No. _____

In the Supreme Court of the United States

MONICA TOTH, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

ARI S. BARGIL
INSTITUTE FOR JUSTICE
2 South Biscayne Blvd.,
Suite 3180
Miami, FL 33131

SAMUEL B. GEDGE
Counsel of Record
BRIAN A. MORRIS
INSTITUTE FOR JUSTICE
901 North Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

JEFFREY P. WIESNER
JENNIFER MCKINNON
WIESNER MCKINNON LLP
90 Canal St., Suite 110
Boston, MA 02114

QUESTION PRESENTED

The Bank Secrecy Act and implementing regulations require U.S. persons to file an annual report—called an FBAR—if they have foreign bank accounts containing more than ten thousand dollars. The maximum civil penalty for willfully failing to file the report is either $100,000 or half the balance in the unreported account, whichever sum is greater. 31 U.S.C. § 5321(a)(5)(C)-(D). Using this formula, the government imposed on petitioner a civil penalty of $2,173,703.00.

The question presented is whether civil penalties imposed under 31 U.S.C. § 5321(a)(5)(C)-(D)—penalties that are avowedly deterrent and noncompensatory—are subject to the Eighth Amendment's Excessive Fines Clause.

PARTIES TO THE PROCEEDINGS

Petitioner is defendant Monica Toth. Respondent is the United States of America.

RELATED PROCEEDINGS

U.S. District Court for the District of Massachusetts:

United States v. *Toth*, No. 1:15-cv-13367 (Sept. 16, 2020)

U.S. Court of Appeals for the First Circuit:

United States v. *Toth*, No. 21-1009 (Apr. 29, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

INTRODUCTION

This case presents an important threshold question concerning the application of the Excessive Fines Clause to civil monetary penalties. Nearly three decades ago, this Court set the standard for determining when economic sanctions are subject to the Excessive Fines Clause: whether "civil or criminal," an economic sanction is subject to the Clause if it serves at least in part "to deter and to punish." *Austin* v. *United States*, 509 U.S. 602, 610, 622 (1993). *Austin* itself happened to arise in the context of civil *in rem* forfeitures. In the years since, however, courts of appeals have applied *Austin*'s standard faithfully not just to *in rem* forfeitures, but to civil penalties more broadly.

The First Circuit is different. Just six months after *Austin* was decided, that court declared that *Austin* was not "applicable to any actions other than forfeitures under" the precise statutes *Austin* considered. *McNichols* v. *Comm'r*, 13 F.3d 432, 434 (1st Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994). Now decades later, the First Circuit built on that same precedent in this case and held that a $2.17 million civil FBAR penalty "is not a 'fine' and as such the Excessive Fines Clause of the Eighth Amendment does not apply to it." App. 34a. As recently as last year, the IRS's National Taxpayer Advocate warned that "[t]he maximum FBAR penalt[ies]" are "among the harshest civil penalties the government may impose." But under the standard in place in the First Circuit, these extraordinary penalties are immune from scrutiny under the Excessive Fines Clause.

In so holding, the First Circuit deployed a standard that broke with the decisions of this Court and of other circuits. Applying *Austin*, the Seventh, Ninth, and Eleventh Circuits all have construed the Excessive Fines

Clause to apply to civil monetary penalties that are tied to the payor's culpability, that do not merely compensate for financial harm, and that are at least partly punitive or deterrent. The First Circuit, by contrast, resorted to its early-'90s precedent and, on that basis, gave no weight to the fact that the size of FBAR penalties turns in large part on violators' culpability. The court then recast the penalties as purely "remedial"—though they do not compensate for actual pecuniary loss. And the court turned a blind eye to what is obvious even to the government: that by design, FBAR penalties are punitive and deterrent. *E.g.*, U.S. Br. at 16, *Bittner* v. *United States*, No. 21-1195 (U.S. May 17, 2022) (emphasizing "the deterrent effect of the penalties").

Simply, the First Circuit applied a standard that bears no resemblance to the one announced in *Austin* and used in other circuits across the Nation. Under the precedent of this Court and at least three courts of appeals, noncompensatory penalties (like the FBAR's) would easily qualify as "fines" within the meaning of the Excessive Fines Clause. Under the First Circuit's standard, by contrast, the Clause has no application at all. This disparity calls out for correction. The basic contours of a Bill of Rights protection should not vary wildly based on geography. And this case spotlights not only how far afield the First Circuit has strayed, but also *why* the Excessive Fines Clause is so "fundamental to our scheme of ordered liberty." *Timbs* v. *Indiana*, 139 S. Ct. 682, 686 (2019) (citation omitted). Over the past decade, the government has expanded its FBAR enforcement relentlessly. Between 2012 and 2020, it assessed nearly $1.5 billion in FBAR penalties. This Term, it is asking the Court to ratify a still more aggressive regime. *Bittner* v. *United States*, 142 S. Ct. 2833 (2022). "At a time when the use of economic sanctions has such dire

consequences and is so widespread, the Eighth Amendment's Excessive Fines Clause is of critical importance." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 295 (2014).

Nor is this a phenomenon unique to FBAR penalties. State and local actors, too, "increasingly depend heavily on fines and fees as a source of general revenue." *Timbs*, 139 S. Ct. at 689 (quoting Br. of ACLU et al. as *amici curiae*); *see also Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1319 n.2 (11th Cir. 2021) (Newsom, J., concurring). For that reason, there is pressure at every level of government for "more and more civil laws bearing more and more extravagant punishments." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment); *see also id.* ("Today's 'civil' penalties include confiscatory rather than compensatory fines . . . ."). And more often than not, the targets are not the wealthy, but the poor and the powerless. In this sphere, clear constitutional standards are key. The decision below construed the Excessive Fines Clause in a way that conflicts with the precedent of this Court, that conflicts with the precedent of other circuits, and that immunizes from Eighth Amendment scrutiny a quintessentially punitive penalty. The Court's intervention is warranted.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-35a) is reported at 33 F.4th 1. The order of the district court granting respondent's motion for summary judgment (App. 37a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2022. On July 15, 2022, the Chief Justice ex-

tended the time within which to file a petition for a writ of certiorari to and including August 29, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Relevant excerpts from Section 5321 of Title 31 of the United States Code are reproduced in the appendix to this petition. App. 59a-60a.

STATEMENT

A. Legal background

1. In 1970, Congress enacted what is commonly called the Bank Secrecy Act, "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Pub. L. No. 91-508, § 202, 84 Stat. 1118. To implement the Act, Congress directed the Secretary of the Treasury to promulgate regulations to impose recordkeeping and reporting requirements on any U.S. resident or citizen who "makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. § 5314(a).

