No. 24-1958

In the United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

RICHARD M. RUND, Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia, Case No. 1:23-cv-00549-MSN-IDD
(Hon. Michael S. Nachmanoff)

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND VACATUR

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 24-1958 Caption: United States v. Rund

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7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: /s/ Samuel B. Gedge Date: 1/23/2025

Counsel for: Institute for Justice

Print to PDF for Filing

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

The Institute for Justice is a public-interest law firm with expertise on the Eighth Amendment's Excessive Fines Clause. We represented the petitioner in *Timbs* v. *Indiana*, 586 U.S. 146 (2019), in which the Supreme Court incorporated the Excessive Fines Clause against the States. On remand, we represented Mr. Timbs twice more, successfully, before the Indiana Supreme Court. We also have litigated other cases involving excessive-fines protections. *E.g.*, *Thomas* v. *County of Humboldt*, --- F.4th ---, 2024 WL 5243033 (9th Cir. Dec. 30, 2024). And in the FBAR context, we represented the petitioner in *Toth* v. *United States*, seeking certiorari on one of the questions presented here: whether the Excessive Fines Clause applies to FBAR penalties. 143 S. Ct. 552 (2023) (Gorsuch, J., dissenting from the denial of certiorari).

The decision below suffered from serious methodological errors. We have a keen interest in the Court's correcting those errors and articulating the proper standards to govern future excessive-fines questions in this Circuit.[1]

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than amicus—contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

As amicus, we currently take no position on the ultimate question whether Richard Rund's penalty is or is not unconstitutionally excessive. (Nor do we have views on the antecedent question whether his violation was willful.) In rejecting Rund's excessive-fines defense, however, the district court committed a series of legal errors that should not be replicated on appeal. The court first held that civil FBAR penalties are not fines under the Eighth Amendment. That contravenes Supreme Court precedent and implicates an acknowledged circuit split. *Compare United States* v. *Toth*, 33 F.4th 1, 19 (1st Cir. 2022) ("[A] civil penalty imposed under § 5321(a)(5)(C)-(D) is not a 'fine' and as such the Excessive Fines Clause of the Eighth Amendment does not apply to it."), *with United States* v. *Schwarzbaum*, --- F.4th ---, No. 22-14058 (11th Cir. Jan. 23, 2025) (slip op. at 27) ("We respectfully decline to 'repeat [*Toth*'s] mistakes.'").[2] In the alternative, the court held that Rund's penalty here was not "excessive"—applying a 30,000-foot legal standard that again breaks with Supreme Court precedent and the precedent of other courts. *See*,

[2] The Eleventh Circuit originally issued its opinion in *Schwarzbaum* on August 30, 2024; it vacated that opinion earlier today (January 23, 2025) and substituted an amended opinion. This brief cites the slip-opinion version of today's decision, which, as of the time this brief is being finalized, is the only version publicly available.

e.g., *Thomas* v. *County of Humboldt*, --- F.4th ---, 2024 WL 5243033, at *10 (9th Cir. Dec. 30, 2024) ("It is critical . . . that the court review the specific actions of the violator rather than by taking an abstract view of the violation." (citation omitted)).

If adopted, the district court's errors would distort excessive-fines precedent circuit-wide, with repercussions not only for the well-heeled, but for people of modest means who are most often the targets of crippling economic sanctions. Those errors should be corrected. This Court would then be well within its discretion to vacate the judgment below and remand for the district court to apply the correct standard in the first instance.

A. The Excessive Fines Clause applies to civil FBAR penalties.

As its first ground for rejecting Rund's excessive-fines defense, the district court held that "the civil FBAR penalty does not constitute a fine for purposes of the Excessive Fines Clause." JA1104. That holding was wrong.

1. The Excessive Fines Clause applies to civil monetary sanctions that are at least partly punitive.

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). Whether an economic sanction is subject to the Excessive Fines Clause thus turns not on whether it is "civil or criminal," but on whether it "serv[es] in part to punish." *Id.* at 610.

The Supreme Court's decision in *Austin*—a case involving the federal civil-forfeiture statute—shows these principles in practice. Civil forfeitures (as the name suggests) take 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, 621-22. 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.

