No. 22-166

IN THE
Supreme Court of the United States

GERALDINE TYLER,
on behalf of herself and all others similarly situated,

Petitioner,

v.

HENNEPIN COUNTY, and DANIEL P. ROGAN,
Auditor-Treasurer, in his official capacity,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF PROFESSOR BETH A. COLGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

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SUMMARY OF ARGUMENT

The Excessive Fines Clause applies when a penalty serves at least "in part to punish." *Austin v. United States*, 509 U.S. 602, 610 (1993). A fine is excessive if the severity of the penalty is grossly disproportionate to the underlying offense. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

In the proceedings below, the United States District Court for the District of Minnesota held that a $25,000 forfeiture for the non-payment of taxes—on top of the outstanding $15,000 owed in taxes, penalties, costs, and interest—does not constitute punishment, and therefore is not a "fine" triggering Excessive Fines Clause scrutiny. *Tyler v. Hennepin Cnty.*, 505 F. Supp. 3d 879 (D. Minn. 2020), Pet.App.11a. Under Minnesota's tax-forfeiture scheme, when a person fails to pay property taxes, the government may seize and sell the person's home, using the proceeds to pay the delinquent taxes. The scheme further allows the government to forfeit any overage from the sale above and beyond the amount of taxes owed. Pet.App.12a-14a. Despite its operation as a penalty for nonpayment, the district court concluded that the

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[*] Pursuant to this Court's Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission.

$25,000 forfeiture was remedial, not punitive—and therefore, outside the scope of the Excessive Fines Clause—no matter how much greater the forfeited overage is as compared to the taxes owed. Pet.App.44a. The Eighth Circuit adopted the district court's conclusions wholesale without further analysis. Pet.App.9a-10a.

The district court—and by extension the Eighth Circuit—committed four distinct errors:

I. The district court reasoned that Minnesota's forfeiture scheme is primarily remedial because it is similar to *in rem* customs forfeitures common at the Founding, which *Bajakajian* likewise characterized as remedial. Pet.App.42a. But records from the colonial era through the 19th century—including this Court's cases—show that *in rem* customs forfeitures were *not* exclusively or even primarily remedial, but instead were considered punishment.

II. The district court erroneously stated that to be at least partially punitive, forfeitures must have a "close[] connect[ion] to criminal proceedings." Pet.App.44a. But, historically, both civil *and* criminal processes were used to impose punishment for offenses against the public. It was the public nature of the offense, not the civil or criminal form of the litigation, that rendered those penalties punitive.

III. By focusing on the notion that the "primary purpose" of Minnesota's tax-forfeiture scheme was to compensate the government for unpaid taxes, Pet.App.44a, the district court conflated the question of whether the $25,000 forfeiture is at least partially punishment for the failure to pay taxes, and thus a fine subject to the Excessive Fines Clause, *Austin*, 509 U.S. at 609, with the question of whether the $25,000

forfeiture is grossly disproportionate to Tyler's offense of failing to pay taxes, and thus unconstitutionally excessive, *Bajakajian*, 524 U.S. at 324.

IV. In treating the tax-forfeiture scheme as nonpunitive, the district court eroded the Excessive Fines Clause's role as a "constant shield" against the government's abuse of its power to punish offenses against the public out of accord with legitimate penal purposes. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019); Pet.App.44a.

ARGUMENT

Civil forfeitures and penalties trigger scrutiny under the Excessive Fines Clause if they serve at least "in part to punish." *Austin v. United States*, 509 U.S. 602, 610 (1993). In interpreting the Clause's scope, this Court has looked to history and tradition, including whether the sanction at issue was considered punishment in our nation's early years. *See United States v. Bajakajian*, 524 U.S. 321, 330-31, 340-43 (1998); *Austin*, 509 U.S. at 606-18; *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-73 (1989). The integrity of that historical analysis is thus critical to safeguarding the rights protected by the Excessive Fines Clause.

Regrettably, the United States District Court for the District of Minnesota (and, by extension, the Eighth Circuit) erred in concluding that a $25,000 forfeiture for the nonpayment of property taxes is not punitive and therefore did not trigger Excessive Fines Clause scrutiny. Pet.App.44a. This conclusion is out of step with early American practices for four reasons.

First, the district court justified its conclusion by comparing Minnesota's tax-forfeiture scheme to early

American *in rem* forfeitures for customs violations, relying on *Bajakajian*'s contention that those customs forfeitures were remedial. Pet.App.42a. But *Bajakajian*'s conclusion that *in rem* customs "forfeitures were historically considered nonpunitive" is out of step with early American understanding of such forfeitures. 524 U.S. at 330.[1] Early in our country's history, courts viewed *in rem* customs forfeiture as a form of punishment for owners who entrusted their ships and goods to seamen who violated the customs laws.

Second, the district court suggested that to qualify as punitive, forfeitures must be "closely connected to criminal proceedings." Pet.App.44a. But historically, both civil and criminal actions were used to impose punishment for offenses against the public. It was the public nature of the offense, not the form of litigation, that rendered early customs forfeitures punitive. Accordingly, the Excessive Fines Clause applies equally in civil cases so long as the forfeiture is imposed in response to an offense against the public, including violations of revenue laws.

