No. 24-

IN THE

Supreme Court of the United States

REAL PROPERTY COMMONLY KNOWN AS: 11475 NW PIKE ROAD, YAMHILL, OREGON, YAMHILL COUNTY AND ANY RESIDENCE, BUILDINGS, OR STORAGE FACILITIES THEREON AND SHERYL LYNN SUBLET,

Petitioners,

v.

YAMHILL COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON AND FORFEITING AGENCY, ON BEHALF OF THE YAMHILL COUNTY INTERAGENCY NARCOTICS TEAM (YCINT) SEIZING AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under Oregon law, in a contested civil forfeiture trial, property may be forfeited only if a jury finds that a person was convicted of a crime, that the property was a proceed or instrumentality of that crime, and that the forfeiture is substantially proportional to the offense. Does such a forfeiture constitute criminal punishment under the Double Jeopardy Clause?

2. Whether this Court's holding in *United States v. Ursery*, 518 U.S. 267 (1996), that *in rem* forfeitures do not constitute criminal punishment, is consistent with the text, history, tradition, and original meaning of the Double Jeopardy Clause.

LIST OF PROCEEDINGS

Oregon Supreme Court
(S070217)

Yamhill County, a political subdivision of the State of Oregon and forfeiting agency, on behalf of the Yamhill County Interagency Narcotics team (YCINT) seizing agency, *Plaintiff-Petitioner on Review* v. Real Property Commonly Known as: 11475 NW Pike Road, Yamhill Oregon, Yamhill County and Any Residence, Buildings, or Storage Facilities Thereon, *Defendant in rem*, and Sheryl Lynn Sublet, *Claimant-Respondent on Review.*

Date of Final Opinion: November 21, 2024
Date of Reconsideration Denial: March 6, 2025

Oregon Court of Appeals
(A173574)

Yamhill County, a political subdivision of the State of Oregon and forfeiting agency, on behalf of the Yamhill County Interagency Narcotics team (YCINT) seizing agency, *Plaintiff-Respondent* v. Real Property Commonly Known as: 11475 NW Pike Road, Yamhill Oregon, Yamhill County and Any Residence, Buildings, or Storage Facilities Thereon, *Defendant in rem*, and Sheryl Lynn Sublet, *Claimant-Appellant*.

Date of Final Order: March 8, 2023

Yamhill County Circuit Court
18CV37372

Yamhill County, a political subdivision of the State of Oregon and forfeiting agency, on behalf of the Yamhill County Interagency Narcotics team (YCINT) seizing agency, *Plaintiff* v. Real Property Commonly Known as: 11475 NW Pike Road, Yamhill Oregon, Yamhill County and Any Residence, Buildings, or Storage Facilities Thereon, *Defendant in rem*, and Sheryl Lynn Sublet, *Claimant*.

Date of Final Order: April 6, 2020

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PETITION FOR WRIT OF CERTIORARI

Sheryl Sublet, by and through undersigned counsel, respectfully petitions this Court for a writ of certiorari to review the judgment of the Oregon Supreme Court.

OPINIONS BELOW

The Oregon Supreme Court's decision reversing the Oregon Court of Appeals in *Yamhill County v. Real Property*, 373 Or. 82, 560 P.3d 59 (2024), is included in the Appendix ("App.") at 1a-49a. The Oregon Court of Appeal's opinion reversing the Yamhill County Circuit Court in *Yamhill County v. Real Property*, 324 Or. App. 412, 526 P.3d 765 (2023), is included at App. 50a-74a. The Yamhill County Circuit Court's August 2, 2019, oral ruling denying Sublet's Motion to Dismiss on Fifth Amendment Double Jeopardy grounds in *Yamhill County v. Real Property*, Yamhill County Circuit Court Case No. 18CV37372, is included at App. 75a-78a.

JURISDICTION

The Oregon Supreme Court reversed the Oregon Court of Appeals on November 21, 2024. App. 1a-49a. Sublet's December 19, 2024, petition for reconsideration was denied on March 6, 2025. App. 79a. Sublet invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a), and files within the time required by S. Ct. R. 13.5. Pursuant to 28 U.S.C. § 2403(b), the State of Oregon may have an interest in the outcome of this case. Therefore, this petition is being served on the Attorney General of Oregon in accordance with Supreme Court Rules 14.1(e)(v) and 29.4(c).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

This case presents a question of enduring constitutional significance: whether there are any circumstances where modern statutory forfeitures—seeking to take property based on its involvement in criminal activity—can still be deemed "civil" for purposes of the Double Jeopardy Clause. It also offers an ideal opportunity to assess whether contemporary statutory forfeitures bear any resemblance to the narrow, historically limited forfeiture practices known at the founding, which were confined to admiralty, customs, and revenue enforcement.

At the founding, forfeiture was the exception, not the rule. It operated outside of criminal law and served specific remedial purposes tied to absent defendants

or contraband at sea. Today, by contrast, forfeiture functions as a routine tool of punishment, often imposed after criminal conviction and justified by deterrence, retribution, and culpability—the very aims that trigger the protections of the Double Jeopardy Clause.

This case illustrates that historical disconnect. Sheryl Sublet was convicted of constructive possession of methamphetamine with a street value of roughly $3,000. She was sentenced to prison and ordered to forfeit $50,000 seized during the investigation. After those punishments were imposed, the same district attorney's office initiated another forfeiture action, this time seeking her $350,000 home based on the same conduct and same convictions. This Court should grant certiorari to make clear that the government cannot sidestep the Constitution's protection against serial punishments by calling one of them "civil."

STATEMENT OF THE CASE

1. Sheryl Sublet is a 68-year-old Vietnam-era veteran who enlisted in the United States Army with aspirations of becoming a helicopter pilot. That dream was dashed after she was raped by a superior officer, later receiving a discharge for "military sexual trauma." Tr. 674. Like many survivors, that experience led Sublet to self-medicate with controlled substances. In 2004, after decades of addiction, Sublet achieved sobriety. Sublet spent the next twelve years working in addiction recovery services, in downtown Portland. Tr. 675-76.

In September 2016, the home at issue in this case, the defendant *in rem*, was in tax foreclosure. Tr. 677. Looking for a quieter life, Sublet purchased the home and

paid off the delinquent taxes. Tr. 678. But that quieter life exacerbated Sublet's unresolved PTSD and anxiety—the isolation and loneliness proved to be an accelerant. Eventually, she relapsed. Tr. 682-83.

The Yamhill County Interagency Narcotics Team (YCINT) is a plain-clothes local drug task force that finances itself through a mix of grants and taking private property through forfeiture. Tr. 633. In October 2017 and March 2018, YCINT intercepted two FedEx packages containing methamphetamine, one addressed to Sublet's house and the other to a different location. Tr. 447-49. Neither package was ever located at the home. Tr. 452, 464.

In response, YCINT executed a search warrant at the home in October 2017, discovering 1.8 grams of methamphetamine that did not lead to prosecution. Tr. 465, 521, 634. A second warrant was executed in March 2018, during which police seized $50,000 in cashier's checks. Tr. 682, 708.

Two parallel proceedings ensued. Sublet was criminally prosecuted for the intercepted packages and, as relevant here, pleaded guilty to two counts of unlawful delivery of no more than 499 grams of methamphetamine in Yamhill County Case No. 18CR15905. Although no sale was completed and no profit earned, Sublet acknowledged that had she sold the drugs, she would have grossed approximately $3,000. Tr. 685.

Simultaneously, the same district attorney's office initiated a civil forfeiture action on behalf of the drug task force, seeking forfeiture of the cashier's checks. As part of

her plea negotiations, Sublet agreed to forfeit those funds to the drug task force.

On July 26, 2018, Sublet was sentenced to six years in prison, and the court ordered the forfeiture of her cashier's checks. Tr. 650–51. As deputies led Sublet away in shackles, the same district attorney's office served her with written notice that it intended to forfeit her $350,000 home based on the very convictions for which she was just punished. The Yamhill County District Attorney's Office then initiated a second civil forfeiture action, alleging that Sublet's home was subject to forfeiture because of her criminal conduct. In substance and effect, the second action targeted the same course of conduct already punished by a prison sentence and the prior $50,000 forfeiture.

Sublet moved to dismiss the subsequent forfeiture action on Fifth Amendment Double Jeopardy grounds. She acknowledged that this Court has upheld certain *in rem* forfeiture schemes that did not require a criminal conviction, a causal connection to the crime, proportionality, or a jury trial, because those proceedings operated outside the criminal context and did not constitute punishment. But Sublet emphasized that while this Court has yet to address a forfeiture scheme like Oregon's, it has repeatedly recognized that Double Jeopardy protections apply to civil forfeitures that function as criminal punishment.

Sublet argued that Oregon's forfeiture scheme, at least as applied to her, crosses the constitutional line. Unlike the schemes previously upheld by this Court, when an owner contests forfeiture, Oregon requires: (1) a criminal conviction; (2) a finding that the property was a proceed

or instrumentality of the crime of conviction; and (3) proof that the forfeiture is "substantially proportional" to the "specific conduct for which the owner was convicted." Unlike traditional *in rem* forfeiture, Oregon civil forfeitures are decided by juries, not judges. Sublet contended that these features are fundamentally different from the narrow forfeitures permitted at the founding in admiralty, customs, and revenue cases. The trial court denied her motion. App. 76a. It reasoned that although Oregon's scheme "makes forfeiture more criminal-like, it does not make it criminal. It still remains a civil matter." Tr. 86.

After trial, a nonunanimous jury forfeited Sublet's house to the county. Sublet appealed.

2. On appeal, Sublet argued, *inter alia*, that this forfeiture action violated Fifth Amendment Double Jeopardy. The Oregon Court of Appeals agreed and reversed. App. 50a-74a. That court engaged in a thorough analysis of forfeiture's origins and this Court's case law around the time Oregon adopted a forfeiture framework that "rejected the legal fiction underlying *in rem* forfeitures—that property itself can be guilty so as to allow the government to take it—and replaced it with an *in personam* theory of forfeiture that implicates double jeopardy." App. 65a. That court noted the unique features of Oregon forfeiture provisions that were unlike any this Court has previously confronted. Consequently, the Court of Appeals held that, to comply with the Double Jeopardy Clause, if the government seeks multiple punishments in the form of prison, restitution, and forfeitures, it must do so in a single proceeding. App. 73a-74a.

3. The Oregon Supreme Court allowed review and reversed. App. 1a-49a. It held that Sublet failed to establish a successful facial challenge to Oregon's scheme because she did not prove that all civil forfeitures under Oregon's statutory scheme are punitive "in all instances." App. 5a. That is, because Sublet did not establish that *every* forfeiture under Oregon's statutory scheme amounts to criminal punishment, the Fifth Amendment's Double Jeopardy protections will never apply even if a particular forfeiture, like this one, is patently punitive. App. 40a-41a.

In reaching that conclusion, the Oregon Supreme Court followed the "two-step" framework from *United States v. Ursery*, 518 U.S. 267 (1996). The first step asks whether the legislature intended the forfeiture scheme to be civil or criminal. If the intent was civil, the second step requires the claimant to show, by "the clearest proof," that the scheme is so punitive in purpose or effect that it must be deemed criminal despite its "civil" label.

At step one, the Oregon Supreme Court noted that Oregon forfeitures are intended to be civil because the legislature described them as "remedial" and structured them as *in rem* proceedings, both hallmarks of a civil scheme. App. 31a-34a; *see also* Or. Rev. Stat. § 131A.010(5) ("The application of any remedy under this chapter is remedial and not punitive").

Turning to step two, the court recognized that Oregon's forfeiture scheme differs in both substance and procedure from any this Court has previously considered. App. 39a-42a. In Oregon, except for abandoned property and contraband, a criminal conviction involving the property is required as a prerequisite to forfeiture. Or.

Rev. Stat. § 131A.255(1) ("in all forfeiture actions, the forfeiting agency must prove that a person has been convicted of a crime that constitutes prohibited conduct"). An owner is entitled to summary judgment if "all criminal charges on which the forfeiture action is based" do not result in a conviction. Or. Rev. Stat. § 131A.225(5).

Moreover, in Oregon, the property must have been directly involved in the crime of conviction as either the "proceeds" or an "instrumentality" of the convicted crime. Or. Rev. Stat. §131A.255(1). The value of forfeited property must be substantially proportional to the "specific conduct for which the owner of the property has been convicted." Or. Rev. Stat. § 131A.255(1); Or. Const. art. XV, § 10(7). When an agency seeks to forfeit real property, a heightened burden of proof applies: the state must prove "by clear and convincing evidence" that the real property was a proceed or instrumentality of a crime. Or. Rev. Stat. § 131A.255(3).

Despite those unique features, the Oregon Supreme Court concluded that it did not matter whether Sublet's forfeiture was punitive. Rather, because Sublet had not demonstrated that *every* forfeiture under Oregon law amounts to criminal punishment, the court held that she had not shown the "clearest proof" that this civil proceeding was operating as a punitive sanction. The court acknowledged the difficulty of navigating the *Ursery* two-step, noting that each step "turns largely on the same considerations." App. 16a. It also struggled to apply the non-exclusive factors at step two, observing that this Court's "cases offer little guidance about what—if anything—*could* constitute 'the clearest proof' that an *in rem* civil forfeiture" is punitive. App. 17a (emphasis in original).

The Oregon Supreme Court acknowledged that (1) "promoting a purpose of deterrence—one of the traditional 'aims of punishment'—can suggest that a sanction is criminal"; (2) "a forfeiture statute [that] includes an 'innocent owner' exception—which helps limit the sanction to only culpable owners" suggests the statutes operate to punish the guilty; and (3) "tying a sanction to criminal activity can be some indication that the sanction is a criminal penalty[.]" *Id.*

Despite those differences, the Oregon Supreme Court concluded that (1) *Ursery* "makes clear" that a deterrence rationale "is not meaningful when evaluating a sanction of forfeiture"; (2) ensuring innocent owners are not penalized is not "relevant" to the inquiry under *Ursery*, and (3) tethering forfeiture to a criminal conviction "is far from the 'clearest proof' necessary to show that a proceeding is criminal." App. 17a.

At every stage, Sublet argued that this forfeiture action violated the Double Jeopardy Clause, as it applied to her. But the Oregon Supreme Court reframed her as-applied challenge as a facial one—then rejected it on that basis. App. 3a-4a. The court also noted that Oregon law does not require a criminal conviction in cases involving abandoned property or contraband. App. 39a. Because some forfeitures may occur without a conviction, the court held that Sublet failed to demonstrate the "clearest proof" that Oregon's scheme was punitive in all applications. App. 40a ("It might be tempting…to simply ask whether a forfeiture proceeding 'is criminal in nature and effect' when the forfeiture depends on proof that the claimant has already been convicted of prohibited conduct," but because no conviction is required to forfeit contraband or abandoned property "the character of the overall civil

forfeiture scheme under current Oregon law cannot be said to be co-extensive with the criminal penalty") (internal quotation omitted). The court declined to address Sublet's contention that, in light of the text, history, tradition, and original meaning of the Double Jeopardy Clause, *Ursery* was wrongly decided.

Sublet petitioned for reconsideration, noting that the court incorrectly framed the question in terms of a "facial" challenge and that she only ever raised an as-applied challenge. That court denied Sublet's petition without explanation. App. 79a.

REASONS FOR GRANTING THE PETITION

The world has changed since this Court last considered whether, and to what extent, the Fifth Amendment's Double Jeopardy Clause applies to a purportedly civil forfeiture action. When *Ursery* was decided in 1996, *in rem* forfeiture proceedings bore strong similarities to founding-era forfeitures that existed in admiralty, customs, or revenue violations. Those schemes could properly be considered remedial because they did not require a criminal conviction or a causal connection between the property's involvement in an underlying crime, and they were tried to the court, not a jury.

Now, however, forfeiture practices have metastasized into a multi-billion-dollar industry, far broader than anything contemplated at the founding. *See*, *e.g.*, *Culley v. Marshall*, 601 U.S. 377, 395 (2024) (Gorsuch, J., concurring) (noting "[i]n 2018, federal forfeitures alone brought in $2.5 billion" and state forfeiture schemes provide "strong financial incentives" particularly "when local law enforcement budgets tighten" because "forfeiture

activity often rises"). In response to perceived forfeiture abuses after *Ursery*, thirteen states, including Oregon, enacted sweeping reforms that bear little resemblance to traditional *in rem* forfeitures.

Oregon's rejection of traditional *in rem* forfeiture is a paradigmatic example of how those jurisdictions have reshaped forfeiture away from actions against property and focused them on punishing a person.

Unlike traditional *in rem* proceedings that target the property itself, in Oregon, the government can prevail at trial only if it convinces a jury[1] that (1) a person was convicted of a crime involving the property,[2] (2) the property's value is substantially proportional to the specific conduct for which the owner was convicted, and (3) the property was either a direct proceed of that conduct or was instrumental in committing the crime of conviction. These procedural requirements transform Oregon's forfeiture trials from the kind of civil *in rem* proceedings previously deemed nonpunitive by this Court into *in personam* actions that seek to punish defendants like Sublet for their criminal conduct.

As simple as this case may seem—taking someone's house to punish a person for dealing drugs is unquestionably

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1. Or. Rev. Stat. § 131A.225(6) ("forfeiture actions are governed by the Oregon Rules of Civil Procedure"); Or. R. Civ. Proc. 51 C ("all issues of fact," absent waiver, are tried by jury).

2. There are exceptions for abandoned property and contraband where no conviction is required. Or. Rev. Stat. § 131A.200; Or. Rev. Stat. § 131A.315; Or. Const. art. XV, § 10(9) ("Exception for unclaimed property and contraband").

"punitive"—this Court's cases have muddied the waters. Although, in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), and *Ursery*, this Court declared that civil forfeiture schemes that function as criminal punishment implicate Double Jeopardy, it has never confronted a scheme that meets that standard. Accordingly, lower courts have no guidance as to what qualifies as the "clearest proof" that a given forfeiture action or scheme is punitive.

This case provides an ideal vehicle for this Court to answer that unsettled question and hold that, unlike founding-era *in rem* forfeitures that do not implicate the clause, a statutory forfeiture scheme that requires a criminal conviction, a causal connection between the claimant's criminal conduct and the property, and a jury trial, implicates the Double Jeopardy Clause of the Fifth Amendment. *Leonard v. Texas*, 580 U.S. 1178, 1179 (2017) (Thomas, J., respecting denial of certiorari) ("Modern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes").

