No. 23-1050

In the Supreme Court of the United States

LUIS SANCHEZ, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE RUTHERFORD INSTITUTE AND MANHATTAN INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does an innocent party permanently forfeit lawfully owned property to the government if the party files a petition, within 21 U.S.C. § 853(n)(2)'s thirty-day petitioning window, that does not fully comply with 21 U.S.C. § 853(n)(3)'s pleading criteria?

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INTEREST OF *AMICI CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has sponsored scholarship and filed briefs supporting economic freedom, property rights, and due process protections in forfeiture and exaction cases. *See*, *e.g.*, *Culley v. Marshall*, No. 22-585 (U.S. June 29, 2023); *Tyler v. Hennepin Cnty.*, No. 22-166 (U.S. May 25, 2023).

This case interests *amici* because it implicates the loss of property rights without due process.

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[1] In accordance with Rule 37.2, all counsel of record received timely notification of *amici*'s intent to file this brief. No party's counsel authored any part of this brief and nobody other than *amici,* their members, and their counsel made any monetary contribution intended to fund its preparation or submission.

BACKGROUND AND SUMMARY OF ARGUMENT

"The Reason why Men enter into Society, is the preservation of their Property." JOHN LOCKE, *Chapter XIX: Of the Dissolution of Government, in* THE SECOND TREATISE ON CIVIL GOVERNMENT 19 § 222 (1690). But if the Eleventh Circuit's interpretation of 21 U.S.C. § 853(n)—which deepens a growing split—stands, countless innocent people will forfeit their legally owned property without having their claim to that property heard by any adjudicatory body whatsoever.

In 1984, Congress amended the Comprehensive Drug Abuse Prevention and Control Act of 1970 to include the forfeiture provisions at issue here. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 301, 98 Stat. 2040, 2044–49. Now codified at 21 U.S.C. § 853, these provisions broadly require criminal defendants to forfeit property related to the commission of their crimes.

When an innocent owner's property happens to be seized in connection with such a criminal prosecution, the criminal defendant, having no interest in the property, may agree to forfeit the innocent owner's property to the government. *See* 21 U.S.C. §§ 853(a), (n) (requiring forfeiture before third parties can assert their property interest). This sometimes happens when the government requires forfeiture of property by a criminal defendant as part of a plea deal. *See, e.g.*, Appendix to Petitioner's Petition for Writ of Certiorari at App. 18 (Pet. App.).

But Congress included language to protect the interests of innocent third parties whose property inadvertently becomes subject to these proceedings.

See 21 U.S.C. § 853(n). The protections included in § 853 are sensible—and likely constitutionally compelled. *See Culley v. Marshall*, No. 22-585, slip op. at 6 (U.S. May 9, 2024) ("After [the government] seizes and seeks civil forfeiture of personal property, due process requires a timely forfeiture hearing."). Indeed, they are the only mechanism through which rightful owners may vindicate their property interests and avert gross injustices.

The Eleventh Circuit's interpretation of that statute conflicted with that applied in other Circuits, deepening a growing split. *See* Petitioner Br. at 15–20. This split is important, because the extent to which federal, state, and local governments seek to impose forfeiture has skyrocketed in recent years.[2]

Fortunately, this erroneous interpretation is readily correctable. The Eleventh Circuit has misread the plain language of the statute at issue; has misapplied the commands of the Federal Rules of Criminal and Civil Procedure and their common-law antecedents; and has adopted a rule that would render the statute at issue unconstitutional. At the least, its interpretation would raise serious doubts about the law's constitutionality. Any one of these grounds is sufficient for reversal. This Court should grant certiorari.

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[2] *See, e.g.*, LISA KNEPPER ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, at 5 (3d ed. 2020), https://ij.org/report/policing-for-profit-3 (describing the vast scope of forfeiture matters, including as an illustrative example that in "2018 alone, 42 states, the District of Columbia, and the U.S. departments of Justice and the Treasury forfeited over $3 billion").

ARGUMENT

I. The Eleventh Circuit's holding conflicts with § 853's plain text, long-existing procedural principles, and this Court's precedents.

Instead of adopting the natural reading of § 853(n) to protect rightful owners' property interests, the Eleventh Circuit read § 853(n) narrowly to require the unjust forfeiture of property when the owner's pleading is procedurally deficient but readily correctible. That interpretation is contrary to the statute's plain text, long-existing procedural principles, and this Court's precedents.