Third, the district court repeatedly suggested that the $25,000 forfeiture for nonpayment of taxes is exempt from Excessive Fines Clause scrutiny because the "primary purpose" of Minnesota's tax-forfeiture

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[1] Correcting the discussion of whether customs forfeitures were historically considered punitive does not require reconsidering *Bajakajian*'s holding that the forfeiture at issue there was a form of punishment. *See* Pet.Br.41. *Bajakajian* itself declared that *in rem* forfeitures were "inapposite" to whether the *in personam* forfeiture at issue constituted a fine. 524 U.S. at 330. Instead, the Court's discussion served as a rejection of the government's claims that the criminal forfeiture at issue was a descendant of *in rem* customs forfeitures, *id.* at 330-34, and that forfeitures were necessarily proportional if they have some remedial characteristics, *id.* at 340-44.

scheme was to compensate the government for unpaid taxes. Pet.App.44a. But that is not the proper test: Forfeitures are "fines" subject to the Excessive Fines Clause if they have a punitive purpose even "in part," *Austin*, 509 U.S. at 610, and, historically, forfeitures often served both remedial and punitive ends. This is the first step of the Excessive Fines Clause analysis. Once a forfeiture is deemed a fine, its remedial qualities—including the extent to which it compensates—may speak to the question of excessiveness, but that is a distinct second step. A forfeiture's remedial qualities cannot override its punitive qualities at the first step of the Excessive Fines Clause analysis.

Fourth, the district court failed to properly recognize the Excessive Fines Clause's role as a bulwark against government imposition of punishments out of accord with legitimate penal aims, and particularly punishments imposed against politically vulnerable individuals. Course correction from this Court is needed to ensure the Excessive Fines Clause remains a potent shield against government abuses.

I. Early American Customs Forfeitures Were Considered Punishment

In holding that the $25,000 forfeiture obtained through Minnesota's tax-scheme is remedial, the district court compared it to *in rem* customs forfeitures, which *Bajakajian* contended were remedial. But *Bajakajian*'s conclusion that *in rem* customs "forfeitures were historically considered nonpunitive," 524 U.S. at 330, does not withstand scrutiny. To illustrate why, this Part details the early American understanding of *in rem* customs forfeitures and then explores two sources of *Bajakajian*'s misstep.

Among its earliest acts, Congress imposed duties on goods entering the United States through seaports. *E.g.*, Act of July 31, 1789, ch. 5, 1 Stat. 29. As ships came into port, the ship's master would provide a manifest to a customs officer who inspected the ship's goods and determined the duties owed. Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1466 (2019).

Masters and seamen could be held liable through *in personam* criminal proceedings for attempting to defraud the government of duties—e.g., by unlading goods outside of official ports or presenting documents undervaluing the goods to be taxed. Nicholas R. Parrillo, *Against the Profit Motive* 224-25 (2013). If convicted, the masters or seamen could be punished by fine—that is, a penalty above and beyond the duties owed. *E.g.*, §§ 11-12, 16, 1 Stat. at 38-39, 41.

Congress also sought to enforce its customs laws through *in rem* forfeitures of goods or vessels. *E.g.*, § 36, 1 Stat. at 47-48; Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2457-64 (2016). *In rem* forfeitures stood on the legal fiction that the property itself was guilty of evading the customs laws. As Justice Story explained: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).

This Court's precedents have correctly noted that *in rem* forfeiture of the goods or vessel "form[ed] no part of the personal punishment" of the master or seamen who attempted to evade the customs duties. *Bajakajian*, 524 U.S. at 330 (quoting *Origet v. United States*, 125 U.S. 240, 246 (1888)); *see also United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) ("a libel *in rem* . . . does not, in any degree, touch the

person of the offender"). That is because the individuals punished for violations of the customs laws typically had no property interest in either the ship or the goods it carried, both of which belonged to an absent third-party owner. Citing *Origet*, this Court stated in *Bajakajian* that "[t]raditional *in rem* forfeitures were . . . not considered punishment against the individual for an offense." 524 U.S. at 331. That observation is true as to the master and seamen who faced *in personam* criminal charges for violations of the customs laws, as discussed above.

Early authorities, however, recognized that *in rem* forfeiture was a form of punishment for the *owner* of the vessel or cargo, not for his *agents* (the master and seamen). In the early years of the customs forfeiture regime, this Court recognized that—despite the legal fiction making the goods or vessel rather than the owner the party to the case—an *in rem* proceeding "punishes the *owner* with a forfeiture." *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (emphasis added); *see also Harmony v. United States*, 43 U.S. (2 How.) 210, 235 (1844) (describing an *in rem* forfeiture statute as "confessedly penal"); Nelson, *supra*, at 2499-500 (citing early cases describing *in rem* forfeiture proceedings as "'penal' and as inflicting a species of 'punish[ment]' on the property's owner"). *In rem* forfeiture was, indeed, sometimes the only way to exact such punishment, because the owner may have been absent from the jurisdiction or unknown. Nelson, *supra*, at 2468-69; *Austin*, 509 U.S. at 615 n.9.