It also provides an opportunity to clarify the quantum of evidence a claimant must marshal to establish the "clearest proof" that a modern forfeiture scheme is punitive and not remedial. Currently, the *Ursery* "two-step" is a dance performed with two left feet. The first step requires courts to look to the same considerations as the second step and, as evidenced by the Oregon Supreme Court's decision below, courts struggle to apply it.[3]

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3. Other state courts struggle with *Ursery*'s rule. *See, e.g.*, *State v. Nunez*, 2 P.3d 264, 279 (N.M. 1999) (criticizing *Ursery*'s "willingness to cede to Congress so much of its control over

For that reason, the unworkability of that test has morphed forfeiture into a constitution-free zone where the Double Jeopardy Clause exists only in hypotheticals. Given the increasingly pervasive use of civil forfeiture post-*Ursery*, coupled with the significant number of states that implemented forfeiture regimes that, apart from the civil label, look nothing like traditional *in rem* proceedings, the need for this Court's involvement is at a crescendo.

"A free society does not allow its government to try the same individual for the same crime until it's happy with the result." *Gamble v. United States*, 587 U.S. 678, 737 (2019) (Gorsuch, J., dissenting). But the current state of this Court's civil forfeiture jurisprudence fosters precisely that.

This Court should grant certiorari and hold that when the government seeks to forfeit property based on its involvement in a crime, to punish the owner's culpable conduct, it must do so in a single proceeding. That holding would not affect historically justified *in rem* forfeitures as they exist in admiralty, customs, or revenue violations.

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fundamental constitutional protections" noting legislative intent "should not be considered determinative of multiple prosecution cases" because "mere fact that the legislature has chosen to affix" a "civil" or "criminal" label "does not sanctify the deprivation of constitutional rights"); *State v. One 1990 Chevrolet Corvette*, 695 A.2d 502, 506-507 (R.I. 1997) (holding because proceeds are "distributed primarily to the law enforcement agencies" forfeiture is remedial and not punitive); *People v. Daniels*, 670 N.E.2d 1223, 1225 (Ill. App. Ct. 1996) (stating because Illinois statute permits forfeiture when no owner contests forfeiture, "it is clear that the scheme is *in rem* and directed at the property itself").

Nor would it impair the state's ability to forfeit contraband and abandoned property without implicating the clause. But Sublet's proposed rule would place meaningful limits on the government's ability to exact multiple punishments in serial proceedings. That approach is consistent with the text, history, tradition, and original meaning of the Double Jeopardy Clause.

I. *In rem* forfeitures do not constitute criminal punishment under this Court's case law.

This Court last confronted a Double Jeopardy challenge in the civil forfeiture context thirty years ago in *Ursery*, 518 U.S. at 278. There, two claimants argued that their forfeiture action constituted criminal punishment for Double Jeopardy purposes. In rejecting those challenges, this Court reaffirmed the "two-part" framework it announced in *89 Firearms*, 465 U.S. at 362 (taking multi-factor test previously used to determine whether Due Process violation occurred and applying that test under the Double Jeopardy Clause).

Under that framework, whether a civil forfeiture proceeding implicates Double Jeopardy requires courts to ask first, if the legislature intended forfeiture to be a remedial civil sanction or a criminal penalty, and second, whether the forfeiture proceedings are so punitive in fact that they may not legitimately be viewed as civil in nature, despite legislative intent to establish a civil scheme. *Ursery*, 518 U.S. at 273-78. If the legislature intended forfeiture to be civil, the "question, then, is whether [the] forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial.'" *Id.* at 277 (quoting *89 Firearms*, 465 U.S. at 362).

If remedial in both purpose and effect, the forfeiture proceeding is *in rem* and Double Jeopardy does not apply.[4] Under those circumstances, the government may seek forfeiture in a standalone proceeding, regardless of whether it precedes or follows any criminal prosecution.

Conversely, a forfeiture scheme that seeks to punish an individual for committing a crime is an *in personam* action. Although the government may pursue multiple forms of punishment at sentencing—including incarceration, fines, disgorgement of illegal profits, restitution, or forfeiture—the Fifth Amendment requires that all such punishments be imposed in a single proceeding. *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (under "the Fifth Amendment double jeopardy guarantee…courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial").

Looking at statutory text, the *Ursery* Court concluded that Congress intended the schemes to operate civilly. *Ursery*, 518 U.S. at 288 (identifying statutory provisions that evince Congress' remedial intent). Turning to the second question—whether the claimants established the "clearest proof" that the scheme was punitive, despite its "civil" label—this Court, again, looked to the same statutory text and emphasized features that supported a civil, nonpunitive purpose.

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4. All forfeiture actions—whether *in rem* or *in personam*—are subject to the Fourth Amendment's exclusionary rule, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993), and the Eighth Amendment's prohibition of excessive fines, *Timbs v. Indiana*, 586 U.S. 146, 149 (2019) (incorporating "protection against excessive fines" in civil forfeiture context because that "safeguard" is "fundamental").

Specifically, this Court held that "*in rem* civil forfeiture is a remedial civil sanction, distinct from potentially *in personam* civil penalties such as fines and does not constitute a punishment under the Double Jeopardy Clause." *Ursery*, 518 U.S. at 278. It reasoned that (1) *in rem* civil forfeiture has not historically been regarded as punishment; (2) the statutes did not require the government to prove *scienter* in order to forfeit property; (3) "deterrence," though a goal of criminal punishment, is also consistent with non-punitive goals; and (4) tethering forfeiture to criminal *activity* but not criminal *convictions* meant that the forfeitures did not amount to criminal punishment. *Ursery*, 518 U.S. at 287-92.

Despite that broad holding, in both *89 Firearms* and *Ursery*, this Court explicitly declared that Double Jeopardy protections will apply when a defendant establishes the "clearest proof" that the civil forfeiture proceeding operates as a tool of punishment. *Id.*; *89 Firearms*, 465 U.S. at 362. Aside from making (and repeating) that declaration, this Court has yet to encounter a civil forfeiture proceeding that constitutes criminal punishment.

a. Forfeiture metastasized post-*Ursery*.

In the wake of *Ursery*, state and local governments significantly expanded their civil forfeiture practices by relying on statutory schemes that mirrored the procedural framework approved of in *89 Firearms* and *Ursery*. Those schemes did not require (1) a criminal conviction, (2) proof that the property was involved in the commission of a specific crime, (3) substantive proportionality between the value of the property and identifiable criminal conduct, or

(4) jury trials. *See*, *e.g.*, Okla. Stat. tit. 63, § 2-506 (forfeiture permitted without conviction, direct causal connection to crime, or jury trial); Fla. Stat. § 932.704 (1995) (same).[5] Consequently, those schemes survived Fifth Amendment Double Jeopardy challenges under *Ursery*. *See*, *e.g.*, *State ex. rel. Campbell v. $18,235*, 184 P.3d 1078, 1082 (Okla. 2008) (holding Oklahoma forfeiture is "purely remedial" because it is not dependent upon "an *in personam* criminal charge or conviction"); *State v. Sobieck*, 701 So. 2d 96, 98 (Fla. Dist. Ct. App. 1997) (holding forfeiture that "does not depend on proof that a person has committed a crime" is not punishment).

Unsurprisingly, forfeitures skyrocketed. The year before *Ursery* was decided, the federal government generated $252 million in forfeiture revenue.[6] By 2018, "42 states, the District of Columbia, and the U.S. departments of Justice and the Treasury forfeited over $3 billion." L. Knepper, J. McDonald, K. Sanchez, & E. Pohl, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, p. 5 (3d ed. 2020).

The motivation for increased forfeiture practices is clear: in "32 states and the federal system, when law enforcement agencies forfeit property, the proceeds go to their own budget." *Culley*, 601 U.S. at 405 (Sotomayor, J., dissenting). Oregon is no exception.

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5. Florida's legislature has since amended its forfeiture statute and now requires jury trials, and the standard of proof is beyond a reasonable doubt. Fla. Stat. § 932.704(3), (8).

6. Dep't. of Treasury, *Treasury Forfeiture Fund: Annual Report Fiscal Year 1995*, p. 19 (1995) (available at: https://home.treasury.gov/system/files/246/FY%201995%20Annual%20Report.pdf) (accessed May 15, 2025).

In an Oregon civil forfeiture proceeding, the "seizing agency"—typically the police department—retains 100% of the proceeds. Or. Rev. Stat. § 131A.305 ("title to the forfeited property passes to the forfeiting agency" upon entry of "judgment forfeiting property"). By contrast, in a criminal forfeiture, the sentencing court may remit some or all of the property based on the severity of the conduct and the punishment already imposed. Or. Rev. Stat. § 131.585(2). That disparity creates a powerful incentive for law enforcement to pursue civil forfeiture, which offers fewer procedural safeguards than its criminal counterpart.

That incentive structure has not gone unnoticed. Since *Ursery*, members of this Court have sounded constitutional alarms that modern forfeiture practices may be out of step with Fifth Amendment guarantees. *See, e.g.*, *Culley*, 601 U.S. at 395 (Gorsuch, J., concurring) (noting "new [forfeiture] laws have altered law enforcement practices across the Nation in profound ways"); *Id.* at 405 (Sotomayor, J., dissenting) (noting "lack of standardized procedural safeguards makes civil forfeiture vulnerable to abuse"); *Timbs v. Indiana*, 586 U.S. 146, 154 (2019) (explaining that "it makes sense to scrutinize governmental action more closely when the State stands to benefit"); *Sessions v. Dimaya*, 584 U.S. 148, 184 (2018) (Gorsuch, J., concurring in part) ("Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's civil penalties include…forfeiture provisions that allow homes to be taken"); *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring) ("One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless").

Not only are forfeitures "rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*." *Dimaya*, 584 U.S. at 184 (Gorsuch, J., concurring in part) (citing Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1798 (1992)) (emphasis in original). That certainly applies to the circumstances of this case.

Here, in addition to taking $50,000 and six years of Sublet's life for constructively possessing $3,000 worth of drugs that were never located at her home, the same district attorney's office—based on the same conduct—initiated a "civil" forfeiture action seeking to take her home. *See Leonard*, 580 U.S. at 1180 (Thomas, J., respecting denial of certiorari) ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses"). This Court should grant the petition and hold that forfeiture actions requiring proof of a criminal conviction, a direct causal relationship between the crime of conviction and the property, and substantive proportionality in a jury trial, bear little resemblance to traditional *in rem* proceedings and thus implicate the Fifth Amendment's Double Jeopardy Clause.

b. Several states, including Oregon, enacted wholesale forfeiture reforms that bear little resemblance to founding-era *in rem* proceedings.

Following *Ursery*, Oregon voters overwhelmingly adopted the Oregon Property Protection Act of 2000, which aimed to curb abusive forfeiture practices. The

Act rejected the legal fiction underlying traditional *in rem* forfeitures and replaced it with an *in personam* framework designed to ensure that contested forfeitures do not punish innocent owners or reach property unconnected to a criminal conviction. Or. Const. art. XV, § 10. In 2009, the Oregon Legislature enacted a statutory scheme consistent with those limitations. Or. Rev. Stat. §§ 131A.005 to 131A.460.

Except for contraband and abandoned property, an Oregon forfeiture can only occur after a defendant is convicted of a crime involving the property,[7] and the value of the property is "substantially proportional to the specific conduct for which the owner of the property has been convicted." Or. Const. art. XV, § 10(7). In all contested forfeitures, proof must be made to a jury, not a judge.

Oregon is not alone in transforming its practices to limit the scope and extent of forfeiture to the guilty. Since *Ursery*, thirteen states amended their forfeiture schemes in ways that mirror Oregon's. The following states require criminal convictions and proof of the property's involvement in the convicted crime before property can be "civilly" forfeited:

- **Arkansas**: Ark. Code. Ann. § 5-64-505(m)(1) ("There shall be no civil judgment under this subchapter and no property shall be forfeited

7. If the defendant was not the owner, forfeiture can occur only upon proof that the owner hindered prosecution, knowingly received forfeitable property, or was practically an accomplice to the convicted crime. Or. Const. art. XV, § 10(5); Or. Rev. Stat. § 131A.255(2).

unless the person from whom the property is seized is convicted of a felony offense that related to the property being seized and that permits the forfeiture of the property");

- **California**, Cal. Health & Safety Code § 11488.4(i)(3) ("a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action");

- **Iowa**, Iowa Code Ann §809A.5(2)(b) ("If the forfeiture is for property valued at less than [$1,000], the owner or interest holder must also be convicted of the criminal offense for the conduct giving rise to forfeiture");

- **Maryland**, Md. Code. Ann., Crim. Proc. § 12-103(d)(1) ("real property used as the principal family residence may not be forfeited under this subtitle unless one of the owners of the real property was convicted of" specific enumerated crimes);

- **Michigan**, Mich. Code. Ann. § 333.7521a(1) (seized property is not subject to forfeiture "unless a criminal proceeding involving or relating to the property has been completed and the defendant pleads guilty to or is convicted of a violation of this article");

- **Minnesota**, Minn. Code. Ann. § 609.531 (Subd. 6a)(b) (asset subject to forfeiture only if "a person is convicted of the criminal offense related to the action for forfeiture" or admits to committing a criminal offense but agrees to become an informant to avoid a criminal conviction);

- **Missouri**, Mo. Ann. Stat. § 513.617(1) ("no property shall be forfeited unless the person charged is found guilty");

- **Montana**, Mont Code. Ann § 44-12-207(1)(a) (court may not order forfeiture of property unless "the owner of the property has been convicted of a criminal offense");

- **North Dakota**, N.D. Cent. Code Ann. §§ 19-03.1-36.2(2) (with some exceptions, forfeiture "may not be initiated until the owner of the property has been convicted");

- **Vermont**, Vt. Stat. Ann. tit. 18, §4243(a) (forfeiture prohibited unless "a person is convicted" or agrees to forfeiture in lieu of criminal conviction);

- **Virginia**, Va. Code. Ann. § 19.2-386.1(C) (conviction required);

- **Wisconsin**, Wis. Stat. Ann. § 961.55(1g) ("A judgment of forfeiture may not be entered under this chapter unless a person is convicted of the criminal offense that was the basis for the seizure of the item or that is related to the action for forfeiture.")

In those jurisdictions, forfeiture authority extends only to property involved in a conviction and does not extend to innocent property owners. Unlike traditional *in rem* forfeitures that exist outside of the criminal legal system, forfeiture schemes in those minority states operate within and because of criminal punishment. Those

schemes look nothing like the one in *Ursery*; rather, they bear strong similarities to the forfeiture discussed in *United States v. Bajakajian*, 524 U.S. 321, 328 (1998), where this Court had "little trouble concluding that the forfeiture" at issue "constitutes punishment" for Eighth Amendment purposes. *Id.*[8]

In *Bajakajian*, the defendant attempted to smuggle currency out of the country without declaring it. *Id.* at 324-25. The government charged him for failing to report the currency and sought forfeiture of the entire amount he attempted to smuggle. *Id.* The defendant pleaded guilty to failing to report and, as to the forfeiture, waived his statutory right to a jury trial and opted for a bench trial. *Id.*

This Court held that the forfeiture violated the Eighth Amendment's prohibition on excessive fines. *Id.* In this Court, the government argued that the challenged forfeiture statute did not trigger constitutional protections because it served remedial purposes and looked like *in rem* forfeiture schemes. *Id.* at 329. Rejecting that argument, this Court noted the forfeiture at issue did "not bear any of the hallmarks of traditional civil *in rem* forfeitures." *Id.* at 331. It concluded that the *Bajakajian* forfeiture "serves no remedial purpose" because it is "designed to punish the offender, and cannot be imposed upon innocent owners[.]"

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8. In *Ursery*, this Court concluded that "punishment" carries different meanings under the Fifth and Eighth Amendment. 518 U.S. at 287. That distinction was announced "[w]ithout a single citation supporting its conclusion." G. Walters, *The Ursery Distinction: Unprincipled and Unnecessary*, 22 S. Ill. U. L.J. 369, 370 (1998). As discussed *infra*, post 29-33, there is ample reason to question the historical underpinnings of that conclusion.

Id. It also emphasized the forfeiture was punitive because it is "imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony." *Id.* So too here.

Although Oregon's statutory scheme labels the proceeding as "civil" and permits judgment against the property itself on proof less than guilt beyond a reasonable doubt, the similarities to civil proceedings end there.

Oregon's focus on a criminal conviction, the property's involvement in that convicted crime, and requiring juries to determine whether the value of the property is substantially proportional to the convicted crime demonstrate that, as in *Bajakajian*, Oregon's forfeiture scheme "does not bear any of the hallmarks of traditional *in rem* forfeitures." *Id.* at 331.

Despite that clear proof that this civil forfeiture action operates as criminal punishment, under *Ursery*'s "clearest proof" framework, it is not enough for Sublet to prevail. Rather, she must prove that *all* forfeitures under Oregon's scheme constitute criminal punishment.

c. The "clearest proof" test is unworkable and merits this Court's intervention.

The "clearest proof" test has been widely criticized. *See*, *e.g.*, Amy Ronner, *Prometheus Unbound: Accepting a Mythless Concept of Civil In Rem Forfeiture With Double Jeopardy Protection*, 44 Buff. L. Rev. 655, 660 (1996) (arguing the second inquiry is nothing but "mere lip service" because "any chance that a forfeiture provision can get beyond that second 'clearest proof' hurdle dies in the *Ursery*" decision).

Much (if not all) of the confusion stems from the use of the "*Mendoza* factors" and later decisions announcing that *Ursery*'s second step requires defendants to prove not just that the instant forfeiture is punitive, but that *all* forfeitures are.

This Court first formulated the "two-step" in *89 Firearms*, 465 U.S. at 366. There, the Court borrowed the test from *United States v. Ward*, 448 U.S. 242 (1980), which was used to determine whether a civil regulatory scheme triggered the Fifth Amendment's privilege against self-incrimination. Without explaining why that approach was appropriate in the forfeiture context, the Court applied it to the Double Jeopardy Clause. *Id.* at 363. The "factors" taken from *Ward* and applied in *89 Firearms* were themselves drawn from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), a case holding that automatic divestiture of citizenship for draft evasion violated Due Process.

The "*Mendoza* factors" consider whether the sanction (1) "involves an affirmative disability or restraint"; (2) "has historically been regarded as a punishment"; (3) "comes into play only on a finding of *scienter*"; (4) promotes the traditional aims of punishment—retribution and deterrence"; (5) carries "an alternative purpose to which it may rationally be connected is assignable for it"; and (6) "appears excessive in relation to the alternative purpose assigned[.]" *Id.*

Aside from listing the *Mendoza* factors in a footnote, this Court did little to analyze their scope or meaning in the context of Double Jeopardy and civil forfeiture. *89 Firearms*, 465 U.S. at 365 n. 7. In the single paragraph

where the Court addressed the issue, it acknowledged "support" for treating the forfeiture as criminal but concluded "that indication is not as strong as it might seem" because the statute was not confined to property connected to a criminal conviction. 465 U.S. at 365. No other *Mendoza* factor was discussed, leaving the remaining considerations entirely undeveloped.

