No. 22-177

In the Supreme Court of the United States

MONICA TOTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 31 U.S.C. 5314 and its implementing regulations, a U.S. person who maintains an account with a foreign financial agency is required to report specified information about the account to the federal government each year. The Secretary of the Treasury "may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(A). For a willful violation of Section 5314 involving a failure to report the existence of a foreign financial account, the maximum amount of the penalty is $100,000 or 50% of the account balance at the time of the violation, whichever is greater. 31 U.S.C. 5321(a)(5)(C)(i) and (D)(ii). The question presented is as follows:

Whether the court of appeals correctly determined that a civil penalty imposed by the Secretary under 31 U.S.C. 5321(a)(5) for petitioner's willful failure to report her Swiss bank account did not constitute punishment for an offense and therefore did not implicate the Eighth Amendment's prohibition on "excessive fines," U.S. Const. Amend. VIII.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations, and rules:

Statutes, regulations, and rules—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 33 F.4th 1. The opinion of the district court (Pet. App. 37a-58a) is not published in the Federal Supplement but is available at 2020 WL 5549111.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2022. On July 15, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 29, 2022, and the petition was filed on August 26, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, after "extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing

criminal or civil liability," *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 26 (1974), Congress enacted what is commonly known as the Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114. The Act was designed to reduce financial crime, tax evasion, and other violations of U.S. law by requiring "the maintenance of records, and the making of certain reports, which 'have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.'" *California Bankers Ass'n*, 416 U.S. at 26 (citations omitted).

This case concerns the Bank Secrecy Act's reporting requirements for U.S. persons who have financial interests in foreign bank accounts. In Title II of the Act, as amended, Congress directed the Secretary of the Treasury to promulgate regulations imposing record-keeping 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); see Bank Secrecy Act § 241(a), 84 Stat. 1124. Congress specified that the records and reports "shall contain" certain categories of information "in the way and to the extent the Secretary prescribes." 31 U.S.C. 5314(a).

The Secretary's regulations require each "United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country" to "report such relationship * * * for each year in which such relationship exists." 31 C.F.R. 1010.350(a).[1] The reporting requirements apply when a U.S. person has a financial interest

[1] The relevant regulations were renumbered, effective March 1, 2011, as part of a broader reorganization. See 75 Fed. Reg. 65,806, 65,806 (Oct. 26, 2010). The foreign-account reporting requirements were previously found at 31 C.F.R. Part 103, Subpart B (2010).

in or signatory or other authority over one or more foreign financial accounts, see 31 C.F.R. 1010.350(a), (e), and (f), with an aggregate balance that "exceed[ed] $10,000 * * * during the previous calendar year," 31 C.F.R. 1010.306(c). Cf. 31 C.F.R. 103.24(a), 103.27(c) (2010) (analogous requirements in prior regulations). The Secretary's regulations further require each U.S. person who is obligated to report a foreign financial account to "provide such information as shall be specified in a reporting form" that has been prescribed by the Secretary under Section 5314. 31 C.F.R. 1010.350(a).

During the period relevant to this case (2005-2009), the prescribed form was Treasury Department Form 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), which was to be filed with the Internal Revenue Service (IRS) by June 30 each year to report accounts maintained in the prior calendar year. Pet. App. 3a; see 31 C.F.R. 1010.306(c), 1010.350(a). The IRS exercises the Secretary's delegated authority to enforce Section 5314 and its implementing regulations. 31 C.F.R. 1010.810(g).

Congress authorized the Secretary to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. 5321(a)(5)(A). In general, the "amount of any civil penalty" imposed under Section 5321(a)(5)(A) "shall not exceed $10,000." 31 U.S.C. 5321(a)(5)(B)(i). The statute also provides a reasonable-cause exception, under which the Secretary may not impose a penalty "with respect to any violation if * * * such violation was due to reasonable cause" and "the amount of the transaction or the balance in the account * * * was properly reported." 31 U.S.C. 5321(a)(5)(B)(ii). If the violation is willful, the maximum penalty increases from $10,000

to the greater of either $100,000 or 50% of "the amount determined under subparagraph (D)." 31 U.S.C. 5321(a)(5)(C)(i). Subparagraph (D) in turn states that, "in the case of a violation involving a failure to report the existence of an account," the amount determined under that provision is "the balance in the account at the time of the violation." 31 U.S.C. 5321(a)(5)(D)(ii). The reasonable-cause exception also does not apply to any willful violation. 31 U.S.C. 5321(a)(5)(C)(ii).[2]

