No. 22-177

In the Supreme Court of the United States

MONICA TOTH, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

ARI S. BARGIL
INSTITUTE FOR JUSTICE
2 South Biscayne Blvd.,
Suite 3180
Miami, FL 33131

SAMUEL B. GEDGE
Counsel of Record
BRIAN A. MORRIS
INSTITUTE FOR JUSTICE
901 North Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

JEFFREY P. WIESNER
JENNIFER MCKINNON
WIESNER MCKINNON LLP
90 Canal St., Suite 110
Boston, MA 02114

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INTRODUCTION

This case raises a question of nationwide importance: what is the standard for whether the Excessive Fines Clause applies to a civil monetary penalty? On this question, the decision below articulated a standard under which even one of "the harshest civil penalties the government may impose" escapes scrutiny. *See* Nat'l Taxpayer Advocate, *2022 Purple Book* 77 (Dec. 31, 2021), https://tinyurl.com/2022-Purple-Book. That standard conflicts with this Court's precedent and with the standard of at least three other circuits. Review is warranted.

The government, for its part, embraces the most extreme aspects of the First Circuit's approach—most notably, its view that the Excessive Fines Clause applies only to civil penalties "with the purpose of deterring *criminality*." Opp. 17. And critically, the government nowhere denies that the First Circuit's standard conflicts with that of the Seventh, Ninth, and Eleventh Circuits. The most the government can say is that those circuits have developed their competing standard in the context of civil penalties other than the one enforced against petitioner. Contrary to the government's suggestion, however, the Court regularly addresses splits over constitutional questions that arise in lower-court cases involving "heterogenous" statutes. Opp. 19. The Court's most recent excessive-fines case is one example. *Timbs* v. *Indiana*, 139 S. Ct. 682 (2019).

Just such a split is presented here, and the government does not seriously dispute the matter. Nor does the government dispute that the First Circuit's flawed standard is rooted in circuit precedent dating back decades. Nor does the government's mine-run vehicle argument (that petitioner might lose on remand) pose any obstacle to review. The petition should be granted.

ARGUMENT

A. The decision below conflicts with this Court's precedent.

In defending the decision below, the government underscores how far that decision diverges from this Court's excessive-fines precedent.

1. Foremost, the government stands by the court of appeals' gravest error: its view that the Excessive Fines Clause applies to civil penalties only if those penalties are based on violations of a separate, criminal law. Opp. 14-15; Pet. 15. However punitive a civil penalty may be, the government maintains, the Excessive Fines Clause is implicated only if there is a "necessary tie" between the penalty and "a criminal offense or criminal culpability." Opp. 15; Pet. App. 28a.

That rule—the cornerstone of the decision below—cannot be squared with this Court's precedent. The Court has been emphatic: the "notion of punishment" contemplated in the Excessive Fines Clause "cuts across the division between the civil and the criminal law." *Austin* v. *United States*, 509 U.S. 602, 610 (1993) (citation omitted); *id.* at 614 n.7 (reviewing founding-era definitions of "fine"). Like the court of appeals, the government is thus mistaken to divine from *Austin*'s "context" that the Clause applies only "to sanctions with the purpose of deterring *criminality*." Opp. 17. *Austin* said just the opposite.

Other courts have taken *Austin* at its word (a "radical" proposition, the government suggests (Opp. 18)). The Colorado Supreme Court, for example, has applied the Excessive Fines Clause to civil penalties imposed for workers-compensation violations, with no predicate criminal offense. *Colo. Dep't of Lab. & Emp.* v. *Dami*

Hosp., LLC, 442 P.3d 94, 100 (2019) (noting that the Clause applies to penalties "whether those fines are part of a criminal scheme or a civil one"), *cert. denied*, 140 S. Ct. 849 (2020). The California Supreme Court, too, has applied the Clause to penalties imposed for purely civil violations. *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 410, 420-23 (2005). Likewise in the Eighth Circuit (*Qwest Corp.* v. *Minn. Pub. Utils. Comm'n*, 427 F.3d 1061, 1069 (2005) (reviewing excessiveness of purely civil penalty)) and, of course, in the Seventh, Ninth, and Eleventh Circuits—the three that most clearly illustrate the split detailed in the petition. The First Circuit's demand for a close-knit tie between civil and criminal law finds no support in this Court's precedent.