The Secretary implemented that charge with a series of regulations and a form called the "Report of Foreign Bank and Financial Accounts"—better known as the "FBAR." 31 C.F.R. § 1010.350(a). Under the Secretary's rules, the FBAR's reporting requirement applies when a U.S. person has a financial interest in (or other authority

over) one or more foreign bank accounts whose aggregate balance exceeded ten thousand dollars during the previous calendar year. *Id.* § 1010.306(c). Filers must report their name, address, date of birth, and other identifying information. They also must report information about each of their foreign accounts: the name of the financial institution holding the account, the account number, and the maximum value during the reporting period. Appellant's C.A. App. 3073.

2. The FBAR requirement is enforced through a slate of civil and criminal sanctions, organized by escalating levels of culpability. If someone can show "reasonable cause" for failing to file an FBAR, they may be excused from liability entirely. 31 U.S.C. § 5321(a)(5)(B)(ii). For people whose violations are not "reasonable" but are at least non-willful, the maximum civil penalty is ten thousand dollars. *Id.* § 5321(a)(5)(B)(i); *see generally Bittner* v. *United States*, 142 S. Ct. 2833 (2022) (granting certiorari to consider statutory question whether the penalty applies on a per-account or per-form basis). But for people whose violations are "willful"—a term lower courts have read to cover not just knowing violations, but reckless ones too—the penalties skyrocket. Willful violators face a maximum civil penalty of either $100,000 or half the balance in their unreported account, whichever is greater. 31 U.S.C. § 5321(a)(5)(C)-(D); *see also id.* § 5322(a) (providing added criminal penalties for willful violations).[1]

---

[1] The Court has held that "willfulness" under the criminal provision of the Bank Secrecy Act requires "the Government [to] prove that the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994). As noted above, several lower courts have held that "willfulness" for purposes of the Act's civil-penalty provision extends beyond knowing violations and covers reckless ones as well. *E.g.*, *United States* v. *Rum*, 995 F.3d

As the IRS's National Taxpayer Advocate observed last year, these "maximum FBAR penalt[ies]" are "among the harshest civil penalties the government may impose." *2022 Purple Book* 77 (Dec. 31, 2021), https://tinyurl.com/2022-Purple-Book. By design, moreover, the penalties bear no relation to any fiscal harm incurred by the government. The FBAR reporting requirement "is separate and apart from the duty to report and pay tax on the income earned on the account." Steven Toscher et al., *When Penalties Are Excessive—The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty*, 11 J. Tax Prac. & Proc. 69, 69 (2010). Thus, the penalties are "imposed regardless of whether there is any actual pecuniary loss" to the government. Mem. Supp. U.S. Mot. for Summ. J. at 8, *United States* v. *Simonelli*, No. 6-cv-653 (D. Conn. Jan. 29, 2008) (Doc. 20-2) (Simonelli Br.).

From 2012 to 2020, the IRS assessed nearly $1.5 billion in FBAR penalties. Dep't of the Treasury, *2020 Report of Foreign Bank and Financial Accounts (FBAR) Report to Congress* at 10 (*2020 Treasury Report*), https://tinyurl.com/IRS-FBAR-Report.[2]

B. Facts and procedural history

1. In the mid-1930s, Monica Toth's father fled his home in Germany after he was assaulted for being Jewish. He ended up in Buenos Aires, where Monica Toth was born in 1940. Appellant's C.A. App. 969-70. Toth's mother pulled her out of school after sixth grade, de-

---

882, 889 (11th Cir.), *cert. denied*, 142 S. Ct. 591 (2021); *United States* v. *Horowitz*, 978 F.3d 80, 88 (4th Cir. 2020). This Court has not addressed that question in the context of the Bank Secrecy Act.

[2] The FBAR reporting requirements are enforced by the IRS in accordance with a Memorandum of Understanding executed with the Financial Crimes Enforcement Network. 31 C.F.R. § 1010.810(g).

manding she devote herself to housework instead. Toth Decl., D. Ct. Doc. 13-1, at ¶¶ 5-11. But at the age of twenty-two, Toth left Argentina for the United States. She completed a high-school equivalency program, got married (and later divorced), and had four children. Throughout her life, she has worked mainly as a homemaker for her family. By the early 1970s, she had earned a college degree. In the 1980s, she became a U.S. citizen.

In the meantime, Toth's father had become a successful businessman. Shortly before his death in 1999, he made Toth a gift of several million dollars. For decades, he had used a bank in Switzerland. When gifting the money to Toth, he facilitated opening an account in her name at the same bank, and the funds were kept there.

Until 2010, Toth did not file any FBARs reporting her foreign account. (During this period, she would fill out her tax returns by hand, using forms from the town library. Appellant's C.A. App. 1019-20.) In late 2010, however, she filed a partially completed FBAR that disclosed the account. She volunteered that she did not have some of the information that had to be included, and she wrote that she would obtain that information and "file amended tax returns and forms to you." Ex. 6 to Def.'s Statement of Additional Material Facts, D. Ct. Doc. 168-5, at 3. Later the same month, she mailed out complete FBARs for the five preceding years. Ex. 8 to Def.'s Statement of Additional Material Facts, D. Ct. Doc. 168-7, at 1 ("Although late, I hope these filings will put me in good standing with your office."). Those forms ultimately were routed, not to the Treasury Department, but to a different agency altogether, the Centers for Medicare & Medicaid Services. Appellant's C.A. App. 3070-79.

The next summer, in 2011, the IRS launched an audit. Following its review, the agency determined that Toth ultimately underpaid her taxes for some years and overpaid for others. (For 2007, for example, the examiner recorded that Toth's amended return reflected an overpayment of more than $11,000. Appellant's C.A. App. 3065.) All told, the examiner noted, "[t]he overall tax deficiencies may not be significant enough to warrant a fraud referral." Appellant's C.A. App. 3042. The agency did, however, assess civil-fraud penalties for the years 2005 to 2008. Toth paid them in early 2012. Combined with her outstanding taxes, her payments totaled slightly under $40,000.

Three months later, the IRS assessed Toth a different penalty: for her untimely FBAR for calendar year 2007. The agency determined that her failure to file the FBAR had been "willful"—meaning the maximum potential penalty could run to half the balance of her bank account for that year. Appellant's C.A. App. 3017. The agency then selected that maximum, equal to 50 percent of the value of Toth's account as of mid-2008. For failing to file the one-page FBAR, her penalty amounted to $2,173,703.00.

