No. 22-7386

IN THE
Supreme Court of the United States

LOUIS MCINTOSH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court may enter a preliminary criminal forfeiture order outside the time limitation set forth in Federal Rule of Criminal Procedure 32.2(b)(2)(B).

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The government does not dispute that when a district court "must" perform an action, it is "required" to do so. The government agrees with petitioner, therefore, that Rule 32.2 mandates that a district court enter a preliminary order of forfeiture in advance of sentencing. And yet, the government argues that a district court need not actually do what is plainly "required" of it by the Rule since no consequence from the court's inaction is specified. By the government's logic, so long as the indictment contains a forfeiture allegation and the district court orally orders forfeiture at sentencing, the court is free to enter a preliminary order of forfeiture whenever the government requests it—even if such a request comes years or decades after the Rule's deadline has expired. The government's strained reading of the Rule completely subverts its mandatory language and would undermine the

finality of convictions; it cannot be the law. Moreover, contrary to the government's proposed "no-consequence-specified" rule, this Court has found other statutes and rules to be strictly enforceable even where no consequence is specified for a failure to comply.

Rule 32.2(b) provides a calibrated and forceful ("must") structure designed to provide a defendant both with procedural due process—with respect to the initial findings and to allow a defendant "to suggest revisions and modifications"—before a defendant can be deprived of their property, and to bring finality to the consequences flowing from of a criminal conviction. As a result, the Rule is necessarily a mandatory claims-processing rule. Interpreting the Rule as a mere-time related directive that can be ignored thwarts both those goals.

In arguing that the Rule is a time-related directive, the government relies entirely on cases involving statutes that use the less commanding term "shall." In arguing that there is no substantive difference between the words "must" and "shall," the government is at odds with English language experts and, more importantly, the Rule's drafters. The reality is that this Court has never found a rule or statute using the term "must" to be a time-related directive, and for good reason: it makes little sense to require a court or litigant to do something but then make noncompliance inconsequential.

The government seemed uninterested in forfeiture in this case until it saw that its ability to seek it was in jeopardy. From the time the government served its bill of particulars until when the district court was

about to pronounce its sentence, *see* JA53-JA54, there was not a word from the government about forfeiture. It was only when the court *sua sponte* raised restitution at the tail-end of petitioner's sentencing that the government awoke from its slumber to say that it would, in fact, be seeking forfeiture of a money judgment and specific property. The government then fell right back to sleep for the next two and half years until petitioner challenged the forfeiture order on appeal.

The government's lackadaisical approach prejudiced petitioner and should have consequences, and the judgment of the Second Circuit should be reversed.

ARGUMENT

Rule 32.2(b)(2)(B)'s Requirement that a Court Enter a Preliminary Order of Forfeiture Before Sentencing Is a Mandatory Claims-Processing Rule and *Dolan* Does Not Compel a Contrary Result.

A. *Dolan* Has Little Relevance To Forfeiture.

The government endeavors to make *Dolan* the lodestar for this Court despite the fact that "*Dolan* provides little direct guidance for the precise issue here." *United States v. Maddux*, 37 F.4th 1170, 1176 (6th Cir. 2022).

Unlike the MVRA, which this Court in *Dolan* found "seeks speed primarily to help the victims of crime and secondarily to help the defendant," *Dolan v. United States*, 560 U.S. 605, 612 (2010), when it comes to forfeiture, "Rule 32.2(b) flips that script—it arms defendants with procedures to correct preliminary forfeiture orders before sentencing." *Maddux*, 37 F.4th at 1178; *see also Shakur*, 691 F.3d 979, 988-89 (8th Cir. 2012)

(Rule 32.2 is designed to provide a defendant with a "meaningful opportunity to contest the deprivation of his property rights, as due process require[s]."). Moreover, by culminating forfeiture at sentencing, "defendants can be sure no more forfeiture awaits them—just like they can be sure that no other new punishment does." *Maddux*, 37 F.4th at 1178.

