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)

REPLY BRIEF OF APPELLANT TUNCAY SAYDAM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

<u>CASES</u>

<u>STATUTES, REGULATIONS AND CODES</u>

<u>OTHER AUTHORITIES</u>

INTRODUCTION

This appeal involves the government's campaign to fine Tuncay Saydam $437,564.00 for not filing his "FBAR" forms. Most conspicuous about the government's response brief is what goes unmentioned: the clear-error standard for district-court fact-finding. Among the findings here: "Saydam was not engaged in other illegal conduct" and "Saydam ' . . . is only subject to the fifty percent penalty because he recklessly disregarded'" the FBAR requirement. Those findings matter greatly to a proper excessive-fines analysis. The one time it applied the Excessive Fines Clause, after all, the Supreme Court invalidated a $357,000 fine for a criminally *knowing* violation of a Bank Secrecy Act reporting requirement. Yet below, the district court upheld a $437,000 fine for civilly *reckless* violations of a neighboring reporting requirement.

In this, the court erred, not in its understanding of the facts, but on the legal standard that applies to them. *United States* v. *Bajakajian*, 524 U.S. 321, 337 n.10 (1998) (explaining that excessiveness standard's application "to the facts of a particular case" is reviewed de novo). As this Court has long recognized, "[i]t is critical" in excessive-fines cases to "review the specific actions of the violator," not "tak[e] an abstract view of the violation." *Thomas* v. *County of Humboldt*, 124 F.4th 1179, 1193 (9th Cir. 2024) (citation omitted). Across almost every metric, the district court broke with that teaching. So, too, does the government's defense of that court's judgment: equal parts wishing away the court's factual findings, demanding unfounded deference to the Executive, and tarring Tuncay Saydam's character. Worse, many of the government's arguments are all but copy-pasted from ones presented—and rejected—in *Bajakajian*.

The Excessive Fines Clause exists for cases like this. A uniquely harsh penalty statute. Designed to catch transnational criminals. Deployed against an 88-year-old retired professor, who failed to report a nest egg earned overseas decades ago. The end result: a $437,000 penalty that, in its design, "bears no articulable correlation to any injury suffered by the government." *Bajakajian*, 524 U.S. at 340. The judgment below should be reversed.

ARGUMENT

I. In upholding Tuncay Saydam's $437,564.00 in FBAR penalties, the district court misapplied the standard for determining whether a fine is unconstitutionally excessive.

A. Fining Tuncay Saydam $437,564.00 was grossly disproportional to the gravity of his reporting violations.

As our opening brief details (at 25-26), the excessiveness analysis compares the defendant's wrongdoing to the fine's severity. Here, the gravity of Saydam's misconduct was relatively low, the penalties staggeringly high.

1. The gravity of Saydam's wrongdoing was relatively minor.

On the first consideration—the gravity of Saydam's misconduct—this Court has derived several data points from *Bajakajian*. Combined, they place Saydam on the least culpable end of the spectrum. Only by disregarding precedent and the district court's findings can the government argue otherwise.[1]

a. The district court's unchallenged findings confirm that Saydam's FBAR violations were unrelated to any criminal activity.

This Court's first "*Bajakajian* factor" is whether Saydam's violations related to other illegal activities. As the district court found, they did not: "Saydam was not engaged in other illegal conduct, such as money laundering or illegal trade." 1-ER-20–21; *see also* 1-ER-16. As in *Bajakajian*, that finding—that Saydam's "willful failure to report the currency was unrelated to any

[1] Last month, the Supreme Court granted certiorari in an excessive-fines case presenting the question whether courts may consider the gravity of the underlying offense purely in the abstract or should consider the gravity of the specific defendant's wrongdoing. Pet. at i, *Jouppi* v. *Alaska* (No. 25-246). This Court's precedent aligns with the majority view on that question in "hold[ing] that '[i]t is critical . . . that the court review the specific actions of the violator rather than by taking an abstract view of the violation.'" Pet. at 20, *Jouppi*, *supra* (quoting *Thomas* v. *County of Humboldt*, 124 F.4th 1179, 1193 (9th Cir. 2024)). (Saydam's counsel represent the petitioner in *Jouppi* also.)

other crime"—is "highly relevant to the determination of the gravity of [his] offense." 524 U.S. at 338 n.12; Appellant's Br. 27-28.

For its part, the government says it would be "obviously incorrect" to read the decision below as "finding 'that Saydam's FBAR violations were unrelated to other illegal activities.'" Gov't Br. 37 (quoting Appellant's Br. 30). Yet that is almost verbatim what the district court said: "It is true that Saydam was not engaged in other illegal conduct, such as money laundering or illegal trade." 1-ER-20–21. That finding is reviewed for clear error (*Bajakajian*, 524 U.S. at 336-37 n.10), a standard the government fails even to mention, much less satisfy.

If loath to say the clear-error standard aloud, the government invites the Court to override the district court's findings because of Saydam's tax deficiencies and what the government calls his "false statements" in IRS interviews. Gov't Br. 37-38. Tabling for now the government's factual misstatements, *Bajakajian* rebuffed this same maneuver. There—as here—the government sought to magnify the reporting violation by recounting that Bajakajian had "lied" to the government months afterward. U.S. Br. at 31-32, *United States* v. *Bajakajian*, 524 U.S. 321 (1998) (No. 96-1487). But the Court rejected that gambit. Bajakajian's "single willful failure to declare [his] currency" was the offense, and its gravity was "not exacerbated or mitigated by 'fable[s]'" he told investigators. 524 U.S. at 337-38 n.12. This Court has held similarly. *E.g.*, *United States* v. *$100,348.00*, 354 F.3d 1110, 1114, 1121 n.8 (9th Cir. 2004). Simply, the government offers no basis for second-guessing that "Saydam was not engaged in other illegal conduct" and "did not engage in other criminal activity related to his foreign accounts." 1-ER-16; 1-ER-20–21.

