No. 22-177

In the Supreme Court of the United States

MONICA TOTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Clark M. Neily III
Counsel of Record
Trevor Burrus
Laura A. Bondank
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 425-7499
cneily@cato.org

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QUESTION PRESENTED

The Bank Secrecy Act and implementing regulations require U.S. persons to file an annual report—called an FBAR—if they have foreign bank accounts containing more than ten thousand dollars. The maximum civil penalty for willfully failing to file the report is either $100,000 or half the balance in the unreported account, whichever sum is greater. 31 U.S.C. § 5321(a)(5)(C)-(D). Using this formula, the government imposed on petitioner a civil penalty of $2,173,703.00.

The question presented is whether civil penalties imposed under 31 U.S.C. § 5321(a)(5)(C)-(D)—penalties that are avowedly deterrent and noncompensatory—are subject to the Eighth Amendment's Excessive Fines Clause.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files amicus briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it involves the preservation of constitutional principles, namely the Eighth Amendment's prohibition on excessive fines. The Excessive Fines Clause was adopted to protect against the government's use of financial penalties as punishment. Failure to extend these protections to civil penalties is contrary to the original meaning of the Excessive Fines Clause and creates harmful incentives for targeted enforcement.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The Bank Secrecy Act ("BSA") was promulgated to "curb the use of foreign bank accounts to evade taxes." *United States v. Toth*, 33 F.4th 1, 3 (1st Cir. 2022). However, since its enactment in 1970, it has become little more than "a minor inconvenience for criminals [and] a major burden on law abiding citizens." Norbert Michel, *FinCEN Needs More Oversight but Congress Needs to Fix the Bank Secrecy Act*, Forbes (Apr. 26, 2022).[2] The Act requires U.S. Citizens holding foreign bank accounts over $10,000 report the existence of such accounts. 31 U.S.C. § 5314(a); *see also* 31 C.F.R. §§ 1010.350(a), 1010.306(c). If a person fails to report this account, the IRS can impose a civil penalty up to half the value of the foreign accounts. 31 U.S.C. § 5321(a)(5)(C). In the case of 82-year-old Monica Toth, she was ordered to pay a penalty of $2,173,703 based on her failure to file a one-page document reporting the existence of her Swiss bank accounts. *See Toth*, 33 F.4th at 3. She was not charged with any crime—she simply failed to file a simple tax form. *See id.* at 16.

The Eighth Amendment prohibits the government from imposing excessive fines. U.S. Const. amend. VIII. The purpose of the amendment was to limit "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989). The limit on excessive fines was intended to cover both civil and criminal penalties. *See Austin v. United States*, 509 U.S. 602 (1993); *United States v. Bajakajian*, 524 U.S. 321 (1998).

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[2] Available at https://bit.ly/3qHCf2p.

Because the original purpose of the Excessive Fines Clause was to limit the government's ability to punish individuals through the imposition of excessive fines, the question of whether the clause applies to a certain penalty must turn on whether the penalty is punishment. *Austin*, 509 U.S. at 610. However, in its opinion below, the First Circuit exempted FBAR penalties from Eighth Amendment scrutiny by recasting these penalties as "remedial," and, in doing so, ostensibly limited the application of the Excessive Fines Clause. *See* Pet. Br. at 16. This outcome is contrary to the original meaning of the clause and risks eliminating one of the few protections Americans have against excessive civil penalties. *See Austin*, 509 U.S. at 606–19.

When an agency is responsible for enforcing and collecting monetary penalties, there is a risk that enforcement will be targeted toward profit rather than public safety. In the context of civil forfeiture, however, this Court's application of the Excessive Fines Clause has placed significant limits on the government's ability to "police for profit." *See* Lisa Knepper, et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice (Dec. 2020).[3] If the same limits are not extended to other civil penalties, enforcement will inevitably be biased toward profit. The government's ability to impose extortionate civil penalties will create harmful incentives by rewarding agencies for targeting profitable conduct, while ignoring less-profitable conduct that poses a cognizable threat to society. *See id.*

This Court should grant certiorari to ensure the Excessive Fines Clause is applied according to its original meaning and to fortify constitutional protections

[3] Available at https://bit.ly/3aMJP7B.

against government imposition of excessive civil penalties. Moreover, this Court should grant certiorari to extend the protections of the Excessive Fines Clause to FBAR penalties and other civil penalties in order to disincentivize profit-based enforcement.

