No. 26-503

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TUNCAY SAYDAM,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 4:22-cv-07371
Hon. Donna M. Ryu

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICANS RESIDENT OVERSEAS IN SUPPORT OF DEFENDANT-APPELLANT

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The Association of Americans Resident Overseas is a nonprofit entity. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amicus*'s participation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Association of Americans Resident Overseas ("AARO"), founded in 1973 under the French Associations Law of 1901 and headquartered in Paris, is a global, volunteer, nonpartisan, nonprofit association with members in over 45 countries. AARO works to increase domestic awareness of issues affecting Americans overseas and seeks fair treatment by the U.S. government for Americans abroad. AARO also informs its members of the issues affecting them and of their rights and responsibilities as American citizens.

AARO is interested in this case because it involves the Report of Foreign Bank and Financial Accounts. Many of AARO's members are subject to this same requirement, and AARO wishes to inform this Court about the obscure form and complicated related legal regime. That provides

[1] No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

important context for assessing whether the penalties imposed upon the defendant are constitutionally excessive.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Maybe nothing else so clearly illustrates the exponential growth in the quantity and complexity of law—and accompanying confusion—as the provisions governing tax and financial reporting obligations. *See generally* Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* (2024). Former Secretary of Defense and White House Chief of Staff Donald Rumsfeld famously sent a letter to the IRS every year, noting that he had "absolutely no idea whether" his "tax returns" were "accurate," owing to the tax code's "complex[ity]."[2] That commentary on the *domestic* reporting regime applies with extra force to the more complicated *foreign* regime at issue.

The foreign reporting obligation at issue in this case ultimately stems from the Bank Secrecy Act, a statute enacted in 1970 to detect and deter serious financial crimes like money laundering. Exercising authority under the Act, the Treasury Secretary has promulgated a variety of regulations

[2] Letter from Donald Rumsfeld to IRS (Apr. 15, 2014), https://www.businessinsider.com/donald-rumsfeld-absolutely-no-idea-if-he-paid-taxes-properly-2014-4.

governing U.S. citizens' relationships with foreign financial entities, including the Report of Foreign Bank and Financial Accounts (commonly called "FBAR"). Americans with overseas bank accounts that exceed $10,000 in the aggregate at any point in the year must file an FBAR the following year. Penalties for failing to file this form can be severe: up to $10,000 (now $16,536 with inflation) for a non-willful violation and the greater of 50% of the funds at issue or $100,000 (now $165,353 with inflation) for a willful violation.

Ordinary Americans too often find themselves unknowingly ensnared by the FBAR requirement. The FBAR is not well known to the public, as even the government has admitted. And it is hardly intuitive: for example, it sweeps in persons whose foreign accounts (usually denominated in a foreign currency) surpass the $10,000 threshold for a single day, as well as persons who do not owe U.S. taxes. Experienced tax professionals are sometimes unaware of the existence or full scope of the FBAR requirement. And, of course, the FBAR must be understood in context as one the many "complex, overlapping, and punitive" reporting requirements for

Americans with foreign accounts. Nat'l Taxpayer Advoc., *2025 Annual Report to Congress* 108 (2025).

The fair-notice concerns with FBAR are at their apex when dealing with supposedly "willful" violations that carry the harshest civil penalties. Courts have upheld six- and seven-figure penalties against Americans based on supposedly willful violations without the government ever needing to prove actual knowledge of (or willful blindness to) the FBAR—let alone the intent to violate the FBAR. As a result, Holocaust survivors have been subject to harsh penalties for "willfully" failing to disclose their escape funds, and Americans who work overseas, are paid overseas, and bank overseas have been tagged as "willful" offenders too.

This context is important and should be considered in analyzing a challenge under the Eighth Amendment's Excessive Fines Clause to a supposedly willful FBAR violation. As this Court's caselaw recognizes, the constitutional excessiveness of a fine depends in part on a defendant's culpability. *Thomas v. County of Humboldt*, 124 F.4th 1179, 1193 (9th Cir. 2024). Here, the defendant's culpability must be assessed in the light of the

obscure FBAR requirement that has ensnared numerous other Americans and exposed them to severe punishments.

