No. _____

In The Supreme Court of the United States

LETANTIA BUSSELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Will the Eighth Amendment permit a forfeiture of half of an account's value, potentially millions of dollars, and, in this case, more than $1 million, based merely on a failure to report the account, and even if the funds in the account have already been identified and taxed?

2. Can the treaty between the United States and Switzerland on dual taxation, which is restricted to disclosure of tax information, be used to obtain information for non-tax uses, such as the existence of a foreign account held in violation of the Foreign Bank Account Report (FBAR) requirement?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Letantia Bussell and the United States of America.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Letantia Bussell respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On December 8, 2015, the district court granted summary judgment for the government in its action to reduce its penalty assessment of $1,221,806 to a judgment based on Bussell's alleged violation of the Foreign Bank Account Report (FBAR) requirement. The district court overruled all of Bussell's affirmative defenses except her Eighth Amendment claim, which it granted in part, finding that the assessment exceeded the maximum penalty set out in the applicable criminal and civil statutes. It therefore decreased the penalty imposed from $1,221,806 to $1,120,513. Appendix at A-41. On October 25, 2017, the United States Court of Appeals for the Ninth Circuit issued an order affirming the decision of the district court. Appendix at A-6.

JURISDICTION

This Court has jurisdiction under Article III, Section 2 of the United States Constitution as it arises under the Constitution and a Treaty of the United States. Jurisdiction for this Petition is under 28 U.S.C. § 1254(1) inasmuch as Bussell seeks review of a judgment of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Article II, Section 2

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur....

United States Constitution, Article III, Section 2, Paragraph 1

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, —between Citizens of

> the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

TREATY AND STATUTES AT ISSUE

Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (effective 1998), Article 1, Section 1

Except as otherwise provided in this Convention, this Convention shall apply to persons who are residents of one or both of the Contracting States.

Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (effective 1998), Article 2, Sections 1-2

> 1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State.
> 2. The existing taxes to which the Convention shall apply are:
>
> > a) in Switzerland: the federal, cantonal and communal taxes on income (total income, earned income, income from property, business profits, etc.);

> b) in the United States: the Federal income taxes imposed by the Internal Revenue Code....

Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (effective 1998), Protocol, Paragraph 1

> **With reference to paragraph 2 of Article 2 Taxes Covered**
> The reference to "Federal income taxes imposed by the Internal Revenue Code" in subparagraph b) does not include social security taxes. Income taxes on social security benefits, however, are covered.

Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (effective 1998), Article 22, Section 1(a)

> Subject to the succeeding provisions of this Article, a person that is a resident of a Contracting State and that derives income from the other Contracting State may only claim the benefits provided for in this Convention where such person... is an individual.

Convention Between the United States of America and the Swiss Confederation for the Avoidance of

Double Taxation with Respect to Taxes on Income (effective 1998), Article 26, Section 1

> Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, ***the taxes covered by the Convention***. Such persons or authorities shall use the information ***only for such purposes***. [emphasis added]

Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (effective 1998), Protocol, Paragraph 10

> **With reference to Article 26 (Exchange of Information)**
> The parties agree that the term "tax fraud" means fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of the tax paid to a Contracting State....

31 United States Code § 5314(a)

Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

> (1) the identity and address of participants in a transaction or relationship.
> (2) the legal capacity in which a participant is acting.
> (3) the identity of real parties in interest.
> (4) a description of the transaction.

31 United States Code § 5321(a)(5)

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.

(B) Amount of penalty.—

(i)In general.—

Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.

* * * * *

(C)Willful violations.—In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—

(i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—

(I) $100,000, or

(II) 50 percent of the amount determined under subparagraph (D), and

(ii) subparagraph (B)(ii) shall not apply.

(D)Amount.—The amount determined under this subparagraph is—

> (i) in the case of a violation involving a transaction, the amount of the transaction, or
> (ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

STATEMENT OF THE CASE

A. *Facts Giving Rise To This Case*

On May 3, 2000, Bussell, along with her former husband and their two tax attorneys, were indicted on charges of conspiracy, false statements on a bankruptcy petition and attempted tax evasion. According to the indictment, she, her husband and their attorneys did not disclose several assets, including $1,149,100 in funds that were held in an account in Switzerland. The funds had not been listed in Bussell's bankruptcy in 1995 and were subsequently not noted on the couple's 1996 tax return. Appendix at A-50. (Complaint)

After her attorneys entered into guilty pleas and testified against her, Bussell was convicted of several of the charges against her on February 6, 2002. On September 9, 2002, the district sentenced Bussell to 36 months in prison and ordered her to pay $2,393,527 in restitution in addition to $62,614.37 for the costs of

prosecution and a fine of $50,000 plus interest. **Bussell was also subjected to multiple forfeitures from which the Department of Justice obtained $2,590,506.92 in "net proceeds.**" [emphasis added] The Justice Department split the funds with the Treasury Department and declined to use any of the proceeds toward Bussell's restitution obligation.