Courts ordered *in rem* forfeiture to "punish[] the owner" for actions undertaken either "with his consent or connivance, or with that of some person employed or trusted by him." *Peisch*, 8 U.S. (4 Cranch) at 364-65; *see also Austin*, 509 U.S. at 615 & n.8. By

choosing the master and seamen who would control the goods and vessel, the owner "impliedly submit[ted]" to the crew's fraudulent acts, "bind[ing] the owner . . . as much as if they were committed by the owner himself." *Dobbins's Distillery v. United States*, 96 U.S. 395, 401, 404 (1877). The Court "understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent." *Austin*, 509 U.S. at 616 (citing *J.W. Goldsmith, Jr.–Grant Co. v. United States*, 254 U.S. 505, 510-11 (1921)).[2]

This explains why early cases barred *in rem* forfeitures where the owners, masters, and seamen were all actually innocent of a customs offense. For example, forfeiture was unavailable where the offense occurred "on account of the misconduct of mere strangers, over whom such owners . . . have no control." *Peisch*, 8 U.S. (4 Cranch) at 364-65;[3] *see also*

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[2] For additional authority on this score, see *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688 (1974) (explaining that subjecting owners to forfeiture "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property"); *Logan v. United States*, 260 F. 746, 749 (5th Cir. 1919) (stating the seller "took the risk of loss of lien" by entrusting it to the offender); *The Little Charles*, 26 F. Cas. 979, 981-82 (C.C.D. Va. 1818) (explaining that the "vessel acts and speaks by the master" who is "selected by the owner, as his agent").

[3] Even Justice Scalia, who questioned *Austin*'s conclusion that *in rem* forfeitures were premised on the owner's culpability, agreed with the *Austin* majority's conclusion that these forfeitures were, "in whole or in part, punitive." 509 U.S. at 625 (Scalia, J., concurring in part and concurring in the judgment) (citation omitted). Justice Scalia wrote separately in *Austin* to note that whether "only actual culpability of the affected property owner" could establish a forfeiture's penal nature was a

United States v. Two Barrels of Whisky, 96 F. 479, 483-84 (4th Cir. 1899) (affirming rejection of forfeiture where the wrongdoer obtained property without the "consent and knowledge" of the owner). Forfeiture also did not apply where circumstances beyond the master and seamen's control necessitated a landing in violation of customs laws—such as due to shipwreck or inclement weather. *The Gertrude*, 10 F. Cas. 265, 267-68 (C.C.D. Me. 1841) (describing *in rem* forfeitures as "highly penal" and therefore declining its application where a customs violation was due to shipwreck); *Stratton v. Hague*, 4 Call 564, 567-68 (Va. 1790) (allowing a necessity defense where a landing was due to a heavy storm).

In fact, the First Congress erected protections against imposition of *in rem* forfeitures in cases lacking evidence that the owner or crew had an intent to defraud, further showing that such forfeitures were considered punishment. By 1790, just one year after passage of the first customs act, Treasury Secretary Alexander Hamilton recognized the harsh consequences that *in rem* forfeitures had for the owners of ships and goods. He reported to Congress that "considerable forfeitures have been incurred, manifestly through inadvertence and want of information." Hamilton, Report on the Petition of Christopher Saddler, in 6 *The Papers of Alexander Hamilton* 191-92 (Syrett ed., 1962). At his urging, Congress passed the 1790 Remission Act, which allowed the owners of forfeited goods and vessels to petition the Treasury Secretary for a return of items if the forfeiture was "incurred without willful negligence or any intention of

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thorny question that the Court need not have reached because the statute at issue "require[d] that the owner not be innocent." *Id.* at 625-26 (emphasis omitted).

fraud." Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23 (repealed 1797). The remission program indicates "a Founding Era consensus" that not only was *in rem* forfeiture punishment, but that its "punitive potential necessitated meaningful limits on its use." Arlyck, *supra*, at 1452; Pet.Br.42.

This historical context undercuts *Bajakajian*'s conclusion that *in rem* forfeitures were "not considered punishment . . . for an offense." 524 U.S. at 331. The Court rested that conclusion in large part on cases considering the applicability of the Double Jeopardy Clause to civil penalties. *Id.* at 330-31 (citing *United States v. Ursery*, 518 U.S. 267, 293 (1996) (Kennedy, J., concurring), and *In re Various Items of Personal Prop.*, 282 U.S. 577 (1931)). As a matter of first principles, *Bajakajian*'s reliance on double jeopardy cases to define the contours of the Excessive Fines Clause is inappropriate, as the double jeopardy and excessive fines analyses are "wholly distinct." *Ursery*, 518 U.S. at 287. To qualify as punishment for double jeopardy purposes, a forfeiture must be "so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism." *Id.* at 278 (quotation marks omitted). To receive excessive fines scrutiny, however, the penalty need be punitive only "in part." *Austin*, 509 U.S. at 610.

Critically for today's purposes, the double jeopardy cases *Bajakajian* relied on tell us little about whether 18th- and early 19th-century customs forfeitures constituted punishment, both because they were decided generations *after* these customs forfeitures were enacted and because they represent a break in this Court's earlier approach to civil penalties and forfeitures. *See supra* 5-9.

The Court's earliest applications of double jeopardy to pecuniary punishments cut against *Bajakajian*'s reasoning because they recognized that civil penalties *did* constitute punishment. In *United States v. Chouteau*, 102 U.S. 603 (1880), the government entered a settlement in a criminal tax fraud proceeding in which the defendant, a distiller, agreed to pay a tax penalty "intended as part punishment." *Id.* at 610.[4] The Court held that the settlement "must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal." *Id.* at 611. Double jeopardy therefore prohibited the government from filing a civil suit against sureties on the distiller's bond to recover the same penalty because "it is still as a punishment for the infraction of the law." *Id.* at 611-12; *cf. Coffey v. United States*, 116 U.S. 436, 443 (1886) (barring the *in rem* forfeiture of a distillery on preclusion grounds following a criminal acquittal because the judgment as to the facts alleged was "conclusive in favor of" the person acquitted).

