No. 23-_____

In The
Supreme Court of the United States

LUIS SANCHEZ, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a person is convicted of a drug crime, 21 U.S.C. § 853 calls for bifurcated proceedings to ascertain what property may be forfeited as a result of the crime. During the initial criminal proceeding—in which third parties may not participate—a court adjudicates whether the property that has been seized has a nexus to the crime. If so, the court must enter a preliminary order of forfeiture, at which point any innocent person who asserts an interest in the property has 30 days to initiate a civil action by petitioning for "a hearing to adjudicate the validity of his alleged interest in the property." *Id*. § 853(n)(2).

Under the plain text of this statute, it is clear that the government has "clear title to property that is the subject of the order of forfeiture," *id*. § 853(n)(7), if no petition is filed within 30 days. But what happens if a petition that contains a readily correctible pleading deficiency is filed within 30 days and the petitioner promptly seeks leave to amend to correct that pleading deficiency? The Second and Seventh Circuits say leave to amend is allowed. But in the decision below, the Eleventh Circuit widened a circuit split by joining the Fifth Circuit in finding that § 853(n) precludes district courts from allowing amendment once the 30-day filing period has run.

The question presented is:

Whether a timely-filed 21 U.S.C. § 853(n) petition may be amended to cure a pleading deficiency after the

QUESTION PRESENTED—Continued

30-day filing period has run, as the Second and Seventh Circuits hold; or whether § 853(n)(2)'s 30-day deadline for filing a petition precludes any amendment after the filing deadline has expired, as the Eleventh and Fifth Circuits hold.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Luis Sanchez, Jaqueline Yupanqui Palacios, and Excentric Import & Export Corporation. Respondent is the United States of America

Petitioners Luis Sanchez and Jaqueline Yupanqui Palacios are not a corporation. Petitioner Excentric Import & Export Corporation is a corporation; it has no parent corporation, and no publicly traded company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Carlos Cancari, No. 21-cr-20134 (Mar. 7, 2022).

United States Court of Appeals (11th Cir.):

United States v. Luis Sanchez, et al., No. 20-2439 (Sept. 11, 2023).

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INTRODUCTION

For the first 150 years of our Republic, forfeitures were disfavored in America. *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."). "[B]etween 1790 and 1970, Congress provided for criminal forfeiture only once: to recover the life estates of Confederate soldiers." *United States v. Nichols*, 841 F.2d 1485, 1487 (10th Cir. 1998). And civil forfeiture laws "were limited to a few specific subject matters" where proceeding "in rem was . . . justified by necessity, because the party responsible for the crime was . . . beyond the personal jurisdiction of the United States Courts." *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., statement regarding denial of certiorari).

Unfortunately, however, the last 50 years have been marked by a dramatic expansion of criminal and civil forfeiture, prosecutorial overreach, and decisions unmooring forfeiture from its historic underpinnings. The net result is more than 150 civil and criminal forfeiture statutes today, nearly all of which were passed since the 1980s. Stephen B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1923 (1998). And contrary to the early caselaw, courts have routinely declined to extend constitutional protections to forfeiture proceedings, with many statutes failing to guarantee the return of property to innocent owners. As a result, forfeiture now does what Justices of this Court have long warned against by "work[ing] a complete revolution in

our criminal jurisprudence," *Miller v. United States*, 78 U.S. (11 Wall.) 268, 323 (1871) (Field, J., dissenting), that allows the "State to evade its burden of proof by replacing its criminal law with a civil system in which . . . the defendant has the burden of proof." *Foucha v. Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting).

This case underscores how modern forfeiture laws are being twisted to eliminate any check on a historically disfavored practice. The Petitioners are a small family business—Excentric Import and Export Corporation—and two small business owners—Luis Sanchez and Jaqueline Yupanqui Palacios—who never have been accused of criminal wrongdoing. Nevertheless, the United States now owns their property because of the location of a signature.

In 2021, Palacios sent Sanchez $9,000 as payment for electronic merchandise through Carlos Quipse Cancari. Unbeknownst to Petitioners, however, Cancari was also transporting drugs and was arrested in Miami. During his arrest, he told the police that the cash was not his money—that it belonged to Sanchez, and that there was no connection between the cash and the drugs he was transporting. Nonetheless, the government sought and obtained a preliminary order of forfeiture based on a plea deal in which Cancari "relinquished his rights" in property that the government knew he did not own.

Despite their limited English proficiency, the compressed time frame, and the need to obtain an affidavit

in a foreign country, Petitioners were able to initiate a civil proceeding to challenge the forfeiture of the cash on December 17, 2021. But because the Petitioners had signed affidavits incorporated by reference into their petition rather than the petition itself, the government moved to dismiss the petition for failure to comply with 21 U.S.C. § 853(n)(3)'s requirement that such petitions "be signed by the Petitioner under penalty of perjury." *Id*. And the district court and Eleventh Circuit accepted the government's position, finding that it was too late to fix that error because § 853(n) petitions cannot be amended after the statute's filing deadline expires.

