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, Case No. 4:22-cv-07371-DMR
(Hon. Donna M. Ryu)

AMICUS BRIEF OF PROFESSOR BETH A. COLGAN SUPPORTING APPELLANT

Thomas Q. Swanson
HILGERS PLLC
1320 Lincoln Mall, Suite 200
Lincoln, NE 68508
(402) 395-4469
TSWANSON@HILGERSLAW.COM

Counsel for Amicus Curiae Prof. Beth A. Colgan

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Professor Beth A. Colgan ("Amicus") is Professor of Law at the UCLA School of Law. She is one of the country's leading experts on constitutional and policy issues related to the use of financial sanctions as punishment, and particularly on the Eighth Amendment's Excessive Fines Clause.

Pursuant to F.R.A.P. Rule 29(a)(2), Amicus states that all parties have consented to the filing of this amicus brief, that no party's counsel authored any part of it, and that no one other than Amicus or her counsel contributed money for its preparation or submission. *See* Fed. R. App. P. 28(a)(4)(E).

SUMMARY OF ARGUMENT

A deprivation of property constitutes a fine subject to the protections of the Eighth Amendment's Excessive Fines Clause if it "serves, at least in part, to punish the owner." *Austin v. United States*, 509 U.S. 602, 618 (1993). The Bank Secrecy Act's civil penalty for the failure to file an FBAR form is akin to eighteenth- and nineteenth-century uses of fines and forfeitures as punishment for violations of tax codes and related regulations. This history is of particular importance, as the Supreme Court has routinely relied on historical practices in interpreting the scope of protections afforded by the Excessive Fines Clause. *E.g.*, *Timbs v. Indiana*, 586 U.S. 146, 151-53 (2019) (tracing the Clause's roots to Magna Carta and incorporating the Clause

against the states); *Austin*, 509 U.S. at 608-09, 611-19 (tracing the historical use of *in rem* forfeitures as punishment).

Specifically, the district court's determination that FBAR penalties are fines is consistent with the historical record as follows:

I. A substantial volume of early American legal texts shows that punishment was not restricted to technically criminal matters. The relevant historical question was whether a pecuniary penalty was imposed in response to a public offense regardless of whether its prosecution proceeded criminally or civilly. Tax and related regulatory violations constitute quintessential public offenses. The punitive nature of the resulting fines and forfeitures was evident both through the public nature of their prosecutions and the use of pardons and remissions as a form of public forgiveness. In short, such civilly imposed pecuniary penalties were historically understood to serve as punishment.

II. These same materials exhibit an historical understanding that punishment and remediation were compatible, rather than mutually exclusive, concepts. Congress historically employed tax and related regulatory fines and forfeitures as punishment to promote compliance with the tax code as a means of protecting

> the revenue. Further, early American legal texts recognized pecuniary punishments could be compensatory. While monies employed to pay tax arrears were nonpunitive, the overage generated through tax penalties was understood to constitute punishment. The possible use of the overage to fund enforcement efforts is consistent with the historical treatment of fines and forfeiture revenue. While expenses tied to a particular case may be relevant to excessiveness of a fine, it does not render the fine nonpunitive.

The historical materials related to each point are set out in greater detail in Beth A. Colgan, *Of Guilty Property and Civil/Remedial Punishment: The Implications and Perils of "History" for the Excessive Fines Clause and Beyond*, 3 J. of Am. Const. Hist. 697 (2025). The argument below includes a more limited set of historical examples along with references to the portion of that article from which additional historical evidence may be found. The focus of that article and this brief are on the question of what constitutes a fine. Should the court determine that FBAR penalties are at least partially punitive and thus a fine, it would not necessarily render the penalties unconstitutional. It would, however, offer Appellant an opportunity to seek

protection against those deprivations on the grounds that they are unconstitutionally excessive.

ARGUMENT

I. THE CIVIL NATURE OF FBAR PENALTIES IS CONSISTENT WITH EARLY AMERICAN PRACTICES FOR IMPOSING PUNISHMENT.

The district court below's determination that FBAR penalties were at least partially punitive, and therefore fines, is consistent with American practices dating back to the eighteenth century. It rejected a First Circuit opinion positing that FBAR penalties could not constitute fines because they were unrelated to a "criminal sanction" and akin to early *in rem* customs forfeitures. *Saydam*, 2025 WL 3214772, at *4 (quoting *United States v. Toth*, 33 F.4th 1, 16 (1st Cir. 2022).[1] As detailed below, however, the use of civil

