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)

BRIEF OF APPELLANT TUNCAY SAYDAM

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument in this appeal. As detailed below, the case raises important issues concerning the application of the Eighth Amendment's Excessive Fines Clause and implicates an acknowledged circuit split. Given the importance of the issues presented, appellant submits that oral argument would be beneficial to the resolution of this case.

INTRODUCTION

Born in 1938 aboard a ship in the Aegean, Tuncay Saydam grew up in poverty in the Turkish city of Izmir. Through extraordinary efforts, he grew to become a pioneering computer-science professor. He is an American by choice. He immigrated with his wife and daughters in 1980, becoming a U.S. citizen and teaching for twenty-five years at the University of Delaware. Now eighty-eight years old, he lives in a tiny condo in San Francisco. Long since retired, he devotes himself to poetry, expressionist painting, and his wife, Oya.

This case involves the federal government's campaign to fine Saydam $437,564.00. His offense: failing to file the "FBAR" form between 2013 and 2017. What's the FBAR? It's a fair question. Until relatively recently, even "many experienced tax professionals and return preparers were not aware of the FBAR reporting obligations." *Bittner* v. *United States*, 598 U.S. 85, 103 (2023) (opinion of Gorsuch, J.) (citation omitted). Briefly, the FBAR requirement is part of the Bank Secrecy Act, a regime designed to combat the use of overseas bank accounts for criminal activity. Each year, every U.S. person who has money in foreign accounts totaling more than $10,000 must file a short form with the Treasury Department—the FBAR—providing basic information about themselves and their accounts.

For his part, Tuncay Saydam isn't a criminal, transnational or otherwise. But over the course of his life, he has had several foreign bank accounts, including between 2013 and 2017—the time relevant here. During that period, he kept between $500,000 and $600,000 at DenizBank in Istanbul. (He remains a dual citizen and still spends his summers in Turkey.) A retired college professor, he has never been rich, and the money was his nest egg. It originated from teaching and consulting work he'd done in Switzerland decades before, including at the École Polytechnique Fédérale de Lausanne.

Saydam didn't file FBARs because he didn't know about FBARs; as gifted as he was in computer science, he would prove far less able when it came to his personal finances. But under the Bank Secrecy Act, even subjectively innocent violations are civilly "willful" if the violator was objectively reckless in not learning about the FBAR. Willful violations, in turn, open the door to stratospheric civil penalties. And in the government's view, Saydam's failure to educate himself about the FBAR was reckless, hence willful. A jury agreed. The resulting FBAR penalty: $437,564.00.

There's one word for that penalty: Excessive. And indeed, the Excessive Fines Clause was built for cases like this one. In the only case in its history in which it has applied the Clause, the Supreme Court invalidated a $357,000 fine

imposed for a reporting violation under the Bank Secrecy Act. Below, however, the district court upheld Saydam's fine: $437,000 for reporting violations under the Bank Secrecy Act. In this, the court erred. Across almost every metric, the court misjudged the gravity of Saydam's wrongdoing—a key input in the excessiveness analysis. If anything, in fact, Saydam's culpability was *lower* than that of the Bank Secrecy Act defendant in the Supreme Court's seminal excessive-fines decision.

More broadly, the district court salted its excessiveness analysis with a misplaced sense of "deference." Yet it's unclear who the court thought was deserving of that deference. While courts at times have suggested that a degree of deference is owed to penalties that are statutorily mandated (the idea being that they reflect a legislative judgment), the penalties imposed on Saydam were not statutorily mandated. They were calculated, not by Congress, but by an executive-branch agency—and one that stridently maintains that the Excessive Fines Clause does not apply at all. Under a straightforward application of this Court's and the Supreme Court's precedents, the judgment below should be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1345, and 1355. That court entered final judgment disposing of all parties' claims on December 4, 2025. 1-ER-2–3. Tuncay Saydam filed his notice of appeal on January 21, 2026. 5-ER-716, 5-ER-719; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court misapplied the Eighth Amendment's Excessive Fines Clause in upholding the $437,564.00 in civil FBAR penalties imposed on Tuncay Saydam.

STATEMENT OF THE CASE

A. Legal background

1. In 1970, Congress enacted what is commonly called the Bank Secrecy Act, "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Pub. L. No. 91-508, § 202, 84 Stat. 1114, 1118. To implement the Act, Congress directed the Secretary of the Treasury to promulgate regulations to impose recordkeeping and reporting requirements on any U.S. resident or citizen who "makes a transaction or maintains a relation for any person with a foreign financial agency." 31 U.S.C. § 5314(a).

The Secretary implemented that charge with a series of regulations and a form called the Report of Foreign Bank and Financial Accounts—better known as the "FBAR." 31 C.F.R. § 1010.350(a). The FBAR's reporting requirement applies when a U.S. person has a financial interest in (or other authority over) one or more foreign bank accounts whose aggregate balance exceeded $10,000 during the previous calendar year. *Id.* § 1010.306(c). Filers must report their name, address, date of birth, and other identifying information. They also must report information about each of their foreign accounts: the name of the financial institution, the account number, and the maximum value during the reporting period. 5-ER-664–671 (example).

The FBAR requirement is enforced by the Internal Revenue Service through a memorandum of understanding with FinCEN. 31 C.F.R. § 1010.810(g). The FBAR is not, however, part of the federal government's taxing apparatus; as with other parts of the Bank Secrecy Act, it serves mainly to identify people using foreign accounts to commit crimes. H.R. Rep. No. 91-975, at 12-13 (1970); S. Rep. No. 108-257, at 32 (2004). Thus, a person might owe no U.S. taxes at all and still be subject to the FBAR. As the government has explained, "the purpose of the FBAR penalty is not tax collection," but disclosure, and it "appl[ies] regardless of whether a person has any tax liability

or even is required to file a federal income tax return." Mem. Supp. U.S. Mot. for Summ. J. at 10, *United States* v. *Simonelli*, No. 6-cv-653 (D. Conn. Jan. 29, 2008) (Doc. 20-2).

2. Since 2004, the FBAR has been enforced through a slate of escalating civil and criminal sanctions. If someone can show "reasonable cause" for failing to file their FBAR, their liability may be excused altogether. 31 U.S.C. § 5321(a)(5)(B)(ii). For people whose violations are not "reasonable" but are at least non-willful, the maximum civil penalty is $10,000. *Id.* § 5321(a)(5)(B). But for "willful" violations, the penalties skyrocket: a maximum civil penalty of either $100,000 or half the unreported account's balance, whichever is greater. *Id.* § 5321(a)(5)(C)-(D). (Subject to those maximums, the IRS imposes penalties using its own formulas. Internal Revenue Manual 4.26.16.6.5.3(2) (Nov. 6, 2015).) Willful violators may face separate criminal penalties as well: up to $250,000 in criminal fines and five years' imprisonment. 31 U.S.C. § 5322(a).

For a time, the government maintained that the willfulness standard for civil FBAR penalties was identical to—and as demanding as—the willfulness standard for criminal ones. For both, the government reasoned, a violation was willful only if it could prove "a voluntary intentional violation of a known legal duty" to report. IRS Chief Counsel, Advice Memorandum 2006-03026, at 2

(Jan. 20, 2006). In time, however, the government staked out a new position: Unlike criminal willfulness, civil willfulness sweeps up not just subjectively intentional reporting failures, but objectively reckless ones as well. Over the past decade, every court of appeals to consider the question has accepted that broader interpretation. *E.g.*, *United States* v. *Hughes*, 113 F.4th 1158, 1163 (9th Cir. 2024).

The government has exploited that expanded civil-willfulness theory relentlessly. In one recent case, it sought to impose an $8.8 million FBAR penalty on "an almost one hundred-year-old Holocaust survivor." *United States* v. *Schik*, No. 20-cv-2211, 2022 WL 685415, at *1 (S.D.N.Y. Mar. 8, 2022). In another, it imposed a $3.1 million penalty, based on unreported funds originally placed in foreign accounts to keep them "hidden from the Nazis and subsequently hidden from the Communist authorities in the Soviet Union." *Landa* v. *United States*, 153 Fed. Cl. 585, 591-92, 602 (2021). In another: a $2.1 million penalty on an octogenarian whose father had fled Nazi Germany and had later entrusted her inheritance to a foreign bank. *Toth* v. *United States*, 143 S. Ct. 552, 552 (2023) (Gorsuch, J., dissenting from the denial of certiorari).

As this case illustrates, moreover, the government's enforcement actions are not confined to society's wealthiest. Ordinary people have foreign

bank accounts too: immigrants, first-generation citizens, and citizens working overseas. They are targeted no less aggressively. *See* Nat'l Taxpayer Advocate, *2011 Annual Report to Congress* (Vol. 1), at 195-97 (Dec. 31, 2011), https://tinyurl.com/435kbvxj. From 2012 to 2020 alone, the IRS assessed nearly $1.5 billion in FBAR penalties. Dep't of the Treasury, *2020 Report of Foreign Bank and Financial Accounts (FBAR) Report to Congress* at 10, https://tinyurl.com/3ne4sych.

B. Factual background

1. Tuncay (pronounced "Toon-jai") Saydam was born aboard a ship off the coast of Anatolia in 1938. 2-ER-45. He grew up desperately poor in the Turkish port city of Izmir; with no electricity, he did his schoolwork beneath a streetlamp outside his home. His father died when he was ten. 2-ER-45; 3-ER-216. That same year, a chance encounter would change the course of his life: He met an American boy, whose parents were working with NATO. From spending time with the boy that summer, he learnt to speak and understand English. 4-ER-385; 3-ER-216.

From those beginnings, Tuncay Saydam grew into a computer-science pioneer. He graduated from Istanbul Technical University and went on to earn graduate degrees in engineering and computer science from the University of

Texas. 4-ER-384. For many years, he taught in Istanbul, becoming dean of engineering at Bosphorus University and an internationally recognized authority in the computer-science field. 4-ER-384; 3-ER-217.