ARGUMENT

I. The FBAR regime presents a massive fair-notice problem that should be considered in assessing an Excessive Fines Clause challenge.

Exercising delegated authority under the Bank Secrecy Act, the Treasury Secretary has promulgated the FBAR, which requires Americans to file an annual report disclosing all foreign accounts they own or control if they *together* hit $10,000 (or its equivalent in foreign currency) in the prior year. The FBAR is obscure, and many ordinary Americans and some financial professionals are unaware of it. In the Bank Secrecy Act, Congress distinguished between non-willful and willful offenders and reserved the harshest punishments for willful offenders alone.[3] But the willfulness

[3] Congress did so through amendments to the Act. *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, Subtitle H, § 1357, 100 Stat. 3207 (codified at 31 U.S.C. § 5321(a)(f)) (establishing penalties for willful violations); American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821, 118 Stat. 1418, 1586 (codified at 31 U.S.C. § 5321(a)(5)(B)–(C)) (increasing penalties for willful violations and establishing penalties for non-willful violations).

standard has been interpreted to reach persons who never knew about the FBAR—much less had the purpose of violating the law—and so has exposed unwitting offenders to six- and seven-figure penalties. All that is critical context for assessing a supposedly willful violation under the Eighth Amendment's Excessive Fines Clause.

A. There is widespread ignorance of the FBAR.

The FBAR is obscure. It ultimately traces to the Bank Secrecy Act, a statute aimed at "money laundering, terrorism finance, tax evasion, and fraud." 31 U.S.C. § 5311(4). But Congress did not provide any details about the FBAR in the Act. Instead, Congress delegated wholesale authority to the Secretary of Treasury to require an American to "file reports … when [he] makes a transaction or maintains a relation for any person with a foreign financial agency." *Id.* § 5314(a).

The Secretary of Treasury exercised that authority to create the FBAR. Buried in two nonadjacent sections within hundreds of pages of Bank Secrecy Act regulations lie the details on the FBAR and when it is triggered. If an American has "a financial interest in, or signature or other authority

over, a … financial account in a foreign country," he must file a "Report of Foreign Bank and Financial Accounts," 31 C.F.R. § 1010.350(a), "with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year," *id.* § 1010.306(c). Americans must then read the Internal Revenue Manual to learn that the FBAR is not just required when *an account* exceeds $10,000, but also when the "aggregate balance" across *all accounts* exceeds $10,000. IRM 4.26.16.3 FBAR Filing Procedures (June 24, 2021). And the timing is confusing too: the regulations still list the original June 30 deadline, 31 C.F.R. § 1010.306(c), even though Congress long ago moved that deadline to April 15, Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006(b)(11), 129 Stat. 443, 458–59.[4]

[4] The Internal Revenue Manual acknowledges this disconnect. IRM 4.26.16.1.2 Authority (June 24, 2021) (acknowledging that the regulations identify "a filing due date of June 30th" although Congress "required the Secretary of the Treasury to change the FBAR due date to April 15 for calendar year 2016 and subsequent years"). It also notes that the government has "announced an automatic extension of the filing deadline to October 15." *Id.*

Americans are often unaware of the FBAR requirement—and the government has admitted as much. In 2002, Treasury conceded that some Americans failed to file the FBAR due to a "lack of knowledge or confusion about the filing requirements." Sec'y of the Treasury, *A Report to Congress in Accordance with § 361(b) of the Patriot Act* 10–11 (Apr. 26, 2002). But rather than provide the education that it knew was needed, *id.*, the government aggravated the problem through "confusing and informal" guidance—"with often conflicting information scattered through the IRS website, requiring taxpayers and practitioners to engage in a 'scavenger hunt to find relevant information.'" Nat'l Taxpayer Advoc., *2009 Annual Report to Congress* 144 (2009) (citation omitted).[5]