2.a. Toth did not pay the FBAR penalty. So the government sued her for a judgment imposing it, plus interest and late fees. For several years, Toth defended herself *pro se*. It went poorly. She denied having willfully failed to file her FBAR. She also raised the Eighth Amendment's Excessive Fines Clause as a defense. But with no legal training (and with lifelong difficulties in communicating), she failed to comply with her discovery obligations.[3] Eventually, the district court sanctioned

[3] *See, e.g.*, Appellant's C.A. App. 379 ("Q. Are you asserting a privilege in refusing to answer a question about who collected your mail

her. For its sanction, the court deemed certain facts established, including that Toth had "willfully failed to file an FBAR regarding the Account with respect to calendar year 2007." *United States* v. *Toth*, No. 15-cv-13367, 2018 WL 4963172, at *6 (D. Mass. Oct. 15, 2018). That sanction, the court acknowledged, would prevent Toth from disputing that she had willfully violated the FBAR's reporting requirement. It would not, however, "foreclose [her] from arguing her affirmative defense that the fine imposed by the Government violates the Excessive Fines Clause of the Eighth Amendment." *Id.* at *5.

b. After two more years of litigation—during which Toth hired counsel—the district court entered summary judgment for the government. The court held that its earlier sanctions order established that Toth had willfully violated the FBAR's reporting requirement. App. 43a-44a, 49a; *see also* App. 50a (adding that the record showed Toth to have been "willfully blind or reckless"). Thus, the court said, "[t]he only remaining issue . . . to resolve is whether the penalty assessed is appropriate and consistent with the law." App. 44a.

On that front, the court rejected Toth's excessive-fines defense. Foremost, the court held that "the Eighth Amendment does not apply to civil penalties under 31 U.S.C. § 5321(a)(5)(A)." App. 53a. "[S]uch proportionality protections as the Eighth Amendment contains," the court recited, "have generally been considered inapplicable to civil actions initiated by the United States." App. 53a (quoting *United States* v. *One Parcel of Real Prop.*, 960 F.2d 200, 206 (1st Cir. 1992)). That view of the

---

in the last ten days? A. I still don't quite know what a privilege means, so I cannot assert a privilege because I'm not sure exactly what it means. And I don't see that I'm asking for a privilege.").

Excessive Fines Clause was repudiated by this Court in 1993; in *Austin* v. *United States*, the Court held that the Clause's application turns not on whether a sanction is "civil or criminal," but on whether it "serv[es] in part to punish." 509 U.S. 602, 610. But six months after *Austin*, the First Circuit declared that "it would not extend the Supreme Court's holding in *Austin* 'to any action other than forfeitures' brought under the statute at issue in *Austin*." App. 53a (quoting *McNichols* v. *Comm'r*, 13 F.3d 432, 434 (1993)). Now almost three decades later, the district court viewed itself as "bound" by that circuit precedent and so held that the Excessive Fines Clause does not apply to FBAR penalties. App. 53a.

The district court added that "[e]ven if" the Excessive Fines Clause applied, the penalty imposed on Toth would be valid. App. 54a. At the same time, however, the court declined to hold an evidentiary hearing on the matter given its predicate "finding that the [excessive-fines] factors do not apply to [Toth's] civil penalty" to begin with. App. 56a-57a n.9.

3. The court of appeals affirmed. The court acknowledged that the government had imposed "the maximum allowable penalty set forth in the [Bank Secrecy] Act." App. 4a. Even so, the court rejected Toth's excessive-fines argument on a single, threshold ground. Echoing the district court, the court of appeals held that the Excessive Fines Clause offers no protection against FBAR penalties. App. 26a-34a.

Like the district court, the court of appeals did not evaluate the penalty using the standard set out by this Court in *Austin*. To begin with, the court perceived several "points of distinction" between civil FBAR penalties and the civil forfeiture in *Austin*. App. 29a. Most notably, the court believed that the forfeiture in *Austin*

"could only be imposed following the conviction of a drug-trafficking crime" while the FBAR penalty "is not tied to any criminal sanction." App. 28a. Again like the district court, the court of appeals then turned to its 1993 decision in *McNichols*, which had refused to extend *Austin* beyond the forfeiture statute considered in *Austin*. *E.g.*, App. 29a (likening FBAR penalty to "the civil tax penalties found not to be punishment for . . . Excessive Fines purposes in *McNichols*"). Throughout, moreover, the court drew on precedent construing not the Excessive Fines Clause, but the Double Jeopardy Clause. App. 29a, 30a-31a, 32a, 33a. The court also depicted FBAR penalties as purely "remedial"—not punitive—on the theory that unreported bank accounts may lead to loss of revenue to the government. App. 30a-32a. Based on this reasoning, the court held that an FBAR penalty "is not a 'fine' and as such the Excessive Fines Clause of the Eighth Amendment does not apply to it." App. 34a.

Given its conclusion that the Eighth Amendment does not apply, the court did not consider whether Monica Toth's penalty was unconstitutionally excessive.

REASONS FOR GRANTING THE PETITION

The decision below entrenches a circuit conflict on an issue of national importance: the proper standard for determining whether civil monetary penalties are subject to the limitations of the Excessive Fines Clause. The civil FBAR penalty at issue in this case is noncompensatory and has an avowedly punitive mission. Given these features, the precedent of this Court and of at least three courts of appeals would hold the penalty a "fine" within the meaning of the Excessive Fines Clause. Under the First Circuit's standard, however, the Excessive Fines Clause has no application. That standard is deeply

flawed and it gives governments—federal, state, and local alike—the power to impose self-evidently punitive economic sanctions with no Eighth Amendment scrutiny. The Court's intervention is warranted.

A. The decision below conflicts with this Court's precedent.

In holding that civil FBAR penalties are "not a 'fine' and as such the Excessive Fines Clause of the Eighth Amendment does not apply to [them]" (App. 34a), the decision below contravenes this Court's Eighth Amendment precedent and the government's litigating positions in FBAR cases nationwide.

1. The Excessive Fines Clause protects against exorbitant fines not just in criminal court, but in civil-enforcement actions as well. Unlike other parts of the Constitution, some of which "are expressly limited to criminal cases," the "text of the Eighth Amendment includes no similar limitation." *Austin* v. *United States*, 509 U.S. 602, 607-08 (1993); *Hudson* v. *United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines . . . ."). Thus, whether an economic sanction is subject to the Excessive Fines Clause turns not on whether it is "civil or criminal," but on whether it "serv[es] in part to punish." *Austin*, 509 U.S. at 610.

