APPEAL NO. 22-11923

In The
United States Court of Appeals
For The Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

versus

LUIS SANCHEZ, *ET AL.*,

Interested Parties – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA CASE NO. 1:21-CR-20134-CMA

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF INTERESTED PARTIES – APPELLANTS AND IN SUPPORT OF REVERSAL

Joseph Gay
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
jgay@ij.org

Wesley Hottot
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, Washington 98101
(206) 957-1300
whottot@ij.com

Counsel for Amicus Curiae

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

United States of America v. Luis Sanchez, et al.,
Record No. 22-11923

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1-1, Amicus certifies that the certificate of interested persons filed by Appellants is complete, and adds the following interested entity and persons:

1. Institute for Justice, a 501(c)(3) nonprofit corporation (Amicus Curiae)
2. Gay, Joseph (counsel for Amicus)
3. Hottot, Wesley (counsel for Amicus)

Amicus further certifies that the Institute for Justice has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Dated: September 6, 2022

/s/ Joseph Gay
Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C1

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE ISSUES 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. Congress Enacted The Ancillary Hearing Procedure To Safeguard Important Property Rights Of Third-Party Property Owners 6

A. Historically Disfavored, Forfeitures Have Expanded Dramatically Over the Last 50 Years 6

B. When Congress Expanded Criminal Forfeiture, It Intended Third-Party Property Owners To Have Their Day In Court To Contest Criminal Forfeitures 10

C. Denying Third-Party Property Owners Their Day In Court To Contest Criminal Forfeitures Causes Real-World Harms 12

II. The Decision Below Jeopardizes Property Rights By Erroneously Inferring Artificial Barriers To § 853(n) Petitions 15

A. The District Court Erroneously Required Detailed Allegations Of Law To Show Standing At The Pleading Stage 16

1. The District Court Erred By Denying Article III Standing To The Intended Recipients Of A Cash Delivery 16

2. The District Court Erred By Denying Statutory Standing To Both The Sender And Intended Recipient Of A Cash Delivery 18

B. The District Court Erroneously Held That § 853(n) Petitions May Never Be Amended Outside The Initial 30-Day Period 20

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF FILING AND SERVICE 29

TABLE OF AUTHORITIES

Page(s)

CASES

Becker v. Montgomery,
532 U.S. 757 (2001)..26

Boyd v. United States,
116 U.S. 616 (1886)..10

Bryant v. Dupree,
252 F.3d 1161 (11th Cir. 2001)..21

Edelman v. Lynchburg College,
535 U.S. 106 (2002)..26

GeorgiaCarry.Org, Inc. v. Georgia,
687 F.3d 1244 (11th Cir. 2012)..7

**Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*,
26 F.4th 1235 (11th Cir. 2022)..16, 20

Harjo v. City of Albuquerque,
326 F. Supp. 3d 1145 (D.N.M. 2018)...1

Humane Society of the United States v. Vilsack,
797 F.3d 4 (D.C. Cir. 2015)..17

In re U.S. Currency ($39,500.00 Dollars),
No. 1 CA-CV 21-0060,
2022 WL 1468773 (Ariz. Ct. App. May 10, 2022).........................13

**Johnson v. City of Shelby*,
574 U.S. 10 (2014)..20

*Principal authorities are marked with an asterisk.

Leonard v. Texas,
137 S. Ct. 847 (2017)....................2, 8

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)....................17

New York State Rifle & Pistol Ass'n, Inc. v. Bruen,
142 S. Ct. 2111 (2022)....................7

Pacheco v. Serendensky,
393 F.3d 348 (2d Cir. 2004) 12

Pretka v. Kolter City Plaza II, Inc.,
608 F.3d 744 (11th Cir. 2010) 22

**Scarborough v. Principi*,
541 U.S. 401 (2004)....................23, 26

**Singleton v. Apfel*,
231 F.3d 853 (11th Cir. 2000) 22, 23, 26

Snitko v. United States,
No. 2:21-cv-04405, 2021 WL 3139706 (C.D. Cal. July 23, 2021)......... 13-14

Timbs v. Indiana,
139 S. Ct. 682 (2019)....................1

United States v. $8,040.00 U.S. Currency,
No. 21-cv-6323, 2022 WL 325175 (W.D.N.Y. Feb. 3, 2022) 13

United States v. $38,000.00 Dollars in U.S. Currency,
816 F.2d 1538 (11th Cir. 1987) 7, 18

United States v. Bardeen,
No. 7:18-cr-179, 2020 WL 1490706 (E.D.N.C. Mar. 24, 2020)....................25

United States v. Chicago,
No. 15-cr-00168, 2017 WL 1024276 (S.D. Ala. Mar. 16, 2017)...... 12-13, 14