Indeed, some trained professionals remain unaware of the FBAR requirement. As one overseas American reported: "I relied on my US CPA

[5] Although the IRS refers to the FBAR requirement at the bottom of Schedule B of Form 1040, that form—which by its title covers "Interest and Ordinary Dividends"—is by one estimate completed by less than 14 percent of individual filers. *See Schedule B*, IRS, https://www.irs.gov/pub/irs-pdf/f1040sb.pdf; Mark Xu, IRS Pub. 4801, 2022 Statistics of Income: Individual Income Tax Returns, Line Item Estimates, 2022, at 7 (Dec. 2024).

to do my taxes competently but he didn't know about FBAR[]." Laura Snyder, Chair of AARO Tax Comm., *Survey Report: Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies* 136 (May 4, 2021), http://seatnow.org/wp-content/uploads/2021/05/Comments-by-topic.pdf ("Snyder Survey"). A couple likewise said: "We were not even aware we had to report fbar and the US accountant was also not aware." *Id.* at 440; *see also Jones v. United States*, 2020 WL 2803353, at *2 (C.D. Cal. May 11, 2020) (accountant "was not familiar with FBAR reporting requirements"). Another couple was fined for not filing FBARs after three separate accountants failed to inform them of and help them comply with the requirement. *Kentera v. United States*, 2017 WL 401228, at *2 (E.D. Wis. Jan. 30, 2017).

That some trained professionals are ignorant of the FBAR requirement only underscores the lack of notice to ordinary Americans, particularly those living overseas. An American who moves abroad probably does not suspect that the checking account she kept in the United States suddenly carries significant reporting requirements when transferred to a European bank.

And Americans who spent most of their lives abroad have even less reason to suspect the FBAR's existence.

Surveys of overseas Americans confirm the FBAR's obscurity. In a 2020-2021 survey, one respondent reported: "I had never heard of" the FBAR until "after doing some research" prompted by "a [bank] letter ... asking for certain information about anti money laundering and terrorism." *Snyder Survey*, *supra*, at 75. Said another: "I have lived in the UK for 19 years" and learned about the FBAR only "last year upon receiving a death benefit payment." *Id.* at 146.

An April 2026 survey performed by *Amicus* replicated these findings. One respondent learned of the FBAR in 2014 after living abroad for 64 years. *AARO April 2026 Survey* (data on file with AARO). Others reported that they had randomly learned of the FBAR very recently: a "few years ago, by accident" from "a comment from a fellow American"; and "[j]ust now" upon seeing AARO's own survey. *Id.* Still others had lived overseas for around a quarter-century or more before they stumbled upon the FBAR: while "looking for cycling videos on youtube"; "from a friend who mentioned it

when talking about something else"; or when a bank sent emails "making reference to FBAR[]" spurred by a decade-old account application showing U.S. citizenship. *Id.*

Even some professionals who might know about the FBAR find it confusing and difficult to comply with. As one respondent, who runs a business that involves "informing people moving or investing overseas," tells it, "Most people don't know about the rules … and many times their accountants don't know." *Id.* (ellipsis in original). Many examples substantiate that statement: "even tax professionals admit finding it all very confusing, with lots of 'grey areas'"; "my tax preparer (a CPA) was so confused by it that she needed to file an amended return and state that she had given me the incorrect information the previous year"; it is "[v]ery frustrating and potentially terrifying," that "I just don't clearly know what I'm meant to be doing … and the legal and accounting professionals that I contact don't seem 100% confident either." *Id.*

On top of the unclear law, the factual predicate for filing the FBAR is often hard for average persons to determine. A key complication is the

$10,000 trigger. The reporting requirement applies "with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year," *id*. § 1010.306(c), meaning the "aggregate amount(s) in the account(s) valued in U.S. dollars exceed $10,000 at any time during the calendar year." IRM 4.26.16.2 FBAR Filing Criteria (Nov. 6, 2015).