[1] The First Circuit's opinion relies on the truncated historical analysis of early *in rem* customs forfeitures in *United States v. Bajakajian*, 524 U.S. 321 (1998) and the cases cited therein. *Toth*, 33 F.4th 15-19. While *Bajakajian* affirmed the partially punitive test set out in *Austin*, the two cases conflicted on the historical understanding of the punitive nature of *in rem* customs forfeitures. *Compare Bajakajian*, 524 U.S. at 333-34, 343, n.18 (suggesting *in rem* forfeitures were not understood to be punitive) *with Austin*, 509 U.S. at 614-18 (finding that such forfeitures were punishment). Subsequent research of a much more significant body of historical records supports the conclusion that, as a matter of history and tradition, both fines and *in rem* forfeitures imposed in response to early American tax and regulatory violations would have been understood to constitute punishment. *See generally* Colgan, *supra*. Importantly, this broader historical analysis does

processes to punish was commonplace in the eighteenth and nineteenth centuries for public offenses, including tax and related regulatory offenses. Those punishments included both fines and *in rem* forfeitures. And further, the punitive nature of those civil penalties was further evident through their modes of prosecution and forgiveness.

A. Civil Processes Were Commonly Used to Impose Pecuniary Punishments for Public Offenses.

Colonial statutes, and those passed by the federal government and American states in the eighteenth and nineteenth centuries, allowed certain offenses for which fines and forfeitures were the typical form of punishment to be adjudicated in civil proceedings. Such proceedings were distinguishable from private disputes litigated civilly given the public nature of the underlying offense. Colgan, *supra*, at 748-59, 764.

The distinction between public and private offenses, and in turn the ability to adjudicate certain public offenses civilly, was borrowed from the English common law. *See Huntington v. Attrill*, 146 U.S. 657, 668-69 (1892) (citing Blackstone for the premise that "[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is

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not touch the *Bajakajian* Court's adoption of a proportionality test or its application in determining excessiveness. Colgan, *supra*, at 702-03, n.20.

a wrong to the public or a wrong to the individual"). As Blackstone explained, private actions involve "an infringement or privation of the civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries.'" 3 Blackstone, *Commentaries on the Laws of England* 2 (12th ed. 1793-1795). In contrast, public wrongs "are a breach and violation of public rights and duties, which affect the whole community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'" *Id.*

Following the English tradition, offenses were understood to necessitate full criminal process if the punishments that could be imposed included death, periods of incarceration, or corporal punishment, at times along with pecuniary penalties. Such matters were typically described as "criminal" in early American legal texts. Colgan, *supra*, at 743-48.

Public offenses for which the primary form of punishment was pecuniary—typically described as "penal" offenses—were frequently prosecuted without full criminal process. Colgan, *supra*, at 743-48. As the Supreme Court explained in 1805, "[a]lmost every fine or forfeiture under a penal statute, [could have been] recovered" through civil processes despite being "punishment for the offence." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340-41 (1805) (applying a penal statute of limitations to a civil action).

Therefore, despite the distinction in procedural form, pecuniary penalties imposed in response to public offenses—whether the offenses were technically criminal in nature or prosecuted civilly—were widely understood to constitute punishment. As the Court explained:

> The real nature of the case is not affected by forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of [the state], the prosecution must be by indictment or by [civil] action; … In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 299-300 (1888) (holding that the rule precluding one jurisdiction from enforcing the penal laws of another extended to penal laws processed civilly), *limited on other grounds Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273-74 (1935); see also *United States v. Mann*, 26 F. Cas. 1153, 1154-57 (C.C.D. N.H. 1812) (No. 15,718) (Story, Circuit Justice) (stating that "without question all infractions of public laws are offences; and it is the mode of prosecution and not the nature of the prohibitions, which ordinarily distinguish penal statutes from criminal statutes").

As detailed below, the failure to adhere to the public duty to pay taxes, and the implications of that lost revenue for the community, made tax code

violations a quintessential public offense, with the resulting fines and forfeitures historically understood to serve as punishment even if processed civilly. Colgan, *supra*, at 759-67.

B. Tax and Related Regulatory Violations Are Quintessential Public Offenses.

At the dawn of the new republic, the federal government's ability to generate revenue through taxation and to regulate commerce—along with the authority to punish violations of those laws—were understood to be among the "great powers" afforded by the Constitution, essential to the young nation's survival. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 417 (1819). Among its earliest acts, Congress adopted an array of laws, which were designed to and did generate revenue through taxation of goods entering the nation's seaports and the related regulation of maritime industries. *E.g.*, Act of Sept. 1, 1789, ch. 11, 1 Stat. 55 ("1789 Registration Act") (regulating maritime industries through registration and licensing); Act of July 31, 1789, ch. 5, 1 Stat. 29 ("1789 Collections Act") (imposing customs duties). Like modern laws such as the FBAR filing requirement, these laws include requirements that owners and mariners register potentially taxable property and provide documentation declaring potentially taxable items. *E.g.*, 1789 Registration Act, §§ 1-23, 1 Stat. 55-61 (establishing requirements for how and where to register vessels); 1789 Collections Act, § 10, 1 Stat. 38

(requiring the master of a vessel importing foreign goods to provide a ship's manifest accounting for the course of travel and details regarding the goods on board).