The government posits (Br. 38) that the absence of related illegal conduct should not matter anyway. "[I]n the civil context," it reasons, "this *Bajakajian* factor is 'not as helpful to [the] inquiry as it might be in criminal contexts.'" Gov't Br. 38 (quoting *Pimentel* v. *City of Los Angeles*, 974 F.3d 917, 923 (9th Cir. 2020) (*Pimentel I*)). That may be true for "overstaying a parking meter." 974 F.3d at 923. But the Bank Secrecy Act is different: It is "principally designed" to identify criminals. *Bajakajian*, 524 U.S. at 338.

b. The district court's unchallenged findings confirm that the nature and extent of Saydam's violations were minor.

The nature and extent of the violations (another *Bajakajian* factor) reinforce that Saydam's culpability was relatively minor. As our opening brief explains (at 28), civil willfulness spans a range of culpability—from knowing and deliberate to unknowing but reckless. Gov't Br. 57-58 (agreeing). Per the district court, Saydam fell on the least culpable end of that spectrum. "Saydam 'is not an *innocent* victim,'" the court stated; "'he is only subject to the fifty percent penalty because he *recklessly*'" violated the FBAR requirement. 1-ER-21 (emphasis added) (quoting *United States* v. *Schwarzbaum*, 127 F.4th 259, 282 (11th Cir. 2025)). That greatly "matters to culpability," for "an 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." *Borden* v. *United States*, 593 U.S. 420, 440 n.8 (2021).

The government's contrary arguments lack merit:

i. Foremost, the government stresses (Br. 34-35) that the *jury* made no finding about where Saydam fell along the willfulness spectrum. True. *Compare* Gov't Br. 34 (objecting to "Saydam's baseless assumption that the jury's finding of willfulness was based exclusively on recklessness"), *with* Appellant's Br. *passim* (offering no such assumption). But the *judge* made such a finding. Again: "Saydam ' . . . is only subject to the fifty percent penalty *because he recklessly disregarded*'" the FBAR requirement. 1-ER-21 (emphasis added); *accord Goldberg* v. *Barreca*, 720 F. App'x 877, 878 (9th Cir. 2018) (applying ordinary standards of review to "intermixed rather than separately stated" findings and conclusions). And there is no basis for harboring "a 'definite and firm conviction'" that Saydam's violations were anything more than reckless. *United States* v. *$132,245.00*, 764 F.3d 1055, 1059 (9th Cir. 2014). If, as the government urged below, "[t]his is a case about recklessness" (4-ER-607), the district court can hardly have erred in finding Saydam's violations reckless.[2]

ii. Like the district court, the government contends (Br. 26) that "even recklessness represents a significant degree of culpability," so Saydam's $437,000 penalties are constitutional regardless. That view contravenes *Bajakajian*. As our opening brief addresses (and the government ignores), Bajakajian committed a criminally *knowing* Bank Secrecy Act reporting violation. Appellant's Br. 30-31. He nonetheless had "a minimal level of culpability," the Court held, given the circumstances of his misconduct, the absence of related crimes, and how he compared to "other potential violators." 524 U.S. at 339 & n.14.

The decisions the government cites are not to the contrary. It is true, for instance, that *Pimentel I* observes that "[r]eckless behavior show[s] more

[2] The court elsewhere stated that "Saydam was found to have at least recklessly violated the FBAR statute" at trial. 1-ER-20; Gov't Br. 19 (italicizing "at least"). But far from contradicting the finding detailed above, that sentence simply recounts the jury's general verdict, reflecting its determination that Saydam's violations were not less than reckless. Gov't Br. 35.

than a minimal level of culpability." Gov't Br. 26 (quoting 974 F.3d at 923). And for strict-liability parking infractions, recklessness may well support a $63 ticket. 974 F.3d at 922. But that says nothing about how someone facing $437,000 in FBAR penalties compares "to other potential violators of the reporting provision." *Bajakajian*, 524 U.S. at 339 n.14. Nor does *$100,348.00* (which *Pimentel I* cited) change the analysis. There, the Court concluded that the claimant bore "more than a minimal level of culpability," not because his *reporting violation* was reckless, but because he had recklessly disregarded the money's potentially *illegal source*. 354 F.3d at 1122-23. And still the Court held that his "offense was in the low range of the gravity spectrum" and affirmed the district court's reduction of the forfeiture—from $100,348 to $10,000. *Id.* at 1123-24.

iii. Likewise without merit is the government's attempt to tar Saydam more broadly. Methodologically, this exercise breaks with how this Court and the Supreme Court analyze excessiveness. Culpability is not judged "generally." *United States* v. *1,679 Firearms*, 659 F. App'x 422, 429 (9th Cir. 2016). Rather, the "inquiry" is "limited" to "culpability with respect to the conduct that gave rise to the forfeiture at issue." *Id.*; *Bajakajian*, 524 U.S. at 338

("Whatever his other vices, ..."). For completeness, however, the government's main factual misstatements are addressed below.