Routine transactions thus turn into tripwires. An extra paycheck or a temporary deposit for, say, home improvements could pull an account above that threshold for a short period. *Snyder Survey*, *supra*, at 20. Many banks report only month-end balances, which provide little notice that the threshold might have been temporarily crossed during the month. *See AARO April 2026 Survey* ("[F]or many accounts[,] finding the highest balance requires much calculation as the bank only puts month end balances"; "[I]t is complicated to find out the exact highest amount"); *Snyder Survey*, *supra*, at 306 ("There is no way I can calculate if, when and how much I went over the limit of 10[,]000 USD for which I have to fill out an FBAR."). And, of course, the $10,000 threshold is in *U.S. dollars*, while many Americans overseas are paid in *foreign* currency, thus adding in the complication of

monitoring fluctuating exchange rates. *AARO April 2026 Survey* ("What currency exchange rate should be used? Why isn't an official rate established at the beginning of the year?").

Complicating matters even further, the FBAR triggers when the $10,000 threshold is reached across foreign accounts in the *aggregate*. Citizens must struggle with figuring out which accounts they need to add up to determine whether they must file an FBAR. *Id.* Respondents raised numerous examples of points of confusion: "PayPal? Wise? credit cards?"; "Obviously checking and savings accounts, but what about PEI and PEE and other retirement vehicles?"; "I was unclear about how the money I have attached to my phone matters. Is it a bank?" *Id.*

Many overseas Americans—and some of their tax professionals—have no idea that the FBAR exists. And even when they do know about it, they struggle to untangle the web of statutes, regulations, and guidance dictating their obligations. But whether they know about the FBAR or not, they may be subject to six- or seven-figure penalties for failing to file one.

B. The Bank Secrecy Act's harsh penalties for willful conduct are often applied to Americans who lacked knowledge of the FBAR.

The Bank Secrecy Act reserves special treatment for "willful" offenders. Willfulness is the trigger for exponentially greater civil fines: from $16,536 for a non-willful offense to the greater of 50% of the funds at issue or $165,353 for a willful one. *See* 31 U.S.C. § 5321(a)(5)(B)–(C); 31 C.F.R. § 1010.821 tbl.1. A showing of willfulness also permits the government to seek criminal penalties. 31 U.S.C. § 5322.

In the criminal context, willfulness requires the government to prove that a defendant has subjective, "actual knowledge" of the reporting requirement and a "purpose to disobey the law." *United States v. Tatoyan*, 474 F.3d 1174, 1177 (9th Cir. 2007). But when it comes to civil penalties, courts have interpreted willfulness more expansively to include persons who "clearly *ought* to have known that there was a grave risk" of a legal violation, and were "in a position to find out for certain very easily." *United States v. Hughes*, 113 F.4th 1158, 1162 (9th Cir. 2024) (emphasis added).

Under this standard, the government has been able to secure the severe penalties for willful violations without proving that a defendant knew of (or was willfully blind to) the FBAR—let alone proving that the defendant intended to violate the law. As a result, the FBAR has ensnared everyone from Holocaust survivors and their families for maintaining "escape funds" to guard against another genocide to American citizens who live overseas and simply deposit their overseas earnings into overseas accounts.

Consider ***Walter Schik***. As a child, he was "forcibly separated from his family in Austria and sent to a Hungarian concentration camp." *United States v. Schik*, 2022 WL 685415, at *1 (S.D.N.Y. Mar. 8, 2022). His family was murdered in concentration camps, but Schik survived and immigrated to the United States. *Id.* "Shortly after becoming a citizen" in the 1950s, Schik opened a Swiss bank account where he deposited "money recovered from the Holocaust from relatives" who had been killed, to "serve[] as a safety-net in case of another Holocaust." *Id.* (quotation marks omitted).