Woven into these laws were various forms of punishment for their violation. This included offenses carrying the threat of incarceration for which criminal procedures were mandated. *E.g.*, 1789 Collections Act, § 34, 1 Stat. 46 (requiring prosecution by indictment in relation to fraudulent drawbacks of duties). It also included civil fines for a wide variety of offenses. *Id.* § 36, 1 Stat. 47 (explaining the procedure to be applied in seeking pecuniary penalties); *see also* 1789 Registration Act, § 21, 1 Stat. 60 (adopting the same procedures for registration violations).

Unsurprisingly, then, early American courts routinely treated and described tax and related regulatory fines imposed civilly as punishment. For example, when the question arose as to whether the Ex Post Facto Clause—which applied only to criminal and penal statutes—was applicable to civil tax fines, the Court answered in the affirmative, describing the tax fines as having "punished" the delinquent taxpayer. *Burgess v. Salmon*, 97 U.S. 381, 382, 384 (1878) ("The case presents but a single point: Can a manufacturer be punished, criminally and civilly—civilly here—for the violation of a statute, when the statute was not in force at the time when the act was

done?"). *See also, e.g.*, *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 274 (1853) (regarding additional duties imposed for the fraudulent undervaluing of goods to be taxed, as a "penal duty" that "do[es] not fall within the regular administration of the revenue system"); *United States v. McKee*, 26 F. Cas. 1116, 1117 (C.C.E.D. Mo. 1877) (No. 15,688) (Miller, Circuit Justice) (treating double taxes imposed through a civil action as punishment in a double jeopardy analysis); *Lott v. Hubbard*, 44 Ala. 593, 600 (1870) (describing a double tax as "punishment"); *Jones v. Town of Bridgeport*, 36 Conn. 283, 386-87 (1869) (distinguishing an "addition of ten percent" from "the tax on the valuation of the property" because it is "made to punish"); *Buckwalter v. United States*, 11 Serg. & Rawle 193, 195-97 (Pa. 1824) (describing double duties "given for the … offense" of failing to pay a tax as "penal" though imposed through a civil action); *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 38 (1815) (describing the penal nature of a tax penalty as a "self-evident proposition[]").

Simply put, tax and related regulatory offenses are necessarily public offenses, and therefore historically civil fines imposed for such violations were understood to constitute punishment.

C. *In Rem* Customs Forfeitures Also Served as Punishment.

The First Circuit concluded in *Toth* that FBAR penalties are not punishment because they are akin to early *in rem* customs forfeitures. 33 F.4th at 16. While the district court below rejected that argument by distinguishing the two forms of punishment, even if they were overlapping, that would not render FBAR penalties nonpunitive.

As essential as the revenue laws were for the financial health of the new nation, the enforcement of such laws in its busy ports and waterways was also notoriously difficult. Those engaging in fraud were seen as "exceedingly ingenious in resorting to various subterfuges to avoid detection." *The Brig Burdett*, 34 U.S. (9 Pet.) 682, 690 (1835).

A crucial part of enforcement, therefore, was an effort to encourage compliance by responding to wrongdoing with punishment. In addition to the punishments detailed above, for some offenses Congress imposed *in rem* forfeitures of the ships and cargo associated with customs offenses. This allowed for the civil prosecution and punishment of owners on three grounds: conspiring with offending mariners to violate customs laws; for their own direct efforts to avoid customs and related regulations; and through an agency theory for the misconduct of the masters in their employ.

E.g., 1789 Collections Act, *supra*, §§ 22-23, 1 Stat. 42-43; *see also* Colgan, *supra* at 717-22.