In 1979, he was invited to join the tenured faculty at the University of Delaware, and a year later he moved to Newark, Delaware, with his wife, Oya, and their two daughters. 4-ER-385–387; *see also* 4-ER-491 ("We love our daughters so much. And that's why we came to this country, for their sake really, so they could go to best schools here, which they did."). He and Oya became U.S. citizens in the late 1980s. 4-ER-387. "[I]t was a life-changing event for me," he would later recall. 3-ER-220. At the swearing-in ceremony, the judge picked him to stand before Oya and a hundred others—new citizens all—and express how it felt to become an American. 3-ER-220–221.

In the decades that followed, he devoted himself to work and family in equal measure. Along with his teaching in Delaware, he published dozens of articles and a half-dozen books. He gave lectures about computer science across the globe, from Switzerland to Turkey to Japan. 3-ER-222–224; 4-ER-392. On the home front, his daughters earned advanced degrees, started families, and launched successful careers. 4-ER-526; *see also* 4-ER-491 ("[W]e are

blessed by three wonderful granddaughters, who also went to the number one, number two best schools in this country. And they are very close to us.").

After 25 years at the University of Delaware, Saydam retired in 2005. 4-ER-393. With Oya, he now lives in a tiny condo in San Francisco. 4-ER-491; 3-ER-334 ("[O]ur daughter lives here and works here and our granddaughters are here. And we needed the support."). He turned eighty-eight last month. 4-ER-383–384.

2. As brilliant as he was in computer science (and now in retirement, expressionist painting), Saydam would prove much less able when it came to his personal finances. In the late '80s and mid '90s, he took two sabbaticals to teach in Switzerland, first at ETH Zurich and then at the École Polytechnique Fédérale de Lausanne. 4-ER-388–389. During that same period, he also served as an engineering consultant with several Swiss communications companies, making short trips to Switzerland once or twice a year. 4-ER-389; 4-ER-391–392. The money he earned in Switzerland was deposited in a bank there. 5-ER-641; 4-ER-394–395.

In 2012, Zürcher Kantonalbank, the bank holding his funds, notified him that, "[i]n view of the expected tightening of the U.S.-regulations," it had decided to no longer do business with U.S. persons. 5-ER-653. Saydam was in

Turkey at the time—he has maintained his Turkish citizenship and normally spends summers there—and he traveled to Zurich to transfer out his money. One of Saydam's family friends (a Turkish investment manager, the son of a primary-school friend) persuaded him to transfer the money to a bank in Turkey. 4-ER-423. Saydam did so, and he entrusted the family friend's investment company with managing the account. 4-ER-426–427. At the time, the sum totaled around $525,000, his "life savings." 4-ER-424 ("And I was born in a poor family in Turkey and lived a very frugal life. So this $500,000 were my life savings.").

That choice cost him: Over the next three years, the investment manager engaged in a raft of self-dealing activities. 4-ER-428–429; 4-ER-479 ("[H]e made me lose more than half of my lifetime savings, if I can be correct."); 5-ER-658–663. In 2015, Saydam fired the man, sued him, and transferred the depleted funds to a different Turkish bank, on the advice of a niece who worked there. 4-ER-427–431; 4-ER-478. Not long after, the funds were transferred to Saydam's bank here in America. 4-ER-487–488; 3-ER-298.

3. In 2017, the IRS opened an examination into Saydam and his wife's taxes; the next year, the agency separately opened an FBAR examination as well, to investigate his "compliance with the laws governing the

reporting of foreign bank accounts." 2-ER-35. Tax-wise, the agency eventually concluded that, between 2013 and 2017, Saydam's foreign accounts had yielded net tax deficiencies totaling $29,006. 1-ER-7; 1-ER-18. (For 2012, by contrast, the Saydams had inadvertently overpaid their taxes. 2-ER-30.) Given those tax deficiencies, the agency imposed an additional penalty ($12,900.60), which applies to underpayments attributable to an "undisclosed foreign financial asset." 26 U.S.C. § 6662(b)(7), (j); 1-ER-6. The agency did not, however, conclude that the tax deficiencies were due to any sort of fraud. 2-ER-25 (stating that no penalty was imposed under 26 U.S.C. § 6663, the fraud-penalty provision).

Still, the agency forged ahead with a separate FBAR investigation. In 2021, it assessed "willful FBAR penalties" against Saydam for having failed to timely file his FBAR forms from 2013 through 2017. The penalties totaled $437,564.00. 1-ER-5; 2-ER-42–43.

C. Proceedings below

1. The government filed this action in late 2022 to reduce Saydam's FBAR penalties to judgment. 3-ER-340–350. (No criminal charges were ever brought.) The case went to trial two years later. At trial, the government argued full-throatedly that Saydam fell on the lowest end of the civil-willfulness spectrum—not deliberate or knowing, but reckless. "This is a case about

recklessness," the government advised the jury. 4-ER-607. "All the United States must prove," the government urged, "is that it is more likely than not that Mr. Saydam acted recklessly in failing to file timely FBARs." 4-ER-586. "This is a reasonable person standard," the government elaborated, "which means even if you think that Mr. Saydam did not know of the risk that he was not complying with the FBAR requirements, you must still find him reckless if you think a reasonable person in Mr. Saydam's position would have known of the risk." 4-ER-588. And more along similar lines.[1]

Against that backdrop, the evidence bore out that Saydam did indeed have a poor grasp on his finances and on federal reporting requirements. "I had no idea about this FBAR thing until I learned about that during the audit," he explained. 4-ER-470. And while the fine print on his tax returns alluded to the FBAR's separate reporting requirement (Schedule B of Form 1040 directs the attentive reader to "FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR)"), Saydam barely reviewed his tax returns. Earlier

[1] *E.g.*, 4-ER-373 ("[I]f, at the end of this trial, you agree and you think that he acted recklessly, then you must find that he acted willfully and decide this case in the United States' favor."); 4-ER-575 ("[I]f you believe that it is more likely than not that Mr. Saydam acted recklessly in not complying with his FBAR reporting obligations, then you must decide this case in the United States' favor."); 4-ER-590 ("[W]hether Mr. Saydam had tax gains or losses from his accounts does not bear on whether he was reckless in failing to report them.").

in life, he had filled them out himself. 4-ER-436. But after retirement, he began suffering "problems with . . . depression and no longer trusted [his] judgment." 4-ER-436. As a result, he began using a strip-mall H&R Block near his home. 4-ER-483–484.

As he would later explain it, H&R Block resembled an assembly line, with customers "queu[ing] into their office for our turn to be announced, and it took only 15-some minutes for them to prepare." 4-ER-437–438. He didn't scrutinize his tax returns before signing them. 4-ER-438–439. He didn't think to bring any Turkish bank statements. 4-ER-436–437. And years later at trial, he denied that H&R Block employees had asked him about foreign accounts. 4-ER-485–486; 4-ER-445 ("If they asked me about my Turkish accounts, I would have told them how much I paid in Turkey on my -- all of my accounts in Turkey. Fully tax-paying Turkish citizen is what you're looking at.").

For their part, the H&R Block employees maintained that they asked customers about foreign accounts as a matter of practice. 2-ER-79; 2-ER-88–89; 2-ER-129; 2-ER-162–163. But if they did in fact ask him, it went over his head. By then well into retirement, he "was interested only in seeing the numbers and signing it." 4-ER-441. He didn't look at the Schedule Bs, which incorrectly had the "No" box checked in response to questions about financial

interests in bank accounts overseas. Nor did he see the fine print directing foreign-account holders "to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority[.]" 4-ER-442. Not until the government began investigating him in late 2018 did he learn about the FBAR requirement at all. "[T]he IRS guys, they said, 'Where are the FBAR things?'" he recalled at trial. 4-ER-490. That was "[t]he first time ever, and I mean 'ever,' I heard about this F-A-B-R word in my life." 4-ER-490.

With the close of evidence, the government returned to its theme: "All the United States must prove is that Mr. Saydam acted recklessly." 4-ER-590. The jury then returned its verdict: Saydam's failure to file his FBARs had indeed been civilly "willful" for all five years at issue. 2-ER-33.

2. Following the jury's verdict, the district court entertained Saydam's motion to reduce penalties under the Eighth Amendment's Excessive Fines Clause. The motion was denied.

The district court first held that FBAR penalties have a "punitive aspect" and thus are "fine[s] for purposes of the Eighth Amendment." 1-ER-10. The court then "analyze[d] whether Saydam's FBAR penalty is excessive." 1-ER-15. In so doing, the court looked to what this Court has described as four

"*Bajakajian* factors" (named for the leading Supreme Court precedent). Those factors are: whether the underlying offense related to other illegal activities, the nature and extent of the underlying offense, whether other penalties may be imposed for the offense, and the extent of the harm caused by the offense. 1-ER-15.

For the first of the factors, the court accepted that "Saydam did not engage in other criminal activity related to his foreign accounts" (1-ER-16)—a finding "highly relevant to the determination of the gravity of [a defendant's] offense." *United States* v. *Bajakajian*, 524 U.S. 321, 338 n.12 (1998).

On the next factor, the court accepted that Saydam's level of culpability was not deliberate or knowing, but reckless. *E.g.*, 1-ER-21 ("Saydam 'is not an innocent victim: he is only subject to the fifty percent penalty because he recklessly disregarded the law which required him to report foreign bank accounts.'"). That level of culpability is on the low end of the FBAR statute's broad "willfulness" spectrum. It is also lower than the culpability of the defendant in *Bajakajian*, who, unlike Saydam, committed a criminally *knowing* Bank Secrecy Act violation. Even so, the district court maintained that Saydam's civil "reckless[ness]" necessarily "show[ed] 'more than a minimal level of culpability.'" 1-ER-16.

The court next considered "whether other penalties may be imposed for the offense." 1-ER-15 (citation omitted). Had Saydam been convicted of criminal tax evasion, the court hypothesized, his Guidelines sentence would be $139,000 and four years' imprisonment—a total that would reflect "a significantly higher level of culpability than was the case in *Bajakajian*." 1-ER-17–18. In reality, of course, Saydam had not committed criminal tax evasion or any other crime. 1-ER-16 ("Saydam did not engage in other criminal activity related to his foreign accounts").