Following Bussell's criminal conviction, the IRS issued a jeopardy levy for 1983, 1984, 1986 and 1987 (because Bussell had granted the IRS' request for eight years of tax assessment extensions) and issued a jeopardy assessment for 1996 based on the failure to report the $1,149,100 in the Swiss bank account. Bussell then filed an action in district court challenging the reasonableness of the jeopardy determination. Case No. 02-6629 (C.D. Cal.). The district court upheld the jeopardy determination, but deferred the question of the amount of tax owed to the tax court. *Id.* In 2005, the tax court issued an opinion upholding the $348,697 income tax deficiency and the related $464,930 fraud penalty solely with respect to the tax and fraud assessments for 1996, which were based on the funds found to have been deposited in the Swiss bank by Bussell's tax attorney. Case No. 15462-02 (2002); T.C. Memo. 2005-77, 2005 WL 775755 (U.S. Tax Ct. 2005). The combined total of the jeopardy, tax, penalty and interest assessment, $1,283,522, exceeded the $1,149,100 that Bussell had allegedly failed to report.

B. *The District Court Proceedings*

In June 2013, the IRS assessed a $1,221,806 penalty against Bussell for failing to report the funds that she held in the Swiss bank in 2006 (the instant matter concerns that assessment). By this time, Petitioner had exhausted her appeals, served her sentence and returned to her work. The enormous penalty was based on a rider to the American Jobs Creation Act of 2004 that empowered the IRS to assess a discretionary maximum penalty of 50 percent of the balance (despite having discretion to impose less) in an account that a U.S. Person failed to report or identify on a Report of Foreign Bank and Financial Accounts (FBAR). 31 U.S. Code § 5321(a)(5)(C). Previously, the maximum penalty had been $100,000. With the new law, $100,000 became an alternative maximum penalty. The new maximum penalty is limited only by the amount of funds deposited abroad. For a nonwillful violation, the maximum penalty is $10,000.

On March 19, 2015, the government filed a complaint against Bussell to reduce the FBAR penalty assessment to a judgment in No. 15-2034 (C.D. Cal.). With interest accruing at a rate of approximately $8,000 per month, the government sought $1,361,694.41 as of after January 23, 2015, plus any additional accrued interest after that date. Appendix at A-54 (complaint). In order to expedite the case, Bussell relied on affirmative defenses, among which were that she was being subjected to an excessive fine under the Eighth Amendment and that her account

information was obtained in violation of the United States' treaty with Switzerland.[1]

On October 27, 2015, the government moved for summary judgment. Bussell protested, stating that her defenses relied on factual issues that could only be fully developed at a hearing or a trial. She also argued that much of the government's own evidence and allegations demonstrated prima facie bases for her affirmative defenses. On December 8, 2015, the

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[1] She also agreed, *inter alia*, not to argue the issue of willfulness. Her verbatim stipulation was that:

> with respect to the complaint and answer filed in this case, plaintiff United States of America and defendant Letantia Bussell, by their respective counsel of record, hereby stipulate and agree that defendant Letantia Bussell (defendant) *without admitting or denying plaintiff's assertions*... for the purpose of this case, defendant will not argue that she did not willfully fail to disclose her financial interest in or other authority over said Swiss account for the year 2006.

It was always defendant's understanding and intention that she did not willfully neglect to fill out a federal form of which there is no evidence that she even knew existed. Petitioner's stipulation to the above was solely to stop the incessant harassment of herself, her staff, and her family at their office and their homes. Petitioner never conceded that she had any knowledge of the FBAR regulation, and the government never offered any evidence that she did. Regardless of this issue, petitioner's claims herein are not affected, as her defenses relevant herein were the legality of the Government's evidence and the proportionality of the penalty. If the bank records obtained pursuant to the Treaty were illegally obtained the Government had no case to bring. Likewise, if the penalty violates the Eighth Amendment, the issue of willfulness or lack thereof is subsumed by the lack of proportionality.

district court entered its judgment. Notwithstanding Petitioner's demand that the district court conduct fact finding, the district court overruled all of Bussell's affirmative defenses except her Eighth Amendment claim, which it granted in part, finding that the assessment exceeded the maximum penalty set out in the applicable criminal and civil statutes. It therefore decreased the penalty imposed from $1,221,806 to $1,120,513 plus interest, which represents the maximum amount permitted under the civil tax statute. Appendix at A-41.