That Saydam "concealed" his Swiss earnings in Switzerland. The government asserts (Br. 25) that Saydam "offer[ed] no explanation for his decision to hide his life savings in Switzerland" after "ceas[ing] to have any business there." In truth, his explanation is clear: not hiding, but inertia. 4-ER-424–425 ("I earned my money there. I wasn't just keeping there. . . . I would eventually move it, of course.").

That Saydam's bank paperwork reflects attempts "to limit his United States reporting requirements." The government suggests (Br. 7, 36) that Saydam's Zürcher Kantonalbank forms reflect efforts to shirk his U.S. reporting obligations. The record confirms the opposite. As our opening brief discusses (at 31-32), the paperwork sometimes identified him as a Turkish citizen, sometimes as an American one. (He's both.) But there was no effort to keep the government in the dark. Saydam submitted forms to the bank identifying himself as a U.S. citizen—on documentation sporting a bolded notice that his identity would be "**disclose[d] . . . to the IRS**." 5-ER-649.

That Saydam was "incensed" at the closure of his Zürcher Kantonalbank account. The government suggests (Br. 33) that Saydam was "incensed" when Zürcher Kantonalbank terminated his account. Why that reaction would bear on as-yet-uncommitted FBAR violations goes unexplained. Regardless, Saydam testified that he was "[n]ot angry":

> I was upset. I hardly get angry at all. I'm a good, people-loving person. Why would I get angry?

4-ER-425. And he further explained why he was upset: He "wasn't hiding anything" and simply did not understand why the bank needed to close his accounts. 3-ER-279.

That Saydam is a "tax evader" who filed "fraudulent" returns. The government intersperses its brief with accusations that Saydam's tax returns and FBARs were "fraudulent" (Br. 19), that his foreign accounts were "a convenient means of evading U.S. taxes" (Br. 33 (quoting 1970s legislative history)), and that he "defrauded" the government (Br. 47 (quoting another FBAR defendant's appellate decision)). But scour the record. Nothing suggests that Saydam meant to evade taxes or defraud. The government never charged him criminally. The Tax Court imposed no civil fraud penalties. 2-ER-25. For several years, Saydam may even have paid more than he would have owed had he known to report his foreign accounts. Appellant's Br. 32.

The government suggests (Br. 36) that Saydam's denying being a "tax evader" is a "quibble." But whether someone underpaid their taxes deliberately is *the* legal distinction between someone who is a tax evader and someone who isn't. *Cheek* v. *United States*, 498 U.S. 192, 200 (1991). And as *Bajakajian* explains, Bank Secrecy Act violations in service of deliberate tax evasion are far worse than those that are not. 524 U.S. at 338-39 & n.14. Saydam's were not, and the government offers nothing to the contrary.

That Saydam lied to the IRS. The government's claims that Saydam lied to the IRS are likewise unfounded:

- The investigating agent testified that Saydam "said that his financial advisor in Turkey had told him to close the Swiss account and transfer the funds to Turkey, but he didn't know why." 4-ER-511. A "lie," says the government. Gov't Br. 13-14. But Saydam's financial adviser *did* advise him to transfer his funds to Turkey. 4-ER-423. As for closing his Zürcher Kantonalbank account, the record demonstrates nothing so clearly as Saydam's endless confusion about why it was terminated. *See* pp. 9-10, *supra*.
- The government notes (Br. 12-13, 35) that Saydam did not tell the investigator about all his Turkish and Swiss financial history during their first audit meeting. But as the investigator testified, the first meeting concerned 2015 alone. 4-ER-516. Saydam volun-

teered then that he had maintained an account in Turkey. 4-ER-519. And later, at his first FBAR-specific interview, he told her about all of his Turkish banks and that he had once used a bank in Switzerland. 4-ER-501–503. Meanwhile, the IRS itself was less than clear in communicating the scope of its inquiry. SER-193 (the "calendar years included in the FBAR examination is [year] through [year]" (brackets in original)).

- The government faults Saydam (Br. 14) for not promptly providing account documents. But again, the record is clear: Saydam "provided some limited records" at his first FBAR interview, but, as his daughter later testified, he struggled mightily to compile more materials. 4-ER-502; 4-ER-529–531.

None of this is to say that Saydam couldn't have handled his finances better. But the record betrays nothing more sinister than that. Read the Excerpts of Record front to back. All they show is what has never been disputed: that Tuncay Saydam was an elderly retiree with a regrettably poor grasp on his finances—easily on the "lower end of the culpability scale." AARO Amicus Br. 20.

c. *The penalties for worse, criminal FBAR violations reinforce that Saydam's violation was minor.*

The penalties for criminal FBAR violations drive home the point. Appellant's Br. 33-36. For a worse offender—an alternate-universe Saydam with criminal scienter—the Guidelines offense level would be as low as Hosep Bajakajian's: level 6. The government nowhere denies that if our Guidelines estimate is sound, this factor cuts decisively in Saydam's favor. And the arguments the government does make cast no doubt on the correctness of that estimate.[3]

i. The government asserts that, below, Saydam "insisted" that the hypothetical Guidelines sentence be calculated using the criminal tax-evasion provisions, not the criminal FBAR provisions. Gov't Br. 18, 40-41. That characterization is inaccurate and incomplete. Saydam did, as the government notes, draw the court's attention to Section 2T1.1, governing tax-evasion sentences. SER-63. On the same page, however, he *also* drew the court's attention to Section 2S1.3—governing criminal FBAR violations and addressed in our opening brief. SER-63 (arguing that Saydam's offense level would be "six" under "§2S1.3(b)(3)"). That more than preserved the issue. Indeed, the district