Schik never knew the FBAR existed. *Id.* at *5–6. For 2007, his accountant prepared his tax returns. *Id.* at *2. The accountant "never asked

if Mr. Schik had funds outside the United States." *Id.* The "prefilled answer" to the relevant question on his tax form, "apparently inputted by his tax preparer's software, was 'no.'" *Id.* For this single failure to file an FBAR in 2007, the government assessed a penalty of $8,822,806, even though Schik "submitted a 'voluntary disclosure to the IRS regarding his foreign accounts'" and "'belatedly filed an FBAR.'" *Id.* at *1–2. After three years of litigation, he signed a punishing $6 million settlement with the government. *United States v. Schik*, 2023 WL 5939639, at *1 (S.D.N.Y. Aug. 23, 2023).

Monica Toth had a similar experience. In the 1930s, her father "escape[d] the swell of violent antisemitism" in Germany. *Toth v. United States*, 143 S. Ct. 552, 552 (2023) (Gorsuch, J., dissenting from denial of certiorari). He gifted his daughter, an American citizen, a Swiss bank account with "a reserve of funds" and "encouraged [her] to keep the money there—just in case." *Id.* Toth adhered to this advice, but for several years failed to file the FBAR because "she did not know of the reporting obligation." *Id.* When Toth "learned of" the FBAR, "she completed the necessary disclosures." *Id.* Still, the government called her violation willful

and a court upheld a more than $3 million award: a $2.1 million penalty, "half of the balance of [her] account—plus another $1 million in late fees and interest." *Id.*

Alice Kimble also lost half her family's escape fund to FBAR penalties. Her paternal grandparents had "fled to the United States to escape persecution" while some of their relatives were "killed in the Holocaust." *Kimble v. United States*, 991 F.3d 1238, 1240 (Fed. Cir. 2021). Fearing future persecution and the "need[] to flee to another country as his parents had," Kimble's father opened a secret Swiss account. *Id.* He instructed Kimble and her husband to keep the account secret and not to use it "unless needed to support an escape." Pet. for Cert. at 4, *Kimble v. United States*, 142 S. Ct. 98 (2021) (No. 20-1697). Following her father's death, Kimble and her husband "maintain[ed] the account exactly as her father had repeatedly directed." *Id.* at 5–6. Kimble's husband had done their taxes, so after her divorce, she hired an accountant. *Kimble*, 991 F.3d at 1241. But the accountant "never asked" whether "she had a foreign bank account" and she never volunteered the existence of her family's escape fund. *Id.*

When Kimble learned of the FBAR from a newspaper article in 2008, she "retained counsel to comply." *Id.* She tried the government's voluntary disclosure program, but withdrew after being hit with a $377,309 penalty. *Id.* Outside the program, the government called her failure to file the FBAR "willful," and a court ultimately upheld a penalty of one-half of her family's escape fund: nearly $700,000. *Id.*

These penalties also reach ordinary Americans living and working overseas, like ***Brett Clemons***. As a computer programmer working in Europe, he opened accounts there to receive pay from his employers. *United States v. Clemons*, 2019 WL 7482218, at *2–3 (M.D. Fla. Oct. 9, 2019). He prepared his own tax returns and told the IRS that he had foreign accounts. *Id.* at *3–4. But his tax software did not prompt him to file an FBAR, and he did not know about the requirement until an IRS agent informed him. *Id.* at *7. He then promptly filed delinquent FBARs. *Id.* But the government still

hit Clemons with $315,000 in penalties—against accounts with an aggregate maximum balance of roughly $500,000. *Id.* at *3–5.[6]

And, of course, the FBAR trap has affected other Americans even if the government has not (yet) sought statutory penalties. Consider a "widowed, retired old lady" abroad who told her story:

