No. 23-1050

IN THE
# Supreme Court of the United States

LUIS SANCHEZ, *ET AL.*,
*Petitioners*,
*v.*
UNITED STATES,
*Respondent.*

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

## BRIEF OF THE CATO INSTITUTE AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


CLARK M. NEILY III
CATO INSTITUTE
1000 Massachusetts
Avenue NW
Washington, DC 20001

KAMRON KOMPANI
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL
LITIGATION AT THE
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004

THOMAS M. JOHNSON, JR.
*Counsel of Record*
JOEL S. NOLETTE
DANIEL T. PARK
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
tmjohnson@wiley.law
(202) 719-7000


May 10, 2024 — *Counsel for* Amici Curiae

## QUESTION PRESENTED

Whether a timely filed 21 U.S.C. § 853(n) petition may be amended to cure a pleading deficiency after the 30-day filing period has run, as the Second and Seventh Circuits hold; or whether § 853(n)(2)'s 30-day deadline for filing a petition precludes any amendment after the filing deadline has expired, as the Eleventh and Fifth Circuits hold.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Constitutional Provisions**



**Statutes**



**Other Materials**

## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in cases implicating its objectives, including in lawsuits involving asset forfeiture. *See, e.g.*, Brief of the DKT Liberty Project, Cato Institute, Goldwater Institute, Due Process Institute, Federal Bar Association Civil Rights Section, and Texas Public Policy Foundation as *Amici Curiae* in Support of Petitioners, *Timbs v. Indiana*, No. 17-1091 (U.S. Sept. 11, 2018), 2018 WL 4358107.

The Goldwater Institute ("Goldwater") was established in 1988 as a nonpartisan public policy foundation devoted to principles of limited government, individual freedom, and constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater litigates cases and files *amicus* briefs when its or its clients' objectives are implicated, and it has represented parties in as-

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were provided timely notice of *amici curiae*'s intent to file this brief.

set-forfeiture cases in federal and state courts across the country. *See, e.g.*, *United States v. Sanders*, No. 22-2290, 2023 WL 8183302 (4th Cir. Nov. 27, 2023) (per curiam).

This case interests Cato and Goldwater because they recognize that the right to property is essential for individual liberty. The decision below threatens those values by misapplying a statute intended to protect the rights of owners whose property gets caught up in third-party criminal forfeiture.

## SUMMARY OF ARGUMENT

Government exists to protect ordered liberty, including the right to property, which is expressly protected from deprivation "without due process of law" by the Fifth Amendment. On one view, in perhaps its most basic sense, this guarantee requires the government to afford individuals all the procedures to which they are legally entitled before depriving them of their property. And more robustly understood, this guarantee imposes a broader duty of fundamental fairness on the government.

Section 853(n) of Title 21 provides the only mechanism by which innocent owners can compel the return of their property after it has been preliminarily forfeited in third-party criminal proceedings. Thus, due process is especially vital in § 853(n) proceedings. But in four sentences in an unpublished opinion, the Eleventh Circuit undercut due process and facilitated the violation of property rights—deepening a circuit split in doing so—by adopting a rule prohibiting the purely formal amendment of timely filed § 853(n) petitions. The Court should grant *certiorari* because this rule fails to ensure the

process that is due when the government seeks to forfeit property that belongs to someone who has not even been charged with, let alone found guilty of, any misconduct.

## ARGUMENT

### I. THE COURT SHOULD GRANT *CERTIORARI* BECAUSE THE ELEVENTH CIRCUIT'S DECISION CANNOT BE SQUARED WITH THE "DUE PROCESS OF LAW"

The "fundamental maxims of a free government" dictate that "the rights of personal liberty and private property" be "held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829) (Story, J.). Indeed, the "preservation of property" was "a primary object of the social compact," *VanHorne's Lessee v. Dorrance*, 28 F. Cas. 1012, 1015 (C.C.D. Pa. 1795) (No. 16,857) (Paterson, J.), which the Fifth Amendment shows by prohibiting deprivations of property "without due process of law," U.S. Const. amend. V. This protection is essential to "individual freedom," which "finds tangible expression in property rights." *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993); *see also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (recognizing the "fundamental interdependence" and false dichotomy between personal liberty and property rights); *VanHorne's Lessee*, 28 F. Cas. at 1015 ("Property is necessary to [people's] subsistence, and correspondent to their natural wants and desires . . . .").