Rule 32.2(b)'s requirement that a preliminary order of forfeiture be entered prior to sentencing is designed to bring about finality for the defendant. This goal is reflected in the differences between the MVRA and Rule 32.2 with respect to post-sentencing modifications. Whereas both permit modification of an order of restitution or forfeiture after sentencing under certain circumstances, there are substantial differences between the modification schemes. Under the MVRA, once a district court indicates that it intends to order restitution at sentencing, it can determine the amount of restitution up to 90 days after sentencing, and amend a post-sentencing restitution order based on any newly identified losses. *See* 18 U.S.C. § 3664(d)(5). By contrast, Rule 32.2's allowed post-sentencing adjustment of the forfeiture amount is much more circumscribed. Rule 32.2(b)(2)(C) permits the entry of a general order of forfeiture, where a later amendment is anticipated, but that order must list the identified property, describe other property in general terms, and on its face "state[] that the order will be amended . . . when additional specific property is identified or the amount of the money judgment has been calculated." Rule 32.2(b)(2)(C)(iii). And Rule 32.2(e) permits the amendment of an existing forfeiture order for subsequently located property, but only when the

newly located asset was subject to forfeiture under a previously existing order. Rule 32.2(e)(1)(A).

The distinctions between Rule 32.2 and the MVRA derive from the different purposes that forfeiture and restitution serve. *See* Pet. Br. 39-41. Forfeiture "is to punish the defendant by stripping him of unlawful gains; restitution's purpose is distinct—to restore the victim's loss." *Maddux*, 37 F.4th at 1179. Because of the former purpose, forfeited property "ordinarily ends up in the hands of the government, not victims." *Id*. And the fact that certain officials have the discretion to transfer forfeited property to victims only serves to "attenuate[] any potential impact on victims, who thus only *might* receive forfeited property." *Id*.

Because forfeiture is not victim-centric, the goals and protections provided for under Rule 32.2(b) are directed to benefit the defendant. Indeed, the government concedes that forfeiture is paid to "the United States," U.S. Br. 34, which is fundamentally different from restitution at issue in *Dolan*, which is paid directly to the victims of a crime, and who therefore should not suffer the consequences of a government-missed deadline. Nevertheless, the government argues that because victims *may* in *some situations* benefit from forfeiture funds, the Court should adopt a rule similar to *Dolan* in the forfeiture context. As noted in the amicus brief filed by the New York Council of Defense Lawyers ("NYCDL Brief"), the government oversells the remission and restoration process, which provide scant support for the government's assertion that forfeited funds frequently go to victims. NYCDL Brief 14-19.

Moreover, the premise of the government's position that disallowing a forfeiture claim will harm victims presupposes that the prospective defendants from whom the government is seeking forfeiture have excess assets that now open up a separate avenue for collection by a victim. The reality, of course, is often different, since the defendant often has insufficient assets to pay both forfeiture and restitution. In those situations, diverting assets to forfeiture hurts victims who then have a smaller pot to go after and can only access the forfeited funds subject to the attorney general's discretion. Instead, and particularly in light of *Dolan*'s rule permitting restitution after the 90-day period, it is hard to see how a victim will be harmed by a determination that Rule 32.2(b) is a mandatory claims-processing rule since the district court can still direct the defendant to make restitution.

While the government trumpets the amount of forfeiture dollars that it discretionarily pays out to victims, it is noteworthy that in making those calculations the government often places itself in the category of victims who it is compensating. *See, e.g.,* Justice Department Returned Over $4 Billion to Victims of Crime Through the Asset Forfeiture Program Between 2002 and 2015 (April 22, 2015) (noting that some of the "victims" that received money were the Internal Revenue Service and the federal Medicare program).

That same source also reveals that victims may fare better on their own rather than going through the forfeiture process. For example, in *United States v. Scott W. Rothstein,* the victims were able to recover "over $500 million in recoveries to date" through

"other legal efforts" wholly apart from the government's forfeiture efforts, which constituted a mere 5% contribution to the victims' overall recovery.