Applying *Austin* faithfully, courts nationwide have held that the Excessive Fines Clause applies to civil monetary sanctions that are at least partly punitive.[3]

2. Because FBAR penalties are at least partly punitive, the Excessive Fines Clause applies.

a. As the government has elsewhere acknowledged, civil FBAR penalties serve, at least in part, to "promote[] retribution and deterrence." U.S. Mem. Supp. Summ. J. at 11, *United States* v. *Hendler*, No. 23-cv-3280 (S.D.N.Y. Jan. 19, 2024) (Doc. 27) (Hendler Br.); *see also, e.g.*, U.S. Br., *Bittner* v. *United States*, 2022 WL 4779399, at *37 (U.S. Sept. 30, 2022). "Deterrence" (like retribution) "has traditionally been viewed as a goal of punishment." *United States* v. *Bajakajian*, 524 U.S. 321, 329 (1998). And as Justice Gorsuch noted two years ago—in an FBAR case, no less—"a fine that serves even '*in*

[3] *E.g.*, *Thomas* v. *County of Humboldt*, --- F.4th ---, 2024 WL 5243033, at *10 (9th Cir. Dec. 30, 2024) ("[O]ur court has extended the protections of the Excessive Fines Clause to local penalties, fines, and fees."); *United States ex rel. Grant* v. *Zorn*, 107 F.4th 782, 797 (8th Cir. 2024) ("The FCA's combination of treble damages with per-claim penalties constitutes a punitive sanction that falls within the reach of the Excessive Fines Clause."), *pet. for cert. docketed*, No. 24-549 (U.S. Nov. 15, 2024); *Grashoff* v. *Adams*, 65 F.4th 910, 916 (7th Cir. 2023) ("The inquiry does not depend on whether the sanction arises in the civil or criminal context . . . ."); *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1308, 1314 n.8 (11th Cir. 2021) (holding, with the government's agreement, that civil penalties under the False Claims Act "constitute fines for the purposes of the Excessive Fines Clause").

part to punish' is subject to analysis under the Excessive Fines Clause." *Toth* v. *United States*, 143 S. Ct. 552, 553 (2023) (opinion dissenting from the denial of certiorari) (quoting *Austin*, 509 U.S. at 610). The syllogism is thus an easy one. The Excessive Fines Clause applies to monetary penalties that serve at least in part "to deter and to punish." *Austin*, 509 U.S. at 622. FBAR penalties, the government accepts, serve at least in part to deter and to punish. So the Excessive Fines Clause applies.

The FBAR statute's structure reinforces this conclusion.

First, a person's exposure to FBAR penalties depends on their level of culpability. They can avoid liability altogether if the reporting violation was due to "reasonable cause"—a defense much like the one in *Austin*. 31 U.S.C. § 5321(a)(5)(B)(ii). If they cannot make that showing, they face a penalty of up to $10,000 per violation. *Id.* § 5321(a)(5)(B)(i). And if the government proves the violation was "willful" (construed to mean knowing or reckless) the maximum penalties escalate further still: to the greater of $100,000 or half the balance of unreported funds. *Id.* § 5321(a)(5)(C). In these ways, the framework displays a "clear focus . . . on the culpability of the owner," making the penalties "look more like punishment, not less." *Austin*, 509 U.S. at 619, 621-22; *see*

also United States v. *Warner*, 792 F.3d 847, 861 (7th Cir. 2015) ("Congress apparently intended FBAR penalties to have a deterrent effect . . . .").

Second—and again as in *Austin*—the amount of FBAR penalties bears "absolutely no correlation" to any harm suffered by the government. *Austin*, 509 U.S. at 621 (citation omitted). For willful and non-willful violations alike, the maximum penalty "is calculated 'irrespective of the magnitude of the financial injury to the United States, if any.'" *Schwarzbaum*, *supra* (slip op. at 19); *see also* 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.) (acknowledging that FBAR penalties are "imposed regardless of whether there is any actual pecuniary loss" to the government). In this way, too, the statute's design confirms what the government's concessions nationwide make clear: "the FBAR penalty is a fine subject to the Eighth Amendment's Excessive Fines Clause." *Schwarzbaum*, *supra* (slip op. at 24).

b. Below, the government urged that "the fact that the civil FBAR penalty does not follow conviction for a criminal offense is perhaps dispositive against treating [it] as an Eighth amendment fine." Dist. Ct. Doc. 38, at 4-5. The district court appears to have agreed. JA1102-1103. Again, however, the Supreme Court has rejected this proposition emphatically: the "notion of

punishment" contemplated in the Excessive Fines Clause "cuts across the division between the civil and the criminal law." *Austin*, 509 U.S. at 610 (citation omitted). Indeed, the statute in *Austin* itself lacked the criminal-civil link the decision below ascribed to it. In the district court's telling, *Austin*'s logic does not apply to civil FBAR penalties because those penalties "appl[y] independently of FBAR *criminal* penalties." JA1103 (emphasis added). Yet that was equally true of the forfeiture statute in *Austin*, which likewise applied independently of any criminal penalty. *United States* v. *$10,700.00*, 258 F.3d 215, 223 n.6 (3d Cir. 2001) ("[F]orfeiture under § 881(a) is not conditioned upon an arrest or conviction for a drug offense."). The district court's main ground for distinguishing *Austin* is belied by *Austin* itself.