Relying on the evidence that there was no other source for the funds in the subject account other than the funds that had been heavily penalized following her criminal conviction, Bussell moved the district court for reconsideration. It was clear that the funds in the subject account included and derived from the same funds that had been deposited in 1996.[2]

After briefing by the parties, the Court denied the Motion for Reconsideration and entered judgment for the government on February 22, 2016. Appendix at A-21.

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[2] The funds were the same, but the account number had changed. The government knew that this was the same money because it had obtained all the bank records through its treaty request. In fact, at petitioner's criminal trial, the prosecutor argued in his summation that the funds transferred to the Syntex account at Swiss Bank Corporation were transferred into the Bussell's personal account on April 16, 1996. He stated that "the government's position is that the Bussells end up with the money." Appendix G. *United States v. Bussell, et al.*, Case No. CR-01-56A, at p.159.

C. *Appellate Court Proceedings*

Petitioner's timely notice of appeal was filed on February 23, 2016. Fed.R.Civ.P. 4(a)(1)(B)(I). The matter came for argument on October 6, 2017, and on October 25, 2017, the Ninth Circuit Court of Appeals issued an order affirming the judgment of the district court.[3] Appendix at A-1. *United States v. Bussell*, 699 F. App'x 695, 697 (9th Cir. 2017).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review Is Warranted Because the Opinion by the Ninth Circuit Conflicts With this Court's Cases on Proportionality under the Eighth Amendment and Was Based on Insufficient Fact-Finding

A. *Significance of the Issue Before the Court*

Since its decision in *Bajakajian*, nearly two decades ago, this Court has weighed in little on the subjects of excessive fines and proportionality. With the possible exception of *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1645 (2017), there has been no case since in this Court considering punitive civil fines in this context and there has been no case examining the 50-percent penalty under FBAR. With respect to civil fines, further elucidation is required, including whether

[3] The Court repeatedly and mistakenly described Bussell's offense as failing to disclose her overseas financial interests on her 2006 tax return. The IRS makes clear that "[t]he FBAR filing requirement is not part of filing a tax return. The FBAR Form 114 is filed separately and directly with FinCEN." See IR-2015-86, June 10, 2015.

criminal fines are an appropriate touchstone for determining the proportionality of civil violations, particularly when, as here, the court compared the FBAR penalty to the fines for the violation of a tax statute, rather than using the guidelines applicable to 31 U.S.C. § 5314, which is what Bussell was accused of violating.

Petitioner is also unaware that this Court has yet considered the penalty provisions of FBAR since 2004 when the 50 percent penalty was imposed. Although Bussell contends that subjecting her to the maximum penalty for the 2006 period was excessive in this case, the six year statute of limitations theoretically exposes violators to a 250 percent penalty for each of the prior years for which a report of a foreign bank account was due. Thus, if ever there was a law that subjected an individual to a potentially excessive fine, this is it. It goes far beyond any possible harm to the government.

While *Bajakajian* does provide a framework for an excessive fines analysis, it does not instruct what weight is to be given to its factors or clearly explain how its test should be applied in a case such as this one. It also does not explain what facts may be relevant or how they are to be assessed. As noted, Bussell was alleged to have failed to report a foreign bank account. She was not accused of a tax offense, and there was no evidence of a tax crime other than the one that had been litigated against her in the 1990s. No evidence showed that she had failed to report other income and no attempt was made to show an actual tax loss. Instead, it was simply assumed in order to justify the size of the penalty.

B. *Basis for Petitioner's Position*

With respect to her Eighth Amendment Claim, Bussell contended that the penalty violated the Excessive Fines Clause as being unrelated to any loss to the government that had not already been the subject of enormous assessments, fines and penalties. Her argument was that a fine of $1.2 million was disproportional to the gravity of her offense. In light of the rationales for the FBAR penalty, such as prevention of money laundering and narcotics trafficking, the only justification for the government's position was that Bussell may have been evading taxes. In no proceeding, including her criminal trial, was it assumed that the subject funds were other than lawfully earned income.