The Supreme Court described *in rem* forfeitures of property imposed for revenue and regulatory violations as "punishment" throughout the nineteenth century. *See Coffey v. United States*, 116 U.S. 436, 444-45 (1886) (describing an *in rem* forfeiture for a revenue violation as "statutory punishment"); *Caldwell v. United States*, 49 U.S. (8 How.) 366, 379-80 (1850) (describing *in rem* forfeitures as "punishment of [revenue] fraud"); *United States v. Carr*, 49 U.S. (8 How.) 1, 8-9 (1850) (describing the *in rem* forfeiture of goods in relation to a manifest requirement as an "aggravated punishment"); *The Brig Burdett*, 34 U.S. (9 Pet.) at 690-91 (describing a loss of property through *in rem* forfeiture for a registry act regulation as being "punished for a violation of the law"); *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (explaining that an *in rem* forfeiture for a revenue violation "punishes the owner"); *United States v. Riddle*, 9 U.S. (5 Cranch) 311, 312 (1809) (interpreting a tax-evasion statute as imposing an *in rem* forfeiture "to punish … the *attempt* to defraud the revenue").

In case after case, the lower courts followed suit. They described *in rem* tax-forfeitures as "punishment" in the early part of the nineteenth century. E.g., *United States v. Twenty-Four Coils of Cordage*, 28 F. Cas. 276, 279

(C.C.E.D. Pa. 1832) (No. 16,566) (Baldwin, Circuit Justice) (describing a statute as "creat[ing] the forfeiture, as a punishment for the omission of the duties previously prescribed"). They did so as the country emerged from the Civil War. E.g., *Dorsheimer v. United States*, 2 Ct. Cl. 103, 117-18 (1866) (differentiating between taxes due and the "punishment" of an *in rem* forfeiture), *aff'd* 74 U.S. 166 (1868). They did so in the years immediately following the ratification of the Fourteenth Amendment. *E.g.*, *250 Barrels of Molasses v. United States*, 24 F. Cas. 437, 440 (C.C.D.S.C. 1869) (No. 14,293) (describing an owner as "properly punished" through *in rem* forfeiture for the use of a false invoice to defraud the revenue). And they did so throughout the latter part of the nineteenth century. *E.g.*, *United States v. Two Barrels of Whisky*, 96 F. 479, 481 (4th Cir. 1899) ("the forfeiture of a man's property is one of the severest punishments that the law can inflict"), *overturned on other grounds United States v. One Saxon Auto*, 257 F. 251, 252-55 (4th Cir. 1919). *See also* Colgan, *supra*, at 736-39 (providing additional examples in regulatory and embargo violation cases, prosecutors' arguments, U.S. Attorney General opinions, and jury charges).

In other words, even if FBAR penalties are similar to *in rem* customs forfeitures, that merely reaffirms their punitive nature.

D. The Punitive Nature of Tax and Regulatory Fines and Forfeitures Is Further Evident through Their Modes of Prosecution and Forgiveness.

The status of tax and related regulatory offenses as public offenses for which pecuniary penalties were imposed as punishment is further evident given that they were investigated and prosecuted on behalf of the government and that they were subject to pardon and remission.

The use of *qui tam* prosecutors—private citizens who investigated, reported, and prosecuted public offenses—was central to the early American enforcement of penal laws. Colgan, *supra*, at 753-55; *see also* Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1269-1305 (2018) (collecting statutes). *Qui tam* prosecutors enforcing the penal laws were compensated through a moiety of fines imposed "to induce persons from motives of gain, who would not be otherwise wrought upon, to prosecute to effect, the violations of this law." *Hylliard v. Nickols*, 2 Root 176, 177 (Ct. 1795) (regarding the apportionment of part of a £100 fine to the *qui tam* prosecutor). Incentivizing citizens to prosecute public offenses was intended to "give force and vigor to the laws, by showing the community, that they cannot be violated with impunity." *State v. Blennerhassett*, 1 Miss. 7, 15 (1818) (distinguishing a *qui tam* prosecution from a private lawsuit by noting

that "[t]he whole community is interested in the execution of the penal laws"). *Qui tam* prosecutors were widely understood to be prosecuting "popular actions" despite the frequent use of civil processes to do so. *E.g.*, *Huntington*, 146 U.S. at 673.

The use of *qui tam* prosecutors to enforce penal laws generally mirrored the structure for enforcing revenue statutes throughout the nineteenth century. Early federal statutes primarily tasked various customs staff, known as "informers," with identifying evidence of and prosecuting customs violations, with the role of prosecutor eventually taken over by U.S. attorneys. Ebenezer R. Hoar, *Informer's Shares Under the Internal-Revenue Laws*, 13 Op. Att'y Gen. 228, 230-35, 239 (May 13, 1870) (stating that revenue officers had a duty "to see that the internal-revenue laws are faithfully administered, and offenders against them punished"); *see generally* Nicholas R. Parrillo, Against the Profit Motive (2023). Those informers were compensated for their efforts by being awarded a moiety of the fines imposed or of the value of the goods and vessels forfeited. Colgan, *supra*, at 725-26. As with penal laws generally, those payments were designed "to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes." *Dorsheimer v. United States*, 74 U.S. 166, 173 (1868). Doing so increased the likelihood

offenses would be "detected and punished." Hoar, *supra* at 238. Like *qui tam* prosecutors enforcing other penal laws, these informers were understood to be investigating and prosecuting public offenses. *E.g.*, *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 289 (1825) ("the seizing officer is the agent of the government from the moment of the seizure up to the termination of the suit").