3. The contrary arguments lack merit.

In this case and others, the government has offered other arguments for exempting civil FBAR penalties from the Excessive Fines Clause. Those arguments (one of which the decision below adopted) are without merit.

a. FBAR penalties are not solely "remedial."

Like the First Circuit in *United States* v. *Toth*, the district court maintained that FBAR penalties "serve[] a remedial purpose, rather than a punitive one" and thus are not "fines." JA1103. For two reasons, that is incorrect.

First, the court's analysis mistook the correct framework. A monetary payment might not be subject to the Excessive Fines Clause if it is one-hundred percent compensatory and zero percent punitive. If it serves a mix of remedial and punitive ends in combination, however, the Clause applies. "Because 'sanctions frequently serve more than one purpose,'" the Supreme Court "has said that the Excessive Fines Clause applies to *any* statutory scheme that 'serv[es] *in part* to punish.'" *Tyler* v. *Hennepin County*, 598 U.S. 631, 648 (2023) (Gorsuch, J., joined by Jackson, J., concurring) (quoting *Austin*, 509 U.S. at 610). Thus, "[i]t matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose. So long as the law 'cannot fairly be said *solely* to serve a remedial purpose,' the Excessive Fines Clause applies." *Id.* (quoting *Austin*, 509 U.S. at 610).

The decision below breaks with these principles. Nationwide, the government has long acknowledged that FBAR penalties serve punitive ends; in the government's telling, the penalties "promot[e] retribution and deterrence" while serving the "additional" purpose "of reimbursing the Government for the cost of investigating and recovering funds." Hendler Br., *supra*, at 11. From the government's own pen, the penalties thus serve "both punitive and

compensatory purposes" and call for Eighth Amendment review. *Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from the denial of certiorari).

Second, calling FBAR penalties "remedial"—even if only in part—is likely unsound in its own right. The term "remedial" has different meanings in different contexts. (More on that below. *See* pp. 13-14, *infra*.) For excessive-fines cases, a purely "'[r]emedial action' is one 'brought to obtain compensation or indemnity.'" *Bajakajian*, 524 U.S. at 329; *cf. Korangy* v. *FDA*, 498 F.3d 272, 277 (4th Cir. 2007). Actions to impose FBAR penalties are nothing of the sort. As the government has elsewhere admitted, "[t]he FBAR penalty does not compensate the government for actual pecuniary loss." Simonelli Br., *supra*, at 8. That leaves no convincing basis to call FBAR penalties "remedial," even in part.

The Supreme Court's decision in *United States* v. *Bajakajian* illustrates the point. There, the government sought to forfeit money that (much like Rund's) had gone unreported in violation of the Bank Secrecy Act. 524 U.S. at 325 & nn.1-2. As here, the government in *Bajakajian* couched the forfeiture as "serv[ing] important remedial purposes." *Id.* at 329 (citation omitted). As here, the government contended that the Excessive Fines Clause did not apply. It even cited the same legislative history the district court invoked below.

Compare U.S. Br., *Bajakajian*, 1997 WL 857176, at *21 (U.S. July 14, 1997), *with* JA1104. Yet the Supreme Court rejected the government's view out of hand. In its design, the Court reasoned, the forfeiture provision did not secure "compensation or indemnity." 524 U.S. at 329 (citation omitted). It addressed "a loss of information"—not money—which "would not be remedied" by confiscating the unreported funds. *Id.* It deterred reporting violations—a punitive function, not a remedial one—and served "no remedial purpose" at all. *Id.* at 332. For good measure, the Court added, "[e]ven if the Government were correct in claiming that the forfeiture . . . is remedial in some way," that feature still would not immunize it from Eighth Amendment review. *Id.* at 329 n.4. It "would still be punitive in part." *Id.* That reasoning translates perfectly here and cements the principles above. Even if partly remedial (a non-obvious proposition), FBAR penalties are at least partly punitive and subject to the Excessive Fines Clause.

b. Whether a penalty is "criminal" under the Fifth and Sixth Amendments differs from whether it is partly punitive under the Eighth Amendment.

In denying excessive-fines review, some lower courts have held that because FBAR penalties do not qualify as "criminal" for purposes of Fifth and Sixth Amendment protections, they cannot qualify as a "fine" for purposes of

the Eighth Amendment. *E.g.*, *Landa* v. *United States*, 153 Fed. Cl. 585, 600-01 (2021) (applying "the factors established in *Kennedy* [v. *Mendoza-Martinez*]"). That confuses two different legal standards. As relevant here, the Fifth and Sixth Amendments secure protections "that attend a criminal prosecution" specifically. *Austin*, 509 U.S. at 610 n.6. That inquiry is fundamentally different from the standard for determining whether a penalty is a "fine" within the meaning of the Eighth Amendment.

