No. 17-1052

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The record below is remarkable for what it unabashedly lacks. Rather than rely on evidence, the district and circuit courts moved forward on mere supposition. Then, when petitioner requested the opportunity to correct these factual assumptions at a hearing, she was rebuked. The result is that matters that respondent continues to assert as established facts are actually anything but. Regarding the questions presented in the writ, the government loses sight of the issues in its opposition.

The government has changed the meaning of the questions presented. The first question is not merely one of a civil penalty. Rather, it asks whether a fine is excessive because it lacks any proportionality to any financial harm. The second question presented is not just whether or not the District Court erred by declining to exclude evidence, it is whether the district court erred in admitting evidence in violation a of an international Treaty. With respect to the latter, a Treaty is the law of the land, equivalent to federal and constitutional law, and any violation thereof is illegal. The tax Treaty with Switzerland specifically states that information derived therefrom can only be used for income tax fraud purposes. Nowhere in the Treaty does it say that information derived therefrom can be used to impose excessive FBAR non-reporting penalties.

A. *The FBAR Assessment Violates the Eighth Amendment*

Foremost among the disputed allegations is respondent's contention that the unreported funds can be traced to untaxed income. Opposition ("Opp.") at 11. No evidence supports this allegation because none was put forward. At the same time, Bussell was precluded from putting on any contrary evidence or expert conclusions. Inasmuch as the core of respondent's argument against the applicability of the Eighth Amendment is that FBAR was aimed at preventing tax evasion and that tax evasion is a serious offense, the unreasonable impact of this unsubstantiated claim is stark.

The government simply failed to prove any nexus between this case and a tax loss. In fact, it failed to prove any tax loss whatsoever. Yet, the district court found that this was a tax case and that Bussell had violated an unspecified tax law. Appendix at 44-45. It was only by accepting this premise as an established conclusion that the Ninth Circuit also found that the Eighth Amendment had not been violated. As respondent argues, this assumption was critical to distinguishing *Bajakajian*, 524 U.S. 321 (1998), in which this Court found that the defendant was not someone against whom the statute was directed and that the government had been deprived of nothing more than information. *Id.* at 337.

It is thus fatal to the government's position that it failed to prove that it was deprived of anything more than information and that it precluded petitioner from rebutting its loss allegations.[1] Based on the underdeveloped record, the government has heretofore enjoyed the luxury of relying on the mysterious disappearance of funds from the first account that petitioner opened and had likewise offered no explanation for how the subject account came to be funded, despite being the sole party in possession of all the relevant bank records.

The failure to prove a loss also goes to the heart of the proportionality analysis. Without any proven harm to the United States, there was no measure against which proportionality could be assessed. Proportionality is the only standard by which the court has determined the appropriateness of fines under the Eighth Amendment of the United States Constitution. The principle of proportionality has always been a cornerstone of the excessive fines analysis. Accordingly, even assuming that there was a monetary loss to the government, it was essential to specify the loss before concluding that the monetary penalty imposed on petitioner was reasonable.

Recourse to the criminal penalties as a surrogate for a fact-based proportionality analysis is also insufficient. Even if Bussell were subject to the

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[1] While the government relies on the district court's finding that Bussell failed to provide evidence as to the source of the funds, Opp. at 13, it ignores Bussell had no access to the account records and was barred from presenting whatever evidence was in her possession (*e.g.,* FOIA disclosures).

maximum criminal fine of $500,000, Opp. at 14 (citing 31 U.S.C. § 5322(b)), it would still be less than half of the civil penalty that was assessed in this case.[2]

Likewise, respondent assumes that it can rely on Bussell's stipulation that she failed to report interest income on the account in question for the tax year of the FBAR assessment. Opp. at 12. What Bussell did not stipulate, however, was that she earned income for that year or that the income was from interest, as opposed to a deferred capital gain.

In fact, there was no attempt by the government to quantify a putative tax loss, identify a capital gain for the subject year or provide a cost basis for valuing the account. Without evidence of a tax loss, the result is a stipulation signifying nothing. The actual words of the stipulation, when taken in context, never admit willfulness as respondent falsely represents.[3] With the

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[2] Even assuming that the FBAR assessment involved funds subject to taxation, they certainly were not taxable at a rate of 100 percent. This fact distinguishes tax from the other target offenses identified by the government – money laundering and drug trafficking (Opp. at 11) – and shows the FBAR penalty to be irrational as applied. The entirety of the proceeds of money laundering and drug trafficking are tainted and subject to complete forfeiture under other provisions of the law. *I.e.*, 18 U.S.C. § 981, 21 U.S.C. § 881.