A. The petitioners timely filed within § 853(n)(2)'s petitioning window.

Section 853(n)(2) requires rightful owners seeking the return of their property to "petition … for a hearing" within thirty days. "Petition" in that Section is a verb, meaning "to ask for; solicit." *Petition,* WEBSTER'S NEW WORLD DICTIONARY 1064 (2d ed. coll. 1982). Thus, the literal statutory requirement is only that a petitioner "ask for" or "solicit" a hearing within thirty days. There is no dispute that the petitioners timely filed their initial petition. Pet. App. at App. 40, n.2 (initial petition filed within petitioning window as extended by the district court). That should have ended the analysis with respect to the statute's timing requirement.

Holding to the contrary, the Eleventh Circuit conflated the statute's *content* requirements, found in § 853(n)(3), with the distinct *timing* requirement found in § 853(n)(2). That approach conflicts with this Court's decision in *Edelman v. Lynchburg College*. *See*

535 U.S. 106, 108–09 (2002). In *Edelman*, the Court considered two separate provisions of Title VII of the Civil Rights Act of 1964, which (i) imposed a deadline within which a "charge" must be filed with the EEOC, and (ii) required that the charge be verified "in writing under oath or affirmation." *Id.* at 109, 112. The Court rejected the argument that either provision incorporated the other, reasoning that "Section 706(b) merely requires the verification of a charge, without saying when it must be verified," while "§ 706(e)(1) provides that a charge must be filed within a given period, without indicating whether the charge must be verified when filed." *Id.* at 112. So, too, here. Whatever content § 853(n)(3) requires,[3] nothing in § 853(n)(2) requires that content as a condition for timely soliciting a hearing.

Additionally, in *McIntosh v. United States*, this Court recently addressed a timing provision in Federal Rule of Criminal Procedure 32.2, which prescribes rules for criminal forfeiture and third-party ancillary proceedings. *See* 144 S. Ct. 980, 982 (2024). The Court applied rules of statutory interpretation, *id.* at 982, 990 (discussing *Dolan v. United States*, 560 U.S. 605 (2010)), and held that in a criminal forfeiture case, "Rule 32.2(b)(2)(B) is a time-related directive that, if missed, does not deprive the judge of her power to order forfeiture against the defendant." *Id.* at 990. The Court reasoned in part that "Rule 32.2(b)(2)(B) does not specify a consequence for

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[3] Among others, § 853(n)(3) requires that a "petition shall be signed by the petitioner under penalty of perjury." The petitioners submitted a declaration under penalty of perjury on a piece of paper separate from the petition itself. Pet. App. at App. 4.

noncompliance with its timing provisions" and, "[i]n the absence of such specification, courts will not in the ordinary course impose their own coercive sanction for noncompliance with a timing directive." *Id.* at 989 (internal quotation marks and citation omitted). The Court contrasted this with section (a) of Rule 32.2, which "provides that the Government's failure to include a forfeiture allegation in the indictment means that the court must not enter a judgment of forfeiture. The use of explicit language specifying a sanction in Rule 32.2(a) but not in Rule 32.2(b)(2)(B) cautions against inferring the same limitation in Rule 32.2(b)(2)(B)." *Id.* at 989–90 (internal quotation marks and citation omitted).

Just as failing to timely enter a preliminary order of forfeiture as required by Rule 32.2(b)(2)(B) does not deprive a judge of her power to order forfeiture, neither does failing to sign personally a timely filed petition as required under § 853(n)(3) deprive a party of her right to a hearing on the petition. Like Rule 32.2(b)(2)(B), §§ 853(n)(2) and (3) do not specify a consequence for noncompliance of a party not personally signing the petition within the filing timeline. Rather, § 853(o) provides that "[t]he provisions of this section shall be liberally construed to effectuate its remedial purposes." And while Rule 32.2(c)(1)(A) provides that a court "may" dismiss a petition for a substantive reason, such as a lack of standing or failure to state a claim, the Rule does not specify any consequence for noncompliance with a minor "procedural error" in the petition that can easily be amended and remedied. *See McIntosh*, 144 S. Ct. at 991.