On this point, too, the Supreme Court has been clear. In *Austin*, the government devoted itself to arguing that "the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy* v. *Mendoza-Martinez* and *United States* v. *Ward*." *Id.* at 607 (citations omitted). Yet the Court rejected that contention root and branch. *Id.* at 610 n.6 ("[T]he United States' reliance on *Kennedy* v. *Mendoza-Martinez* and *United States* v. *Ward* is misplaced."). The *Kennedy* standard, the Court reasoned, is designed to identify those civil penalties that are rightly viewed as "criminal" and thus implicate constitutional protections reserved for criminal-court proceedings alone. *Id.* But whether a penalty is an Eighth Amendment "fine" presents a different question altogether—asking not whether the penalty "is civil or criminal," but simply whether it serves at

least in part to punish. *Id.* at 610. In years to come, the Court would hold that same line: it reaffirmed that *Austin* remains the yardstick for the Excessive Fines Clause even as it extended the *Kennedy* standard from the Sixth Amendment to the Fifth. *Hudson* v. *United States*, 522 U.S. 93, 102-03 (1997); *Schwarzbaum*, *supra* (slip op. at 15 n.1).

For similar reasons, it would be error to harness Fifth and Sixth Amendment precedent to say that FBAR penalties are purely "remedial" for purposes of the Eighth. The First Circuit committed precisely this mistake in *Toth*. In calling FBAR penalties "remedial," it relied heavily on mid-century double-jeopardy precedent. *Toth*, 33 F.4th at 16-19 (invoking, e.g., *Helvering* v. *Mitchell*, 303 U.S. 391 (1938)). Yet double-jeopardy decisions used that term in a way that differs from how it is used in modern excessive-fines precedent. In the double-jeopardy context, "remedial" is a shorthand for the universe of non-criminal sanctions. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1829 (1992) (noting that "remedial" was used in *Helvering* and other cases as "a catchall label for sanctions that courts did not want to define as punitive in the criminal sense, but that were clearly not simple compensatory damages"). That shorthand may be useful in double-jeopardy cases, which distinguish between

punishments that are and are not "criminal." *Hudson*, 522 U.S. at 99. But, again, the Excessive Fines Clause is different: it "cuts across the division between the civil and the criminal law." *Austin*, 509 U.S. at 610 (citation omitted). Many penalties thus are "remedial" (i.e., civil) enough to fall outside the Fifth and Sixth Amendments while still being "punitive" enough to implicate the Eighth. *United States* v. *Ursery*, 518 U.S. 267, 287 (1996) (saying just that).

c. This Court's decision in Thomas *v.* Commissioner *does not extend to civil penalties writ large.*

In 1995, this Court held that "an addition to tax for civil fraud" assessed under the Internal Revenue Code did not implicate the Excessive Fines Clause. *Thomas* v. *Comm'r*, 62 F.3d 97, 98, 103; *see also* Dist. Ct. Doc. 38, at 6 (noting *Thomas*). Much of *Thomas*'s reasoning is questionable—particularly with the benefit of three decades of development in excessive-fines precedent. The panel harbored doubts, for example, about whether *Austin*'s standard "extend[s] beyond the civil forfeiture context." 62 F.3d at 103. Later precedent has confirmed that *Austin* is not in fact so limited. *Hudson*, 522 U.S. at 103 ("The Eighth Amendment protects against excessive civil fines, including forfeitures."); *see also* p. 5 n.3, *supra*. As for the panel's other line of reasoning, it placed unexplained emphasis on idiosyncrasies in the factual record that had no obvious bearing on the question before it. *Compare* 62 F.3d at 103 (dwelling

on separate plea agreement), *with Ursery*, 518 U.S. at 287 (describing *Austin*'s standard as a "categorical approach").

Against this backdrop, *Thomas*'s holding must needs be narrow: "civil additions to tax imposed under the Internal Revenue Code do not violate the Excessive Fines Clause." Br. in Opp., *Louis* v. *Comm'r*, 1999 WL 33632833, at *11-12 (U.S. Nov. 24, 1999) (characterizing *Thomas*'s holding). Whatever its continued vitality, that holding does not extend to civil penalties like the one here. According to the panel in *Thomas*, for instance, the tax penalty "imposed on Thomas does no more than compensate the government for its damages and costs." 62 F.3d at 102 (double-jeopardy analysis). Maybe that conclusion was right. Probably it wasn't. Either way, FBAR penalties are different: "[t]he FBAR penalty does not compensate the government for actual pecuniary loss." Simonelli Br., *supra*, at 8. Then there's the fact that *Thomas* based its holding on what it viewed as unique features of "the tax penalty context." 62 F.3d at 102. Again, that logic may be sound. Or not. Either way, it does not apply here: as the government has long insisted, "a civil penalty assessed under Section 5321 is not a 'tax penalty.'" U.S. Br., *Bittner*, 2022 WL 4779399, at *6; *see also* Simonelli Br., *supra*, at 10 (similar).