While the burden may have been on Bussell to prove the constitutional violation, she was also entitled to rely on the state of the evidence and on the inferences to be drawn therefrom. Considering that the events giving rise to the charges against her occurred 10 years before the tax year giving rise to the FBAR assessment, this was particularly salient. Throughout, it was Bussell's claim that the penalized funds were the same funds that had been deposited in Switzerland by her tax attorneys.

As Bussell asserted, the FBAR assessment was based on the same 1996 deposit that had already caused her to suffer millions in fines, restitution, penalties, assessments and forfeitures, not to mention years in prison and the suicide of her husband. Other than that the funds were found in an account with a new number, no evidence controverted Petitioner's claim that the funds on deposit were identical. The

original account no longer existed and there was no evidence of other unreported income or transfers of funds to or from the subject account during the period from 1997, the year that the subject account was funded, to 2006, the assessment year. The penalty assessment was based solely on Bussell's alleged failure to disclose an account of which the government's moving papers affirm it was already well aware.

Generally, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Here, the violation was failure to report the funds on deposit in a foreign account on a treasury form (not on a tax return as the appellate court erroneously stated). Whether the forfeiture was grossly disproportionate rests primarily on the harm caused by the violation. *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1198 (9th Cir.), opinion amended on denial of reh'g, 172 F.3d 689 (9th Cir. 1999) ("In determining whether the forfeiture is grossly disproportionate given the gravity of the offense, the court should consider the extent of the harm caused.") (citing *Bajakajian*, 524 U.S. at 339).

Here, the district court based its proportionality analysis on the assumption that Bussell had committed tax fraud, stating that she "committed fraud by failing to report her interests in the Subject Account in her 2006 tax return." Appendix at A-44. There is no evidence to support this conclusion. It also incorrectly identified 31 U.S.C. § 5314 (the FBAR reporting requirement) as a tax offense. In fact, the

district court stated that this is "clearly a tax collection case." Appendix at A-45. It is not. The United States tax code is codified in Title 26. Although the IRS has since been tasked with FBAR enforcement, this is a treasury law that was previously enforced by the FinCEN arm of the Treasury Department.

The actual violation was her failure to file a Treasury Department Form 90-22.1 on June 30, 2007. While the court discussed fraud, unreported income and tax evasion, none of these are elements of a violation of Section 5314. Insufficient facts were developed to reach any conclusion as to these issues, which have completely different elements. While the criminal case from the 1990s was highlighted throughout, its allegations only explain the source of the funds and that they had already been subject to extreme penalties. They were not pertinent to proving the government's case.[4]

The Ninth Circuit accepted the district court's conclusory disposition, holding that "the assessment against her is not grossly disproportional to the harm she caused because Bussell defrauded the government and reduced public revenues." Appendix at A-3. *United States v. Bussell*, 699 F. App'x 695, 696 (9th Cir. 2017) (citing *United States v. Mackby*, 339 F.3d 1013, 1017–18 (9th Cir. 2003). As the district court had, the Circuit ignored the lack of evidence of the source of the funds or that there was any tax loss. From an accounting point of view, there was also no cost-basis

[4] Although there were two different account numbers, there was no evidence that these were different funds than had been previously identified. The evidence is to the contrary.

analysis of the stock in the account provided by Respondent to determine if there were any capital gains.[5] There was also no acknowledgment that the different account numbers realted to the exact same funds:

> [T]he district court must avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds. We therefore hold that where, as here, plaintiff makes a *prima facie* showing that the forfeiture may be excessive, the district court **must** make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the eighth amendment.

United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) [emphasis added]. The government has shown absolutely no dollar amount by which the public revenue was decreased. It has failed to give any supporting accounting. It may very well have been that an accurate accounting would show that Bussell had an unrealized deduction for that year. The court should not just pull conclusions out of thin air without any substantiating facts.

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[5] The maximum amount due for capital gains in 2006 was 15 percent of the gains realized that year, not 15 percent of the account balance. The government never provided any cost basis for valuing the account, much less that any taxes were owed for 2006. Moreover, for there to have been a capital gain for 2006, an asset held in the account would need to have been sold.

There was no way to make this determination based on the facts presented to the district court by respondent. Solely from the perspective of a harms analysis, the available facts as they had been established indicated that the only harm caused in 2006 was the failure to report the same funds for which Bussell had already been severely penalized. When a forfeiture, such as that at issue here, is quite literally without limitation, it may well exceed constitutional bounds in any particular case. *Id.* at 1414.

