deposits over $10,000), 5316 (reports of exports and imports of monetary instruments), 5331 (reports relating to cash receipts exceeding $10,000). The Patels concede (Br. 4 ¶ 6; Br. 13-15) that those provisions involve reporting on a per-transaction basis or, in the case of the export and import of monetary instruments exceeding $10,000, a per-event basis. *See* 31 U.S.C. § 5313(a); 5316(a), (b); 5331(a); 31 C.F.R. §§ 1010.310-.314 (§ 5313 reports), 1010.340(a) (§ 5316 reports), 1010.330(a)(1) (§ 5331 reports), 1010.306(a), (b)(1)-(2), (d) (addressing timing of reports). It does not follow, however, that where the Secretary has exercised his discretion to design an efficient way for multiple foreign accounts to be reported annually on the same form, that a violation of § 5314 occurs on a per-form basis and not on a per-account basis.

### 8. Boyd's assertion that the IRS will misapply the mitigation guidelines in other cases is immaterial to the resolution of this case

Boyd asserts (Br. 43-44) that if the Government were to prevail here, then the IRS might disregard the mitigation guidelines in other cases. First, the possibility that another person may argue in another case that the IRS abused its discretion in applying its guidelines plainly is immaterial to this appeal, where Boyd makes no such allegation or argument. Boyd concedes (Br. 4-5) that she did not argue below that the IRS abused its discretion in computing the penalty here according to the mitigation guidelines, if the Government is correct that the non-willful penalty applies on a per-account basis. Indeed, Boyd benefitted from the IRS's FBAR procedures when the non-willful penalty was imposed with respect to only 2010 and when she received a significantly reduced penalty under the mitigation guidelines. (SER 38-39.) *See* pp.7-9, *supra*.

Second, Boyd has abandoned any argument regarding mitigation. The only argument Boyd made below regarding the guidelines was that if she prevailed, then she was entitled to a single penalty of $5,000 under "Level II" of the mitigation guidelines for non-willful violations.

*See* p.9 n.5, *supra*; ER 27-31. Contrary to Boyd's suggestion (Br. 43), the Government correctly stated (SER 67) that she was not entitled to a particular result under the guidelines because it is well-established that the Internal Revenue Manual "does not have the force of law and does not confer rights on taxpayers." *Fargo v. Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006). *Accord Norman*, 942 F.3d at 1115; *United States v. Wanland*, 830 F.3d 947, 955-56 (9th Cir. 2016). Moreover, because the guidelines reflect an understanding that the non-willful penalty may be applied per account, it would make little sense to apply them if Boyd were correct that the penalty *cannot* be imposed on a per-account basis.

In any event, Boyd raises no argument in her opening brief that she is entitled to a single $5,000 penalty under the mitigation guidelines if she were to prevail here. She therefore has waived any argument on that score. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (issues not raised in the opening brief are deemed waived). Her related request (if she prevails) for a remand "for a determination of whether she is entitled to a reduction of the FBAR penalty below the statutory maximum of $10,000" (Br. 44-45) therefore is inappropriate.

## CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

RICHARD E. ZUCKERMAN
*Principal Deputy Assistant*
*Attorney General*

/s/ Kathleen E. Lyon

FRANCESCA UGOLINI (202) 514-1882
DEBORAH K. SNYDER (202) 305-1680
KATHLEEN E. LYON (202) 307-6370
*Attorneys*
*Tax Division*
*Department of Justice*
*Post Office Box 502*
*Washington, D.C. 20044*

*Of Counsel:*
NICOLA T. HANNA
*United States Attorney*

MARCH 2020

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States respectfully inform the Court that they are not aware of any cases related to the instant appeal that are pending in this Court.

## ADDENDUM


| Statutes (31 U.S.C.) | | Page |
|---|---|---|
| § 5311 | Declaration of purpose | 64 |
| § 5314 | Records and reports on foreign financial agency transactions | 64 |
| § 5321 | Civil penalties | 65 |
| § 5322 | Criminal penalties | 67 |
| **Treasury Regulations (31 C.F.R.)** | | |
| § 1010.350 | Reports of foreign financial accounts | 67 |
| § 1010.306 | Filing of reports | 71 |

## 31 U.S.C.

### § 5311 Declaration of purpose

It is the purpose of this subchapter (except section 5315) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

### § 5314 Records and reports on foreign financial agency transactions

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the 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, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.
(2) the legal capacity in which a participant is acting.
(3) the identity of real parties in interest.
(4) a description of the transaction.