In sum, *Dolan* does not provide the answer here. Moreover, even using *Dolan*'s methodology (*i.e.*, the language, context, and purpose of the Rule), this Court can safely conclude that Rule 32.2 is a mandatory claims-processing rule.

B. Rule 32.2's Text Indicates It Is A Mandatory Claims-Processing Rule.

Rule 32.2 plainly provides that a district court "must" enter a preliminary order of forfeiture "in advance of sentencing." Rule 32.2(b)(2)(B). To do so, "[a]s soon as practical after a verdict of finding of guilty . . . the court *must* determine what property is subject to forfeiture." Rule 32.2(b)(1)(A) (emphasis added). The "musts" continue, *see* Pet. Br. 17 & n.6 (collecting twenty "musts" in Rule 32.2), though in places the Rule uses less restrictive language (like "may") when the drafters meant to provide flexibility, *id.* at 19-21. In the face of all this, the use of "must" in Rule 32.2(b)(2)(B) can only be interpreted as an absolute requirement. *See* Pet. Br. 18-19. Indeed, in *Eberhart*, this Court concluded that another "must" Federal Rule of Criminal Procedure was an "inflexible" "claims-processing rule." *Eberhart v. United States*, 546 U.S. 12, 19 (2005). So, too, is Rule 32.2(b)(2)(B).

Moreover, the text of the Rule is explicit in its purpose, *i.e.*, "to allow the parties to suggest revisions or modifications before the order becomes final", all of which reflects that goal of providing the defendant with adequate due process prior to sentencing along

with an assurance of finality as a result of any issues being addressed. Rule 32.2(b)(2)(B).

By contrast, to the defendant-minded "must," in each of the cases the government cites as time-related directives, the statutes employed the more permissive word "shall."[1] Those cases say nothing about a statute or rule that uses the more forceful and definitive term "must." *See* Pet. Br. 18-19. Moreover, nearly all the other statutes that this Court has deemed as mandatory claims-processing rules use the term "shall," belying the idea that the use of "shall"—to say nothing of its sterner cousin "must"—is indicative of a time-related directive.[2]

In addition to meaningful differences in language, the timing provisions in the government's cases are qualitatively different from Rule 32.2. For example, *Brock, Regions Hospital* and *Barnhart* all involved internal administrative deadlines, and this Court was reluctant to strictly enforce a deadline, absent an

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[1] *See Brock v. Pierce County*, 476 U.S. 253, 260 (1986); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993); *Regions Hosp. v. Shalala*, 522 U.S. 448, 459 n.3 (1998); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160-61 (2003); *Dolan*, 560 U.S. 605; *Nielsen v. Preap*, 139 S. Ct. 954 (2019).

[2] *See, e.g.*, *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Scarborough v. Principi*, 541 U.S. 401 (2004); *cf. Santos-Zacaria v. Garland*, 598 U.S. 411 (2023) (holding provision using the more permissive "a court may review" language is a mandatory claims-processing rule); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013) (same).

explicit congressional direction, based on a bureaucratic agency's failure to act where strict enforcement would likely harm an innocent third party that the statute sought to protect. *See* Pet. Br. 38 n.19. *Dolan* involved similar concerns. 560 U.S. at 616 (observing "the prospect of depriving innocent crime victims of their due restitution"). Similarly, the administrative deadlines in *James Daniel Good* were purely internal, and those deadlines, far from being put into place to benefit property owners, were "designed to ensure the expeditious collection of revenues" through the forfeiture process. 510 U.S. at 64-65 (failure to comply with an administrative rule can be ameliorated by "disciplinary measures" imposed on the "subordinates [who] fail to discharge their statutory duties").

Rule 32.2, which places no obligation on an administrative agency and its officers, is the polar opposite. Thus, the rule was designed to benefit the parties, in particular the defendant and not some innocent third-party victim, and to ensure that the defendant was afforded adequate due process before being punitively deprived of his property. "Procedural due process requires that an individual receive adequate notice *and procedures to contest the deprivation of property rights*" that result from criminal forfeiture under 21 U.S.C. § 853. *Shakur*, 691 F.3d at 988; *see also Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 569-70 (1972) (due process requires adequate notice and procedures to contest the deprivation of property rights); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (a fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner").