For almost a century, this Court has consistently applied the English principle of proportionality as a prohibition against disproportionate punishment. *Solem v. Helm*, 463 U.S. 277, 284 (1983). This is particularly true when a forfeiture is strictly *in personam* and can only be explained to serve a remedial purpose through pure conjecture. In fact, there is no evidence whatsoever that Bussell evaded taxes in 2006, only that she neglected to file a foreign bank account report. Based on these principles, the *Bajakajian* Court outlined at least five factors that are relevant to the proportionality analysis: the nature and extent of the violation; other related illegal activities; other penalties; harm caused; and the amount of the forfeiture compared to the gravity of the offense.[6]

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[6] See also *Busher*, 817 F.2d at 1415, and see *Enmund v. Florida*, 458 U.S. 782, 797-801, 102 S. Ct. 3368, 3376-78, 73 L.Ed.2d 1140 (1982) (examining the circumstances of defendant's crime in great detail). More particularly, *Solem* noted that, in considering the gravity of the offense, a court should look both at the harm suffered by the victim and the defendant's culpability.

These factors all lead to the conclusion that the gross disproportionality of the assessment in this case violates the Excessive Fines Clause.[7] The issue is not whether a given penalty is within a range authorized by Congress or whether it is at or below the statutory maximum. In *Bajakajian*, the forfeiture in question was also authorized by Congress and within the statutory maximum. For the Eighth Amendment to have any meaning and for courts to fulfill their roles under the Constitution, the magnitude of the fine must be determined to be proportionate.

1. *The Nature and Extent of the Offense Are Disproportionate to the Penalty*

As in Bajakajian, the offense in this case is "solely a reporting offense." See *Bajakajian*, 524 U.S. at 325, 337; *United States v. $132,245.00*, 764 F.3d 1055, 1058 (9th Cir. 2014). Other than through speculation, there is no evidence to the contrary. It is not a crime to have funds in a Swiss bank account. In fact, the FBAR requirements were passed with regard to "the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency." 31 U.S.C. § 5314.

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463 U.S. at 292, 103 S..Ct. at 3010. [emphasis added]

[7] The Clause is applicable to civil cases as well as criminal cases, so long as the penalty is punitive. *Austin v. United States*, 509 U.S. 602, 610 (1993).

As its prior actions against Bussell show, the government was well aware of the existence of the bank account. Aside from the fact that a person must have more than $10,000 on deposit to trigger the reporting requirement, there is nothing about the nature of the funds that is relevant to the alleged FBAR violation.

Thus, in the first analysis, the relevant facts of this case are the same as in *Bajakajian*.

2. *Other Related Illegal Activities*

While Bussell was charged and convicted of a crime involving the transfer of funds that were later deposited in Switzerland, there is nothing to show that the funds themselves were involved in or derived from any kind of illegal activity. *Thurman St.*, 164 F.3d at 1197 In fact, the government has consistently alleged that these funds were income from Bussell's legitimate business.

To the extent that the funds could be considered the proceeds of concealing assets in bankruptcy, Bussell has already paid the penalties for that offense. In *Thurman St.*, the Court recognized that the equity in the property that the government sought to forfeit was a proceed of a fraudulently obtained loan and that the claimant was not an innocent owner. Yet, it found that the forfeiture of the claimant's equity was disproportionate and therefore excessive, in part because the forfeiture judgment provided that the funds would first be applied to paying back the loan principal and interest. *Id.* at 1198. The same is true here since any harm caused by the alleged bankruptcy

fraud had long ago been remedied with substantial penalties.

Because the government already had information about the account and had taxed the funds that were deposited, any possible violation cannot be considered to have gone undetected. *Bajakajian*, 524 U.S. at 339.

3. *Other Penalties*

"In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence," as are the maximum penalties that could have been imposed under the Sentencing Guidelines. *Id.* at 338 & n.14. Here, the maximum authorized penalty for a criminal violation of 31 U.S.C. § 5314 is a five year sentence and a $250,000 fine. Under the Sentencing Guidelines, which take account of the level of culpability of the offender, the fine ranges from a low of $500 to a maximum of $5000.[8]

The district court, however, based its analysis on tax fraud, stating "[t]his action imposed a tax loss on the public." Appendix at A-44. There is no evidence to support this conclusion. It also incorrectly identified 31 U.S.C. § 5314 (the FBAR reporting

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[8] U.S.S.G. § 5E1.2(c)(3). By operation of the so-called "safe harbor provision" of U.S.S.G. § 2S1.3(b)(3), Bussell's sentence would be at an offense level of four. The funds were not proceeds of illegal activity; there was no pattern of illegal activity within a 12-month period; Petitioner did not act with reckless disregard of the source; and she did not intend to use the funds for illegal purposes. This calculation also assumes a two-level decrease under U.S.S.G. § 3E1.1.

requirement) as a tax offense. It is not. The United States tax code is codified in Title 26. Although the IRS has since been tasked with enforcement, this is a treasury law that was previously enforced by the FinCEN arm of the Treasury Department.