This Court reaffirmed the "two-step" framework in *Ursery,* and, like *89 Firearms*, the second step analysis was sparse. 518 U.S. at 290. The Court acknowledged that some features of the forfeiture statute—such as protecting "innocent owners" from forfeiture—could properly be viewed as punitive. *Id.* at 292. But it emphasized that the statute also "serve[d] important nonpunitive goals," including "encourag[ing] property owners to take care in managing their property," and did not require proof of *scienter* or "any connection between the property and a particular person." *Id.* Concluding that these punitive features were not enough to satisfy the "clearest proof" standard, the Court held that the forfeiture was not criminal. *Id.*

The *Ursery* Court also announced that the *Mendoza* factors "are neither exhaustive nor dispositive" but did not identify any non-enumerated factor courts may consider. *Ursery*, 518 U.S. at 291. Later, in *Hudson v. United States*, 522 U.S. 93, 100 (1997), this Court clarified that the "clearest proof" standard relates "to the statute on its face."

Accordingly, under the current state of this Court's cases, a defendant must establish the "clearest proof" that a forfeiture scheme is punitive to obtain Double Jeopardy

protections. That determination requires consideration of (1) "*Mendoza* factors" that are undeveloped in this Court's case law, and (2) other unknown and unidentified factors. *Wooden v. United States*, 595 U.S. 360, 397 (2022) (Gorsuch J., concurring in part and dissenting in part) ("Under our rule of law, punishments should never be products of judicial conjecture about this factor or that one").

Thus, if a particular civil forfeiture—or even the lion's share of forfeitures under a challenged scheme—operates as a tool of punishment, the Double Jeopardy Clause will not prevent the government from initiating serial forfeiture proceedings to punish the same conduct. That anomalous result follows because this Court fashioned its "clearest proof" test to require an individual defendant to establish that *all* forfeitures under the scheme are punitive. But "such a test places an undue burden on a defendant to show by the 'clearest proof' that Congress' scheme is punitive and is unfair because it does not examine the particular facts giving rise to the forfeiture." Adam C. Wells, *Multiple-Punishment and the Double Jeopardy Clause: The United States v. Ursery Decision*, 71 St. John's L. Rev. 153, 168 n. 89 (1997).

In all other successive prosecution challenges, this Court looks to the specific circumstances to determine if Double Jeopardy protections apply. *See*, *e.g.*, *Brown v. Ohio*, 432 U.S. 161, 166 n. 6 (1977) (stating Double Jeopardy analysis requires courts conduct individualized inquiry to determine if "second prosecution requires the relitigation of factual issues already resolved by the first"); *In re Nielsen*, 131 U.S. 176 (1889) (holding, under case specific facts, subsequent prosecution for adultery was barred by Double Jeopardy after defendant convicted of cohabitating with two wives for years).

Even in jurisdictions where contested forfeitures function as criminal punishment, practical purposes exist to enact statutes permitting forfeiture of contraband and abandoned property.[9] Those categories of forfeiture, by necessity, do not require a criminal conviction or proof of the owner's culpability. Because uncontested forfeitures of contraband and abandoned property operate consistently with the legal fiction underlying traditional *in rem* forfeitures, a defendant will never establish the "clearest proof" that *all* forfeitures under the challenged scheme are punitive.

Consequently, despite this Court's repeated declarations that a "civil" forfeiture proceeding that operates as punishment will receive Double Jeopardy protection, the "clearest proof" test is an insurmountable burden. *See e.g. State v. Nunez*, 2 P.3d 264, 277 (N.M. 2001) (observing "'clearest proof' is such an inaccessible standard that it requires the judiciary to suspend its own interpretation of the constitution in favor of that of the legislature" and "[i]t is difficult to imagine a forfeiture scenario that would be so punitive as to surpass the bar set by *Ursery*"); Rebecca A. Brommel, *A Constitutional and Statutory Assessment of Civil Forfeiture of an Intoxicated Driver's Vehicle: Should Iowa Follow the "Get Tough" Approach?*, 49 Drake L. Rev. 641, 651 (2001) (noting "[i]t is very unlikely" that a litigant can hurdle "clearest proof" standard).

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9. *See,* Louis Rulli, *The Long-Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 Fed. Sent'g. Rep. 87, 88 (2001) ("By most accounts, 80% of all forfeitures are uncontested").

For that reason, this Court should grant certiorari to recalibrate and clarify the "clearest proof" standard. By focusing the inquiry on the specific forfeiture at issue, rather than the statutory scheme in the abstract, the Court can adopt a rule consistent with founding-era practice. Indeed, *Ursery*'s historical *bona fides* were criticized when it was issued. *Ursery*, 518 U.S. at 301 (Stevens, J., concurring in the judgment in part and dissenting in part) (arguing *Ursery* majority "shows a stunning disregard not only for modern precedents but for our older ones as well").

II. *Ursery*'s historical analysis is wrong—the founders always considered forfeiture as a form of punishment.

This Court recently observed that though "[p]recedents should be respected" there are occasions when this Court errs. *Dobbs v. Jackson Women's Health Organization et al.*, 597 U.S. 215, 293 (2022). When that happens—particularly when the historical underpinnings justifying the prior decision were erroneous—*stare decisis* must give way to correct Constitutional interpretation. *Id.* at 291-94 (collecting cases overturning precedent based on incorrect prior Constitutional interpretation). *Ursery* is one of those errors. Contrary to *Ursery*'s broad view of founding-era forfeitures, the historical record demonstrates that the founders always considered forfeiture as punishment.

Forfeiture finds roots in the English common law where it was confined to the discrete arenas of admiralty, customs, and revenue violations. *Culley*, 601 U.S. at 398 (Gorsuch, J., concurring) (noting early authorities "allowed the government to seize a vessel involved in 'piratical' or

other maritime offenses and later initiate post deprivation civil forfeiture proceedings"); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (noting early American authorities that "provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws"). Founding-era forfeitures were confined to those discrete arenas. *See*, *e.g.*, K. Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev 1449, 1466 (2019); *and Keene v. United States*, 9 U.S. 304, 308 (1809) (noting Congress gave "exclusive original cognizance of all seizures under the laws of impost, navigation, or trade"). Importantly, forfeiture was always seen as a form of punishment for the violation of an offense. *See*, *e.g.*, *Peisch v. Ware*, 8 U.S. 347, 364 (1807) (noting customs-based forfeiture "punishes the owner with forfeiture" and is permitted only when the owner was culpable for the violation); *see also United States v. Eighty-Four Boxes of Sugar*, 32 U.S. 453, 458 (1833) ("The statute [authorizing forfeiture of unlawfully imported goods] is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly").

Often, when the government seeks to enforce criminal, civil, or administrative laws against a person in a legal proceeding, the government proceeds against the citizen personally (an action *in personam*). Early federal forfeiture statutes, however, permitted the government to proceed against the property itself (known as *in rem*) under the fiction that the property, rather than the owner, was guilty of the crime. *See Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931) ("[I]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient").

Under that historical fiction, the conduct of the property owner was irrelevant; indeed, there was often no requirement that the owner of forfeited property be convicted of a specific crime. *See*, *e.g.*, *Origet v. United States*, 125 U.S. 240, 246 (1888) ("[T]he merchandise is to be forfeited irrespective of any criminal prosecution.... The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent"). The justification for that approach was predicated upon the government's desire to punish a property owner it lacked personal jurisdiction over.

In the early Republic, for example, once a ship was found in violation of piracy or customs law, American courts often could not exercise jurisdiction over an owner who lived on another continent. *See* R. Waples, Proceedings in Rem, § 19, p. 22 (1882). In many instances, forfeiting the ship represented "the only adequate means of suppressing the offence or wrong, and insuring an indemnity to the injured party." *Harmony v. United States*, 2 How. 210, 233 (1844) (Story, J.); *see also* 3 Blackstone 262 (1768) (justifying civil forfeiture in customs violations "to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice").

When pirates were able to escape to a foreign destination, often the government could only "punish" the importer with forfeiture of the imported goods. *See*, *e.g.*, *United States v. 1,960 Bags of Coffee*, 12 U.S. 398, 400 (1814) ("forfeiture of the thing, by which the offense is committed, is the punishment itself"). Notably, when the government had the option to seek forfeiture *in rem*

or *in personam*, it could only exact one remedy, not both. *See*, *e.g.*, *United States v. Grundy*, 7 U.S. 337, 346 (1806) ("The act gives the United States an election of one of two remedies, but not both. They may proceed *in rem*, or *in personam*" but where one *in rem* judgment is obtained it "is conclusive as to the subject matter of it" and *in personam* action cannot be maintained).

Early authorities were concerned about preventing forfeiture against innocent owners. In America's early years, statutes permitted owners to avoid forfeiture upon proof that the violation "proceeded from accident or mistake." 1 Stat. 677; *see United States v. Nine Packages of Linen*, 27 F. Cas. 154, 157 (No. 15,884) (C.C.D.N.Y. 1818); 3 Stat. 183 (no forfeiture of goods from "bona fide purchaser"). Others permitted the Treasury Secretary to afford the same remedy—and evidence suggests officials "were exceedingly liberal in their use of the…power, granting relief in the overwhelming majority of cases presented to them." Arlyck, 119 Colum. L. Rev. at 1487; *see also 1,960 Bags of Coffee*, 12 U.S. at 404 ("If there be hardship in the case, application should be made to the secretary of the treasury who has the power to relieve").

To be sure, *Ursery*'s historical underpinnings have been questioned since its inception. Christine Fontana, *The "New/Old" Concept of Civil Forfeiture: An Eye for an Eye, a Tooth for a Tooth…a Mobile Home and a Body Shop for Two Grams of Cocaine*, 42 Loy. L. Rev. 769, 785 (1997) (noting *Ursery*'s "holding undermines the multitude" of prior forfeiture cases, is deserving of a "constitutional slap," and argues "the bottom line to the disparity" is that "civil forfeiture due to narcotics violations is the money-making darling of the government."); Ronner, 44 Buff. L.

Rev. at 660 (arguing *Ursery*'s "punishment" distinction "is not only mythic, but also quite detrimental because its effect is to undermine the Double Jeopardy Clause's underlying principle of finality and condone governmental overreaching"); *The Supreme Court 1995 Term*, 110 Harv. L. Rev. 206, 211 (1996) (arguing *Ursery*'s analysis "was unsatisfactory for several reasons"); Matthew Costigan, *Go Directly to Jail, Do Not Pass Go, Do Not Keep House*, 87 J. Crim. L. & Criminology 719, 719-20 (1997) (arguing *Ursery* "abandoned the common sense path it had forged in three of its recent cases," repurposed "an old test for determination of whether the Double Jeopardy Clause applies to civil forfeitures, and arguably reached the wrong result when applying that test").

Despite that historical record, the *Ursery* Court concluded that the founders did not consider forfeiture as punishment to anyone. *Ursery*, 518 U.S. at 291 (purporting a "long tradition of federal statutes" renders it "absolutely clear that *in rem* civil forfeiture has not historically been regarded as punishment"). But that holding is unsupported by the historical record and this court should overrule it. *See*, *e.g.*, *Dobbs*, 597 U.S. at 270 (stating this Court overrules precedent when decision "relied on an erroneous historical narrative," and not grounded in "text, history, or precedent"). This Court should heed the long line of criticism and reassess *Ursery*'s historical underpinnings.

III. This case is an ideal vehicle to resolve constitutional ambiguity that will realign forfeiture to its historical justification, be workable in practice, and prevent unjust results.

This case is an ideal vehicle for resolving a persistent constitutional ambiguity as to whether there are any circumstances where a purportedly "civil" forfeiture proceeding that operates as criminal punishment will implicate the Fifth Amendment's Double Jeopardy Clause. The Oregon Supreme Court decided an important federal question that has not been, but should be, settled by this Court: whether modern forfeiture schemes that include procedural and substantive features of punishment—criminal conviction, causal nexus, proportionality, and a jury trial—constitute criminal punishment under the Double Jeopardy Clause. Sup. Ct. R. 10(c).

Despite maintaining that a "civil" forfeiture scheme that operates as criminal punishment will receive Double Jeopardy protections, this Court has never identified a forfeiture scheme that does. *Culley*, 601 U.S. at 403 (Gorsuch, J., concurring) ("in future cases, with the benefit of full briefing, I hope we might begin the task of assessing how well the profound changes in civil forfeiture practices we have witnessed in recent decades comport with the Constitution's enduring guarantee[s]"); *id.* (Sotomayor, J., dissenting) ("People who have their property seized by police remain free to challenge other abuses in the civil forfeiture system"); *Leonard*, 580 U.S. at 1182 (Thomas, J., respecting denial of certiorari) ("Whether this Court's treatment of the broad modern forfeiture practice can be

justified by the narrow historical one is certainly worthy of consideration in greater detail"). This is that case.

This case also provides an opportunity to confront a preserved challenge to *Ursery*'s continued validity in light of the text, history, tradition, and original meaning of the Double Jeopardy Clause. Sublet squarely argued that *Ursery* was wrongly decided and that, contrary to *Ursery*'s broad holding, the founders always considered forfeiture as a form of punishment. The Oregon Supreme Court relied extensively on *Ursery*; thus, the decision rests on an erroneous historical narrative that is unsupported by constitutional text, founding-era sources, or precedent. Accordingly, the Oregon Supreme Court decided the federal question in a manner that conflicts with the interpretative methodology set forth in *Dobbs*. Sup. Ct. R. 10(c).

Since *Ursery*, Oregon and twelve other states have revamped their forfeiture practices in both scope and substance. In all contested cases, forfeiture is permitted only upon proof that the property was involved in the commission of a crime that resulted in a conviction, and that no claimant is innocent of the conduct giving rise to forfeiture. And, unlike all other *in rem* schemes, Oregon forfeitures are tried to a jury, not a judge.

This Court should grant certiorari and hold that a forfeiture action targeting property involved in a specific crime of conviction, and limited to owners who have committed wrongdoing, constitutes an *in personam* proceeding that implicates the Double Jeopardy Clause.

Lower courts continue to struggle with *Ursery*'s "two-step" framework because they lack meaningful guidance on what constitutes the "clearest proof" that a civil forfeiture scheme operates as criminal punishment. This Court should grant certiorari to clarify that when the government seeks to impose multiple punishments for the same crime, whether labeled civil or criminal, the Double Jeopardy Clause applies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE SUPREME COURT FOR THE STATE OF OREGON, DECIDED NOVEMBER 21, 2024

IN THE SUPREME COURT OF THE
STATE OF OREGON

(CC 18CV37372) (CA A173574) (SC S070217)

YAMHILL COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON AND FORFEITING AGENCY, ON BEHALF OF THE YAMHILL COUNTY INTERAGENCY NARCOTICS TEAM (YCINT) SEIZING AGENCY,

Petitioner on Review,

v.

REAL PROPERTY COMMONLY KNOWN AS: 11475 NW PIKE ROAD, YAMHILL, OREGON, YAMHILL COUNTY AND ANY RESIDENCE, BUILDINGS, OR STORAGE FACILITIES THEREON,

Defendant in rem,

and

SHERYL LYNN SUBLET,

Respondent on Review.

Argued and Submitted December 14, 2023
Decided November 21, 2024

Appendix A

On review from the Court of Appeals.*

Before Flynn, Chief Justice, and Duncan, Garrett, DeHoog, James, and Masih, Justices, and Walters, Senior Judge, Justice pro tempore.**

FLYNN, C.J.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

FLYNN, C.J.

Oregon law allows local governments to acquire property that is connected to certain criminal conduct by bringing a civil forfeiture action against the property itself—a so-called *in rem* action. *See* ORS 131A.225 (authorizing and describing use of "civil forfeiture action in rem" for property subject to forfeiture). For the *in rem* action, no person is named as a defendant, but the forfeiting entity must make "reasonable efforts" to notify potential claimants "known to have an interest" in the property. ORS 131A.150(4). And if a claimant chooses to oppose the forfeiture, then the local government must prove that "a person has been convicted of a crime that constitutes prohibited conduct" (generally drug crimes

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* Appeal from Yamhill County Circuit Court, Ladd J. Wiles, Judge. 324 Ore. App. 412, 526 P3d 765 (2023).

** Bushong, J., did not participate in the consideration or decision of this case.

and human trafficking crimes) and that the property to be forfeited is proceeds of, or an instrumentality of, either the crime for which the person has been convicted or another crime that is similar. ORS 131A.255; *see* ORS 131A.005(12) (defining "prohibited conduct"). *But see* ORS 131A.200(1) and ORS 131A.315 (permitting forfeiture without proof of conviction if no claimant appears to oppose the forfeiture). The statutory forfeiture process aligns with limitations that the Oregon Constitution imposes on the use of "civil forfeiture" by "the State or any of its political subdivisions." Or Const, Art XV, §10; ORS 131A.010(2) (specifying that "[a]ll forfeitures under the provisions of this chapter are subject to the limitations of section 10, Article XV of the Oregon Constitution").

The question in this case is whether civil forfeiture in Oregon is effectively a criminal penalty for purposes of the Double Jeopardy Clause of the Fifth Amendment, such that a civil forfeiture action is barred by—and bars—a separate criminal prosecution of the property's owner for the same prohibited conduct.[1] The arguments present a facial challenge to the overall civil forfeiture scheme, and we reject that challenge. We conclude that the civil forfeiture authorized by ORS chapter 131A does not facially trigger the protections of the Fifth Amendment's Double Jeopardy Clause.

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1. The federal Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." US Const, Amend V.

Appendix A

I. BACKGROUND

In this civil forfeiture case, Yamhill County filed an *in rem* action against real property located on NW Pike Road, alleging that the defendant property had been used to facilitate prohibited conduct and that Sheryl Lynn Sublet (claimant), had asserted an interest in the property. Claimant appeared in the action and opposed the forfeiture on numerous grounds, including that the forfeiture action was barred under the federal Double Jeopardy Clause because claimant already had been prosecuted for the same prohibited conduct. The trial court rejected claimant's double jeopardy argument, a jury found in favor of the county, and the trial court entered a judgment forfeiting the defendant property to the county. But the Court of Appeals reversed. It agreed with claimant that the forfeiture implicates, and is barred by, the federal prohibition against double jeopardy. This court allowed the state's petition for review to determine whether the forfeiture proceeding implicates the federal Double Jeopardy Clause.

