No. 23-1050

IN THE

Supreme Court of the United States

LUIS SANCHEZ, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Less than three months ago, this entire Court agreed that when the government tries to forfeit private property, due process requires at least a timely hearing. Justice Kavanaugh, writing for the majority, held that when "States seize and seek civil forfeiture of personal property, due process requires a *timely* post-seizure forfeiture hearing." *Culley v. Marshall*, 601 U.S. 377, 384 (2024). Justices Gorsuch and Thomas, concurring, reviewed history and asked—like Sanchez, Palacios, and Excentric ("Petitioners")—whether modern forfeiture practices violate due process. *Id.* at 403. And Justices Sotomayor, Kagan, and Jackson, dissenting, wanted greater due process protection than the majority, explaining that "forfeiture is vulnerable to abuse" because it targets "marginalized groups, such as low-income communities of color, who are less likely to have the resources to challenge" a forfeiture. *Id.* at 405–06.

Having seen this Court's unanimous agreement that the seizure of private property must be accompanied by some timely forfeiture hearing, one would have expected the government to agree that the district court was wrong to order the forfeiture of private property without a hearing. Especially in Palacios' case, where the only reason she was denied a hearing was an easily correctible pleading deficiency (*i.e.*, the location of her signature). But instead, the government has doubled down on its aggressive tactics that have led to "egregious and well-chronicled abuses." *Id.* at 401 (Gorsuch, J., concurring).

The forfeiture in this case began under a criminal forfeiture statute. But criminal forfeiture is not any more favored than civil forfeiture under our history.

United States v. Nichols, 841 F.2d 1485, 1487 (10th Cir. 1998) ("[B]etween 1790 and 1970, Congress provided for criminal forfeiture only once: to recover the life estates of Confederate soldiers."). And by the government's own admission, it never met its initial burden to show that the property it seized in this case was subject to criminal forfeiture. Instead, it relied on a plea deal with an individual who had "told the arresting officers that the $9,000 belonged to petitioner Sanchez," Opp. 3, to shift its burden of proof onto two small business owners who are not charged with any crime.

Presumably to avoid the glaring constitutional problems that would result if the government could forfeit private property based on a plea deal with a individual who had no interest in the seized property, Congress adopted the "ancillary proceeding," Fed. R. Crim. P. 32.2(c)(1), set forth in 21 U.S.C. § 853(n). But rather than allowing the Petitioners this ancillary proceeding, the government opted to exploit a minor pleading deficiency to permanently deprive them of any hearing and take their property.

As Petitioners have pointed out at every stage of these proceedings, what the government did here is inconsistent with the Constitution and our history. But this case can be resolved without addressing the constitutionality of the statute more generally. By reversing the Eleventh Circuit's denial of leave to amend, and agreeing with the Second and Seventh Circuits that leave to amend is permitted, this Court can safeguard the rights of innocent property owners like Petitioners.

The petition should be granted.

ARGUMENT

I. The circuits are split.

The government argues that certiorari should be denied because the decision below is unpublished, like the Fifth Circuit's decision in *United States v. Lamid*, 663 F. App'x 319 (5th Cir. 2016), and "does not conflict with the decision of any other court of appeals" regardless. Opp. 15. Neither argument is sound.

1. That the decision below is unpublished is not a reason to deny certiorari. Since October Term 2013, 48.8% of this Court's *certiorari* grants of Eleventh Circuit decisions were in unpublished cases. See Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137, 1166 (2022). And, if anything, the fact that "the decision below is unpublished" is "in itself . . . yet another reason to grant review," *Plumley v. Austin*, 574 U.S. 1127, 1131–32 (2015) (Thomas, J., dissenting from denial of certiorari), because unpublished opinions "have a lingering effect" on the law. *Smith v. United States*, 502 U.S. 1017, 1020, n.* (1991) (Blackmun, J., dissenting from denial of certiorari).

To find proof of unpublished decisions' impact, this Court need look no further than *Lamid*, which provided the basis for the district court's denial of amendment here, App. 50–52, after reversing the trajectory of the law in the Fifth Circuit. Compare, *e.g.*, *United States v. Ward*, No. 07-cr-30013-01, 2007 WL 2993870, at *2 (W.D. La. Oct. 11, 2007) (finding, pre-*Lamid*, that post-deadline amendment under **§ 853(n)** was permissible), with, *e.g.*, *United States v. Zelaya Rojas*, 364 F. Supp. 3d 626, 631–32

(E.D. La. 2019) (applying *Lamid* to prohibit post-deadline amendment). And the Eleventh Circuit's decision will only have stronger effects than *Lamid* given that it follows an en banc petition that pointed out that the Eleventh Circuit had widened a circuit split.

Despite knowing that it was widening a circuit split, the Eleventh Circuit nevertheless denied en banc review, strongly indicating that the full court did not disagree with the panel's leave to amend ruling, as the government will now argue in future cases. And the Eleventh Circuit's failure to issue a published decision is not a reason for this court to ignore a circuit split on an important issue that has drawn six Amici. *Smith*, 502 U.S. at 1020 n.* ("Nonpublication must not be a convenient means to prevent review.").