The question presented in this case is whether a district court has discretion to allow a person who has had his or her property seized amend a timely-filed § 853(n) petition after the statute's 30-day filing period has run to fix readily curable pleading deficiencies. In the decision below, the Eleventh Circuit joined the Fifth Circuit in saying no. But the Second and Seventh Circuits have held otherwise as have numerous other district courts throughout the country.

As evidenced by the Eleventh Circuit's opinion in this case—which concluded that Palacios had standing to contest the forfeiture but nevertheless dismissed her petition due to the location of her signature—whether leave to amend is allowed under § 853(n) is incredibly important. In this case alone, it determines whether the government may rely on a readily correctible pleading deficiency to obtain "clear title" to private property despite sworn allegations that the

government has known the whole time that the property had no nexus to criminal activity. 21 U.S.C. § 853(n)(7). And unfortunately, cases like Palacios's happen far too often because forfeiture most frequently targets individuals in disadvantaged communities, who are bound to make pleading mistakes because they are often unable to find an attorney and forced to proceed in these cases pro se. See Jennifer McDonald & Dick M. Carpenter, II, *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims* 5, 10–13 (2021) (collecting survey data from Philadelphia's civil forfeiture system).

In recent years, this Court has increasingly scrutinized how forfeiture operates. And this case presents a perfect vehicle for this Court to do so once again and continue reconnecting forfeiture to its historic underpinnings. The decision below presents a circuit split. The decision below is wrong, inconsistent with this Court's decision in *Scarborough v. Principi*, 541 U.S. 401 (2004), and raises a host of troubling constitutional questions by standing for the premise that the government may now seize private property without ever meeting its burden of proof and then insulate itself from accountability through a small and readily correctible pleading deficiency. Finally, because the Eleventh Circuit concluded that Palacios has standing and simply dismissed her petition due to the location of her signature, this case perfectly presents the circuit split that is the subject of this petition as Palacios would have plainly had a path to recover her funds in the Second and Seventh Circuits.

For those reasons and the others set forth below, the petition for certiorari should be granted to resolve a growing circuit split and correct the Eleventh Circuit's deeply flawed interpretation of 21 U.S.C. § 853.

OPINIONS BELOW

The opinion of the court of appeals (App. 1–13) is unreported but available at 2023 WL 5844958. The District Court's preliminary (App. 53–56) and final orders of forfeiture (App. 31–36) are unreported as is the District Court's orders dismissing Petitioners' request for a hearing under § 853. (App. 16–30, 37–52).

JURISDICTION

The initial judgment of the court of appeals was entered on September 11, 2023, and the court of appeals denied a timely petition for rehearing on November 21, 2023. On February 5, 2024, Justice Thomas then extended the time within which to file a petition for a writ of certiorari to and including March 20, 2024 (No. 23A722). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 853(n)(2) provides that "[a]ny person, other than the defendant, asserting a legal interest in

property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property."

21 U.S.C. § 853(n)(3) provides that "[t]he petition shall be signed by the Petitioner under penalty of perjury and shall set forth the nature and extent of the Petitioner's right, title, or interest in the property, the time and circumstances of the Petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the Petitioner's claim, and the relief sought."

21 U.S.C. § 853(n)(7) provides that "[f]ollowing the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee."

STATEMENT

A. Statutory Background

21 U.S.C. § 853 "applies to 'any person' convicted of certain serious drug crimes," and mandates the forfeiture of property "flowing from (§ 853(a)(1)), or used

in (§ 853(a)(2)), the crime itself." *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017). But to protect the property rights of any individuals who have an ownership interest in the property that the government moves to forfeit, the statute bifurcates forfeiture into two proceedings, the first of which is criminal and the second of which is civil.

In the initial criminal proceeding, in which only the criminal defendant may participate, see 21 U.S.C. § 853(k), if a defendant is convicted of any count upon which criminal forfeiture is sought, "the court must determine what property is subject to forfeiture" by evaluating "whether the government has established the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1). If so, the court "must promptly enter a preliminary order of forfeiture." Fed. R. Crim. P. 32.2(b).

Upon entry of a preliminary order of forfeiture, "the United States shall publish notice of the order and of its intent to dispose of the property." 21 U.S.C. § 853(n)(1). After doing so, "[a]ny person . . . asserting a legal interest in property which has been ordered forfeited to the United States . . . may, within thirty days of the final publication of notice . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property." *Id*. § 853(n)(2).

In the event a petition is filed under § 853(n)(2), an ancillary civil proceeding is triggered in which the Court may "dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful

reason." Fed. R. Crim. P. 32.2(c)(1). But the Court must assume that the "facts set forth in the petition are . . . true," *id*., and is obligated to hold a hearing where the "Petitioner may testify and present evidence and witnesses on his own behalf." 21 U.S.C. § 853(n)(5). In addition, the statute provides that the "petition shall be signed by the Petitioner under penalty of perjury and shall set forth the nature and extent of the Petitioner's right, title, or interest in the property, the time and circumstances of the Petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the Petitioner's claim, and the relief sought." *Id*. § 853(n)(3).