The government would have this Court believe that the Rule cannot be a mandatory claims-processing rule because it does not prescribe the consequences of the missed deadline that "must" be met. U.S. Br. 23-24. What the government leaves out, however, is that it is the rare statute that *does* specify a consequence for noncompliance, and this Court has not usually considered this a remotely relevant question. Indeed, in the numerous cases in which this Court has termed deadlines as claims-processing rules—mostly after *Dolan*—the statutes have failed to say what happens when a deadline is blown.[3] *Eberhart* is a good example. There, the Court concluded that Federal Rule of Civil Procedure 33's timeline was a claims-processing rule, despite the fact that the Rule provided no consequence for the failure to adhere to its deadline. 546 U.S. at 13. In fact, the Court generally looks for whether a particular provision specifies consequences only insofar as it requires a "clear statement" before designating a timeline as "jurisdictional." *See* U.S. Br. 23.

Similarly, there is no merit to the government's claim that because Rule 32.2(b)(2)(B)'s "must" is "an obligation on the court, rather than the parties," it should be construed as a mere time-related directive. U.S. Br. 25; *contra* Pet. Br. 34-35. In making this argument, the government completely ignores the provisions of Rule 32.2(b)(1)(A), which place the obligation on the government to first act to enable the district

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[3] *See, e.g.*, *Santos-Zacaria,* 598 U.S. at 419; *Fort Bend County*, 139 S. Ct. at 1852; *Auburn Regional Medical Center*, 568 U.S. at 154; *Gonzalez*, 565 U.S. at 141, 143; *Henderson,* 562 U.S. at 435; *Kontrick*, 540 U.S. at 456; *Scarborough*, 541 U.S. at 413.

court to carry out its obligations with respect to forfeiture. Thus, the prerequisite for the district court's determinations with respect to forfeiture are dependent on "*[i]f* the government seeks forfeiture of specific property" or "*[i]f* the government seeks a personal money judgment". Rule 32.2(b)(1)(A) (emphasis added).[4] Notably, although the government acknowledges the "multiple provisions specifying steps the government may or must take" under Rule 32.2, it conspicuously omits the critical provision contained in Rule 32.2(b)(1)(A), which triggers the entry of a preliminary forfeiture order to begin with. U.S. Br. 25 & n.2. In other words, the Department of Justice's instructions to the government are not simply "a matter of best practices," U.S. Br. 26, they are a critical component of the process contemplated by Rule 32.2(b). Under the framework set up by the Rule's drafters, the district court must enter the preliminary order of forfeiture ahead of sentencing, but that obligation only triggers upon the government's post-trial, pre-sentence election to proceed with forfeiture.[5]

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[4] The election described by Rule 32.2(b)(1)(A) cannot be referring back to the indictment's allegation that the government intends to seek forfeiture. Rule 32.2(b)(1)(A) presupposes that the indictment contained a forfeiture allegation; otherwise, Rule 32.2(a) prohibits forfeiture in such instances, a fact even the government concedes. U.S. Br. 24.

[5] As this Court recognized in *United States v. Lovasco*, 431 U.S. 783, 794 n.15 (1977), prosecutors enjoy wide discretion in making prosecutorial decisions. Those considerations include whether "the disproportion of the authorized punishment in relation to the particular offense or the offender." Indeed, it would have been reasonable for petitioner to conclude here that the government made a conscious decision to forgo forfeiture given the effective

Finally, to the extent that the government is ever truly blameless for a district court's failure to enter a preliminary order—when, for example a district court fails to enter a preliminary order despite a government request for one—the government can easily correct that oversight without impacting its ultimate ability to recover; Rule 32.2(b)(4)(C) contemplates that such an error can be corrected by the government on appeal.

In sum, the text supports petitioner's reading of the Rule.