The arguments in this court present a narrow question, and we clarify what is not at issue. First, claimant does not contend that any provision of the state or federal constitution precludes the legislature from authorizing civil *in rem* forfeiture of property that is an instrumentality of "prohibited conduct." Second, she does not advance any argument under the state constitution—not under the double jeopardy clause contained in Article I, section 12, nor under any other provision. Third, as indicated above, claimant presents a facial challenge

that the overall forfeiture scheme under Oregon law is criminal. Accordingly, the only question presented by this case is whether civil forfeiture actions under Oregon law place an owner of the property in "jeopardy" for purposes of the Fifth Amendment, in all instances, without regard to the individual circumstances of the particular case.[2]

It is not a novel question. As the United States Supreme Court has emphasized, "[s]ince the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events." *United States v. Ursery*, 518 U.S. 267, 274, 116 S Ct 2135, 135 L Ed 2d 549 (1996). And, in "a long line of cases," the Court "has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment." *Id.* This court reached the same conclusion when we last considered the application of the Double Jeopardy Clause to a civil

2. Under the "first things first" doctrine, "this court has frequently stated a preference for resolving disputes under state law, including the state constitution, if possible." *State v. Link*, 367 Ore. 625, 640, 482 P3d 28 (2021). Although we do not let the parties' choice of argument dictate whether we adhere to that doctrine, claimant's arguments have proceeded exclusively as a challenge under the federal constitution, and the Court of Appeals resolved this case as a matter of federal constitutional law. We allowed review to determine whether that decision was correct and, thus, exercise our discretion to resolve this case under the federal constitution, leaving any state constitutional questions for another day.

forfeiture proceeding, in *State v. Selness*, 334 Ore. 515, 542, 54 P3d 1025 (2002).[3]

But the statutes that we considered in *Selness* have been replaced by the new civil forfeiture statutes set out in ORS chapter 131A, which the legislature adopted in 2009 to align with the new constitutional limitations that voters originally adopted in 2000 and then amended in 2008. *See* Or Const, Art XV, § 10 (describing limits on the government's ability to pursue "civil forfeiture"); Or Laws 2009, ch 78 (adopting provisions now set out at ORS chapter 131A). In this case, the Court of Appeals was persuaded that those changes to civil forfeiture in Oregon permit a different conclusion than this court reached in *Selness*. The court held that the voters who originally adopted Article XV, section 10, intended to make all forfeiture "criminal in nature for [the] purpose of the Double Jeopardy Clause of the Fifth Amendment" and, as a result, that a forfeiture proceeding under current Oregon law implicates that provision. *Yamhill County v. Real Property*, 324 Ore. App. 412, 428, 526 P3d 765 (2023). We allowed review to consider whether the new constitutional or statutory provisions have converted civil forfeiture in Oregon to essentially a criminal punishment that places the property owner in "jeopardy" for purposes of the Fifth Amendment.

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3. The defendants in *Selness* also argued that the forfeiture implicated the double jeopardy protections under Article I, section 12, of Oregon's constitution, and the opinion primarily is devoted to explaining why the forfeiture did not constitute "jeopardy" for purposes of Oregon law. 334 Ore. at 523-40.

II. DISCUSSION

The Fifth Amendment's Double Jeopardy Clause, among other things, prohibits a government from "'attempting a second time to punish [a person] criminally for the same offense.'" *Ursery*, 518 U.S. at 273 (quoting *Witte v. United States*, 515 U.S. 389, 396, 115 S Ct 2199, 132 L Ed 2d 351 (1995)). Under limited circumstances, the Supreme Court has held that a civil action to punish a person implicates the Double Jeopardy Clause, but the Court consistently has drawn "a sharp distinction" for double jeopardy purposes between so-called *in personam* civil penalty actions and *in rem* civil forfeiture actions brought against property itself. *Id.* at 275. The distinction is captured by a "remarkably consistent theme" in the Court's cases: "*In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause." *Id.* at 278; *see Various Items of Personal Property v. United States*, 282 U.S. 577, 580-81, 51 S Ct 282, 75 L Ed 558 (1931) (explaining distinction between *in rem* civil forfeitures and *in personam* civil penalties).

A. A "Remarkably Consistent Theme": *In Rem* Civil Forfeitures Are Not Punishment

The Court first drew that "sharp distinction" in *Various Items*, in which the Court considered whether an *in rem* civil forfeiture action, which followed the owner's prior criminal conviction for the same actions, was barred by the Fifth Amendment. 282 U.S. at 581.

And in *Ursery*, the Court highlighted the distinction between *in rem* and *in personam* civil proceedings by pointing to *United States v. La Franca*, 282 U.S. 568, 51 S Ct 278, 75 L Ed 551 (1931)—another decision that was issued the same day as *Various Items*—in which it had held that a civil, *in personam*, action against a taxpayer to recover taxes *was* "'punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions.'" *Ursery*, 518 U.S. at 275 (quoting *Various Items*, 282 U.S. at 580). By contrast, the Court emphasized, the action in *Various Items* was "'a proceeding *in rem* to forfeit property used in committing an offense'" and did not implicate the prohibition against double jeopardy because an *in rem* forfeiture against the property itself "'*is no part of the punishment for the criminal offense*.'" *Id.* (quoting *Various Items*, 282 U.S. at 580-81 (emphasis in *Ursery*)).

The line drawn by the Court in *Various Items* is not between forfeiture and other sanctions, but between *in personam* forfeiture actions against a property's owner and *in rem* forfeitures against property. *See Dobbins's Distillery v. United States*, 96 U.S. 395, 399-400, 24 L. Ed. 637 (1877) (describing the two types of forfeitures). In "the Middle Ages and at common law[,]" an *in personam* forfeiture action was considered "part of the punishment imposed for felonies and treason." *United States v. Bajakajian*, 524 U.S. 321, 332, 118 S Ct 2028, 141 L Ed 2d 314 (1998). An *in rem* civil forfeiture, by contrast, "has not historically been regarded as punishment, as [the Court has] understood that term under the Double Jeopardy Clause." *Ursery*, 518 U.S. at 291. In fact, as the Court

observed in *Ursery*, "[h]ad the Court in *Various Items* found that [an *in rem*] civil forfeiture could constitute a 'punishment' under the Fifth Amendment, its holding would have been quite remarkable." 518 U.S. at 275. The reason is that, "at common law, not only was it the case that a criminal conviction did not *bar* a civil forfeiture, but, in fact, the civil forfeiture could not be *instituted* unless a criminal conviction had already been obtained." *Id.* (emphases in original).

An early rationale given for the rule that *in rem* forfeitures do not implicate the Double Jeopardy Clause was that "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." *Various Items*, 282 U.S. at 581. The Court has also pointed to the nature of an *in rem* action, in which jurisdiction is "dependent upon seizure of a physical object," rather than on acquiring jurisdiction over a person. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363, 104 S Ct 1099, 79 L Ed 2d 361 (1984). Such forfeitures, the Court has observed, are structured "to be impersonal by targeting the property itself." *Ursery*, 518 U.S. at 289. The Court also has attributed the rule to an understanding that civil *in rem* forfeitures are "remedial in nature," in a way that criminal punishment is not. *89 Firearms*, 465 U.S. at 366. Remedial justifications that have been advanced for civil forfeiture include preventing property from being used for illegal purposes, removing potentially dangerous items from circulation, ensuring that persons do not profit from their illegal acts, and making criminal activity unprofitable. *See Ursery*, 518 U.S. at 290-91

(highlighting that forfeiture at issue served "nonpunitive goals" of ensuring that property is not used for illegal purposes and, in the case of proceeds, ensuring "that persons do not profit from their illegal acts"); *89 Firearms*, 465 U.S. at 364 (emphasizing that the civil forfeiture of firearms "further[ed] broad remedial aims," including "discouraging unregulated commerce in firearms" and "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers"); *Bennis v. Michigan*, 516 U.S. 442, 452, 116 S Ct 994, 134 L Ed 2d 68 (1996) (explaining that "[f]orfeiture of property prevents illegal uses * * * by imposing an economic penalty, thereby rendering illegal behavior unprofitable" (internal quotation marks omitted)); *see also State v. Curran*, 291 Ore. 119, 127-28, 628 P2d 1198 (1981) (explaining traditional purpose of *in rem* forfeiture as "not merely to punish criminal activity but to make it unprofitable" by "removing equipment necessary to the carrying on of the illegal activity and recouping some of the costs of law enforcement," as well as generally deterring criminal activity).

Regardless of the rationale, however, the Court's cases over the last century have continued to adhere to the "remarkably consistent theme" that "*[i]n rem* civil forfeiture is a remedial civil sanction, * * * and does not constitute a punishment under the Double Jeopardy Clause." *Ursery*, 518 U.S. at 278. Four decades after *Various Items*, the Court next revisited the theme in the context of a double jeopardy challenge to the civil forfeiture of jewels, under the Tariff Act of 1930, after the owner had been acquitted on charges of smuggling the jewels into the country. *One Lot Emerald Cut Stones*

v. United States, 409 U.S. 232, 233, 93 S Ct 489, 34 L Ed 2d 438 (1972). The brief *per curiam* opinion observed that "Congress could and did order both civil and criminal sanctions" for violations of the Act and that, "[i]f for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments." *Id.* at 235-36. *Ursery* explains that the forfeitures in *One Lot* "were not criminal punishments because they did not impose a second *in personam* penalty for the criminal defendant's wrongdoing." 518 U.S. at 276. In other words, the Court has—without exception—held that the protections of the Double Jeopardy Clause do not apply to *in rem* civil forfeiture actions, without regard to whether the forfeiture comes before or after a related criminal prosecution, and without regard to whether the prosecution ends with an acquittal or conviction.

But the Court's most recent decisions have settled on a rule for civil forfeiture that arguably allows for at least the possibility that even an *in rem* forfeiture labeled "civil" might, under some circumstances, implicate double jeopardy protections:

> "'Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. The question, then, is whether [the] * * * forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial.'"

Ursery, 518 U.S. at 277 (quoting *89 Firearms*, 465 U.S. at 362). The Court's application of that rule provides no examples of what could make an *in rem* forfeiture "essentially criminal in character" but, instead, provides multiple examples of what does not.

B. The Court's Two-Part Inquiry

To answer the question at the heart of that rule, the Court in *89 Firearms* distilled a two-part inquiry that "provides a useful analytical tool" for determining whether a forfeiture proceeding is punishment that implicates the Double Jeopardy Clause. *Ursery*, 518 U.S. at 288. Under that two-part inquiry, the Court first considers whether those who created the forfeiture proceeding intended it to be criminal or civil. *Id.* The Court next considers whether the proceeding, even if intended as civil, is "so punitive in fact as to 'persuade [the Court] that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' despite" the intent. *Id.* (quoting *89 Firearms*, 465 U.S. at 366). The Court has emphasized, however, that, "[t]hough the two-part analytical construct employed in *89 Firearms* was more refined, perhaps, than that we had used over 50 years earlier in *Various Items*, the conclusion was the same in each case: *In rem* civil forfeiture * * * does not constitute a punishment under the Double Jeopardy Clause." *Ursery*, 518 U.S. at 278.

1. Intended to be criminal or civil

As both *Ursery* and *89 Firearms* make clear, the question of intent focuses primarily on the text of the

authorizing legislation and is significantly informed by whether the text creates a civil *in rem* proceeding. Indeed, the Supreme Court has consistently described the question as one of statutory construction that focuses on the procedural mechanisms specified in the authorizing legislation, in addition to any clear evidence of the "aims" of those who authorized the forfeiture. *Ursery*, 518 U.S. at 277; *89 Firearms*, 465 U.S. at 363-64; *see One Lot*, 409 U.S. at 237 ("The question of whether a given sanction is civil or criminal is one of statutory construction.").

For example, in *89 Firearms*, the government had seized a collection of weapons from the owner's home and, after the owner was acquitted of illegally dealing in firearms without a license, the federal government brought an *in rem* forfeiture action against the weapons pursuant to a federal statute that authorized seizure and forfeiture of "'any firearm or ammunition involved in or used or intended to be used in'" violations of certain federal laws. 465 U.S. at 355-56; *id.* at 356 n 2 (quoting 18 USC § 924(d)). The Court identified the clearest indication of Congressional intent in the "distinctly civil procedures" that the statute specified for enforcing forfeitures under the statute. *Id.* at 363. The Court pointed in particular to the statutory requirement that "an action to enforce a forfeiture 'shall be in the nature of a proceeding *in rem*'" and reiterated the theme, mentioned above, that "actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object." *Id.* at 363 (quoting 26 USC § 7323). In addition, the Court identified as significant the fact that the statutory framework authorized summary proceedings for forfeitures of low-value property. *Id.*

"Finally," the Court reasoned, the authorized forfeiture furthered "broad remedial aims" that had motivated Congress to pass the legislation, including "by discouraging unregulated commerce in firearms and by removing from circulation firearms that have been used or intended for use outside regulated channels of commerce." *Id.* at 364; *see id.* (explaining that "Congress sought to 'control the indiscriminate flow' of firearms and to 'assist and encourage States and local communities to adopt and enforce stricter gun control laws'" (quoting HR Rep No 1577, 90th Cong, 2d Sess, *reprinted in* 1968 USCCAN 4410, 4413)).

The Court employed that approach again in *Ursery*, in which it considered consolidated cases, one in which the circuit court had held that a prior civil forfeiture presented a double jeopardy bar to the owner's subsequent criminal prosecution, and one in which the circuit court had held that the owner's prior criminal conviction presented a double jeopardy bar to the civil forfeiture action. 518 U.S. at 271-72. As it had in *89 Firearms*, the Court concluded that Congress's intent was "most clearly demonstrated" by the "distinctly civil procedures" that Congress had established for enforcing forfeitures under the statutes—primarily the fact that Congress had designated the forfeiture as "civil" and had specified that the forfeiture would proceed "*in rem*." *Id.* at 288-89 (quoting *89 Firearms*, 465 U.S. at 363). The Court secondarily pointed to various other "distinctly civil procedures" that Congress had incorporated, including that forfeiture could proceed without actual notice to the claimant, that the seized property was subject to forfeiture through a summary procedure if no claim was filed, and

that the government's burden of proof was low—there, probable cause. *Id.*

2. Effect of the forfeiture proceeding

The Supreme Court has cautioned that, when a forfeiture is intended to serve a "remedial civil sanction rather than a criminal punishment," only "the clearest proof that the purpose and effect of the forfeiture are punitive will suffice to override [the legislature's] manifest preference for a civil sanction." *89 Firearms*, 465 U.S. at 364-65 (internal quotation marks omitted); *see Ursery*, 518 U.S. at 290 (explaining that Court found "little evidence, much less the clearest proof that we require" that forfeiture proceedings under the statute were "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary" (internal quotation marks omitted)).

The Court in other contexts has identified a nonexclusive list of considerations that are "relevant to the question whether a proceeding is criminal." *Ursery*, 518 U.S. at 292 (citing *United States v. Ward*, 448 U.S. 242, 247-247 n 7, 249, 65 L. Ed. 2d 742, 65 L Ed 2d 742 (1980), as "listing relevant factors and noting that they are neither exhaustive nor dispositive"); *89 Firearms*, 465 U.S. at 365 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S Ct 554, 9 L Ed 2d 644 (1963), which lists the same factors).[4] But the Court's analysis in

4. The nonexhaustive list of factors in *Ward* is taken from *Mendoza-Martinez*:

Ursery and *89 Firearms* illustrates that, in the context of a forfeiture, determining whether proceedings are so punitive as to be deemed criminal turns largely on the same considerations that also persuaded the Court that Congress intended to create a civil sanction.

"Most significant" to the Court in *Ursery* was the fact that the forfeiture statutes, "while perhaps having certain punitive aspects, serve important nonpunitive goals." 518 U.S. at 290. That factor tracks one of the listed considerations—whether the sanction "may rationally be connected" to "an alternative purpose"—but also repeats one of the considerations that the Court has pointed to as evidence of Congressional intent. *See 89 Firearms*, 465 U.S. at 364 (identifying statute's furtherance of "broad remedial aims" in concluding that Congress intended "a remedial civil sanction rather than a criminal punishment"). Another factor asks whether the sanction has historically been regarded as a punishment, and, as

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> "'[W]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.'"

Ward, 448 U.S. at 247 n 7 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69).

the Court highlighted in *Ursery*, "it is absolutely clear that *in rem* civil forfeiture has not historically been regarded as punishment, as we have understood that term under the Double Jeopardy Clause." 518 U.S. at 291. Yet another factor asks whether the sanction requires a finding of *scienter*, which the Court disposed of by citing the procedural mechanism that permitted forfeiture of property "even if no party files a claim to it and the Government never shows any connection between the property and a particular person." *Id.* at 291-92.

Ultimately, the Court's cases offer little guidance about what—if anything—*could* constitute "the clearest proof" that an *in rem* civil forfeiture is "so punitive in form and effect as to render [it] criminal despite" a contrary intent, but they offer guidance on what does *not* suffice. First, although promoting a purpose of deterrence—one of the traditional "aims of punishment"—can suggest that a sanction is criminal, *Ursery* makes clear that the factor is not meaningful when evaluating a sanction of forfeiture, because forfeiture "serves a deterrent purpose distinct from any punitive purpose." *Id.* at 292 (internal quotation marks omitted). Nor is it relevant that a forfeiture statute includes an "innocent owner" exception—which helps limit the sanction to only culpable owners—"without more indication of an intent to punish." *Id.* Finally, although tying a sanction to criminal activity can be some indication that the sanction is a criminal penalty, "[b]y itself, the fact that a forfeiture statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal." *Id.*; *see 89 Firearms*, 465 U.S. at 366 (in explaining that it was not sufficient that

the proscribed behavior was also a crime, emphasizing "the forfeiture remedy cannot be said to be co-extensive with the criminal penalty").

C. The Two-Part Inquiry Applied to Civil Forfeiture Under Oregon Law

Oregon, similarly, has a long history of authorizing civil *in rem* forfeiture through proceedings that are in addition to any criminal prosecution for the same conduct. *See*, *e.g.*, *State v. 1920 Studebaker Touring Car*, 120 Ore. 254, 256, 251 P 701 (1926) (describing Oregon's prohibition-era law authorizing *in rem* forfeiture of boats and vehicles used to unlawfully transport "intoxicating liquor"); Or Laws 1949, ch 415, §§ 2-3 (authorizing forfeiture of "premises" on which the owner or operator engaged in the unlawful service of "alcoholic liquor containing more than 14 per cent of alcohol by volume," if "any person" was convicted for a violation of the Act). And this court, in *Selness*, employed the Supreme Court's two-part inquiry to determine that Oregon's civil *in rem* forfeiture scheme prior to 2000 was "neither punishment nor criminal" for purposes of the Fifth Amendment's Double Jeopardy Clause. *Selness*, 334 Ore. at 542 (internal quotation marks omitted).