[3] The district court's analysis of Saydam's theoretical Guidelines range is a legal issue of the sort this Court ordinarily reviews de novo. *United States* v. *Scheu*, 83 F.4th 1124, 1126 (9th Cir. 2023).

court seemingly believed it was applying both provisions together. 1-ER-17 (citing both without distinguishing). On appeal, the government nowhere disputes that Section 2S1.3 is the proper analogue. *United States* v. *Bajakajian*, 87 F.3d 1323, at *1 (9th Cir. 1996) (table) (affirming that Bajakajian's Bank Secrecy Act violation was level 6 "pursuant to U.S.S.G. § 2S1.3(b)"); U.S.S.G. § 2S1.3 cmt. background (explaining that Section 2S1.3 applies to criminal FBAR violations). Nor does the government suggest that this Court lacks authority to undertake the correct analysis under that provision. The Court should do just that.

ii. On how Section 2S1.3 would apply, the government's arguments are equally unsound. As our opening brief details (at 34-36), a hypothetically criminal Saydam would readily qualify for Section 2S1.3's "safe harbor," which "essentially permits the district court to disregard the value of the funds involved in the offense and return the offense level to 6 when specified circumstances exist." *United States* v. *Keleta*, 552 F.3d 861, 865 (D.C. Cir. 2009). For its part, the government insists that the safe harbor would not apply, while discounting the whole analysis as a "fool's errand" in civil cases. Gov't Br. 44-45. *But see 1,679 Firearms*, 659 F. App'x at 427 (performing analysis in a civil case); *$100,348.00*, 354 F.3d at 1122-23 (same, and analyzing safe harbor).

The government's arguments against the safe harbor are meritless. The government questions whether Saydam's moneys were "derived [from] lawful activity" or "to be used for lawful purposes," two of the safe harbor's prerequisites. Gov't Br. 42-43. But the government concedes that the money came from "university salary and consulting fees." Gov't Br. 46 (citing 4-ER-393–395); *see also* 3-ER-241. And Saydam intended the money as his nest egg, a lawful purpose. 4-ER-395.

The government also posits (Br. 44) that in the "hypothetical universe" where Saydam was criminally convicted for FBAR violations, he would "necessarily" also have violated a different statute criminalizing filing false Schedule Bs on tax returns. Because that parallel-universe Saydam would have committed his FBAR offense "while violating another law of the United States," the government continues, he would be ineligible for the safe harbor and, worse, would face a two-level enhancement. Gov't Br. 43-44 (quoting U.S.S.G. § 2S1.3(b)(2)).

That reasoning is extraordinarily far afield. For example:

- There is no basis for assuming that everyone with the criminal scienter to not file FBAR forms "necessarily" also had the scienter to file false Schedule Bs. *United States* v. *Marchini*, 797 F.2d 759, 766 (9th Cir. 1986) (explaining that filing false tax returns is its own specific-intent crime). In fact, the case law the government quotes recounts, not the views of a court, but of the litigants before it. *United States* v. *Simon*, 727 F.3d 682, 698 (7th Cir. 2013).

- The Guidelines language the government invokes to exclude parallel-universe Saydam from the safe harbor ("while violating another law of the United States") went into effect only in November 2024—years after parallel-universe Saydam committed his 2013–2017 violations. U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines* at 27-28 (Apr. 30, 2024). Under the Guidelines and the Constitution, it thus would not apply. *Peugh* v. *United States*, 569 U.S. 530, 533 (2013).

- Even in the government's worst-case scenario, a Saydam with the criminal intent for both FBAR violations *and* tax-return violations still would not have committed the one "while" committing the other. U.S.S.G. § 2S1.3(b)(2). The violations would have been separated by a span of months: April 15 for the Schedule B and June 30 or October 15 for the FBAR.[4]

Of course, all this distracts from a more basic point. The record confirms that a worse, hypothetically *criminal* Tuncay Saydam would readily qualify for offense-level 6 under Section 2S1.3. Hosep Bajakajian himself qualified. And all the government submits in response are arguments that either defy the record or misapply the Guidelines to imaginary misdeeds. That is hardly the "rough approximation of the applicable Guideline sentencing level" this Court's precedents call for. *United States* v. *3814 NW Thurman St.*, 164 F.3d 1191, 1197 n.3 (9th Cir. 1999). It also loses sight of the mission: to home in on the "specific culpability of the offender"—not to distort his culpability beyond all recognition. *$132,245.00*, 764 F.3d at 1060 (citation omitted).

d. The harm caused by Saydam's FBAR violations does not support the penalty imposed.

The government acknowledges that FBAR penalties must be "tethered to the nature and extent of the harm suffered by the government." Gov't Br. 27 (quoting *Pimentel* v. *City of Los Angeles*, 115 F.4th 1062, 1067 (9th Cir.

[4] In 2017, the FBAR deadline was moved from June to April. But FinCEN "grant[s] filers failing to meet the FBAR annual due date of April 15 an automatic extension to October 15 each year." FinCEN, *New Due Date for FBARs* (Dec. 16, 2016), https://tinyurl.com/4xcpn5w8.