"[A]fter the hearing," the District Court "shall amend the order of forfeiture" if the Petitioner "established by a preponderance of the evidence" that the Petitioner (1) "is a bona fide purchaser for value" or (2) "has a legal right, title, or interest in the property" that was either "vested in the Petitioner" or "superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section." *Id*. § 853(n)(6). By contrast, if "no [third-party] petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee." *Id*. § 853(n)(7).

B. Facts and Procedural History

1. Petitioner Luis Sanchez is a small business owner with no criminal record and a part owner of Excentric, a Florida corporation that sells electronics. Petitioner Jaqueline Palacios is a customer of Excentric who also has no criminal record and resides in Bolivia.

On February 4, 2021, Palacios sent with Carlos Cancari $9,000 in cash that she owed to Sanchez as payment towards computer accessories that she had previously purchased. Unbeknownst to Petitioners, however, Cancari was transporting drugs at the same time, and was arrested in Miami. During his arrest, Cancari disclaimed any ownership interest in the $9,000, explaining that it belonged to Sanchez. Nevertheless, the government moved to forfeit the cash without disclosing Cancari's statements to the Court. Then, the government had Cancari sign a plea deal in which he relinquished his rights to the funds he did not own.

Based on the plea deal that Cancari signed, the district court entered a preliminary order of forfeiture. App. 53–56. But in that plea deal, the government did not even bother to plead any facts supporting its position that the $9,000 was subject to forfeiture because it had a nexus to criminal activity. As a result, a preliminary forfeiture order was entered even though the government had failed to meet its burden to establish "the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1)(A).

Despite their limited English proficiency, the compressed time frame, and the need to obtain an affidavit

in a foreign country, Petitioners filed a timely petition for the release of the $9,000 under 21 U.S.C. § 853(n), which gave the district court federal question jurisdiction under 18 U.S.C. § 3231, 28 U.S.C. § 1331, and 21 U.S.C. § 853(*l*). But the government subsequently moved to dismiss that petition arguing that Petitioners lacked standing to contest the forfeiture. In addition, the government alleged that the Petitioners had made a fatal, though entirely technical, mistake: that their signatures were on the wrong page because Petitioners had signed affidavits incorporated by reference into their petition rather than the petition's signature page in violation of § 853(n)(3)'s requirement that such petitions "be signed by the Petitioner under penalty of perjury." The government also argued that it was too late to fix the mistake because § 853(n) petitions cannot be amended after the initial 30-day filing deadline expires.

On February 17, 2022, the district court granted the motion to dismiss the petition that Sanchez, Palacios, and Excentric had filed, resulting in the issuance of a final order of forfeiture on March 7, 2022. App. 31–52. In so ruling, the court found that Sanchez and Excentric lacked Article III standing and that the three Petitioners lacked statutory standing. App. 4. Then, the district court dismissed the petition because the Petitioners had not signed the petition, as required by § 853(n)(3). App. 4. Finally, the court denied the Petitioners' request for leave to amend their petition because the "statute authorizing third-party petitions in criminal forfeiture proceedings only allowed petitions

to be filed during a thirty-day window, which had long passed by." App. 4; see also App. 50–51 (following the Fifth Circuit in holding that "a third-party Petitioner may not amend a claim to correct a defect under section 853(n)(3) after the 30-day deadline for filing a petition has passed").

2. After receiving the district court's dismissal order, Petitioners filed a motion to reconsider, which was denied, App. 16–30, and then filed a timely appeal with the Eleventh Circuit. In that appeal, Petitioners argued that the district court's preliminary order of forfeiture was invalid because the government had never established a nexus between the seized cash and Cancari's crime. In addition, Petitioners argued that the dismissal of their petition was in error because they had standing and their petition complied with § 853(n)(3) because it expressly incorporated signed affidavits which should have been considered part of the petition under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

In the alternative, Petitioners requested leave to amend their petition to add their signature to the petition itself and thereby satisfy § 853(n)(3), citing several decisions in which courts had permitted the amendment of a § 853(n) petition to add a signature where there was no indication that the timely-filed claims were frivolous. See, e.g., *United States v. Bardeen*, No. 7:18-CR-179-FL, 2019 WL 4316997, at *4 (E.D.N.C. Aug. 27, 2019) ("[I]t may be appropriate for

the court to allow her to re-submit her petition signed under penalty of perjury"); *United States v. Thach*, Nos. 12-624, 13-1984, 2013 WL 5177311, at *4–*5 (D. Md. Sept. 12, 2013) (declining to dismiss an unsigned petition because the failure to sign the petition under the penalty of perjury could easily be corrected and there was no indication that the Petitioner had failed to sign because they were asserting frivolous claims). In support of that position, Petitioners reiterated that ancillary forfeiture proceedings are governed by the Rules of Civil Procedure, which require the court to "freely give leave" to amend. Fed. R. Civ. P. 15(a)(2).