The only alleged violation fell squarely under FBAR. The actual violation was her failure to file a Treasury Department Form 90-22.1 by June 30, 2007. While the court discussed fraud, unreported income and tax evasion, none of these are elements of a violation of Section 5314. Moreover, no facts were developed to reach any conclusion as to these issues, which have completely different elements. While the criminal case from the 1990s was highlighted throughout the government's pleadings, its allegations only explain the source of the funds and that they had already been subject to extreme penalties. They were not pertinent to proving the government's case.

4. *Harm Caused*

With respect to Bussell, the government acknowledged that she had already paid for her crimes and then some. Any harm that she caused had been remedied. With it appearing that the only harm caused to the government was Bussell's alleged failure to report an account of which the government was already aware, Bussell's presumed violation is an omission of the least severe kind. *Thurman St.*, 164 F.3d at 1198 (citing *Bajakajian*, 524 U.S. at 339). "The harm that [Bussell] caused was also minimal. Failure to report [her account] affected only one party, the Government, and in a relatively minor way." Bajakajian, 524 U.S. at 321. The government could

hardly have been defrauded when it knew all along about the funds in Switzerland.

While the government asserted that Bussell earned $1 million in interest on the subject account, there was no evidence as to whether this was in fact interest and, if it was, when the interest earned over ten years became a taxable event.[9] The government failed to show that this income wasn't otherwise reported in Bussell's returns for the tax periods from 1997 to 2006 or what the tax would have been had the interest been properly reported.[10] Importantly, all that the evidence showed was that Bussell negligently omitted to file a foreign bank account report in 2006. There was no evidence as to whether she owed unpaid taxes.

Again, like the penalty analysis, the harm analysis was driven by the unfounded assumption that Bussell had committed a tax offense. Had the court not granted summary judgment for the government, Bussell intended to further develop this critical issue.

5. *Gravity of the Offense Versus the Amount of the Forfeiture*

Any examination of the gravity of the offense required taking account of the penalties that Bussell had already paid, the lack of any identified tangible harm to the government, the other penalties

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[9] Clearly, the account could not have garnered $1 million in interest during the year in question.

[10] To the extent it was treated as a tax matter, which it appears to have been, here was also no examination of corresponding deductions.

associated with her violation, the limited nature of the offense, the lawfulness of the source and purpose of the funds and the disproportionality of the penalty it imposed.

With it appearing that Bussell would face a maximum fine of $5000 if she had been prosecuted and convicted of not reporting the account, the assessment that the court enforced was almost 275 times the criminal penalty. In the same manner, the Court in *Bajakajian* compared the gravity of the defendant's crime with the forfeiture that the government sought and found that it "bears no articulable correlation to any injury suffered by the Government." *Bajakajian*, 524 U.S. at 340. It thus found that the forfeiture was grossly disproportionate to the gravity of the offense. *Id.* at 339-40.

As the Court observed in *Bajakajian*, "It is impossible to conclude, for example, that the harm [Bussell] caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs." *Id.* at 339.

This assessment was an abuse of discretion by Respondent and the courts that clearly violated the excessive fines clause of the Eighth Amendment.

Under FBAR, a taxpayer must disclose the name of the bank where funds are deposited, the account number and the maximum value of the account for a given year. From her prior cases, the government knew that over $1 million was in Switzerland. It thus had sufficient knowledge of the foreign account and ample means to obtain the minimum information required by FBAR.

Nonetheless, Respondent waited until the maximum penalty had increased from $100,000 to half the account's balance.

The government has suffered no tangible harm and presented no evidence to show that it did. It not only knew of the account, it has already punished Bussell for her non-reporting of the funds in the account. Under the *Bajakajian* factors, the penalty is grossly disproportionate to the gravity of the offense. There was thus a clear evidentiary basis to find that Bussell should have been able to prevail on her Eighth Amendment defense by demonstrating that any harm caused by her alleged reporting violation was disproportionate and thus excessive.