Section 853(n) of Title 21 provides the "sole means by which a . . . claimant can establish entitlement to return" of property preliminarily forfeited in third-party criminal proceedings. *United States v.*

*Davenport*, 668 F.3d 1316, 1320 (11th Cir. 2012) (citing *Libretti v. United States*, 516 U.S. 29, 44 (1995)). Thus, due process of law takes on heightened importance in § 853(n) proceedings. *See, e.g.*, *United States v. Daugerdas*, 892 F.3d 545, 553 n.7 (2d Cir. 2018) (permitting amendment of an § 853(n) petition in part "because of the significant constitutional rights potentially at stake"). But the Eleventh Circuit took a decidedly different tack in the decision below by adopting a rule that leave to amend a timely filed petition cannot be granted after the filing deadline in § 853(n)(2) has passed. *See* App. to Pet. Cert. 12–13. Whether due process is understood in its more-basic or more-robust senses, the rule adopted by the Eleventh Circuit cannot be squared with that guarantee.

### A. The Rule Adopted Below Denies Property Owners Their Procedural Rights

To some, "due process of law" means simply that the government must act consistently with the requirements of positive law that apply in the circumstances. *See Johnson v. United States*, 576 U.S. 591, 622–23 (2015) (Thomas, J., concurring in the judgment); *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting); *cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting that one "central concern[]" of "procedural due process" is to prevent deprivations "on the basis of an erroneous or distorted conception of . . . the law"). But even on that basic understanding of the Fifth Amendment, the Eleventh Circuit's decision does not pass muster because it denies § 853(n) petitioners some of the process they are due—the right to seek and obtain leave

to amend a timely filed § 853(n) petition after the filing deadline has passed.

To begin, given the "procedural mechanisms" prescribed in § 853(n)—including the preponderance-of-evidence burden of proof and the placing of that burden on petitioners—there is "little doubt that Congress intended" § 853(n) proceedings "to be civil proceedings." *See United States v. Ursery*, 518 U.S. 267, 288–89 (1996) (discussing forfeiture proceedings under 21 U.S.C. § 881 and 18 U.S.C. § 981). Thus, § 853(n) proceedings are considered "civil in nature." *See, e.g.*, *United States v. Mar. Life Caribbean Ltd.*, 913 F.3d 1027, 1036 (11th Cir. 2019); *United States v. Butt*, 930 F.3d 410, 413 (5th Cir. 2019).[2]

Accordingly, § 853(n) proceedings are generally "governed by the Federal Rules of Civil Procedure." *United States v. Negron-Torres*, 876 F. Supp. 2d 1301, 1304 (M.D. Fla. 2012); *see also* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil . . . proceedings in the United States district

---

[2] *Accord United States v. Furando*, 40 F.4th 567, 580 (7th Cir. 2022); *United States v. Bradley*, 882 F.3d 390, 392–93 (2d Cir. 2018); *United States v. Moser*, 586 F.3d 1089, 1092–94 (8th Cir. 2009); *United States v. McHan*, 345 F.3d 262, 275 (4th Cir. 2003); *United States v. Lavin*, 942 F.2d 177, 181–82 (3d Cir. 1991); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 n.4 (9th Cir. 1996); *United States v. Stells*, Crim. No. 14-16-DLB-CJS-01, 2016 WL 489522, at *3 n.3 (E.D. Ky. Jan. 19, 2016), *report and recommendation adopted*, 2016 WL 502044 (E.D. Ky. Feb. 8, 2016); *United States v. One Rural Lot Identified as FINCA No. 5991 Located in Barrio Pueblo, Puerto Rico*, 726 F. Supp. 2d 61, 68 (D.P.R. 2010); *United States v. Wade*, 93 F. Supp. 2d 19, 21 (D.D.C. 2000).

courts . . . ."); 4 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1028, Westlaw (4th ed. updated Apr. 2023) (noting that, unless "expressly excluded," the Federal Rules of Civil Procedure govern "all adversary proceedings of a civil nature").[3]

Under Rule 15, courts must "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2).[4] This standard requires "liberality in allowing amendment of pleadings to achieve the ends

---

[3] Granted, given the ancillary nature of § 853(n) proceedings and the specific procedures prescribed therein, "it would not be appropriate to make the Civil Rules applicable *in all respects*." *See* Fed. R. Crim. P. 32.2, Committee Notes on Rules—2000 (emphasis added). Even so, like other statutes involving civil proceedings, § 853(n) "ought to be construed to harmonize with the Rules" wherever possible. *See* 8 John Bourdeau et al., *Fed. Proc., L. Ed.* § 20:640, text accompanying note 8, Westlaw (updated Mar. 2024); *see also Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (noting that the rules govern absent a "clear expression" from Congress to the contrary); *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 436 (2023) (same).