The Bank Secrecy Act separately authorizes criminal penalties for certain willful violations of the Act and its implementing regulations. 31 U.S.C. 5322(a) and (b). For a criminal violation of the foreign-account reporting requirements, the violator "shall be fined not more than $250,000, or imprisoned for not more than five years, or both." 31 U.S.C. 5322(a).

2. Petitioner is a U.S. resident and citizen who, since 1999, has maintained a foreign bank account with UBS AG in Zurich, Switzerland. Pet. App. 3a, 38a; C.A. App. 3083. From 1999 to 2009, the account held the equivalent of millions of U.S. dollars and therefore well exceeded the $10,000 threshold for triggering a reporting obligation under Section 5314. C.A. App. 3022, 3024. Petitioner never filed an FBAR to report the account during that period. Pet. App. 3a; C.A. App. 3024. Although U.S. citizens are generally required to pay U.S. taxes on income they earn outside the United States, see 26 C.F.R. 1.1-1(b), petitioner also did not report any income that she earned in her Swiss account. C.A. App. 3022.

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[2] For violations occurring after November 2, 2015, the maximum civil penalty amounts have been periodically adjusted to account for inflation. See 87 Fed. Reg. 3433, 3433-3434 & n.1 (Jan. 24, 2022).

Petitioner maintains that the funds in the account derived from a gift from her father. Pet. 7. When the account was opened, her father advised her not to tell anyone about it. Pet. App. 38a. Consistent with that advice, petitioner actively took steps to conceal her ownership of the account. For example, in 2004 UBS informed petitioner that, as a result of changes in Swiss law, the bank would no longer send funds from her account in Switzerland to an account she held in the United States without identifying her as the sender. *Id.* at 39a; see C.A. App. 1368-1370. Petitioner directed UBS to stop making such transfers; instead, she directed the bank to begin transferring funds from her Swiss account—sometimes as much as $95,000 at a time—to accounts held by her relatives in South America, who then made corresponding transfers to her in the United States. Gov't C.A. Br. 5; see Pet. App. 39a.

In 2008, petitioner filed an individual income tax return on IRS Form 1040 for the 2007 tax year. Pet. App. 40a; see Gov't C.A. Br. 6. Petitioner personally prepared the return. C.A. App. 3022. Schedule B of the form stated: "At any time during 2007, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See page B-2 for exceptions and filing requirements for Form TD F 90-22.1," followed by boxes for checking "Yes" or "No." IRS, *Schedules A&B (Form 1040)*, at 2, line 7a (2007) (emphasis omitted), perma.cc/ZH82-ZEPR. Petitioner left the answer to that question blank. Pet. App. 40a. Petitioner similarly failed to disclose the existence of her Swiss account on any of the other annual Form 1040s that she filed before 2010. C.A. App. 3024.

In 2009, the IRS requested information from UBS regarding certain kinds of accounts as part of a broader investigation into the Swiss bank's role in helping U.S. taxpayers evade U.S. taxes. Gov't C.A. Br. 5; see C.A. App. 1362-1363. In March 2010, UBS informed petitioner that her account appeared to be among the covered accounts and that, upon confirmation of that assessment, Swiss authorities would make information and records regarding her account available to the IRS. C.A. App. 3101. Petitioner objected, telling the bank in a letter that "[t]he main reason why my father and I chose your organization is the contemplation that you would adhere to the privacy laws of your country." *Id.* at 1333. Notwithstanding her objection, information identifying her as the owner of the account was subsequently provided to U.S. authorities. *Id.* at 3022.