United States v. Conn,
No. 5:17-cr-043, 2018 WL 2392511 (E.D. Ky. May 25, 2018)....................25

United States v. Couch,
No. 15-cr-0088, 2017 WL 4105769 (S.D. Ala. Sept. 15, 2017) 25

**United States v. Douglas*,
55 F.3d 584 (11th Cir. 1995) 22

United States v. Elkins,
No. 3:18-cr-15, 2019 WL 1507407 (W.D.N.C. Apr. 5, 2019)......................25

United States v. Farley,
919 F. Supp. 276 (S.D. Ohio 1996)..11

**United States v. Furando*,
40 F.4th 567 (7th Cir. 2022)..23, 24

**United States v. Gilbert*,
244 F.3d 888 (11th Cir. 2001) 12, 22

**United States v. Glenn*,
No. 10-cr-084, 2012 WL 3775965 (E.D. Okla. Aug. 28, 2012) 23, 24

United States v. Lazarenko,
504 F. Supp. 2d 791 (N.D. Cal. 2007)...18, 19

United States v. Marion,
562 F.3d 1330 (11th Cir. 2009) 12

United States v. Martino,
681 F.2d 952 (Former 5th Cir. 1982) 7

United States v. McClellan,
44 F.4th ___, 2022 WL 3221230 (4th Cir. Aug. 10, 2022)............................1

United States v. McDonald,
18 F. Supp. 3d 13 (D. Me. 2014)..25

United States v. Natalie Jewelry,
No. 14-cr-60094, 2015 WL 15084 (S.D. Fla. Jan. 13, 2015) 25

United States v. Nichols,
841 F.2d 1485 (10th Cir. 1988) 8

United States v. One 1985 Mercedes,
917 F.2d 415 (9th Cir. 1990) 10

United States v. One Ford Coach,
307 U.S. 219 (1939) 7

United States v. Reckmeyer,
836 F.2d 200 (4th Cir. 1987) 18

United States v. Reckmeyer,
628 F. Supp. 616 (E.D. Va. 1986) 11

United States v. Salkey,
No. 2:15-cr-146, 2016 WL 3766308 (E.D. Va. July 11, 2016) 25

United States v. Sigillito,
938 F. Supp. 2d 877 (E.D. Mo. 2013) 25

United States v. Simmons,
No. 17-cr-127, 2019 WL 3532113 (S.D.N.Y. Aug. 2, 2019) 25

United States v. Sims,
No. 2:18-cr-00353, 2020 WL 3415576 (N.D. Ala. June 22, 2020) 25

United States v. Soultanali,
No. 14-cr-229, 2018 WL 4008333 (N.D. Ill. Aug. 20, 2018) 25

United States v. Thach,
No. 12-cr-624, 2013 WL 5177311 (D. Md. Sept. 12, 2013) 25

United States v. Totaro,
345 F.3d 989 (8th Cir. 2003) 12

Via Mat International South America Ltd. v. United States,
446 F.3d 1258 (11th Cir. 2006) 17

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 20

CONSTITUTIONAL PROVISION

U.S. Const. art. III, § 3 8

STATUTES

18 U.S.C. § 1963 8

21 U.S.C. § 853 .... 4, 8

21 U.S.C. § 853(a) 10

21 U.S.C. § 853(k) 10

*21 U.S.C. § 853(n) .... *passim*

21 U.S.C. § 853(n)(2) 21

21 U.S.C. § 853(n)(3) 24, 25

21 U.S.C. § 853(o) 24

28 U.S.C. § 2461(c) 9

Civil Asset Forfeiture Reform Act of 2000,
Pub. L. No. 106-185, § 16, 114 Stat. 202 9

Comprehensive Forfeiture Act of 1984,
Pub. L. No. 98-473, ch. III, 98 Stat. 1837 9

RULES

Fed. R. Civ. P. 15 ....6, 22, 27

Fed. R. Civ. P. 15(c)..23, 26

Fed. R. Crim. P. 32.2(b)(5) 10

OTHER AUTHORITIES

Black's Law Dictionary (5th ed. 1979) 18

Black's Law Dictionary (8th ed. 2004) 19

Brief of Appellant, *United States v. Starling*,
No. 22-659, 2022 WL 2467508 (2d Cir. June 30, 2022) 14

Eric R. Markus,
Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure,
59 Temp. L.Q. 1097 (1986)...8

James Madison,
Property (1792), reprinted in 6 The Writings of James Madison 101
(Gaillard Hunted., 1906)..7

*Jennifer McDonald & Dick M. Carpenter, II,
Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims 5 (2021), https://bit.ly/3Q1K9hB 14, 21