[3] Bussell solely agreed not to *argue* the issue of willfulness for purposes of this case. She neither admitted nor denied the allegation of willfulness. She very specifically stated that the stipulations was made "...without admitting or denying plaintiff's assertions...."

burden on respondent to come forward with evidence to prove its case, Bussell signed the stipulation in order to prevent what she saw as harrassment.

B. *Petitioner's Banking Information Was Obtained in Violation of the Taxation Treaty*

As explained in more detail in her Petition, Bussell clearly has standing under the treaty because it provides her with rights, benefits and even a grievance procedure. It also protects her interest in maintaining the privacy of her financial information and prohibits "fishing expeditions." Significantly, the animating purpose of the treaty is to protect taxpayers from being doubly taxed in two jurisdictions. It thus differs from drug trafficking accords and mutual legal assistance treaties (MLATs), which are aimed at sharing intelligence.

Where the subject of the treaty is an individual, be it a taxpayer or, in the case of extradition, a criminal, the individual whose rights are protected by the treaty clearly has standing. In the case of extradition, an individual has the right to base a challenge on such issues as dual criminality, the nature of the crime, the penalty involved and, in some cases, whether extradition would be offensive to the defendant's dignity or deny him or her a fair trial. Thus, where a treaty is silent on an issue, its language, its history of negotiations and practice is controlling. *United States v. Alvarez-Machain*, 504 U.S. 655, 664-65 (1992). For the same reasons, petitioner has standing to object when the auspices of the taxation treaty were abused to improperly obtain her information.

The government asserts that the foreign bank account reporting requirement is "an important tax-administration and -investigation tool." Opp. at 16. However, it is wholly separate from the United States convention with Switzerland, which is restricted to matters involving taxation. To devine more from the treaty requires and inferential leap that would imply terms that do not exist. *Id.* at 668-70. In fact, it seems fair to assume that United States' Bank Secrecy Act was never within the contemplation of the signatories to the tax treaty with Switzerland. What the government is left with is an ends-justifies-the-means argument that is undercut by the fact this case is about the failure to report a foreign account, not taxation. How information obtained for purposes of the Bank Secrecy Act may be used has nothing to do with the wholly separate issue of the restrictions imposed on information gathered under the Swiss Tax Convention. The Swiss bank even added a page to documents provided under the treaty that reiterated and stressed that the baking information was for tax purposes only. Appendix at A-56.

The mere fact that information about foreign bank accounts could lead to evidence of tax evasion – as well as drug trafficking, money laundering and otherwise innocent conduct – does not convert the terms or restrictions of the tax convention to suit the government. Opp. at 17. The fact that the tax convention includes a proscription on fishing expeditions only makes the sharing of Bussell's banking information all the more egregious. Not only was the government fishing, it was fishing for evidence of an FBAR, as opposed to a tax, violation.

Contrary to the government's claim, petitioner is not asking this Court to decide for the first time whether the exchange of information was consistent with the Convention. While the Ninth Circuit did indeed decide the treaty issue solely on the ground of standing, it affirmed the district court, which did reach the issue by proclaiming that this was a "tax collection case." Appendix at 45. Thus, there is a record – albeit erroneous – for this Court to review. This mischaracterization of the case is a ground for reversal.

Finally, with respect to the stipulation that petitioner entered into, she would never have done so had she known her claims would be treated so summarily. She was never allowed to present evidence in support of her Eighth Amendment claim, and the Treaty was given such a lax reading that the protections it creates were rendered virtually meaningless. The stipulation was the fruit of the government's abuse of the treaty. Without the information that was provided to the government solely for tax purposes, there would have been no basis to exact Bussell's stipulation.

In short, there is a record in the courts below, but it was so badly botched that petitioner has little to rely on beyond the case that might have been. Should this Court find that the case remains unripe for review, Petitioner requests that it be remanded so that she can more fully develop the factual record that she has to this point been denied.

CONCLUSION

For the foregoing reasons, the Court should either decide this case on the merits of petitioner's Eighth Amendment and treaty-based claims or it should remand the case for further proceedings below.

Dated: April 9, 2018

Respectfully submitted,

By: ________________________

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