In November 2010, petitioner filed her first FBAR with the IRS to report her Swiss account. Pet. App. 3a; see C.A. App. 433. The form was incomplete. It did not identify the calendar year for which the report was being made, and it did not disclose the maximum value of the account for that year. See C.A. App. 433. In May 2011, petitioner filed amended income tax returns for the years 2007 to 2009 to report the income she had earned in her Swiss account. *Id.* at 3022. Although she reported the income she had earned in the account on her amended returns, petitioner still failed to answer "Yes" to the question on Schedule B regarding the existence the account itself. *Id.* at 3023.

During a subsequent examination, petitioner provided an IRS revenue agent with copies of FBARs reporting her Swiss account for calendar years 2005 to 2009. C.A. App. 3022. Petitioner claimed that she had mailed those forms, which were dated November 30,

2010, to the IRS address listed on the forms, but that the forms were "routed to another government agency" (a Medicare contractor). *Id.* at 3024. The IRS has no record of ever receiving the additional FBARs that petitioner claims to have mailed, and she could not substantiate her claim of having mailed them to the correct address—or to any other government agency. *Ibid.* Nonetheless, the delinquent FBARs that she supplied to the agent during the examination were added to her files. Gov't C.A. Br. 7; cf. Pet. App. 3a & n.1.

In 2012, the IRS proposed to assess a civil penalty against petitioner for willfully failing to report her Swiss account for the 2007 calendar year. Pet. App. 40a. The IRS proposed to assess the maximum penalty amount of 50% of the account balance at the time of the violation, or $2,173,703. C.A. App. 3020. In an accompanying written explanation, the agency stated that it had determined that petitioner's violation was willful based on a number of factors, including because she admitted during the examination that she was aware of the foreign-account question on Schedule B of Form 1040 and she deliberately declined to answer that question because "she did not want anyone to know about the account," based on her father's advice to keep it secret. *Id.* at 3025. The agency also concluded that the "only reason" that petitioner filed an (incomplete) FBAR in 2010 to report the account was the notice from UBS, described above, about turning over account-identifying information to U.S. authorities. *Id.* at 3026. Although petitioner also failed to report her account as required in other years within the six-year limitations period for penalty assessments, see 31 U.S.C. 5321(b)(1), the IRS proposed to assess a penalty only for her 2007 violation. The agency selected that year because it was the year

within the limitations period in which petitioner's failure to report income from her Swiss account caused the largest inaccuracy in her income tax filings. C.A. App. 3026. The IRS proceeded to assess the penalty, as proposed, in September 2013. Pet. App. 40a-41a.

3. In 2015, the government brought this civil action in the District of Massachusetts to recover the penalty assessed against petitioner, along with associated late-payment penalties and interest. Pet. App. 4a; see 31 U.S.C. 5321(b)(2)(A). Petitioner initially represented herself in the proceedings, and the district court entered a default judgment against her after she failed to answer the complaint. Pet. App. 4a. The court later granted her request to set aside the default and permitted her to file a motion to dismiss, which the court denied. *Id.* at 5a; see 2017 WL 1703936, at *1. Petitioner then filed an answer to the complaint, and the case proceeded to discovery. Pet. App. 5a.

Petitioner repeatedly failed to comply with her discovery obligations. Pet. App. 5a. As an initial sanction, the district court ordered her to respond to the government's discovery requests and forbade her from raising any objections other than claims of privilege. *Id.* at 6a. The court also "expressly warned [her] that [it] would consider additional strong sanctions against her if she failed to comply with" the court's orders, including potentially "accepting certain facts as established." 2018 WL 4963172, at *2. Petitioner violated the court's orders in multiple respects. *Ibid.* After another hearing at which the court admonished petitioner to comply with her discovery obligations (which she did not), the court ultimately imposed further sanctions. *Id.* at *2-*6. The court ordered that certain facts be "taken as established for purposes of this litigation," including that petitioner

was obligated to report her Swiss account for calendar year 2007 and that her failure to do so was "willful[]." *Id.* at *6. Petitioner then retained counsel and moved to vacate the sanctions. 2019 WL 7039627, at *1. The court denied her motion. *Id.* at *8.

