SUPREME COURT OF THE UNITED STATES

No. 93–144

DEPARTMENT OF REVENUE OF MONTANA, PETITIONER
v. KURTH RANCH ET AL.

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

[June 6, 1994]

JUSTICE O'CONNOR, dissenting.

In an attempt to save their ranch from creditors, the extended Kurth family turned to marijuana farming. "The business expanded to the largest marijuana growing operation in the State of Montana when shut down by law enforcement authorities in October, 1987." *In re Kurth Ranch*, 145 B. R. 61, 66 (Bkrtcy. Ct. Mont. 1990). The Kurths were convicted and sentenced on various state drug charges.

During the raid on the ranch, authorities found 1,811 ounces of harvested marijuana in the Kurths' possession. Under Montana law, "[t]here is a tax on the possession and storage of dangerous drugs," and "each person possessing or storing dangerous drugs is liable for the tax." Mont. Code Ann. §15–25–111(1) (1987). In the case of marijuana, the tax is 10 percent of the market value of the drugs or $100 per ounce, whichever is greater. §15–25–111(2). Pursuant to this law, the Montana Department of Revenue assessed a tax of $181,000 against the Kurths. The Kurths argue, and the courts below agreed, that this tax is a second punishment prohibited by the Double Jeopardy Clause. See *Schiro* v. *Farley*, 510 U. S. ___, ___ (1994) (slip op., at 7) (the Clause "`protects against multiple punishments for the same offense'"), quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969).

The government may, of course, tax illegal activity. See, *e.g.*, *Marchetti* v. *United States*, 390 U. S. 39, 44 (1968). In fact, we have upheld, as within Congress'

taxing authority, a $100 per ounce tax on marijuana. *United States* v. *Sanchez*, 340 U. S. 42, 44 (1950). But the power to tax illegal activity carries with it the danger that the legislature will use the tax to punish the participants for engaging in that activity. This is particularly true of taxes assessed on the possession of illegal drugs: because most drug offenses involve the manufacture, possession, transportation, or distribution of controlled substances, the State might use a tax on possession to punish a participant in a drug crime twice for the same conduct. We would certainly examine a $100 per ounce *fine* levied against a person who had previously been convicted and sentenced for marijuana possession for consistency with the Double Jeopardy Clause. Cf. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 548–549 (1943). Because in my view there is no constitutional distinction between such a fine and the tax at issue in this case, a tax imposed on the possession of illegal drugs is subject to double jeopardy analysis.

To hold, however, that Montana's drug tax is not *exempt* from scrutiny under the Double Jeopardy Clause says nothing about whether imposition of the tax is unconstitutional. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely *punishing* twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell*, 303 U. S. 391, 399 (1938) (emphasis added). The Fifth Amendment says "nor shall any person be subject for the same offence to be twice put in jeopardy," and a civil proceeding following a criminal prosecution simply is not a second "jeopardy." See *post*, at 4–5, and n. 1 (SCALIA, J., dissenting). But we have recognized that the Constitution constrains the States' ability to denominate proceedings as "civil" and so dispense with the criminal procedure protections embodied in the Bill of Rights. See, *e.g.*, *Allen* v. *Illinois*, 478 U. S. 364, 368–369 (1986). Some governmental exactions are so

punitive that they may only be imposed in a criminal proceeding. *United States* v. *Ward*, 448 U. S. 242, 248–249 (1980). And because the Double Jeopardy Clause prohibits successive criminal proceedings for the same offense, the government may not sanction a defendant for conduct for which he has already been punished *insofar as the subsequent sanction is punitive*, because to do so would necessitate a criminal proceeding prohibited by the Constitution. See generally *United States* v. *Halper*, 490 U. S. 435 (1989).

The question, then, is whether Montana's drug tax is punitive. Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective. *United States* v. *Halper*, *supra*, at 448–450. See also *Bell* v. *Wolfish*, 441 U. S. 520, 539, n. 20 (1979); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168 (1963). This will obtain when, as in *Halper*, the amount of the sanction is "overwhelmingly disproportionate" to the damages caused by the wrongful conduct and thus "is not rationally related to the goal of making the Government whole." 490 U. S., at 449, 451.

The State and Federal Governments spend vast sums on drug control activities. See, *e.g.*, U. S. Dept. of Justice, Bureau of Justice Statistics, Fact Sheet: Drug Data Summary 5 (Apr. 1994) (approximately $27 billion in fiscal year 1991). The Kurths are directly responsible for some of these expenditures—the costs of detecting, investigating, and raiding their operation, the price of prosecuting them and incarcerating those who received prison sentences, and part of the money spent on drug abuse education, deterrence, and treatment. The State of Montana has a legitimate nonpunitive interest in defraying the costs of such activities. *United States* v. *Halper*, *supra*, at 444–446, and n. 6; see also *United States* v. *Ward*, 448 U. S., at 254; *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 237 (1972); *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 153–154 (1956). For example, readily available statistics indicate that apprehension, prosecution, and incarceration of the Kurths will cost the State of Montana at least $120,000. See Montana Board of Crime Control, Per-Unit and Per-Transaction Expenditures in the Montana Criminal Justice System 8, 15, 19, 21, 22–23, and Tables 21 and 23 (1993) (Montana Criminal Justice Expenditures).