II.
Review Is Warranted Because the Case Concerns the Obligations of the United States Under its Treaty with Switzerland and the Rights Owed to a Beneficiary of that Treaty, a Citizen of One of the Contracting States

In its Opinion, the Ninth Circuit dismissed Bussell's claims under the Convention between the United States and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income on standing grounds, stating that she had not shown "that the treaty she relies on creates an enforceable right." (citing *United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987)). It thus never reached the merits of her argument that the disclosure of her records was in breach of the United States treaty with

Switzerland, which is restricted to evidence relevant to tax fraud offenses in the United States.

A. *Petitioner Had Standing to Assert Her Rights under the Treaty*

As stated in Article I, ¶ 1of the tax treaty, the agreement applies specifically to "persons who are residents of one or both of the Contracting States." Throughout, it provides benefits to the residents of the two nations. For example, it protects Bussell from taxes and tax requirements in Switzerland that are different or more burdensome than those in the United States. Art. 24, ¶ 1. It also provides individuals with the ability to bring grievances regarding the treaty to a competent authority within the Contracting State of which he or she is a resident. When a satisfactory solution cannot be achieved through the competent authorities in the United States, the treaty provides recourse to the competent authorities in Switzerland. Art. 25, ¶¶ 1-2.

The Convention applies specifically to taxes imposed on behalf of a Contracting State, which for United States persons specifically means taxes imposed on income by the Internal Revenue Service. Art. 2. The Protocol accompanying the treaty narrows its scope so as not to include social security taxes or taxes on social security benefits. It also specifically defines "tax fraud" as "fraudulent conduct that causes or is intended to cause an *illegal and substantial* reduction in the amount of tax paid to a Contracting State. There is no provision for Foreign Bank Account Report requirements or penalties, which, at the time

that the treaty was entered into, were not assessed or imposed by the IRS.[11]

Moreover, the convention clearly provides tax payers with due process. After acknowledging that an individual may claim benefits under the treaty, Art. 22, ¶ 1(a), which makes them its beneficiaries, the treaty further requires that all information recieved by a Contracting State must be held secret and be restricted to use by authorities involved in the collection of taxes enumerated by the Convention. "Such persons or authorities shall use the information only for such purposes." Art. 26. Thus, taxpayers are necessarily granted standing under the terms of the treaty when information has been improperly disclosed or used for an unauthorized purpose unrelated to the collection of taxes.

The Ninth Circuit's finding that Bussell lacked an enforceable right was clearly misplaced. The court's reference to *United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987) is not persuasive. *Mann* involves the enforcement of an international accord on drug trafficking. Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol. As such, it speaks only of obligations and procedures for redress regarding member states. There are no individual beneficiaries of the treaty, which leaves domestic drug control policy largely withing the discretion of the states who are parties to the convention. The sections of the treaty at issue in *Mann* involved international cooperation "with a view

[11] These were delegated from FinCEN to the IRS in 2003, five years after the treaty which deals only with taxes took effect.

to maintaining a co-ordinated campaign against the illicit traffic." *Id.* at Art. 35, ¶ (c).

In no manner does it define any individual rights that might prevent a country from complying with the cooperation provisions. In fact, it contemplates that enforcement, including by severe punishment, is within the discretion of the contracting states. *Id.* at Art. 36, ¶ 4, Art. 39. Nonetheless, in *Mann*, which involved a request from the United States to the United Kingdom, the government produced evidence *in camera*, including evidence that "(1) the IRS was unable to find a legitimate source for Mann's income; (2) Mann refused to identify the source of the income; (3) an informant identified Mann as the operator of a boat used by a convicted marijuana importer; and (4) the IRS had reason to believe that Mann maintained a bank account in the Cayman Islands." *Mann*, 829 F.2d at 850.

By contrast, Bussell was contemplated as a beneficiary with rights under the Swiss treaty, which provides only for the exchange of information relating to income tax fraud violations. Since there has never been any evidence that Bussell's bank information was obtained for tax fraud purposes, the disclosure clearly violated the narrow exception to her rights under Swiss law. Notwithstanding the district court's finding, there was no evidence of a tax fraud violation. Rather, it appears that the sole purpose of the United States' request was to unearth an unreported foreign bank account, which is not a matter within the scope of the United States authorization under the treaty, which explicitly precludes "fishing expeditions." The act of demanding production was as much a violation

of United States law as it was a transgression against the treaty's guarantees for individuals affected by the accord.