2024) (*Pimentel II*)). Yet it says little about the mismatch between harm and penalty here. It nowhere contests the district court's finding that the tax deficiencies attributable to Saydam's accounts during the relevant period were $29,000. Or that the FBAR penalties dwarf that figure more than fifteen times over. Or that the Tax Court separately imposed judgment for that deficiency, plus $12,000 in penalties Congress set for tax deficiencies from "undisclosed foreign financial asset[s]." Or that the FBAR penalties were calculated without regard to tax loss or any other loss. Appellant's Br. 42-44. In its design, the penalties were "arbitrarily both imposed and increased without regard for the harm" caused. *Pimentel II*, 115 F.4th at 1071 n.5.

What arguments the government *does* make break with precedent. It observes, for instance, that Congress generally considered Bank Secrecy Act violations "very serious." Gov't Br. 45 (citation omitted). But much the same was said about the Bank Secrecy Act violation in *Bajakajian*. U.S. Br. at 32, *Bajakajian*, *supra* ("Congress viewed willful violations of the reporting requirement as a serious offense[.]"). In evaluating Hosep Bajakajian's wrongdoing, however, the Supreme Court "did not impute to [him] the offenses of others," but instead "considered what specific harms his specific acts had caused." *State* v. *Timbs*, 169 N.E.3d 361, 373 (Ind. 2021); *Bajakajian*, 524 U.S.

at 339. Only thus can courts fulfill the Excessive Fines Clause's basic promise: ensuring that no fine "greatly outweighs [a defendant's] particular contribution" to "multi-faceted problems." *One 1995 Toyota Pick-Up Truck* v. *District of Columbia*, 718 A.2d 558, 566 (D.C. 1998); Appellant's Br. 45-46.[5]

The government also posits (Br. 48) that "unknown" theoretical tax deficiencies from unknown decades past should count toward the harm of Saydam's 2013–2017 FBAR violations. But courts "'cannot let the imagination run wild' in terms of speculated harm." *United States ex rel. Grant* v. *Zorn*, 107 F.4th 782, 799 (8th Cir. 2024). That is doubly true here. Deliberately, Congress set limitations periods for tax deficiencies as "an almost indispensable element of fairness" and "practical administration of an income tax policy." *Rothensies* v. *Elec. Storage Battery Co.*, 329 U.S. 296, 301 (1946). The government's argument turns that congressional judgment on its head, invoking the

[5] *Vasudeva* v. *United States*, 214 F.3d 1155 (9th Cir. 2000), which the government cites (Br. 46), is not to the contrary. The Court there remarked that the offense at issue "undermines the viability of an important government program." 214 F.3d at 1161. But the court did not suggest that this alone would justify an enormous fine regardless of culpability. Moreover, the penalties at issue appear to have been understood to correspond to each defendant's misconduct ($19,920 for one, $17,160 for another, $5,280 for the third) and were imposed as an alternative to disqualification from the food-stamp program.

shadow of taxes unknown from years unknown to justify a penalty having nothing to do with taxes.

Lastly, the government invokes (Br. 48) unspecified costs of "Saydam's civil FBAR examination." Yet the district court made no finding to support the view that the government's examination was so unique as to salvage Saydam's otherwise-excessive penalty. In any event, the government could have made the same argument (and did) in *Bajakajian*. U.S. Br. at 18 n.3, *Bajakajian*, *supra*. There, it spent months investigating Bajakajian and years prosecuting him. But the Supreme Court nonetheless described "[t]he harm that [he] caused" as "minimal," concluding that his violation "caused no loss to the public fisc." 524 U.S. at 339; *id.* at 343 n.19 ("[E]ven a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation."); *cf. Diamond Sands Apartments, LLC* v. *Clark County*, 164 F.4th 759, 764 (9th Cir. 2026) (remarking that "where the harms from a violation would be felt by the government itself rather than its citizens," it "makes more sense to require documentary evidence of harm to the government itself").

Other FBAR cases highlight the government's lack of a limiting principle on this front. For example, the government is elsewhere seeking $40,000 for *non*-willful FBAR violations (plus $68,000 for duplicative reporting issues). There, as here, the government cites as its "harm" the generic "cost of investigating and remedying the account-holder's failure." U.S. Opp. Mot. for Summ. J. at 19, *United States* v. *Chen-Baker*, No. 22-cv-256 (W.D.N.Y. Dec. 19, 2025) (Doc. 48). But the actual tax deficiencies? Twenty-five dollars. Ex. HH to Def.'s Opp. Mot. for Summ. J. at 4, *Chen-Baker*, *supra* (Doc. 46-1). Bluntly, the government cannot convert an excessive fine into an acceptable one by choosing to sink exorbitant resources into sledgehammering a fly. Checking that perverse impulse is one reason the Excessive Fines Clause exists in the first place. Appellant's Br. 22-23.

2. The $437,564.00 penalty is unusually severe.

Opposite Tuncay Saydam's culpability on the excessiveness scale is the penalty's harshness. On this, the government nowhere denies that Saydam's penalties dwarf the tax loss from his foreign accounts from 2013 to 2017. It nowhere denies that they dwarf the Guidelines range for a level-6 criminal defendant. Rather, the government makes just two points: This Court disallows considering hardship to the defendant, and Saydam offered no evidence of hardship. Gov't Br. 48.

