

No. A-_____

In the Supreme Court of the United States

MONICA TOTH, APPLICANT,

v.

UNITED STATES OF AMERICA

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the First Circuit:

Under this Court’s Rules 13.5, 22, 30.2, and 30.3, Applicant Monica Toth applies for a 32-day extension of time—to and including Monday, August 29, 2022—within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. The First Circuit entered its judgment on April 29, 2022. *See* App. 1a-42a; *see also* App. 43a (errata). Unless extended, the time for petitioning for a writ of certiorari will expire on July 28, 2022. The jurisdiction of this Court would be based on 28 U.S.C. § 1254(1).

1. The right to be free from “excessive punitive economic sanctions” is secured by the Eighth Amendment’s Excessive Fines Clause and is “fundamental to our scheme of ordered liberty.” *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (citation omitted). The Clause applies not just to criminal fines, but to civil penalties as well. *See Hudson v. United States*, 522 U.S. 93, 103 (1997). Whether in criminal court or civil, a monetary penalty that is at least partly punitive or deterrent triggers Eighth Amendment scrutiny. *See Austin v. United States*, 509 U.S. 602, 610 (1993); *see also, e.g., Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1308 (11th Cir. 2021) (applying the Excessive Fines Clause to civil penalty under the False Claims Act); *United States v. Mackby*, 261 F.3d 821, 830-31 (9th Cir. 2001) (same); *Towers v. City of Chicago*, 173 F.3d 619, 624 (7th Cir. 1999) (applying the Excessive Fines Clause to civil administrative penalty).

2. The Bank Secrecy Act and implementing regulations require U.S. persons to file an annual report (called an “FBAR”) if they maintain foreign bank accounts containing

more than \$10,000. The civil penalty for willfully failing to file such a report can run to the greater of \$100,000 or half the balance in the unreported account. 31 U.S.C. § 5321(a)(5)(C)-(D). The penalties can be imposed whether or not a reporting failure causes the federal government any pecuniary loss. Lower courts have held that heightened “willfulness” penalties can be imposed based not only on knowing or deliberate reporting failures, but reckless ones also. *E.g.*, *United States v. Horowitz*, 978 F.3d 80, 88 (4th Cir. 2020). And in recent years, the government has pursued these penalties vigorously. *E.g.*, *United States v. Schik*, No. 20-cv-2211, 2022 WL 685415, at *1 (S.D.N.Y. Mar. 8, 2022) (denying government’s summary-judgment motion in an action to collect \$8.8 million FBAR penalty from “an almost one hundred-year-old Holocaust survivor”).

3.a. Monica Toth learned all this the hard way. In the mid-1930s, her Jewish father fled Germany after being assaulted by Nazis. He ended up in Argentina, where Toth was born in 1940. In the 1960s, Toth moved to the United States, got married, went to school, and had four children. She still lives in the United States today.

Shortly before his death in the late 1990s, Toth’s father made her a gift of several million dollars. Those funds were held in a foreign bank account with UBS. Toth first filed an FBAR for the account in 2010. The next year, the Internal Revenue Service audited her and ultimately concluded that her failure to file an FBAR for the 2007 calendar year had been “willful.” The agency then assessed a civil penalty amounting to half the balance of her bank account at the time of the violation: \$2,173,703.

b. In late 2015, the government sued Toth for a judgment imposing the \$2.17 million civil penalty, plus interest and late fees. The district court ruled for the government.

In 2018, the court sanctioned Toth (then *pro se*) with an adverse finding that her failure to file an FBAR in 2007 had been willful. In 2020, the court rejected Toth’s main constitutional defense—that the penalty violated the Eighth Amendment’s Excessive Fines Clause—and granted summary judgment in the government’s favor.

c. The court of appeals affirmed, and in doing so, it rejected Toth’s Excessive Fines Clause defense on a threshold ground that conflicts with the reasoning of this Court and of others: in the court of appeals’ view, civil FBAR penalties are not even partly punitive and thus do not “implicate the Excessive Fines Clause” at all. App. 32a. In reaching that conclusion, the court maintained that FBAR penalties are purely “remedial.” App. 38a. *But cf.* Mem. Supp. United States’ Mot. for Summ. J. at 8, *United States v. Simonelli*, No. 6-cv-653 (D. Conn. filed Jan. 29, 2008) (Dkt. No. 20-2) (“The FBAR penalty does not compensate the government for actual pecuniary loss.”). The court ignored the penalties’ punitive and deterrent aspects. *See, e.g., United States v. Warner*, 792 F.3d 847, 861 (7th Cir. 2015) (“Congress apparently intended FBAR penalties to have a deterrent effect.”); *see generally United States v. Bajakajian*, 524 U.S. 321, 329 (1998) (“Deterrence . . . has traditionally been viewed as a goal of punishment . . .”). The court also resorted to precedent construing not the Excessive Fines Clause, but the Double Jeopardy Clause—which this Court “never ha[s] understood as parallel to, or even related to,” the Eighth Amendment’s protection against excessive fines. *United States v. Ursery*, 518 U.S. 267, 286 (1996); *see also* App. 35a, 38a. Combined, these errors led the court of appeals to hold that “a civil penalty imposed under § 5321(a)(5)(C)-(D) is not a ‘fine’ and as such the Excessive Fines Clause of the Eighth Amendment does not apply to it.” App. 40a-41a.

4. The undersigned counsel requests a 32-day extension of time, to and including August 29, 2022, within which to file a petition for a writ of certiorari. This case presents an important question about the scope of a constitutionally protected right that this Court recently recognized as “both ‘fundamental to our scheme of ordered liberty’ and ‘deeply rooted in this Nation’s history and tradition.’” *Timbs*, 139 S. Ct. at 689. Counsel at the Institute for Justice did not represent Monica Toth in the lower courts, they have only recently entered into an attorney-client relationship with her, and they would benefit from additional time to review the lengthy district-court record and prepare the petition. In addition, Mr. Gedge will be participating in a multi-day trial in the Commonwealth Court of Pennsylvania, beginning July 12. *Ladd v. Real Estate Comm’n*, No. 321 MD 2017. He also will be overseeing the preparation of responses to two motions to dismiss in a putative class-action lawsuit, due July 25. *Coleman v. Town of Brookside*, No. 22-cv-423 (N.D. Ala.). And Mr. Bargil will be presenting argument before the Eleventh Circuit on July 14. *Ficken v. City of Dunedin*, No. 21-11773. Counsel thus respectfully submits that the requested 32-day extension is supported by good cause.

Respectfully submitted.

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