Lastly, in evaluating "the extent of the harm caused by the violation," the court determined that Saydam's tax deficiencies for the relevant period totaled $29,006—what the court viewed as "a significant amount." 1-ER-18 (citation omitted). The court did not consider that those tax deficiencies were caused, not by Saydam's FBAR violations, but by separate errors in his tax returns, punished separately in a Tax Court proceeding. Nor did the court consider that, to the extent Saydam's tax debt informed the analysis at all, the FBAR penalties dwarfed that debt fifteen times over.

All told, the court held that the $437,564.00 in FBAR penalties "is not grossly out of proportion to the activity the Government is seeking to deter."

1-ER-22. The court thus entered judgment against Saydam in that amount, plus additional late-payment penalties and interest. 1-ER-2–3.

SUMMARY OF ARGUMENT

In the one case in its history in which it has applied the Excessive Fines Clause, the Supreme Court in *Bajakajian* invalidated a $357,000 fine imposed for a criminally knowing violation of a Bank Secrecy Act reporting requirement. Below, the district court upheld a $437,000 fine imposed for a civilly reckless violation of a neighboring Bank Secrecy Act reporting requirement. In this, the court erred. Applying *Bajakajian*'s principles to the record here yields the same result: Tuncay Saydam's $437,564.00 in FBAR penalties violates the Excessive Fines Clause.

I. In upholding Saydam's $437,564.00 fine, the district court misapplied both this Court's precedent and the Supreme Court's.

A. The Eighth Amendment singles out "excessive fines" for special mention, and "[t]he touchstone of the constitutional inquiry . . . is the principle of proportionality." *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998). Put differently, a fine is unconstitutionally excessive "if it is grossly disproportional to the gravity of a defendant's offense." *Id.* In evaluating the gravity of a defendant's offense, this Court has distilled one core teaching from Supreme

Court precedent: "It is critical . . . that the court review the specific actions of the violator rather than by taking an abstract view of the violation." *Thomas* v. *County of Humboldt*, 124 F.4th 1179, 1193 (9th Cir. 2024) (citation omitted).

B. Applying the above principles, the record confirms a glaring mismatch between Saydam's wrongdoing and the penalties imposed.

1. On one side of the scale, this Court's "*Bajakajian* factors" confirm that the gravity of Saydam's reporting violations was relatively minor. The district court found that "Saydam did not engage in other criminal activity related to his foreign accounts," a finding highly relevant to the offense's gravity. The violations were objectively reckless, not subjectively knowing, making Saydam's culpability lower even than Hosep Bajakajian's. For a qualitatively *worse* offender—an alternate-universe Saydam with full-blown criminal scienter—the Guidelines sentencing range would be zero to six months' imprisonment and a criminal fine of $1,000 to $9,500. And to the extent Saydam's tax debt factors into the analysis at all, the FBAR penalties dwarfed that debt by a factor of over fifteen.

2. On the other side of the scale, $437,564.00 in FBAR penalties is extraordinarily severe. For just one comparator, it is more than forty-six times the maximum fine the Guidelines would recommend for a qualitatively worse

violator—a criminally deliberate one. That Saydam's Turkish accounts embodied his retirement nest egg only reinforces the fines' severity.

C. Beyond misconstruing the "*Bajakajian* factors," the district court's analysis was shot through with a deeper conceptual error: the notion that courts owe "substantial deference" in evaluating whether FBAR penalties violate the Excessive Fines Clause. But deference to whom? While Congress certainly established the statutory *maximum* for FBAR penalties, the decision to set *Saydam's* penalties at $437,564.00 was made, not by Congress, but by an executive-branch agency—one that insists that the Excessive Fines Clause places no check on its power at all.

II. As it has elsewhere, the government argued below that the Excessive Fines Clause does not apply at all to civil FBAR penalties. The district court correctly rejected that theory. Given the importance of that first-order question—it has generated a square circuit conflict—this Court should confront it directly and reject the government's view.

A. The Excessive Fines Clause applies to FBAR penalties. A monetary penalty is an Eighth Amendment "fine" if it is at least partly punitive. Repeatedly, the government has acknowledged the obvious: that FBAR penalties are at least partly punitive. That should be the end of the matter.

B. The government's contrary arguments lack merit. As just one example, the government suggested below that because "tax penalties" are not protected under the Fifth Amendment's Double Jeopardy Clause, FBAR penalties are not protected under the Excessive Fines Clause. But—as the government has elsewhere acknowledged—an FBAR penalty "is not a 'tax penalty.'" U.S. Br. at 6, *Bittner* v. *United States*, 598 U.S. 85 (2023) (No. 21-1195). And as both this Court and the Supreme Court have remarked, the Double Jeopardy Clause is not the Excessive Fines Clause. If the Excessive Fines Clause applies to parking tickets (and this Court has held that it does) then it surely applies here.

C. The Court should tackle this first-order question first. Whether FBAR penalties are a "fine" is logically antecedent to whether they are "excessive"—the first question asks whether the penalty is punitive at all and the second asks whether it is *too* punitive. And the need for the courts' intervention on this threshold question is acute. For years, the government has exploited the FBAR penalties' uncertain status under the Excessive Fines Clause. Internally, the government calculates FBAR penalties firmly in the belief that the Excessive Fines Clause imposes no constraint on it. Yet before the courts, the government insists that Article III judges must defer on

whether the Clause has been violated. Simply, the government's position in this case—and many others—subverts a Bill of Rights protection that is "deeply rooted in this Nation's history and tradition." *Timbs* v. *Indiana*, 586 U.S. 146, 154 (2019) (citation omitted). And its vision for the Excessive Fines Clause promises injustice not just for the wealthy, but for Americans of more modest means as well. The Court should hold that FBAR penalties are subject to the Excessive Fines Clause and that the penalties imposed on Saydam violate it.

STANDARD OF REVIEW

Whether a fine contravenes the Excessive Fines Clause is reviewed de novo, and factual findings are reviewed for clear error. *United States* v. *Bajakajian*, 524 U.S. 321, 336-37 n.10 (1998).

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. The excessiveness standard looks to the culpability of the specific offender.

"Protection against excessive punitive economic sanctions" is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" *Timbs* v. *Indiana*, 586 U.S. 146, 154 (2019). "[U]niquely

of all punishments," fines stand to make governments money, in turn raising special risk of being "imposed in a measure out of accord with the penal goals of retribution and deterrence." *Harmelin* v. *Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.); *see also R.* v. *Mosley*, 111 Eng. Rep. 499, 500 (K.B. 1835). The Eighth Amendment thus singles out fines for special mention: "They cannot be excessive." *Tyler* v. *Hennepin County*, 598 U.S. 631, 650 (2023) (Gorsuch, J., joined by Jackson, J., concurring).

As the Supreme Court articulated in 1998, "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *United States* v. *Bajakajian*, 524 U.S. 321, 334. A fine is unconstitutionally excessive "if it is grossly disproportional to the gravity of a defendant's offense." *Id.* And isolating "the gravity of the defendant's offense" (*id.* at 337) is particularly critical when—as here—the penalizing statute applies with undifferentiated force to a wide range of misconduct.

The Court's analysis in *Bajakajian* illustrates the standard. The statute Hosep Bajakajian violated—as here, part of the Bank Secrecy Act—requires people to submit a report before bringing more than $10,000 into or out of the country. The accompanying penalty provisions mandate forfeiture of all unreported currency: for Bajakajian, $357,144. That provision reaches all sorts of

offenders. And given that sweep, the Court's excessiveness analysis focused on locating Bajakajian, specifically, on the statute's spectrum of culpability.

The Court first considered the gravity of his particular misconduct. His "crime was solely a reporting offense," the Court observed, and his money "was the proceeds of legal activity." *Id.* at 337-38. That his violation "was unrelated to any other crime" was also "highly relevant." *Id.* at 338 n.12. The Court also looked to his relatively lenient sentencing-guidelines range (offense level 6), which, the Court remarked, refuted the government's emphasis on the maximum statutory punishments. *Id.* at 339 & n.14. "That the maximum fine and Guideline sentence to which [Bajakajian] was subject were but a fraction of the penalties authorized," the Court reasoned, "undercuts any argument based solely on the statute." *Id.* For "they show that [his] culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed." *Id.*

In evaluating the gravity of Bajakajian's wrongdoing, the Court also considered "[t]he harm that [he] caused." *Id.* at 339. Here, too, the Court homed in on the man: It focused, not on the generalized harms of Bank Secrecy Act violations in the abstract, but on the harm caused by Bajakajian's violation specifically. *Id.* On the record before the Court, that harm was "minimal." *Id.*

On the other side of the balance, the $357,144 forfeiture was massive. A fine of that magnitude, the Court concluded, bore "no articulable correlation to any injury suffered by the Government" and was "grossly disproportional to the gravity of [Bajakajian's] offense." *Id.* at 339-40.

This Court has since faithfully distilled *Bajakajian*'s central teachings, deriving several factors that can inform the gravity of a defendant's misconduct (what the Court has called the "*Bajakajian* factors"). At the same time, though, the Court has cautioned against too "rigid" or "mechanistic[]" an application of those factors. *Pimentel* v. *City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020) (*Pimentel I*) (citation omitted); *United States* v. *Ferro*, 681 F.3d 1105, 1115 (9th Cir. 2012). At base, the excessiveness analysis looks to the totality of the circumstances. *State* v. *Timbs*, 134 N.E.3d 12, 35-36 (Ind. 2019). And the core lesson is as simple as it is important: "It is critical . . . that the court review the specific actions of the violator rather than by taking an abstract view of the violation." *Thomas* v. *County of Humboldt*, 124 F.4th 1179, 1193 (9th Cir. 2024) (citation omitted).

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

Applying the above principles, Saydam's $437,564.00 in FBAR penalties blows past the Excessive Fines Clause's constraints. Structurally, the analysis

involves two main considerations. What is the gravity of the defendant's wrongdoing? And how severe is the fine? Here, the gravity of Saydam's misconduct was relatively low and the penalties remarkably "steep." 1-ER-21. That mismatch yields precisely the sort of "excessive punitive economic sanction[]" the Excessive Fines Clause exists to check. *Timbs*, 586 U.S. at 154.