C. Rule 32.2(b)'s Structure Indicates That It Sets Forth a Mandatory Claims-Processing Rule.

As the Sixth Circuit observed, whatever the text of Rule 32.2(b) may be lacking (and as demonstrated above, there is little lacking), "its structure makes up the difference—a structure that dovetails with other rules aimed at giving sentences finality." 37 F.4th at 1177. Thus, Rule 32.2(b) provides a step-by-step framework for ensuring that to the extent that the government is continuing to seek forfeiture, the particular property or the amount of a money judgment is determined prior to sentencing, so that whatever punishment is imposed on the defendant is final at sentencing. *See* Pet. Br. 23-25. Although the order of

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life sentence petitioner was originally to receive as a result of the mandatory minimum. This undermines the government's assertion that any error here was harmless, on the theory that petitioner was on notice that the government was seeking forfeiture. *See* U.S. Br. 44.

forfeiture is ultimately for the court to impose, it is the government that must shepherd the process along. *Id.* at 26-27.

According to the government, the inclusion of an "impractical" exception undermines petitioner's claim that Rule 32.2(b) is a mandatory claims-processing rule. U.S. Br. 27. *Eberhart* demonstrates otherwise. Like Rule 32.2(b)'s "impractical" exception, Rule 33 provides an exception where a defendant obtains "newly discovered evidence," and permits a motion after the (then) 7-day (now 14-day) deadline has expired notwithstanding the fact that such a motion would certainly undermine the finality of a conviction. Despite this exception, *Eberhart* recognized that the Rule's requirement that all other motions "must" be filed within 7 days was absolute, and not simply a directive to spur the defendant to action.[6]

That conclusion is consistent with this Court's statutory interpretation caselaw employing the canon of *expressio unius*. *See* Pet. Br. 21. This Court has explained that where a drafting body "explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013); *see also Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other

[6] The version of Rule 33 under consideration in *Eberhart* also contained a provision analogous to Rule 32.2(b)'s "impractical" provision. Thus, the Rule permitted a district court to extend the strict 7-day deadline to "such further time as the court sets during the 7-day period." The equivalent of this provision is now found in Fed. R. Crim P. 45(b).

mode."); *Cont'l Cas. Co. v. United States*, 314 U.S. 527, 533 (1942) ("The statement of the conditions negatives action without the satisfaction of those requirements. Generally speaking a 'legislative affirmative description' implies denial of the nondescribed powers."). Here, the drafters' decision to craft a targeted exception to the pre-sentencing forfeiture requirement that applies only when issuing a pre-sentencing forfeiture order "is impractical," Rule 32.2(b)(2)(B), is evidence that they intended for no other exceptions to apply.

There is also no merit to the government's argument that Rule 32.2(b)(2)(B)'s pre-sentencing requirement cannot be a claims-processing rule because it allegedly includes a "flexible standard for determining when to enter a preliminary order." U.S. Br. 28. At the outset, this argument is legally wrong since this Court "routinely" classifies pre-suit exhaustion requirements as claims-processing rules. *Santos-Zacaria*, 598 U.S. at 417 & n.4 (collecting cases). Such provisions require one thing (exhaustion) to be done before another (bringing suit), just as Rule 32.2(b)(2)(B) requires the court to enter a preliminary forfeiture order "in advance of sentencing."

Once again, the government ignores the structure of the Rule. While the government correctly argues that the Rule permits the court in a "straightforward case" to enter a preliminary order "even the morning of sentencing," U.S. Br. 28, that is only presupposing that 1) the government chose to pursue forfeiture as required by Rule 32.2(b)(1)(A); 2) as a result of that election the district court "determine[d]" as it "must" "what property is subject to forfeiture"; and 3) whether the requisite nexus exists to any specific property or

4) the amount of a money judgment. Assuming, as required by the Rule, that the district court, prompted by the government, carried out all of these steps "as soon as practical" after the verdict, there is little harm in the district court entering a preliminary order even on the morning of sentencing because all the work necessary for that preliminary order has essentially been concluded.[7]

In other words, a district court's failure to enter a preliminary order of forfeiture in a particular case does not occur in a vacuum; rather, it is the result of a complete failure by the government to do anything with respect to forfeiture when it was required to by the Rule. From the point in time when the government filed a bill of particulars regarding the BMW until after the district court indicated that it was about to impose sentence, forfeiture was apparently forgotten but not gone.