The Court's decision in *Austin*—a case involving the federal civil-forfeiture statute—shows these principles in practice. Civil forfeiture (as the name suggests) takes place in civil actions, not criminal. But as the Court held in *Austin*, several features confirmed that the forfeiture statute serves "at least in part as punishment." *Id.* at 610-11. To start, the statute "expressly provide[d] an 'innocent owner' defense," linking forfeitures at least in part to "the culpability of the owner." *Id.* at 619. Then

there was the legislative history, which characterized forfeitures as "a powerful deterrent." *Id.* at 620 (citation omitted). In addition, the conduct giving rise to forfeiture was elsewhere punishable criminally. *Id.* And by design, the forfeitures "ha[d] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law"—meaning they could not be classified as purely compensatory (or "remedial"). *Id.* at 621 (citation omitted). Given these characteristics, the Court held that the forfeiture statute served at least partly "to deter and to punish," making it "subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.* at 622.

These principles apply straightforwardly to civil FBAR penalties. To impose penalties for willful violations, the government must prove a defendant's culpability. *See* 31 U.S.C. § 5321(a)(5)(C). By contrast, defendants who are blameless can avoid liability altogether. *Id.* § 5321(a)(5)(B)(ii). As in *Austin*, that "focus . . . on the culpability of the owner" makes the penalties "look more like punishment, not less." *See Austin*, 509 U.S. at 619. And again as in *Austin*, the amount of an FBAR penalty bears "absolutely no correlation" to any harm suffered by the government. *Id.* at 621 (citation omitted). For "willful" reporting violations, for example, the maximum penalty is inherently subject to "dramatic variations" in size (*id.*): it runs to one-half of whatever happens to be in a defendant's bank account when the reporting violation took place. That penalty is available whether a violation causes major harm to the government or minor harm or no harm at all. Distilled, FBAR penalties serve to penalize—to deter and punish reporting violations. In turn, the threshold Eighth Amendment issue is an uncomplicated one: because FBAR penalties are at least partly punitive, they are subject to the Excessive Fines Clause.

Compare United States v. *Warner*, 792 F.3d 847, 861 (7th Cir. 2015) ("Congress apparently intended FBAR penalties to have a deterrent effect"), *with United States* v. *Bajakajian*, 524 U.S. 321, 329 (1998) ("Deterrence . . . has traditionally been viewed as a goal of punishment . . . .").

2. In holding otherwise, the court of appeals broke with this Court's precedent at a bedrock level. This Court in *Austin* articulated the standard for evaluating whether economic sanctions are subject to the Excessive Fines Clause: do they serve at least in part "to deter and to punish"? At every turn, however, the court of appeals failed to apply that standard. Throughout, the court resorted to a panel decision from the early 1990s—*McNichols* v. *Commissioner*—which had written off *Austin* as not "applicable to any actions other than forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7)." 13 F.3d 432, 434 (1st Cir. 1993) *cert. denied*, 512 U.S. 1219 (1994); *see also* App. 29a (likening FBAR penalty to "the civil tax penalt[y] found not to be punishment for . . . Excessive Fines purposes in *McNichols*"), 31a-32a (invoking *McNichols* again), 33a-34a (again). And in large part based on its precedent in *McNichols*, the court of appeals openly parted ways with *Austin*. The court acknowledged, for example, that "[t]he 'culpability of the owner' in the forfeiture scheme at issue in *Austin* did support the determination that it was a 'fine' for Eighth Amendment purposes." App. 33a. Yet based on *McNichols*, the court declined to apply that logic to civil penalties more broadly. It thus gave no weight to the fact that the size of FBAR penalties turns in large part on an offender's culpability, with Congress authorizing vastly "different maximum penalties depending on the willfulness of the violation." App. 32a.

Exacerbating its break with *Austin*, the court of appeals misread basic aspects of the Court's reasoning in that case. According to the court of appeals, civil penalties implicate the Excessive Fines Clause under *Austin* only if they are sufficiently "tied" to a separate "criminal sanction." App. 28a. But "[t]he relevant question" in *Austin* "was not whether a particular proceeding was criminal or civil, . . . but rather was whether forfeiture under §§ 881(a)(4) and (a)(7) constituted 'punishment' for the purposes of the Eighth Amendment." *United States* v. *Ursery*, 518 U.S. 267, 281 (1996). Indeed, the forfeiture regime in *Austin* itself lacked the criminal-civil link the decision below ascribed to it. In the court of appeals' telling, *Austin*'s logic does not apply to FBAR penalties because the forfeiture in *Austin* "could only be imposed following the conviction of a drug-trafficking crime." App. 27a. In truth, however, "forfeiture under § 881(a) is not conditioned upon an arrest or conviction." *United States* v. *$10,700.00*, 258 F.3d 215, 223 n.6 (3d Cir. 2001). At base, the court of appeals' main ground for distinguishing *Austin* rested on a misperception of the forfeiture regime in that case.

The court of appeals' other lines of reasoning drive home its misapplication of this Court's precedent. Having largely jettisoned *Austin*, the court drew on precedent construing not the Excessive Fines Clause, but the Double Jeopardy Clause instead. Because FBAR penalties might not trigger double-jeopardy protections, the court suggested, they do not implicate the Excessive Fines Clause either. App. 29a (likening FBAR penalties to "the civil tax penalties found not to be punishment for Double Jeopardy purposes in *Helvering* v. *Mitchell*, 303 U.S. 391, 398 (1938)"); App. 30a, 31a-33a. On this point, however, this Court has been emphatic. "*Austin* . . . did not involve the Double Jeopardy Clause at all." *Ursery*,

518 U.S. at 286. The Excessive Fines Clause has "never" been understood "as parallel to, or even related to, the Double Jeopardy Clause." *Id.* The analyses are "wholly distinct." *Id.* at 287. And for obvious reasons. Textually, the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson*, 522 U.S. at 99 (citing *Helvering*, 303 U.S. at 399). But the Excessive Fines Clause "includes no similar limitation." *Austin*, 509 U.S. at 608. In fact, the Court has justified reading the Double Jeopardy Clause narrowly in part *because* the Excessive Fines Clause applies more broadly to criminal and civil penalties alike. *See Hudson*, 522 U.S. at 102-03.