This case also betrays the unworkability of the First Circuit's standard. In the court of appeals' view (and the government's), FBAR penalties do not implicate the Excessive Fines Clause because they may be imposed "without regard to whether the violation constituted a crime or was tied to or otherwise facilitated some other crime." Opp. 15. But as the government acknowledges (Opp. 4, 18), the Bank Secrecy Act *does* have a criminal provision covering willful FBAR violations. The government even brandished it at Monica Toth. Mem. Supp. Mot. Summ. J., D. Ct. Doc. 165, at 16 (commenting on "the potential criminal sanctions for Toth's actions"). Compared to that criminal provision, however, the civil-penalty provision is both substantively broader and economically harsher. As enforced, it extends to a class of *less* culpable offenders than does its criminal counterpart. Pet. 5 n.1, 27. It boasts a *more* lenient burden of proof. And it opens the door to far more severe monetary sanctions. *Compare* 31 U.S.C. § 5322(a) (capping criminal fine at $250,000), *with* Pet. i (noting Toth's

$2,173,703 civil penalty). That the court of appeals could construe the Excessive Fines Clause not to apply spotlights the gulf between its standard and *Austin*'s.

2. Like the court of appeals, the government also maintains that FBAR penalties are purely "remedial" and thus outside the bounds of the Excessive Fines Clause. Opp. 16-17. As the government concedes, however, this Court has made clear "that 'remedial' usually connotes 'obtain[ing] compensation or indemnity.'" Opp. 16 (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 329 (1998)). With some understatement, the government also accepts that FBAR penalties do not "precisely correspond" to any compensatory sums. Opp. 17; *see* Pet. 18 (quoting government's less understated position that FBAR penalties are "imposed regardless of whether there is any actual pecuniary loss"). And the government concedes that the penalties "have a deterrent effect," by "putting a price on conduct that the government seeks to reduce or eliminate." Opp. 17 (citation omitted); *cf. Bajakajian*, 524 U.S. at 329 ("Deterrence . . . has traditionally been viewed as a goal of punishment . . . ."). By the government's own account, FBAR penalties are materially indistinguishable from the forfeiture the Court addressed in *Bajakajian*—itself a Bank Secrecy Act case.

In fact, the similarities are unmissable. In the government's telling, the FBAR penalty is remedial in a way *Bajakajian*'s forfeiture was not because the FBAR's reporting requirement serves to "remedy th[e] harms to the public fisc" caused by "'hundreds of millions in tax revenues [being] lost'" through foreign accounts. Opp. 16-17 (quoting Pet. App. 30a (in turn quoting H.R. Rep. No. 975, 91st Cong., 2d Sess. 12-13 (1970))). Yet the reporting law in *Bajakajian* was enacted as part of the same Bank Secrecy Act as was the FBAR. The government in *Bajakajian* harnessed the

same legislative history. U.S. Br., 1997 WL 857176, at *3 (U.S. July 14, 1997). It did so in service of the same mission: to recast a punitive monetary sanction as remedial. And it lost; *Bajakajian* rejected the government's view in terms that apply equally here, that conflict with the decision below, and that the government's brief does not even try to reckon with. Only by misreading this Court's precedent could the court of appeals hold that one of the government's harshest civil penalties does not implicate the Excessive Fines Clause.[1]

B. The government's response confirms the circuit conflict.

The government does not seriously dispute that the court of appeals construed the Excessive Fines Clause in a way that conflicts with the standard elsewhere. The decision below held that the Clause does not apply to a punitive, noncompensatory civil penalty where that penalty lacks the "necessary tie" to a criminal offense. Opp. 15. And the government does not deny that the standard of at least three other circuits would lead to a different result. The government does not deny that under the standard used by the Seventh, Ninth, and Eleventh Cir-

[1] The court of appeals fortified its reasoning with various "analog[ies]" (Opp. 16), none of which the government meaningfully defends. The government notes, for example, that the court of appeals "viewed the Section 5321(a)(5) penalties as akin to civil tax penalties." Opp. 11. Elsewhere, though, the government admits that "a civil penalty assessed under Section 5321 is not a 'tax penalty.'" U.S. Br., *Bittner* v. *United States*, 2022 WL 4779399, at *6 (U.S. Sept. 30, 2022). The government also portrays the court of appeals' reliance on the Double Jeopardy Clause as an exercise in "reasoning by analogy." Opp. 16. But it is doubtful how "instructive" (Opp. 16 n.3) such an analogy can be when the Double Jeopardy Clause is not "parallel to" or "even related to" the Excessive Fines Clause. *United States* v. *Ursery*, 518 U.S. 267, 286 (1996).

cuits, "the lack of a civil-criminal link play[s] no role in the analysis." Pet. 23. Nor does it deny that those courts have construed "remedial" to mean compensatory in a way that diverges from the First Circuit's approach. Pet. 23-24. Far from generating a merely "speculative" split (Opp. 19), the decision below built on decades-old circuit precedent to construe the Excessive Fines Clause in a way that conflicts directly with the standard of other courts of appeals.