(b) The Secretary may prescribe--

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

**§ 5321 Civil penalties**

* * *

(a)(5) Foreign financial agency transaction violation.--

(A) Penalty authorized.--The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.

(B) Amount of penalty.--

(i) In general.--Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.

(ii) Reasonable cause exception.--No penalty shall be imposed under subparagraph (A) with respect to any violation if--

(I) such violation was due to reasonable cause, and

(II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported.

(C) Willful violations.--In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314--

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

(I) $100,000, or

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

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

(D) Amount.--The amount determined under this subparagraph is--

(i) in the case of a violation involving a transaction, the amount of the transaction, or

(ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

* * *

## § 5322 Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

(b) A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

* * *

## Treasury Regulations (31 C.F.R.)

## § 1010.350 Reports of foreign financial accounts

(a) In general. 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 to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. The form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD–F 90–22.1), or any successor form. See paragraphs (g)(1) and (g)(2) of this section for a special rule for persons with a financial interest in 25 or more accounts, or signature or other authority over 25 or more accounts.

(b) United States person. For purposes of this section, the term "United States person" means—

(1) A citizen of the United States;

(2) A resident of the United States. * * *; and

(3) An entity, including but not limited to, a corporation, partnership, trust, or limited liability company created, organized, or formed under the laws of the United States, any State, the District of Columbia, the Territories and Insular Possessions of the United States, or the Indian Tribes.

(c) Types of reportable accounts. For purposes of this section—

(1) Bank account. The term "bank account" means a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking.

(2) Securities account. The term "securities account" means an account with a person engaged in the business of buying, selling, holding or trading stock or other securities.

(3) Other financial account. The term "other financial account" means—

(i) An account with a person that is in the business of accepting deposits as a financial agency;

(ii) An account that is an insurance or annuity policy with a cash value;

(iii) An account with a person that acts as a broker or dealer for futures or options transactions in any

commodity on or subject to the rules of a commodity exchange or association; or

(iv) An account with—

(A) Mutual fund or similar pooled fund. A mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions; or

(B) Other investment fund. [Reserved]

* * *

(d) Foreign country. A foreign country includes all geographical areas located outside of the United States as defined in 31 CFR 1010.100(hhh).

(e) Financial interest. A financial interest in a bank, securities or other financial account in a foreign country means an interest described in this paragraph (e):

(1) Owner of record or holder of legal title. A United States person has a financial interest in each bank, securities or other financial account in a foreign country for which he is the owner of record or has legal title whether the account is maintained for his own benefit or for the benefit of others. If an account is maintained in the name of more than one person, each United States person in whose name the account is maintained has a financial interest in that account.

(2) Other financial interest. A United States person has a financial interest in each bank, securities or other financial account in a foreign country for which the owner of record or holder of legal title is—

(i) A person acting as an agent, nominee, attorney or in some other capacity on behalf of the United States person with respect to the account;

(ii) A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than an entity in paragraphs (e)(2)(iii) through (iv) of this section) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits;

(iii) A trust, if the United States person is the trust grantor and has an ownership interest in the trust for United States Federal tax purposes. See 26 U.S.C. 671–679 and the regulations thereunder to determine if a grantor has an ownership interest in the trust for the year; or

(iv) A trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.

* * *

(f) Signature or other authority—

(1) In general. Signature or other authority means the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained.

* * *

(g) Special rules—

(1) Financial interest in 25 or more foreign financial accounts. A United States person having a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

(2) Signature or other authority over 25 or more foreign financial accounts. A United States person having signature or other authority over 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.
* * *

**§ 1010.306 Filing of reports**
(effective March 1, 2011 to Nov. 3, 2016)

* * *

(c) Reports required to be filed by § 1010.350 shall be filed with the Commissioner of Internal Revenue on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year.

(d) Reports required by § 1010.311, § 1010.313, § 1010.340, § 1010.350, § 1020.315, § 1021.311 or § 1021.313 of this chapter shall be filed on forms prescribed by the Secretary. All information called for in such forms shall be furnished.

(e) Forms to be used in making the reports required by § 1010.311, § 1010.313, § 1010.350, § 1020.315, § 1021.311 or § 1021.313 of this chapter may be obtained from the Internal Revenue Service. Forms to be used in making the reports required by § 1010.340 may be obtained from the U.S. Customs and Border Protection.

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number** 19-55585

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1. The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is [11,856] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ] The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Kathleen E. Lyon

Date: Mar 9, 2020

("s/" plus typed name is acceptable for electronically-filed documents)