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

BETH A. COLGAN
UCLA SCHOOL OF LAW
385 Charles E. Young Dr. East
Los Angeles, CA 90095

MATTHEW S. ROZEN
Counsel of Record
KATHERINE MORAN MEEKS
TESSA GELLERSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3596
MRozen@gibsondunn.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[*]

Beth A. Colgan is Professor of Law at UCLA School of Law. She is one of the country's leading experts on constitutional and policy issues related to the use of economic sanctions as punishment, and particularly on the Eighth Amendment's Excessive Fines Clause.

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). In the decision below, the First Circuit held that the $2 million penalty imposed for failure to file a Report of Foreign Bank and Financial Accounts ("FBAR") tax disclosure form is not punitive even in part because it "is not tied to any criminal sanction." Pet.App.28a. In doing so, the appeals court committed two errors. *First*, the court likened the FBAR penalty to 18th- and 19th-century customs forfeitures that supposedly "did not constitute punishment." Pet.App.29a. *Second*, the court compared the penalty to civil sanctions "found not to be punishment for Double Jeopardy purposes." *Id.* Both of these comparisons misapprehend the historical record.

I. Records from the colonial era through the 19th century—including this Court's cases—show that *in rem* customs forfeitures were considered punishment for owners who placed their ships or goods in the care

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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. Counsel of record for all parties received timely notice of and have consented to the filing of this brief.

of masters or seamen who attempted to evade customs duties. That these forfeitures were imposed in civil rather than criminal actions does not alter the analysis, as both types of 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 those penalties punitive.

II. The First Circuit erred in using the double jeopardy test to determine whether the FBAR penalty is punitive. Pet.App.29a. This Court has emphasized that this test is inapplicable in the excessive fines context. Pet. 15-16. Even if it were relevant to the question before the Court, the modern double jeopardy test is inconsistent with the historical record, including this Court's early cases, which treated *in rem* forfeitures as punishment of the owner even if they also served remedial purposes. It was not until the 1930s that the Court reversed course and held that double jeopardy did not apply to *in rem* forfeitures, casting them as entirely remedial. The First Circuit wrongly excluded FBAR penalties from Eighth Amendment scrutiny by relying on double jeopardy cases.

III. This Court should grant certiorari to revisit the First Circuit's faulty history and ensure that the Excessive Fines Clause remains a safeguard against abusive forfeiture actions. From this country's infancy, governments at all levels have relied on civil forfeitures and penalties as revenue-raising tools, often out of proportion with their penal interests and at the expense of those who can least afford to pay. This Court's intervention is needed to ensure that the Excessive Fines Clause remains a potent shield against these practices.

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); *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 First Circuit's determination that the FBAR penalty is not punishment, and thus outside the Clause's scope, is inconsistent with colonial and early American practices and caselaw. The court of appeals concluded that the penalty at issue in this case was nonpunitive by analogizing it to early customs forfeitures that supposedly "did not constitute punishment for purposes of the Excessive Fines Clause." Pet.App.29a. The court of appeals found further support for this conclusion in this Court's double jeopardy precedents, which supposedly confirmed the nonpunitive character of *in rem* forfeiture. *Id.*

The historical record runs counter to the First Circuit's decision. 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. It was not until the mid-20th century that this Court turned away from that core understanding of the revenue laws, treating *in rem* forfeitures as entirely remedial, and thus nonpunitive, for double jeopardy purposes.

This Court should grant certiorari because this case presents a unique opportunity to clarify the historical record on the scope of the Excessive Fines Clause. Absent review, the First Circuit's inattention to history will improperly confine the reach of the Excessive Fines Clause and lead to the sort of unjust result that obtained in this case.

I. The First Circuit Erred in Relying on Early American Customs Forfeitures, Which Were Punitive, to Hold That the FBAR Penalty Was Nonpunitive

The First Circuit concluded that petitioner could not maintain an excessive fines challenge to the FBAR penalty because the penalty was analogous to early American *in rem* customs forfeitures that supposedly "did not constitute punishment for purposes of the Excessive Fines Clause." Pet.App.29a. That conclusion was erroneous. Early *in rem* forfeitures punished the owners of seized vessels or goods. In contrast, the masters or seamen who served as their agents could be criminally punished for customs violations. *In rem* forfeitures were punishment even though governments pursued such forfeitures through actions of debt and other civil processes.