In 2020, the district court granted the government's motion for summary judgment and entered judgment against petitioner for the assessed civil penalty and associated late-payment penalties and interest. Pet. App. 37a-58a. The court's prior order established the essential facts of petitioner's willful violation, *id.* at 43a, but the court nonetheless addressed petitioner's "attempts to relitigate this issue," *id.* at 48a. The court explained that petitioner's "willfulness in failing to file a 2007 FBAR" could be inferred from the "deliberate steps" she took "to maintain the secrecy" of the account. *Id.* at 49a; see *id.* at 49a-50a. The court also rejected petitioner's challenge to the penalty under the Eighth Amendment's prohibition on "excessive fines," U.S. Const. Amend. VIII. The court found that "the Eighth Amendment does not apply to civil penalties" assessed under Section 5321(a)(5) because such penalties are "remedial, rather than punitive." Pet. App. 53a. The court also determined that, "[e]ven if [it] were to find the Eighth Amendment applicable here," the assessed penalty was not excessive. *Id.* at 54a. The court emphasized that the IRS had exercised its discretion to impose a civil penalty for only one of petitioner's violations, and that the harm caused by that violation—in the form of lost tax revenue and "the resources the Government expended in investigating [her] conduct"—was "significant and precisely the type of harm Congress sought to avoid in enacting the reporting requirement." *Id.* at 56a; see *id.* at 54a-56a.

4. The court of appeals affirmed. Pet. App. 1a-35a. As relevant here, the court determined that the district court did not abuse its discretion in sanctioning petitioner for her "severe, repeated, and deliberate" violations of discovery orders. *Id.* at 13a (citation omitted). The court of appeals noted that petitioner was repeatedly given "second chances," *id.* at 14a; that she was "warned * * * that she could face sanctions" if she persisted in disregarding court orders, *id.* at 15a; and that the sanctions escalated over time, with the district court first trying lesser measures before ordering that certain facts be taken as established, *id.* at 16a. The court of appeals also noted that, although sanctioning petitioner by taking her willfulness as established took "one of [her] primary defenses off the table," petitioner was still free to and did raise other arguments, including her Eighth Amendment challenge. *Id.* at 17a. Like the district court, the court of appeals found those other arguments unavailing. *Id.* at 18a-35a.

With respect to the Eighth Amendment, the court of appeals explained that "[o]nly monetary penalties that function as 'punishment for some offense' are encompassed by the [Excessive Fines] Clause." Pet. App. 26a (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 327-328 (1998)). The court recognized that "there is no per se rule that the Excessive Fines Clause only applies to criminal proceedings," and that "[w]hat matters is whether [the] penalty, even if only a civil one, 'is punishment.'" *Id.* at 27a (quoting *Austin* v. *United States*, 509 U.S. 602, 610 (1993)). Applying those principles, the court determined that civil penalties assessed under Section 5321(a)(5) are not "fines" for Eighth Amendment purposes. *Id.* at 28a-34a. The court explained that, unlike the forfeitures "held to constitute 'punish-

ment' in both *Austin* and *Bajakajian*," the civil penalties authorized by Section 5321(a)(5) are not tied in any way to a "criminal sanction." *Id.* at 28a. The court instead viewed the Section 5321(a)(5) penalties as akin to civil tax penalties, which this Court has found not to be punishment for purposes of the Fifth Amendment's Double Jeopardy Clause and which the circuit courts have uniformly found not to constitute fines for purposes of the Excessive Fines Clause. *Id.* at 29a.

The court of appeals further explained that Congress authorized civil penalties for violations of Section 5314 to remedy real harms to the United States, in the form of lost tax revenues and increased investigative costs, given the law-enforcement resources required to "police the use of these accounts" when a U.S. person fails to report or keep records of them. Pet. App. 30a. The court noted that the penalized account holder's "frustration of governmental efforts to recoup what is owed" to the United States "from a foreign account is likely to be especially effective" in a case like this one, "when the holder of the undisclosed foreign account is willfully seeking to hide it." *Id.* at 32a.