* * *

Distilled, the simplest approach is the correct one. Just weeks ago, the IRS's National Taxpayer Advocate reiterated that "[t]he maximum FBAR penalt[ies]" are "among the harshest civil penalties the government may impose." *2025 Purple Book* at 83 (Dec. 31, 2024), https://tinyurl.com/5bdr4hxz. Since 2012, the government has assessed well over one billion dollars in FBAR penalties. Appellant's Br. 57. And doggedly, it has resisted any Eighth Amendment constraint. When strategically beneficial, the government embraces the obvious: that FBAR penalties are punitive and deterrent. *E.g.*, Simonelli Br., *supra*, at 7-11 (insisting that FBAR penalties are not compensatory and thus not dischargeable in bankruptcy). Yet when it comes to constitutional limits, the government has persuaded a raft of lower courts to exempt these penalties from Eighth Amendment scrutiny altogether. That pattern should not persist. "[U]nder controlling Supreme Court precedent," civil FBAR penalties "are subject to review under the Eighth Amendment's Excessive Fines Clause." *Schwarzbaum*, *supra* (slip op. at 4).

B. The district court's excessiveness analysis was flawed.

As an alternative basis for rejecting Richard Rund's Eighth Amendment defense, the district court held that "[t]he FBAR penalty applied to [him] is not excessive." JA1104. As amicus, we do not currently take a position on the bottom-line question whether and to what extent Rund's penalty is excessive. But the standard used by the district court suffered from serious legal errors. The best course, we submit, is thus for the Court to focus on correcting those errors and accurately framing the relevant standard. Having done so, the Court would be within its discretion to vacate and remand for the district court to consider the excessiveness question anew.

1. The Supreme Court's excessiveness standard looks to the culpability of the specific offender.

a. As the government noted below, the factors for evaluating excessiveness have been "articulated in different ways" by the lower courts. Dist. Ct. Doc. 38, at 7; *see also* JA1104. The guidepost, however, remains the Supreme Court's decision in *Bajakajian*. *Bajakajian* is the only time the Court has addressed whether an economic sanction violates the Excessive Fines Clause. And its fundamental teaching is this: in evaluating excessiveness, the defendant's specific level of culpability is the core part of the analysis. Isolating

"the gravity of the defendant's offense" is particularly critical, moreover, where the penalizing statute spans a wide range of culpability. 524 U.S. at 337.

Pages 337 to 340 of the *Bajakajian* opinion illustrate the standard and provide the best data point for lower courts. The provision under which Hosep Bajakajian was sanctioned (a neighbor of the one at issue here) reached many sorts of offenders. It covered people, like Bajakajian, who failed to report lawfully earned currency due to a general "distrust for the Government." *Id.* at 326, 337 n.12 (citation omitted). It reached the violations of "tax evaders, drug kingpins, [and] money launderers" too. *Id.* at 339 n.14. Given that sweep, almost all the Court's analysis involved placing Bajakajian—specifically—on that broad spectrum of culpability. In the first of its two paragraphs of analysis, the Court considered the gravity of his particular misconduct. His "crime was solely a reporting offense," the Court observed. *Id.* at 337. That it "was unrelated to any other crime" was also "highly relevant." *Id.* at 337 n.12; *see also id.* at 337-38. The Court also looked to his (relatively minor) sentencing-guidelines range, which, the Court remarked, defused the government's emphasis on the maximum theoretical punishments set by Congress. *Id.* at 338-39 & n.14. "That the maximum fine and Guideline sentence to which [Bajakajian] was subject were but a fraction of the penalties authorized" by

Congress, the Court reasoned, "undercuts any argument based solely on the statute." *Id.* at 339 n.14. For "they show that [his] culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed." *Id.*

In its second paragraph of analysis, the Court then evaluated "[t]he harm that [Bajakajian] caused" by his reporting violation. *Id.* at 339. Here, too, the Court homed in on the man: it focused, not on the generalized harms of Bank Secrecy Act crimes in the abstract, but on the "loss to the public fisc" caused by Bajakajian himself. *Id.* On the record before it, the Court concluded, that harm was "minimal." *Id.*; *see also* Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 Minn. L. Rev. 880, 901 (2004) ("[T]he Court seems to analyze the gravity of Bajakajian's offense solely from a retributivist perspective—asking how much harm his particular violation of the statute caused.").