3. On September 11, 2023, the Eleventh Circuit affirmed the dismissal of Petitioners' § 853(n) petition by dismissing Petitioners' challenge to the district court's preliminary order of forfeiture for lack of jurisdiction and affirming the district court's dismissal of Petitioners' § 853(n) petition on the merits. Like the district court, the Eleventh Circuit held that Sanchez and Excentric lacked standing because Sanchez and Excentric failed to allege that they had "an ownership . . . or possessory interest in the seized cash." App. 9. But unlike the district court, it concluded that Palacios had standing to contest the forfeiture as the alleged owner of the cash at the time it was seized. App. 9–11.

Nevertheless, the Eleventh Circuit went on to find that Palacios's petition was properly dismissed because Palacios "didn't comply with an unambiguous pleading requirement laid out by the statute: the requirement that she sign the petition," and "the mandatory thirty-day deadline" for filing a petition had

"long since passed" by the time Palacios sought leave to add her signature to the petition. App. 12. In reaching that ruling, it affirmed the district court's holding that it lacked discretion to allow leave to amend because the text of § 853(n)(2) requires a claimant to file their petition within thirty days, and that window "establish[ed] a 'mandatory 30–day period for filing third-party petitions.'" *Id*. (citation omitted).

Following the panel's decision, Petitioners filed a petition for rehearing that pointed out that the panel's leave-to-amend holding was in conflict with published decisions from the Second and Seventh Circuits. See *United States v. Swartz Family Trust*, 67 F.4th 505, 519–20 (2d Cir. 2023) (holding that the District Court erred in concluding that § 853(n)(2)'s 30-day deadline deprives a claimant of the ability to amend their petition); *United States v. Furando*, 40 F.4th 567, 574–75 (7th Cir. 2022) ("Claimants' first issue on appeal is whether the district court erred in sua sponte denying their joint § 853(n) petition without a hearing or opportunity to amend. We hold this disposition was not appropriate, as any jurisdictional deficiency may have been curable through amendment."). Nevertheless, rehearing was denied. App. 57–58.

Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 20, 2024. This timely petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve an important and recurring question of federal law that has prompted a 2-2 circuit split, and raised serious concerns regarding how forfeiture under § 853(n) operates. That question is whether a district court has the discretion to permit amendment to a timely-filed § 853(n) petition to correct minor pleading deficiencies.

In the Second and Seventh Circuits, amendment is permitted. But by joining the Fifth Circuit in holding otherwise, the Eleventh Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," rendering certiorari warranted. S. Ct. R. 10(a). Worse yet, its decision is wrong on an important issue that implicates one of the most fundamental rights of American citizens—private property—leaving a wake of profound practical consequences that raise serious constitutional concerns.

Insofar as the Eleventh Circuit found that Palacios had standing to challenge the government's forfeiture, this case also squarely and cleanly presents the Circuit split. In the Second or Seventh Circuit, leave to amend would have been permitted, allowing Palacios to recover her money. But because she filed her petition in the Eleventh Circuit, the government was able to acquire her money without ever being put to its burden of proof simply because she failed to meet the burden that was improperly placed on her—the innocent

property owner—to stop the forfeiture. The petition for a writ of certiorari should thus be granted.

I. The circuits are split on whether a district court has the discretion to provide a civil forfeiture claimant an opportunity to amend a timely-filed 21 U.S.C. § 853(n) petition.

Although the decision below is unreported and does not expressly acknowledge the contrary decisions of other Courts of Appeal, the Eleventh Circuit's decision deepens a circuit split on whether a district court has the discretion to provide a civil forfeiture claimant the opportunity to amend a timely-filed § 853(n) petition. What's more, the current 2-2 circuit split will grow as other Courts of Appeal weigh in, which at least the Ninth Circuit will do this year. Only this Court can resolve that disagreement

1. In direct conflict with the decision below, the Second and Seventh Circuits, along with many district courts outside of the Eleventh Circuit, have held that a timely-filed § 853(n) petition may be amended.

In *United States v. Furando*, 40 F.4th 567 (7th Cir. 2022), the Seventh Circuit addressed a petition that had been dismissed for lack of standing. 40 F.4th at 574–75. The panel agreed that the petition "was conclusory" and that it failed to properly allege any legal interests in the seized property. *Id.* at 579. Pointing, however, to § 853(o)'s requirement that ancillary hearing provisions be "liberally" construed, the Seventh Circuit remanded the case to the district court "to

provide either a hearing or an opportunity to amend the petition, as this jurisdictional defect is not incurable." *Id.* As the Seventh Circuit explained, "it is sensible to give claimants the opportunity to amend their petition to provide information to satisfy § 853(n)(3) (if they have it) and the opportunity for a hearing (if it is warranted)." *Id.* at 579–80.