ARGUMENT

The court of appeals correctly determined that the civil penalty assessed on petitioner by the Secretary of the Treasury under 31 U.S.C. 5321(a)(5) for petitioner's willful failure to report her foreign financial account, in violation of 31 U.S.C. 5314, does not implicate the Eighth Amendment's prohibition on "excessive fines," U.S. Const. Amend. VIII. Petitioner contends (Pet. 11-25) that the decision below conflicts with this Court's precedent and with the decisions of other courts of appeals. In fact, the decision below is the first occasion on which any court of appeals has squarely addressed the

question presented, and the First Circuit's decision is entirely faithful to this Court's Eighth Amendment precedents. This case would also be an unsuitable vehicle in which to address the question presented because resolution of that question in petitioner's favor would make no difference to the disposition of the case. As the district court found, the civil penalty imposed on petitioner was not "excessive" even if analyzed as a fine under the Eighth Amendment. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the civil penalty assessed by the Secretary under Section 5321(a)(5) for petitioner's willful failure to report her Swiss bank account in 2007 was not a "fine" within the meaning of the Eighth Amendment, because the penalty was not a form of punishment. Pet. App. 26a-34a.

a. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. "Taken together, these Clauses place 'parallel limitations' on 'the power of those entrusted with the criminal-law function of government.'" *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989)). The Excessive Fines Clause, in particular, "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Ibid.* (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998)).

"[A]t the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'" *Bajakajian*, 524 U.S. at 327 (citation omitted). "Then, as now," fines were typically imposed as punishments in criminal pros-

ecutions, not civil actions. *Browning-Ferris Indus.*, 492 U.S. at 265. Consistent with that history, payments imposed as sanctions for the commission of crimes are "clearly a form of monetary punishment," subject to the constraints of the Excessive Fines Clause. *Alexander* v. *United States*, 509 U.S. 544, 558 (1993) (criminal forfeiture of property); see *Bajakajian*, 524 U.S. at 328 (criminal forfeiture of currency). But the Court has also found the Clause applicable to some payments that a defendant is ordered to make in civil *in rem* forfeiture actions that "are at least partially punitive." *Timbs*, 139 S. Ct. at 689; see *Austin* v. *United States*, 509 U.S. 602, 619-622 (1993) (civil forfeiture of property used to commit drug crimes). The form of proceeding, civil or criminal, is therefore not entirely dispositive; the question remains whether a particular payment is "punishment" for an "'offense'" against the sovereign. *Austin*, 509 U.S. at 610, 622 (citation omitted).

b. The court of appeals correctly identified the governing principles of law set forth in this Court's Eighth Amendment case law and correctly applied those principles to the question presented, which was a matter of first impression. Indeed, the court of appeals' rationale for finding the Excessive Fines Clause inapplicable to the civil penalty assessed against petitioner consisted largely of a careful comparison between the statutory scheme at issue here and the civil forfeitures that this Court analyzed in *Austin* and *Bajakajian*. See, *e.g.*, Pet. App. 27a-29a (discussing *Austin* and *Bajakajian* and explaining why "this civil penalty" is "unlike the civil forfeitures held to constitute 'punishment' in" those cases); *id.* at 30a-31a, 33a (further distinguishing this case from *Bajakajian* and *Austin*). Petitioner's criticisms of the decision below lack merit and, at all

events, provide no sound basis for further review. Cf. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Petitioner principally contends (Pet. 12-15) that the court of appeals misapplied *Austin* in concluding that the civil penalty assessed against her was not a form of punishment. But the court persuasively explained why this penalty lacks the punitive character of the civil forfeiture addressed in *Austin*. See Pet. App. 27a-28a, 33a. There, the statutory scheme permitted the federal government to bring an *in rem* forfeiture action to seize vehicles or real property used or intended for use in the commission of specified drug crimes. *Austin*, 509 U.S. at 604-605 & n.1. The government brought such an action after Austin pleaded guilty in state court to a drug-trafficking offense in which he used the premises of an auto-body shop and a mobile home to conduct his drug sales. *Id.* at 605-606. The lower court had concluded, in conflict with another circuit, that the Excessive Fines Clause did not apply to any "*in rem* civil forfeitures." *Id.* at 606. This Court reversed, concluding that the forfeitures at issue in *Austin* "constitute[d] 'payment to a sovereign as punishment'" for the property owner's underlying drug crimes. *Id.* at 622 (citation omitted).