B. Nothing in the statute precludes relation back to a timely filing.

Longstanding procedural principles permit a motion for leave to amend to relate back to an initial, timely filing, and nothing in the statute abrogates those principles. Those principles apply for several independent reasons, including the fact that applicable provisions of both the Federal Rules of Criminal Procedure and of Civil Procedure permit amendment and relation back. Further, as this Court has repeatedly held, the relation-back principle also applies of its own force as a longstanding background rule against which Congress is presumed to legislate.

Ironically, the district court itself demonstrated everyday procedural standards' applicability to a § 853(n) petition: Before denying leave to amend, the district court extended the petitioners' filing deadline beyond § 853(n)(2)'s thirty-day petitioning window. Pet. App. at App. 40 n.2 ("The Court granted Petitioners additional time to file their Petition."). If § 853(n)(2)'s petitioning window were "mandatory" and abrogated implicitly longstanding procedural principles like amendment and relation back, this ruling would have been the equivalent of entrapment. Pet. App. at App. 12. Rather, the district court's initial intuition, implicit in its extension, was correct: Nothing in § 853(n) nullifies the normal procedural practices that apply to district court proceedings.

1. Applicable provisions of the Criminal and Civil Rules permit amendment and relation back.

Section 853 is a criminal forfeiture statute. *See* § 301, 98 Stat. at 2044 (forfeiture provisions enacted

under header "Criminal Forfeiture"). As such, the Criminal Rules apply to § 853's provisions. *See* Fed. R. Crim. P. 32.2 (prescribing rules for criminal forfeiture proceedings). The Civil Rules also apply to certain aspects of criminal forfeiture proceedings; indeed, the Criminal Rules themselves look to the Civil Rules to effectuate forfeiture proceedings. *See* Fed. R. Crim. P. 32.2(b)(6), (b)(7), (c)(1)(B) (applying Civil Rules to forfeiture proceedings).[4] Provisions of both the Criminal and the Civil Rules provide for amendment and relation back to a timely filed petition.

For example, Criminal Rule 49(b)(4)—which governs signature requirements for filings (one of the alleged deficiencies here)—provides that "[t]he court must strike an unsigned paper *unless the omission is promptly corrected*," (emphasis added), plainly contemplating leave to amend a timely filing.

The Civil Rules also broadly permit amendment and relation back, and courts regularly grant leave to amend when dismissing claims. *See* 6 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1484 (3d ed. 2023) (noting "innumerable judicial pronouncements" that "court[s] should freely give leave when justice so requires"). Directly on point here, Civil Rule 15 provides: "An amendment to a

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[4] Other authorities confirm the Civil Rules' applicability to criminal forfeiture proceedings. *See* Fed. R. Crim. P. 32.2(c) advisory committee's note to 2000 amendment ("prevailing case law" is in accord with applying civil rules to motions to dismiss in ancillary forfeiture proceedings); *Pacheco v. Serendensky*, 393 F.3d 348, 352 (2d Cir. 2004) (applying Fed. R. Civ. P. 12(b) to § 853(n) proceeding); *United States v. Marion*, 562 F.3d 1330, 1341–42 (11th Cir. 2009) (same).

pleading relates back to the date of the original pleading when … the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—*or attempted to be set out*—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B) (emphasis added). The rule's reference to "pleadings" rather than "petitions" does not change the analysis. *See Scarborough v. Principi*, 541 U.S. 401, 417–19 (2004) (applying Rule 15's relation-back principle to fee application and rejecting argument that Rule 15 applies only to "pleadings").

The application of both the Criminal and Civil Rules reflects how civil forfeiture is a "hybrid" that "occupies a murky space between criminal forfeiture and ordinary government deprivations of property." *Culley*, slip op. at 2 (Sotomayor, J., dissenting). The government does not have to "comply with strict procedural rules" in civil forfeiture like it does to secure a criminal penalty; this "asymmetry" has made civil forfeiture "a booming business" for the government. *Id.* at 3 (Gorsuch, J., concurring). The "cash incentives … encourage [the government] to create labyrinthine processes for retrieving property in the hopes that innocent owners will abandon recovery," *id.* at 3 (Sotomayor, J., dissenting), or will simply fail due to a minor technical error—such as signing the wrong page of a timely filed petition. Thus, "procedural safeguards" for innocent owners—like Criminal Rule 49(b)(4) and Civil Rule 15(c)(1)(B)—help ensure that civil forfeiture is not "vulnerable to abuse." *See id.* Whether this Court looks to the Criminal Rules, the Civil Rules, or both, the result is the same: Section 853(n) petitioners may amend a timely filed petition.