The government observes that "no other court of appeals has squarely addressed whether a civil penalty imposed under Section 5321(a)(5) for a willful violation of Section 5314 implicates the Excessive Fines Clause." Opp. 18. That does not lessen the concreteness of the conflict at issue: over the standard for determining when civil penalties implicate the Excessive Fines Clause. On questions of this type, in fact, it's commonplace for lower-court conflicts to manifest in cases involving "a heterogenous mix" of statutes. Opp. 19. In *Timbs* v. *Indiana*, the split over the Excessive Fines Clause's incorporation evolved in cases about civil-forfeiture laws, cigarette-distribution penalties, consumer-protection statutes, and more. *See* Pet. for Cert., 2018 WL 704837, at *13-18 (U.S. Jan. 31, 2018). The Fifth Amendment split giving rise to *Horne* v. *U.S. Department of Agriculture* arose not in a line of cases about raisins, but in ones addressing abandoned-property statutes, election laws, even a statute about Lee Harvey Oswald's effects. Br. in Opp., 2014 WL 8623699, at *22 (U.S. Dec. 8, 2014). Nor are those cases outliers; questions about Bill of Rights protections are of nationwide importance precisely *because* they affect diverse laws. The conflict here is no less real.

The government posits that there is "no reason to think" the First Circuit's excessive-fines standard "necessarily" differs from that of the Seventh, Ninth, and

Eleventh Circuits. Opp. 20. But as discussed, there is *every* reason to think so. As the petition explains (at 22-24), each of those courts applies the Excessive Fines Clause to civil penalties that are in material respects identical to the one considered below. They do so using a standard that is irreconcilable with that of the decision below. The government nowhere argues otherwise. The split on how the Excessive Fines Clause applies to civil penalties is mature, it dates back decades, and it is a compelling candidate for review.

C. The question presented is important and warrants review in this case.

The question presented is important and this case is a suitable one in which to resolve it. The government's contrary arguments lack merit.

1.a. The government suggests that, at most, the decision below reflects "the misapplication of a properly stated rule of law." Opp. 14 (citation omitted). As discussed, however (at 5-7), the government does not deny that the court of appeals articulated a case-dispositive legal standard that diverges from that of at least three other circuits. Nor does the government deny that the First Circuit's resistance to the Excessive Fines Clause dates back decades. Pet. 14, 24-25 (discussing *McNichols* v. *Comm'r*, 13 F.3d 432 (1st Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994)). The conflict is entrenched and warrants review.

b. Also without merit are the government's "question[s]" about the case's importance. Opp. 20. For example, the government minimizes the question presented because the First Circuit is the first court of appeals to have addressed it in the FBAR context specifically. But as discussed, the split on the excessive-fines standard is stark, and that it arises in diverse penalty regimes only

reinforces its importance. At all events, any shortage of FBAR-specific appeals is due in part to the very abuses the Excessive Fines Clause exists to curtail; because FBAR penalties are "financially devastating," the government can leverage even exorbitant settlements. Nat'l Taxpayer Advocate, *2011 Annual Report to Congress* (Vol. 1), at 191 (Dec. 31, 2011), https://tinyurl.com/2011-NTA-Report ; *see also* Matthew D. Lee, *US Supreme Court to Settle Long-Disputed FBAR Penalty Issue*, Bloomberg Tax (Sept. 12, 2022) ("This system tends to encourage settlement of FBAR cases at the IRS level to avoid lengthy and potentially uncertain litigation."), https://tinyurl.com/Bloomberg-Tax.