As the court of appeals explained here, the *in rem* forfeiture in *Austin* was "tied to [a] criminal sanction." Pet. App. 28a. Indeed, all of this Court's cases applying the Excessive Fines Clause have involved either forfeitures ordered as sanctions for criminal conduct after an adjudication of guilt, see *Bajakajian*, 524 U.S. at 325-326; *Alexander*, 509 U.S. at 547-548, or civil actions brought after the property owner had already been convicted of a crime, seeking forfeiture of property used in

the commission of the crime, see *Timbs*, 139 S. Ct. at 686; *Austin*, 509 U.S. at 605. Under Section 5321(a)(5), by contrast, the Secretary may assess a civil penalty for a violation of Section 5314 without regard to whether the violation constituted a crime or was tied to or otherwise facilitated some other crime, such as criminal tax evasion or money laundering.

Petitioner asserts (Pet. 15) that the court of appeals misunderstood the forfeiture scheme in *Austin*, under which a prior *conviction* for a drug-trafficking offense was not actually necessary for the forfeiture to occur. But the court of appeals was merely following the logic of this Court's decision. This Court emphasized in *Austin* that "Congress ha[d] chosen to tie forfeiture directly to the *commission* of drug offenses," by authorizing the forfeiture of property that was "used or intended for use to facilitate the transportation of controlled substances" or "the commission of * * * drug-related crime[s]." 509 U.S. at 620 (emphasis added); cf. *United States* v. *Jalaram, Inc.*, 599 F.3d 347, 354 (4th Cir. 2010) (concluding that, in *Austin*, *Alexander*, and *Bajakajian*, this Court "consistently focused on whether the forfeiture stemmed, at least in part, from the property owner's criminal culpability"). Here, by contrast, there is no necessary tie to a criminal offense or criminal culpability.

Petitioner further asserts (Pet. 15-16) that the court of appeals erred in drawing guidance from this Court's decision in *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), which held that an addition to tax imposed as a penalty for fraud did not constitute "punishment" within the meaning of the Double Jeopardy Clause, U.S. Const. Amend. V. See *Helvering*, 303 U.S. at 398-405. But petitioner has herself to blame for any error: The court of

appeals found that she had waived her argument seeking to distinguish "Double Jeopardy cases." Pet. App. 29a n.14. In any event, the court of appeals recognized that it was reasoning by analogy and noted that this Court relied on a similar analogy in *Bajakajian*. *Ibid.*; see *Bajakajian*, 524 U.S. at 329 (drawing a contrast to a double-jeopardy case involving customs forfeitures, *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam)).[3]

The court of appeals also correctly determined that civil money penalties imposed under Section 5321(a)(5) are remedial, "unlike the forfeiture at issue in *Bajakajian*." Pet. App. 30a; see *id.* at 30a-32a. Petitioner emphasizes (Pet. 16-17) the Court's observations in *Bajakajian* that "remedial" usually connotes "'obtain[ing] compensation or indemnity,'" and that the criminal forfeiture at issue in *Bajakajian* did "not serve the remedial purpose of compensating the Government for a loss." *Bajakajian*, 524 U.S. at 329 (citation omitted). But the court of appeals persuasively explained why these civil penalties are different.

In the Bank Secrecy Act, Congress directed the Secretary to adopt the foreign-account reporting requirements that petitioner violated after finding "'that hundreds of millions in tax revenues were lost' due to the secret use of foreign financial accounts—which Congress characterized as the 'largest single tax loophole

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[3] In *United States* v. *Ursery*, 518 U.S. 267 (1996) (cited at Pet. 15-16), the Court made clear that its holding in *Austin* extending the reach of the Excessive Fines Clause to some civil *in rem* forfeitures does not support similarly extending the Double Jeopardy Clause. See *id.* at 286-288. As the Court's later decision in *Bajakajian* illustrates, however, double-jeopardy cases can nonetheless be instructive in evaluating whether a sanction is punishment.