[4] Rule 15 addresses "pleadings." Even assuming the rule does not squarely cover § 853(n) petitions, a court has inherent power to grant leave to amend, *see* Fed. R. Civ. P. 15, Notes of Advisory Committee on Rules—1937; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47–49 (1991), and Rule 15 still applies to "properly guide[]" that analysis, *see Scarborough v. Principi*, 541 U.S. 401, 417–19 (2004) (applying the relation-back doctrine under Rule 15(c) to a fee application under 28 U.S.C. § 2412(d) despite acknowledging that such application is not a "pleading"); *cf. SEC v. Secs. Inv. Prot. Corp.*, 842 F. Supp. 2d 321, 327–28 (D.D.C. 2012) (noting that, even in proceedings where the rules do not squarely govern, courts still may apply them "as circumstances and justice require").

of justice." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 158 (1964). Thus, whenever justice so requires, a litigant effectively has "a right to amend" under Rule 15(a)(2). *See United States v. Hougham*, 364 U.S. 310, 311, 316–17 (1960) (holding that the district court "erred" in denying the government leave to amend to seek additional damages for fraud on the government); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating that Rule 15(a)(2)'s "mandate is to be heeded"). And "amendments under Rule 15(a)(2) may be made at any stage of the litigation." 6 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1484, text accompanying note 11, Westlaw (3d ed. updated Apr. 2023). Accordingly, § 853(n) petitioners may seek and obtain (when justice so requires) leave to amend, even after § 853(n)(2)'s filing deadline has passed.

The rule adopted by the Eleventh Circuit denies § 853(n) petitioners this right to seek and obtain leave to amend. Thus, that rule denies those petitioners some of the process they are due, even on this basic understanding of the Fifth Amendment.

The Eleventh Circuit's brief analysis suggests that, in its view, such process is not owed to § 853(n) petitioners because the filing deadline is "mandatory" and "absolute" and must be "strictly construed." *See* App. 12–13 (internal quotation marks omitted). For three reasons, this logic does not hold.

First, the notion that § 853(n) must be "strictly construed" flies in the face of the plain text of the statute. *See Furando*, 40 F.4th at 579 (noting that "statutory language casts . . . some doubt on this [strict-construction] sentiment"). In § 853(o), Con-

gress directed courts to "liberally construe[]" the provisions of § 853 "to effectuate its remedial purposes." Whatever the viability of the remedial-purposes canon in the abstract, *see Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995), applying the canon here is explicitly "grounded in the statute's text," *see CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014), and thus "applies with special force" to § 853(n), *see Abbott v. Abbott*, 560 U.S. 1, 16 (2010).

Section 853(o) requires reading § 853(n) "in a way which avoids harsh and incongruous results" and "in conformance with its purpose" of ensuring that owners can reclaim their property. *See Voris v. Eikel*, 346 U.S. 328, 333 (1953). Here, that requires reading § 853(n) to permit post-deadline amendment, "to effectuate this lone remedial route" for owners to recover their property. *See Furando*, 40 F.4th at 579–80; *cf. Wilkinson*, 27 U.S. at 657 ("[N]o court of justice in this country would be warranted in assuming, that the power to violate and disregard [property rights] . . . lurked under . . . any general expressions of the will of the people. . . . without very strong and direct expressions of such an intention."). Thus, strict construction does not apply here, let alone dictate reading § 853(n) to prohibit post-deadline amendment.

Second, the Eleventh Circuit's rationale is beside the point under the relation-back doctrine. Under Rule 15(c), an amendment "relates back" to the date of the original filing when the amendment "asserts a claim or defense that arose out of the conduct, trans-