*Lisa Knepper et al.,
Policing for Profit: The Abuse of Civil Asset Forfeiture (3d ed. 2020),
https://bit.ly/3QZK5jn 1, 14, 21

*S. Rep. No. 98-225 (1983)...*passim*

Sarah N. Welling,
3 Federal Practice & Procedure § 571 (4th ed. 2022 update)..........................9

William Blackstone,
Commentaries of the Laws of England 7

U.S. Sentencing Commission,
2021 Annual Report & Sourcebook of Federal Sentencing Statistics 56,
https://bit.ly/3cutbKO 11

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm that seeks to uphold individuals' constitutional rights. IJ has become a leading advocate for ending civil forfeiture. Whereas *criminal* forfeiture allows the government to take property from convicted criminals, *civil* forfeiture allows it to take property from people who have not been charged with a crime (much less convicted).

IJ represents property owners in civil forfeiture proceedings, *e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), challenges civil forfeiture programs, *e.g.*, *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018), and sometimes participates in oral argument as amicus in important cases, *e.g.*, *United States v. McClellan*, 44 F.4th ___, 2022 WL 3221230 (4th Cir. Aug. 10, 2022). Additionally, IJ publishes empirical research addressing the many problems posed by civil forfeiture. *E.g.*, Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed. 2020).[2] IJ's research has been cited by Justice Thomas in an opinion that questioned the constitutionality of modern forfeiture practices. *See*

---

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than Amicus—contributed money that was intended to fund the preparation or submission of this brief.

[2] Available at https://bit.ly/3QZK5jn ("Policing for Profit").

Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

This case, of course, arises from a *criminal* forfeiture. IJ is equally interested, because this case illustrates how the government also uses criminal procedures to take property from people who are never charged with a crime. Like here, where the government seeks to forfeit property that belongs to someone other than the person convicted of the crime. Criminal defendants have no incentive to protect property that is not theirs, particularly not in plea negotiations. In this way, criminal forfeiture causes the same injustices as civil forfeiture, with third-party property owners losing money, vehicles, businesses, and even homes, without doing anything wrong.

As shown below, Congress intended criminal forfeiture to punish wrongdoers. Lawmakers crafted an ancillary hearing procedure that is supposed to liberally allow third parties to petition criminal courts to have property returned. Yet some courts—including the district court here—apply judicially created rules that have greatly narrowed third parties' rights to contest criminal forfeitures. IJ urges this Court to reject such rules. Third-party property owners should be afforded the procedural rights that Congress created for them to contest the forfeiture of property somehow caught up in criminal proceedings.

STATEMENT OF THE ISSUES

1. Whether petitions contesting forfeiture under 21 U.S.C. § 853(n) require only factual allegations to establish standing at the pleading stage rather than specific legal allegations.

2. Whether a timely petition contesting forfeiture under § 853(n) may be amended after the initial 30-day period for filing.

SUMMARY OF THE ARGUMENT

The facts of this case are simple. A foreign business entrusted a courier with currency that it owed to another business in the United States. The courier was arrested in transit for attempting to smuggle drugs. He repeatedly explained that the currency belonged to the businesses, but, as part of his plea deal, he agreed to forfeit it to the government. The two businesses petitioned to have their money returned under the procedures of 21 U.S.C. § 853.

However, the district court held that ***neither*** the sender ***nor*** the intended recipient of the money had standing to contest the forfeiture. It did so based on a flawed reading of the petition and alleged technical failures. And although those technical deficiencies could easily have been fixed, the court also held that ancillary petitions can never be amended in criminal forfeiture proceedings.

There is no basis in § 853(n) or background legal principles for such an outcome. As shown below, property rights are fundamental to our constitutional order, while forfeitures are historically disfavored and construed narrowly. In fact, Congress established robust procedures to protect the rights of third-party property owners. And those procedures are particularly important in criminal forfeiture cases, where convictions almost always result from plea bargaining—a process in which third-parties do not participate and criminal defendants have every incentive to bargain away someone else's property.

Unfortunately, some lower courts have created demanding standing inquiries and procedural hurdles that deny third parties the opportunity to contest the criminal forfeiture of their property. The district court in this case did so when it held that neither of the two businesses can contest the criminal forfeiture of money that under these allegations plainly belongs not to the criminal defendant but to the two businesses.

This Court should reverse. First, at the pleading stage, the standing burden is modest. Property owners only need to make factual allegations that, together with reasonable inferences, are sufficient to plausibly show their interest in the property. The allegations here are that the government intercepted money that was being transported between the claimants. That is more than sufficient to demonstrate standing. The district court erred by demanding technical legal allegations as well.