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

On the first consideration—the gravity of the defendant's misconduct—this Court has derived several data points from *Bajakajian* to guide the inquiry: whether the underlying offense related to other illegal activities; the nature and extent of the underlying offense; whether other penalties may be imposed for the offense; and the extent of the harm caused by the offense. *Pimentel* v. *City of Los Angeles*, 115 F.4th 1062, 1067 (9th Cir. 2024) (*Pimentel II*), *cert. denied*, 145 S. Ct. 2735 (2025). Combined, these considerations place Saydam on the least culpable end of the FBAR statute's spectrum of wrongdoing. In many respects, in fact, his violations were less serious even than Hosep Bajakajian's.

a. Saydam's FBAR violations were unrelated to criminal activity, and their nature and extent were minor.

i. The first two of this Court's "*Bajakajian* factors" spotlight Saydam's low culpability. To start: whether his FBAR violations related to other illegal activities. *Id.* As the district court found, they did not: "[T]he Government does not dispute that Saydam did not engage in other criminal activity related to his foreign accounts." 1-ER-16; *see also* 1-ER-20–21 ("It is true that Saydam was not engaged in other illegal conduct, such as money laundering or illegal trade."). As in *Bajakajian*, that finding—that Saydam's "willful failure to report the currency was unrelated to any other crime"—is "highly relevant to the determination of the gravity of [his] offense." 524 U.S. at 338 n.12.

It also reinforces that his culpability lay on the bottom end of the civil-willfulness spectrum. As with other components of the Bank Secrecy Act, the FBAR requirement serves primarily to identify people using foreign accounts to commit crimes. H.R. Rep. No. 91-975, at 12-13 (1970); S. Rep. No. 108-257, at 32 (2004). Yet, much like Bajakajian's reporting violation, Saydam's were linked to no crimes at all. That feature sets him apart from "the class of persons for whom the statute was principally designed." *Bajakajian*, 524 U.S. at 338. Indeed—and while Saydam faced no criminal charges—the judgment of

the U.S. Sentencing Commission bears out his low level of culpability. Ordinarily, the base offense level for a criminal FBAR violation corresponds to the amount of unreported money. U.S.S.G. § 2S1.3(a)(2). But the Guidelines carve out a safe harbor for defendants the Commission has identified as the least culpable: those, like Saydam, whose funds had no connection to criminal activity. *Id.* § 2S1.3(b)(3).

The nature and extent of the underlying offense (another of the *Bajakajian* factors) likewise confirms that Saydam's culpability was relatively minor. *Pimentel I*, 974 F.3d at 922 ("Courts typically look to the violator's culpability to assess this factor."). Now on appeal, it's undisputed that Saydam met the statutory definition of civil "willfulness." 2-ER-33. But as the government emphasized at trial, civil willfulness spans an extraordinary range of culpability. *See* pp. 12-13, *supra*. It covers the deliberate violator and the knowing violator. And it covers the unwitting violator, one whose failure to familiarize himself with the FBAR was subjectively innocent but objectively reckless. *United States* v. *Hughes*, 113 F.4th 1158, 1160 (9th Cir. 2024). On that wide "gravity spectrum," *United States* v. *$100,348.00*, 354 F.3d 1110, 1122 (9th Cir. 2004), Saydam fell on the conspicuously low end—not purposeful or knowing, but reckless.

In this regard, in fact, his culpability was *lower* than that of Hosep Bajakajian. Unlike Saydam, Bajakajian was convicted criminally, meaning he subjectively knew he was violating the Bank Secrecy Act. 524 U.S. at 324-25 & nn.1-2; *see generally Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994) (holding that to secure a conviction under 31 U.S.C. § 5322, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful"). Saydam, meanwhile, had no such intent; an elderly retiree, he was simply hopeless with his finances. He didn't study his tax returns. *E.g.*, 4-ER-438–439; 4-ER-441; 4-ER-443. He didn't scrutinize bank correspondence. 4-ER-414. He barely kept apprised of his nest-egg account in Turkey. 4-ER-481. He even fell prey to a swindler. 4-ER-428–429; 4-ER-480–481. Where Hosep Bajakajian knew full well of the reporting requirement he was violating, Saydam "had no idea about this FBAR thing until [he] learned about that during the audit" after the fact. 4-ER-470. And he was hardly alone. Even in the late-aughts, "many experienced tax professionals and return preparers were not aware of the FBAR reporting obligations." *Bittner* v. *United States*, 598 U.S. 85, 103 (2023) (opinion of Gorsuch, J.) (citation omitted). What was true of Bajakajian is thus doubly true of Saydam: He "does not fit into the class of

persons for whom the statute was principally designed," and he displayed only "a minimal level of culpability." *Bajakajian*, 524 U.S. at 338, 339.

ii. As noted above, the district court found (correctly) that Saydam's FBAR violations were unrelated to other illegal activities. 1-ER-16; 1-ER-20–21. In considering Saydam's culpability, however, the court maintained that his meeting the civil "reckless[ness]" standard necessarily "show[ed] 'more than a minimal level of culpability.'" 1-ER-16; *see also* 1-ER-20 ("Because Saydam was found to have at least recklessly violated the FBAR statute, he has more than minimal culpability."); *accord United States* v. *Schwarzbaum*, 127 F.4th 259, 281-82 (11th Cir. 2025) (committing same analytic error). Yet that logic cannot be squared with precedent. As discussed, for example, Hosep Bajakajian committed a criminally *knowing* Bank Secrecy Act violation. Even so, the Supreme Court determined that his violation reflected "a minimal level of culpability" given the circumstances of his misconduct and how he compared to "other potential violators of the" statute. 524 U.S. at 339 & n.14. That he had a statutory violation to his name, in short, said little about his "individualized culpability." *Ferro*, 681 F.3d at 1107.

Likewise here. Particularly given the breadth of the civil FBAR statute—and the breadth of civil willfulness—the fact that Saydam was found to

have violated the statute says little about the gravity of his wrongdoing. After all, the Excessive Fines Clause "*presume[s]* that some [offense] was committed that caused harm and for which penalties may be imposed." *United States* v. *$11,500.00*, 869 F.3d 1062, 1074 n.8 (9th Cir. 2017). If Bajakajian's culpability for a criminally knowing Bank Secrecy Act violation could have been "minimal," 524 U.S. at 339, the same must needs be true of Saydam's civilly reckless ones.

For its part, the government below sought to magnify Saydam's culpability by tarring him as a "tax evader" who "defrauded the government" and "lied about his foreign accounts on his tax returns." D. Ct. Doc. 94, at 16, 17. Yet the record supports none of those characterizations, and the district court made no such findings. While Saydam's foreign accounts yielded a separate tax-deficiency judgment (more on that below), the Tax Court imposed no penalty for fraud. 2-ER-25. And far from signaling that he sought to conceal his accounts from U.S. authorities, the record confirms the opposite. For example, he freely told Zürcher Kantonalbank that he was a U.S. citizen. 4-ER-398. His bank paperwork, while haphazard, identified him variously as either a Turkish citizen or a U.S. citizen. (Again, he's both.) *Compare*, *e.g.*, 5-ER-643 (noting Turkish nationality), *with* 5-ER-649 (checking box for U.S. citizenship), *and* 4-

ER-401 ("And I'm a proud U.S. citizen, so I checked that box."). On at least one occasion, he gave Zürcher Kantonalbank a W-9—complete with his Delaware address—to facilitate the bank's identifying him to the IRS. 5-ER-641; 5-ER-649; 5-ER-651. Given the tax-deductible fraud losses he himself suffered, moreover, his omitting the Turkish accounts on his tax returns almost certainly yielded a *higher* U.S. tax bill for several of the unreported years. IRS Rev. Proc. 2009-20.

Simply, just as the record supported no finding that Saydam's FBAR violations were related to "other illegal conduct" (1-ER-20–21), the record supports no finding that those violations were the product of ill-intent. *Cf. Ferro*, 681 F.3d at 1116 (noting that property owner's being "quite naive" would bear on her culpability). While the jury evidently determined that a reasonable person would have done more to comprehend the FBAR requirement, the government's accusations of tax fraud and lies find no support in the record. Before the jury, in fact, the government pressed a different perspective: "[I]t is critical," the government maintained, "for you to remember that, to find Mr. Saydam willful, you do not need to find that he had an evil motive in failing to report his foreign accounts." 4-ER-586.

More to the point, the government tried much the same gambit in *Bajakajian* as well—and without success. There, as here, it accused its target of having "deliberately lied about the amount of money in his possession." U.S. Br. at 31, *United States* v. *Bajakajian*, 524 U.S. 321 (1998) (No. 96-1487). And there, at least, the government may have been on firmer ground. 524 U.S. at 324-25 & 337 n.12. But even so, the Supreme Court rejected that maneuver. Bajakajian's "single willful failure to declare [his] currency" was the offense at issue, the Court reasoned, and its gravity was "not exacerbated or mitigated by 'fable[s]' that [he] told one month, or six months, later." *Id.* at 337-38 n.12. This Court has said much the same. Courts are "not asked to judge [the defendant's] culpability generally"; rather, the inquiry focuses on their "culpability with respect to the conduct that gave rise to the forfeiture at issue." *United States* v. *1,679 Firearms*, 659 F. App'x 422, 429 (9th Cir. 2016). And here, the record confirms what no one seriously disputes: Saydam is an elderly retiree with a love for painting and only the shakiest grasp on his finances.

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

i. The penalties for criminal FBAR violations (another of the *Bajakajian* factors) drive home the point. Saydam, of course, did not fit the criteria for a criminal conviction. Although he met the standard for objective

recklessness—enough for civil willfulness—even the government did not seriously contend that he had the subjective scienter needed for criminal charges. *See* pp. 12-13, *supra*. That makes the penalties for a corresponding criminal FBAR conviction an even starker data point. For a qualitatively *worse* offender—an alternate-universe Saydam with full-blown criminal scienter—the sentencing range under the Guidelines would be zero to six months' imprisonment and $1,000 to $9,500 in criminal fines. The offense level? Identical to Hosep Bajakajian's.