2. Likewise, the government is wrong to claim that the "decision below does not conflict with the decision of any other court of appeals," and that the petitioners are merely "overreading" it. Opp. 15. Instead, it is merely mischaracterizing the decision below as constituting an *application* of the district court's discretion to deny leave to amend, when, in fact, the key legal error made by the trial court was its conclusion that it *lacked* any discretion to permit amendment.

As clear as can be, the district court in this case concluded that it *lacked* discretion to allow Petitioners to amend their petition to cure any alleged deficiencies because the thirty day deadline for filing a petition under Section 853(n)(2) had expired. App. 51 ("In sum, Petitioners provide no authority establishing they can amend their Petition after the statutory 30-day period

in section 843(n)(2) [sic] expires."). The Eleventh Circuit then affirmed that holding by concluding that it could not "say that the district court abused its discretion when it enforced this congressionally prescribed, 'mandatory' thirty-day window and denied leave to amend." App. 12.

"A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). So the district court would have abused its discretion if it denied amendment based on an erroneous holding that leave to amend was not permitted. And by reaching an outcome opposite to the Second Circuit on this issue, the circuits are plainly split on the question presented. Compare *United States v. Swartz Family Trust,* 67 F.4th 505, 520 (2d Cir. 2023) ("Because the District Court believed that the statutory framework categorically precluded amendment after the 30-day deadline . . . we vacate and remand."), with App. 12 (holding that it can't "say that the district court abused its discretion when it enforced this congressionally prescribed, 'mandatory' thirty-day window").

Attempting to distinguish this case, the government claims that the Seventh Circuit's decision in *United States v. Furando*, 40 F.4th 567 (2022), is different because it involved an "unexplained *sua sponte* dismissal of a Section 853(n) petition for failure to set forth sufficient information about the petitioners' claims" and thus does not suggest that the Seventh Circuit "would have found an abuse of discretion on the facts of this case." Opp. 16. Then, the government attempts to distinguish *Swartz* on the grounds that it involved a petitioner's "technical failure to describe its bona fide purchaser claim as such," *id.* (cleaned up), and that "[w]hether leave to amend may

be granted to allow Section 853(n) petitioners to allege . . . additional facts" is different than whether leave to amend may be granted to supply a missing signature. Opp. 16–17.

At the outset, these efforts to distinguish *Swartz* and *Furando* fail because the statute treats the pleading deficiencies addressed by the Seventh and Second Circuits identically to a petitioner's failure to comply with the signature requirement. See 21 U.S.C. § 853(n)(3). But contrary to the government's claims, the Petitioners signed their petition under penalty of perjury—they simply did so by attaching "sworn affidavits" verifying the contents of the petition rather than signing the petition itself. App. 19. And the decision below had nothing to do with the sufficiency of the facts alleged in the petition because the district court did not decline to exercise its discretion to permit amendment based on the factual content of the petition. Instead, the district court concluded, contrary to *Furando* and *Swartz*, that it lacked any discretion to allow Petitioners to amend their petition to cure any of the pleading deficiencies the government raised, one of which was the exact same specificity issue that is the subject of *Furando* and *Swartz*, namely, Palacios' supposed failure "to allege in any detail the 'nature and extent' . . . of her legal interest in the $9,000." Opp. 18. The Eleventh Circuit agreed. There is therefore a clear circuit split.

II. The decision below is wrong.

Some circuit splits can be left to percolate. Not all errors demand correction. But this is not one of those cases. Instead, this is a case where any delay will exacerbate an "asymmetry" in power that has concerned Justices of this Court. *Culley*, 601 U.S. at 395 (Gorsuch, J., concurring). For it is the most marginalized members of

the most marginalized groups that will be most affected by the Eleventh Circuit's leave to amend ruling—the pro se litigants who are most likely to make a pleading error and need amendment.

To this, the government does not deny the importance of the question presented. Instead, it (1) mischaracterizes the decision below as an *application* of the district court's discretion and (2) argues that the inequitable result in this case is legally mandated. Opp. 10–15. But both arguments are wrong. And even if the government were right, that would still entitle the Petitioners to the return of their property by rendering Section 853(n) unconstitutional. Either way, the petition should be granted.

1. Ignoring that the Petitioners are uncharged innocent property owners who have had no hearing on the forfeiture of their property, the government suggests that the decision below is right because "it was not an abuse of discretion to deny petitioners' request for leave to amend" when there were several reasons to question the credibility of the Petitioners' affidavits. Opp. 11–12. But once again, this case is not about an exercise of the District Court's discretion, or the facts of the case, or the Petitioners' credibility, which should not be evaluated at the pleading stage in any event. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining that courts must assume "that all the allegations in the complaint are true (even if doubtful in fact)"). Instead, the district court denied leave to amend on the ground that it *lacked* discretion, App. 51–52, which is wrong.

2. a. Turning next to the petition, the government argues that Petitioners were wrong to argue that leave to amend is permitted because Section 853(n) proceedings

are governed by the rules of criminal procedure. But even if the government were right, Federal Rule of Criminal Procedure 49(b)(4)—which governs signature requirements for filings—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. And Rule 32.2(c) plainly contemplates leave to amend as well, stating that "the court *may*," rather than *must*, "dismiss" a petition that fails "for lack of standing, for failure to state a claim, or any other lawful reason." Fed. R. Crim. P. 32.2(c)(1)(A) (emphasis added).