Yet another indicator of the public nature of tax and related regulatory offenses and the punitive nature of their corresponding pecuniary penalties involves the procedures through which they could be forgiven: pardon and remission. Colgan, *supra*, at 723-27, 733-34, 763-64.

Pardons are the vehicle by which the executive—in the case of federal revenue laws, the president—forgives an offense and relieves the offender of punishment. *See, e.g.*, 3 Joseph Story, Commentaries on the Constitution of the United States, Book III, Ch. 37, § 1498, at 353-54 (1833) (describing pardon powers generally as applying to the "remission of fines, penalties, and forfeitures"); Henry Stanbery, *President's Pardon*, 12 Op. Att'y Gen. 81, 81 (Nov. 2, 1866) (stating that the pardon power "is co-extensive with the punishing power, and is applicable to the remission of fines, penalties, and forfeitures which are imposed by law as punishment for offenses"). That includes fines and forfeitures imposed for violations of the revenue laws. *See,*

e.g., Pardon of Jan. 17, 1834, Nat'l Archives Record 5989411 (restoring a ship forfeited due to the failure to obtain a customs license given a lack of evidence of intentional fraud); John MacPherson Berrien, *Pardons and Remissions of Forfeitures*, 2 Op. Att'y Gen. 329, 330 (Mar. 17, 1830) (stating that "the pardoning power is considered to be coextensive with the power to punish," and that it therefore applies to "[t]he remission of fines, penalties, and forfeitures, under the revenue laws").

In addition to pardons, the First Congress created a failsafe to remit pecuniary penalties imposed for customs offenses in cases in which a truly innocent party (the original owner lacking intent to defraud or a bona fide purchaser uninvolved in the offense) was punished. Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1482-91, 1506-09 (2019). By 1790, just one year after the passage of the first customs act, Treasury Secretary Alexander Hamilton and members of Congress recognized the harsh consequences resulting from the use of pecuniary penalties in some cases. He reported to Congress that "considerable forfeitures have been incurred, manifestly through inadvertence and want of information." Alexander Hamilton, Report on the Petition of Christopher Saddler, in 6 The Papers of Alexander Hamilton 191-92 (Syrett ed., 1962). At his urging, and out of concern that "no person ought to be liable who is not guilty of a

violation of the laws intentionally or willfully," Congress passed the 1790 Remission Act. Arlyck, *supra* at 1483 (quoting 1 Annals of Cong. 1228 (1790) (Joseph Gales ed., 1834) (statement of Sen. Sturgis). The Remission Act allowed people subjected to tax fines and the owners of forfeited property to petition the Treasury Secretary for a remission if the wrongdoing was "intended without willful negligence or any intention of fraud." Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23.

That Congress intended the Treasury Department's remission program to protect innocent owners from punishment is evident in the resolution of disputes raised when the Secretary remitted property to which informers would otherwise have had a claim. Despite the importance of prosecutions based on the work of informers, their claims to a moiety were constrained by the Remission Act because without remission "the system here would justly have exposed the American government to the charge of injustice in making no discrimination between the innocent and guilty." *United States v. Morris*, 26 F. Cas. 1336, 1345 (C.C.D. N.Y. 1822) (No. 15,816) (Livingston, Circuit Justice), *aff'd* 23 U.S. (10 Wheat.) 246 (1825). Innocent owners were protected through the return of all that was wrongly taken, rather than all minus a moiety, because to hold otherwise "would be subjecting the innocent

to great and inequitable losses, contrary to the manifest spirit and intention of the law." *Morris*, 23 U.S. (10 Wheat.) at 292.

In other words, both the president's pardon power and the Treasury Secretary's remission authority were available to forgive civilly imposed tax fines and forfeitures only because they were punishment. *Dorsheimer*, 74 U.S. at 173 (distinguishing between taxes, which were not subject to remission, and forfeitures, which were); Hugh S. Legare, *Penalties Under the Tariff Act of 1842, and Their Remission*, 4 Op. Att'y Gen. 182, 182-83 (June 7, 1843) (opining that remission of an additional 50 percent duty was subject to remission because it was "very clear that [it] … is a penalty").