The Guidelines analysis is straightforward. Say a counterfactual Saydam were to have been convicted under the criminal FBAR statute (31 U.S.C. § 5322) for his 2013–2017 reporting failures. The base offense level for a Section 5322 offense is calculated under Section 2S1.3 of the Guidelines. U.S.S.G. App'x A at 538; U.S.S.G. § 2S1.3 cmt. background (noting that Section 2S1.3 applies to violations relating to "Reports of Foreign Bank and Financial Accounts"). So flip to Section 2S1.3. That section provides a base offense level of 6, plus an additional number of levels corresponding to the value of the unreported funds. *Id.* § 2S1.3(a)(2). Whatever that amount of unreported funds, however, Section 2S1.3 provides a safe harbor. Under it, the offense level reduces back to 6 if three conditions are met: "the defendant did not act with

reckless disregard of the source of the funds"; "the funds were the proceeds of lawful activity"; and "the funds were to be used for a lawful purpose." *Id.* § 2S1.3(b)(3); *see also id.* (providing that the safe harbor applies only if Sections 2S1.3(b)(1) and (b)(2) do not, both of which provide enhancements for violations related to other criminal activity). In Saydam's circumstances, that safe harbor would readily apply; as the district court recognized, he "did not engage in other criminal activity related to his foreign accounts." 1-ER-16. For each counterfactual FBAR count, the offense level thus would revert to 6.

Grouping the five counts together would lead to the same bottom line. *United States* v. *3814 NW Thurman St.*, 164 F.3d 1191, 1197 n.3, *opinion amended*, 172 F.3d 689 (9th Cir. 1999) (accounting for multiple-count grouping). Offenses covered by Section 2S1.3 are governed by the grouping rule in Section 3D1.2(d). U.S.S.G. § 3D1.2(d) (including Section 2S1.3). And under that provision, "the offense level applicable to a Group is the offense level corresponding to the aggregated quantity [of unreported funds], determined in accordance with Chapter Two and Parts A, B and C of Chapter Three." *Id.* § 3D1.3(b). In short: Go back to Section 2S1.3 and calculate the group offense level using, not each per-year sum of unreported money individually, but the total that went unreported for all five years combined. According to the

government, that total figure is $2,868,110. 1-ER-5. Yet whether that figure is right or wrong (*see* p. 48 n.4, *infra*), the "safe harbor" discussed above kicks in again regardless. As for each count, so too for the group: The offense level reverts to 6. U.S.S.G. § 2S1.3(b)(3).

This data point reinforces Saydam's low level of culpability. For a conspicuously worse offender—a criminally knowing violator rather than a civilly reckless one—the Guidelines would yield a bottom-tier offense level identical to that in *Bajakajian*. 524 U.S. at 338-39. As with Bajakajian, Saydam's spotless record would yield a Category I criminal history. The prison-term range would be the same as Bajakajian's—zero to six months. The fine range (accounting for an inflationary adjustment) would be the same as well—$1,000 to $9,500. So, just as in *Bajakajian*, the Guidelines "confirm a minimal level of culpability" and underscore "that [Saydam's] culpability relative to other potential violators of the reporting provision . . . is small indeed." *Id.* at 339 & n.14.[2]

[2] In a supplemental brief, the government posited that a two-level obstruction enhancement and a two-level sophisticated-means enhancement might have applied to Saydam's theoretical guidelines calculation following his theoretical criminal charges and theoretical conviction. D. Ct. Doc. 102, at 5. As the district court correctly recognized, however, "it is at best speculative that these enhancements would apply." 1-ER-17. And in the world of what-ifs, it's equally

ii. Nothing in the district court's decision or in the government's arguments below casts doubt on the above analysis. The government, for example, placed its chief emphasis, not on the theoretical Guidelines range, but on the theoretical statutory maximums. Having stacked five statutory five-year prison terms atop five statutory $250,000 fines, it maintained that the "relevant criminal penalty" would be "$1.25 million and 25 years in prison." D. Ct. Doc. 94, at 17. Compared to those staggering maximums, the government posited, $437,557.00 in civil penalties is small change. *Accord Schwarzbaum*, 127 F.4th at 282-83 (committing same error).

That argument lacks merit. In fact, the Supreme Court roundly rejected it in *Bajakajian* itself. There, the government "stress[ed]" the very statutory maximums it invoked below: "a maximum fine of $250,000 plus five years' imprisonment for willfully violating the statutory reporting requirement." 524 U.S. at 339 n.14. But the Court looked to the Guidelines instead. The fact that Bajakajian's Guidelines range reflected "but a fraction of the penalties authorized" disposed of "any argument based solely on the statute." *Id.*

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likely that Saydam would have earned a two-level downward adjustment for acceptance of responsibility and another two-level reduction as a zero-point offender. U.S.S.G. §§ 3E1.1, 4C1.1.

This Court has held similarly. A statutory maximum might inform the culpability of the theoretical worst-case offender. But under the Excessive Fines Clause, courts don't theorize worst-case offenders. Rather, they examine the "individualized culpability" of the flesh-and-blood person before them. *Ferro*, 681 F.3d at 1107; *see also Thomas*, 124 F.4th at 1193. That is why Guidelines estimates hold "greater weight than the statutory maximum" in evaluating the gravity of a defendant's wrongdoing. *$100,348.00*, 354 F.3d at 1122. By design, they "take into account the specific culpability of the offender" in a way statutory maximums do not. *Id.*

Rightly, the district court rejected the government's resort to the "maximum criminal FBAR penalty." 1-ER-17. Yet in executing its own analysis, the court appears to have mistakenly believed that the Guidelines for criminal FBAR offenses were indistinguishable from those applicable to criminal tax evasion. 1-ER-17. Had Saydam been convicted of five counts of tax evasion, the court reasoned, his offense level for 2013, 2014, and 2015 would have been level 10 and for 2016 and 2017 level 6. 1-ER-17. The court then stacked the resulting maximum Guidelines sentences for a combined maximum of $139,000 in fines and four years' imprisonment. 1-ER-17–18. That total, the court

reasoned, reflected "a significantly higher level of culpability than was the case in *Bajakajian*." 1-ER-18.

In this, the district court erred both procedurally and conceptually. Procedurally, the court neglected to group its theorized tax-evasion counts. U.S.S.G. § 3D1.2(d). Had it done so, it would have settled on a group offense level of 12 (*id.* § 2T4.1(D)) and a far lower sentence (ten to sixteen months' imprisonment and a $5,500–$55,000 fine). *Id.* ch. 5, pt. A & § 5E1.2(c)(3).

More important is the court's conceptual error. As noted above, the point of the Guidelines calculation is to supply insight into "the specific level of culpability of the offender." *3814 NW Thurman St.*, 164 F.3d at 1197. Yet the district court's tax-evasion analysis is an apples-to-oranges comparison. Liability for FBAR violations has nothing to do with tax liability. *See* Mem. Supp. U.S. Mot. for Summ. J. at 10, *United States* v. *Simonelli*, No. 6-cv-653 (D. Conn. Jan. 29, 2008) (Doc. 20-2) (Simonelli Br.) ("The reporting requirement and the FBAR penalty . . . apply regardless of whether a person has any tax liability or even is required to file a federal income tax return."); 4-ER-589–590. Nor, for that matter, does the record suggest that Saydam had the scienter to support a criminal conviction for tax evasion. Quite the opposite. The district court found that he "did not engage in other criminal activity related

to his foreign accounts." 1-ER-16. And the government saw no basis to impose even a civil fraud penalty in his separate tax proceeding. 2-ER-25.

In short, how alternate-universe Tuncay Saydam might have been punished had he committed criminal tax evasion says nothing about real-life Tuncay Saydam's culpability for failing to file his FBAR forms. That someone who criminally violates a different statute might face substantial criminal punishment sheds no light on the question that matters: What is the gravity of Tuncay Saydam's wrongdoing?

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

The final main data point in evaluating an offense's gravity is "the extent of the harm caused by the offense." *Pimentel II*, 115 F.4th at 1067 (citation omitted). As this Court has framed it, the excessiveness analysis is "tethered to the nature and extent of the harm suffered by the government." *Id.* Here, the penalties imposed bear no correlation at all to any harms caused by Saydam's FBAR violations.

i. To start, the government set Saydam's FBAR penalties without regard to any "loss to the public fisc" or any other, non-monetary harm his reporting violations may have caused. *Bajakajian*, 524 U.S. at 339. Rather, the government applied a rote formula, one tethered, not to harm, but to the

amount of unreported money: "50 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination." Internal Revenue Manual 4.26.16.6.5.3(2) (Nov. 6, 2015); *see also id.* (instructing that the formula should be used "in most cases"); 1-ER-5 (explaining that the formula was used here). In this way, the government replicated yet another misstep rejected in *Bajakajian*. There, as here, the government maintained that keying its penalty to the amount of unreported funds was "perfectly calibrated to the seriousness of the defendant's conduct since the amount of the fine increases in direct proportion to the amount that is concealed." U.S. Br. at 30, *Bajakajian*, *supra*. Yet the Court's majority rejected that view root and branch. There is no such "inherent proportionality," the Court reasoned. 524 U.S. at 339. It was "impossible to conclude," for example, that the harm from Bajakajian's otherwise-lawful $357,144 going unreported was "anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs." *Id.* Where the violation being punished is "solely a reporting offense," the Court concluded, there is no "correlation" between the amount of unreported funds "and the harm that the Government would have suffered had the [offense] gone undetected." *Id.* at 337, 339; *cf. Pimentel II*,

115 F.4th at 1071 n.5 (noting that the analysis "assess[es] whether the fine was arbitrarily both imposed and increased without regard for the harm").