action, or occurrence . . . attempted to be set out" in the original filing. *See* Fed R. Civ. P. 15(c)(1)(B). Where, as here, a proposed amendment meets this test, *see, e.g.*, App. 12 (noting that the proposed amendment was simply to add a signature directly to the § 853(n) petition), the amended petition is treated "as if it had been" filed before the deadline, even if it is submitted post-deadline, *see McCurdy v. United States*, 264 U.S. 484, 487 (1924); *see also Scarborough*, 541 U.S. at 417–19 (allowing the post-deadline amendment of a 28 U.S.C. § 2412(d) fee application under the relation-back doctrine). This has long been true even in the face of jurisdictional deadlines, to say nothing of merely "mandatory" ones. *See, e.g.*, *Watkins v. Lujan*, 922 F.2d 261, 263 (5th Cir. 1991) (observing that a "cause of action can relate back under Rule 15(c) without usurping the jurisdictional nature" of a filing deadline); *Wadsworth v. U.S. Postal Serv.*, 511 F.2d 64, 66 (7th Cir. 1975) ("The time bar is jurisdictional, but . . . jurisdiction is not disturbed by an amendment . . . ."); *cf. Se. Pa. Transp. Auth. v. Orrstown Fin. Servs. Inc.*, 12 F.4th 337, 345–52 (3d Cir. 2021) (holding that the relation-back doctrine under Rule 15(c) allowed amendment after a statute of repose expired). Thus, even if § 853(n)(2)'s deadline were "strict[]," "mandatory," or "absolute," *see* App. 12–13 (internal quotation marks omitted), that is irrelevant.

Third, the Eleventh Circuit's rationale is inconsistent with settled law governing similar filing deadlines. Perhaps most analogously, consider the deadlines under the Civil Asset Forfeiture Reform Act ("CAFRA") that an owner must comply with to recover their seized property. *See* 18 U.S.C. § 983(a).

CAFRA provides that claims are to be filed "not later than" specified deadlines. *See* 18 U.S.C. § 983(a)(2)(B), (a)(4)(A). By their terms, these deadlines are no less "mandatory" than the deadline in § 853(n)(2). *Compare, e.g.*, *Davenport*, 668 F.3d at 1322–23 (calling § 853(n)(2) "mandatory" because it "requires" claimants to file a petition within the specified deadline), *with, e.g.*, *United States v. Simon*, 609 F. App'x 1002, 1006 (11th Cir. 2015) (per curiam) (noting that, under § 983(a)(2)(B), a claim "must be made" within the specified deadline), *and Troconis-Escovar v. United States*, 59 F.4th 273, 276 (7th Cir. 2023) (same). Yet despite this equivalence, courts have "liberally permitted" post-deadline amendments under § 983(a), particularly to allow for the correction of "technical and procedural errors." *See, e.g.*, *United States v. $125,938.62*, 370 F.3d 1325, 1328–30 (11th Cir. 2004) (per curiam) (internal quotation marks omitted) (holding that the district court abused its discretion in "disallowing" as untimely an amendment under § 983(a)(4)(A)); *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 892 F. Supp. 2d 1038, 1041, 1046–47, 1053 (N.D. Ill. 2012) (granting leave to amend § 983(a)(4)(A) claims under Rule 15(a)(2)).[5]

---

[5] Some courts have qualified this approach, permitting amendment so long as doing so does not "undermine" the "policy interests" of the forfeiture scheme. *See $125,938.62*, 370 F.3d at 1329–30 (internal quotation marks omitted). But "perceived policy concerns" generally do not warrant departing "from the usual practice under the Federal Rules." *See Jones v. Bock*, 549 U.S. 199, 212 (2007).

Consider also the filing deadline for a fee application under the Equal Access to Justice Act ("EAJA") in an action against the United States. *See* 28 U.S.C. § 2412(d)(1)(B). Under the EAJA, a prevailing party "shall" file a fee application within thirty days of final judgment in the underlying action. *Id.* And this statute effects a partial waiver of the federal government's sovereign immunity, *see Scarborough*, 541 U.S. at 419–20, implicating the "traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged . . . beyond what the language requires," *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (cleaned up); *see also Scarborough*, 541 U.S. at 423–27 (Thomas, J., dissenting) (making this point). Even so, this Court held that a "timely filed EAJA fee application may be amended, out of time," to correct a technical defect. *See Scarborough*, 541 U.S. at 423 (majority opinion).

Faced with a similar deadline, however, the Eleventh Circuit adopted a contrary rule for § 853(n) petitioners. Its rationale departs from this settled law.

In sum, § 853(n) petitioners have the right to seek and obtain leave to amend "when justice so requires." *See* Fed. R. Civ. P. 15(a)(2). But under the rule adopted below—dictating wrongly "that the statutory framework categorically preclude[s] amendment after the 30-day deadline," *see United States v. Swartz Fam. Tr.*, 67 F.4th 505, 520 (2d Cir. 2023)—§ 853(n) petitioners will be denied this right. That rule has denied and will continue to deny § 853(n) petitioners their procedural rights unless this Court intervenes now.