permitted by American law.'" Pet. App. 30a (quoting H.R. Rep. No. 975, 91st Cong., 2d Sess. 12-13 (1970)). The civil penalties are designed to remedy those harms to the public fisc. *Ibid.* The penalties also reflect the substantial law-enforcement costs associated with investigating foreign financial accounts that U.S. persons fail to report—costs that are "especially" acute in cases like this one, where the account owner "is willfully seeking to hide" the foreign account. *Id.* at 32a. And, contrary to petitioner's suggestion (Pet. 13), Congress may reasonably authorize the Secretary to impose a civil penalty without requiring that the penalty precisely correspond in each case to the fiscal costs of the violation, which may be difficult to quantify. Cf. *One Lot Emerald Stones*, 409 U.S. at 237 (likening a customs forfeiture to a "reasonable form of liquidated damages").

The civil penalties authorized by Section 5321(a)(5) are remedial in character, rather than punitive, even if they "have a deterrent effect." Pet. 14 (quoting *United States* v. *Warner*, 792 F.3d 847, 861 (7th Cir. 2015)); cf. Pet. 2, 18-19 & n.5, 29 (citing prior government briefs likewise recognizing the deterrent effect of the civil penalties). As this Court has explained, "all civil penalties have some deterrent effect." *Hudson* v. *United States*, 522 U.S. 93, 102 (1997). That effect—putting a price on conduct that the government seeks to reduce or eliminate—is not the kind of deterrent to which the Court was referring in *Austin* when it stated that a civil sanction that serves "deterrent purposes[] is punishment," 509 U.S. at 610 (citation omitted). In context, the Court was instead referring in *Austin* to sanctions with the purpose of deterring *criminality*, such as the drug-trafficking *in rem* forfeiture laws at issue in that case. See *id.* at 622 (finding that forfeiture under those

provisions "constitutes 'payment to a sovereign as punishment for some offense'") (citation omitted); *id.* at 627 (Scalia, J., concurring in part and concurring in the judgment) (similarly concluding that such forfeitures "are certainly *payment* (in kind) *to a sovereign* as *punishment* for an *offense*").

A contrary reading of *Austin* would threaten to transform every civil penalty into a form of punishment for Eighth Amendment purposes, since every civil penalty presumably deters to some extent the conduct for which the penalty is assessed. Such a radical expansion of the Excessive Fines Clause has no sound basis in the original meaning of the Clause, its historical application, or this Court's precedent. And the civil penalties authorized by Section 5321(a)(5) do not have the purpose of deterring crime. That is especially clear in this statutory scheme because Congress provided elsewhere for criminal penalties—including fines—to deter and punish certain violations of the foreign-account reporting requirements. 31 U.S.C. 5322(a); cf. *Helvering*, 303 U.S. at 404-405 (drawing a similar inference from the presence of "two separate and distinct provisions imposing sanctions," one criminal and one civil).

2. The decision below does not conflict with any decision by another court of appeals. In fact, no other court of appeals has squarely addressed whether a civil penalty imposed under Section 5321(a)(5) for a willful violation of Section 5314 implicates the Excessive Fines Clause. The Ninth Circuit has found that a civil penalty imposed under Section 5321(a)(5) for a willful violation did not violate the Excessive Fines Clause because it was not excessive. See *United States* v. *Bussell*, 699 Fed. Appx. 695, 696 (2017), cert. denied, 138 S. Ct. 1697 (2018). But in that case, the Ninth Circuit did not ad-

dress the threshold question of whether the Clause applies, and even if it had, the unpublished memorandum disposition would not bind a future panel to any particular view on that question. 9th Cir. R. 36-3(a). As petitioner recognizes (Pet. 28-29), the decision below is consistent with decisions by several district courts and the Court of Federal Claims. See, *e.g.*, *United States* v. *Miga*, No. 19-cv-1015, 2021 WL 8016223, at *2 (N.D. Tex. May 27, 2021); *Landa* v. *United States*, 153 Fed. Cl. 585, 599-601 (2021); *United States* v. *Collins*, No. 18-cv-1069, 2021 WL 456962, at *8-*9 (W.D. Pa. Feb. 8, 2021), aff'd on other grounds, 36 F.4th 487 (3d Cir. 2022), petition for cert. pending, No. 22-335 (filed Oct. 6, 2022); *United States* v. *Schwarzbaum*, No. 18-cv-81147, 2020 WL 2526500, at *5-*8 (S.D. Fla. May 18, 2020), amended, No. 18-cv-81147, 2020 WL 5076979 (S.D. Fla. Aug. 27, 2020), vacated and remanded on other grounds, 24 F.4th 1355 (11th Cir. 2022).