II. TREATING FBAR PENALTIES AS FINES IS CONSISTENT WITH HISTORICAL UNDERSTANDINGS OF THE RELATIONSHIP BETWEEN PUNISHMENT AND REMEDIATION.

The *Toth* court, this Court, and the government in the case below have each pointed to a series of twentieth century cases arising under the Fifth Amendment's Double Jeopardy Clause to posit that FBAR penalties do not constitute fines because of their possible remedial qualities. *Toth*, 33 F.4th at 16-18; *Louis v. C.I.R.*, 170 F.3d 1232, 1236 (9th Cir. 1999); *Little v. C.I.R.*, 106 F.3d 1445, 1454-55 (9th Cir. 1997); D. Ct. Doc. 94, at 11-12. That reliance s questionable in the first instance because the Double Jeopardy and

Excessive Fines Clauses are "wholly distinct," with the former employing a much more restrictive test and the latter requiring a penalty to be only partially punitive to constitute a fine. *United States v. Ursery*, 518 U.S. 267, 278 (1996). Further, as detailed below, the double jeopardy cases do not attempt to meaningfully engage with the historical record, resulting in a matryoshka doll of historical misapprehensions that case punishment and remediation as mutually exclusive even though historically they would have been understood as compatible.

A. Congress Historically Employed Tax and Regulatory Fines and Forfeitures as Punishment to Promote Compliance and Protect the Revenue.

One of the double jeopardy cases playing a particularly prominent role in overshadowing the partially punitive nature of early American fines and forfeitures, *Helvering v. Mitchell*, posited that such penalties were remedial because "[t]hey are provided primarily as a safeguard of the protection of the revenue." 303 U.S. 391, 401 (1938); *see also Little*, 106 F.3d at 1454-55 (quoting same). Among other problems, to reach that conclusion, *Helvering* drew a sharp line between criminal and civil proceedings, and in doing so failed to recognize that the use of civil proceedings to punish was in keeping with early American practices. 303 U.S. at 399-404 & nn. 2-13; Colgan, *supra* at 782-784. In addition, *Helvering* relied on early American cases applying

the rule of lenity, but failed to understand the use of the word "remedial" as a term of art in that context. Colgan, *supra* at 768-80.

Dating back to the English common law and continuing forward in the United States, the rule of lenity held that, in a case of ambiguity as to legislative intent, criminal and penal statutes were to be interpreted in favor of the person who might be punished, whereas other statutes—described as "remedial" for the purposes of the rule—were to be liberally construed. *See* John Comyns, A Digest of the Laws of England, 322-3, R. 19-20 (5th ed., corr. 1822); *Respublica v. Weidle*, 2 U.S. (2 Dall.) 88, 90-91 (1781). As a general matter, due to difficulties detecting and thus prosecuting offenses involving fraud, such statutes were at times categorized as "remedial" for the sole purpose of applying a liberal statutory construction even though they were "penal" in the broader sense of imposing punishment. *E.g.*, 1 Blackstone, *supra*, at *88 (explaining that strict construction should not be required when interpreting statutes involving frauds). This approach was consistent with the understanding that "though penal laws [were] to be construed strictly they [were] not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Put plainly, the rule of lenity did not mandate an

interpretation of any statute—including a revenue statute—that would effectively neuter the law.

From America's earliest days, courts respected the balance between employing the rule of lenity to protect those alleged to have committed tax violations and ensuring that it did not go so far as to wholly undermine Congress's efforts to collect tax revenue. In 1787, the Court of Common Pleas in Philadelphia County took up a case involving the interpretation of the following statutory language: "Every vessel or boat, from which any goods, wares, or merchandize shall be unladed, before due entry thereof at the office of the collector of the port of Philadelphia, &c. shall be forfeited." *Phile v. The Ship Anna*, 1 U.S. (1 Dall.) 197, 205 (1787). The claimants—whose crew allegedly unlade forty-two hampers of porter though the master only declared twenty in the official manifest—argued that the statute should be interpreted to mandate the forfeiture of only the twenty-two hampers not declared, rather than the full forty-two unladed. *Id.* The court explained that "it is requisite that such laws should be strictly worded," but interpreted the statute to allow forfeiture of all of the unladen goods, given the evidence of legislative intent inherent in statutes designed to protect against revenue fraud. *Id.* at 205-06. It explained: "This has been repeatedly called a hard law: but the truth is, that revenue laws are of a harsher nature than any

others, and necessarily so; for, the devices of ingenious men, render it indispensable for the legislature to meet their illicit practices with severer penalties." *Id.* at 205-06. *See also, e.g.*, *Taylor v. United States*, 44 U.S. (3 How.) 197, 209-11 (1845) (declining to interpret a tax-fraud statute in favor of the defendant though describing the statute as "penal" given that it "impos[ed] a penalty or forfeiture").