1. The two-part inquiry as applied in *Selness*

Although both *Ursery* and *89 Firearms* analyzed forfeiture proceedings authorized by federal statutes, and thus, framed the first inquiry in terms of the intent of "Congress," the Court's focus on the text of the authorizing

legislation is precisely how we identified the legislature's intent in *Selness*. *See* 334 Ore. at 541 (describing statutory inquiry). And it is how we answer all questions of enactor-intent, whether for a statute or constitutional provision. In both instances, we look to the text of the enactment as the best evidence of the intent of those who adopted it. *See State v. Gaines*, 346 Ore. 160, 171, 206 P3d 1042 (2009) (explaining that "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes" (internal quotation marks omitted)); *Priest v. Pearce*, 314 Ore. 411, 415-16, 840 P2d 65 (1992) (describing that method for analyzing original constitutional provisions).

The double jeopardy challenge in *Selness* arose in the context of criminal prosecutions for drug activity that coincided with an *in rem* forfeiture action against the defendants' home pursuant to the civil forfeiture statutes in effect at the time.[5] 334 Ore. at 518. Although the defendants were aware of the forfeiture proceeding, they did not file a claim or otherwise appear. *Id.* at 521. Shortly after the defendants had been arraigned on charges of possessing, manufacturing, and delivering a controlled substance, the City of Portland obtained a default judgment of forfeiture based on the allegation that

5. The civil forfeiture statutes at issue in *Selness* had been adopted in 1989 and amended in 1993. Oregon Laws 1989, ch 791; Oregon Laws 1993, ch 699. The opinion notes that those statutes had been incorporated into ORS chapter 475A, but, for reasons that the court did not explain, it referred to the statutory provisions by their Oregon Laws citations throughout the opinion. 334 Ore. at 518 n 2.

the defendants had used their home to facilitate the same "prohibited conduct" on which the defendants' pending criminal charges were based. *Id.* The defendants then moved to dismiss the pending criminal charges, contending that the earlier forfeiture barred the prosecutions under the Fifth Amendment Double Jeopardy Clause. *Id.* at 521.[6] This court first explained that it was considering only whether "the overall forfeiture scheme" created a proceeding that implicated double jeopardy, because the defendants had waived any argument that "as applied to them, the forfeiture" proceeding counted as "jeopardy." *Id.* at 523-24. And the court concluded that the legislature had created a forfeiture proceeding that was "neither 'punishment' nor criminal for purposes of the [Fifth Amendment's] Double Jeopardy Clause." *Id.* at 542 (quoting *Ursery*, 518 U.S. at 292).

Selness reached that conclusion by analyzing the statutory framework under *Ursery*'s two-part inquiry, which we highlighted as employing a rebuttable presumption that can be overcome only by the "clearest proof":

> "'That a forfeiture is designated as civil by Congress and proceeds *in rem* establishes a presumption that it is not subject to double jeopardy. * * * Nevertheless, where the 'clearest

6. The defendants in *Selness* also argued that the forfeiture implicated the double jeopardy protections under Oregon's constitution, Article I, section 12, and the opinion primarily is devoted to explaining why the forfeiture did not constitute "jeopardy" for purposes of Oregon law. 334 Ore. at 523-40.

> proof' indicates that an *in rem* civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause.'"

Id. at 541 (quoting *Ursery*, 518 U.S. at 289 n 3).

Employing that analytical framework, this court concluded that "[c]learly, the forfeiture scheme provided by [the statutes at issue] satisfies the first step" of the *Ursery* analysis. *Id.* at 541. Like the federal forfeiture statutes at issue in *Ursery* and *89 Firearms*, the forfeiture statute at issue in *Selness* "repeatedly refer[ed] to *civil* forfeiture[,]" and specified that the forfeiture proceed through an *in rem* action. *Id.* at 536 (emphasis in original). In addition, the statutes expressly articulated an intent that "any remedy under this Act is intended to be remedial and not punitive" and suggested several remedial purposes: "to render drug manufacture and trafficking activities unprofitable by confiscating the proceeds, to render those activities more difficult by confiscating tools and other property that facilitate the activities, and to provide resources to governments that enforce drug trafficking laws." *Id.* at 536, 538. This court reasoned that, "[l]ike the federal statute" in *Ursery*, the Oregon forfeiture statute "announces, on its face, the legislature's intent that it be remedial and nonpunitive." *Id.* at 541-42.

Moving to the second step of the Supreme Court's inquiry, this court emphasized that the defendants had not "pointed to anything in the statutory scheme that

would suggest that they might obtain a different outcome at the second step of the *Ursery* analysis." *Id.* at 542. "Ultimately," this court concluded, "the forfeiture scheme provided" under Oregon law was "indistinguishable, for purposes of the present analysis, from the forfeiture scheme that the *Ursery* court held to be civil." *Id.* Thus, "like the forfeiture scheme that was at issue in" *Ursery*, the Oregon forfeiture scheme at issue in *Selness* was "'neither 'punishment' nor criminal for purposes of the [Fifth Amendment's] Double Jeopardy Clause.'" *Id.* (quoting *Ursery*, 518 U.S. at 292).

2. The two-part inquiry applied to Oregon's current forfeiture law

As in *Selness*, claimant has not argued that any particular aspects of the forfeiture proceeding cause the proceeding to count as "jeopardy" as applied to claimant. Thus, as in *Selness*, the question before us is whether "the overall forfeiture scheme [under current Oregon law], and not just its particular effect in [claimant's] case, is criminal" such that a forfeiture proceeding under that law necessarily places an owner in jeopardy for purposes of the Fifth Amendment. 334 Ore. at 524. Our decision in *Selness* significantly informs our analysis of that question, but *Selness* examined a different civil forfeiture law than the statute at issue in this case. We, therefore, must consider whether differences between the civil forfeiture law that we analyzed in *Selness* and the current forfeiture law at issue here have converted civil forfeiture in Oregon to a sanction that the United States Supreme Court would consider to be essentially criminal punishment subject

to the Double Jeopardy Clause. And because we are not resolving an as-applied argument under that provision, we must consider the entirety of the current forfeiture scheme. To provide context for the parties' arguments and our analysis, we turn first to the changes to Oregon forfeiture law since *Selness*.

a. Evolution of *in rem* forfeiture in Oregon

The first change came while this court was considering the challenge to the 1989 forfeiture law at issue in *Selness*, when voters in 2000 adopted Ballot Measure 3, which was known as "The Oregon Property Protection Act of 2000." That measure added to the Oregon Constitution several substantive limitations on the "forfeiture of property in a civil forfeiture proceeding," and announced as a general principle that a person's property should not be forfeited to the government "unless and until that person is convicted of a crime involving the property." Or Const, Art XV, § 10(2), (3) (2000).[7] The passage of Measure 3 prompted legal challenges and, ultimately, amendments to Article XV, section 10, and legislative action.

Initially, the legal challenges to Measure 3 appeared to succeed, when the Court of Appeals declared the measure void under Article 17, section 1, of the Oregon Constitution,

7. Voters had adopted Measure 3—the provisions of which became the 2000 version of Article XV, section 10—while the *Selness* case was pending in this court, and the effect of the constitutional provisions on the existing civil forfeiture framework was not at issue in that case.

for changing multiple constitutional provisions in a single measure. *See Lincoln Interagency Narcotics Team v. Kitzhaber*, 188 Ore. App. 526, 554, 72 P3d 967 (2003), *rev'd*, 341 Ore. 496, 145 P3d 151 (2006) (so holding). Although this court ultimately reversed the decision of the Court of Appeals, in the intervening vacuum, legislators adopted changes to the forfeiture statutes. Or Laws 2005 ch 830, §§ 30-35. Those changes incorporated the principle underlying Measure 3, that forfeiture generally should be limited to the property of a person who has been convicted of a crime, but added exceptions to that general rule that are similar to those found under the current law. *Id.* § 30. In that same bill, the legislature created a process for criminal forfeiture, as "a remedy separate and apart from any other criminal penalty and from civil forfeiture or any other civil penalty." *Id.*§ 2; *see also id.* §§ 1-18 (setting out the criminal forfeiture provisions of the 2005 Act that are now codified at ORS chapter 131A).

After this court held that Measure 3 had validly added civil forfeiture protections to the Oregon Constitution, *Lincoln Interagency Narcotics Team*, 341 Ore. 496, the legislature agreed on proposed amendments to Article XV, section 10, which it referred to the voters as Ballot Measure 53 (2008). SJR 18 (2007). In addition to making nonsubstantive organizational changes, the proposed amendments, which the voters approved, significantly modified the forfeiture limitations adopted under Measure 3, including by modifying the statement of principles to reflect the proposition that the property of a person "generally" should not be forfeited unless that person has been convicted of a crime and by expanding the

circumstances under which property could be forfeited without a conviction of the owner. *Compare* Or Const, Art XV, § 10(3) (2000),[8] *with* Or Const, Art XV, § 10(2), (5) (2008).[9] In addition, the amendments modified what had been a requirement of proof by "clear and convincing evidence" in almost every case and modified the requirement that forfeited property must be proceeds or an instrumentality of the crime of conviction. *Compare* Or Const, Art XV, § 10(3) (2000), *with* Or Const, Art XV, § 10(3)(c), (d), (4), (6) (2008).

After the voters adopted the amendments to Article XV, section 10, through their approval of Measure 53, the legislature took up the task of crafting our current statutory framework for civil forfeiture. The legislature in 2009 adopted the provisions set out in ORS chapter 131A as a new, comprehensive statutory framework to govern civil forfeiture. *See* Or Laws 2009, ch 78, §2 (specifying that the legislature adopted provisions of the chapter to be "the sole and exclusive law of the state governing civil forfeiture of real and personal property based on prohibited conduct").

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8. Under the 2000 version of Article XV, section 10, the exceptions to the requirement that the owner must have been convicted of a crime were limited to persons who "took the property or the interest with the intent to defeat the forfeiture" and property for which "no person claims an interest in the seized property or if the property is contraband." Oregon Const, Art XV, § 10(4), (5) (2000).

9. The provisions of Article XV, section 10, have not been amended since the passage of Measure 53 in 2008. Thus, except for references to Article XV, section 10 (2000), all references are to the current constitutional provision.

Appendix A

The provisions of ORS chapter 131A govern all "civil forfeiture of real and personal property based on prohibited conduct" and expressly incorporate "the limitations of section 10, Article XV of the Oregon Constitution." ORS 131A.010(2). In explaining the reason for the new civil forfeiture law, the legislature included findings that "[t]ransactions involving property subject to civil forfeiture under this chapter escape taxation" and that "[g]overnments attempting to respond to prohibited conduct require additional resources." ORS 131A.010(1)(b), (c). It also specified that "[t]he application of any remedy under this chapter is remedial and not punitive." ORS 131A.010(5).

Those statutes authorize a "civil forfeiture action in rem" against property that has some connection to "prohibited conduct"—generally defined as drug crimes and human trafficking crimes. ORS 131A.225(1); ORS 131A.005(12). The connection extends to proceeds of "prohibited conduct," personal property "used to facilitate prohibited conduct," and real property "that is used in any manner, in whole or part, to commit or facilitate prohibited conduct." *See* ORS 131A.020 (describing property that is subject to forfeiture under ORS chapter 131A).

The statutes specify that the "civil forfeiture action in rem," is initiated by filing a complaint that need only allege "that there is probable cause for seizure of the property or that a court order was issued." ORS 131A.225(1), (4). Upon commencement of the action, the seizing entity must also serve the summons and the complaint, in the

manner required by the Rules of Civil Procedure, "on all persons known to have an interest in the property." ORS 131A.230. And a person who intends to assert an interest in the property generally "must file a responsive pleading as provided in the Oregon Rules of Civil Procedure." ORS 131A.235.

The procedural mechanisms contemplate that actual notice to interested persons is not always necessary and specify that forfeiture can proceed through a summary *ex parte* or default procedure, without proof of a conviction, if no claim or responsive pleading is filed. *See* ORS 131A.200(1) (providing that the agency may seek an *ex parte* forfeiture judgment if no timely claim to the property was filed and no person is "known to have an interest, other than a person who is believed by the forfeiting agency to have engaged in prohibited conduct"); ORS 131A.315 (providing circumstances for a default forfeiture judgment).

If a forfeiture complaint is contested, then the entity seeking forfeiture must prove only that "a person has been convicted of a crime that constitutes prohibited conduct" and that the property is either proceeds or an instrumentality of "the crime for which the person has been convicted" or "one or more other crimes similar to the crime for which the person was convicted." ORS 131A.255(1). But the statutes also contemplate that the person claiming an interest in the property may not necessarily be the person who was convicted of a crime. *See* ORS 131A.255(2) (describing additional elements of

proof when a claimant is not the person convicted). If a person claiming the property is not the person who was convicted of a crime, then the forfeiting agency also must prove that the claimant "[t]ook the property with the intent to defeat forfeiture," "[k]new or should have known that the property was proceeds of prohibited conduct," or "[a]cquiesced in the prohibited conduct." ORS 131A.255(2); *see also* ORS 131A.255(4) (explaining that "a claimant shall be considered to have acquiesced in prohibited conduct if the claimant knew of the prohibited conduct and failed to take reasonable action under the circumstances to terminate the prohibited conduct or prevent use of the seized property to facilitate the prohibited conduct").

The forfeiting agency's standard of proof in a contested action varies, depending on the type of property, but in all cases it is one of the standards associated with civil proceedings, rather than the traditional criminal standard of "beyond a reasonable doubt." *See Apprendi v. New Jersey*, 530 U.S. 466, 477, 490, 120 S Ct 2348, 147 L Ed 2d 435 (2000) (emphasizing that due process requires proof "beyond a reasonable doubt" of every element of a crime and facts that enhance the sentence for a crime). To forfeit real property, the agency must prove the specified elements by clear and convincing evidence, but, to forfeit personal property, the agency must prove the elements only by a preponderance of the evidence. ORS 131A.255(3); Or Const, Art XV, § 10(6) (for personal property, requiring proof by preponderance of evidence and, for real property, clear and convincing evidence). And for cash, weapons, or negotiable instruments, if the agency establishes that the items "were found in close

proximity to controlled substances or to instrumentalities of prohibited conduct," then the agency bears no burden of proof as to the remaining elements; instead, the person claiming the items bears the burden to prove that the cash, weapons, or negotiable instruments are *not* proceeds or instrumentalities of prohibited conduct. ORS 131A.255(5).

b. Applying the Court's analytical framework to ORS chapter 131A

As described above, to determine whether the county's civil forfeiture action violated claimant's rights under the Fifth Amendment's Double Jeopardy Clause, we employ the two-part inquiry articulated in *Ursery*, informed by *Selness*'s application of that analysis to Oregon forfeiture law.

According to the county, the new constitutional limitations, and the new statutory framework incorporating those limitations, have retained an overall forfeiture scheme that is neither intended to be criminal punishment nor in effect the equivalent of criminal punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment. Therefore, the county urges this court to reach the same conclusion that we reached regarding the proceeding in *Selness*.

Claimant disagrees. She contends that the voters that initially adopted constitutional limitations on civil forfeiture intended forfeiture proceedings in Oregon to be criminal and punitive. She also argues that, regardless of intent, civil forfeiture in Oregon is "so punitive in effect

as to constitute criminal punishment," thus implicating federal double jeopardy prohibitions.[10]

As we will explain, we reach the same conclusion about the current civil forfeiture framework that we reached when examining the forfeiture at issue in *Selness*: "[T]he forfeiture scheme [under current Oregon law] is 'neither punishment nor criminal for purposes of the [Fifth Amendment's] Double Jeopardy Clause.'" *Selness*, 334 Ore. at 542 (quoting *Ursery*, 518 U.S. at 292 (third brackets in *Selness*)).

Turning first to whether the current forfeiture sanction is intended to serve a criminal purpose, it is significant that the text of the current constitutional and statutory provisions includes the same indications that, in *Selness*, persuaded us that the statute demonstrated, "on its face, the legislature's intent that it be remedial and nonpunitive." *See* 334 Ore. at 541-42. Most significantly, as in *Selness*, the legislature again authorized forfeiture that proceeds through the mechanism of an *in rem* action, a mechanism that the constitutional limitations do not prohibit. ORS 131A.225(1); Or Const, Art XV, § 10. In other words, Oregon law has "specifically structured these

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10. A substantial portion of claimant's brief also raises reasons why, in her view, civil forfeiture is bad policy for Oregon. But we decline to consider those arguments. The only question before this court is whether this forfeiture proceeding violated claimant's federal right against double jeopardy. *See State v. Atkinson*, 298 Ore. 1, 6, 688 P2d 832 (1984) (explaining that this court is "a judicial, not a legislative body," and that it "is not our function to decide" matters of policy).

forfeitures to be impersonal by targeting the property itself." *Ursery*, 518 U.S. at 289. In addition, references to the proceeding as a "civil forfeiture" pervade both ORS chapter 131A and Article XV, section 10. Thus, as in *Selness*, current forfeiture law "announces, on its face, the legislature's intent that it be remedial and nonpunitive." 334 Ore. at 541-42; *see* ORS 131A.010(5) (stating that "any remedy under this chapter is remedial and not punitive").

As we explained in *Selness*, those designations of the sanction as a "civil forfeiture" that proceeds as an "*in rem*" action, alone, satisfy the first *Ursery* inquiry and give rise to "a presumption that" the proceedings under current forfeiture law are not subject to federal double jeopardy prohibitions. *See* 334 Ore. at 541 (describing significance that *Ursery* assigned to those designations). Indeed, the legislature's designation of a "civil" and "*in rem*" forfeiture proceeding in ORS chapter 131A has heightened significance because we presume that the legislature was aware of the emphasis that both *Ursery* and *Selness* assigned to those designations. *See OR-OSHA v. CBI Servs.*, 356 Ore. 577, 593, 341 P3d 701 (2014) (explaining that a statute's context includes judicial "decisions that existed at the time that the legislature enacted" the statute at issue). Those cases make it clear that the most significant characteristics of a forfeiture that is civil and remedial, and thus not criminal punishment for purposes of the Double Jeopardy Clause, are that the forfeiture is effectuated through an *in rem* action that has been given a "civil" designation.