To be clear, Saydam's penalties are excessive regardless of the hardship to him. Appellant's Br. 50-51. But the government is also wrong. The language of this Court's decisions is best read as leaving the financial-hardship question open. Appellant's Br. 48-49. And factually, the record confirms that $437,000 in penalties would consume almost all Saydam's life savings. 4-ER-395; 4-ER-424; 4-ER-483. Either way, though, the result here is the same: Saydam's $437,000 in penalties is "grossly disproportional to the gravity of his offense." *Bajakajian*, 524 U.S. at 339-40.

B. The government's remaining arguments lack merit.

The government's residual arguments do not alter the above analysis.

1. The government invites this Court to replicate the worst of the Eleventh Circuit's missteps in Schwarzbaum.

Throughout, the government holds out the Eleventh Circuit's *Schwarzbaum* opinion as worth emulating. Yet as detailed in the recently granted certiorari petition in *Jouppi* v. *Alaska*, the Eleventh Circuit's excessiveness standard breaks both with the Supreme Court's standard and with this Court's in particular. Pet. at i, 20-21, 24-27, *Jouppi*, *supra.* For example, the Eleventh Circuit asserted that Isac Schwarzbaum fell "squarely in the [FBAR statute's] crosshairs" simply because the statute applied to him—a fact equally true in *Bajakajian* and in any Excessive Fines Clause case. 127 F.4th at 282 (citation omitted); Appellant's Br. 30-31. The Eleventh Circuit nowhere accounted for the fact that Schwarzbaum was merely reckless, not knowing (127 F.4th at 264), with no "intention of evading United States tax reporting requirements" (*id.* at 266) and with funds not "believed to be from illegal sources or used for a criminal purpose." Ex. 1 to U.S. Mot. Judgment at 4, *United States* v. *Schwarzbaum*, No. 18-cv-81147 (S.D. Fla. Sept. 15, 2022) (Doc. 152-1).

The rest of *Schwarzbaum*'s analysis was similarly flawed. The court compared Schwarzbaum's penalty to the statutory maximum criminal FBAR sentence. 127 F.4th at 282-83; Gov't Br. 39. This Court and the Supreme Court, meanwhile, focus instead on individualized Guidelines. Appellant's Br. 37-38. More of the same in *Schwarzbaum*'s discussion of harm. Rather than evaluating the harm Schwarzbaum caused, the court resorted to legislative-history commentary from 1970—the same invoked in *Bajakajian*'s dissent. 127 F.4th at 283; 524 U.S. at 351 (Kennedy, J., dissenting). In short, *Schwarzbaum* did precisely what this Court consistently warns against: "examin[e] the gravity of the [offense] in the abstract." *$100,348.00*, 354 F.3d at 1123 (citation omitted); *cf.* Appellant's Br. 44-45 (noting dearth of briefing in *Schwarzbaum*).

The Eleventh Circuit's analysis stemmed, too, from a more basic misconception: Repeatedly, it sounds in rational-basis review. *E.g.*, 127 F.4th at

280 (describing the statute's penalty structure as "not irrational"). Within the Eleventh Circuit and beyond, however, judges have forcefully criticized that court's "hyper-deferential posture toward Congress's judgments about excessiveness." *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318 (11th Cir. 2021) (Newsom, J., joined by Jordan, J., concurring); *Zorn*, 107 F.4th at 800 n.5. As for this Court, the government's project to import the Eleventh Circuit's errors is not just ill-considered, but foreclosed by precedent. Appellant's Br. 51; *Pimentel II*, 115 F.4th at 1072 n.7 (rejecting "rational basis review"). And the government's appeal to deference is particularly inapt here. Gov't Br. 26-27, 31-32. As our opening brief explains (at 51-54), *Congress* didn't mandate a $437,000 penalty for Tuncay Saydam. The *Executive Branch* set that figure. Gov't Br. 4. Whatever deference may apply to penalties mandated by statute (*but see* Appellant's Br. 51), none attaches here.

2. *The government's bid to abandon* **Bajakajian***'s standard in favor of a mathematical comparison of fines to funds breaks with precedent.*

The government urges dispensing with any evaluation of Saydam's culpability and simply comparing the penalties to the maximum potential penalties set by statute or the amount of money the government believes was in Saydam's accounts. Gov't Br. 26, 29. Or perhaps both? Either way, its bid to abandon "a more specific analysis of the *Bajakajian* factors" is misplaced. Gov't Br. 32.

a. To start, the government cites no decision from this Court supporting its *Bajakajian*-free analysis. And both of its formulas contravene precedent. Comparing the penalty imposed to the theoretical maximum may be "instructive" but is "not dispositive." *United States* v. *Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003) (*Mackby II*). That a statute allows even harsher penalties might shed light on the punishment appropriate for worst-case offenders. But it says nothing about the gravity of a particular defendant's wrongdoing. Appellant's Br. 53-54. That caution has particular force here, moreover, where the statutory maximums are so "extraordinarily harsh" as to be unprecedented. Nat'l Taxpayer Advocate, *2021 Purple Book* at 74 (Dec. 31, 2020), https://tinyurl.com/uhep6c9k. The circuit precedents the government cites (Br. 29-31) reinforce the point: None upholds a fine simply by comparing the penalty imposed to the theoretical maximum.[6]

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[6] *Balice* v. *Dep't of Agric.*, 203 F.3d 684, 699 (9th Cir. 2000) (evaluating whether defendant was among "the 'least culpable'" of violators and upholding $224,500 penalty based largely on his "illegal profit of roughly $246,677"); *United States* v. *Mackby*, 339 F.3d 1013, 1015-17 (9th Cir. 2003) (upholding $729,454 in fines, where defendant submitted 8,499 false claims for $331,078 in Medicare payments); *United States* v. *Bussell*, 699 F. App'x 695, 696 (9th Cir.