### B. The Rule Adopted Below Threatens Fundamental Fairness to Property Owners

At another level, as this Court has long recognized, "due process of law" imposes a "requirement of 'fundamental fairness.'" *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 24–25 (1981); *accord N.C. Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 588 U.S. 262, 268 (2019). But by adopting a rule that puts § 853(n) petitioners on worse footing than the government when it stands in similar circumstances, the decision below threatens fundamental fairness in perhaps the worst way of all—violating the basic requirement of even-handedness, that "in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016); *accord RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 349 (2016); *cf. Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting) ("At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law . . . .").

For one, compare the decision below with this Court's decision in *James Daniel Good Real Property*. There, the issue was whether the government's failure to comply with several timing prerequisites to forfeit property under 21 U.S.C. § 881 required the dismissal of an otherwise timely forfeiture action brought by the government. *See* 510 U.S. at 62–63. This Court held that "courts *may not* dismiss" a timely filed forfeiture action for noncompliance with these other timing requirements. *Id.* at 65 (emphasis added). Under the rule adopted below, however,

basically the opposite is true for § 853(n) petitioners—courts must dismiss timely filed petitions if other technical defects are present, even if those defects could be cured by amendment post-deadline.

Or consider the comparative solicitude afforded the government with respect to deadline-compliance under CAFRA. CAFRA specifies that the government must file a complaint for forfeiture "[n]ot later than 90 days" after an owner files a claim for the property in question. *See* 18 U.S.C. § 983(a)(3)(A). Even so, courts generally have held that the deadline can be equitably tolled after-the-fact, doing so when the government has committed technical errors like the one here. *See, e.g.*, *United States v. Six Hundred Fourteen Thousand Three Hundred Thirty-Eight Dollars and No Cents ($614,338.00) in U.S. Currency*, 240 F. Supp. 3d 287, 292 (D. Del. 2017) (collecting authorities and equitably tolling the deadline where the government mistakenly concluded "in good faith" that the filing of a claim did not trigger the ninety-day clock); *United States v. $39,480.00 in U.S. Currency*, 190 F. Supp. 2d 929, 932–33 (W.D. Tex. 2002) (tolling the deadline where the government's untimely filing followed from a clerical error). Under the rule adopted below, however, one technical misstep in a timely filed petition requires dismissing an § 853(n) claim if the misstep would have to be fixed after the filing deadline.

Further, compare the decision below with this Court's decision just a few weeks ago in *McIntosh v. United States*, 601 U.S. ___, 144 S. Ct. 980 (2024). In *McIntosh*, this Court addressed whether Federal Rule of Criminal Procedure 32.2(b)(2)(B)'s require-

ment that a preliminary order of forfeiture be entered by a particular point in time renders a court "powerless to order forfeiture against the defendant" after that time. *See* 144 S. Ct. at 985. Concluding that the requirement was merely a "time-related directive," the Court held that violation of the deadline "does not deprive a district court of its power to order forfeiture." *See id.* at 992. Yet under the rule adopted by the Eleventh Circuit, a district court is basically powerless to grant relief from forfeiture under § 853(n) if the petitioner in essence does not fulfill every jot and tittle of § 853(n) before the deadline.

Headlines casting doubt on the fundamental fairness of government investigations and proceedings seem to appear with startling frequency.[6] And even though we are "a Nation so jealous of its liberties," too often federal asset-forfeiture practices have been the subject of these headlines. *See Culley v. Marshall*, No. 22-585, slip op. at 9 (U.S. May 9, 2024) (Gorsuch, J., concurring); *see also Leonard v. Texas*, 580 U.S. 1178, 1179–80 (2017) (Thomas, J., statement respecting denial of certiorari) (recounting just a few of these headlines). Here, then, the "appearance of evenhanded justice which is at the core of due process" takes on special import. *See Mayberry*

---

[6] *See, e.g.*, Victor Nava, *Federal Judge Accuses the DOJ of Hypocrisy for 'Flouting' Biden Impeachment Inquiry Subpoenas*, N.Y. Post (Apr. 5, 2024), *available at* https://tinyurl.com/3a4npxc2 ("District Judge Ana Reyes, an appointee of President Biden, argued that the Justice Department was being hypocritical for instructing [DOJ lawyers] not to comply with [a House] committee's subpoenas while throwing [Peter Navarro] in prison for similar actions.").

*v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring) ("In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." (quoting 5 Daniel Webster, *The Writings and Speeches of Daniel Webster* 163)). But at the very least, appearances aside, the fundamental-fairness requirement inherent in the "due process of law" requires evenhandedness in fact. *Cf. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) ("'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied.").