2. The relation-back principle applies of its own force, as this Court has repeatedly held.

The relation-back principle also applies to § 853(n) of its own force. This Court has long held that statutes incorporate basic background principles unless those statutes expressly abrogate those principles. *See, e.g.*, *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 106 (2014) ("basic common law principles resolve" a statutory case); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005) (reading statute against backdrop of maritime law); *see generally* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 Harv. J.L. & Pub. Pol'y 1331 (2023) (statutes should be read against common law backdrop).

Relation back is such a principle. It "has its roots in the former federal equity practice and a number of state codes," this Court has affirmed its application for at least 130 years,[5] and nothing in § 853 purports to abrogate it. WRIGHT & MILLER, *supra*, at § 1496.

This Court has applied the relation-back principle to analogous facts several times. For example, in *Edelman*, this Court held that a "charge" of discrimination under the Civil Rights Act of 1964 could be amended out-of-time to supply a required oath verification. *See* 535 U.S. at 108–09. In doing so, this Court observed the relation-back principle's "long history," which both "persuades by its regularity over time" and "points to

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[5] *See, e.g.*, *Texas & P. Ry. Co. v. Cox*, 145 U.S. 593, 603–04 (1892) (permitting relation back); *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U.S. 570, 575–78 (1913) (same); *Seaboard Air Line Ry. v. Renn*, 241 U.S. 290, 293–94 (1916) (same); *New York Cent. & Hudson River R.R. Co. v. Kinney*, 260 U.S. 340, 344–45 (1922) (same).

tacit congressional approval … Congress being presumed to have known of this settled judicial treatment." *Id.* at 116–17.[6] Notably, this Court tied this history to forfeiture provisions, citing the civil forfeiture provisions of an admiralty statute and reasoning that when "a statute or supplemental rule requires an oath, courts have shown a high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing." *Id.* at 116 & n.11. Also relevant here, this Court noted that denying relation back would cause unsophisticated lay complainants to forfeit their rights inadvertently—exactly what happened in this case. *Id.* at 115.

More recently, in *Scarborough*, this Court held that a deficient application for attorney's fees under the EAJA could be amended out-of-time. 541 U.S. at 406. That result is significant because the EAJA's thirty-day filing deadline is more stringent than either the statute at issue in *Edelman* or § 853(n). Unlike § 853(n), the EAJA prescribes both timing and content requirements in the same section. *Id.* at 407–08; 28 U.S.C. § 2412(d)(1)(B) ("A party seeking an award ... shall, within thirty days ... submit to the court an application" that "shall" contain certain prescribed content). Still, failure to include the required content did not preclude the filing party from amending an application out-of-time to add that content. *Scarborough*, 541 U.S. at 419 ("[C]ounsel's initial omission of [a required] assertion … is not beyond repair."). Section 853(n)'s more permissive structure presents a much easier case, and the Court's reasoning applies even more readily here.

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[6] That presumption applies equally to the later-enacted § 853(n).

Other precedents of this Court are in accord.[7] Together, they present a clear line of cases counseling reversal.

C. The government cannot argue that it would be prejudiced by leave to amend.

Though prejudice to an opposing party may sometimes bar operation of the relation-back principle, there is no prejudice to the government here. *See Scarborough*, 541 U.S. at 422–23. The petitioners timely petitioned to recover their own property from the government, and the government had no ownership interest in that property at the time of their filing. *See* § 853(n)(7) (requiring disposition of "all petitions filed under this subsection" before title vests in government). The timely filing put both the government and the court on notice of the petitioners' property rights, which the Eleventh Circuit's refusal to grant leave to amend then extinguished. As "McIntosh failed to show prejudice sufficient to void the forfeiture order," the government here has likewise failed to show any prejudice sufficient to deny the property owners leave to amend their timely filed petition. *McIntosh*, 144 S. Ct. at 992 (internal quotation marks and citation omitted). Any prejudice has been suffered by the petitioners, not the government.

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[7] *See, e.g.*, *Becker v. Montgomery*, 532 U.S. 757, 765 (2001) (holding that notice of appeal could be amended out-of-time to add a required signature despite the jurisdictional nature of the notice's timing and content requirements); *see also supra* note 5.

II. The Eleventh Circuit's interpretation likely renders § 853(n) unconstitutional; this Court's constitutional avoidance canons therefore require reversal.