The government theorizes that, for FBAR penalties specifically, abuse-of-discretion review might do the same work as the Eighth Amendment. Opp. 20. That, too, is wrong. First, the government has argued successfully that FBAR penalties pass abuse-of-discretion review whenever the IRS "follow[s] the penalty guidelines provided in the Internal Revenue Manual, which comply with the statute." Br. Supp. Mot. Summ. J. at 3, *Kimble* v. *United States*, No. 17-cv-421 (Fed. Cl. June 27, 2018) (Doc. 29); *United States* v. *Williams*, No. 09-cv-437, 2014 WL 3746497, at *1 n.1 (E.D. Va. June 26, 2014) ("[G]reat deference to the judgment of the agency."). Under the Eighth Amendment, in contrast, this Court and others have invalidated economic sanctions even when authorized by statutes. *Bajakajian*, 524 U.S. at 344; *accord Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318 (11th Cir. 2021) (Newsom, J., concurring) (questioning circuit's history of "great deference to Congress's judgment about the excessiveness of the fine"). Simply, the APA is no substitute for the Bill of Rights.

Second (and to risk belaboring the obvious) this case implicates more than the FBAR. How the Eighth Amendment applies to civil penalties matters at the federal, state, and local levels alike. For many such penalties, the APA does not apply, and the Excessive Fines Clause stands as a key check on the power to punish.

c. The government also contends that this case is an unsuitable vehicle because, in the government's view, Monica Toth would lose even were the Excessive Fines Clause to apply. Opp. 20-21. But the court of appeals forestalled that inquiry by holding that the Clause "does not apply." Pet. App. 34a. In these circumstances, the Court's practice is straightforward: address the "threshold question" presented by the court of appeals' decision, then remand for the lower courts to resolve whatever issues their error "prevented them from addressing." *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (citation omitted). The government gives no reason why that practice would not work here. Indeed, the government made much the same vehicle argument—unsuccessfully—in resisting certiorari in *Austin*. Br. in Opp. at 7, *Austin*, 509 U.S. 602 (U.S. Dec. 28, 1992) (No. 92-6073) (contending that even were the Excessive Fines Clause to apply, "the forfeiture in this case is constitutional").

The government notes that, unlike the court of appeals, the district court below performed an excessiveness analysis of a sort. Opp. 21. But because of its threshold error, the court of appeals had no occasion to review that analysis, and the government offers no reason why this Court's remand practice would not apply as usual. *E.g.*, *Holland* v. *Florida*, 560 U.S. 631, 643-44, 653-54 (2010). That practice has special virtue here, moreover, where the district court's analysis suffered from errors that would invite reversal were the court of

appeals to review it in the first instance. For example, the district court declined to hold an evidentiary hearing, citing its view that the Eighth Amendment did not apply. Pet. App. 56a-57a n.9. The court declined to consider parts of the record that would have borne on Toth's culpability. Pet. App. 41a n.3. The court maintained that Toth "is precisely within the class of individuals the legislature intended to target" (Pet. App. 54a), when even the government placed her on the less culpable end of the willfulness spectrum. Pet. 27. And where the government sees in Toth a "potential tax evader[]" (Opp. 21), the record exposes an elderly, compulsively private woman with a history of physical and mental challenges. Toth Decl., D. Ct. Doc. 13-1, at ¶ 5 ("For some 9 years, I received no education, was being kept quite isolated, and had little social contact with anyone my own age because my mother wanted to keep me to herself . . . ."); *id.* ¶ 13 ("[T]he car I was driving was hit by another car, and I was severely injured both physically and mentally."). There is every reason to think the court of appeals would find merit in her excessive-fines defense on remand.[2]

2. Ignored in the government's brief are this case's advantages. The petition cleanly presents a threshold question concerning the Excessive Fines Clause's application to civil monetary penalties. That question bears on all levels of the Nation's civil-enforcement apparatus. It involves what the Court recently recognized as a fundamental right. Pet. 25-26. And it coincides with the growth of "more and more civil laws bearing more and

[2] The government devotes several paragraphs to the sanctions Toth received when defending herself *pro se* (Opp. 8-10) but does not suggest that the sanctions bear on the question presented or pose any obstacle to review. *See* Pet. 10.

more extravagant punishments." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). This case also captures perfectly the magnitude of the First Circuit's error: under that court's standard, the Excessive Fines Clause does not apply even to a civil penalty that is famously draconian and that has been enforced over the past decade to impose well over a billion dollars in economic sanctions. Pet. 6. This Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ARI S. BARGIL
INSTITUTE FOR JUSTICE
2 South Biscayne Blvd.,
Suite 3180,
Miami, FL 33131

SAMUEL B. GEDGE
Counsel of Record
BRIAN A. MORRIS
INSTITUTE FOR JUSTICE
901 North Glebe Rd.,
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

JEFFREY P. WIESNER
JENNIFER MCKINNON
WIESNER MCKINNON LLP
90 Canal St., Suite 110
Boston, MA 02114

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