According to the government, treating Rule 32.2(b) as a mandatory claims-processing rule would be inconsistent with other provisions of the Federal Rules where a violation is subject to a harmless error standard. U.S. Br. 29 (citing Rules 32(h) and 32(i)). The government cites no authority from this Court on this point, and the views of the lower court are certainly not unanimous. For example, the government claims that "if a court fails to perform one of the tasks that Rule 32(i) specifies for the court to do '[a]t sentencing'

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[7] The government says that because of this operation of the Rule, "[w]hether adopting [petitioner's] approach would actually benefit defendants in practice is unclear." U.S. Br. 43. To the extent this is true, it undermines the government's (spurious) "windfall" argument it makes elsewhere. *Id.* at 37.

. . . the court would not lose the power to impose a sentence on the defendant." U.S. Br. 29. While the court may not lose the power to impose sentence, several appellate courts have concluded that the resulting sentence requires automatic reversal. *See, e.g., United States v. Pagan*, 33 F.3d 125 (1st Cir. 1994) (district court's depriving defendant of his right to allocute before it imposed sentence required automatic reversal). Indeed, by waiting to raise forfeiture until after the district court had indicated it was ready to impose sentence, the government deprived petitioner of his right to allocution as to this aspect of his sentence.

In arguing that Rule 32.2 is a mere time-related directive, the government hangs its hat on the statutory context which Rule 32.2 operates alongside, but its arguments on this front, too, lack merit. Specifically, the government devotes pages in its brief to arguing that the statutory framework contained in 28 U.S.C. § 2461(c) is inconsistent with construing Rule 32.2(b) as a mandatory claims-processing rule. U.S. Br. 33-37.[8] In the government's view, because "criminal forfeiture is a mandatory consequence of conviction," it makes no sense that a Rule should abrogate that right. *Id.* at 34. Yet, an analysis of Rule 32.2 reveals that is precisely what the Rule does, even under the government's reading.

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[8] It is worth noting that 28 U.S.C. § 2461(c), which the government describes as "mandatory," U.S. Br. 34, uses the word "shall." So "shall" and "must" apparently are words whose meaning changes depending on when it suits the government. *Compare* U.S. Br. 34 (construing "shall" as "mandatory"), *with id.* at 38 (noting examples of when "shall" is not mandatory).

To start, Rule 32.2(a) makes clear that a court cannot enter a judgment of forfeiture "unless the indictment or information contain[ed] notice to the defendant." *See* U.S. Br. 5 (noting same). So it cannot be true that the "mandatory" nature of criminal forfeiture somehow always trumps the operation of the Rule. Indeed, the statute here is permissive on this specific point—it provides only that "the Government *may* include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure." 28 U.S.C. § 2461(c) (emphasis added). We know, then, that the Rule can impose obligations on the government above what the statute requires.

Further, even zooming in on Rule 32.2(b), the government appears to acknowledge that, at a minimum, the district court is required to orally pronounce some order of forfeiture at sentencing; otherwise, the government's ability to obtain forfeiture expires. *See, e.g.,* U.S. Br. 14 (failure to enter preliminary order of forfeiture before sentencing "does not disable the court from ordering forfeiture *at sentencing*") (emphasis added); *see also* Rule 32.2(b)(4)(B) ("The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing.").[9] In other words, despite the fact that "criminal forfeiture is a mandatory consequence of conviction," U.S. Br. 34,

[9] *See also Dolan*, 560 U.S. at 608 ("[A] sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution—at least where, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution.").

even the government recognizes that there are limits to the government's ability to enforce its rights due to its failure to follow Rule 32.2. Yet somehow under the government's bespoke version of Rule 32.2, it must follow the first and last steps in the criminal forfeiture process, but can skip over *the* central preliminary forfeiture order step without fanfare.[10]

Other provisions of Rule 32.2(b) confirm that the government's arguments concerning the mandatory nature of forfeiture are misplaced. Thus, despite the purported mandatory nature of criminal forfeiture, Rule 32.2(b)(1)(A) makes forfeiture dependent on a government election to proceed with forfeiture. In other words, the supposed obligation to impose forfeiture is not inviolate.