ARGUMENT

I. THE FIRST CIRCUIT'S HOLDING CONFLICTS WITH THE ORIGINAL MEANING OF THE EXCESSIVE FINES CLAUSE AND THREATENS ONE OF THE FEW PROTECTIONS AMERICANS HAVE AGAINST EXCESSIVE CIVIL PENALTIES

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. The Framers understood that "when the same Man, or set of men, holds both the sword and purse, there is an end of liberty." George Mason, Fairfax County Freeholders' Address (May 30, 1783). To protect against those concerns, the Framers added the Excessive Fines Clause into the Eighth Amendment. *See* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1242 (1987).

The language of the Eighth Amendment came directly from the Virginia Declaration of Rights, which "adopted verbatim the language of the English Bill of Rights [of 1689]." *Browning-Ferris*, 492 U.S. at 267. The drafters of the English Bill of Rights sought to guard against the Crown's imposition of excessive fines. *Id.* at 295 (O'Connor, J., concurring). This desire stemmed from a long history of abuse of power by the English monarchy, namely the Crown's use of fines as

a means to financially subvert enemies of the crown. *See* Massey, *supra*, at 1243–57 (providing an in-depth historical analysis of the pre-colonial prohibition on excessive fines). Understanding the abuses faced by their English predecessors, the Framers wanted to ensure the same protections against excessive fines existed in America. *Browning-Ferris*, 492 U.S. at 267. Thus, the Excessive Fines Clause was adopted to "limit[] the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.*

The historical application and understanding of the Excessive Fines Clause demonstrates that its protections extend to all sanctions imposed as punishment, "whether by a civil action or a criminal prosecution." *Id.* at 298. "[A] chronological account of the Clause and its antecedents demonstrates that [it] derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct." *Id.* at 287 (O'Connor, J., concurring) (emphasis original). The clause was never intended to be limited to criminal sanctions—a fact made apparent by the pre-colonial English prohibition on excessive fines covering both criminal penalties and amercements. *See Massey*, *supra*, at 1243.

The Court's opinion in *Austin v. United States* marked a turning point for judicial recognition of constitutional protections against excessive civil penalties. Prior to that case, lower courts were hesitant to limit civil penalties under the Excessive Fines Clause. *See* M. Lynette Eaddy, *How Much is Too Much? Civil Forfeitures and The Excessive Fines Clause After* Austin v. United States, 45 Fla. L. Rev. 709, 716 (1993). But in *Austin*, the Court held that the forfeiture of the

defendant's mobile home and autobody shop was an excessive fine under the Eighth Amendment. *Austin*, 509 U.S. at 605. In doing so, this Court "articulated a constitutional standard against which civil penalties in general should be evaluated" and Americans were finally afforded protection against the government's imposition of excessive civil penalties. Pet. Br. at 25.

The Court's analysis in *Austin* applies the Excessive Fines Clause according to its original meaning. The *Austin* Court held that the Excessive Fines Clause limits the government's power to impose financial penalties "as *punishment* for some offense." *Austin*, 509 U.S. at 610 (quoting *Browning-Ferris*, 492 U.S. at 265). Because "the notion of punishment, as we commonly understand it, cuts across the division between civil and criminal law," the question is not whether the penalty "is civil or criminal, but rather whether it is punishment." *Id.*