Second, the district court erred when it concluded that claimants are not permitted to amend their petition once the initial 30-day period for petitioning for an ancillary hearing has passed. Although the statute sets forth a 30-day deadline for petitions, nothing in its text prohibits later amendments. And while a handful of non-precedential decisions have stated without analysis that petitions cannot be amended, the Seventh Circuit (in a published decision) has held otherwise, and the practice in countless other courts is to permit amendments. Eleventh Circuit precedents, meanwhile, confirm that ancillary proceedings under § 853(n) are civil in nature,

meaning Federal Rule of Civil Procedure 15's lenient standards for amendment should govern. Applying Rule 15 to § 853(n) petitions would also be consistent with how this Court and the Supreme Court have instructed lower courts to address filing deadlines in similar circumstances.

For these reasons, amicus urges this Court to reverse, ensuring that claimants and countless other property owners have their day in court before the government permanently forfeits their property.

ARGUMENT

I. Congress Enacted The Ancillary Hearing Procedure To Safeguard Important Property Rights Of Third-Party Property Owners.

This case implicates protections for property rights throughout this Circuit. As discussed below, although forfeitures were historically disfavored, the practice has expanded dramatically over the past 50 years. Yet when Congress expanded criminal forfeiture, it intended for third-party property owners to have a meaningful opportunity to contest the forfeiture of their property. The growing trend of denying property owners their day in court, however, does not just thwart the will of Congress—it threatens real-world harm to property owners everywhere.

A. Historically Disfavored, Forfeitures Have Expanded Dramatically Over the Last 50 Years.

Property rights are fundamental to our constitutional order. As this Court has recognized, it is "simply beyond rational dispute that the Founding Fathers, through

the Constitution and the Bill of Rights, sought to *protect* the fundamental right of private property." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012) (emphasis in original), *abrogated on other grounds by N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The Framers recognized that securing "property of every sort" was a core purpose for establishing government, and thus, "that alone is a just government which impartially secures to every man whatever is his own." *Id.* (quoting James Madison, Property (1792), *reprinted in* 6 The Writings of James Madison 101, 102 (Gaillard Hunt ed., 1906)). Indeed, "private property" is enshrined among "the three fundamental rights," along with personal security and personal liberty. *See id.* (citing Blackstone's Commentaries).

It is therefore no surprise that forfeitures have long been disfavored in this country. As the Supreme Court has explained, "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939); *accord United States v. $38,000.00 Dollars in U.S. Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987). "Just as nature abhors a vacuum, historically our society has abhorred forfeitures." *United States v. Martino*, 681 F.2d 952, 962 (Former 5th Cir. 1982) (en banc) (Politz, J., dissenting).

Consistent with this abhorrence, forfeiture was largely unknown in this country for most of its history. Criminal forfeiture has "origins in ancient English common law," S. Rep. No. 98-225, at 193 (1983), but was "largely a remnant of

feudal times." Eric R. Markus, *Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 Temp. L.Q. 1097, 1104 (1986). Distrustful of English abuses, the Founders rejected the practice. *See United States v. Nichols*, 841 F.2d 1485, 1486–87 (10th Cir. 1988). The Constitution limits the scope of forfeiture as a punishment for treason, U.S. Const. art. III, § 3, and the First Congress banned forfeiture of estate as a criminal punishment in 1790. *Nichols*, 841 F.2d at 1487. With a single exception from the Civil War, Congress did not authorize criminal forfeitures between 1790 and 1970. *Id.*[3]

Congress only established forfeiture in earnest in 1970, as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 853, and the Organized Crime Control Act of 1970, 18 U.S.C. § 1963. These statutes introduced civil forfeiture for a broader range of offenses (*e.g.*, 21 U.S.C. § 853), and they also authorized criminal forfeitures of profits obtained from RICO violations and drug trafficking enterprises.

[3] Civil forfeiture, meanwhile, was confined to extremely narrow situations like customs and piracy, where proceeding civilly against the property itself was "justified by necessity, because the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of the United States Courts." *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., statement regarding denial of certiorari).

In 1984, Congress dramatically expanded the scope of criminal forfeiture to include essentially all felony drug cases. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, ch. III, 98 Stat. 1837. The Act also expanded the scope of property subject to forfeiture, including, for example, real property. *Id.* §§ 302–03. Yet, with this expansion in criminal forfeiture came concerns about the rights of third parties. Congress therefore established the original version of the § 853(n) ancillary hearing procedure to provide third-party property owners an opportunity to vindicate their rights. In establishing this procedure, Congress explained that criminal forfeitures "may reach only property of the defendant." S. Rep. No. 98-225, at 208 (1983). Congress further emphasized that it "strongly agree[d]" that "third parties are entitled to judicial resolution of their claims." *Id.*

Finally, while reforming civil forfeiture in 2000, Congress sought to encourage the use of criminal forfeiture as an alternative to civil forfeiture. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 16, 114 Stat. 202. It did so by making criminal forfeiture available anytime civil forfeiture is authorized. *Id.* (codified at 28 U.S.C. § 2461(c)). This reform extended criminal forfeiture procedures to over 250 crimes. Sarah N. Welling, 3 Federal Practice & Procedure § 571 (4th ed. 2022 update).