The First Circuit relied on dictum in *Bajakajian* for the principle that *in rem* customs forfeitures were nonpunitive. Pet.App.29a; *see also* note 1, *infra*. But *Bajakajian* correctly observed that "forfeiture of the goods of the *principal* can form no part of the personal punishment of his *agent*." 524 U.S. at 330 (emphases added) (quoting *Origet v. United States*, 125 U.S. 240, 246 (1888)). To the extent *Bajakajian*'s language swept more broadly than the historical record would support, this case presents an opportunity to correct the record and provide clarity for lower courts.

A. Early *In Rem* Customs Forfeitures Punished the Owners of Seized Vessels and Goods

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.

Following longstanding English practices employed in the colonial era, 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. *Origet*, 125 U.S. at 246; *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.[1] That observation is true as to the master and seamen who faced *in personam* criminal charges for violations of the customs laws. Early authorities recognized, however, that *in rem* forfeiture was a form of punishment for the *owner* of the vessel or cargo, not for his *agents*.

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

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[1] This language from *Bajakajian* is dictum in any event because that case addressed criminal *in personam* forfeitures rather than *in rem* forfeitures. 524 U.S. at 333. The Court itself declared that *in rem* forfeitures were "inapposite" to its discussion of the scope of the Excessive Fines Clause. *Id.* at 330. Instead, the Court discussed early customs forfeitures mainly in response to the government's argument that the penalty in that case was not excessive—a question not at issue here. Correcting that discussion of whether customs forfeitures were punitive in no way requires reconsidering *Bajakajian*'s holding that the criminal forfeiture at issue there was a form of punishment subject to excessive fines scrutiny.

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 at 2499-500 (describing *in rem* forfeiture proceedings as "penal actions" that "inflict[ed] a species of punishment 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 at 2468-69; *Austin*, 509 U.S. at 615 n.9.

Although *in rem* forfeiture laws did not mandate an inquiry into the extent of the owner's involvement in the fraud, the owner was not considered innocent. 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]

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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,

This explains why early cases barred *in rem* forfeitures where the owners, masters, and seamen were all actually innocent of a customs offense. 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; *see also 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 the customs law. *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 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. These protections indicated "a Founding Era consensus that forfeiture's punitive potential necessitated meaningful limits on its use." Arlyck at 1452.

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

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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").

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 wilful negligence or any intention of fraud." Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23 (repealed 1797). According to a recent study of New York and Pennsylvania forfeiture cases between 1790 and 1807, the Treasury Department granted 91% of remission petitions, with nearly three-quarters of the petitions granted in full and the remaining penalties substantially remitted. Arlyck at 1487-88.

B. Early *In Rem* Customs Forfeitures Had a Punitive Purpose Even Though They Proceeded by Civil Action

The fact that government pursued early customs forfeitures through civil proceedings does not suggest these forfeitures were nonpunitive. To the contrary, in colonial and early American history, civil proceedings were a common method for punishing customs violations and other offenses against the public. That history demonstrates why the First Circuit erred in holding that FBAR penalties do not trigger excessive fines scrutiny.

The First Circuit concluded that the FBAR penalty did not constitute punishment because "this civil penalty is not tied to any criminal sanction." Pet.App.28a. The court of appeals assumed that sanctions entered in standalone civil proceedings are necessarily nonpunitive and thus outside the scope of the Excessive Fines Clause. *Id.* That division between

civil and criminal proceedings is historically inaccurate. *See Browning-Ferris*, 492 U.S. at 296-97 (O'Connor, J., concurring in part and dissenting in part). Instead, damages awarded in private suits (*e.g.*, for breach of contract) were considered nonpunitive, whereas fines or forfeitures ordered for offenses against the public—whether litigated criminally or civilly—were punishment. *See United States v. Mann*, 26 F. Cas. 1153, 1154 (C.C.D.N.H. 1812) (Story, J.) ("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.").

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 were 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, whereas pecuniary penalties imposed civilly—including *in rem* customs forfeitures—did not carry a threat of imprisonment.[3] *Hitchcock v. Munger*, 15 N.H. 97, 103 (1844). But regardless of whether they were handed down in a crim-

[3] The words "fines" and "forfeiture" were used interchangeably in early American statutes, signifying that the ratifying generation would have understood both to trigger excessive fines scrutiny. 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.

inal or civil action, pecuniary penalties imposed for offenses against the public were punishment. *See* Nelson at 2496-500.