The legislature could have departed from either characteristic when it adopted the new comprehensive forfeiture framework—indeed, when the legislature adopted ORS chapter 131A, Oregon law already included statutes authorizing and specifying procedures for "criminal forfeiture." *See* Or Laws 2005, chapter 830 (codified at ORS 131.550-131.604). But the legislature, instead, chose to authorize a separate *in rem* civil forfeiture proceeding that "does not affect the application of any other civil or criminal remedy under any other provision of law." ORS 131A.010(5). Those key characteristics of the statute were enough to persuade us in *Selness* that the statutory scheme "[c]learly" established that the legislature intended the forfeiture to be civil and remedial. 334 Ore. at 541. And they are enough to persuade us here as well, but other provisions of the forfeiture laws reinforce that conclusion.[11]

First, the legislature's intent to authorize a remedial, civil sanction is confirmed by the statute's express

11. We do not suggest that the legislature, by applying a "civil, *in rem*" label, can preclude a court from later concluding that a forfeiture action implicates double jeopardy protections. Indeed, despite adopting characteristics that create a "presumption" under federal law that the forfeiture does not implicate double jeopardy, *see Selness*, 334 Ore. at 541, the legislature apparently recognized that a court might eventually conclude otherwise—under state or federal law. That recognition is reflected in ORS 131A.265 and 131A.270, which provide for stays or consolidation of related criminal and civil forfeiture actions and which specify that a defendant's motion to stay a forfeiture or any opposition by the defendant to consolidation "constitutes a waiver of double jeopardy" by the defendant.

indications of a nonpunitive purpose. In *Selness*, this court pointed to the legislative findings that the forfeiture "remedy" under the Act was "intended to be remedial and not punitive" as "clearly express[ing] a civil intent." 334 Ore. at 536. Current Oregon law contains an identical statement of purpose in ORS 131A.010(5). Moreover, as was true in *Selness*, both the statutes and constitution permit forfeiture of property owned by a person who has not been convicted of a crime if the person "should have known that the property was proceeds of prohibited conduct" or "[a]cquiesced in the prohibited conduct." ORS 131A.255(2); Or Const, Art XV, § 10(5) (providing the same). As the Court explained in *Ursery*, forfeiture in that context serves "important nonpunitive goals" of "encourage[ing] property owners to take care in managing their property and ensur[ing] that they will not permit that property to be used for illegal purposes." 518 U.S. at 290.

Oregon's civil forfeiture laws also incorporate what the Court in *Ursery* and *89 Firearms* identified as other "'distinctly civil procedures'" for the authorized forfeiture that further point to an intent to authorize forfeiture as a civil, remedial sanction. *Ursery*, 518 U.S. at 289 (quoting *89 Firearms*, 465 U.S. at 363). Those procedures include that actual notice to interested persons is not always necessary, that forfeiture can proceed through a summary procedure if no claim is filed, and that the state is held to a standard of proof that in all cases is lower than the criminal "beyond a reasonable doubt" standard. *See* ORS 131A.200(1) (providing that the agency may seek an *ex parte* forfeiture judgment if no timely claim to

the property was filed and no person is "known to have an interest, other than a person who is believed by the forfeiting agency to have engaged in prohibited conduct"); ORS 131A.315 (providing circumstances for a default forfeiture judgment); ORS 131A.150(4) (requiring only that "forfeiting agency shall make reasonable efforts to serve a forfeiture notice on all persons known to have an interest in the seized property"); ORS 131A.255(3) (requiring proof by preponderance of evidence for personal property and, for real property, clear and convincing evidence). The Court in *Ursery* and *89 Firearms* identified the same "'distinctly civil procedures'" as secondary indications confirming that Congress had intended to create a civil sanction. *Ursery*, 518 U.S. at 289 (quoting *89 Firearms*, 465 U.S. at 363). As the Court reasoned in *Ursery*, by "creating such distinctly civil procedures for forfeitures," the legislature indicated "clearly that it intended a civil, not a criminal sanction." 518 U.S. at 289 (internal quotation marks and brackets omitted).

We thus have no doubt that the legislature intended to authorize a forfeiture that is a civil, remedial sanction, rather than a criminal, punitive sanction, resolving the first *Ursery* inquiry. Indeed, neither the Court of Appeals nor claimant have disputed that legislative intent or disputed that, in giving effect to that intent, the legislature enacted a forfeiture scheme that conforms to the limitations on civil forfeiture imposed by Article XV, section 10. And given that intent, only "the clearest proof that the purpose and effect of the forfeiture are punitive will suffice to override [the legislature's] manifest preference for a civil sanction." *89 Firearms*, 465 U.S. at 365 (internal quotation marks omitted).

The second *Ursery* inquiry requires us to assess whether, despite the legislature's intent, the forfeiture proceedings are so punitive in form and effect as to render them criminal. When concluding that the forfeiture at issue in *Ursery* was not in effect a criminal punishment, the Court identified as "[m]ost significant" the fact that the forfeiture statutes, "while perhaps having certain punitive aspects, serve important nonpunitive goals." 518 U.S. at 290. The same was true of the forfeiture that we considered in *Selness*, and the same is true of civil forfeiture under current Oregon law.

In *Ursery*, the Court described the forfeiture at issue as serving the nonpunitive goals of ensuring that property is not used for illegal purposes and, in the case of proceeds, ensuring "that persons do not profit from their illegal acts." 518 U.S. at 290-91. And *Selness*, similarly, identified provisions of the forfeiture statute that "suggest, and are consistent with, remedial purposes," specifically "(1) to render the sale and manufacture of illegal drugs unprofitable by confiscating the proceeds of those activities; (2) to make those activities more difficult by confiscating the tools and property that have made those activities possible; and (3) to reimburse governments for their costs in enforcing drug laws." 334 Ore. at 536-37 (citing Or Laws 1989, ch 791, § 1(a), (c); Or Laws 1989, ch 791, § 3).

Current Oregon forfeiture law also contains provisions that suggest, and are consistent with, those same remedial aims. *See* Or Const, Art XV, § 10(2)(d) (stating principle that "[p]roceeds from forfeited property should be used

for treatment of drug abuse, unless otherwise specified"); Or Const, Art XV, § 10(2)(c) (specifying distribution of net forfeiture proceeds "[t]o the State or any of its political subdivisions to be used exclusively for drug treatment, unless another disposition is specially provided by law"); ORS 131A.010(1)(c) (finding that "[g]overnments attempting to respond to prohibited conduct require additional resources"); ORS 131A.020(4), (6), (7) (specifying that "all proceeds of prohibited conduct" are subject to forfeiture as well as "all conveyances" that "are used in prohibited conduct or that are used to facilitate prohibited conduct" and "[a]ll real property" used "to commit or facilitate prohibited conduct"); ORS 131A.365(5) (providing that the state shall use a portion of forfeiture proceeds to fund the Criminal Justice Revolving Account and Special Crime and Forfeiture Account).

Nevertheless, according to claimant, several aspects of the constitutional forfeiture limitations require us to reach a different answer about the essential character of the current civil forfeiture framework than we reached in *Selness*. She points to the statement of principles in Article XV, section 10, which she views as "confining forfeiture to circumstances that promote the traditional aims of punishment—retribution and deterrence," and she points to several substantive provisions. Claimant contends that Article XV, section 10, has drastically changed forfeiture in Oregon to require "a criminal conviction as a prerequisite to obtaining a forfeiture judgment," a direct causal relationship between "the underlying criminal conduct" and the property to be forfeited, and a "substantially proportional" relationship between

the value of the property and the "underlying criminal conduct." She urges us to conclude that, as a result of those changes, Oregon's civil forfeiture law must be regarded as criminal punishment under the considerations described in the *Mendoza-Martinez* case.[12]

As an initial matter, claimant is mistaken about the significance of the reference in the statement of principles to what she views as promoting "retribution and deterrence." The Court in *Ursery* emphasized that, although promoting a purpose of deterrence generally can suggest that a sanction is criminal, the factor is not meaningful when evaluating a sanction of forfeiture, because forfeiture "serves a deterrent purpose distinct from any punitive purpose." 518 U.S. at 292 (internal quotation marks omitted). We reasoned similarly in *Selness*, in which the defendants had pointed to "the presence of a traditionally criminal legislative purpose of deterring prohibited conduct and the inclusion of an 'innocent owner' defense"—meaning that forfeiture was tied to the owner's criminal activity—as making the forfeiture proceeding criminal in nature. 334 Ore. at 542. We dismissed those aspects of the law as "aspects that the court in *Ursery* expressly dismissed as inconsequential." *Id.*

12. As described above, the considerations listed in *Mendoza-Martinez* were also listed in *Ward*, and the Court in *Ursery* explored how those factors applied in the context of a civil forfeiture, concluding that they "tend[ed] to support a conclusion that" forfeitures under the statutes at issue "are civil proceedings." 518 U.S. at 290-92 (citing *Ward*, 448 U.S. at 247-48, 247 n 7, 249).

Claimant is also mistaken about the significance of the proportionality requirement. Although claimant is correct that Article XV, section 10, provides that forfeiture "may not be excessive and shall be substantially proportional to the specific conduct for which the owner of the property has been convicted," claimant is mistaken about the significance of that provision. The forfeiture law that we considered in *Selness*, also had a provision requiring the court to consider upon request whether the amount of forfeiture was "excessive," based on factors including the value of the property "in relation to the criminal culpability of the person or persons engaging in the prohibited conduct." 334 Ore. at 520 n 7, 537 (citing Or Laws 1993, ch 699, §§ 13-15). And we characterized those provisions as suggesting "an intent to avoid punitive effects." *Id.* at 537; *see also Ursery*, 518 U.S. at 287 (explaining that, although the forfeiture was subject to review for excessiveness, "this does not mean, however, that those forfeitures are so punitive as to constitute punishment for the purposes of double jeopardy").

The remainder of claimant's argument regarding what she views as significant changes to Oregon forfeiture law rests in part on premises that are unsound. Despite claimant's characterization to the contrary, neither Article XV, section 10, nor the statutory provisions that incorporate those protections, require a conviction as a prerequisite to obtaining a forfeiture judgment in all cases. Rather, both the constitution and the controlling statutes permit forfeiture under certain circumstances without proof that the owner, or indeed anyone, was convicted of a crime. Or Const, Art XV, § 10(5)(b), (c) (permitting

forfeiture under certain circumstances if the claimant "knew or should have known that the property constituted proceeds or an instrumentality of criminal conduct," or if the claimant "knew of the criminal conduct and failed to take reasonable action under the circumstances to terminate the criminal conduct or prevent use of the property to commit or facilitate the criminal conduct"); *id.* § 10(9) (permitting forfeiture without any proof of a conviction "if, following notice to all persons known to have an interest or who may have an interest, no person claims an interest in the seized property"); *see* ORS 131A.200(1) (permitting *ex parte* forfeiture of personal property without proof of conviction if no timely claim has been filed); ORS 131A.225(4) (specifying that complaint initiating forfeiture action "need not allege that any claimant has been convicted of a crime"); ORS 131A.315 (providing for default judgment of forfeiture without proof of conviction if there is no claim or responsive pleading in the action).

Nor do either the constitutional or statutory provisions require a direct causal relationship between the underlying prohibited conduct and the property to be forfeited. Instead, both permit forfeiture of property that is the proceeds or an instrumentality of "one or more other crimes similar to the crime for which the person was convicted." ORS 131A.255(1)(c), (d); Or Const, Art XV, § 10(3)(c), (d).

Although we recognize that the forfeiture sanction under current Oregon law is generally tied to a conviction in a way that the forfeiture at issue in *Selness* may not

have been, the need to prove a criminal conviction of the owner in *some* forfeiture actions does not establish that forfeiture under Oregon law is necessarily equivalent to criminal punishment. *See 89 Firearms*, 465 U.S. at 366 (reasoning that "[w]hat overlap there is between the two sanctions is not sufficient to persuade [the Court] that the forfeiture proceeding may not legitimately be viewed as civil in nature"). Indeed, as the Court in *Ursery* emphasized, "at common law, not only was it the case that a criminal conviction did not *bar* a civil forfeiture, but, in fact, the civil forfeiture could not be *instituted* unless a criminal conviction had already been obtained." 518 U.S. at 275 (emphases in original). Tying a sanction to criminal activity can be some indication that the sanction is a criminal penalty, but, "[b]y itself, the fact that a forfeiture statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal." *Id.* at 292; *see Selness*, 334 Ore. at 541 (describing *Ursery* as having "expressly rejected arguments that the statute was shown to be punitive by the fact that it tied forfeiture to criminal activity").

It might be tempting to ignore the categories of forfeiture under Oregon law that do not require a conviction of the owner, and to simply ask whether a forfeiture proceeding "is criminal in nature and effect" when the forfeiture depends on proof that the claimant has already been convicted of prohibited conduct. But this court held in *Selness* that an owner's appearance or nonappearance cannot be the basis for determining whether the forfeiture proceeding puts a property owner "in jeopardy in the constitutional sense," because "[r]ealistically

a property owner's decision to file a claim in a forfeiture proceeding under [Oregon forfeiture law], has no effect on the essential character of that proceeding." 334 Ore. at 524. The question before us is whether the essential character of forfeiture proceedings under current Oregon law is now "so punitive in form and effect as to render them criminal despite [the legislature's] intent to the contrary," *Ursery*, 518 U.S. at 290, and the answer to that question must be the same regardless of whether the owner appears, *Selness*, 334 Ore. at 524. And because claimant has not made an argument based on the specific circumstances of this forfeiture proceeding, it must be that "the overall forfeiture scheme" under current Oregon law is effectively criminal in its form and effect. Given that neither the constitution nor the statutory provisions require proof of a conviction when the owner fails to appear, the character of the overall civil forfeiture scheme under current Oregon law "cannot be said to be co-extensive with the criminal penalty." *89 Firearms*, 465 U.S. at 366.

The Court in *89 Firearms* ultimately concluded that none of the other *Mendoza-Martinez* factors lent "any support" to a view that the forfeiture proceeding was punitive and "criminal in nature." 465 U.S. at 365. The Court reached the same conclusion in *Ursery*, explaining that the considerations listed in *Ward* "tend[ed] to support a conclusion that" forfeitures under the statutes at issue "are civil proceedings." 518 U.S. at 290-92. And we reached the same conclusion in *Selness*. There, this court considered the "aspects of the overall scheme that defendants tout as indicative of the statute's overwhelmingly criminal nature," but we were not persuaded. 334 Ore. at 542. We

concluded that the defendants' "Fifth Amendment double jeopardy claim cannot prevail under the *Ursery* analysis" because the "forfeiture scheme" at issue in *Selness* was "indistinguishable, for purposes of the present analysis, from the forfeiture scheme that the *Ursery* court held to be civil." *Id.* at 541-42. As was true in *Selness*, claimant's arguments fail to persuade us that the civil *in rem* forfeiture authorized under current Oregon law is "so punitive either in purpose or effect as to be equivalent to a criminal proceeding." *Id.* at 541(internal quotations omitted).

In arguing that we must reach a different conclusion regarding the forfeiture authorized under current Oregon law, claimant argues that voters in 2000 intended Article XV, section 10, to restrict civil forfeiture to a sanction so close to criminal punishment that it amounts to "jeopardy" as the Supreme Court understands that term. The Court of Appeals was persuaded, concluding that those voters intended to "[i]n effect * * * reject[] the legal fiction underlying *in rem* forfeitures—that property itself can be guilty so as to allow the government to take it—and replace[] it with an *in personam* theory of forfeiture that implicates double jeopardy." *Yamhill County*, 324 Ore. App. at 423.

We acknowledge that the sources on which the Court of Appeals relied suggest an intent to limit forfeiture to property of a person who has been convicted of a crime. As indicated above, the text of the original measure specified as a statement of principle that "[t]he property of a person should not be forfeited in a forfeiture proceeding by

government unless and until that person is convicted of a crime involving the property," Measure 3(2)(b) (2000), and the voters pamphlet described the "result of 'yes' vote" as: "requires conviction before property forfeiture," Official Voters' Pamphlet, General Election, Nov 7, 2000, 236. But the court's reliance on those general provisions overstates both the extent and the significance of the alignment between forfeiture and a criminal conviction under Measure 3. *See Ursery*, 518 U.S. at 275 (explaining that, "at common law, not only was it the case that a criminal conviction did not *bar* a civil forfeiture, but, in fact, the civil forfeiture could not be *instituted* unless a criminal conviction had already been obtained" (emphases in original)); Or Const, Art XV, § 10(9) (permitting forfeiture without a conviction "if, following notice to all persons known to have an interest or who may have an interest, no person claims an interest in the seized property").

Moreover, the focus on those indications of intent in 2000 overlooks two key obstacles: First, despite general expressions of intent, voters in 2000 did not change the characteristics of civil forfeiture that *Ursery* and *Selness* describe as the most significant indications of an intent to make forfeiture a civil, remedial sanction; and second, voters in 2008 substantially amended Article XV, section 10, in ways that demonstrate an intent to further distinguish civil forfeiture from criminal punishment.

When we determine the intent of voters who adopted an initiated ballot measure, we focus—as we do in the construction of statutes—on the measure's text and context, and on the measure's history "should it appear

useful to our analysis." *Knopp v. Griffin-Valade*, 372 Ore. 1, 9, 17, 543 P3d 1239 (2024) (internal quotations omitted). Examining the text of Measure 3, informed by *Ursery*, there are strong indications that voters did not intend to eliminate civil, remedial forfeiture in Oregon.

We base that conclusion on the same textual indications of intent that we identified in ORS chapter 131A and in the forfeiture statutes at issue in *Selness*. Our analysis of Measure 3 differs, however, in that the text of that measure did not purport to authorize any type of forfeiture proceeding; it only adopted limitations on when property may be forfeited. Thus, our understanding of whether the voters in 2000 intended to eliminate civil forfeiture is informed by the forfeiture mechanisms they allowed as much as by those that they prohibited.

Starting with what the Supreme Court has made clear are the most significant indications of intent, the constitutional provision adopted by Measure 3 repeatedly referred to the protections it creates as limitations applicable to "a civil forfeiture proceeding." Or Const, Art XV, § 10(3), (4) (2000). It also stated, as a principle and as a substantive provision, that proceeds from forfeiture would be distributed to serve a remedial purpose—to "be used for treatment of drug abuse unless otherwise specified by law for another purpose." *Id.* § 10(2)(d), (7).

Moreover, Measure 3 did nothing to prohibit the existing, "distinctly civil" procedural mechanisms for accomplishing forfeiture—most notably the existing use of an *in rem* procedure to accomplish forfeiture of

property connected to "prohibited conduct." *See Ursery*, 518 U.S. at 288 (explaining that Congress' intent that a forfeiture would be a civil proceeding was "'most clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute[s]'" (quoting *89 Firearms*, 465 U.S. at 363)). Claimant argues that the statement of principles at the outset of Measure 3 "appears to embrace an *in personam* theory of forfeiture," but the substantive provisions do not bear that out; nothing in Measure 3 requires forfeiture to be accomplished through an action against a person.