b. The upshot—recognized by courts and commentators alike—is that *Bajakajian*'s standard is "fact intensive and depends on the totality of the circumstances." *State* v. *Timbs*, 134 N.E.3d 12, 35-36 (Ind. 2019). Echoing *Bajakajian*, for instance, the Indiana Supreme Court in *Timbs* reasoned that sentencing guidelines (and sentences imposed) offer "more precise insight"

than "the maximum statutory penalty" set for "those who commit the worst variants of the crime." *Id.* at 37.[4] The U.S. Supreme Court has read *Bajakajian* as focused on "the relationship between the penalty and the harm to the victim caused by the defendant's actions." *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001).[5] Just last month, the Ninth Circuit reiterated the lesson: "It is critical . . . that the court review the specific

[4] *United States* v. *$100,348.00*, 354 F.3d 1110, 1123 (9th Cir. 2004) ("The culpability of the offender should be examined specifically, rather than examining the gravity of the crime in the abstract." (citation omitted)); *State* v. *Real Prop. at 633 E. 640 N.*, 994 P.2d 1254, 1261 (Utah 2000) ("While reference to the maximum penalties is helpful in determining the gravity of the offenses, it has limited relevance in determining proportionality."); *accord Commonwealth* v. *One 2016 Chevrolet Tahoe*, No. CL-2018-3474, 2019 WL 2269901, at *4 (Va. Cir. Ct. May 24, 2019).

[5] *State* v. *Timbs*, 169 N.E.3d 361, 373 (Ind. 2021) ("In *Bajakajian*, the Supreme Court pointed out that currency-reporting crimes might generally include serious violations by 'tax evaders, drug kingpins, or money launderers' but did not impute to the defendant the offenses of others and rather considered what specific harms his specific acts had caused."); *Commonwealth* v. *1997 Chevrolet*, 160 A.3d 153, 190 (Pa. 2017) ("[W]e find generic considerations of harm to be largely unhelpful in this regard, as all crimes have a negative impact in some general way to society."); Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture after* United States v. Bajakajian, 2000 U. Ill. L. Rev. 461, 495 ("*Bajakajian*'s proportionality analysis emphasizes that it is not sufficient merely to invoke the notion that because drug trafficking is a serious offense, the forfeiture is, therefore, permissible.").

actions of the violator rather than by taking an abstract view of the violation." *Thomas*, 2024 WL 5243033, at *10 (citation omitted).

2. The district court's analysis contravenes precedent.

The district court's mode of analysis broke with the standard above. Rather than "review[ing] the specific actions of the violator," the court took a paradigmatically "abstract view of the violation." *Id.* The Court in *Bajakajian* examined Bajakajian's "culpability relative to other potential violators of the reporting provision." 524 U.S. at 339 n.14. The decision below did nothing of the sort. It merely confirmed the obvious: that statutorily, Rund "falls under the class of persons that the statute targets." JA1105. It nowhere considered the "highly relevant" question whether Rund's violation was related "to any other illegal activities." *Bajakajian*, 524 U.S. at 337-38 & n.12; *cf. United States* v. *Jalaram, Inc.*, 599 F.3d 347, 356 (4th Cir. 2010). It looked to the very $250,000 maximum criminal fine *Bajakajian* abjured. JA1106. It then octupled that statutory maximum. JA1106. And it did so while overlooking that the civil offense Rund committed is materially different from (and less serious than) the criminal comparator it employed. *United States* v. *Horowitz*, 978 F.3d 80, 88 (4th Cir. 2020) ("[F]or the purpose of applying § 5321(a)(5)'s civil penalty, a 'willful violation' of the FBAR reporting requirement includes both

knowing and reckless violations, even though more is required to sustain a criminal conviction for a willful violation of the same requirement under § 5322."). That mismatch leaves the court's penalty comparison as something of an apples-to-oranges exercise. That someone who violates a *different statute* than Rund might face a theoretical maximum "criminal fine of up to $2 million" (JA1106) sheds no light on the question that matters: what is the gravity of *Rund's* wrongdoing? *Bajakajian*, 524 U.S. at 339 n.14 (making the same point as to the maximum penalties actually applicable to the defendant's offense); *see also Schwarzbaum*, *supra* (slip op. at 39-42 & n.7) (committing similar error as district court's).