Likewise without merit is the government's comparing Saydam's penalties to the amount it believed was in his accounts. For one thing, the government is compelled to quintuple-count Saydam's dollars to say that its penalties are "only 15% of the maximum aggregate account balances." Gov't Br. 31. (Each year of non-reporting involved primarily, not new dollars, but the same ones as years past.) More fundamentally, the government's premise—that "the harm from secret foreign accounts scales with the amounts concealed" (Gov't Br. 31)—is yet another argument *Bajakajian* rejected. There, as here, the government justified its fine by rotely comparing the penalty to the total unreported funds. The fine was "precisely tailored to the magnitude of the violation," the government contended, since "the greater the amount of cash" unreported, "the greater the potential harm posed." U.S. Br. at 11, *Bajakajian*, *supra*. Again, the Supreme Court rejected that view, "disagree[ing]" with the government's claimed "correlation" between the amount of unreported funds and harm to the government. 524 U.S. at 339. Here, too, our opening brief flagged this issue (at 40-42). Here, too, the government gives no

2017) (one sentence of reasoning affirming $1.2 million FBAR penalty and citing defendant's culpability for "defraud[ing] the government").

response—beyond volunteering that here, too, the *Schwarzbaum* court was led astray. Gov't Br. 28, 31.

b. At times, the government seemingly advocates that the mathematical exercises it proposes be executed on a year-by-year basis. Gov't Br. 29-30. *But see* Gov't Br. 30-31 (simultaneously comparing the aggregated penalties to what it believes were the aggregated unreported funds). For the reasons detailed above, this methodology is unsound. And year-by-year parsing is especially suspect. This Court generally reviews aggregated fines in the aggregate. *E.g.*, *Mackby II*, 339 F.3d at 1015-17; *Balice* v. *Dep't of Agric.*, 203 F.3d 684, 688-89, 698-99 (9th Cir. 2000). That approach is particularly suitable here, where the government calculated one $437,564 penalty for Saydam's violations, then formulaically "allocat[ed] the total penalty amount" across "all years for which the FBAR violations were willful." Internal Revenue Manual 4.26.16.6.5.3(2) (Nov. 6, 2015); U.S. Mem. Supp. Mot. for Summ. J. at 28, *United States* v. *Rund*, No. 23-cv-549 (E.D. Va. Dec. 1, 2023) (Doc. 33) (describing these allocations as "clerical" and making "no practical difference" to the "total penalty").

In any event, whether viewed on a per-year basis or an all-years basis, the upshot is unchanged: Tuncay Saydam failed to file FBARs for five years, and for those violations, the government fined him $437,000. That punishment "bears no articulable correlation to any injury suffered by the Government," *Bajakajian*, 524 U.S. at 340, and the district court held otherwise only by misapplying the governing standard. Its judgment should be reversed.

II. The government's alternative theory—that the Excessive Fines Clause does not apply to FBAR penalties at all—should be addressed head-on and rejected.

A. The government fails to rebut that FBAR penalties are at least partly punitive.

On the threshold question whether civil FBAR penalties are "fines," the logic is straightforward. The Excessive Fines Clause governs monetary penalties that serve at least in part "to deter and to punish." *Austin* v. *United States*, 509 U.S. 602, 622 (1993). And FBAR penalties deter and punish. Appellant's Br. 54-57. The government's contrary arguments are meritless.

1. The government suggests (Br. 51-52) that whether a penalty is an Eighth Amendment fine depends on whether it is criminal. But the Excessive Fines Clause "cuts across the division between the civil and the criminal law." *Austin*, 509 U.S. at 610 (citation omitted). A penalty's being criminal may *suffice* to make it a fine, but it is not necessary.

This Court, too, has repeatedly applied the Excessive Fines Clause to penalties that are not even arguably criminal. *E.g.*, *Pimentel II*, 115 F.4th at

1066; *United States* v. *Mackby*, 261 F.3d 821 (9th Cir. 2001). The government's response? Those decisions reflect an "expansive reading" of *Austin*. Gov't Br. 58. They don't. But either way, circuit precedent is binding. Under circuit precedent, civil False Claims Act penalties are Eighth Amendment fines. Parking tickets are Eighth Amendment fines. FBAR penalties are no different.

2. The government objects to *Austin*'s standard on the (intricate) theory that certain language in *Austin* derived from a double-jeopardy decision the Supreme Court later abrogated for double-jeopardy cases. Gov't Br. 55 ("[I]n *Hudson v. United States*, the Supreme Court squarely abandoned *Halper*'s analysis as 'unworkable.'"). Yet the Court justified narrowing the double-jeopardy standard in part *because* the Excessive Fines Clause would continue to apply more broadly. "[S]ome of the ills at which *Halper* was directed are addressed by other constitutional provisions," the Court reasoned. *Hudson* v. *United States*, 522 U.S. 93, 102-03 (1997). Among them: the Excessive Fines Clause, which would continue to "protect[] against excessive civil fines." *Id.* at 103 (citing *Austin*, 509 U.S. 602); Appellant's Br. 60.