In excluding FBAR penalties from limitation under the Eighth Amendment, the First Circuit's opinion deviates from this Court's holding in *Austin* as well as the intent and original public meaning of the Excessive Fines Clause. Here, the First Circuit exempted FBAR penalties from Eighth Amendment scrutiny by "recast[ing] FBAR penalties as purely compensatory (or 'remedial')." Pet. Br. at 16. Because FBAR penalties "are not tied to any criminal sanction," the court ignored their punitive nature and held the Excessive Fines Clause inapplicable. *Toth*, 33 F.4th at 16. Instead of looking at whether the penalty is intended to punish, the First Circuit allowed FBAR penalties to evade Eighth Amendment scrutiny by distinguishing them from civil forfeitures. *Id.* at 15; Pet. Br. at 15. This reasoning clashes with the historical

understanding of the clause and the Framers' intent to focus on punishment.

The First Circuit's analysis threatens one of the few protections Americans have against excessive civil penalties. The Eighth Amendment serves "as a vital check" on the overreach of government power. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L & Pol'y Rev. 541, 554 (2017). The First Circuit's classification of FBAR penalties as "remedial" opens the door to countless other punitive civil penalties being placed outside the reach of the Excessive Fines Clause. The government need only tailor its regulations to serve an acceptable "remedial" purpose to avoid Eighth Amendment scrutiny. This outcome strips Americans of any ability to contest excessive civil penalties and leaves them vulnerable to government abuse.

If the proper understanding of the Excessive Fines Clause isn't enforced, there is no limit on the government's power to punish citizens with civil sanctions. American citizens would be at the mercy of the government, which would have the power to impose outrageous fines in the event an individual fails to comply with the most nuanced regulatory requirement. This Court should grant certiorari to ensure the Excessive Fines Clause is applied according to its original meaning and to protect Americans from what the Framers feared: the unchecked abuse of the government's prosecutorial power through the imposition of excessive fines. *See Browning-Ferris*, 492 U.S. 257, 265–66.

II. FAILURE TO EXTEND THE EXCESSIVE FINES CLAUSE TO OTHER CIVIL PENALTIES WILL CAUSE GOVERNMENT AGENCIES TO TARGET ENFORCEMENT TOWARD PROFIT RATHER THAN PUBLIC SAFETY

The government's use of civil forfeiture demonstrates how civil penalties can create harmful incentives to "police for profit." Knepper, *supra*, at 5–7. "Under most state and federal forfeiture laws, most or all proceeds from forfeited property go to law enforcement coffers, often supplementing the budgets of the very agencies that seized the property and the prosecutors that secured its forfeiture." *Id.* at 34. This creates a perverse incentive for law enforcement to target crimes they know will result in forfeitures. *Id.* (explaining how civil forfeiture proceedings "enable agencies to self-fund outside normal legislative appropriations"). Civil forfeitures are extremely difficult to challenge, and, until this Court's holding in *Austin*, lower courts were reluctant to place limits on the government's ability to forfeit property. *See* Eaddy, *supra*, at 716.

While the harmful impacts of civil forfeiture continue to exist post-*Austin*, the extension of Excessive Fines Clause protections to such penalties "imposes significant limitations on the government's power to forfeit property." James E. Beaver et al., *Civil Forfeiture and the Eighth Amendment after* Austin, 19 Seattle U.L. Rev. 1, 28 (1995). Therefore, while incentives to target enforcement toward profit may still exist, application of the Excessive Fines Clause cabins the government's abuse of its authority. Application of the clause diminishes the incentives to "police for profit"

by reducing the government windfall created by excessive forfeitures.