And more. The Court in *Bajakajian* "considered what specific harms [Bajakajian's] specific acts had caused," rather than "imput[ing] to [him] the offenses of others." *State* v. *Timbs*, 169 N.E.3d 361, 373 (Ind. 2021). The decision below focused on harms *en masse*: the "'hundreds of millions in tax revenues' lost from the use of secret foreign bank accounts" in general. JA1104; *see also* JA1106 (referring back to this discussion); *accord Schwarzbaum*, *supra* (slip op. at 42-43) (similar error). And though, in a footnote, the court stated that "[t]here is no genuine dispute of fact that the Government suffered a loss of revenue and resources" (JA1106), the material it cited (by our read,

at least) says nothing about the extent to which Rund's violations led to loss of revenue or resources. Dist. Ct. Doc. 38, at 10-11; Dist. Ct. Doc. 33, at 5, 8, 13.

At base, the district court's standard looks less like that of *Bajakajian*'s majority and far more like that of its dissent. 524 U.S. at 351 (Kennedy, J., dissenting). On the district court's reasoning, in fact, Hosep Bajakajian himself would have lost. His forfeiture was "authorized by Congress." JA1105. Necessarily, he was within "the class of persons that the statute targets." JA1105. His sort of violation—aggregated—could be said to "cause a legitimate loss to the Government." JA1106. (It's part of the same Bank Secrecy Act, after all.) And the maximum statutory fine, $250,000, was not obviously "out of line" with the $357,144 forfeiture imposed. JA1106. Voilà. That the district court's standard would appear to support a reversal in *Bajakajian* rather than the majority's affirmance is an unmistakable red flag.

3. The Court would be within its discretion to correct the district court's legal errors and remand for that court to apply the correct standard in the first instance.

Summary-judgment rulings are of course reviewed de novo. So despite the district court's many errors, this Court certainly has the authority to scour the record in the first instance and apply the proper Eighth Amendment standard. We respectfully submit, however, that this case and the develop-

ment of excessive-fines precedent more broadly would be better served by a narrower approach: correcting the legal errors below and remanding for the district court to apply the correct standard in the first instance.

a. This Court's "usual practice" favors "allowing the district court to conduct the required analysis in the first instance." *Scott* v. *Baltimore County*, 101 F.4th 336, 350 (4th Cir. 2024). That prudential rule has special purchase, moreover, where the lower court's "framing of the relevant legal standards differ[s] from those set out" by this Court on appeal. *Id.* at 349. In *Scott*, for example, the panel articulated a different standard from the one that guided the district court's summary-judgment analysis. And while the panel acknowledged that "the de novo standard of review means we could apply those standards ourselves to decide whether to affirm the district court's grant of summary judgment," it opted instead to remand. *Id.* at 349-50. That approach, the panel reasoned, accords with this Court's role as "a court of review, not of first view." *Id.* at 350 (citation omitted). And it is "especially appropriate" where "the relevant inquiry" is "inherently fact-intensive." *Id.*

These principles apply straightforwardly here. As in *Scott*, the ultimate question is a legal one. *Bajakajian*, 524 U.S. at 336 n.10. But, again as in *Scott*, "many of the subsidiary questions that guide that analysis are, unsurprisingly,

'factual question[s].'" *Scott*, 101 F.4th at 350. And many are hotly contested. Take just two. First: whether Rund's reporting violation was related to any other wrongdoing ("highly relevant," says *Bajakajian*). In the government's telling, Rund's reporting violations were the acts of an "incorrigible tax cheat." Dist. Ct. Doc. 38, at 10. Rund, in contrast, affirmed under oath that they were due to diagnosed ADHD, exacerbated by depression and cancer. JA0880-0881. The district court dismissed those "personal challenges" as immaterial to the antecedent *statutory* question: whether Rund's violations were "willful." JA1100. Yet they absolutely are material to the *excessiveness* question. Whether Rund's violations were those of a fraudster or of a cognitively impaired cancer patient surely informs whether his "failure to report the currency was unrelated to any other crime" and whether he "fit[s] into the class of persons for whom the statute was principally designed." *Bajakajian*, 524 U.S. at 337-38 & n.12.

A second fact dispute: the harm caused. This issue, too, is at the heart of the standard in *Bajakajian*. This one, too, the district court appears not to have seriously examined. *See* pp. 22-23, *supra*. For that matter, the government took harm off the table altogether: in response to a contention interrogatory, it stated adamantly that "[t]he United States does not make any

contentions in this suit regarding 'loss, cost, expense, or other damages (collectively "damages") as a result of Mr. Rund's delay in filing FBARs' because such 'damages' are irrelevant to the assessment of the FBAR penalty at issue." JA0792. The district court discounted that response. JA1106. But whatever its wisdom, it was the government's to make and be bound by. *See Va. Innovation Scis., Inc.* v. *Samsung Elecs. Co.*, No. 12-cv-548, 2014 WL 12603188, at *1 (E.D. Va. Apr. 11, 2014) (explaining that interrogatories "narrow and sharpen the issues" (citation omitted)). Viewing the record most favorably to Rund, the district court's conclusion that "[t]here is no genuine dispute of fact that the Government suffered a loss of revenue and resources" is hard (or impossible) to sustain under Rule 56 and *Bajakajian*. JA1106.