The court of appeals' final ground of decision cemented its departure from this Court's precedent: the court recast FBAR penalties as purely compensatory (or "remedial"), in turn labeling them nonpunitive and outside the bounds of the Excessive Fines Clause. App. 29a-31a. But as the government has elsewhere acknowledged, "[t]he FBAR penalty does not compensate the government for actual pecuniary loss." Simonelli Br., *supra*, at 8. And this Court has roundly rejected the notion that noncompensatory sanctions can escape Eighth Amendment scrutiny as "remedial." In *United States* v. *Bajakajian*, the government sought to forfeit money that (much like Toth's) had gone unreported in violation of the Bank Secrecy Act. 524 U.S. at 325 & nn.1-2. Like the court of appeals here, the government couched the forfeiture as "serv[ing] important remedial purposes." *Id.* at 329 (citation omitted). Yet the Court rejected that maneuver out of hand. A "'[r]emedial action,'" the Court noted, "is one 'brought to obtain compensation or indemnity.'" *Id.* (quoting *Black's Law Dictionary* 1293 (6th ed. 1990)). And a forfeiture under the Bank Secrecy Act did no such thing. It addressed "a loss of infor-

mation," which "would not be remedied" by confiscating unreported moneys. *Id.* It served to deter reporting violations—a punitive function, not a remedial one. *Id.* In short, it was punitive and "within the purview of the Excessive Fines Clause." *Id.* at 329 n.4; *cf. Kokesh* v. *SEC*, 137 S. Ct. 1635, 1644 (2017) ("SEC disgorgement . . . bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate.").

This precedent translates perfectly to FBAR penalties. Like the forfeiture in *Bajakajian*, FBAR penalties are an enforcement mechanism for the Bank Secrecy Act. Like the forfeiture in *Bajakajian*, they "do[] not serve the remedial purpose of compensating the Government for a loss." *See* 524 U.S. at 329. Like the forfeiture in *Bajakajian*, they address "a loss of information"—not revenue—and serve to deter reporting violations. *See id.*; Internal Revenue Manual 4.26.16.5.5(5) ("The purpose of FBAR penalties is to promote compliance with the FBAR reporting and recordkeeping requirements."). And of course, "[d]eterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. *Bajakajian* thus confirms what *Austin*'s logic made clear: FBAR penalties are at least partly punitive, meaning the Excessive Fines Clause applies.[4]

---

[4] In places, the decision below incorrectly characterized *Bajakajian*'s forfeiture as a "civil forfeiture." App. 28a. In fact, the forfeiture was a criminal forfeiture, a feature that contributed to the Court's conclusion that it "serve[d] no remedial purpose" and was "designed to punish the offender." 524 U.S. at 332. The decision below also likened FBAR penalties to a customs-law forfeiture the Court considered in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), a double-jeopardy case. App. 29a, 31a. But the Court in *Bajakajian* distinguished that case on the

3. In other settings, the government has come perilously close to agreeing. In *Bittner*, for example—now on the Court's merits docket—the government has protested that permitting only a single FBAR penalty per report would "significantly curtail[] the deterrent effect of the penalties." U.S. Br. at 16, *Bittner* v. *United States*, No. 21-1195 (U.S. May 17, 2022). In the bankruptcy context also (where remedial obligations are more likely to be dischargeable) the government has magnified the FBAR penalties' punitive traits. There, the government has stressed that the penalties are "imposed regardless of whether there is any actual pecuniary loss" and "regardless of whether a person has any tax liability or even is required to file a federal income tax return." Simonelli Br., *supra*, at 8, 10. At least one court has been persuaded, holding FBAR penalties exempt from discharge in bankruptcy partly because they are "assessed . . . as punishment, not as any sort of compensation for any pecuniary harm." *United States* v. *Simonelli*, 614 F. Supp. 2d 241, 244 n.6 (D. Conn. 2008); *see generally Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990) ("[Section] 523(a)(7) 'codifies the

---

ground that the customs forfeiture should be understood as "compensat[ing] Government for lost revenues" (a sort of "'remedial' sanction") while the same could not be said of a forfeiture for violating the Bank Secrecy Act, which involved "loss of information" alone. 524 U.S. at 329. Whatever might be said of customs law, then, *Bajakajian* was clear: forfeitures for violating the Bank Secrecy Act "serve[d] no remedial purpose," and the Eighth Amendment applied. *Id.* at 332; *see generally id.* at 346 (Kennedy, J., dissenting) (questioning "nonpunitive penalties" as "a contradiction in terms"); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 319 (2014) ("[T]he ratifying generation would likely not have divided remedial and punitive penalties when determining whether a sanction qualified as a fine").

judicially created exception to discharge' for both civil and criminal fines.").

Those examples are hardly outliers. In a report to Congress, the Treasury Department characterized an earlier (and more lenient) version of FBAR penalties as "civil sanctions." Sec'y of the Treasury, *A Report to Congress in Accordance with §361(b)* at 7 (Apr. 26, 2002), https://tinyurl.com/FBARreport. More recently, the Tax Division let slip that reporting violations are "punishable" by civil FBAR penalties. U.S. Resp. to Def.'s Mot. for Partial Summ. J. at 1, *United States* v. *Kaufman*, No. 18-cv-787 (D. Conn. Jan. 15, 2020) (Doc. 67). From coast to coast, the government has acknowledged FBAR penalties for what they are: "deterrent."[5] In holding differently, the decision below departed from this Court's precedent and from the government's litigating positions nationwide.

B. The First Circuit's interpretation of the Excessive Fines Clause conflicts with the standard used by other courts of appeals.

The court of appeals also reinforced a conflict with the Seventh, Ninth, and Eleventh Circuits. Unlike the First Circuit, each of those courts has applied *Austin*'s

---

[5] U.S. Mot. for Partial Summ. J. at 24, *United States* v. *Bittner*, No. 19-cv-415 (E.D. Tex. Mar. 12, 2020) (Doc. 29) ("Congress[] intended to provide greater deterrence against hiding foreign bank accounts."); U.S. Resp. to Def.'s Mot. for Partial Summ. J. at 7, *United States* v. *Kaufman*, No. 18-cv-787 (D. Conn. Jan. 15, 2020) (Doc. 67) ("Limiting the penalty to $10,000 per year, regardless of how many accounts are not reported would drastically limit the deterrent value of the penalty . . . ."); U.S. Mot. for Summ. J. at 28, *Moore* v. *United States*, No. 13-cv-2063 (W.D. Wash. Feb. 3, 2015) (Doc. 32) ("Congress has made a policy judgment about the size of the penalty that will accomplish its remedial and deterrent purposes."); *id.* ("[A] total penalty of $40,000 is an appropriate deterrent.").

standard scrupulously, not just to civil forfeitures, but to civil monetary penalties more broadly. In turn, each has extended the protections of the Excessive Fines Clause to civil penalties that would be immune from Eighth Amendment scrutiny under the First Circuit's standard.