B. When Congress Expanded Criminal Forfeiture, It Intended Third-Party Property Owners To Have Their Day In Court To Contest Criminal Forfeitures.

Encouraging criminal rather than civil forfeiture was consistent with the country's longstanding abhorrence of forfeiture procedures. Criminal forfeiture avoids many of the pitfalls of civil forfeiture, such as the ability to take property without accusing anyone of wrongdoing and imposing what amounts to a criminal punishment without the procedural protections afforded in prosecutions. *See, e.g.*, *United States v. One 1985 Mercedes*, 917 F.2d 415, 419 (9th Cir. 1990) (observing that "many traditional criminal law guarantees do not protect civil forfeiture owner-claimants" and that defenses to civil forfeiture "stand in stark contrast to those available to a criminal defendant"); *see also Boyd v. United States*, 116 U.S. 616, 634 (1886) (noting that civil forfeiture proceedings, "though they may be civil in form, are in their nature criminal"). Criminal forfeiture, by contrast, entitles the defendant to a jury trial and requires proof of wrongdoing beyond a reasonable doubt. *See* 21 U.S.C. § 853(a) (forfeiture applies to persons "convicted" of certain violations); Fed. R. Crim. P. 32.2(b)(5) (defendant may request that the jury determine forfeitability of specific property).

All the same, careful attention must be paid to third parties whose property is subject to criminal forfeiture. Third parties are barred from intervening in the criminal proceeding to protect their interests. 21 U.S.C. § 853(k). Their only remedy

is to prove their interests in the property after a court has entered a preliminary order of forfeiture by petitioning for an ancillary proceeding under § 853(n). And those procedures place the burden on the third-party to prove their interest, because Congress assumed that by that point the government "will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt." S. Rep. No. 98-225, at 209.

In the vast majority of cases, however, the government never has to prove its allegations. Instead, nearly all criminal cases result in a guilty plea. *See* U.S. Sentencing Commission, 2021 Annual Report & Sourcebook of Federal Sentencing Statistics 56 (98.3% of federal sentences were the result of a guilty plea while 1.7% resulted from trial).[4] And many courts have observed the danger that guilty pleas raise for the property of third-party property owners. *See, e.g.*, *United States v. Farley*, 919 F. Supp. 276, 278 n.3 (S.D. Ohio 1996) ("[A] criminal defendant may well be motivated to plead guilty to a forfeiture to gain a more favorable plea bargain even if the property does not belong to him."); *United States v. Reckmeyer*, 628 F. Supp. 616, 621 (E.D. Va. 1986) ("[A] defendant is likely to have little or no interest in litigating the issue of ownership of property belonging to other persons."). Put differently, a criminal defendant has no incentive to stick their neck out—and risk a

[4] Available at https://bit.ly/3cutbKO.

longer criminal sentence—to protect someone else's property from forfeiture, and every reason to offer up that property in exchange for leniency.

That is why Congress established ancillary hearings under § 853(n) to protect third-party property owners. And that is why Congress was explicit that it intended those property owners to have their day in court. S. Rep. No. 98-225, at 208 (explaining that "third parties are entitled to judicial resolution of their claims"). Other courts have similarly recognized the importance of ensuring that criminal forfeiture reaches the property interests of criminal defendants but extend no further. *United States v. Gilbert*, 244 F.3d 888, 920 (11th Cir. 2001) (principles of criminal forfeiture "dictate that the jury could forfeit only that portion of the [property] owned by the convicted [defendants]"), *superseded by rule on other grounds as recognized in United States v. Marion*, 562 F.3d 1330 (11th Cir. 2009); *Pacheco v. Serendensky*, 393 F.3d 348, 349 (2d Cir. 2004) ("[A] criminal defendant can only be made to forfeit what was his in the first place."); *United States v. Totaro*, 345 F.3d 989, 994 (8th Cir. 2003) (noting constitutional questions raised if criminal forfeiture reached third party's property).