Where it would not effectively eviscerate enforcement, courts did, in fact, employ the rule of lenity to protect those charged with tax violations. For example, in 1808, the Court took up a case in which customs officers sought the forfeiture of cargo salvaged from a stranded vessel, arguing that the owners failed to comply with a statute requiring that imported cargo carry certain marks and certifications. *Peisch*, 8 U.S. (4 Cranch) at 358-59. In light of the accidental nature of the failure to comply, and "the extreme severity of [the government's proposed interpretation of the] regulation," the Court determined that such a "construction of the law could only be made where the words would admit of no other." *Id.* at 362-64. The Court declined to read the statute as allowing an owner to be "punish[ed]" through *in rem* forfeiture under circumstances in which the crew would have been unable to comply with the statute given the catastrophe at hand. *Id.* at 363-64. *See also, e.g.*, *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462-63

(1833) (employing the rule of lenity to interpret a "highly penal" statute as excluding cases where, due to "accident or mistake" sugars were miscategorized for the purpose of establishing customs duties).[2]

The applicability of the rule of lenity to statutes setting out tax penalties—and thus their punitive nature—is also evident in a late-nineteenth century attorney general opinion responding to a likely attempt by Congress to sidestep the rule of lenity in the customs context. The opinion surmised that, when drafting a customs statute, Congress used the word "duty" rather than "penalty" "in accordance with the extreme high-tariff policy of the framers of this famous act, to prevent a strict construction in favor of the importer." Richard Olney, *"Additional Duties"—Penalties—Remission of Forfeiture*, 20 Op. Att'y Gen. 660, 664 (Sept. 9, 1893). Rejecting that attempt, the opinion explained that a tax penalty "is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names." *Id.* at 661.

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[2] For an example of the application of the rule of lenity to interpret a tax statute outside of the customs context, see *Judson v. State*, Minor 150, 153 (Ala. 1823) (agreeing that a statute "as relates to the laying and fixing the amount of the tax" was not subject to strict construction, "[b]ut, as to penalties for failing to pay the taxes, it must be subject to the rules of construction which apply to all other penal statutes").

Unfortunately, *Helvering*'s misapprehension of early American legal practices, including the rule of lenity, has leeched into modern understandings of the relationship between punishment and the protection of the revenue. For example, relying on *Helvering*, the First Circuit posited that FBAR penalties were non-punitive because Congress understood unreported foreign bank accounts to be "very difficult for law enforcement to police," *Toth*, 33 F.4th at 17-18; *see also Little*, 106 F.3d at 1454 (positing that tax penalties were remedial because "they serve only to deter noncompliance with the tax laws by imposing a financial risk on those who fail to do so"). That determination is grossly out of accord with historical practice. As detailed in Parts I.B–C, the difficulty in enforcing tax laws was a central reason why Congress employed punishment in an attempt to promote compliance. Congress understood both that tax laws served as an essential component of the development and protection of the nation and that they were difficult to enforce given the ease by which fraud could occur. Congress therefore devised an ever-expanding array of tax and related regulations, which carried with them the threat of serious punishment—including civil fines and forfeitures—for those seeking to defraud the revenue. Historically, difficulty of enforcement was positively correlated with punishment, not negatively as *Helvering* assumed.

B. Early American Legal Texts Recognized Pecuniary Punishments Could Be Compensatory.

In addition to its error regarding safeguarding the revenue, the *Helvering* Court also characterized tax penalties as remedial because they could possibly "reimburse the government for" unpaid tax arrears as well as "the heavy expense of investigation." 303 U.S. at 401. Once again, this characterization was made without meaningful engagement with the history and tradition of using tax penalties dating back to the nation's earliest days. Colgan, *supra* at 780-88.

Helvering's notion that pecuniary penalties are rendered non-punitive due to the existence of unpaid taxes obfuscates the distinction between the portion of tax penalties used to satisfy tax arrears on the one hand, and the overage resulting from the imposition of such penalties on the other. Of course, the imposition of taxes in the first instance is unquestionably nonpunitive, and so too the monies used to satisfy that debt. *E.g.*, E.g., John MacPherson Berrien, *Customs—Forfeitures*, 2 Op. Att'y Gen. 358, 359 (July 10, 1830) (distinguishing customs duties from "the penalty or forfeiture" imposed for "an attempted fraud upon the revenue, by means of false or fraudulent invoice"); *see also Carpenter v. Com. of Pennsylvania*, 58 U.S. (17 How.) 456, 463 (1854) (declining to apply the Ex Post Facto Clause to an estate tax law because the tax did not constitute a punishment). But early