Like the Seventh Circuit, the Second Circuit has also found that leave to amend is permitted under 21 U.S.C. § 853 in *United States v. Swartz Family Trust*, 67 F.4th 505 (2d Cir. 2023). Confronted with a district court decision dismissing a petition and refusing "to permit amendment to the petition" because "the 30-day time period in which to file a third-party petition under § 853(n)(2) is ordinarily strictly construed," the Second Circuit held that the District Court had abused its discretion in refusing to permit amendment. *Swartz Family Trust*, 67 F.4th at 519 (cleaned up). As the Second Circuit went on to explain, the point of the "30-day deadline" is "intended to promote finality for the Government" because "if no third party files a petition within the prescribed time (or no Petitioner prevails), the Government emerges with clear title to the forfeited property." *Id*. (cleaned up). But "[w]here, as here, a third party files its petition before the deadline and moves promptly to amend it, rejecting leave to amend does not always further that purpose" rendering it "appropriate to permit the Petitioner to amend its petition outside the 30-day window" in limited circumstances. *Id.* at 519–20.

Given the circumstances presented in that case—including the fact that "the District Court based its dismissal of [the] claim primarily on a technical issue"—the Second Circuit indicated that the scales seemed to "favor . . . granting Orienta leave to amend." *Id*. at 520. But because the district court erroneously "believed that the statutory framework categorically precluded amendment after the 30-day deadline," it did not consider "whether amendment would otherwise have been proper," *id*., and the Second Circuit vacated and remanded the district court's denial of the request for leave to amend for further proceedings.

Consistent with the decisions of the Second and Seventh Circuits, district courts in the First, Fourth, Sixth, Eighth, and Tenth Circuits have all granted leave to amend a § 853(n) petition. See, e.g., *United States v. Bardeen*, No. 7:18-cr-179, 2020 WL 1490706, at *1 (E.D.N.C. Mar. 24, 2020) (noting that court had "further directed Clayton to resubmit her petition under penalty of perjury"); *United States v. Elkins*, No. 3:18-cr-15, 2019 WL 1507407, at *1 (W.D.N.C. Apr. 5, 2019) (noting that Petitioner had already had "two chances" to fix shortcomings with petition); *United States v. Conn*, No. 5:17-cr-043, 2018 WL 2392511, at *2 (E.D. Ky. May 25, 2018) (noting that court had ordered Petitioner "to file an amended claim for seized funds which complied with the relevant legal requirements"); *United States v. Salkey*, No. 2:15-cr-146, 2016 WL 3766308, at *1 (E.D. Va. July 11, 2016) (court allowed Petitioner "to amend his petition and correct the deficiencies noted in the Order"); *United States v.*

McDonald, 18 F. Supp. 3d 13, 17 (D. Me. 2014) (to give Petitioner "the opportunity to protect his property interest," the court gave Petitioner "time to conduct further investigation" before amending petition); *United States v. Sigillito*, 938 F. Supp. 2d 877, 883 (E.D. Mo. 2013) (court had "directed [Petitioner] to file an amended petition" that "must comply with the pleading requirements set forth in 21 U.S.C. § 853(n)(3)"); *United States v. Thach*, No. 12-cr-624, 2013 WL 5177311, at *4 (D. Md. Sept. 12, 2013) (permitting amendment where the "failure to comply with the statutory requirement could be easily corrected by amendment"); *United States v. Glenn*, No. 10-cr-084, 2012 WL 3775965, at *2 (E.D. Okla. Aug. 28, 2012) (acknowledging "no clear rule" on whether amendments are permitted but refusing to "oust" claimant's petition "on a technicality," and instead exercising discretion to permit amendment). As a result, the law in five additional circuits aligns with the approach of the Second and Seventh Circuits.

2. In open conflict with the approach of the Second and Seventh Circuits, the Eleventh Circuit here joined the Fifth in holding that leave to amend is not allowed.

Specifically, the district court in this case concluded that it lacked any discretion whatsoever to allow Appellants to amend the petition to cure any of the alleged deficiencies identified in the government's motion to dismiss because the thirty day deadline for filing a petition under § 853(n)(2) had expired. App. 51 ("In sum, Petitioners provide no authority establishing they can amend their Petition after the statutory

30-day period in section 843(n)(2) [sic] expires, while the Government provides persuasive authority holding to the contrary."). The Eleventh Circuit then affirmed that holding by concluding that it could not "say that the district court abused its discretion when it enforced this congressionally prescribed, 'mandatory' thirty-day window and denied leave to amend." App 12. For were the district court wrong to have held that it lacked discretion to grant leave to amend, it would have abused its discretion by applying an incorrect legal standard. *Swartz Family Trust*, 67 F.4th at 520 ("Because the District Court believed that the statutory framework categorically precluded amendment after the 30-day deadline, it does not appear to have considered whether amendment would otherwise have been proper. Accordingly, we vacate and remand").