Indeed, the government can only make its argument that the purported mandatory nature of the forfeiture statutes relegates Rule 32.2(b) to a time-related directive by ignoring the plain text of the statute which *specifically incorporates* the Federal Rules of Criminal Procedure. *See* U.S. Br. 34 (omitting from its quote of § 2461(c) the words "pursuant to . . . the Federal Rules of Criminal Procedure"). This omission is significant because even the government acknowledges forfeiture need only be determined "when the

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[10] Petitioner's opening brief explained that the Rule's references to the preliminary order in places as simply "the order" underscored the importance of this step in the process. Pet. Br. 22. The government's response is one only a lawyer could love: it argues that this somehow indicates that a preliminary order "is an order with legal effect—not merely a draft or proposed order." U.S. Br. 30. That is not the "ordinary meaning" of those words. *See, e.g.*, *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022).

relevant prerequisites are satisfied." *Id.* When the government finally comes around to acknowledging this language, it dismisses it based on the unpersuasive argument that "the statutory framework focuses on sentencing and not on the antecedent procedural steps between conviction and sentencing." *Id.* at 35. But this argument ignores the fact that, at sentencing, the preliminary order of forfeiture "*becomes* final as to the defendant" *assuming* the district court complied with these antecedent steps. Rule 32.2(b)(4)(A) (emphasis added). Having skipped the critical step of entering a preliminary order of forfeiture, the district court's oral order was a nullity.

D. The Purpose of Rule 32.2 Confirms Its Status As a Mandatory Claims-Processing Rule.

Rule 32.2(b)'s requirement that a preliminary order of forfeiture be filed in advance of sentencing reflects the Rule's dual goals of providing a defendant with both due process and finality. *See* Pet. Br. 27-28. The government makes the unpersuasive claim that the history of the Rule is inconsistent with this purpose. U.S. Br. 31-33. Thus, the government advances the nonsensical claim that Rule 32.2(b)(2)(B)'s requirement to enter a preliminary forfeiture order prior to sentencing so that the parties can "advise the court of omissions or errors" before it becomes part of a criminal judgment, *see* Fed. R. Crim. P. 32.2 Advisory Committee Notes, 2009 Amendments, Subdivision (b)(2)(B), was "only secondarily to help the defendant," U.S. Br. 33. In the government's view, the "principal purpose is to assist the court itself in entering an accurate and complete order," *id.*, as if the court's

interest in entering an accurate order is an end in and of itself, wholly divorced from the interests of the parties before it. The advisory committee's notes, however, make clear that requiring the preliminary order of forfeiture to be entered prior to sentencing avoids a situation where "the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant." Fed. R. Crim. P. 32.2 Advisory Committee Notes, 2009 Amendments, Subdivision (b)(2)(B).

Under the government's view of the world, there are essentially no limits to when a district court can enter a preliminary order of forfeiture. Indeed, as the government sees it, so long as a district court ultimately gets the amount right so that a defendant cannot claim prejudice, there is nothing that prevents a district court from entering a preliminary order of forfeiture after the defendant's appeal has been determined or after they have been released from prison. *See* U.S. Br. 42, 44. Moreover, while the government suggests under its reading that a district court still has to enter some sort of forfeiture order at sentencing, there is nothing in the Rule that would distinguish between a district court's failure to enter a preliminary order of forfeiture and an oral order of forfeiture. Both provisions use the same mandatory language, and both fail to specify any consequence.