The result in this case would have surprised and dismayed the Framers. Just about everyone in this dispute—the courts, the government, and the bailee of the petitioners' currency—knows that the petitioners timely asserted their respective rights to the money. And if that currency really belongs to the petitioners, then the government's exploitation of a statutory technicality constitutes an unjustified (and unjust) windfall for the United States.

Newly analyzed evidence from the Founding suggests that the government was once far more solicitous of procedural rights in forfeiture cases. One scholar has argued ably that this solicitousness may have flowed from a Founding-Era understanding of forfeiture's constitutional bounds. The sort of forfeiture regime blessed by the Eleventh Circuit stretches those bounds to the point of ripping, rendering § 853(n) unconstitutional, or at the very least raising serious doubts as to its constitutionality. This Court's constitutional avoidance canons require overturning the lower court's wrongful ruling.

A. The Eleventh Circuit's reading of the statute is inconsistent with the original conception of procedural rights in forfeiture cases.

Alexander Hamilton would have given the money back.

In a recent article, Kevin Arlyck catalogs a noteworthy Founding-Era phenomenon: Secretaries of the Treasury almost always exercised their power to remit forfeitures whenever the subject of a forfeiture raised a plausible (even if unconvincing) excuse. *See* Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1452 (2019). The remission power was formally discretionary, but early treasury secretaries discussed their exercise of the power in a way that indicated an understanding of a constitutional backstop on the congressionally conferred discretion.

The Founders' robust conception of procedural rights in forfeiture cases represents a stark contrast to the government's modern approach in cases like this one. The Eleventh Circuit's interpretation of the statute grants freewheeling governmental discretion to disregard potentially meritorious claims. That is constitutionally problematic.

Forfeiture long predates the Founding. *See* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2457 (2016). For the Framers, forfeiture was part of the new republic's design. *See* LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 46 (1996). But after ratifying a Constitution that was (and remains) solicitous of property rights, the Founding Fathers set out to reconcile the practice of forfeiture with the nation's ideals.

In enacting a forfeiture regime, the First Congress concerned itself primarily with full collection of "the customs duties imposed on goods imported into the United States"—an important source of revenue for

the country in the 1700s. Arlyck, *supra*, at 1466.[8] Although the First Congress established a "harsh strict liability regime" for forfeiture, the executive moderated that regime by exercising its statutorily conferred "discretion to return forfeitable property." *Id.* at 1482. At Hamilton's urging, the 1790 Remission Act vested discretionary power in the treasury secretary to remit forfeitures upon petition from "any party interested in a seizure." *Id.* at 1484. And remit he did. Arlyck reports that between 1790 and 1807, the first three treasury secretaries—including Hamilton—"granted [at least in part] ninety-one percent of remission petitions." *Id.* at 1488.

Arlyck further demonstrates that "[t]he Secretaries accepted a broad range of excuses as justifications for" evading forfeiture: everything from the inconvenience of complying with customs regulation to "admitted carelessness in following the law." *Id.* at 1489. Moreover, the secretaries "remitted forfeitures despite misgivings about the veracity of petitioners' assertions" and "went to great lengths to ensure that claimants were able to make their cases," including self-investigation of claims. *Id.* at 1489–90; *see also id.*

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[8] At least one scholar has taken the position that "there is no longstanding tradition for using civil forfeiture outside the maritime, revenue, and war power fields." Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910, 1925 (1998); *see also Culley*, slip op. at 6 (Gorsuch, J., concurring) ("[I]t is far from clear to me whether the postdeprivation practices historically tolerated inside the admiralty, customs, and revenue contexts enjoy 'the sanction of settled usage' outside them."); *Leonard v. Texas*, 580 U.S. 1178, 1181 (2017) (mem.) (statement of Thomas, J., respecting the denial of certiorari) ("[H]istorical forfeiture laws ... were limited to a few specific subject matters, such as customs and piracy.").

at 1490–91 ("For Hamilton, this willingness to bend over backward in favor of petitioners was motivated by an appreciation of forfeiture's potentially severe consequences.").