Likewise, the government is wrong that section 853(n) proceedings are criminal proceedings "governed by the rules of *criminal* procedure." Opp. 12. For while Federal Rule of Criminal Procedure 32.2(a) uses the term "criminal proceeding," Rule 32.2(c) refers to Section 853(n) proceedings as "an ancillary proceeding," which indicates that they are not criminal proceedings. *Pulsifer v. United States*, 601 U.S. 124, 149 (2024) (explaining that in a given text, "the same term usually has the same meaning and different terms usually have different meanings."). And even if Section 853(n) proceedings were criminal proceedings, the advisory committee notes confirm that Section 853(n) proceedings are to be treated as civil cases in several areas "includ[ing] the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim." Fed. R. Crim P. 32.2 advisory committee's note (2000).

Consequently, "procedures analogous to those in the Civil Rules," *id.*, plainly govern at least—but not only—the pleading, discovery, and summary judgment phase of

ancillary proceedings. See *Samantar v. Yousef*, 560 U.S. 305, 317 (2010) (explaining "that use of the word 'include'" signals an "illustrative" list). And there is no reason to treat leave to amend differently given the permissive language regarding dismissal in Rule 32.2(c) and the fact that the relation-back principle applies of its own force as a longstanding background rule against which Congress is presumed to legislate. See *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1016 (2020).

2. b. The government next denies that the decision below is inconsistent with this Court's precedent. But that is incorrect because this Court has regularly applied the presumption against a change in the common law to hold that "the relation-back regime" permits amendment after a filing deadline has run to perfect content specifications of federal statutes that are silent on amendment. *Scarborough v. Principi*, 541 U.S. 401, 417–18 (2004); *Edelman v. Lynchburg College*, 535 U.S. 106, 112–19 (2002).

Trying to distinguish those cases, the government argues that *Scarborough* and *Edelman* implicate civil statutes and that permitting amendment here would prejudice the government, which has an interest in verification. Opp. 13–14. But this Court rejected an identical prejudice argument in *Edelman*—which also dealt with verification. And the civil versus criminal distinction doesn't matter either because the presumption that Congress legislates against a background of unexpressed presumptions applies to both criminal and civil statutes. See *Bond v. United States*, 572 U.S. 844, 857 (2014).

If anything, the Eleventh Circuit's decision has only grown more out of step with this Court's precedent since this petition was filed because Sections 853(n)(2) and (3) do not specify a consequence for a party's failure to personally sign the petition within the filing timeline. See *McIntosh v. United States*, 144 S. Ct. 980 (2024) (applying rules of statutory interpretation to conclude that "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"). The decision below is therefore fundamentally at odds with this Court's precedent.

2. c. Finally, the government claims that constitutional arguments that Petitioners raise in support of their arguments were not properly raised and lack merit. Opp. 14–15. But the government admits that the Petitioners raised their constitutional arguments in both the district court and the Eleventh Circuit, Opp. 14, and does not contest that Petitioners preserved the question presented. As a result, Petitioners have preserved their constitutional arguments, which merely provide one additional, but ultimately unnecessary, argument in support of reversal. See *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim."); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (the fact that "arguments in the District Court were much less detailed . . . does not imply that petitioner failed to preserve the issue raised in its petition for certiorari").

Likewise, the government is wrong to say that there are no constitutional problems posed by the fact that Section 853 permits a forfeiture that lacks any historic analogue under a mere preponderance of the evidence

standard. See *Culley*, 601 U.S. at 393–403 (Gorsuch, J., concurring) (raising constitutional questions). Instead, the constitutional problems are particularly serious here, given the absence of any forfeiture hearing and the fact that Petitioners could not intervene in the initial forfeiture proceedings under Section 853(k). Petitioners are therefore right that this Court's constitutional avoidance canons support their unquestionably preserved leave to amend argument.

III. There are no vehicle problems.

The government lastly attempts to manufacture vehicle problems by claiming that Sanchez and Excentric have standing issues and that there are several problems with Palacios' petition. Opp. 18–19. But neither argument makes this case an unsuitable vehicle because "[o]nly one petitioner needs standing to authorize review," *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), and the government has not filed a cross-petition on the Eleventh Circuit's finding that Palacios has standing. That leaves the sole reason for Palacios' dismissal the Eleventh Circuit's finding that Palacios could not amend her petition to add a signature, which is a very clean presentation of the question presented.

The government is also wrong to say that a decision would have no "practical effect" on Palacios because she has offered "no reason to conclude" that "the district court would ultimately find on the merits that she is entitled to the forfeited $9000." Opp. 19. Putting aside that it is not Palacios' burden to prove her claim's merits at the pleading stage, a decision in Palacios' favor has a "practical effect" on her due process rights by establishing her right to a

hearing to prove her interest in the funds. There is also no reason to doubt Palacios' sworn statements that she owns the cash.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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