The structure of Rule 32.2, which also focuses on third-party interests, cut in the exact opposite direction of the third-party interests that are the subject of the MVRA in *Dolan*. There, third-party interests would have been harmed by deeming the deadline as a mandatory claims-processing rule; here, third-party

harm would flow from designating the deadline as merely a time-related directive. Rule 32.2(b)'s requirement that a preliminary order of forfeiture be entered prior to sentencing is to, *inter alia*, ensure that any rights with respect to the defendant are addressed in a timely manner so that third parties can then have any of their own rights to the property timely addressed. *See* Pet. Br. 30. Indeed, this was one of the animating principles behind updating the rule from the prior version, which "pose[d] real problems" since "third parties were forced to wait until after sentencing to petition for a determination of their interests." U.S. Br. 31-32. Under the government's reading, which for all practical purposes reverts back to the original rule and essentially allows for the entry of a preliminary order of forfeiture at any time, resolution of the third-party interests is once again delayed since resolution of those rights must await the entry of the order. *See* Rule 32.2(b)(6)(A) ("If the court orders the forfeiture of specific property, the government must publish *notice of the order* and send notice to any person who reasonably appears to be a potential claimant.") (emphasis added).[11] Because so much time has passed since the seizure, these third-parties may very well have lost track of the issue and are likely no longer be on the lookout for any such notice.

Indeed, this case provides a perfect example. Here, because of the delays occasioned by the government's

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[11] *See also* 21 U.S.C. § 853(k)(1) (barring third-parties from intervening in a criminal forfeiture proceeding "except as provided in subsection (n)"); 21 U.S.C. § 853(n)(1) (permitting third-parties to assert claims "[f]ollowing the entry of an order of forfeiture under this section").

tardiness, no notice was published pursuant to Rule 32.2(b)(6)(A) until April 25, 2023 (i.e., some 12 years after seizure of the vehicle). In such a situation, should an innocent third-party miss the deadline to file a claim, this Court can rest assured that the government will argue that deadline is a mandatory claims-processing rule thereby extinguishing the rights of any third-party claimants. *See, e.g., United States v. Swartz Family Trust*, 67 F.4th 505, 514 (2d Cir. 2023) (barring third-party claimant who missed the 30-day deadline despite the fact that claimant was incapacitated due to a medical condition at the time the notice was served). Only if Rule 32.2(b) is interpreted as a mandatory claims-processing rule will the rule function as intended and allow for the timely addressing of third-party rights, and the government's proposed harmlessness analysis—focused entirely on the defendant—leaves out these important third-party interests.

Nor is the government right that the error in this case was harmless as to petitioner. U.S. Br. 44-45. Petitioner was in fact prejudiced by the failure to timely enter a preliminary order of forfeiture. Here as a result of the government's failure to notify the court that it intended to seek forfeiture, its concomitant failure to provide the court with a proposed preliminary order of forfeiture, and the court's failure to enter such an order, petitioner's forfeiture never became final. As a result, petitioner lost the benefit of the higher value that a sale of his automobile would have received had it been sold earlier. The government's response (U.S. Br. 45) that petitioner could have sought an interlocutory sale misses the mark since the district court's oral order (mistakenly) directed forfeiture of *both* the car

and a money judgment without giving him the benefit of any sale. In other words, until the entry of a preliminary order of forfeiture, petitioner had no incentive to seek a sale of the car since he was not getting credit for it. Moreover, even after the preliminary order of forfeiture was entered in August 2017, JA124-JA129, the government continued to dilly-dally and only published notice of its intent to dispose of the property in April 2023 some six years later, JA184-JA185.

* * *

Both amici point out the double standard that the government seeks to uphold here. Brief of National Association of Criminal Defense Lawyers 8-19; NYCDL Brief 24. Suffice to say, the government ignores these arguments likely because it has no answer. The principle of "what's good for the goose is good for the gander," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 314 (2002) (Thomas, J. dissenting), counsels that the government should be held to the same standards as defendants and third parties in the context of forfeiture. Like any other party that fails to follow the rules, the government's failure to adhere to the mandatory requirements set forth in Rule 32.2(b) requires the loss of its right to seek forfeiture.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

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FEBRUARY 2024