If the statutes did not compel the government to "bend over backward in favor of petitioners," then what did? The Constitution is the likely explanation. When early treasury secretaries spoke of their discretion to remit forfeitures, their discussion of the issue sounded constitutional notes. Treasury Secretary Albert Gallatin opined in 1813 to Congress that "[h]e did not 'consider himself authorized' to deny remission (at least in part) if he believed there was no fraudulent intent," despite unfettered statutory discretion to do so and policy considerations cutting generally in the other direction. *Id.* at 1507–10. Hamilton explicitly used constitutional terms: Writing in support of a 1791 law that "included the kinds of fines and forfeitures found in customs regulations," Hamilton invoked multiple Eighth Amendment standards when he declared that the act's penalties "could not be considered 'either unusual or excessive'" *so long as* they were imposed only "for 'wilful and fraudulent breaches of an important law.'" *Id.* at 1512–13; *see also id.* at 1513 ("Hamilton's report offers … reason to think that, in his view, remission was necessary to preserve forfeiture's constitutionality.").

As Hamilton's insistence on "wilful and fraudulent breaches" indicates, concern was especially great for innocent owners whose property was subject to forfeiture. To be sure, this Court has rejected a constitutionally compelled innocent-owner defense in forfeiture cases. *See Bennis v. Michigan*, 516 U.S. 442 (1996). This brief takes no position whether *Bennis*

was rightly decided. Rather, it notes that "there is good reason to think that [early] Treasury Secretaries' generous remission practices were motivated by widespread Founding Era agreement that it was fundamentally unjust to seize private property in response to unintentional violations of the law." Arlyck, *supra*, at 1506. Particularly for innocent owners, the Founding-Era evidence demonstrates that forfeiture operated substantially less harshly in the country's early days than it does in the modern era. *See Culley*, slip op. at 8 (Gorsuch, J., concurring) ("Even in the areas where the law tolerated civil forfeiture, earlier generations tempered some of its harshest features.") (citing Arlyck, *supra*). Thus, "many large[] questions … about whether, and to what extent, contemporary civil forfeiture practices can be squared with the Constitution's promise of due process" remain "unresolved." *Id.* at 1. And while a complete defense to forfeiture may not follow from the Due Process Clause, the Constitution appears to demand a more robust conception of innocent owners' procedural rights in forfeiture cases than the Eleventh Circuit interpreted § 853(n) to establish.

When engaging in originalist inquiry, the fact that no one raised constitutional concerns about a given Founding-Era practice can be evidence that the practice was consistent with the Constitution's original meaning. *Cf.* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 281–82 (2021) (discussing the nondelegation doctrine). But to the extent that "the early history [is] apparently devoid of any constitutional challenges to particular forfeitures in court," despite the forfeiture regime's formal harshness, Arlyck observes that such

challenges were not necessary: "Innocent claimants seeking return of their property did not make constitutional arguments in court because they did not have to go to court at all." Arlyck, *supra*, at 1513–14; *see also id.* at 1514 ("Given the very high rate of success for remission petitions, claimants who could make colorable assertions of lack of fraudulent intent likely preferred remission's near-guaranteed path to relief than the expense and uncertainty of trial.").

Hamilton "repeatedly gave petitioners further opportunity to 'explain and put matters in a more satisfactory light, if they [could].'" *Id.* at 1491 (alterations deleted). Today, the government moves for default if you petition in a timely manner but sign the wrong page of the document. The historical evidence indicates that the Founding generation would have raised constitutional objections to such a practice.

B. This Court should apply constitutional avoidance canons to reverse.

This Court has formulated two versions of the constitutional avoidance canon: "unconstitutionality" and "doubts." *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 138 (2010) (citing John Copeland Nagle, Delaware & Hudson *Revisited*, 72 Notre Dame L. Rev. 1495, 1496 (1997)). The Eleventh Circuit's judgment must be reversed under either.

The unconstitutionality canon "maintains that when one interpretation of a statute would render it unconstitutional, the court should adopt any plausible interpretation that would save it." *Id.* at 138. Justice Story announced this construction in *United States v. Coombs*, 37 U.S. 72, 75–76 (1838):

> [When] the section admits of two interpretations … . [one of which] brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous.[9]

This canon has become a mainstay in case law. *See* Nagle, *supra*, at 1498 n.17 (collecting cases).