Several lower courts also held that double jeopardy applied to civil penalties generally and *in rem* forfeitures specifically. Although the case law was not uniform on this score, multiple cases recognized that no distinction "can be drawn between inflicting punishment for the same offence, by different modes of

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[4] It is unsurprising that litigation on double jeopardy's application to pecuniary punishments took so long to reach the Court. Before this time, the lower courts were largely focused on the question of whether the clause's reference to "life and limb" should be taken literally, limiting the clause's scope to capital cases. It was not until 1873 that the Court concluded double jeopardy applied to all forms of punishment. *Ex parte Lange*, 85 U.S. 163, 169-73 (1873).

prosecution [indictment or action of debt] under an enactment, or by applying to the case enactments in separate statutes, all having relation to precisely the same subject matter." *United States v. Gates*, 25 F. Cas. 1263, 1266 (S.D.N.Y. 1845) (precluding an action of debt to obtain a $400 civil penalty following conviction); *see also United States v. One Distillery*, 43 F. 846, 853 (S.D. Cal. 1890) (barring *in rem* forfeiture of a company's property following conviction of a stockholder); *United States v. McKee*, 26 F. Cas. 1116, 1117 (C.C.E.D. Mo. 1877) (barring civil action for liquor-tax fraud penalty in light of prior conviction).[5]

Not until 140 years after the ratification of the Bill of Rights did this Court embrace the view that *in rem* forfeitures do not punish the property owner for double jeopardy purposes. On the same day in 1931, the Court issued tandem opinions addressing whether certain civil sanctions were punishments triggering double jeopardy. In *United States v. La Franca*, 282 U.S. 568, 575 (1931), the Court concluded that double jeopardy barred a suit by the United States to recover tax penalties for activity that had already sustained a

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[5] In the late 19th century, at least two courts relied on the legal fiction that the property was the guilty party in *in rem* proceedings to conclude that the owner was not punished twice. *United States v. Olsen*, 57 F. 579, 584-86 (N.D. Cal. 1893); *United States v. Three Copper Stills*, 47 F. 495, 499 (D. Ky. 1890). The Nebraska Supreme Court also concluded that double jeopardy did not apply to civil actions where penalties were imposed. *See Mitchell v. State*, 11 N.W. 848, 848-49 (Neb. 1882). The Nebraska court relied on a treatise, 1 Joel Prentiss Bishop, *Criminal Law* § 650 (1856), which in turn cited three inapposite cases holding that double jeopardy did not bar retrial when the defendant had obtained acquittal by fraud. Another treatise from that era instructing that double jeopardy did not apply to *in rem* forfeitures cited only the Clause itself for this errant proposition. *See* Rufus Waples, *Proceedings in Rem* § 21 (1882).

criminal conviction because the tax suit was, "in its nature, a punitive proceeding, although it take the form of a civil action." In *Various Items*, however, the Court reached the opposite conclusion in a civil suit seeking *in rem* forfeiture of property that allegedly served as an instrumentality of liquor-tax fraud. 282 U.S. at 578-79. The Court rested its conclusion on the legal fiction that *in rem* forfeiture treats the property, rather than its owner, as the guilty party. *Id.* at 581. Accordingly, the owner's previous criminal conviction for violating liquor-tax laws did not bar the later civil forfeiture action. *Id.* In its cursory analysis, the Court failed to consider the historical understanding—described above—that *in rem* forfeitures served to punish the owners of vessels and goods for "impliedly submit[ting]" to frauds committed by their agents. *Dobbins's Distillery*, 96 U.S. at 401; *see supra* 6-9. Because it misapprehended the punitive nature of *in rem* forfeitures, the Court incorrectly concluded that double jeopardy was no obstacle to the government's suit. *Various Items*, 282 U.S. at 581.

A second source of *Bajakajian*'s misstep is its reliance on *Taylor v. United States*, 44 U.S. (3 How.) 197 (1845), to suggest *in rem* forfeitures were remedial. *Taylor* involved the rule of lenity as it related to a statute allowing for the *in rem* forfeiture of goods for revenue fraud. The rule of lenity generally dictates that "penal laws should be construed strictly." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment) (quoting *The Adventure*, 1 F. Cas. 202, 204 (C.C.D. Va. 1812)); *see also Bittner v. United States*, No. 21-1195 (U.S. Feb. 28, 2023).

In a brief discussion, Justice Story's *Taylor* opinion referenced two exceptions to the rule of lenity

found in English common law. 44 U.S. (3 How.) at 210-11. First, the rule would not apply to statutes involving frauds which "act[ed] upon the offence, by setting aside the fraudulent transaction." 1 Blackstone, *Commentaries on the Laws of England* 88 (1793); *see also* Matthew Bacon, New Abridgment of the Law 462 (1832). Second, statutes involving "suppression of wrong or for public good" were to "be taken in equity." 5 John Comyns, A Digest of the Laws of England, R.19 (5th ed., corr. 1825). Justice Story concluded the statute for revenue fraud at issue in *Taylor* fell within those exceptions, and declined to apply the rule of lenity. 44 U.S. (3 How.) at 201-11. He reached this conclusion even though he had previously applied the rule of lenity to a statute given the "highly penal" nature of forfeitures, *United States v. Mann*, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) (interpreting congressional intent to repeal an embargo act), and, one year prior to *Taylor*, the Court had applied the rule of lenity to a customs statute allowing for the *in rem* forfeiture of goods for attempts "to defraud the revenue," *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 461-63 (1833) (interpreting the statute to preclude *in rem* forfeiture in cases of "accident or mistake").