But measuring the costs actually imposed by every participant in the illegal drug trade would be, to the extent it is even possible, so complex as to make the game not worth the candle. Thus, the government must resort to approximation—in effect, it exacts liquidated damages. See *Rex Trailer Co.* v. *United States*, *supra*, at 153–154 ("The damages resulting from [the government's] injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances"); *United States* v. *Halper*, *supra*, at 452–453 (KENNEDY, J., concurring) ("Our rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount"). The Montana Legislature has determined that $100 per ounce of marijuana is an appropriate estimate of its costs of drug control, and at least 22 other States have made a similar determination and tax marijuana at approximately the same rate.[1]

The Court of Appeals recognized that imposition of

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[1]See Ala. Code §40–17A–8(1) (1993); Colo. Rev. Stat. §39–28.7–102(1) (Supp. 1993); Conn. Gen. Stat. §12–651(b)(1) (1993); Ga. Code Ann. §48–15–6(1) (Supp. 1993); Idaho Code §63–4203(2)(a) (Supp. 1993); Ill. Comp. Stat. 520/9(1) (1993); Iowa Code §453B.7(1) (Supp. 1994); Kan. Stat. Ann. §79–5202(a)(1) (Supp. 1990); La. Rev. Stat. Ann. §47:2601(1) (West Supp. 1994); Me. Rev. Stat. Ann., Tit. 36, §4434(1) (Supp. 1993); Mass. Gen. Laws ch. 64K, §8(1) (Supp. 1994); Minn. Stat. §297D.08(1) (1991); Neb. Rev. Stat. §77–4303(1)(a) (1990); Nev. Rev. Stat. Ann. §372A.070(b)(1) (1993); N. M. Stat. Ann. §7–18A–3A(5) (1993); N. C. Gen. Stat. §105–113.107(1) (1992); N. D. Cent. Code §57–36.1–08(1) (1993); Okla. Stat., Tit. 68, §450.2(1) (1992); R. I. Gen. Laws §44–49–9(1) (Supp. 1993); Tex. Tax Code Ann. §159.101(b)(2) (1992); Utah Code Ann. §59–19–103(1)(a) (1992); Wis. Stat. §139.88(1) (Supp. 1993).

the drug tax on the Kurths' possession of marijuana would not be punishment if the sanction bore some rational relationship to "the staggering costs associated with fighting drug abuse in this country." *In re Kurth Ranch*, 986 F. 2d 1308, 1312 (CA9 1993). But the court held that "allowing the state to impose this tax, *without any showing of some rough approximation of its actual damages and costs*, would be sanctioning a penalty which *Halper* prohibits." *Ibid.* (emphasis added). As evidenced by the highlighted phrase, the Court of Appeals skipped a step in the double jeopardy analysis. In *Halper*, we held that determining whether an exaction is punitive entails a two-part inquiry:

> "Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as `punishment' in the plain meaning of the word, *then* the defendant is entitled to an accounting of the Govern-
> ment's damages and costs to determine if the penalty sought *in fact* constitutes a second punishment." 490 U. S., at 449–450 (emphasis added).

In other words, the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives; the burden then shifts to the government to justify the sanction with reference to the particular case. This bifurcated approach to the double jeopardy question makes good sense. The presumption of constitutionality to which every state statute is entitled means in this context that a sanction denominated as civil must be presumed to be nonpunitive. This presumption would be rendered nugatory if the government were required to prove that the sanction is in fact nonpunitive before

imposing it in a particular case. Rather, the defendant must show that the sanction may be punitive as applied to him before the government can be required to justify its imposition. As we emphasized in *Halper*, it will be the "rare case" in which a litigant will succeed in satisfying the first prong of the constitutional analysis. 490 U. S., at 449. We don't know whether this is such a case because the courts below improperly faulted the State for failing to prove its actual damages even though the Kurths have not shown that the amount of the tax is not rationally related to the government's legitimate nonpunitive objectives.

The Court avoids this problem by asserting that "[s]ubjecting Montana's drug tax to *Halper*'s test for civil penalties is . . . inappropriate." *Ante*, at 16. To reach this conclusion, the Court holds that imposition of the drug tax is *always* punitive, regardless of the nature of the offense or the offender. The consequences of this decision are astounding. The State of Montana—along with about half of the other States—is now precluded from *ever* imposing the drug tax on a person who has been punished for a possessory drug offense. A defendant who is arrested, tried, and convicted for possession of one ounce of marijuana cannot be taxed $100 therefor, even though the State's law enforcement costs in such a case average more than $4,000. See Montana Criminal Justice Expenditures 24. Moreover, presumably the State cannot tax *anyone* for possession of illegal drugs without providing the full panoply of criminal procedure protections found in the Fifth and Sixth Amendments, given the Court's holding that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution." *Ante*, at 17. See *United States* v. *Ward*, 448 U. S., at 248; *post*, at 11 (SCALIA, J., dissenting).

Today's decision is entirely unnecessary to preserve

individual liberty, because the Excessive Fines Clause is available to protect criminals from governmental overreaching. See *Alexander* v. *United States*, 509 U. S. ___ (1993); *Austin* v. *United States*, 509 U. S. ___ (1993); *post*, at 6, n. 2 (SCALIA, J., dissenting). See also *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 283–284 (1989) (O'CONNOR, J., concurring in part and dissenting in part) (discussing incorporation of Excessive Fines Clause). On the other hand, today's decision will be felt acutely by law-abiding taxpayers, because it will seriously undermine the ability of the State and Federal Governments to collect recompense for the immense costs criminals impose on our society. I therefore respectfully dissent from the Court's unwarranted expansion of our double jeopardy jurisprudence. I would simply vacate the judgment below and remand the case for further proceedings consistent with this opinion and *Halper*.