The fact that voters continued to allow "civil forfeiture" through an "*in rem*" proceeding is imbued with particular significance in the context of the existing and controlling guidance from the Court in *Ursery*, which had emphasized that *in rem* forfeitures are structured "to be impersonal by targeting the property itself" and that the Court's cases have adhered to the "remarkably consistent theme" that "[*i*]*n rem* civil forfeiture is a remedial civil sanction." *Ursery*, 518 U.S. at 278, 289. We generally presume that even laws enacted by voters "are enacted in light of the judicial decisions that preceded and bear directly on them." *Hazell v. Brown*, 352 Ore. 455, 465-66, 287 P3d 1079 (2012). And, applying that principle to voters in 2000, their choice to allow the legislature to continue authorizing "civil forfeiture" through an *in rem* action against the property significantly undermines claimant's premise that those voters intended to transform forfeiture into the kind of proceeding that the Supreme Court would consider to be "equivalent to a criminal proceeding" and subject to the Double Jeopardy Clause. *Selness*, 334 Ore. at 541.

In addition, claimant's premise that voters in 2000 intended to make all forfeiture actions the equivalent of a criminal proceeding faces a second significant obstacle because it ignores the substantial amendments that voters in 2008 made to the provisions of Article XV, section 10; it is those amended limitations that the legislature incorporated when it adopted the current civil forfeiture scheme in 2009. As we recently explained, "when interpreting a constitutional amendment adopted through an initiated ballot measure, we consider the voters' intent," and when later voters have made relevant amendments to the constitutional provisions, we must consider the intent of the later voters. *Knopp*, 372 Ore. at 9 (internal quotations omitted); *see id.* (considering intent of voters that approved the amended text of Article IV, section 15, which was at issue); *see also Hazell*, 352 Ore. at 465 (explaining that "we apply a similar method of analysis to statutes enacted by voter-initiated measures as we do to statutes enacted by the legislature, with the goal of discerning the intent of the voters who passed those initiatives into law").

In arguing that the text of Measure 3 points to an intent to transform forfeiture to a criminal punishment, claimant pointed to the statement of principles and to the general alignment between forfeiture of property and a criminal conviction of the owner. But, as mentioned above, voters in 2008 modified those provisions in three significant ways when they adopted Measure 53.

First, Measure 53 modified the "statement of principles" in Article XV, section 10, to specify that "[t]he

property of a person *generally* should not be forfeited in a forfeiture proceeding by government unless and until that person is convicted of a crime involving the property." Official Voters' Pamphlet, Primary Election, May 20, 2008, 84; Measure 53 §10(2)(b) (emphasis in original).

Second, Measure 53 modified what had been the general prohibition on forfeiture "until and unless the owner of the property is convicted of a crime" to make that provision expressly subject to exception, and the measure added new exceptions that expand the circumstances under which forfeiture does not require a conviction of the owner. *Id.* §10(3). Those exceptions permit forfeiture under certain circumstances, including if the "property constitutes proceeds or an instrumentality of crime committed by another person" and the claimant "knew or should have known that the property constituted proceeds or an instrumentality of criminal conduct," or if the claimant "knew of the criminal conduct and failed to take reasonable action under the circumstances to terminate the criminal conduct or prevent use of the property to commit or facilitate the criminal conduct." *Id.* § 10(5)(b), (c).

And third, Measure 53 substantially modified what had been a "clear and convincing" proof requirement to instead permit forfeiture upon proof by "a preponderance of the evidence" for personal property, and it entirely shifted the burden to the claimant if the property is "cash, weapons or negotiable instruments" that "were found in close proximity to controlled substances or to instrumentalities of criminal conduct." *Id.* § 10(6)(a), (b).

In other words, to the extent that the original text of Article XV, section 10, reflected an intent to closely align civil forfeiture with criminal punishment of the owner, the amendments in 2008 demonstrate an intent to attenuate the alignment between the two processes. *See Ursery*, 518 U.S. at 289 (citing "probable cause" standard of proof as a "distinctly civil" procedural mechanism, pointing to an intent to authorize forfeiture as a civil, remedial sanction); *89 Firearms*, 465 U.S. at 366 (explaining the significance of a decision to authorize a forfeiture remedy that "cannot be said to be co-extensive with the criminal penalty").

And in determining whether the civil forfeiture proceeding authorized under current Oregon law is intended to be equivalent to a criminal punishment, we must consider the intent of the voters who adopted the current constitutional limitations, which the legislature then incorporated into the current statutory framework. Taking into account all of the indications of intent, we are not persuaded that the forfeiture proceeding authorized under current law is intended to be equivalent to the criminal punishment that the Supreme Court would recognize as subject to the Double Jeopardy Clause.

In sum, we have explained why the forfeiture that the legislature authorized is neither intended to be criminal punishment nor is so punitive in purpose and effect that it must be viewed as criminal punishment for purposes of the federal Double Jeopardy Clause. Claimant does not contend that the legislatively authorized forfeiture is inconsistent with the limitations that Article XV, section 10, imposes—indeed, the legislature expressly

incorporated those limitations. And nothing about the provisions of Article XV, section 10, or its adoption, rises to the "clearest proof" that is required to overcome the presumption that the forfeiture authorized by Oregon law is not punishment for purposes of the Double Jeopardy Clause of the federal constitution. As was true in *Selness*, claimant's arguments fail to persuade us that the civil *in rem* forfeiture authorized under current Oregon law is distinguishable "for purposes of the present analysis, from the forfeiture scheme that the *Ursery* court held to be civil." 334 Ore. at 542.

III. CONCLUSION

Civil forfeiture under ORS chapter 131A is neither intended to be criminal punishment nor is the overall scheme so punitive in purpose or effect as to persuade us that the statutes amount to criminal punishment for the purpose of the Double Jeopardy Clause of the Fifth Amendment. Accordingly, we reverse the decision of the Court of Appeals and remand to that court for consideration of claimant's unaddressed assignments of error.[13]

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

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13. Claimant raised 53 assignments of error in the Court of Appeals, but the court's resolution of the double jeopardy challenge made it unnecessary for the court to address—and the court did not address—claimant's remaining assignments of error.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE STATE OF OREGON, FILED MARCH 8, 2023

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

A173574
Yamhill County Circuit Court
18CV37372

YAMHILL COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON AND FORFEITING AGENCY, ON BEHALF OF THE YAMHILL COUNTY INTERAGENCY NARCOTICS TEAM (YCINT) SEIZING AGENCY,

Plaintiff-Respondent,

v.

REAL PROPERTY COMMONLY KNOWN AS: 11475 NW PIKE ROAD, YAMHILL, OREGON, YAMHILL COUNTY AND ANY RESIDENCE, BUILDINGS, OR STORAGE FACILITIES THEREON,

Defendant in rem.,

and

SHERYL LYNN SUBLET,

Claimant-Appellant.

Appendix B

Ladd J. Wiles, Judge.

Argued and submitted on May 20, 2021.

Before Kamins, Presiding Judge, and Lagesen, Chief Judge, and Jacquot, Judge.*

LAGESEN, C. J.

Reversed and remanded.

*Jacquot, J., *vice* James, J. pro tempore.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

[ ] No costs allowed.

[X] Costs allowed, payable by Respondent.

[ ] Costs allowed, to abide the outcome on remand, payable by

LAGESEN, C. J.

Historically—in Oregon and elsewhere—the law has provided for the forfeiture of property involved in criminal activity, regardless of the owner's involvement in any crime. The law has done so through a legal fiction: that property itself can be a guilty actor, entitling the government to take it.

In 2000, Oregonians rejected that historical approach to forfeiture. Concerned that people were being unjustly deprived of property as penalties for crimes they did not commit, Oregonians exercised the initiative power under Article IV, section 1(2)(a), of the Oregon Constitution to approve Ballot Measure 3 (2000), a constitutional amendment. That provision, now contained in Article XV, section 10, created new limitations on forfeiture.

Among other things, the constitution now generally requires a criminal conviction before property can be forfeited, allows only for forfeiture of the instrumentalities or proceeds of the specific crime of conviction or similar crimes, and specifies that the value of any property forfeited must be "substantially proportional" to the specific crime of conviction. *See generally* Oregon Const, Art XV, § 10. Oregonians' constitutional rejection of the historical character of forfeiture has led to the question before us: Do forfeiture proceedings in Oregon implicate the Double Jeopardy Clause of the Fifth Amendment, even when denominated as civil proceedings, in view of Oregonians' recasting of forfeiture's character in Article XV, section 10?

This appeal arises from a forfeiture proceeding under ORS chapter 131A, which governs "civil" forfeiture proceedings. Sheryl Sublet, claimant, was convicted pursuant to a plea bargain of two counts of unlawful delivery of between 100 and 499 grams of methamphetamine, ORS 475.890, and one count of felon in possession of a firearm, ORS 166.270. The drugs underlying the convictions were found in packages that law enforcement intercepted before

delivery; one of the packages was addressed to claimant's Yamhill County home. As part of her sentence, Sublet agreed to forfeit $50,000 in cashier's checks found in a search of her home after the packages were intercepted, but she did not agree to any other forfeitures.

After claimant had been convicted and sentenced, Yamhill County initiated this forfeiture proceeding under ORS 131A.020. The county sought the forfeiture of claimant's Yamhill County home based on her convictions. The trial court rejected claimant's contention that the proceeding should be dismissed on the ground that it violated the Fifth Amendment's prohibition on double jeopardy, a jury found in favor of the county, and the trial court entered a general judgment of forfeiture in favor of the county. Claimant appealed, assigning error to, among other rulings, the trial court's denial of her motion to dismiss on the grounds of double jeopardy.

For the reasons that follow, we conclude that, as a result of Oregonians' adoption of Article XV, section 10, of the Oregon Constitution, the forfeiture of real property is criminal in nature for purposes of the Fifth Amendment prohibition on double jeopardy. Accordingly, the prior criminal proceeding precluded this subsequent forfeiture proceeding against claimant. We therefore reverse and remand with directions to dismiss the complaint.

STANDARD OF REVIEW

Whether double jeopardy barred this proceeding presents a question of law, making our review for legal

error. *State v. Worth*, 274 Oregon App 1, 8, 360 P3d 536 (2015), *rev den*, 359 Oregon 667 (2016).

LEGAL BACKGROUND

To provide context, we start with an overview of the historical principles of forfeiture law (borrowing liberally from the United States Supreme Court's previous recounting of those principles), and the legal framework for determining when forfeiture proceedings implicate double jeopardy principles. We then provide an overview of Oregon forfeiture law, and how, as of the twenty-first century, Oregon chose to depart from the historical approach to forfeitures. We conclude by addressing how Oregon's unique constitutional choices lead to the conclusion that Oregon forfeiture proceedings like this one activate the Fifth Amendment's bar on double jeopardy.

Historically, the law has recognized two main types of forfeitures: civil *in rem* forfeitures and criminal *in personam* forfeitures. *See, e.g., United States v. Bajakajian*, 524 US 321, 327-34, 118 S Ct 2028, 141 L Ed 2d 314 (1998); *United States v. Ursery*, 518 US 267, 116 S Ct 2135, 135 L Ed 2d 549 (1996).

"Traditional *in rem* forfeitures were * * * not considered punishment against the individual for an offense." *Bajakajian*, 524 US at 331. Instead, "[t]he theory behind such forfeitures was the fiction that the action was directed against guilty property, rather than against the offender himself." *Id.* at 330 (internal quotation marks omitted). That is, "[t]he thing is here primarily considered

as the offender, or rather the offence is attached primarily to the thing[.]" *The Palmyra*, 25 US 1, 14, 12 Wheat 1, 6 L Ed 531 (1827).

In personam forfeitures, by contrast, "have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law." *Bajakajian*, 524 at 332. "Although *in personam* criminal forfeitures were well established in England at the time of the founding," American law generally did not allow for them until the latter half of the twentieth century. *Id.* at 332 & n 7.

Under Supreme Court precedent, the historical distinction between *in rem* forfeitures and *in personam* forfeitures is significant for the purpose of double jeopardy. *Ursery*, 518 US at 289. In general, *in rem* forfeitures are viewed as civil and, for that reason, do not implicate double jeopardy. *Id.* at 291 ("[I]t is absolutely clear that *in rem* civil forfeiture has not historically been regarded as punishment."). By contrast, *in personam* forfeitures—forfeitures intended as punishments for crimes—may implicate the double-jeopardy prohibition on multiple punishments for the same crime. *United States v. One Assortment of 89 Firearms*, 465 US 354, 362, 104 S Ct 1099, 79 L Ed 2d 361 (1984). As the Court has explained, "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. The question, then, is whether [the] forfeiture proceeding [at issue] is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial." *Id.* (internal citation omitted).

Appendix B

For many years, Oregon's approach to forfeiture tracked the approach of the nation, providing for *in rem* forfeitures of property without a criminal conviction. *See, e.g., Smith v. One Super Wild Cat*, 10 Oregon App 587, 590-91, 500 P2d 498 (1972) (discussing *in rem* nature of forfeiture and concluding that a prior conviction is not a prerequisite to forfeiture). A 1989 legislative act illustrates the historical approach: In that year, the legislature enacted provisions broadly authorizing the civil *in rem* forfeiture of currency and real and personal property involved in violations of the controlled substances law, ORS chapter 475. *See* Oregon Laws 1989, ch 791, §§ 3, 2(11) (defining the scope of forfeitures governed by the chapter).[1] Consistent with the historical understanding of *in rem* forfeitures, the legislature did not condition forfeiture on the state having obtained a criminal conviction or identify forfeiture as being a punishment for the crime. *See generally* Oregon Laws 1989, ch 791. Rather, the legislature explained that it found the forfeiture provisions were needed because, among other reasons, "[t]ransactions involving property subject to forfeiture under this Act escape taxation," and "[t]here is a need to provide for the forfeiture of certain property subject to forfeiture under this Act." Oregon Laws 1989, ch 791, § 1(1)(b), (d). The legislature stated further that "[t]he application of any remedy under this Act is intended to be remedial and not punitive and shall not preclude or be precluded by the application of any previous or subsequent civil or criminal remedy under any other provision of law." Oregon Laws 1989, ch 791, § 1(5).

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1. For reasons not clear, Oregon Laws 1989, chapter 791, was never made a part of the Oregon Revised Statutes.

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Oregon's approach to forfeitures paralleled the historical and national approach until 2000. Then, through the initiative process, Oregonians opted to change direction. They adopted a measure, denominated "The Oregon Property Protection Act of 2000," that amended the state constitution to alter the character of forfeiture. Consequently, the constitution now generally precludes forfeiture without a criminal conviction and requires that the value of any forfeited property "be substantially proportional to the specific conduct for which the owner of the property has been convicted." Oregon Const, Art XV, § 10(3) (2000); Oregon Const, Art XV, § 10(7) (2008).[2]

As the many supportive statements in the Voters' Pamphlet reflect, proponents viewed the measure as necessary to combat the perceived abuse of the civil forfeiture process to take the property of people who had not been convicted of crimes. Proponents viewed this practice as contrary to the presumption of innocence, and as an affirmative injustice. A few examples illustrate the point:

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2. As discussed further below, Article XV, section 10, was amended via the referendum process in 2008 to allow for a different approach to animal forfeitures, and to forfeitures of money and weapons found along with controlled substances. The referendum also made several nonsubstantive organizational changes to the measure and added on additional circumstances in which property in the hands of a person without a criminal conviction could be forfeited. Those revisions generally do not affect our analysis in this case. We cite both the original provisions of Article XV, section 10, and the amended provisions of Article XV, section 10, when necessary for clarity.

Appendix B

> "**Measure 3 Ensures People are Innocent until Proven Guilty:**
>
> "Measure 3 will allow criminals to have their assets seized, but the government can't keep the property permanently unless it proves the person has committed a crime. The constitutional protection of 'innocent until proven guilty' will be applied to forfeiture cases for the first time."

Official Voters' Pamphlet, General Election, Nov 7, 2000, 239 (boldface in original).

> "Civil forfeitures occur an average of three times a day in Oregon. In 1999, police reported taking $2.1 million from 1,069 people. In 72 percent of those cases, no one was arrested, charged, or convicted of a crime.
>
> "**No one should ever lose their property to the government unless they are first convicted of a crime involving the use of their property**."

Id. (boldface in original).

> "While Oregon Gun Owners and the American Civil Liberties Union of Oregon don't often agree on issues, there is one ballot Measure we both support this year—Measure 3.

> "Here's why:
>
> "All of us support taking the profit out of crime.
>
> "All of us also believe in the constitutional protection of 'innocent until proven guilty.'
>
> "**We support Measure 3 because we want to make sure that the property taken by the government is really being taken from criminals rather than from innocent property owners**."

Id. at 240 (boldface in original).

> "Most of us are surprised to learn that the cherished concept of 'innocent until proven guilty,' a cornerstone of our criminal justice system, doesn't apply in civil forfeiture cases. Under current law, the government can keep an innocent person's home, car, life-savings, and personal belongings without a criminal charge or conviction. Far too many innocent Oregonians have suffered tragic personal losses under this flawed and unjust law."

Id. at 241.

> "**We take it for granted that people are innocent until proven guilty**.

> "This is one of the most cherished doctrines in America. However, Oregon police have exploited a loophole in our Constitution.
>
> "Through this loophole, the police are allowed to confiscate property, including cars, cash and land, from innocent Oregonians without arresting or charging them. This loophole, called Asset Forfeiture, has flipped justice on its head.
>
> "Right now, police can take and keep your cash, property, businesses and possessions on the suspicion that they may be linked to a crime. They do not have to prove it, either! Under asset forfeiture, the accusation is enough. **In Oregon, more than 70 percent of the people who lose their property to forfeiture are never convicted of a crime**.
>
> "Measure 3 closes this loophole by requiring a person to be proven guilty before their property can be permanently confiscated and sold.
>
> "We fear this sort of treatment when we travel to totalitarian countries, but we face it here in Oregon."

Id. at 243 (boldface in original).

To redress those perceived injustices, Measure 3 proposed that voters adopt four core constitutional principles regarding forfeiture:

> "Statement of principles. The people, in the exercise of the power reserved to them under the Constitution of the State of Oregon, declare that:
>
> "(a) A basic tenet of a democratic society is that a person is presumed innocent and should not be punished until proven guilty;
>
> "(b) The property of a person should not be forfeited in a forfeiture proceeding by government unless and until that person is convicted of a crime involving the property;
>
> "(c) The value of property forfeited should be proportional to the specific conduct for which the owner of the property has been convicted; and
>
> "(d) Proceeds from forfeited property should be used for treatment of drug abuse unless otherwise specified by law for another purpose."

Measure 3 (2000), § 10(2); *see also* Measure 53 (2008), § 10(2).