Importantly, for present purposes, *Taylor* does nothing to contradict the notion that early *in rem* forfeitures were understood as punishment. Rather, the treatises cited in *Taylor* made clear that *in rem* forfeitures were penal. They stated that the exceptions to the rule of lenity existed *despite* the fact that the laws were penal. 1 Blackstone, *supra*, at 88 ("most statutes against frauds being in their consequences penal"); 5 Comyns, *supra*, at R.19 (describing the statutes as "penal against the offenders"). So while the rule of lenity may not have applied as a matter of statutory

construction, the resulting forfeiture remained punitive.

In sum, *Bajakajian*'s conclusion that *in rem* customs "forfeitures were historically considered nonpunitive," 524 U.S. at 330, was out of step with historical practices and this Court's early case law. In adopting *Bajakajian*'s conclusion, the district court (and, by extension, the Eighth Circuit) only compounded that error—one this Court should take this opportunity to correct.

II. Both Civil *And* Criminal Proceedings Were Used To Punish Offenses Against The Public

To support its conclusion that the $25,000 forfeiture is remedial, the district court suggested that when this Court has found forfeitures punitive it has "relied heavily" on a "close[] connect[ion] to criminal proceedings." Pet.App.44a. *Bajakajian*, for example, stated that "[t]he nonpunitive nature" of early customs forfeitures was "reflected in their procedure," because they were imposed through "a civil action of debt" rather than via criminal prosecution. 524 U.S. at 343 n.18.

But there is significant historical evidence that whether a forfeiture would have been understood as at least partially punitive—and thus subject to the Excessive Fines Clause—turned on the public nature of the offense rather than the civil or criminal nature of the proceedings.

Dating back to the English common law, "[t]he test whether a law is penal, in the strict and primary sense, [has been] whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *Huntington v. Attrill*, 146 U.S. 657, 668

(1892) (citing 3 Blackstone, *Commentaries on the Laws of England* 2 (1794)). The question of public versus private wrongs often arose with respect to jurisdictional constraints, as courts were restricted from enforcing the penal laws of another jurisdiction. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 336-37 (1816). This Court explained that the restriction applied "not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue." *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 290 (1888);[6] *see also United States v. Lathrop*, 17 Johns. 4, 9 (N.Y. Sup. Ct. 1819) ("It cannot be doubted, that a pecuniary penalty for a violation of, or nonconformity to, an act of Congress [requiring a liquor license], is as much a punishment for an offence against the laws, as if a corporal penalty had been inflicted."); *Jackson v. Rose*, 2 Va. Cas. 34, 36-38 (Va. Gen. Ct. 1815) (holding that an action of debt brought *qui tam* for the recovery of a federal revenue penalty could not be enforced in state court because the fact that such laws were penal were "self-evident propositions").

In contrast, private harms, the damages for which were recoverable for the private litigant's use, were deemed remedial. *E.g.*, *Brady v. Daly*, 175 U.S. 148, 153-55 (1899) (holding that a suit for a copyright violation was nonpenal because the damages would be awarded to the copyright holder and because it had

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[6] The Court later clarified that the obligation to pay taxes was nonpenal, but that tax penalties consistent with the conception of public offenses offered in *Huntington* remained punitive. *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 278-80 (1935).

"nothing in the nature of a *qui tam* action about it"[7]); *Reed v. Inhabitants of Northfield*, 13 Pick. 94, 100-01 (Mass. 1832) (holding that a suit for injuries sustained due to a town's failure to maintain a highway was "purely remedial" because the damages were "recoverable to his own use").

In colonial and early American history, laws that protected against harms to the public were enforced in and punished through both criminal and civil proceedings. Criminal proceedings for public offenses were initiated by indictment and mandated for offenses that carried a sentence of death, imprisonment, corporal punishment, or fines. *E.g.*, Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. When fines were imposed through criminal proceedings, individuals who failed to pay them could be incarcerated. On the other hand, civil proceedings initiated by information,[8] libel, or action of debt were employed when the punishment for an offense against the public was a pecuniary penalty

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[7] Through the mid- to late-19th century, American jurisdictions relied heavily on *qui tam* prosecutors—private citizens who instituted prosecutions for public wrongdoing. *See Marvin v. Trout*, 199 U.S. 212, 225 (1905). Though *qui tam* prosecutors stood to personally benefit through an award of a moiety of fines and forfeitures imposed, it was widely understood that the actions were "brought for the benefit of the king or other public use, as well as [the prosecutor] himself." *United States v. Griswold*, 24 F. 361, 364 (D. Or. 1885).

[8] An "information in debt" or "information in rem" were civil proceedings distinct from the modern criminal information. Nelson, *supra*, at 2460-61, 2497-98.

that did not carry the threat of imprisonment—including some fines and *in rem* customs forfeitures.[9] *Mann*, 26 F. Cas. at 1154-57 ("For without question all infractions of public laws are offences; and it is the mode of prosecution, and not the nature of the prohibitions, which ordinarily distinguishes penal statutes from criminal statutes."). Whether litigated criminally or civilly, these were punishments for public offenses. *See* Nelson, *supra*, at 2496-500.