Simply, what was true when *Bajakajian* issued remains true today: the excessiveness standard is "fact intensive and depends on the totality of the circumstances." *Timbs*, 134 N.E.3d at 35-36. Here, facts material to the analysis appear to be genuinely disputed (or at least raise record-intensive questions). Yet given its misperception of the standard, the district court engaged with none of them. As in *Scott*, the litigation would thus be well-served by this Court's correcting the district court's legal errors and remanding for it to "conduct the required analysis in the first instance." 101 F.4th at 350.

b. That narrow, corrective ruling would also well-serve the development of excessive-fines precedent more broadly. The Excessive Fines Clause presents many important issues that the decision below failed to fully consider. To give one example, the district court appears to have entertained the notion that the time and resources the government spends in *prosecuting* a violation is properly factored into the "harm" calculus. *See* JA1106; *see also* JA1136. Yet that assumption cannot be squared with *Bajakajian*, where the government spent countless hours prosecuting the case but where the Court nonetheless concluded that Bajakajian's crime "caused no loss to the public fisc." 524 U.S. at 339; *see also id.* at 343 n.19. Or consider another issue: whether stacked penalties should be evaluated individually or in the aggregate. In *Schwarzbaum*, the Eleventh Circuit (somewhat summarily) declined to "focus on the total aggregated fine." *Schwarzbaum*, *supra* (slip op. at 28). Other courts have done the opposite. *E.g.*, *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420-23 (Cal. 2005); *accord Golan* v. *FreeEats.com, Inc.*, 930 F.3d 950, 963 (8th Cir. 2019) (due-process analysis). Here, too, the decision below offered no views.

These certainly aren't the only open questions percolating in the courts. *See, e.g.*, *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1323

(11th Cir. 2021) (Newsom, J., concurring) ("I've written separately to question the degree of deference we give Congress's judgments on the constitutionality of fines it sets."). But they illustrate at least some of the issues the district court's threshold errors prevented it from considering—and some of the pitfalls that would be avoided by the narrow, corrective ruling we propose. In this regard, the Eleventh Circuit's *Schwarzbaum* opinion stands as a cautionary tale: in undertaking the excessiveness analysis in the first instance (and with little briefing), the panel there committed several errors that could muddy circuit precedent for years to come. *See* p. 22, *supra*.

The repercussions of these types of errors are especially acute, moreover, given the demographics most often targeted by excessive fines. While Richard Rund may be wealthy, the Excessive Fines Clause often has its most urgent application in protecting the poor and politically powerless. Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 3, 5-9 (2016). Even in the FBAR context, the government targets people of modest means. In 2023, to give one example, the government sued an elderly immigrant couple, seeking an overlapping $60,000 in penalties (half for each spouse) for concededly "non-willful" reporting violations. Am. Compl. ¶¶ 7, 16-17, 26, *United States* v. *Bhasin*, No. 23-cv-1470 (E.D.N.Y. Mar. 16, 2023) (Doc.

6). After several extensions, the pair defaulted. Mot. for Extension, *Bhasin*, No. 23-cv-1470 (E.D.N.Y. Sept. 19, 2023) (Doc. 16) ("I am currently incapacitated and unable to move."). Nor is their experience unique; in 2011, the National Taxpayer Advocate compiled accounts from people who (in the words of one) were "hunted down by the IRS and harassed for living overseas but not claiming a foreign bank account." *2011 Annual Report to Congress* (Vol. 1), at 196-97 (Dec. 31, 2011), https://tinyurl.com/435kbvxj. The "[p]rotection against excessive punitive economic sanctions," in short, is "fundamental" for good reason. *Timbs* v. *Indiana*, 586 U.S. 146, 154 (2019). The district court's errors should be corrected and the case remanded for that court to apply the fact-intensive standard required by precedent.

CONCLUSION

The Court should hold that the Excessive Fines Clause applies to civil FBAR penalties. On the question whether the penalty here is excessive, the Court should correct the district court's misunderstanding of the relevant standard; having done so, the Court would be within its discretion to remand for that court to apply the correct standard in the first instance.

Dated: January 23, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,494 words.

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Expanded font.

Dated: January 23, 2025.

/s/ Samuel B. Gedge
Samuel B. Gedge

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Samuel B. Gedge
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