The penalty model here is flawed in the same way. The penalty for Bajakajian's Bank Secrecy Act violation was premised on the amount of unreported funds: 100 percent. The penalty for Saydam's Bank Secrecy Act violation was likewise premised on the amount of unreported funds: 50 percent of the highest aggregate balance of all unreported foreign financial accounts. With that shared premise, what was true in *Bajakajian* is true here: The penalty calculation "bears no articulable correlation to any injury suffered by the Government." *Bajakajian*, 524 U.S. at 340.

ii. The district court ascribed weight to the fact that Saydam was later found to have owed $29,006 in back taxes on his foreign accounts during the 2013–2017 period—a "significant amount," in the court's view. 1-ER-18. For two reasons, that figure does not rehabilitate the government's $437,000 in FBAR penalties.

First—and at risk of stating the obvious—Saydam's FBAR violations did not "cause[]" the tax deficiencies. *Pimentel II*, 115 F.4th at 1067 (citation omitted); *see also* Simonelli Br., *supra*, at 9 ("There is no underlying tax with which the FBAR penalty could be linked."). Nor were his FBAR violations

part of a broader scheme to underpay his taxes. *See* p. 27, *supra*. Rather, his tax deficiencies were due to a separate error entirely: his failure to submit accurate income-tax returns. For those separate violations, the government has already secured a separate judgment. That judgment makes the government whole for the unpaid taxes during the relevant period. And more: It imposes its own penalties—ones that, unlike the FBAR penalties, correspond to Saydam's asserted underpayments. 1-ER-6 (noting $12,990.60 in penalties for 2013–2017).

Second, even were Saydam's tax deficiencies to inform the gravity of his FBAR violations, that tax debt is wholly unmoored from the FBAR penalties imposed. And not surprisingly: It was not until nearly a half-decade after the FBAR penalties were assessed that the government even decided how much it thought Saydam owed in back taxes. *See* D. Ct. Doc. 96, at 2. As a result, any relationship between tax debt and FBAR penalties is necessarily arbitrary.

The numbers mismatch drives home the point: Saydam's FBAR penalties vastly exceed his tax deficiency—totaling more than fifteen times the tax debt for the same period. Even were that underpayment attributable to Saydam's FBAR violations, such a disconnect between harm and punishment would raise grave constitutional concerns. *Cf. State Farm Mut. Auto. Ins. Co.*

v. *Campbell*, 538 U.S. 408, 425 (2003) (noting that a punitive-damages award "of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety").[3] That is doubly so here, where Saydam's tax deficiencies were not due to his FBAR violations, where the government's FBAR penalties were untethered from those tax deficiencies, and where the government imposed a separate slate of penalties targeting those tax deficiencies directly.

iii. In recent years, one other court of appeals—the Eleventh Circuit—has entertained an excessive-fines challenge to a set of FBAR penalties. *Schwarzbaum*, 127 F.4th 259. That court's analysis suffered from several of the errors discussed above. *See, e.g.*, pp. 30, 37, *supra*. (In fairness to the Eleventh Circuit, the excessiveness issue filled all of three pages in the defendant's

[3] This Court has "decline[d] to apply the Supreme Court's test[]" developed in *State Farm* "outside the context of a jury's award of punitive damages." *Wakefield* v. *ViSalus, Inc.*, 51 F.4th 1109, 1122-23 (9th Cir. 2022). The Court has, however, looked to that precedent "by analogy" to evaluate statutory-damages awards where those damages reflect a mismatch with the underlying "violation and injury." *Id.* Meanwhile, the Supreme Court has remarked that its punitive-damages standard "focuse[s] on the same general criteria" as its excessive-fines standard, including "the relationship between the penalty and the harm to the victim caused by the defendant's actions." *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001); *see also United States ex rel. Grant* v. *Zorn*, 107 F.4th 782, 799 (8th Cir. 2024) (applying *State Farm* principles in excessive-fines challenge), *cert. denied*, 145 S. Ct. 2812 (2025).

appellate briefs.) Its conceptualization of harm was likewise flawed. Rather than evaluate any harm caused by the defendant himself, the court instead couched "harm" at an impossibly high level of generality. It relied exclusively on legislative-record comments about how foreign accounts *can* be used to further "organized criminal operations," "evade income taxes," violate securities laws, and launder "illegally obtained monies." *Schwarzbaum*, 127 F.4th at 283 (quoting H.R. Rep. No. 91-975, at 4397 (1970)). Yet those generalized harms had equal purchase in *Bajakajian*. After all, *Bajakajian* involved the Bank Secrecy Act too. And both the government and the dissent in *Bajakajian* cited the same House Report—and some of the same passages—the Eleventh Circuit invoked. *Compare id.*, *with* U.S. Br. at 25, *Bajakajian*, *supra*, *and Bajakajian*, 524 U.S. at 351 (Kennedy, J., dissenting). For *Bajakajian*'s majority, however, the "harm" that informed its analysis—like the rest of its standard—was defendant-specific, asking "how much harm [Bajakajian's] particular violation of the statute caused." Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 Minn. L. Rev. 880, 901 (2004).

Below, the government urged something like the Eleventh Circuit's approach. D. Ct. Doc. 94, at 17-18. But unlike the Eleventh Circuit, this Court

adheres to *Bajakajian*'s majority, not its dissent. "The culpability of the offender," this Court has long maintained, "should be examined specifically, rather than examining the gravity of the crime in the abstract." *$100,348.00*, 354 F.3d at 1123 (citation omitted). That principle applies equally when evaluating the harm caused. In excessive-fines challenges arising out of drug cases, for instance, the Court has admonished that judges "must *not* put 'full responsibility for the "war on drugs" on the shoulders of every individual claimant.'" *United States* v. *Real Prop. in El Dorado Cnty.*, 59 F.3d 974, 986 n.13 (9th Cir. 1995). Nor is this Court an outlier in this regard. *E.g.*, *State* v. *Timbs*, 169 N.E.3d 361, 373 (Ind. 2021); *Commonwealth* v. *1997 Chevrolet*, 160 A.3d 153, 190 (Pa. 2017); *cf. Paroline* v. *United States*, 572 U.S. 434, 456 (2014).

In short, the throughline for the excessiveness analysis is simple: Just as Hosep Bajakajian was held to account for his offense alone, so, too, for Tuncay Saydam. And for all the reasons detailed above, Saydam's culpability was relatively minor, particularly as compared to "other potential violators of the reporting provision." *Bajakajian*, 524 U.S. at 339 n.14.

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

a. On the other side of the balance, Saydam's $437,564.00 in FBAR penalties is an extraordinarily harsh sanction. That figure is more than forty-

six times greater than the maximum fine the Guidelines would recommend for a qualitatively worse violator—a criminally deliberate one. If Saydam's tax debt factors into the analysis at all (*but see* pp. 42-43, *supra*), the FBAR penalties exceed that tax debt by a factor of more than fifteen. And they exceed by a factor of more than thirty-three the penalty Congress set for the actual tax deficiency attributable to Saydam's foreign accounts during the same period. *See* p. 43, *supra*.

The Excessive Fines Clause was built for cases like this. This Court, for example, has held that a forfeiture amount between three and twenty times the maximum Guidelines fine would be excessive. *$100,348.00*, 354 F.3d at 1123. In another case, the Court rejected a forfeiture totaling "more than 40 times the maximum fine permitted under the Guidelines." *3814 Thurman Street*, 164 F.3d at 1198. And then there's *Bajakajian*, a Bank Secrecy Act case in the same mold as this one. Just as Bajakajian's $357,000 punishment was grossly disproportional, so, too, is Tuncay Saydam's $437,000 punishment.

b. That Saydam's foreign accounts embodied his nest egg reinforces the fine's severity. While the Supreme Court has yet to decide whether "wealth or income are relevant to the proportionality determination," *Bajakajian*, 524 U.S. at 340 n.15, it has strongly suggested that they are, *see*

Timbs, 586 U.S. at 151-52. Indeed, this principle predates the Excessive Fines Clause itself, with Blackstone remarking that "what is ruin to one man's fortune, may be a matter of indifference to another." 4 *Commentaries* *371. That the government's $437,000 penalty undisputedly consumed much of Saydam's savings thus adds an exclamation mark to its magnitude. *E.g.*, 4-ER-395 ("Q. Was the money in your Swiss bank account your savings? A. Yes."); 4-ER-424 ("Those amounts were my life savings, miss. And I was born in a poor family in Turkey and lived a very frugal life. So this $500,000 were my life savings.").[4]

The district court appears to have labored under the misimpression that this Court's precedent forecloses "consider[ing] 'the hardship to the defendant'" in evaluating a pecuniary fine's proportionality. 1-ER-20 n.10 (quoting *Real Prop. in El Dorado Cnty.*, 59 F.3d at 985); *see also* 1-ER-20 n.10 ("*El Dorado* does not apply here."). And it is true that one member of this Court has read Circuit precedent as "suggesting that financial hardship is a relevant factor *only* in *in rem* forfeiture proceedings." *United States* v. *Peralta-Vega*,

[4] In its complaint, the government alleged that the sums in Saydam's main Turkish account (DenizBank 1441) totaled $810,276, $842,304, and $671,570 in 2013, 2014, and 2015 respectively. 3-ER-344. But the evidence at trial confirmed that the account's balances in fact totaled almost exactly what Saydam recollected: low $500s in 2013, mid-$500s in 2014, and a drop by half in 2015 due to his investment manager's misconduct. 5-ER-657 (letter from DenizBank to IRS).

No. 22-10131, 2024 WL 5165719, at *3 (9th Cir. Dec. 19, 2024) (Collins, J., concurring in the judgment) (citing *Pimentel II*, 115 F.4th at 1072). Contrary to the district court's view, however, this Court does not in fact appear to have addressed the question. In *Pimentel I*, the panel characterized the issue as unresolved ("a novel claim in this circuit") and "open" at the Supreme Court. 974 F.3d at 925. The panel then stated its intent to follow suit. *Id.* ("We, too, decline Pimentel's invitation to affirmatively incorporate a means-testing requirement . . . ."). In *Pimentel II*, the second panel then did the same, nearly verbatim. 115 F.4th at 1072 ("We, too, once again decline to incorporate a means-testing requirement . . . ."). Opinions "we, too-ing" an open question can hardly be said to have resolved it.