Actions of debt illustrate the point. Actions of debt were a form of civil proceeding used as a method for punishing customs violations and other offenses against the public. *See Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information."); *Markle v. Town Council of Akron*, 14 Ohio 586, 589-91 (1846) (explaining that actions of debt, while civil, can be brought for "many offenses, made so by statute, which are but *quasi* criminal" and "for the recovery of fines, penalties, and forfeitures").

Sometimes, actions of debt were the sole vehicle for charging public offenses. *E.g.*, *An Act for the Suppressing of Lotteries*, 1791 N.H. Laws 271; *An Act to Prevent Stealing of Cattle and Hogs*, 1741 N.C. Sess. Laws 48, ch. 8, §§ 2-3. In still other cases, actions of debt were one of multiple civil processes available to enforce penal laws. *E.g.*, *An Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries*, 1731 S.C. Acts 129, No. 522, § 41 ("All the

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[9] The words "fines" and "forfeiture" were used interchangeably in colonial and early American statutes. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 302-03 (2014). The distinction drawn here merely relates to whether a pecuniary penalty would require a criminal or civil process.

fines and forfeitures which shall arise and accrue by virtue of this act . . . [are] to be recovered by action of debt, bill, plaint or information."); *see also* Colgan, *supra*, at 319 & n.211.

Underscoring that actions of debt served a punitive function, some penal statutes allowed for prosecution via an action of debt *or* a criminal indictment. For example, a Georgia statute made minor gambling offenses punishable via action of debt, while more serious gambling offenses—punishable by fines and corporal punishment—were prosecuted via indictment. *An Act to Suppress Lotteries, and Prevent Other Excessive and Deceitful Gaming*, 1764 Ga. Laws 15-20, §§ 1, 5; *see also An Act Limiting Suits on Penal Statutes*, 1790 N.H. Acts 262-63 (describing civil processes and indictments as both arising under "penal statutes").

In short, actions of debt served as one mechanism for punishing offenses against the public. The fact that these actions were styled as civil proceedings and sought only forfeiture or other pecuniary penalties does not undermine the conclusion that they were designed at least in part to punish. *See* Colgan, *supra*, at 319 & n.211; Nelson, *supra*, at 2497-500. The district court—and by extension the Eighth Circuit—thus erred in suggesting that the civil or criminal mode of enforcement of a forfeiture informs whether the Excessive Fines Clause applies.

III. Forfeitures Are Fines If They Have A Punitive Purpose, Even In Part, While Compensatory Qualities Are Relevant To The Question Of Excessiveness

The district court further reasoned that the $25,000 forfeiture falls outside the Excessive Fines Clause's ambit because its "primary purpose is . . .

compensating the government for the losses caused by the non-payment of property taxes." Pet.App.44a. But whether revenue generated by a forfeiture may be used to compensate the government is not the test for whether a forfeiture constitutes a "fine" triggering Excessive Fines Clause scrutiny.

This Court has recognized that the Excessive Fines Clause requires a two-step inquiry. At the first step, forfeiture constitutes a fine when it is punitive *in part*, even if it also has remedial qualities. *Bajakajian*, 524 U.S. at 329 & n.4; *Austin*, 509 U.S. at 618. When a forfeiture is a "fine," courts must next consider whether the severity of the penalty is grossly disproportionate to the underlying offense and therefore excessive. *Bajakajian*, 524 U.S. at 334. At this second step, the gravity of the harm to be remedied factors into the analysis. *Id.* at 337-40. In this case, the extent to which the $25,000 forfeiture exceeds or merely compensates the government's losses speaks to its proportionality. But here, the district court conflated the question at step one (whether the forfeiture is at least partially punitive and thus a fine) with the question at step two (whether the forfeiture is excessive).

To be sure, this Court has at times obscured the two-step inquiry and itself conflated the threshold question of whether a forfeiture is a fine with the secondary question of excessiveness. As Justice Kennedy pointed out in his dissent, the *Bajakajian* majority "confuse[d] whether a fine is excessive with whether it is a punishment" by suggesting that "a fine is not a punishment even if it is much larger than the money owed." 524 U.S. at 344-45 (Kennedy, J., dissenting); *see* Pet.Br.42. *Bajakajian* stated that a forfeiture is

remedial if it "'provide[s] a reasonable form of liquidated damages' to the Government." 524 U.S. at 343 n.19 (quoting *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972)). Yet it simultaneously contended that whether revenues from a forfeiture may compensate the government for investigation and enforcement expenses "is essentially meaningless, because even a clearly punitive criminal fine or forfeiture" could serve that purpose. *Id.* This has created a breeding ground for confusion.

But once again, there is historical support for properly separating the two-step analysis of whether a forfeiture is a "fine" and whether it is "excessive." This separation is critical to ensuring the integrity of the Excessive Fines Clause.

In colonial and early American practices, punishment and remediation were not mutually exclusive concepts. Pecuniary penalties called "fines" and "forfeitures" imposed for the violation of public offenses served both to punish and to compensate the government for law enforcement expenses, court and incarceration costs, and *qui tam* prosecution fees. Colgan, *supra*, at 311-13. Many records described these partially remedial fines and forfeitures in punitive terms, and in some cases they served as the sole punishment for an offense or were imposed under circumstances suggesting courts took the offender's degree of culpability into account in setting the amount. *Id.* at 313-15. Early statutes and case law suggest, however, that the degree of harm caused by an offense, and thus the degree of remediation it necessitated—was relevant to understandings of proportionality. *Id.* at 324-25 & n.245. Therefore while the remedial qualities of a fine might weigh against a determination of constitutional

excessiveness, it did not detract from its treatment as punishment.