1.a. In *Yates* v. *Pinellas Hematology & Oncology, P.A.*, the Eleventh Circuit last year considered "whether an FCA monetary award is a fine for the purposes of the Excessive Fines Clause." 21 F.4th 1288, 1308 (2021). Much like civil FBAR penalties, civil penalties under the FCA (the False Claims Act) bear no relation to any financial harm to the government. They "are preset by Congress and compulsory irrespective of the magnitude of the financial injury to the United States, if any." *Id.* Given the penalties' noncompensatory design, the Eleventh Circuit's threshold Eighth Amendment question was thus an easy one to answer: the penalties "are at least in part punitive," the court held, so they "constitute fines for the purposes of the Excessive Fines Clause." *Id.* Under the Eleventh Circuit's standard, even the FCA's treble-damages provisions—which, unlike the penalties, have at least "a compensatory aspect"—trigger Eighth Amendment scrutiny as "partially punitive." *Id.*

b. The Ninth Circuit proceeds similarly. In 2000, for example, the court of appeals applied the "seminal case of *Austin*" to hold that an across-the-board "victim's compensation" deduction from prison-inmate funds "serves the traditional goals of deterrence and is therefore punishment." *Wright* v. *Riveland*, 219 F.3d 905, 915 (9th Cir.). Despite the program's compensatory label, the law provided for a fixed deduction of five percent from funds received by every inmate. It applied "regardless of whether an inmate committed an offense for which restitution is appropriate" and "regardless of

whether the inmate had already been ordered to pay court-ordered restitution at sentencing." *Id.* Such an arrangement, the court reasoned, implicated the Excessive Fines Clause. The statute "[e]xtract[ed] payments from each and every inmate, without regard to the existence and extent of any injury to a victim." *Id.* It could not be understood as "remedial," but was "punitive and subject to Eighth Amendment scrutiny." *Id.*; *see also Pimentel* v. *City of Los Angeles*, 974 F.3d 917, 920 (9th Cir. 2020) ("We hold that the Eighth Amendment's Excessive Fines Clause applies to municipal parking fines.").

A second case further exemplifies the standard the Ninth Circuit applies to determine whether civil penalties are subject to the Excessive Fines Clause. In a decision much like the Eleventh Circuit's in *Yates*, the Ninth Circuit applied *Austin* to conclude that "the civil sanctions provided by the False Claims Act are subject to analysis under the Excessive Fines Clause because the sanctions represent a payment to the government, at least in part, as punishment." *United States* v. *Mackby*, 261 F.3d 821, 830 (2001). The FCA's language, the court observed, "does not specify whether its sanction of $5,000 to $10,000 per claim is meant to be punitive or remedial." *Id.* But with *Austin* as its guide, the court determined that the penalties "clearly ha[ve] a punitive purpose"—not least because they are noncompensatory. *Id.* "No damages to the government need be shown," the court reasoned, and remedies elsewhere in the statute reinforced that the penalties' "purpose is not to provide a form of damages." *Id.* The legislative history fortified that "the statute has a deterrent purpose." *Id.* So based on *Austin*, the Excessive Fines Clause applied. *Id.*; *accord Hays* v. *Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003) ("[W]e agree with the Ninth Circuit that FCA penalties

are punitive in nature and therefore fall within the reach of the Excessive Fines Clause.").

c. The Seventh Circuit's standard is similar. In *Towers* v. *City of Chicago*, the court considered a challenge to the constitutionality of an "administrative penalty" imposed on the owners of vehicles found to contain illegal drugs or guns. 173 F.3d 619, 621 (7th Cir.), *cert. denied*, 528 S. Ct. 874 (1999). The "$500 civil penalty" could be imposed whether or not the owner was responsible for the contraband. *See id.* at 621-22. It also could be imposed whether or not anyone was convicted criminally.

Drawing on *Austin*, the Seventh Circuit held that the Excessive Fines Clause applied. The court asked whether the civil penalties could be classified as "solely remedial" and concluded that they could not because "they do not compensate the City for any loss sustained as a result of the violations." *Id.* at 624. The court also thought it "clear" that the penalties served "at least in part" the "punitive purpose of deterring owners from allowing their vehicles to be used for prohibited purposes." *Id.* As a result, the question whether the Excessive Fines Clause applied was a simple one. "Because the fines, at least in part, serve this deterrent purpose," the court determined that "they constitute payment 'as punishment for some offense.'" *Id.* (quoting *Austin*, 509 U.S. at 610). The Excessive Fines Clause applied. *Id.*

2. The decision below construed the Excessive Fines Clause in a way that conflicts with the legal standard of the circuits described above. To start, the First Circuit distanced itself from *Austin*'s standard based on its perception that "unlike the civil forfeiture[] held to constitute 'punishment'" in *Austin*, the civil FBAR penalty is "not tied to any criminal sanction." App. 28a. That feature was just as true, however, of the civil penalties con-

sidered by the Seventh Circuit in *Towers*, the Ninth Circuit in *Mackby* and *Pimentel*, and the Eleventh Circuit in *Yates*. All those cases involved civil penalties with no tie to criminal sanctions. Under the logic of the decision below, that feature would have cut decisively against applying *Austin*'s standard and against construing the Excessive Fines Clause to apply. But under the standard in force in the Seventh, Ninth, and Eleventh Circuits, the lack of a civil-criminal link played no role in the analysis. Applying *Austin* faithfully, those courts held that the civil penalties were at least partly punitive and therefore subject to the Excessive Fines Clause.

The First Circuit's recasting of punitive penalties as "remedial" likewise conflicts with the standard of those other circuits. In the First Circuit's view, civil FBAR penalties are purely "remedial" even though there is no correlation between the penalty and the financial loss (if any) caused by the underlying violation. Because, as a general matter, undisclosed accounts *may* lead to unpaid taxes and "costly investigations," the court of appeals reasoned that the penalties are remedial and outside the compass of the Excessive Fines Clause. App. 30a. *But see Bajakajian*, 524 U.S. at 343 n.19 ("[E]ven a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation."). Here, too, that construction of the Excessive Fines Clause cannot be squared with the standard of other circuits. If a civil penalty applies "irrespective of the magnitude of the financial injury to the [government]," the courts of the Seventh, Ninth, and Eleventh Circuits rightly hold that the penalty cannot evade Eighth Amendment scrutiny under the guise of being remedial. *Yates*, 21 F.4th at 1308.