3. The government accepts (Br. 58) that the Excessive Fines Clause may apply to penalties with "a deterrent purpose," but not, it posits, to penalties with "only deterrent effects." That, too, is wrong. The government rightly

concedes (Br. 50) that "civil FBAR penalties undoubtedly have deterrent effects." And "[i]t is generally prudent for courts to assume that legislatures intend the obvious and natural consequences of the statutory language they enact." *Doermer* v. *Callen*, 847 F.3d 522, 532 (7th Cir. 2017). In candid moments, even the Tax Division describes FBAR penalties as having "deterrent purposes." U.S. Mot. for Summ. J. at 28, *Moore* v. *United States*, No. 13-cv-2063 (W.D. Wash. Feb. 3, 2015) (Doc. 32). If more were needed, Congress called FBAR penalties, well, "penalties." 31 U.S.C. § 5321(a)(5)(C); *Toth* v. *United States*, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting from denial of certiorari) ("Really, the notion of 'nonpunitive penalties' is 'a contradiction in terms.'").

4. The government agrees that, for Eighth Amendment purposes, "remedial" means "compensating the Government for a loss." Gov't Br. 51 (citation omitted). It contends that FBAR penalties are purely remedial because they are "additions to the calculated tax loss." Gov't Br. 53.

That is false; FBAR penalties are disconnected entirely from any "calculated tax loss." As catalogued in our opening brief (at 5-6, 57-61), the Tax Division has argued as much (correctly) elsewhere. Contra the government's representations here, there "is no underlying tax with which the FBAR penalty could be linked." Mem. Supp. U.S. Mot. for Summ. J. at 9, *United States* v. *Simonelli*, No. 6-cv-653 (D. Conn. Jan. 29, 2008) (Doc. 20-2) (*Simonelli* Br.). Rather, "the penalty is calculated 'irrespective of the magnitude of the financial injury to the United States, if any.'" *Schwarzbaum*, 127 F.4th at 272. And to the extent the government elsewhere suggests (Br. 61) that FBAR penalties are a blunderbuss proxy for investigative costs, that (unfounded) portrayal would not render them non-punitive either. For "even a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation." *Bajakajian*, 524 U.S. at 343 n.19.

5. Lastly, the government suggests (Br. 50) that the reasoning of this Court's decision in *Louis* v. *Commissioner* "applies equally to civil FBAR penalties." In *Louis*, recall, this Court held that tax penalties are not Eighth Amendment fines. As our opening brief discussed (at 60-62), *Louis*'s reasoning stands in tension with precedent both before and since, and it should not be extended beyond its tax-penalty compass. The government's response? "[C]ivil FBAR penalties are synonymous with tax penalties," so *Louis* must needs apply. Gov't Br. 52.

Our opening brief explains (at 60-61) why FBAR penalties are unlike tax penalties, so rather than quote ourselves, we'll quote the government. Here, the government advises (Br. 52) that FBAR penalties are the same as tax penalties because "[t]hey are assessed by the IRS." Four years ago, the Solicitor General told the Supreme Court the opposite: "Notwithstanding the IRS's administrative role, a civil penalty assessed under Section 5321 is not a 'tax penalty.'" U.S. Br. at 6, *Bittner* v. *United States*, 598 U.S. 85 (2023) (No. 21-1195). Here, the government maintains (Br. 52) that FBAR penalties "recoup lost tax revenue." Elsewhere, the Tax Division says the opposite. *Simonelli* Br., *supra*, at 8-10. Here, the government suggests (Br. 52) that the FBAR's codification in Title 31, rather than Title 26, is irrelevant. Elsewhere: the opposite. Simonelli Br., *supra*, at 9. Here, the government represents (Br. 53) that FBAR penalties are "additions" to "calculated tax loss." Elsewhere: the opposite. Again. *See* pp. 30-31, *supra*.

B. The government's arguments are so at odds with precedent as to cement the need for this Court to address the issue.

As it did below, the government invites the Court to sidestep whether FBAR penalties are fines and affirm solely on the second-order excessiveness question. Gov't Br. 23, 49-50 (citing *United States* v. *Bussell*, 699 F. App'x 695 (9th Cir. 2017), in which the government nowhere mentioned the threshold Eighth Amendment question). Yet the flaws in the government's arguments spotlight the value of addressing the first-order question first. The FBAR regime imposes crippling penalties on those who fail to turn the squarest of corners with the government. In this setting, it "cannot be too much to expect the government to turn square corners" of its own. *Niz-Chavez* v. *Garland*, 593 U.S. 155, 172 (2021). For years, however, the Executive Branch has insisted that the Excessive Fines Clause places no constraints on FBAR penalties. On that understanding, it calculates astronomical penalties in-house. In court, it demands unwavering deference. Yet when pressed, its arguments against the Clause's applicability distort Supreme Court precedent, dismiss circuit precedent, misstate the law, and jettison its previous positions. Hardly square corners.

Only by addressing the issue head-on can this Court begin to right the ship. If the Court is persuaded that FBAR penalties are fines, the Court should so hold, then proceed to the second-order excessiveness question. If, somehow, the Court is persuaded that FBAR penalties are not fines, the Court should affirm on that ground alone and pave the way for the Supreme Court to resolve the circuit split. Either way, letting the question linger breeds uncertainty and visits real harm on the rights of the many Americans—like Tuncay Saydam—who find themselves ensnared in devastating enforcement actions.

CONCLUSION

The district-court judgment should be reversed and the case remanded with instructions to reduce the judgment to an amount that comports with the Excessive Fines Clause.

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Respectfully submitted,

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