> [I] always thought I was following the rules until … 2015 when a neighbour (investment broker) showed me an article in her professional journal re[garding] … FBAR, [and] asked if this applied to me. The blood drained from [m]y head, I had NEVER heard of [it] and panic ensued. …
>
> I have always had a US accountant that professed to be competent in international taxation. Being a complete dolt in such matters and of VERY modest income I laid all of my trust in her, just signed the returns and thought nothing of it.
>
> Upon studying FBAR penalties I came to the HORRIFYING reality that I owed US 180k in FBAR fines. …
>
> I also learned that the IRS determines wilfulness; I may be ignorant but only a fool would walk into that web.
>
> So, having thought I was always compliant, having zero tolerance for risk, I now find myself a covered expatriate and

[6] After a jury found that Clemons's violation was willful as to only one of the three years in question, the court upheld a judgment of $125,639. *United States v. Clemons*, 2020 WL 7407549, at *2, 5 (M.D. Fla. Apr. 15, 2020).

> terrified to step one foot in the God forsaken nation. (Beyond sad as I have family there and a new grandchild.)

Snyder Survey, *supra*, at 530.

C. This Court should consider the above in assessing the Excessive Fines Clause challenge.

All of the above provides important context in assessing any challenge under the Eighth Amendment's Excessive Fines Clause. A critical aspect for perhaps a thousand years in assessing whether a fine is excessive is the culpability of the defendant. *See Timbs v. Indiana*, 586 U.S. 146, 160–61 (2019) (Thomas, J., concurring in judgment) (tracing the history of the Eighth Amendment's Excessive Fines Clause). This Court has likewise recognized the importance of culpability in evaluating the size of a fine. *Thomas*, 124 F.4th at 1193. And a defendant's mental state matters massively to culpability. *See United States v. Bailey*, 444 U.S. 394, 404 (1980). "[E]ven a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes, *The Common Law* 3 (1881).

The defendant in this case, Tuncay Saydam, claims that he did not know of the FBAR requirement, much less purposefully violate it. *See* Br.

Appellant Tuncay Saydam 2. That claim is not far-fetched. To the contrary, as this brief illustrates, considerable experience corroborates his claim. The government has poorly publicized the FBAR. Even some financial professionals are unaware of the FBAR requirement or its contours. Many overseas Americans say they first learned of the FBAR requirement by sheer happenstance, years or decades after moving abroad. And, like Saydam, others have been punished for supposedly "willful" violations despite claimed ignorance of the FBAR.

Someone who lacked knowledge of an obscure legal requirement should be deemed on the lower end of the culpability scale. After all, fair notice of the law has long been considered the most fundamental premise of a just punishment. *See, e.g.*, 1 Blackstone, *Commentaries on the Laws of England* *45–46 (1765) (the law must be "notified to the people who are to obey it," not concealed as under "Caligula, who … wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people").

That conclusion takes on greater force in this context, where culpability must be assessed "relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example"—all knowing and purposeful offenders. *United States v. Bajakajian*, 524 U.S. 321, 338–39 & n.14 (1998); *see also Borden v. United States*, 593 U.S. 420, 440 n.8 (2021) (opinion of Kagan, J.) ("[A]n act done recklessly often should not receive as harsh a punishment as the same act done purposefully or knowingly, even when the two cause the same harm.").

CONCLUSION

Everyday Americans with foreign accounts—including Americans residing overseas—face the possibility that they could be fined hundreds of thousands of dollars, or much, much more, for failing to file a form they did not know about. One of the few protections they have left is the Eighth Amendment's Excessive Fines Clause. In analyzing Saydam's constitutional challenge to the penalties assessed against him, the court should take into account the lack of fair notice he and many Americans have of the FBAR.

Respectfully submitted,

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Dated: May 22, 2026

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of 9th Cir. R. 29(a)(2) because it contains 4,178 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. 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 it has been prepared in a proportionally spaced typeface in Palatino Linotype, 14-point font.

/s/ David J. Feder
Counsel for Amicus Curiae *AARO*

Dated: May 22, 2026