C. Denying Third-Party Property Owners Their Day In Court To Contest Criminal Forfeitures Causes Real-World Harms.

Contrary to the will of Congress, lower courts are increasingly erecting barriers to forfeiture claimants coming into court to protect their property rights. *See, e.g.*, *United States v. Chicago*, No. 15-cr-00168, 2017 WL 1024276, at *1–2, *7–8

(S.D. Ala. Mar. 16, 2017) (petitioner not entitled to contest criminal forfeiture of bank account in her name or home deeded to her where she lived with her children, and not permitted to amend petition to cure defects). This trend has also been visible in IJ's civil forfeiture work. *See, e.g.*, *In re U.S. Currency ($39,500.00 Dollars)*, No. 1 CA-CV 21-0060, 2022 WL 1468773, at *4 (Ariz. Ct. App. May 10, 2022) (lower court erroneously "placed the burden on [claimant] to prove the money was not connected to criminal activity—merely to have standing to challenge the forfeiture"); *United States v. $8,040.00 U.S. Currency*, No. 21-cv-6323, 2022 WL 325175, at *4–6 (W.D.N.Y. Feb. 3, 2022) (chronicling *pro se* claimant's year-plus effort to secure return of her property, yet refusing to set aside default despite her assertion that she never received notice of forfeiture complaint). This case presents an opportunity for this Court to enforce established principles for threshold issues about pleading standing and amending pleadings, and to push back against the creep of restrictive rules that run counter to the will of Congress.

Forfeiture procedures impact a great deal more than abstract property rights; they involve things people need to put a roof over their head, drive to work to make a living, buy food, and more. For example, after the government seized his life savings from a safe deposit box and sought to administratively forfeit it, one IJ client was unable to pay for necessary medical care and was forced to live off canned food he had stockpiled during the pandemic. *Snitko v. United States*, No. 2:21-cv-04405,

2021 WL 3139706, at *1–2 (C.D. Cal. July 23, 2021). Another IJ client lost the money she had saved up to realize her dream of starting a food truck. Br. of Appellant, *United States v. Starling (In re $8,040.00 United States Currency)*, No. 22-659, 2022 WL 2467508, at *10 (2d Cir. June 30, 2022). Similar examples involving criminal forfeiture abound. *E.g., Chicago*, 2017 WL 1024276, at *7 (forfeiture of home where mother was raising her kids).

These burdens are not evenly distributed. IJ's research has shown that forfeitures disproportionately target those on the margins of society. *See* Jennifer McDonald & Dick M. Carpenter, II, *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims* 5, 10–13 (2021) (collecting survey data from Philadelphia's civil forfeiture system).[5] And the sums that the government seeks to forfeit are not limited to large-scale or wealthy criminals. Philadelphia's forfeiture program, for example, seized on average less than $600, and across a broader sample of states the median cash forfeiture between 2015 and 2019 was just $1,276. *Id.* at 14; Policing for Profit at 20. For federal civil forfeitures, half of the Department of Justice's currency forfeitures between 2015 and 2019 were less than $12,090. Policing for Profit at 163. The modest sum here was no aberration.

[5] Available at https://bit.ly/3Q1K9hB ("Frustrating, Corrupt, Unfair").

For these reasons—the centrality of property rights to our system of government; our nation's historic distrust of forfeitures; Congress's intent to protect third-party property owners from criminal forfeiture; and the real-world harms when they are not protected—it is crucial that courts give petitioners under § 853(n) their day in court to litigate the merits of their asserted property rights.

II. The Decision Below Jeopardizes Property Rights By Erroneously Inferring Artificial Barriers To § 853(n) Petitions.

The district court here did not give the sender of the cash (appellant Palacios) or the intended recipient (appellants Sanchez and his company, Excentric) (collectively, "claimants") an opportunity to prove their interest in the seized cash. Instead, the lower court employed a strict, technical reading of the petition to conclude that they lacked standing to even ask for the property back. And even though the claimants easily could have remedied the perceived shortcomings, the district court concluded twice that § 853(n) petitions may not be amended after the initial 30-day filing deadline. Although claimants catalog the lower court's other errors in their opening brief, these two aspects of the decision below, if accepted by this Court, would threaten property rights throughout this Circuit and substantially increase the risk that third-party property owners are erroneously deprived of their property.

A. The District Court Erroneously Required Detailed Allegations Of Law To Show Standing At The Pleading Stage.

As claimants alleged, and as we must accept as true at this stage, claimant Palacios provided cash to Defendant Cancari to take to claimants Sanchez and Excentric. App. 74 (Pet. ¶¶ 18–19); *id.* at 86 (Sanchez Aff. ¶¶ 3–4); *id.* at 88 (Palacios Aff. at 1). These simple factual allegations should have easily met the burden for pleading standing. But the district court here concluded that the intended recipient lacked both Article III and statutory standing, and that the sender lacked statutory standing. This was error.