Despite this history, *Bajakajian* suggested that the possibility that revenue generated from a forfeiture could compensate the government could eclipse the forfeiture's punitive qualities and allow it to escape constitutional scrutiny. 524 U.S. at 329, 331, 341–43 & n.19. But the cases *Bajakajian* relied upon to reach that conclusion do not withstand close inspection. The primary case, *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871), was poorly reasoned. In *Stockwell*, the Court considered several challenges to a penalty imposed under a statute that required a forfeiture for the illegal importation of goods equal to double the goods' value. The Court concluded that the forfeiture was "fully as remedial in its character . . . as are the statutes rendering importers liable to duties" because it indemnified the government for "the loss which such infringement might cause." *Id.* at 546-47. In a break with historical practice, which had long treated forfeitures as penal (even if sometimes also remedial), the Court concluded that the penalty prescribed was designed only to compensate and not to punish. *Id.* at 550-51.

In focusing solely on a forfeiture's compensatory possibilities, *Stockwell* was an outlier, and *Bajakajian*'s reliance on it perpetuates the misconception that forfeitures' punitive and remedial purposes are mutually exclusive. Not only did *Stockwell* contradict this Court's earlier cases, *see* Section I, *supra*, fifteen years after *Stockwell*, this Court held that a statute authorizing compulsory production of papers to be used as evidence in *in rem* forfeiture proceedings violated the Fourth Amendment and the Fifth

Amendment privilege against self-incrimination because such proceedings had a "*quasi* criminal nature." *Boyd v. United States*, 116 U.S. 616, 634-35 (1886). The Court continued to recognize the punitive nature of civil penalties in other constitutional decisions in the same period. *See Lees v. United States*, 150 U.S. 476, 479-81 (1893) (holding the privilege against self-incrimination applies in civil actions to obtain monetary forfeitures where they could also be pursued criminally); *United States v. Zucker*, 161 U.S. 475, 481 (1896) (declining to apply the Confrontation Clause to civil customs proceedings because the text of the Sixth Amendment limited it to actions "technically criminal in . . . nature" while confirming that civil forfeitures were of a "penal nature"). The revenues generated from any of these penalties could serve to compensate the government, but they were still punishment.

Further, *Bajakajian*'s reliance on 20th century double jeopardy cases that overemphasize compensation, again, breaks down under close scrutiny. In 1972, the Court held that the forfeiture of jewels and a ring brought into the United States without proper declaration was not punishment for double jeopardy purposes because "it provide[d] a reasonable form of liquidated damages for violation of the inspection provisions." *Emerald Cut Stones*, 409 U.S. at 237. *Bajakajian* relied on that decision to conclude that early customs forfeitures were historically considered to serve only "the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties." 524 U.S. at 342-43. But *Emerald Cut Stones*'s main support for that conclusion was *Helvering v. Mitchell,* 303 U.S. 391 (1938), which enshrined the historically inaccurate notion—one this Court had rejected before *Bajakajian* was decided,

Austin, 509 U.S. at 610—that a penalty could be punitive or remedial, but not both. *Helvering* posited that double jeopardy would not apply to "a civil action by the Government, remedial in its nature." 303 U.S. at 397. And *Helvering* concluded that the revenue laws at issue were strictly remedial because "[t]hey are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Id.* at 401. *Helvering* reached that faulty conclusion in part by relying on *Stockwell*, which as explained above, *see supra* 19-20, was poorly reasoned.

Emerald Cut Stones also cited two additional cases that are easily distinguishable.[10] The cases merely stood for the proposition that double jeopardy does not prohibit the government from enforcing its private contractual rights even if the acts at issue were also punished criminally. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943) ("'It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.'") (quoting *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850)); *see also Rex Trailer Co. v. United States*, 350 U.S. 148, 150-53 (1956) (citing *Marcus* approvingly). In other words, those cases involved harms to the government indistinguishable from the types of private

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[10] The Court also cited without discussion *Murphy v. United States*, 272 U.S. 630 (1926), which held that acquittal for the offense of maintaining a nuisance was not *res judicata* as to a subsequent action seeking a time-limited injunction on the use of property.

harms that would have been understood to be nonpunitive, as detailed above. *See* Sections I-II, *supra*. But *Emerald Cut Stones* involved a violation of the customs laws, which were historically understood as offenses against the public subject to punishment. *See supra* 15-19. So the mere fact that liquidated damages provisions were allowable in government contracts so long as they were reasonably calculated to reimburse the government for a breach, *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411-12 (1947), does nothing to undermine the fact that a forfeiture for the public offense of a revenue violation constituted punishment.

In sum, the district court's reliance on *Bajakajian* led it to conflate the question of whether the forfeiture is a fine, with the question of whether the forfeiture is excessive.