On the merits, moreover, it is entirely "proper," in evaluating a fine's severity, to consider the defendant's financial circumstances. *1997 Chevrolet*, 160 A.3d at 188; *see also*, *e.g.*, *City of Seattle* v. *Long*, 493 P.3d 94, 111-12 (Wash. 2021). "To conduct a proportionality analysis at all," after all, courts must "consider the punishment's magnitude." *Timbs*, 134 N.E.3d at 36. And "the owner's economic means—relative to the property's value—is an appropriate consideration for determining that magnitude." *Id.*; *cf. 1,679 Firearms*, 659 F. App'x at 426 (noting that the degree to which a fine "sting[s]" may

depend on "the wealth of the individual to be fined"). This Court has recognized as much in the context of civil and criminal forfeitures. *E.g.*, *Peralta-Vega*, 2024 WL 5165719, at *1; *Real Prop. in El Dorado Cnty.*, 59 F.3d at 985. And there is no textual, historical, or logical reason why the analysis should differ when a fine happens to be "in cash" versus "in kind." *Austin* v. *United States*, 509 U.S. 602, 609-10 (1993). *Contra Pimentel II*, 115 F.4th at 1072-73 (positing that financial circumstances may be relevant to "*in rem* forfeitures" but not "civil *in personam* fines"). While a fine certainly can be excessive regardless of the payor's circumstances, *1,679 Firearms*, 659 F. App'x at 426, the fact that it demolishes a defendant's life's savings can only aggravate its severity.[5]

To be clear, Saydam's penalties contravene the Eighth Amendment either way. That they amounted to nearly all of his nest egg spotlights their severity. But even without that consideration, the result is the same: The totality

[5] The district court distinguished the hardship a fine might work on a defendant's financial circumstances (which it believed was foreclosed by Circuit precedent) from the question whether a fine would be "so onerous as to deprive a defendant of his or her future ability to earn a living." 1-ER-20 & n.10 (citation omitted). On the second, separate question, the court concluded that the FBAR penalties would not deprive Saydam of his "future livelihood." 1-ER-20. Even if the penalties might not deprive Saydam (now eighty-eight) of his "future ability to earn a living" (1-ER-20), however, the fact that the penalties would consume much of his life savings fortifies their severity.

of the circumstances confirms that Saydam's $437,000 in FBAR penalties is "grossly disproportional to the gravity of his offense." *Bajakajian*, 524 U.S. at 339-40 & n.15 (so holding, even though Bajakajian "d[id] not argue that his wealth or income are relevant to the proportionality determination").

C. The district court erred in the deference it afforded a fine calculated by an executive-branch agency.

Beyond misconstruing specific "*Bajakajian* factors," the district court's analysis was also shot through with a broader methodological error: In that court's view, it owed "substantial deference" to the fines imposed. 1-ER-15 (citation omitted); *see also, e.g.*, 1-ER-22. Of course, even when a statute *mandates* a specific penalty, this Court has cautioned against "reflexive deference" to legislative judgments. *Pimentel II*, 115 F.4th at 1069; *see also Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318 (11th Cir. 2021) (Newsom, J., joined by Jordan, J., concurring) (questioning Eleventh Circuit's "hyper-deferential posture toward Congress's judgments about excessiveness"). But here—and unlike in *Bajakajian*—Saydam's punishment was *not* mandated by statute. Which leaves it unclear who exactly the district court thought deserving of deference.

Certainly it wasn't Congress. Congress exercised no judgment at all about whether a defendant in Tuncay Saydam's shoes merits a $437,000

penalty. As with most punishments in the U.S. Code, Congress simply set the statutory maximums—with an eye toward the worst-case offender—and left it at that. For all Congress cares, Saydam could have been fined $437,000 or $4.37 or $0.00. Internal Revenue Manual 4.26.16.6.7(1) (Nov. 6, 2015) ("The examiner may determine that the facts and circumstances of a particular case do not justify asserting a penalty."). Which highlights an important point: The penalty calculated for Saydam reflects the judgment not of Congress, but of the Executive Branch. And whatever might be said of the deference owed to a legislative body, it's not at all clear why an Article III court owes any deference to an executive agency's views on whether a particular fine is unconstitutionally excessive. That abdication would be ill-supported at the best of times—but especially so where that same agency insists full-throatedly that its fines are "not subject to the . . . Excessive Fines Clause" to begin with. D. Ct. Doc. 94, at 13.

Similarly, the government contended below that "[w]hen the IRS assesses willful FBAR penalties less than the statutory maximum, '[t]he presumption of constitutionality is particularly strong.'" *Id.* at 19 (quoting *Schwarzbaum*, 127 F.4th at 284). The district court seems to have credited that view, 1-ER-21, but it is unsound for much the same reasons detailed

above. Statutorily, the maximum FBAR penalties are astronomical—among "the harshest civil penalties the government may impose." Nat'l Taxpayer Advocate, *2025 Purple Book* at 83 (Dec. 31, 2024), https://tinyurl.com/5bdr4hxz; *Schwarzbaum*, 127 F.4th at 272-73 ("We are aware of no comparable civil penalty in any other statute[.]"). But just as maximum criminal penalties are "designed as an outer limit on the punishment available," *von Hofe* v. *United States*, 492 F.3d 175, 187 (2d Cir. 2007), so are maximum civil penalties. Neither "necessarily reflect[s] an individual offender's culpability or the gravity of the actual offense." *See id.*

The point follows as much from common sense as from precedent. That the FBAR statute allows an even harsher penalty than Saydam received might be instructive about the punishment appropriate for the theoretical worst-case offender. *Cf. Bajakajian*, 524 U.S. at 339 n.14. But it says nothing about the gravity of Saydam's actual wrongdoing. And it says nothing about the severity of the fine imposed on him. While this Court has at times commented on the maximum penalties available, *e.g.*, *United States ex rel. Shutt* v. *Cmty. Home & Health Care Servs., Inc.*, 305 F. App'x 358, 361 (9th Cir. 2008), the fact that Congress authorized a stratospheric theoretical maximum has little bearing on whether the penalty actually imposed is proportioned to the wrongs

actually committed. *Cf. United States* v. *Mackby*, 339 F.3d 1013, 1017 (9th Cir. 2003) ("The possible penalty available under the FCA is instructive but not dispositive of the constitutional question."). Certainly it does not support the sort of deference the government invoked below. An Excessive Fines Clause that lets an executive agency both set the fine and cloak it with a "presumption of constitutionality" would be unrecognizable to those who ratified it.

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.

As it has in many other cases, the government argued below that the Excessive Fines Clause does not apply at all to civil FBAR penalties. The district court rightly rejected that argument. This Court should likewise confront and reject it.

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

1. The Excessive Fines Clause protects against exorbitant fines not just in criminal court, but in civil-enforcement actions also. Unlike other parts of the Constitution, some of which "are expressly limited to criminal cases," the "text of the Eighth Amendment includes no similar limitation." *Austin*, 509 U.S. at 607-08. Whether an economic sanction is subject to the Excessive

Fines Clause thus turns not on whether it is "civil or criminal," but on whether it "serv[es] in part to punish." *Id.* at 610.

The Supreme Court's decision in *Austin*—a case involving the federal civil-forfeiture statute—shows these principles in practice. Civil forfeitures (as the name suggests) take place in civil actions, not criminal. But as the Court held in *Austin*, several features confirmed that the forfeiture statute serves "at least in part as punishment." *Id.* at 610-11. To start, the statute "expressly provide[d] an 'innocent owner' defense," linking forfeitures at least in part to "the culpability of the owner." *Id.* at 619, 621-22. Then there was the legislative history, which characterized forfeitures as "a powerful deterrent." *Id.* at 620 (citation omitted). In addition, the conduct giving rise to forfeiture was elsewhere punishable criminally. *Id.* And by design, the forfeitures "ha[d] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law"—meaning they could not be classified as purely compensatory (or "remedial"). *Id.* at 621 (citation omitted). Given these characteristics, the Court held that the forfeiture statute served at least partly "to deter and to punish," making it "subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.* at 622.

Applying *Austin* faithfully, courts nationwide have held that the Excessive Fines Clause applies to civil monetary sanctions that are at least partly punitive. This Court, for example, has held that civil penalties imposed under the False Claims Act are fines "subject to analysis under the Excessive Fines Clause." *United States* v. *Mackby*, 261 F.3d 821, 830 (9th Cir. 2001) (*Mackby I*). The Court has held the same for across-the-board "victim's compensation" deductions from inmate funds. *Wright* v. *Riveland*, 219 F.3d 905, 915 (9th Cir. 2000). And for municipal parking fines. *Pimentel I*, 974 F.3d at 921-22.

2. The above principles apply straightforwardly here. As the government has declared far and wide, civil FBAR penalties serve, at least in part, to "promote[] retribution and deterrence." U.S. Mem. Supp. Summ. J. at 16, *United States* v. *Hendler*, No. 23-cv-3280 (S.D.N.Y. Jan. 19, 2024) (Doc. 27); *see also*, *e.g.*, U.S. Br. at 37, *Bittner* v. *United States*, 598 U.S. 85 (2023) (No. 21-1195). Like retribution, "[d]eterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. And as Justice Gorsuch noted three years ago—in an FBAR case—"a fine that serves even '*in part* to punish' is subject to analysis under the Excessive Fines Clause." *Toth* v. *United States*, 143 S. Ct. 552, 553 (2023) (opinion dissenting from the denial of certiorari) (quoting *Austin*, 509 U.S. at 610). The syllogism is thus an easy one.

The Excessive Fines Clause applies to monetary penalties that serve at least in part "to deter and to punish." *Austin*, 509 U.S. at 622. FBAR penalties serve at least in part to deter and to punish. So the Excessive Fines Clause applies.