At the motion to dismiss stage, courts must accept the allegations as true and make all reasonable inferences in favor of claimants. *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 26 F.4th 1235, 1240 (11th Cir. 2022). And the burden to allege standing at this stage is correspondingly modest—"general factual allegations" will suffice if they plausibly show that the elements of standing are present. *Id.* (internal quotation marks omitted).

1. The District Court Erred By Denying Article III Standing To The Intended Recipients Of A Cash Delivery.

Applying these standards, the district court erred when it concluded that Sanchez and Excentric—the intended recipients of a cash delivery—lacked Article III standing. For purposes of Article III, litigants only need to state "a plausible claim that the plaintiff has suffered an injury in fact fairly traceable to the actions of the

defendant that is likely to be redressed by a favorable decision on the merits." *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). The Supreme Court has emphasized that only "general ***factual*** allegations" are necessary at the pleading stage, because courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added).

The factual allegations in this case were more than sufficient. *See Via Mat Int'l S. Am. Ltd. v. United States*, 446 F.3d 1258, 1262–63 (11th Cir. 2006) ("economic harm to a party with a possessory interest in seized property . . . can constitute a palpable injury sufficient to confer standing"). Not receiving $9,000 you are owed is definitely an injury—the recipient is, after all, deprived of $9,000 they would otherwise have.[6] The only reason they do not have that $9,000 is because the government seized it and forfeited it. And a favorable decision would put $9,000 in their pockets. Article III requires nothing more.

---

[6] The district court labeled Sanchez and Excentric as general creditors because the delivery was for cash rather than some other valuable property. But even if they were creditors, they were creditors of Palacios (the sender who purchased electronics), not Cancari (the defendant who was supposed to deliver the cash). At a minimum, even accepting the district court's label that they are general creditors, intercepting a large cash delivery to Sanchez and Excentric would hurt their bottom line and make it less likely that they are ever compensated for their products. *See, e.g.*, *Vilsack*, 797 F.3d at 10 (courts "routinely credit" allegations founded on "application of basic economic logic" to conclude standing is satisfied).

2. *The District Court Erred By Denying Statutory Standing To Both The Sender And Intended Recipient Of A Cash Delivery.*

The District Court also erred when it concluded that neither Palacios, Sanchez, nor Excentric had statutory standing because none of them had any "legal interest" in the money that Sanchez directed Cancari to deliver to Sanchez and Excentric. As other courts have recognized, the term "interest" is the "most general term that can be employed to denote a right, claim, title, or legal share in something." *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (quoting Black's Law Dictionary 729 (5th ed. 1979)). A claimant "need only have some type of property interest," which "need not be an ownership interest; it can be any type of interest, including a possessory interest." *United States v. Lazarenko*, 504 F. Supp. 2d 791, 794 n.2 (N.D. Cal. 2007); *see also $38,000 in U.S. Currency*, 816 F.2d at 1544 ("a lesser property interest, such as a possessory interest, is sufficient for standing").

Notably, the district court did not find that the claimants lacked any legal interest in the intercepted currency. Instead, the court repeatedly emphasized that the claimants had not adequately explained the jurisdiction under which their legal interests arose. App. 169–70, 254. And when claimants cited authority establishing their legal interests, the district court faulted them for relying on a "variety of case

law," App. 169–170, that was "seemingly random," "without explaining what laws created their property rights," *id.* at 254.[7]

This requirement to plead specific legal allegations upends the usual standards that apply at the motion to dismiss stage. Claimants pleaded the "general factual allegations" giving rise to their legal interest in the property. They pleaded the legal jurisdictions (Florida and Bolivia) where the relevant transaction took place. Those general factual allegations, and the reasonable inferences they supported, plausibly claimed that claimants had "some type of property interest," *Lazarenko*, 504 F. Supp. 2d at 794 n.2, including, for example, that Palacios had an interest as a bailor. Black's Law Dictionary 151–52 (8th ed. 2004) (Bryan A. Garner, ed.) (defining "bailment" as "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose under an express or implied-in-fact contract"). The allegations also plausibly assert that Sanchez and Excentric—as the intended recipients—had a possessory interest in the intercepted funds. *Id.* at

[7] The district court originally found that Sanchez and Excentric lacked statutory standing for the same reasons they lacked Article III standing. But after claimants' Motion for Relief from Order pointed to Sanchez and Excentric's constructive possessory interest in the funds, the district court ultimately concluded that they, too, lacked statutory standing because they failed to include sufficient legal allegations about where their property interests arose. *Id.*

1203 (defining "possessory interest" to include "present or future right to the exclusive use and possession of property").[8]

At that point, there was no need to plead further legal allegations to support their standing to ask for their funds back. *Cf. Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (summarily reversing requirement that plaintiffs plead legal theory supporting claim where factual allegations sufficed to show substantive plausibility). At the pleading stage, claimants only need to allege "***facts*** demonstrating each element" of standing." *Glynn Env't Coal.*, 26 F.4th at 1240 (emphasis added). "Only factual allegations, and not legal conclusions, are relevant[.]" *Id.* Claimants' Opening Brief (at 36–42) persuasively demonstrates that they in fact ***do*** have a legal interest in the seized currency. But far less than that is required under the applicable pleading standards, and the district court erred by requiring far more.