The onerous rule adopted below for § 853(n) petitioners, especially when contrasted with the liberal rules adopted by this Court and others for the government in similar contexts, threatens the fundamental fairness of § 853(n) proceedings—to say nothing of appearances. For this reason as well, this Court's intervention is warranted now.

## II. THE UNPUBLISHED STATUS OF THE DECISIONS ON THE WRONG SIDE OF THE CIRCUIT SPLIT FURTHER JUSTIFIES GRANTING *CERTIORARI*

Petitioners identify a 2-2 circuit split on the question presented. *See* Pet. Cert. 15–20. Both decisions on the wrong side of this circuit split are unpublished and thus not technically precedential under those circuits' rules. *See United States v. Sanchez*, No. 22-11923, 2023 WL 5844958 (11th Cir.

Sept. 11, 2023) (per curiam); 11th Cir. R. 36-2; *United States v. Lamid*, 663 F. App'x 319 (5th Cir. 2016) (per curiam); 5th Cir. R. 47.5.4. But if anything, that fact further justifies granting *certiorari* here.

For one, this Court has made clear that the unpublished status of the decision being challenged is not a valid reason to deny *certiorari*. *See Comm'r of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam) (granting *certiorari* and reversing, despite "nonpublication" of the decision under review and "any assumed lack of precedential effect of a ruling that is unpublished").[7] Empirically, this is especially true of unpublished decisions from the Eleventh Circuit. *See* Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137, 1166 (2022) (reporting that, since October Term 2013, 48.8% of the Court's *certiorari* grants of Eleventh Circuit decisions were in unpublished cases). And the Court's approach is right. After all, even an unpublished opinion will "have a lingering effect in the Circuit," *Smith v. United States*, 502 U.S. 1017, 1020

---

[7] *But see* Brief for the United States in Opposition, *Kinzy v. United States*, No. 23-578 (U.S. Apr. 12, 2024), 2024 WL 1622770, at *9 (arguing against *certiorari* in part because "the decision below is unpublished and nonprecedential"); Brief for the United States in Opposition, *Kapoor v. United States*, Nos. 21-994, 21-6952 (U.S. Apr. 29, 2022), 2022 WL 1307087, at *23 (arguing that, because a decision was "unpublished and nonbinding," it did not "show a circuit conflict warranting this Court's review"); Brief for the United States in Opposition, *Hallinan v. United States*, No. 19-1087 (U.S. May 26, 2020), 2020 WL 2747444, at *12 (opposing *certiorari* on the basis that "the decision below is unpublished and nonprecedential and thus cannot create or deepen a circuit conflict" (citation omitted)).

n.* (1991) (Blackmun, J., dissenting from denial of certiorari), as it signals to the district courts in that circuit what at least one panel of the judges on that circuit think about the issue. *Lamid*'s effect in the Fifth Circuit illustrates well this point. *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 an unpublished opinion just as readily may have out-of-circuit impact as well, as the district court's decision here demonstrates. *See* App. 50–52 (following *Lamid*).

If anything, 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). It is no secret that—owing in no small part to the technically nonprecedential status of such decisions, *see id.*—"[j]udges generally do not labor over unpublished judgments and memoranda . . . with the same intensity they devote to signed opinions," Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 139 (1990). That is, an unpublished decision inevitably comes "without the discipline and accountability" inherent in publication, no matter the ethos and intention of those responsible for it. *See County of Los Angeles v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting). And even though "they should not be used" for this purpose, unpublished decisions not infrequently "develop[] or modif[y] a rule of law," as the decision

below illustrates. *See* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 Md. L. Rev. 766, 782 (1983); *Williams v. Dall. Area Rapid Transit*, 256 F.3d 260, 261–62 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (observing that unpublished decisions "establish[ing] a new rule of law or apply[ing] existing law to distinct facts" are "more common than one might think"). Thus, particularly where (as here) an unpublished decision deepens a circuit split, the decision's unpublished status further justifies granting *certiorari*. *Cf. Smith*, 502 U.S. at 1020 n.* ("Nonpublication must not be a convenient means to prevent review.").

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

CLARK M. NEILY III
CATO INSTITUTE
1000 Massachusetts Avenue NW
Washington, DC 20001

KAMRON KOMPANI
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004

THOMAS M. JOHNSON, JR.
*Counsel of Record*
JOEL S. NOLETTE
DANIEL T. PARK
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
tmjohnson@wiley.law
(202) 719-7000

May 10, 2024

*Counsel for* Amici Curiae