Profit-targeted enforcement is not unique to civil forfeitures. When comparing different types of civil penalties, the highest fines almost always involve corporate or financial regulations. Celine McNicholas et al., *Civil Monetary Penalties for Labor Violations are Woefully Insufficient to Protect Workers*, Economic Policy Institute (July 15, 2021 12:56 PM).[4] For example, civil penalties for violations under the Consumer Financial Protection Act "stretch well into the millions of dollars," while the "maximum penalty for a standard OSHA violation is well below 1% of the maximum insider trading penalty." *Id.* As a result, the government puts more resources toward collecting financial and corporate civil penalties, rather than less-profitable civil penalties stemming from employment and safety regulations. *See generally* Lydia Beyoud, *SEC Would See Funding Boost in Biden's Budget Plan*, Bloomberg (Mar. 28, 2022 11:00 AM).[5] In fact, in 2021, the SEC's enforcement budget was $628 million, while OSHA's enforcement budget was only $229 million. *Compare* SEC, FY 2023 Congressional Budget Justification 18 (2022) (hereinafter "SEC Budget"), *and* Dep't of Labor, FY 2023 Budget in Brief 38 (2022) (hereinafter "Dep't of Labor Budget"). In justifying its request for an even larger enforcement budget for 2023, the SEC pointed to its success in obtaining monetary penalties and other relief in 96 percent of its enforcement actions in 2021. SEC Budget, *supra*, at 188. In sum, the more money these agencies collect through the imposition of financial penalties, the greater their funding. *See id.*

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[4] Available at https://bit.ly/3S26hdl.

[5] Available at https://bit.ly/3Lyt5yM.

at 18; Dep't of Labor Budget, *supra*, at 38. That creates perverse incentives for agencies to "select targets not because they are the worst violators, but for improper reasons such as agency or individual self-aggrandizement." Sonia A. Steinway, *SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 Yale L.J. 209, 224 (2015).

Under the First Circuit's opinion, agencies would not only be able to profit from their enforcement activities, they would also be able to do so without limitation, further "biasing [their] priorities toward the pursuit of property over justice." Knepper, *supra*, at 34. In the last decade, there has been "an increase in the frequency in which BSA enforcement actions have involved an assessment by federal regulators of monetary penalties, and an increase in the size of those penalties." Jay B. Sykes, *Trends in Bank Secrecy Act/Anti-Money Laundering Enforcement*, Congressional Research Service 2 (Jan. 12, 2018).[6] While data suggests that agencies already target enforcement based on budget considerations, exempting civil penalties from Excessive Fines Clause scrutiny would further incentivize profit-based enforcement.

Additionally, failure to apply the Excessive Fines Clause to civil penalties will encourage agencies to forgo criminal sanctions in lieu of more profitable civil penalties. The Bank Secrecy Act provides for both civil and criminal sanctions. 31 U.S.C. §§ 5321–5322. There is no question that the Excessive Fines Clause limits criminal penalties under the BSA. *See Browning-Ferris*, 492 U.S. at 257. However, according to the First

[6] Available at https://bit.ly/3C6vVXR.

Circuit's holding, civil penalties are not so limited. *See Toth*, 33 F.4th at 19.

It is already easier for the government to secure civil penalties than criminal penalties. "Civil proceedings often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof." *Leonard v. Texas*, 580 U.S. 1178, 1179 (2017) (Thomas, J., concurring). If civil penalties are not limited by the Excessive Fines Clause, the government will have little reason to go through the hassle of imposing criminal sanctions. Instead, the government will employ civil penalties as an easier and more profitable method of punishing conduct, thus allowing agencies to "aggrandize their criminal authority without actually operating through criminal law." Note, *Policing and Profit*, 128 Harv. L. Rev. 1723, 1731 (2015).[7]

"The constitutional protection of the Excessive Fines Clause is especially important . . . 'where the Government has a direct pecuniary interest in the outcome of the proceeding.'" *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 735 (C.D. Cal. 1994) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993)). There are already strong incentives for the government to target enforcement toward profit rather than public safety. Knepper, *supra*, at 1. Without limitation by the Excessive Fines Clause, there will be nothing to protect Americans from government abuse. Accordingly, this Court should grant certiorari and extend the application of the Excessive Fines Clause to all civil penalties in

[7] Available at https://bit.ly/3UnUgAI.

order to curb the harmful effects of profit-based enforcement.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

Clark M. Neily III
Counsel of Record
Trevor Burrus
Laura A. Bondank
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 425-7499
cneily@cato.org

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