Like the Eleventh Circuit's decision in this case, the Fifth Circuit's decision in *United States v. Lamid*, 663 Fed. App'x 319 (5th Cir. 2016), has concluded that leave to amend is not permitted after the 30-day deadline is expired. In that case, like this one, the Fifth Circuit denied leave to amend on the grounds "that the deadline in section 853(n)(2) is mandatory" rendering leave to amend beyond those 30 days barred as futile and "untimely." *Lamid*, 663 Fed. App'x at 325. In addition, district courts in the Third and Ninth Circuits have held that leave to amend is prohibited although the district court in the Ninth Circuit indicated that minor amendments might be allowed, which would set up a third view on the split where some but not all types of amendments are permitted. See *United States*

v. Sze, No. 22-0141, 2024 WL 195468, at *12 (D.N.J. Jan. 18, 2024) ("Because any amended claim would be untimely, the Court dismisses all of the Petitions *with prejudice.*"); *United States v. Welch*, No. 2:20-cr-00052, 2023 WL 7020377, at *5 (D. Idaho Oct. 25, 2023) (following the Fifth Circuit in holding that "amendments after the 30-day deadline are not allowed" to add a new ground for relief but indicating that "the Court would likely have allowed amendment" if "the ground for relief was already in the record but was factually deficient").

Based on publicly available PACER filings, the District of Idaho's decision has already been appealed to the Ninth Circuit and the District of New Jersey's decision is still within the deadline for filing an appeal. As a result, what is currently a 2-2 circuit split will only continue to grow and deepen until this court intervenes as district courts in other circuits continue to split on the issue. And this case implicates far more than a 2-2 circuit split on whether a district court may allow a civil forfeiture claimant the opportunity to amend a timely-filed 21 U.S.C. § 853(n) petition.

II. The Eleventh Circuit's approach to Section 853(n) is wrong and concerning.

On its own, a circuit split on an issue of national significance would justify certiorari. But this Court's review is all the more necessary because the Eleventh Circuit's decision is wrong, irreconcilable with this Court's cases, and raises serious constitutional issues.

As this Court has repeatedly remarked, when interpreting a statute, the "beginning point is the relevant statutory text." *United States v. Quality Stores, Inc.*, 572 U.S. 141, 145 (2014). And there is nothing in the plain text of § 853(n) that prohibits the amendment of a timely-filed petition. Rather than require a person to file "a petition" or "final petition" within 30 days, the statute merely requires the Petitioner to "petition the court for a hearing" within "30 days." 21 U.S.C. § 853(n). As a result, when, "as here, a third party files its petition before the deadline and moves promptly to amend it," *Swartz*, 67 F.4th at 519–20, the Petitioner has, in fact complied with § 853(n)(2) by filing a "petition" within "30-days." And although § 853(n)(3) contains a content requirement mandating that "[t]he petition" be "signed by the Petitioner under penalty of perjury," there are three glaring problems with interpreting that content requirement as creating a mandatory rule of pleading that prohibits any amendment to meet that content requirement after 30 days have expired.

First, civil "forfeiture proceedings that arise out of criminal cases are civil in nature and are thus governed by the Federal Rules of Civil Procedure." *United States v. Negron-Torres*, 876 F. Supp. 2d 1301, 1304 (M.D.Fla. 2012). As such, they are subject to Rule 15, which requires the court to "freely give leave" to amend, and generally allows amendments to relate back to the date of the original pleading such that an amended petition would be considered filed as of the

date that the initial petition was filed for the purposes of assessing with compliance under § 853(n)(3).

To understand why, the Federal Rules of Civil Procedure "were promulgated under the authority" of an act of Congress, *see Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941), and Federal Rule of Civil Procedure 1 specifies that the Rules "govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." In addition, this Court recognized in *Scarborough v. Principi*, 541 U.S. 401 (2004) that "the relation-back regime" that is now codified in Rule 15(c) is "a well recognized doctrine" that proceeded the Federal Rules and had "its roots in the former federal equity practice and a number of state codes." *Id*. at 417–18. As a result, Congressional clarity was required to displace Rule 15 under several canons of statutory interpretation. See *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1016 (2020) ("[W]e generally presume that Congress legislates against the backdrop of the common law."); *Califano v. Yamanski*, 442 U.S. 682, 700 (1979) (expressing that the abrogation of a Federal Rule of Civil Procedure is generally inappropriate "[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318–19, 327–33 (1st ed. 2012) (discussing the "presumption against change in common law" and "presumption against implied repeal").

But far from any clarity that Congress intended to displace the Rule 15, Congress indicated the opposite. It stated that it "strongly agree[d]" that "third parties are entitled to judicial resolution of their claims," S. Rep. No. 98-225, at 208, and required the statute to "be liberally construed to effectuate its remedial purposes." 21 U.S.C. § 853(o). For that reason, Rule 15 must apply.