B. *The Use of Banking Evidence in this Case Violated the United States' Treaty with Switzerland*

The documents received in discovery clearly indicate that the information provided to the government was under the United States convention with Switzerland that allowed the exchange of banking information solely for the purpose of investigating tax fraud violations. Appendix at A-56. The notice to the government contained at the beginning of the documents produced from the Swiss bank states, "**The information contained within must be used only for income tax cases under the terms of the Agreement between the United States of America and the Swiss Confederation**." *Id.*

However, as Bussell argued, the FBAR requirement is not a tax law, and the assessment against her was not made under the tax code, which is codified in Title 26, United States Code. To the contrary, this case was brought under the treasury code pursuant to 31 U.S.C. § 5314 and the Department of Treasury regulations promulgated at 31 C.F.R. § 1010.350(a). These sections are silent as to defining any tax obligations or tax offenses. Rather, they describe a reporting requirement that is intended to give the government information about foreign bank accounts, regardless of whether a tax violation has taken place. As much as anything, the regulation is

directed at such crimes money laundering and concealing narcotics proceeds.

By contrast, the United States treaty with Switzerland is directed solely at income tax cases, not at Treasury reporting requirements. As such, it specifically exempts cases of "tax fraud" from Swiss banking secrecy. Tax Convention with Swiss Confederation (effective 1998), Memorandum of Understanding ¶8.

> Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, ***the taxes covered by the Convention.*** Such persons or authorities shall use the information ***only for such purposes***.

Id. at Art. 26 ¶ 1 [emphasis added]. Nowhere in the treaty does it mention, much less permit, information obtained under the treaty to be used to allege an FBAR violation.

The assessment against Bussell was not for any taxes that may have been due. It was a penalty that was based solely on a nontaxable event, her negligence in not filing a form, as to which there is no evidence she was aware. It thus was outside the scope of "tax fraud," which is the sole basis by which the United

States may request banking information under the treaty. "The parties agree that the term "tax fraud" means fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of the tax paid to a Contracting State. Protocol ¶ 10.

As explained in her description of why she has standing, the taxpayers of the contracting states are the beneficiaries of the agreement, which is intended primarily to protect their rights. Although there is a carve-out for providing information that might otherwise be protected by a nation's bank secrecy laws, it is a narrow one. It is limited to taxes covered by the convention and the information received may be only used for such purposes. To seek information under the treaty for purposes unrelated to substantial income tax fraud is a violation of the United States legal authority, U.S. Const. Art. I, § 8, Art. II, § 2, Art. III, § 2, Art. VI, and its legal obligations as a signatory to its treaty with Switzerland. Enforcement of the treaty ultimately and exclusively lies with this Court, as does the protection of Petitioner's rights. U.S. Const. Art. III, § 2, Art. VI, ¶ 2.

Under the doctrine of specialty concerning extradition treaties, it is by now well-accepted that an action may be barred if it is for an offense that does not come within the scope of an extraditing state's law. *United States v. Rauscher*, 119 U.S. 407, 419-421 (1886); *United States v. Khan*, 993 F.2d 1368, 1373 (9th Cir. 1993), as amended. This right to be assured that a legal violation in one state is also a legal violation in the other state is one that may be asserted by the accused under a treaty. So too here. The treaty with

Switzerland requires that if information obtained by treaty is not for an approved tax-related purpose, the information shall not be used and shall be held secret. As with an unauthorized prosecution of a person extradited by treaty, the use of treaty information for non-tax purposes is forbidden under international law.

The district court rejected this defense, stating without analysis that "[t]he instant case is clearly a tax collection case." Appendix at A-45. On an equally unreflective footing, the Ninth Circuit simply refused to find standing, despite the fact that Petitioner is described as a beneficiary under the treaty. Considering that no taxes were assessed and that there was no finding that taxes were due, it is impossible to comprehend how this was a tax case. Likewise, the case has nothing to do with fraud. This was very plainly a regulatory case based on negligence in not providing information. This was all that the government proved as a prima facie case and all that it was required to prove. Any insinuation that there may have been funds in the account for which taxes were due is sheer speculation, irrelevant to the action and lacking in an evidentiary basis.

Thus, the district court and the Ninth Circuit erroneously failed to find that the government was misusing data that is restricted by an international treaty. The complaint fails on grounds of having no admissible, lawfully-obtained, evidence. Such illegally obtained evidence must be excluded. As a tax matter, Bussell had already been substantially penalized. She has paid all taxes and penalties assessed to date in full. Unlike Bussell's other affirmative defenses, the

treaty violation is purely a matter of law that requires reversal on the merits.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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