Actions of debt, a form of civil proceeding, were one method for punishing customs violations and other offenses against the public. These actions had deep roots in English common law. Blackstone described them as resting on a social-contract theory: "The party offending [was] bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires." 3 Blackstone, *Commentaries on the Laws of England* 158-60 (1794). Using actions of debt to prosecute public offenses was likely necessary in the nation's early days given the insufficient supply of public prosecutors to adequately enforce penal laws.[4]

Multiple statutes punishing public offenses authorized actions of debt. *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."[5]); *Markle v. Town Council of Akron*, 14 Ohio 586, 589-91 (1846)

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[4] Through the mid- to late 19th century, American jurisdictions relied heavily on *qui tam* prosecutors—private citizens who instituted prosecutions for public wrongdoing through actions of debt or other civil proceedings. *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).

[5] The word "information" here refers to a civil proceeding rather than the modern criminal information. Nelson at 2460-61.

(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 the 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 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 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 at 319 & n.211; Nelson at 2497-500.

II. The First Circuit Erred in Relying on Double Jeopardy Precedents to Declare the FBAR Penalty Nonpunitive

The First Circuit also erred in relying on this Court's double jeopardy precedents to conclude that FBAR penalties do not qualify as punishment for purposes of the Excessive Fines Clause. Under the Court's modern cases, the double jeopardy and excessive fines analyses are "wholly distinct." Pet. 16 (quoting *United States v. Ursery*, 518 U.S. 267, 287 (1996)). To qualify as punishment for double jeopardy purposes, the FBAR penalty must be "so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism." *Ursery*, 518 U.S. at 278. To receive excessive fines scrutiny, however, the penalty need be punitive only "in part." *Austin*, 509 U.S. at 610. Because the Double Jeopardy Clause applies to a narrower class of fines and forfeitures than the Excessive Fines Clause does, the First Circuit erred in relying on those precedents to hold the FBAR penalty was immune from excessive fines scrutiny.

Even if it were appropriate for double jeopardy cases to control the excessive fines analysis, this Court historically applied double jeopardy principles to a broader class of civil fines and forfeitures than it does now.

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 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.

It is therefore unsurprising that this Court applied double jeopardy to both civil penalties and criminal punishments early in this country's history. 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. 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 an infraction of the law." *Id.* at 611-12; *see also 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 caselaw 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

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).[6]

Not until 140 years after the ratification of the Bill of Rights did this Court embrace the view that *in rem* forfeitures do not rank as punishment of the property owner for double jeopardy purposes. On the same day in 1931, the Court issued tandem opinions addressing whether certain civil sanctions are a form of punishment that trigger 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

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[6] At least two lower 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 the Double Jeopardy Clause did not bar retrial when the defendant had obtained acquittal by fraud. Another treatise from that era which instructed that double jeopardy did not apply to *in rem* forfeitures likewise cited only the Clause itself for this errant proposition. *See* Rufus Waples, *Proceedings in Rem* § 21 (1882).

that had already sustained a criminal conviction because the tax suit was, "in its nature, a punitive proceeding, although it take the form of a civil action." In *In re Various Items of Personal Property*, 282 U.S. 577, 578-79 (1931), 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. 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 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; pp. 6-7, *supra*. Because it misapprehended the punitive nature of *in rem* forfeitures, the Court concluded that double jeopardy was no obstacle to the government's suit. *Various Items*, 282 U.S. at 581.

The Court's next double jeopardy case, *Helvering v. Mitchell*, 303 U.S. 391 (1938), enshrined the historically inaccurate notion that a penalty could be punitive or remedial, but not both. *Helvering* explained that double jeopardy would not apply to "a civil action by the Government, remedial in its nature." *Id.* 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 this conclusion in part by relying on a poorly reasoned case, *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871) (cited at *Helvering*, 303 U.S. at 401). 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. Although *Stockwell* was not a double jeopardy case, two of the issues presented required consideration of whether the forfeiture was a form of punishment. 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.

But *Stockwell* was an outlier in treating civil forfeitures as exclusively remedial. *See* Section I.A, *supra*. Fifteen years later, 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, 480-81 (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").

Two other cases on which *Helvering* relied, *Taylor v. United States*, 44 U.S. (3 How.) 197 (1845), and *In re Cliquot's Champagne*, 70 U.S. (3 Wall.) 114 (1865), also do not support the notion that penalties serve either punitive or remedial ends, but not both. The issue in those cases was whether the rule of lenity, which 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)), governed the interpretation of certain revenue statutes. Although both cases concluded that lenity did not apply, both suggested that the distinction between punitive and remedial statutes is not airtight. *Taylor* observed that "every law imposing a penalty or forfeiture may be deemed a penal law," but "in another sense, such laws are often deemed, and truly deserve to be called, remedial." 44 U.S. (3 How.) at 210. Similarly, *Cliquot's* concluded that revenue laws "are not penal laws in the sense that requires them to be construed with great strictness," but it simultaneously recognized that such laws are "intended to prevent fraud, suppress public wrong, and promote the public good," 70 U.S. (3 Wall.) at 145—deterrent functions traditionally associated with punishment, *see Bajakajian*, 524 U.S. at 329. Indeed, in cases predating *Taylor* and *Cliquot's*, this Court applied the rule of lenity to customs and embargo laws given their "highly penal" nature. *See United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462-63 (1833) (interpreting statute to preclude *in rem* forfeiture in cases of "accident or mistake"); *Harmony*, 43