IV. The Excessive Fines Clause Provides Critical Protection Against Abusive Tax Schemes

For the reasons just stated, the district court erred in concluding the $25,000 forfeiture is non-punitive. In doing so, its holding undermines the Excessive Fines Clause's role as a "constant shield" against the government's abuse of its power to punish offenses against the public. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

This Court has recognized that "there comes a time in the extension of the penalizing features of [a] so-called tax" when the protections afforded by the Constitution must stand between the government and the people. *Child Labor Tax Case*, 259 U.S. 20, 36-38 (1922) (striking down a tax penalty under the Tenth Amendment). Were that not the case—were this

Court "[t]o give such magic to the word 'tax'" when imposed for an offense against the public as to allow taxes to escape constitutional scrutiny—it would "break down all constitutional limitation of the powers of" the government. *Id.* at 38.

When, as here, a tax forfeiture serves at least in part to punish, the Excessive Fines Clause has a central role to play in ensuring that federal, state, and local governments do not use such forfeitures "out of accord with the penal goals of retribution and deterrence." *Timbs*, 139 S. Ct. at 689. And the risk is real because, as history shows us, the government has a strong incentive to use tax forfeitures to raise revenue.

The customs laws passed by the First Congress exemplify the need for robust Excessive Fines Clause protections. Customs regulation was essential to the fledgling nation's financial well-being, and Congress accordingly smoothed the path for collection of *in rem* forfeitures for customs violations. *See* Arlyck, *supra*, at 1466. Customs statutes set a wide range of behaviors as offenses against the public. *Id.* at 1468. The charging documents initiating the case required few factual allegations, judges served as fact finders to prevent jury nullification, and property owners carried the burden of proof. *Id.* at 1469-71. Congress also incentivized customs officers to seek out violations by awarding a moiety of *in rem* forfeitures for which they served as prosecutors. *Id.* at 1469; *see also Hylliard v. Nickols*, 2 Root 176, 177 (Conn. Super. Ct. 1795) (explaining that moieties served to "induce persons from motives of gain . . . to prosecute").

Of course, in the 1790 Remission Act—the statute championed by Secretary Hamilton—Congress temporarily placed other considerations ahead of revenue

generation, but that Act is not the end of the story. Congress and the states continued to rely on *in rem* forfeitures as a source of revenue. For example, in an effort to finance the Civil War, Congress incentivized prosecutions of tax offenses by increasing the amount of the moieties awarded to those who prosecuted even minor customs violations. Parrillo, *supra*, at 221-23.

The expansion of forfeitures—both in relation to tax violations and beyond—continues today. Over time, "federal and state forfeiture statutes" have come to "reach virtually any type of property that might be used in the conduct of a criminal enterprise," including violations of customs and revenue laws. *Calero-Toledo*, 416 U.S. at 683. This expansion of forfeiture programs creates opportunities for abuse. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993) (quoting Attorney General bulletin urging prosecutors to "significantly increase production [of forfeitures] to reach our budget target"). Though nominally civil, these forfeiture statutes may inflict penalties "far more severe than those found in many criminal statutes." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Ensuring that these punishments are treated as such—and are subject to a determination of whether they are constitutionally excessive—is essential.

Further, as this Court has recognized, the Excessive Fines Clause—along with Magna Carta and the English Bill of Rights before it—is necessary to protect against governmental abuse of fines and forfeitures targeted at those without political power. *Timbs*, 139 S. Ct. at 688-89; *see also id.* at 697-98 (Thomas, J., concurring in the judgment) (describing abuses dating back to Magna Carta). Magna Carta's

drafters "sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements [a predecessor of the fine] as a source of royal revenue, and as a weapon against enemies of the Crown." *Browning-Ferris*, 492 U.S. at 270-71. In turn, the prohibition against excessive fines found in the English Bill of Rights was adopted in response to abuses by the notorious jurists of the Star Chamber, who took aim at enemies of the Crown, imposing exorbitant and ruinous fines. *See* John Southerden Burn, *The Star Chamber: Notices of the Court and Its Proceedings; with a Few Additional Notes of the High Commission* 30, 85-87, 90-156 (J. Russel Smith 1870); 2 Henry Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II* 46-47 (2d ed. 1829); *see also Powell v. McCormack*, 395 U.S. 486, 502 (1969). And on our own shores, government officials have abused the prosecutorial power to extract revenues through fines and forfeitures against those with limited political power. *E.g.*, *Timbs*, 139 S. Ct. at 688-89 (regarding the use of the Black Codes); *see also id.* at 693-98 (Thomas, J., concurring in the judgment) (same).

Minnesota's tax-forfeiture scheme creates the same risk—that punishment out of accord with legitimate penal aims will be borne by those who are most politically vulnerable. *Cf. Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari) (explaining that civil forfeitures "frequently target the poor and other groups least able to defend their interests" leading to "egregious and well-chronicled abuses"). Those whose homes are seized and sold under Minnesota's scheme will certainly include people living in "extreme poverty, ill-health, [with] cognitive disability, and other factors[.]"

Pet.Br.38 (citing John Rao, *The Other Foreclosure Crisis*, Nat'l Consumer Law Ctr. 5, 9, 33, 38 (July 2012)).

While it may well turn out that this particular overage is not sufficiently disproportionate to Tyler's failure to pay taxes to render it constitutionally excessive, the risks of allowing the government to side-step this critical protection are simply too great. This Court should ensure that the Excessive Fines Clause remains "a constant shield" against excessive pecuniary penalties. *Timbs*, 139 S. Ct. at 689.

CONCLUSION

The Court should hold the $25,000 forfeiture constitutes a fine for purposes of the Excessive Fines Clause.

Respectfully submitted,

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