The "doubts" canon "maintains that when one interpretation of a statute would raise a serious constitutional question, the court should adopt any plausible interpretation of the statute that would avoid that question." Barrett, *supra*, at 138–39. Justice Edward White first articulated this canon in

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[9] Justice Story first described this canon while riding circuit in 1814: "But there is a construction, which although not favored by the exact letter, may yet well stand with the general scope of the statute, and give it a constitutional character. … In deference to the legislature, this construction ought to be adopted, if by law it may." *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 763, 766, 769 (C.C.D.N.H. 1814) (Story, J.) (holding a statute governing tenants' rights prospective only, after holding that owners, British subjects, did not "forfeit[] rights previously acquired" upon the American Revolution, including the right to sue or the right to continue holding land in the U.S.).

Justice Story thus believed that "while a court may not twist the text beyond what it will bear, a judge ought to eschew the best, but unconstitutional interpretation in favor of a less plausible, but constitutional one," and his opinions "reflect the general belief that Congress would prefer that a court adopt a saving construction." Barrett, *supra*, at 141–42.

United States v. Delaware & Hudson Co.: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." 213 U.S. 366, 408 (1909). Justice Brandeis, whose statement of the rule is better remembered, explained in 1936, "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *see also* Nagle, *supra*, at 1497.

This canon has endured. In more modern times, the Court has still deemed it a "cardinal principle." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 78 (1997) (citing *Ashwander*, 297 U.S. at 348). And just last Term, the Court bolstered its justification of its reading of a statute by explaining that even if the interpretation it adopted was "not the best one, [it] is at least 'fairly possible'—so the canon of constitutional avoidance would still counsel [the Court] to adopt it." *United States v. Hansen*, 599 U.S. 762, 781 (2023) (citing *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) for the doubts canon) (cleaned up).

This case presents this Court with an opportunity to employ either avoidance canon, depending on its ultimate confidence level about the correct resolution of the underlying constitutional issues that the holding

below raises.[10] If the Court determines that the Eleventh Circuit's interpretation of § 853(n) would render it unconstitutional, "the [C]ourt should adopt any plausible interpretation that would save it." Barrett, *supra*, at 138. As established, there is another plausible interpretation that would save § 853(n)—allowing amendments to a timely-filed petition to relate back to the original filing.

Alternatively, this Court can acknowledge—under the doubts canon—that the holding below is "susceptible of two constructions." *Delaware & Hudson Co.*, 213 U.S. at 408. The first—that an innocent party permanently forfeits lawfully owned property if the party petitions within § 853(n)(2)'s thirty-day petitioning window but does not fully comply with § 853(n)(3)'s pleading criteria—is an interpretation by "which grave and doubtful constitutional questions arise." *Id.* The second—that the statute allows for amendment that would preclude such a basis for forfeiture—is one by "which such questions are avoided." *Id.* The Court's "duty is," therefore, "to adopt the latter." *Id.*

Holding that courts may afford a petitioner leave to amend a § 853(n) petition is the *better* interpretation of the statute's text. And, without disturbing the

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[10] Another canon, the rule of lenity, also should apply. Only "[f]ollowing the entry of an order of forfeiture" may a rightful owner petition for the return of their property, and when they do, the rightful owner bears the burden of establishing their property interest. § 853(n)(1), (6). In effect, the rightful owner shares in the criminal defendant's sentence unless and until the rightful owner satisfies § 853(n)'s requirements for the return of her property. In such a situation, the rule of lenity counsels this Court to resolve any statutory ambiguities in favor of rightful owners.

statute, it would resolve this and potentially many other forfeiture matters that may otherwise raise the same constitutional questions, while limiting the government's ability to profit significantly from innocent owners' property. *Cf. Leonard v. Texas*, 580 U.S. 1178, 1179–80, 1182 (2017) (mem.) (statement of Thomas, J., respecting the denial of certiorari) (doubting that "this Court's treatment of the broad modern forfeiture practice," which is "widespread," "highly profitable," and subject "to egregious and well-chronicled abuses," "can be justified by the narrow historical one"). In so doing, this Court could "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 that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.'" *Culley*, slip op. at 11 (Gorsuch, J., concurring).

* * * *

Deep respect for private property rights, with ancient roots in our legal tradition, is fundamental to the operation of a free society. 1 WILLIAM BLACKSTONE, COMMENTARIES *134–36. This respect permeates the Constitution throughout, as well as forfeiture practice at the time of our nation's Founding and the very text of the statute at issue. The stark contrast between these principles and the Eleventh Circuit's decision warrants this Court granting the writ of certiorari.

CONCLUSION

The Court should grant the petition.

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