The FBAR statute's structure reinforces this conclusion. The maximum available penalties are tiered by reference to the violator's willfulness, making the penalties "look more like punishment, not less." *Id.* at 619; *see also Ferro*, 681 F.3d at 1114. And again as in *Austin*, FBAR penalties bear "absolutely no correlation" to any harm the government suffers. *Austin*, 509 U.S. at 621 (citation omitted); *see also Mackby I*, 261 F.3d at 830. To borrow the government's words, FBAR penalties are "imposed regardless of whether there is any actual pecuniary loss" to the Treasury. Simonelli Br., *supra*, at 8. The statute's design thus confirms what the government's concessions nationwide make clear: "[T]he FBAR penalty is a fine subject to the Eighth Amendment's Excessive Fines Clause." *Schwarzbaum*, 127 F.4th at 274.

B. The contrary arguments lack merit.

Below, the government offered several arguments for exempting civil FBAR penalties from Eighth Amendment scrutiny. Each is without merit.

1. Foremost, the government maintained that FBAR penalties are "remedial sanctions" and thus "not subject to the Excessive Fines Clause." D. Ct. Doc. 94, at 12. For two reasons, that is incorrect.

First, the government misperceived the framework. A monetary payment might not be subject to the Excessive Fines Clause if it is one-hundred percent compensatory and zero percent punitive. If it serves a mix of remedial and punitive ends in combination, however, the Clause applies. *Tyler*, 598 U.S. at 648 (Gorsuch, J., joined by Jackson, J., concurring) (discussing *Austin*, 509 U.S. at 610). Nationwide, the government has long acknowledged that FBAR penalties serve punitive ends, at least in part. *See* p. 56, *supra*. That should be the end of the matter. From the government's own pen, the penalties call for Eighth Amendment review. *Thomas*, 124 F.4th at 1193.

Second, calling FBAR penalties "remedial"—even if only in part—is unsound in its own right. For excessive-fines cases, a purely "'[r]emedial action' is one 'brought to obtain compensation or indemnity.'" *Bajakajian*, 524 U.S. at 329; *see also Wright*, 219 F.3d at 915. Actions to impose FBAR penalties are nothing of the sort. As the government has elsewhere admitted, "[t]he FBAR penalty does not compensate the government for actual pecuniary loss."

Simonelli Br., *supra*, at 8. That leaves no convincing basis to call FBAR penalties "remedial," even partially.

Bajakajian again illustrates the point. As here, the government in *Bajakajian* couched its Bank Secrecy Act forfeiture as "serv[ing] important remedial purposes." 524 U.S. at 329 (citation omitted). As here, the government contended that the Excessive Fines Clause did not apply. It even cited the same legislative history it invoked below. *Compare, e.g.*, U.S. Br. at 30, *Bajakajian*, *supra*, *with* D. Ct. Doc. 94, at 11-12. Yet the Supreme Court rejected that view out of hand. The statute addressed "a loss of information"—not money—which "would not be remedied" by confiscating the unreported funds. 524 U.S. at 329. It deterred reporting violations—a punitive function, not a remedial one—and served "no remedial purpose" at all. *Id.* at 332. For good measure, the Court added, "[e]ven if the Government were correct in claiming that the forfeiture . . . is remedial in some way," that feature still would not immunize it from Eighth Amendment review. *Id.* at 329 n.4. It "would still be punitive in part." *Id.* That reasoning translates perfectly here.

2. Below, the government suggested that FBAR penalties are "remedial" under the Excessive Fines Clause because they might be "remedial" under the Double Jeopardy Clause. D. Ct. Doc. 94, at 11 ("In *Helvering* v.

Mitchell, the Supreme Court held that tax penalties are remedial sanctions . . . .”). Yet mid-century double-jeopardy decisions used the term “remedial” in a way that differs from how it is used in modern excessive-fines precedent. In the double-jeopardy context, “remedial” is a “catchall label” for the universe of non-criminal sanctions. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1829 (1992). That shorthand may be useful in double-jeopardy cases, which distinguish between punishments that are and are not criminal. But the Excessive Fines Clause is different: It “cuts across the division between the civil and the criminal law.” *Austin*, 509 U.S. at 610 (citation omitted). Many penalties thus are “remedial” (i.e., civil) enough to fall outside the Fifth Amendment while still being punitive enough to implicate the Eighth. *United States* v. *Ursery*, 518 U.S. 267, 287 (1996); *United States* v. *$273,969.04*, 164 F.3d 462, 466 (9th Cir. 1999) (“[A] civil sanction that does not implicate the Double Jeopardy Clause may still be punitive for purposes of the Excessive Fines Clause.”).

3. Lastly, the government observed that this Court in the 1990s held that “civil tax penalties” do not implicate the Excessive Fines Clause. D. Ct. Doc. 94, at 11. Tax penalties in particular, the Court reasoned, serve the “primarily remedial” purpose of “protect[ing] the revenue and . . . reimburs[ing]

the government for the expense of investigating fraud." *Louis* v. *Comm'r*, 170 F.3d 1232, 1236 (9th Cir. 1999); *Little* v. *Comm'r*, 106 F.3d 1445, 1454 (9th Cir. 1997). But whatever might be said of tax penalties, the government has long insisted that FBAR penalties are no such thing. "The fact that the assessment and collection of the FBAR penalty was delegated to the IRS," the government maintains, "does not transform this civil penalty into a tax penalty." Simonelli Br., *supra*, at 10; *see also* U.S. Br. at 6, *Bittner* v. *United States*, 598 U.S. 85 (2023) (No. 21-1195). For unlike with tax penalties, "[t]he purpose of the FBAR penalty is not tax collection." Simonelli Br., *supra*, at 10. Nor does the FBAR penalty "compensate the government for actual pecuniary loss." *Id.* at 8; *see also* 1-ER-14. There is thus no basis to extend the Court's tax-penalty precedents to civil penalties writ large.

That is all the more true given the serious questions those precedents raise. In one of the two tax-penalty cases, for example, this Court immunized the penalty from excessive-fines review because it was "primarily" remedial. *Louis*, 170 F.3d at 1236. But as the Court has since recognized, "even if . . . penalties serve *some* remedial purpose, the Supreme Court has rejected . . . the argument that such penalties are not punitive." *Thomas*, 124 F.4th at 1193. In the other case, the Court suggested that tax penalties are not

punitive because they "deter noncompliance." *Little*, 106 F.3d at 1454. "Deterrence, however, has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. And in both of the cases, the Court committed one of the missteps noted above: looking to precedent holding that tax penalties are not subject to the Fifth Amendment to conclude that they are likewise not subject to the Eighth. *Little*, 106 F.3d at 1454-55 (relying on *Helvering*, *supra*); *see also Louis*, 170 F.3d at 1236. In short, to the extent *Louis* and *Little* are still good law, there is no ground for extending them beyond their compass. If the Excessive Fines Clause applies to parking tickets, *Pimentel I*, 974 F.3d at 921-22, it surely applies here.

C. The Court should address head-on whether FBAR penalties are fines under the Excessive Fines Clause.

In other cases, the government has invited courts to bypass the first-order question whether FBAR penalties are "fines" and affirm on the alternative basis that, even if fines, the particular penalties at issue are not excessive. *E.g.*, U.S. Br. at 41-42, *United States* v. *Rund*, No. 24-1958 (4th Cir. Mar. 17, 2025) (Doc. 28). For all the case-specific reasons detailed above, that approach is unavailable here: Saydam's penalties *are* in fact excessive. More broadly, there are important reasons to "perform the first part of a multipart

constitutional analysis first," *McCullen* v. *Coakley*, 573 U.S. 464, 478 (2014), and address head-on whether the Excessive Fines Clause applies.

Foremost, there is a circuit split on the question. For all the flaws in its excessiveness analysis (*see* pp. 44-46, *supra*), the Eleventh Circuit has correctly held that "the FBAR penalty is a fine subject to the Eighth Amendment's Excessive Fines Clause." *Schwarzbaum*, 127 F.4th at 274. The First Circuit has held the opposite, based on many of the errors addressed above. *See Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from the denial of certiorari). As the split illustrates, "this area of the law is in flux and guidance would be beneficial." *Earle* v. *Shreves*, 990 F.3d 774, 778 (4th Cir. 2021). That is especially true here, where the second-order question—is the penalty too punitive?—is logically subsequent to the first-order question: Is the penalty punitive at all?

Nationwide, moreover, the government continues to exploit FBAR penalties' uncertain status under the Eighth Amendment. When strategically beneficial, the government embraces the obvious: that FBAR penalties are punitive, not compensatory. Simonelli Br., *supra*, at 7-10 (insisting that FBAR penalties are not compensatory and thus not dischargeable in bankruptcy). Yet when it comes to constitutional limits, the government doggedly insists that

those same penalties are remedial, not punitive. And more besides. The government demands deference from Article III courts on whether its FBAR penalties violate the Excessive Fines Clause. Yet it calculates those penalties with no regard for the Clause—and with a formula that defies excessive-fines precedent. *See* pp. 40-42, *supra*.

In short, FBAR cases spotlight *why* the Excessive Fines Clause is so "fundamental to our scheme of ordered liberty." *Timbs*, 586 U.S. at 154 (citation omitted). The government's position in this case—and many others—subverts a Bill of Rights protection that is "deeply rooted in this Nation's history and tradition." *Id.* (citation omitted). And its vision for the Excessive Fines Clause promises injustice not just for the wealthy, but for people of more modest means as well. This Court should hold unequivocally that FBAR penalties are subject to the Excessive Fines Clause and that the penalties imposed on Tuncay Saydam violate it.

CONCLUSION

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

Dated: May 15, 2026.

Respectfully submitted,

s/ Samuel B. Gedge

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STATEMENT OF RELATED CASES

In accordance with Circuit Rule 28-2.6, appellant states that one other case pending before this Court may present (among several other issues) an excessive-fines challenge to an FBAR penalty and thus could potentially be deemed to raise a legal issue related to the one here. *United States* v. *Leeds*, No. 26-1451 (9th Cir.).

s/ Samuel B. Gedge
Samuel B. Gedge

Counsel for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 26-503

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