Second, barring amendment here is inconsistent with this Court's precedent. Most notably, in *Scarborough*, this Court addressed whether a timely fee application under the Equal Access to Justice Act (EAJA) could be amended after the initial 30-day filing deadline. 541 U.S. at 406. Just as the government and lower court have insisted here that § 853(n) should be strictly construed to protect the government against false or frivolous claims, the government in *Scarborough* asserted that EAJA's filing deadline should be strictly construed because it constituted a waiver of sovereign immunity. *Id.* at 419–20. This Court, however, rejected that reasoning. It noted that it had applied the relation-back doctrine to filing deadlines in all manner of circumstances, including unsigned notices of appeals and unverified Title VII discrimination charges, and could not identify any reason why EAJA applications should be treated differently. See *id.* (citing *Becker v. Montgomery*, 532 U.S. 757 (2001); *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002)). Then, this Court concluded that the EAJA application at issue there was capable of amendment because the "amended application 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set

forth' in the initial application." *Id.* at 418–19 (quoting Fed. R. Civ. P. 15(c)).

Suffice it to say, what is true for all other civil pleadings, notices of appeal signatures, discrimination charges, and EAJA applications is equally true here. If anything, § 853(n) petitions are closer to traditional civil pleadings, and thus a more natural fit for the relation-back doctrine than those other situations where this Court has applied it. As such, this Court's decisions support that § 853(n) petitions are subject to amendment under Rule 15, and the Eleventh Circuit's decision otherwise violates this Court's precedent.

Third, interpreting the statute as barring amendment raises serious constitutional problems that favor the Second and Seventh Circuit's view of § 83(n)(2) under the constitutional-doubt cannon. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). For several aspects of § 853 stand out as unconstitutional to the extent that this statute is interpreted in a manner that allows the government to seize private property without ever being put to a burden of proof and then extinguish the property rights of citizens who petition for the return of their property, but in so doing, make a minor, easily correctible pleading defect.

Among other issues, 21 U.S.C. § 853 does not require the government to justify forfeiture beyond a reasonable doubt in violation of the Fifth Amendment, which early Supreme Court case-law indicated applied in forfeiture proceedings. *Brig Burdett*, 34 U.S. (9 Pet.) 682, 690 (1835) ("The object of the prosecution against the Burdett is to enforce a forfeiture of the vessel, and all that pertains to it, for a violation of a revenue law. This prosecution then is a highly penal one, and the penalty should not be inflicted, unless the infractions of the law shall be established beyond reasonable doubt."). Instead, it imposes a "presumption" of forfeitability when the government "establishes by a preponderance of the evidence that—(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and (2) there was no likely source for such property other than the violation of this subchapter or subchapter II." 21 U.S.C. § 853(d).

In addition, § 853(k) prohibits the third parties from intervening in the forfeiture proceedings to contest the property's nexus to the offense, thereby allowing a criminal defendant to bind the interests of innocent property owners by waiving arguments affecting the rights of those owners as a condition of their plea deal. In so doing, the statute poses due process concerns and allows the government to alleviate itself of its nominal burden to prove the forfeiture by the preponderance of the evidence. See *Parklane Hoisery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a

litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

Finally, the statute contravenes the early history of forfeiture in America. Contrary to the practice at the Founding, which "permitted the government to proceed *in rem* under the fiction that the thing itself, rather than the owner, was guilty of the crime," *Leonard*, 137 S. Ct. at 849 (Thomas, J., statement regarding denial of certiorari), § 853 "effectively merg[es] the *in rem* forfeiture proceeding with the *in personam* criminal," *Honeycutt*, 137 S. Ct. at 1635 (internal quotation marks omitted), while also expanding forfeiture outside of the "few specific subject matters" where proceeding "in rem was . . . justified by necessity, because the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of the United States Courts." *Leonard* 137 S. Ct. at 849 (Thomas, J., statement regarding denial of certiorari). And this system currently operates without the backstop of a robust remission process that effectively guarantees the return of private property to an innocent property owner. As such, § 853 lacks a key element of the civil forfeiture regime that ensured its constitutionality at the time of the Founding. Kevin Arlyck, *The Founders Forfeiture*, 119 COLUM L. REV. 1449, 1487–88 (2019) (reporting that "ninety-one percent of remission petitions were granted from" 1790–1807).

By interpreting the statute to permit amendment, the Second and Seventh Circuits have averted the constitutional problems posed by 21 U.S.C. § 853 by

safeguarding a process that allows innocent property owners to provide a check on an otherwise unchecked forfeiture power by petitioning for, and thereby obtaining, the return of their property. But by reading the statute to hold that the government obtains clear title to private property whenever a citizen makes one small, easily correctable mistake, the Eleventh Circuit walked directly into them by further enabling a system in which the government is able to shift its burden of proof onto the innocent property owner by exploiting the bifurcated nature of forfeiture proceedings under 21 U.S.C. § 853 to avoid its burden of proof. For that reason as well, the Eleventh Circuit's ruling is wrong.

III. The question presented is important and this case is an ideal vehicle to resolve it.

Finally, certiorari is warranted because the question presented is important and recurring, and this case presents an ideal vehicle for resolving it.