U.S. (2 How.) at 235 (interpreting "confessedly penal" statute to exclude forfeiture of cargo because it was not expressly authorized); *Mann*, 26 F. Cas. at 1157 (determining Congress intended to repeal former statute given the "highly penal" nature of the forfeitures at issue).

Still other cases cited in *Helvering* confirm that pecuniary penalties related to tax violations *do* constitute punishment, even where they also serve remedial purposes. *See McDowell v. Heiner*, 9 F.2d 120, 122-24 (W.D. Pa. 1925) (explicitly describing tax penalties as within "the power of Congress to punish the delinquent taxpayer"). In *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 274 (1853), this Court reasoned that such penalties are intended to deter "illegal or fraudulent dealings on the part of the importer or his agents," and therefore even though they may serve as "compensation for a violated law," they remain "a penal duty." *See also Passavant v. United States*, 148 U.S. 214, 221 (1893); *Doll v. Evans*, 7 F. Cas. 855, 857 (C.C.E.D. Pa. 1872); *Dorsheimer v. United States*, 74 U.S. (7 Wall.) 166, 173 (1868) (stating merely that "[t]he purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes").

In short, a penalty may have remedial qualities and still be a punishment. Therefore, even if the FBAR penalty at issue provided a "reasonable form of liquidated damages" to the government for the costs of enforcing revenue laws, Pet.App.31a (quoting *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 235-37 (1972)), that does not mean that it is nonpunitive.

III. The Excessive Fines Clause Is a Critical Bulwark Against Abusive Forfeitures

History illuminates the serious downside of narrowing the Excessive Fines Clause's scope as the First Circuit did. Throughout history, federal, state, and local governments have used these sanctions as revenue-raising tools "out of accord with the penal goals of retribution and deterrence." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019); *see also id.* at 693-98 (Thomas, J., concurring in the judgment) (describing abuses dating back to Magna Carta).

The customs laws passed by the First Congress exemplify the strong incentive to use forfeitures to raise revenue. Customs regulation was essential to the fledgling nation's financial well-being, and Congress accordingly smoothed the path for collection of *in rem* forfeitures. *See* Arlyck at 1466. Customs statutes criminalized a wide range of behaviors. *Id.* at 1468. The "libel" or "information" 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 then and now. For

example, in an effort to finance the Civil War, Congress increased both the amount of duties imposed and the amount of the moieties awarded to those who prosecuted even minor customs violations. Parrillo at 221-23.

Over time, "federal and state forfeiture statutes [have] reach[ed] virtually any type of property that might be used in the conduct of a criminal enterprise," *Calero-Toledo*, 416 U.S. at 683, creating opportunities for abuse, *see United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993) (citing 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).

Governmental abuse of fines and forfeitures has historically targeted the politically vulnerable. *Timbs*, 139 S. Ct. at 689; *id.* at 693-98 (Thomas, J., concurring in the judgment). That problem continues today. *See* Sarah Stillman, *Taken*, New Yorker (Aug. 5, 2013) (documenting abuses). As Justice Thomas has explained, civil forfeitures "frequently target the poor and other groups least able to defend their interests" and lead to "egregious and well-chronicled abuses." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari); *see also James Daniel Good Real Prop.*, 510 U.S. at 81-82 (Thomas, J., concurring in part and dissenting in part).

The First Circuit's errant opinion excluding the FBAR penalty from excessive fines scrutiny will only perpetuate these abuses. Certiorari is warranted to

align contemporary understandings of civil forfeitures and penalties with historical practice and ensure the Excessive Fines Clause remains "a constant shield" against excessive pecuniary penalties. *Timbs*, 139 S. Ct. at 689.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BETH A. COLGAN
UCLA SCHOOL OF LAW
385 Charles E. Young Dr. East
Los Angeles, CA 90095

MATTHEW S. ROZEN
Counsel of Record
KATHERINE MORAN MEEKS
TESSA GELLERSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3596
MRozen@gibsondunn.com

Counsel for Amicus Curiae

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