American state and federal courts treated the overage from tax penalties as punishment for the underlying tax violation throughout the eighteenth and nineteenth centuries. *See supra* Parts I.B–C (listing cases describing tax fines and forfeitures as punishment). For example, in the mid-nineteenth century the Court took up a case in which property had been seized on the allegation that the property owner made a false return and fraudulently withheld taxes owed. *Dorsheimer*, 74 U.S. at 167. Following the seizure, a company in the process of purchasing the seized property negotiated with the Commissioner of the Internal Revenue, who released the majority of the property upon obtaining a bond from the owner for $220,102. *Id.* at 168. In assessing how the funds were to be distributed, the Court distinguished between the $195,102 needed to cover the deficient taxes, which it deemed nonpunitive, and the remainder of $25,000, which served as punishment. *Id.* at 173-74.

Helvering's other proposition—that pecuniary penalties are rendered nonpunitive because the resulting funds may be distributed to cover expenses related to enforcement—is undermined by the very structures central to the operation and enforcement of the penal laws generally and early American customs systems specifically. Recall that *qui tam* prosecutors enforcing the penal laws were compensated through a moiety of fines

imposed. *See supra* Part I.D. The fact that the monies generated by those fines were used in part to compensate those who served to enforce the penal laws did not render those fines nonpunitive. That system mirrored the structure for enforcing customs laws by informers who worked in exchange for a moiety of tax penalties. *Id.* Like other types of fines, the fact that a portion of the monies generated from tax penalties was employed to compensate informers, did not render such forfeitures non-punitive. Instead, as detailed in Part I, such penalties were treated and described as punishment.[3]

Put simply, *Helvering* and its progeny do not work in the excessive fines context because they are not employing the two-part structure differentiating between the threshold question of whether something is at least partially punitive, and thus a fine, with the separate question of whether the fine is excessive. *Ursery*, 518 U.S. at 287 (distinguish double jeopardy and excessive fines analyses "[b]ecause the second stage of inquiry under the

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[3] Indeed, even setting aside the historical record, if the mere ability of the government to use the proceeds of fines and forfeitures to fund its enforcement efforts rendered those penalties nonpunitive, then no pecuniary penalty could ever constitute a fine: "By definition, all civil penalties and criminal fines serve a revenue-raising function." *Pimentel v. City of Los Angeles*, 115 F.4th 1062, 1070 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 2735, (2025).

Excessive Fines Clause asks whether the particular sanction in question is so large as to be 'excessive,'" and so "a preliminary-stage inquiry that focused on the disproportionality of a particular sanction would be duplicative of the excessiveness analysis that would follow"). Therefore, even if the double jeopardy cases did not suffer from being historically unsound, importing them to the excessive fines context results in improper conflation of the question of whether a penalty is punitive with whether it is excessive. For example, when *Toth* posited that an FBAR penalty could not be punitive because there was a resulting "fraud and loss" to "the public fisc," 33 F.4th at 17-18, it put the proverbial cart before the horse. The defendant's culpability for any loss created as a result of their actions speaks only to whether the penalty was disproportionate, and thus excessive, and not to whether a punishment was imposed in the first instance. *See Bajakajian*, 524 U.S. at 339 (considering the minimal nature of the harm caused by the defendant's Bank Security Act violation in assessing the proportionality of the punishment imposed). Conflation improperly restricts access to the proportionality review afforded by the Excessive Fines Clause for any pecuniary penalty that is at least partially punitive.

CONCLUSION

The district court's determination that FBAR penalties constitute fines is consistent with the history and tradition by which civilly imposed tax fines and forfeitures were employed as punishment to incentivize compliance with tax laws. This Court should likewise hold that FBAR penalties are fines, making them eligible for review under the Excessive Fines Clause.

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Respectfully Submitted,

/s/ Thomas Q. Swanson
Thomas Q. Swanson
HILGERS PLLC
1320 Lincoln Mall, Suite 200
Lincoln, NE 68508
(402) 395-4469
TSWANSON@HILGERSLAW.COM

Counsel for Amicus Curiae Prof. Beth A. Colgan

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/s/ Thomas Q. Swanson
Thomas Q. Swanson
HILGERS PLLC

Attorney for Amicus Prof. Beth A. Colgan

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate Electronic Filing system.

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/s/ Thomas Q. Swanson
Thomas Q. Swanson
HILGERS PLLC

Attorney for Amicus Prof. Beth A. Colgan