As to importance, this Court has long-recognized that it is beyond dispute that property "rights are central to our heritage." *U.S. v. James Daniel Good Real Property* 510 U.S. 43, 81 (1993) (Thomas, J., concurring); *Payton v. New York*, 445 U.S. 573, 601, (1980) ("[R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic"); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235–36 (1897) ("Due protection of the rights of property has been regarded as a vital principle of republican institutions," which is "founded

in natural equity, and is laid down as a principle of universal law."). As a result, any seizure of private property usually implicates the Constitution's guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." See U.S. Const. amend. V.

In some degree of tension with "that justice which should be the foundation of the due process of law required by the Constitution," *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921), this Court has recognized that "forfeiture of property without proof of the owner's wrongdoing, merely because it was 'used' in or was an 'instrumentality' of crime" is constitutional insofar as "it has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments." See *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring). But all the same, careful attention must be paid to third parties whose property is subject to criminal forfeiture because third parties are barred from intervening in the criminal proceeding to protect their interests. 21 U.S.C. § 853(k). That means that their only opportunity to prove their interests in the property is after a court has entered a preliminary order of forfeiture by petitioning for an ancillary proceeding under § 853(n). And those procedures place the burden on the third-party to prove their interest because Congress assumed that by that point the government "will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt." S. Rep. No. 98-225, at 209.

Unfortunately for property rights in this Country, the government's burden to prove that the property was either used in or an instrumentality of the crime is not met in the vast majority of cases. Instead, nearly all criminal cases result in a guilty plea, *see* U.S. Sentencing Commission, 2021 Annual Report & Sourcebook of Federal Sentencing Statistics 56 (98.3% of federal sentences were the result of a guilty plea while 1.7% resulted from trial), which creates a significant danger for third party property owners because "a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations." Fed. R. Crim. P. 32.2, Advisory Committee's Note (2000 Adoption). On the contrary, a "defendant who seeks a favorable plea deal from the Government may be motivated to endorse forfeiture even if no nexus exists" in exchange for a better sentence, which is precisely what happened here. *United States v. Nicoll*, No. 13-385, 2015 WL 13628130, at *4 (D.N.J. 2015); *United States v. Farley*, 919 F. Supp. 276, 278 n.3 (S.D. Ohio 1996) ("[A] criminal defendant may well be motivated to plead guilty to a forfeiture to gain a more favorable plea bargain even if the property does not belong to him."); *United States v. Reckmeyer*, 628 F. Supp. 616, 621 (E.D. Va. 1986) ("[A] defendant is likely to have little or no interest in litigating the issue of ownership of property belonging to other persons.").

Given these incentives, the filing of a § 853(n) petition is usually the exclusive check on an otherwise unlimited forfeiture power. But contrary to Congress's will that property owners have their day in Court,

S. Rep. No. 98-225, at 208 (explaining that "third parties are entitled to judicial resolution of their claims"), lower courts are increasingly erecting barriers to forfeiture claimants coming into court to protect their property rights. See, e.g., *United States v. Chicago*, No. 15-cr-00168, 2017 WL 1024276, at *1–2, *7–8 (S.D. Ala. Mar. 16, 2017) (Petitioner not entitled to contest criminal forfeiture of bank account in her name or home deeded to her where she lived with her children, and not permitted to amend petition to cure defects). And the decision below continues that trend with profound practical consequences due to the prevalence of forfeiture and its "well-chronicled abuses." See *Leonard*, 137 S. Ct. at 848 (Thomas, J., statement respecting the denial of certiorari); *see also* Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 5 (Institute for Justice 3d ed. 2020), at p. 6 https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf (noting that more than $3 billion in property was forfeited to federal agencies, 42 states and the District of Columbia in 2018).

As empirical studies have shown, "[t]he median currency forfeiture is small, averaging just $1,276 across 21 states with available data," and reaching as low as $369 in Pennsylvania. *Id.* Those statistics matter here because modest amounts like that will complicate efforts to find an attorney and Claimants have no more than 30 days in which to find counsel and file a petition for a hearing. See 21 U.S.C. § 853(n)(2). In addition, forfeiture disproportionally impacts those who are politically and economically vulnerable, placing

additional language barriers and logistical difficulties on the process that make the need to amend elevated insofar as the odds that a pro se petition will fall short in some way are high. See Jennifer McDonald & Dick M. Carpenter, II, *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims* 5, 10–13 (2021) (collecting survey data from Philadelphia's civil forfeiture system). For those reasons, the question presented in this case is deeply important insofar as it stands to affect the property rights of significant numbers of people each year, with its consequences having the greatest impact on the less fortunate members of our society.

Finally, certiorari is warranted because this case presents an excellent vehicle for deciding the circuit split that is presented in this petition. The question presented was fully briefed below and although the government argued that Petitioners lacked standing, the Eleventh Circuit correctly rejected that position as to Palacios. As a result, whether or not Palacios may obtain a hearing turns solely on whether leave to amend is permitted as there is no question that the deficiency with Palacios's petition (i.e. the location of the signature) can be easily corrected. Likewise, Sanchez and Excentric are prejudiced by the leave to amend ruling insofar as it precluded them from repleading allegations supporting standing.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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