Petitioner nonetheless contends (Pet. 19-25) that the decision below creates a conflict warranting review on the theory that the First Circuit's reasoning in this case would lead it to apply the Excessive Fines Clause differently than its sister circuits in other contexts. If such a square conflict were to develop in the future, this Court could assess whether it warrants review at that time. But the possibility of such a conflict is merely speculative at this point. The decisions that petitioner invokes (Pet. 20-22) do not suggest otherwise. Those cases involved payments mandated by a heterogenous mix of other federal, state, and local laws, not Section 5321(a)(5). See *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1308 (11th Cir. 2021) (civil penalty and treble damages under the False Claims Act, 31 U.S.C. 3729 *et seq.*); *Pimentel* v. *City of Los Angeles*,

974 F.3d 917, 922 (9th Cir. 2020) (municipal parking fines); *United States* v. *Mackby*, 261 F.3d 821, 829-831 (9th Cir. 2001) (False Claims Act); *Wright* v. *Riveland*, 219 F.3d 905, 915-916 (9th Cir. 2000) (deductions applied to prison inmate funds); *Towers* v. *City of Chicago*, 173 F.3d 619, 623-624 (7th Cir.) (municipal penalties on owners of vehicles containing contraband), cert. denied, 528 U.S. 874 (1999). Petitioner fails to show that those cases would obligate a future panel in the relevant circuits to depart from the First Circuit's conclusion here. Conversely, petitioner identifies no reason to think that the First Circuit would necessarily disagree with the results those other courts have reached if it were confronted with the same questions they resolved.

The fact that only one court of appeals has squarely addressed the question presented also calls into question petitioner's assertion (Pet. 25) that the question has "real legal and practical importance." Notably, the amount of a civil penalty assessed under Section 5321(a)(5) is already subject to judicial review. See, *e.g.*, *Kimble* v. *United States*, 991 F.3d 1238, 1243 (Fed. Cir.) (reviewing penalty amount for abuse of discretion), cert. denied, 142 S. Ct. 98 (2021). Petitioner does not explain why also asking whether the penalty is constitutionally "excessive," U.S. Const. Amend. VIII, would change the result in any significant number of cases. Several courts that have found the Excessive Fines Clause inapplicable to civil penalties imposed under Section 5321(a)(5) have also found, in the alternative, that the assessed penalties in those cases were not excessive. See, *e.g.*, *Miga*, 2021 WL 8016233, at *2; *Collins*, 2021 WL 456962, at *9-*11.

3. Finally, this case would be an unsuitable vehicle in which to address the question presented because res-

olution of that question in petitioner's favor would not alter the outcome of the case. Petitioner suggests (Pet. 31) that the case might be remanded to evaluate whether the penalty assessed against her is in fact excessive. But the district court already performed that same analysis and concluded, correctly, that the penalty is not "excessive" even if viewed as a form of punishment subject to the Excessive Fines Clause. Pet. App. 54a (applying "the factors * * * outlined in *Bajakajian* for determining whether a fine is proportional or excessive"). As the court explained, petitioner is within a class of persons at whom the statute was directed (potential tax evaders whose foreign bank transactions may warrant federal investigation); the penalty, imposed for just one year, was not excessive in light of the maximum penalties that could have been assessed under Section 5321(a)(5) for petitioner's multi-year failure to report her Swiss account; and the harms here, including tax losses and the expenditure of investigatory resources, were both significant and precisely the kinds of harms that Congress sought to redress. *Id.* at 54a-56a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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