Under the provision adopted by voters in 2000, as amended in 2008, unless a specified exception applies, a

criminal conviction of the person claiming the property is a prerequisite to the entry of a forfeiture judgment. Oregon Const, Art XV, § 10(3). To be subject to forfeiture, property must constitute an instrumentality or proceeds of the crime of conviction or an instrumentality of a crime similar to the crime of conviction. *Id.* The property of a person who has not been convicted of a crime is subject to forfeiture if the person consents to the forfeiture, or if the "forfeiting agency" demonstrates that the property is an instrumentality or proceeds of a crime committed by another person, and the property claimant "took the property with the intent to defeat forfeiture of the property;" the property claimant "knew or should have known that the property constituted proceeds or an instrumentality of criminal conduct;" or the property claimant "acquiesced in the criminal conduct." *Id.* § 10(5).

The constitution also places limits on the value of property that may be taken by way of forfeiture, linking it to the crime of conviction allowing for the forfeiture: "The value of the property forfeited under the provisions of this section may not be excessive and shall be substantially proportional to the specific conduct for which the owner of the property has been convicted." Oregon Const, Art XV, § 10(3) (2000); Oregon Const, Art XV, § 10(7) (2008).

Statements opposing the measure in 2000, which were outnumbered by statements in favor, urged that the measure should be rejected for a range of reasons, including that the measure would make it harder to take animals in cases of animal cruelty, harder to take vehicles from drunk drivers, and harder to shut down drug houses.

Official Voters' Pamphlet, General Election, Nov 7, 2000, 244-48. One opponent also observed that, consistent with the statements in favor, the measure made forfeiture in Oregon a criminal matter. The opponent stated further that, by doing so, Oregonians risked requiring the state to choose between prosecuting a crime and forfeiture:

> "The people who are behind Measure 3 want to abolish forfeiture. Measure 3 may accomplish this. In 1989 we were very careful to make forfeiture civil in nature. That way the state could pursue both the criminal case and the forfeiture. Measure 3 makes forfeiture criminal in nature. Therefore the state may have to choose between a criminal prosecution or forfeiture."

Id. at 244.

After adopting it in 2000, Oregon voters amended Article XV, section 10, once, in 2008, via the referendum process. The amendment, proposed through Measure 53 (2008), was intended to clarify that the principles in the amendment did not apply either to animals or to abandoned property, such as cash left next to a large quantity of drugs. *See* Oregon Const, Art XV, § 10(6)(b), (10); *see also* Official Voter's Pamphlet, Primary Election, May 20, 2008, 84-85. The amendments also reorganized portions of the text and broadened the measure's reach to allow for the forfeiture of property constituting the instrumentalities or proceeds of crimes similar to the crime of conviction, subject, still, to the proportionality requirement. *See* Oregon Const, Art XV, §§ 10(2), (7).

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As noted, in 2009, after the passage of Measure 53, the legislature enacted new civil forfeiture provisions, now codified in ORS chapter 131A.[3] Oregon Laws 2009, ch 78. In so doing, the legislature expressly provided that "[a]ll forfeitures under the provisions of this chapter are subject to the limitations of section 10, Article XV of the Oregon Constitution." ORS 131A.010(2). Although the legislature stated that "the application of any remedy under this chapter is remedial and not punitive and does not affect the application of any other civil or criminal remedy under any other provision of law," ORS 131A.010(5), the legislature also addressed the application of double jeopardy. ORS 131A.265(2) authorizes a stay of forfeiture proceedings "upon the filing of criminal charges that are related to the prohibited conduct that is the basis for the action." When the motion for a stay in the forfeiture proceedings is filed "by the defendant in the related criminal proceeding," that is deemed to be "a waiver of double jeopardy by the defendant as to the forfeiture action and any related criminal proceeding." ORS 131A.265(2). Similarly, ORS 131A.270(2) allows for a forfeiture proceeding under ORS chapter 131A to "be consolidated for trial or other resolution with any related criminal proceeding." If a criminal defendant objects or seeks to sever the forfeiture proceeding from the criminal proceeding, that is deemed to be a waiver of double jeopardy: "Any objection by the defendant to the consolidation, or any motion by the defendant to sever the related criminal case from the

3. The legislature also for the first time enacted criminal forfeiture provisions in 2005, after Measure 3 (2000) passed; those provisions are contained in chapter 131. *See* Oregon Laws 2005, ch 803.

forfeiture action, constitutes a waiver of double jeopardy as to the related criminal action and the forfeiture action." ORS 131A.270(2).

ANALYSIS

With that historical background in mind, we turn to the question at hand: Whether, in view of Article XV, section 10, forfeiture proceedings in Oregon implicate the Fifth Amendment's double jeopardy prohibition and, in particular, its prohibition on successive punishments for the same criminal offense. *See Ursery*, 518 US at 273 (explaining that double jeopardy prohibits, among other things, an attempt to punish an offender criminally twice for the same offense).

Under Supreme Court precedent, determining whether forfeitures, as defined under Article XV, section 10, are criminal punishments under the Double Jeopardy Clause turns on whether (1) the voters, in enacting Article XV, section 10, intended for forfeiture proceedings to be criminal and punitive or civil and remedial; and (2) if civil, whether the proceedings nonetheless are "so punitive in fact" that they cannot "be viewed as civil." *Ursery*, 518 US at 288. Here, we do not reach the second part of the inquiry; we are persuaded that, by adopting Article XV, section 10, Oregon voters intended to make those forfeitures like the one at issue here punishment for a crime. In effect, by ratifying Article XV, section 10, Oregonians rejected the legal fiction underlying *in rem* forfeitures—that property itself can be guilty so as to allow the government to take it—and replaced it with an

in personam theory of forfeiture that implicates double jeopardy.

To begin, we acknowledge that we are working in unmapped territory. As best we can tell, no other state takes the approach to forfeiture embodied in Article XV, section 10, and neither the Oregon Supreme Court nor the United States Supreme Court has had occasion to address a scheme like the one embraced by Oregon voters. That means the answer to the question before us does not follow in an obvious way from previous case law; in that regard, we are appreciative of the arguments presented by the advocates.

That acknowledgment made, we turn to the task of ascertaining what, exactly, Oregon voters intended to accomplish by enacting Article XV, section 10. Did the voters intend to make forfeitures criminal punishments, even when imposed through civil processes? To determine whether Article XV, section 10, makes forfeitures punishment for crimes, we examine the text of the measure within its historical context. *Wittemyer v. City of Portland*, 361 Oregon 854, 860, 402 P3d 702 (2017). "In the case of constitutional amendments adopted by initiative, our analysis also includes sources of information that were available to the voters at the time the amendment was adopted, including the ballot title, information in the voters' pamphlet and contemporaneous news reports and editorials." *Id.* (internal quotation marks omitted). Our aim is to "determine the meaning of the provision at issue most likely understood by those who adopted it." *Couey v. Atkins*, 357 Oregon 460, 490-91, 355 P3d 866 (2015).

Applying that approach here, we conclude that the voters who adopted Article XV, section 10, "most likely" understood the provision to make the forfeitures that it covers criminal punishment, even while retaining a civil process for exacting them. In particular, the text of the measure, together with the statements in the voters' pamphlet about its effect, would have communicated to voters that they were making forfeitures a form of criminal punishment, even when a civil process is used to impose them.

We start with the text. As noted, as originally proposed to voters,[4] section 10(2) of Measure 3 (2000) established four core principles of forfeiture:

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4. As mentioned, Article XV, section 10, was amended via referendum in 2008. Although the amendments modified portions of the original text of Article XV, section 10, as explained to the voters, the modifications were in furtherance of provisions designed to (1) exempt animal forfeitures from the application of the provisions; and (2) allow for seizure and forfeiture of "cash, weapons or negotiable instruments * * * found in close proximity to controlled substances or to instrumentalities of criminal conduct." Oregon Const, Art XV, § 10(6)(b), (10); Official Voters' Pamphlet, Primary Election, May 20, 2008, 84-86. Although the 2008 amendment, among other things, added the word "generally" to section 10(2)(b), changing it from "[t]he property of a person should not be forfeited" absent a criminal conviction to "[t]he property of a person generally should not be forfeited" absent a criminal conviction, nothing in the 2008 referendum or the voters' pamphlet statements discussing it would have suggested that approval of the measure would change the overall concept of forfeiture as adopted by the voters in 2000 rather than simply exempt the identified categories from its reach.

> "Statement of principles. The people, in the exercise of the power reserved to them under the Constitution of the State of Oregon, declare that:
>
> "(a) A basic tenet of a democratic society is that a person is presumed innocent and should not be punished until proven guilty;
>
> "(b) The property of a person should not be forfeited in a forfeiture proceeding by government unless and until that person is convicted of a crime involving the property;
>
> "(c) The value of property forfeited should be proportional to the specific conduct for which the owner of the property has been convicted; and
>
> "(d) Proceeds from forfeited property should be used for treatment of drug abuse unless otherwise specified by law for another purpose."

The plain terms of the first three of those principles would have indicated to voters that the point of the measure was to restrict the government's use of forfeiture to the criminal context. The first principle, particularly when read in the context of the next two principles, would suggest to voters that forfeitures are a form of criminal punishment that should not be imposed absent a finding

of guilt. The second principle directly requires a criminal conviction as a prerequisite to forfeiture, a feature that would have strongly signaled to voters that, if they approved the measure, forfeitures would be a component of criminal punishment. The third principle underscores the notion of forfeitures as a form of punishment for criminal convictions by specifically requiring that forfeitures be proportional to criminal conduct. An ordinary voter reading that provision likely would understand it to be a variation on the idea that the punishment should fit the crime of conviction.

The substantive provisions of the measure reinforce the message of the principal provisions, echoing the thought that forfeitures are a form of criminal punishment. They do so in two respects. First, section 10(3) of the measure prohibits forfeiture absent a criminal conviction: "No judgment of forfeiture of property in a civil forfeiture proceeding by the State or any of its political subdivisions shall be allowed or entered until and unless the owner of the property is convicted of a crime in Oregon or another jurisdiction[.]" Measure 3 (2000), § 10(3). Requiring a criminal conviction as a prerequisite to forfeiture would suggest to voters that the measure would make forfeiture part of the criminal process. Second, section 10(3) of the 2000 measure (as proposed) imposes a proportionality requirement between the value of the forfeited property and the specific crime of conviction: "The value of the property forfeited under the provisions of this subsection shall not be excessive and

shall be substantially proportional to the specific conduct for which the owner of the property has been convicted."[5] *Id.* That proportionality requirement reiterates the idea that, in Oregon, forfeiture is a punishment that must be tailored to a particular crime of conviction.

Statements in the voters' pamphlet would have emphasized the message of the measure's text: that approval of the measure would make forfeiture a component of criminal punishment for a conviction, and bar its use against innocent persons. As the statements recounted above show, the general purpose of the measure was to right the wrong of state and local governments using civil forfeiture to take the money and property of people who had not been convicted of crimes, something the measure proposed to accomplish by prohibiting forfeitures absent criminal conviction.

Further, as mentioned, one of the measure's opponents stated that "Measure 3 makes forfeiture criminal in nature," and identified some of the consequences of making forfeiture criminal in character. Official Voters' Pamphlet, General Election, Nov 7, 2000, 244. No statement for or against the measure refuted the assertion that the measure would make "forfeiture criminal in nature." Given the array of statements urging approval of the measure so as to restore the presumption of innocence and ensure that only guilty persons are subject to forfeitures, along

5. The 2008 amendments moved the proportionality principle from section 3 to section 7 of Article XV.

with the unrefuted statement addressing the potential consequences of making forfeiture criminal, we are persuaded that Oregon voters most likely understood that, if they approved the measure, they would be making forfeiture a form of criminal punishment. That choice means that forfeiture proceedings governed by Article XV, section 10, implicate Fifth Amendment double jeopardy.

In arguing for a different conclusion, the county points to cases predating Article XV, section 10, and holding that Oregon's prior civil forfeiture scheme did not implicate double jeopardy. The county points further to the fact that many provisions of the civil forfeiture scheme laid out in ORS chapter 131A do not differ materially from the provisions of the prior civil forfeiture scheme held not to implicate double jeopardy. That means, in the county's view, that the current scheme also does not raise double jeopardy issues.

The county is correct that many aspects of civil forfeiture law have not changed in the years after those cases were decided. Something else, however, has. Since those cases were decided, Oregon voters recharacterized the nature of forfeiture in Oregon, and they did so in the constitution. As a result of the adoption of Article XV, section 10, forfeiture in Oregon, even when denominated as civil, bears little resemblance to the *in rem* forfeitures that the Supreme Court has held do not implicate double jeopardy. By generally requiring a person's criminal conviction as a prerequisite to the forfeiture of property,

and by requiring that the value of any property forfeited be substantially proportional to the specific crime of conviction, Oregonians have effectively rejected historical *in rem* civil forfeitures—along with the underlying legal fiction that property itself can be guilty so as to allow the government to take it—and adopted *in personam* criminal forfeitures, or something very close to them. As we understand the Supreme Court's decisions on the matter, one consequence of that choice to shift the theory of forfeiture from one of guilty property to one of guilty person is that double jeopardy applies.

The county also points out that Article XV, section 10, allows for forfeitures of property of persons who do not have a conviction in some instances. In the county's view, that makes it inferable that Article XV, section 10, was not intended to be punitive but, instead, remedial.

The county's point is a fair one. Ultimately, though, it does not convince us that voters intended forfeitures under Article XV, section 10, to be remedial in nature. In the limited circumstances in which the government may obtain the forfeiture of property in the hands of a person without a conviction, the constitution requires that (1) someone have been convicted; (2) the property be connected to the crime; and (3) the person possessing the property be morally culpable, because the person "took the property with the intent to defeat forfeiture" of the property, "knew or should have known that the property constituted proceeds or an instrumentality"

of a crime, or "acquiesced in the criminal conduct" leading to the conviction. Oregon Const, Art XV, § 10(5). Additionally, even when the property is in the hands of a person without the conviction, the constitution still requires that any forfeiture be proportional to the crime of conviction. Oregon Const, Art XV, § 10(7). Together, those provisions all tend to suggest that voters intended for the forfeitures covered by Article XV, section 10, to be proportionate punishment for criminal conduct, by, in all instances, (1) requiring a conviction as a prerequisite of forfeiture; (2) requiring culpability connected to a conviction for forfeitures of property in the hands of someone who does not have a conviction themselves; and (3) requiring that any forfeiture be proportionate to the offense of conviction. Again, this conception of forfeiture bears little resemblance to the *in rem* forfeitures that the Supreme Court has held do not implicate double jeopardy.

For the foregoing reasons, we conclude that forfeitures subject to Article XV, section 10, of the Oregon Constitution are criminal in nature for purpose of the Double Jeopardy Clause of the Fifth Amendment. That is because we conclude that voters, in approving Article XV, section 10, most likely understood that, by approving the measure, they were making forfeiture a form of criminal punishment.

We note that we do not appear to be alone in reaching that conclusion. Notwithstanding its characterization of ORS chapter 131A forfeitures as "remedial" rather than

"punitive," in ORS 131A.010, the legislature appears to have recognized that the character of forfeiture under Article XV, section 10, raises jeopardy issues; as noted, the legislature specifically addressed potential jeopardy issues in ORS 131A.265 and ORS 131A.270 by providing for stays and the consolidation of ORS chapter 131A forfeiture proceedings with criminal cases. That means that our conclusion that double jeopardy applies does not equate to a conclusion that forfeiture is not available; it simply means that forfeiture proceedings may need to be consolidated with criminal proceedings as allowed by ORS 131A.270 so as to avoid jeopardy's bar.

Reversed and remanded.

APPENDIX C — OREGON TRIAL COURT TRANSCRIPT EXCERPT

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

Case No. 18CV37372

No. A173574

YAMHILL COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON AND FORFEITING AGENCY, ON BEHALF OF THE YAMHILL COUNTY INTERAGENCY NARCOTICS TEAM (YCINT), SEIZING AGENCY,

Plaintiff,

vs.

REAL PROPERTY COMMONLY KNOWN AS: 11475 NW PIKE ROAD, YAMHILL, OREGON, YAMHILL COUNTY AND ANY RESIDENCE, BUILDINGS, OR STORAGE FACILITIES THEREON,

Defendant in rem,

vs.

SHERYL LYNN SUBLET,

Claimant.

Yamhill County
Circuit Court

Appendix C

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TRANSCRIPT OF PROCEEDINGS ON APPEAL

BE IT REMEMBERED that the above-entitled matter came on regularly for trial before the Honorable LADD J. WILES, Judge of the Circuit Court, Monday, April 22, 2019, at the Yamhill County Courthouse, McMinnville, Oregon.

* * *

[73]THE COURT: Well, I think I'm comfortable denying the motion on the first two arguments, on the double jeopardy and on the seizure versus seizure for forfeiture. I'm persuaded that the Plaintiff's here have the superior arguments.

The double jeopardy is not expressly included in the constitutional provision as linked up, even though it sort of blends the civil forfeiture with some components of criminal law, it doesn't explicitly introduce the protections against double jeopardy into the forfeiture law. It still has civil aspects to it. I think if I mean, I don't – there's a possible reference to it in a voter's pamphlet from a governor at one point in time. I mean, that's – I guess it's kind of persuasive, but I don't think that's a binding opinion on the courts. I guess I'm more persuaded by the State's argument as to the [74]double jeopardy.

The other one also for the seizure and seizure for forfeiture, I do find that you can have two separate ones.

Appendix C

Seizure under a warrant is different than seizure as it pertains to a forfeiture action. Even though it is a distinct issue from what Judge Stone addressed, there is some overlapping similarity and again, as I said, I think the State's argument is better there.

I am not as comfortable today issuing a ruling on the third argument about overbreadth. I don't think I quite saw the big issue there when I was reviewing the memos earlier and I want to look at that a little bit more.

* * *

APPENDIX D — ORDER DENYING PETITION FOR RECONSIDERATION OF THE SUPREME COURT OF THE STATE OF OREGON, FILED MARCH 6, 2025

IN THE SUPREME COURT
OF THE STATE OF OREGON

Oregon Court of Appeals
A173574

S070217

YAMHILL COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON AND FORFEITING AGENCY, ON BEHALF OF THE YAMHILL COUNTY INTERAGENCY NARCOTICS TEAM (YCINT) SEIZING AGENCY,

Plaintiff-Respondent,
Petitioner on Review,

v.

REAL PROPERTY COMMONLY KNOWN AS: 11475 NW PIKE ROAD, YAMHILL, OREGON, YAMHILL COUNTY AND ANY RESIDENCE, BUILDINGS, OR STORAGE FACILITIES THEREON,

Defendant in rem.,

and

SHERYL LYNN SUBLET,

Claimant-Appellant,
Respondent on Review.

Appendix D

Filed March 6, 2025

ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.

/s/ Meagan A. Flynn
Meagan A. Flynn
Chief Justice, Supreme Court
March 06, 2025

Bushong, J., not participating.