The Ninth and Eleventh Circuits' handling of False Claims Act penalties illustrates the point. False Claims

Act penalties and FBAR penalties are noncompensatory in materially identical ways. Like FBAR violations, for example, violations of the False Claims Act may (or may not) be linked to harm to the public fisc. Under the False Claims Act, "[n]o damages to the government need be shown" to impose penalties, *Mackby*, 261 F.3d at 830, and FBAR penalties likewise "apply regardless of whether a person has any tax liability," Simonelli Br., *supra*, at 10. Under the False Claims Act, penalties may be imposed "irrespective of the magnitude of the financial injury to the United States, if any." *Yates*, 21 F.4th at 1308. FBAR penalties likewise are "imposed regardless of whether there is any actual pecuniary loss" to the government. Simonelli Br., *supra*, at 8. All told, the two regimes share the same noncompensatory features. Given those features, the Ninth and Eleventh Circuits construe the Excessive Fines Clause to apply. *Yates*, 21 F.4th at 1308; *Mackby*, 261 F.3d at 830. The Seventh Circuit is in accord. *Towers*, 173 F.3d at 624 ("[The municipal penalties] appear to serve little or no remedial purpose; they do not compensate the City for any loss sustained as a result of the violations."). The decision below, by contrast, departed from the standard used by those circuits and construed the Excessive Fines Clause to reach the opposite result.

At base, the decision below resurrects an error the First Circuit committed twenty-nine years ago. Six months after *Austin* set the standard for determining when a civil penalty is a "fine," the First Circuit cabined that standard to its facts: it held that *Austin* is not "applicable to any actions other than forfeitures under" the precise statutes considered in *Austin*. *McNichols*, 13 F.3d at 434; *see also* pp. 9-11, *supra*. In the decades since, other courts of appeals have taken the more sensible view: *Austin* articulated a constitutional standard

against which civil penalties in general should be evaluated. This Court, too, has drawn on *Austin*'s standard to evaluate whether novel pecuniary remedies are at least partly punitive. *Kokesh*, 137 S. Ct. at 1645 (citing *Austin*, 509 U.S. at 610, 621).

But courts in the First Circuit remain trapped in the '90s. The district court below considered itself "bound" by the court of appeals' precedent in *McNichols*. App. 53a. So it held "that the Eighth Amendment does not apply to civil penalties under 31 U.S.C. § 5321(a)(5)(A)." App. 53a. The court of appeals then repeated that misstep, using *McNichols*—not *Austin*—as its guiding star in holding that civil FBAR penalties are "not a 'fine' and as such the Excessive Fines Clause of the Eighth Amendment does not apply to [them]." App. 34a. The result is an interpretation of the Excessive Fines Clause that breaks with *Austin*, that conflicts with the standard of other courts of appeals, and that merits correction.

C. The question presented is important and warrants review in this case.

The question presented is of real legal and practical importance. This case presents the question cleanly and is an ideal vehicle for the Court's review.

1. In 2019, the Court held emphatically that the Eighth Amendment's "[p]rotection against excessive punitive economic sanctions" is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" *Timbs* v. *Indiana*, 139 S. Ct. 682, 689. Threshold questions about whether and when this protection applies are of inherently national importance. Like most other provisions of the Bill of Rights, the Excessive Fines Clause sets a constitutional floor nationwide. "The National Government and, beyond it, the separate States are bound by the proscrip-

tive mandates of the Eighth Amendment . . . , and all persons within those respective jurisdictions may invoke its protection." *Kennedy* v. *Louisiana*, 554 U.S. 407, 412 (2008). Against that backdrop, however, the First Circuit's outlier standard for determining what constitutes a "fine" means the Excessive Fines Clause enjoys a far narrower compass in New England than it does elsewhere in the Nation. For people who invoke the Clause's protection in Chicago or Los Angeles or Miami, a noncompensatory monetary penalty (like the FBAR's) easily qualifies as a "fine." *See* pp. 19-22, *supra*. But under the standard in force in Boston, such a penalty implicates the Excessive Fines Clause not at all.

That mismatch calls out for correction. A question as fundamental as *does a Bill of Rights provision even apply?* should not depend on the happenstance of geography. Certiorari is warranted to realign the First Circuit's standard with the precedent of this Court and of other courts of appeals.

2. In practical terms, this case also spotlights why a clear standard is so important. Civil FBAR penalties are ripe for the sort of abuses the Framers sought to curtail. Penalties for "willful" FBAR violations can cover a broad spectrum of wrongdoing—from purposeful nonreporting to the merely reckless. Given the government's aggressive view of what counts as reckless, it also "can be difficult for taxpayers to establish that a violation was not willful." Nat'l Taxpayer Advocate, *2022 Purple Book*, at 78; *see also id.* ("[T]he government might reasonably argue (and a court might reasonably find) that *any* failure to file an FBAR form is willful where a taxpayer filed a federal tax return that included Schedule B, which directs taxpayers to the FBAR filing requirement."). Once in the government's sights as a willful actor, an offender then faces maximum penalties

that—like the forfeiture in *Bajakajian*—bear "no articulable correlation to any injury suffered by the Government." 524 U.S. at 340.

In these ways, civil FBAR penalties can be "extraordinarily harsh." Nat'l Taxpayer Advocate, *2021 Purple Book* at 74 (Dec. 31, 2020), https://tinyurl.com/2021-Purple-Book. And in recent years, the government has exploited them to the hilt. In one recent case, the government sought to impose an $8.8 million FBAR penalty on "an almost one hundred-year-old Holocaust survivor." *United States* v. *Schik*, No. 20-cv-2211, 2022 WL 685415, at *1 (S.D.N.Y. Mar. 8, 2022). In another, the government imposed a penalty of $3.1 million, based on unreported funds originally placed in foreign accounts to keep them "hidden from the Nazis and subsequently hidden from the Communist authorities in the Soviet Union." *Landa* v. *United States*, 153 Fed. Cl. 585, 588, 602 (2021). Then there's Monica Toth, whom the government appears to have placed on the less culpable end of the willfulness spectrum—not a deliberate offender, but a reckless one—before imposing a $2.17 million penalty anyway. U.S. Reply Supp. Mot. Summ. J., D. Ct. Doc. 171, at 14.

These examples spotlight a nationwide trend. Over the past decade, the IRS has steadily "expanded" its definition of willfulness. Nat'l Taxpayer Advocate, *2021 Purple Book* at 74 n.8. At times, the agency has insisted on "draconian penalties against taxpayers with overseas accounts, irrespective of their benign purpose." Nat'l Taxpayer Advocate, *2012 Annual Report to Congress* (Vol. 1), at viii (Dec. 31, 2012), https://tinyurl.com/2012-NTA-Report. By "erod[ing] the distinction between willful and non-willful violations," the agency can leverage severe penalties even for inadvertent reporting errors. Nat'l Taxpayer Advocate, *2014 Annual Report to Con-*

gress: Executive Summary at 33 (Dec. 31, 2014), https://tinyurl.com/2014-NTA-Summary. Right now, in fact, the government is urging this Court to construe the Bank Secrecy Act to permit a multimillion-dollar penalty against a person who the government freely concedes behaved "non-willfully." *United States* v. *Bittner*, 19 F.4th 734, 737 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2833 (2022).

Simply, FBAR penalties have evolved into a prime source of "royal revenue." *See Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989). In the past decade alone, the government has assessed well over one billion dollars in FBAR penalties. *2020 Treasury Report*, *supra*, at 10. And doggedly, the government has resisted any Eighth Amendment constraint. In many settings, the government concedes the obvious: that FBAR penalties are punitive and deterrent. *See* pp. 18-19 & n.5, *supra*. Yet when it comes to constitutional limits, the government has persuaded a raft of federal trial courts (and, now, the First Circuit) to exempt these penalties from Eighth Amendment scrutiny. Often, the grounds are even more flawed than those in the decision below. Last year, for example, a district court in Pennsylvania held that FBAR penalties "are not 'fines' covered by the Eighth Amendment" because they are "at least partially" remedial and "can be imposed even where . . . the [government] chooses not to undertake a criminal action." *United States* v. *Collins*, No. 18-cv-1069, 2021 WL 456962, at *8-9 (W.D. Pa. Feb. 8, 2021), *aff'd on other grounds*, 36 F.4th 487 (3d Cir. 2022). *But see Austin*, 509 U.S. at 607-10. Months later, a district court in Texas embraced a similar view. *United States* v. *Miga*, No. 19-cv-1015, 2021 WL 8016223, at *2 (N.D. Tex. May 27, 2021). Then there's the Court of Federal Claims, which ruled that FBAR penalties are

"not subject to the eighth amendment's limitations on excessive fines"—based on a double-jeopardy opinion this Court has said does not apply to the Excessive Fines Clause. *Compare Landa*, 153 Fed. Cl. at 600-01 (applying "the factors established in *Kennedy* [v. *Mendoza-Martinez*]"), *with Austin*, 509 U.S. at 610 n.6 ("[T]he United States' reliance on *Kennedy* v. *Mendoza-Martinez* . . . is misplaced."), *and id.* at 607 (same).

Something has gone seriously awry. Over the past decade, the federal government has maximized its power to impose crippling FBAR penalties nationwide. It is right now seeking to magnify its power even more, citing Congress's interest in deterrence—in punishment. U.S. Br. at 16, *Bittner* v. *United States*, No. 21-1195 (U.S. May 17, 2022). But with that power comes limits, chief among them the Eighth Amendment's "[p]rotection against excessive punitive economic sanctions." *Timbs*, 139 S. Ct. at 689. Only by gravely misconstruing this Court's precedent could the First Circuit hold differently; an Excessive Fines Clause that does not apply to sanctions like FBAR penalties would be unrecognizable to those who ratified it.

Nor is the importance of petitioner's question presented confined to people wealthy enough for foreign bank accounts. The main evil addressed by the Excessive Fines Clause—like its precursors in the English Bill of Rights and Magna Carta—is the sovereign impulse to "use[] the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 275. This safety valve is as urgently needed today as ever. And clear standards are key. Unlike every other form of punishment—all of which cost the government money—"fines are a source of revenue." *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion

of Scalia, J.). So "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Id.* Like the Stuart practices of old, moreover, modern economic sanctions often are "directed to the mulcting of the less wealthy classes of the community." 1 *The Fairfax Correspondence: Memoirs of the Reign of Charles the First* 213 (George W. Johnson ed., 1848). A standard like the First Circuit's—which exempts self-evidently punitive penalties from Eighth Amendment scrutiny—thus promises injustice not only for the well-heeled, but for the poor and politically powerless who are more often the targets of debilitating monetary sanctions. *See generally* Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 3, 5-9 (2016).

3. This case is the ideal vehicle for resolving the question presented. In rejecting Monica Toth's excessive-fines defense, the court of appeals affirmed on a single ground: the Excessive Fines Clause "does not apply" to FBAR penalties. App. 34a. That decision involved a pure question of law. It turned on no factual disputes. And it was paired with no alternative grounds for affirmance; because the court of appeals disposed of the excessive-fines argument at the starting gate, it had no occasion to consider the logically subsequent question whether Toth's penalty was excessive.

In this way, the case's posture is much like that of two of the Court's previous Excessive Fines Clause cases. In both *Austin* and *Timbs*, the lower court rejected the petitioner's excessive-fines defense on a threshold legal ground (in *Austin*, holding that the Clause did not apply to *in rem* forfeitures, and in *Timbs*, holding that it did not apply to the States). In each, this Court granted review to correct the lower court's legal error. Having

done so, the Court then remanded each case for the lower courts to analyze the question of excessiveness in the first instance. *Timbs*, 139 S. Ct. at 691; *Austin*, 509 U.S. at 622-23. The same order of operations would be warranted here. Because it believed the Excessive Fines Clause did not apply to Toth's penalty, the court of appeals "thought it was foreclosed from engaging in the inquiry" whether the penalty was unconstitutionally excessive. *See Austin*, 509 U.S. at 622. That error is susceptible to easy correction, after which this Court can remand for the court of appeals (or, if appropriate, the district court) to evaluate whether Toth's penalty violates the Excessive Fines Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ARI S. BARGIL
INSTITUTE FOR JUSTICE
2 South Biscayne Blvd.,
Suite 3180,
Miami, FL 33131

SAMUEL B. GEDGE
Counsel of Record
BRIAN A. MORRIS
INSTITUTE FOR JUSTICE
901 North Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

JEFFREY P. WIESNER
JENNIFER MCKINNON
WIESNER MCKINNON LLP
90 Canal St., Suite 110
Boston, MA 02114

AUGUST 26, 2022