B. The District Court Erroneously Held That § 853(n) Petitions May Never Be Amended Outside The Initial 30-Day Period.

The district court also erred when it concluded, both in its original dismissal and its denial of claimants' motion for relief, that § 853(n) petitions can never be amended after the initial 30-day deadline. Yet neither the district court here nor the authorities it relied on engaged with the statutory text or the background principles

[8] At a minimum, the district court should have concluded that ***at least*** one of the claimants had an interest in the money, rather than ***neither*** of them, which would have resolved the standing dispute. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) (only one plaintiff needs to have standing).

governing when pleadings are amendable. That analysis confirms that amendments are permissible, and that the lower court here erred by concluding that it could not permit claimants to amend their petition.

The practical consequences of the district court's error are profound. Claimants have no more than 30 days in which to find counsel and file a petition for a hearing. *See* 21 U.S.C. § 853(n)(2) (specifying two ways the government can provide notice of the forfeiture and tying 30-day filing deadline to "whichever is earlier"). The amounts at issue, like those here, may often be relatively modest, complicating efforts to find an attorney. *See* Frustrating, Corrupt, Unfair at 24, 30 (survey respondents reported the "low value of property" and "the high cost of hiring an attorney" as obstacles to contesting forfeitures in Philadelphia); Policing for Profit at 20–21 (estimating at least $3,000 to contest simple state forfeiture, and "considerably more" to contest federal forfeiture). Forfeiture also disproportionately impacts those on the margins of society. *See supra* at 14. Language barriers and other logistical difficulties (as seen here) further complicate the process. The odds that a petition will fall short in some way are high. Yet the need to amend pleadings is common in litigation. *Cf. Bryant v. Dupree*, 252 F.3d 1161, 1163–64 (11th Cir. 2001) (request to amend complaint should have been granted where, among other factors, there was no previous "notice of the possible deficiencies in their complaint"). Prohibiting amendments in § 853(n) proceedings, where the need to

amend is, if anything, elevated, will undoubtedly lead to the dismissal of meritorious petitions and deprive property owners of their rights to have their property returned.

In the face of such consequences, one would expect clear textual evidence if Congress intended to depart from established legal norms and prohibit amendments to § 853(n) petitions. Yet nothing in 21 U.S.C. § 853(n) directs courts to disallow amendments to petitions. And the legislative history confirms that Congress instead wanted to protect the rights of third-party property owners and "strongly agree[d]" that "third parties are entitled to judicial resolution of their claims." S. Rep. No. 98-225, at 208. In sum, nothing in the statutory text or legislative history suggests that Congress intended a petition "to be a high stakes gamble in which one pleading failure . . . completely forecloses" a petitioner's opportunity to secure the return of their property. *Singleton v. Apfel*, 231 F.3d 853, 858 (11th Cir. 2000) (discussing statutory deadline for EAJA applications).

Just the opposite: Congress intended for normal litigation procedures to apply to § 853(n) petitions. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 758–59 (11th Cir. 2010) (when Congress "wishes to deviate from deeply rooted principles, it will say so"). As this Circuit has repeatedly observed, ancillary criminal forfeiture hearings are for relevant purposes "civil in nature." *Gilbert*, 244 F.3d at 906–07; *see also United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995). And in civil actions, it is well-established that Federal Rule of Civil Procedure 15 provides lenient

standards for amending pleadings and generally allows amendments to relate back to the date of the original pleading. Indeed, not only were Rule 15(c)'s relation-back provisions in place long before Congress enacted § 853(n), those provisions reflect a "well-recognized doctrine" with "roots" preexisting the rules of procedure. *Scarborough v. Principi*, 541 U.S. 401, 418 (2004). It is therefore inescapable that Congress wanted the well-established relation-back doctrine to apply to the essentially civil petitions authorized by § 853(n).

Disregarding the established rules governing amendments is not justified by the policy concern that § 853(n) petition requirements must be "construed strictly to discourage false or frivolous claims." *United States v. Furando*, 40 F.4th 567, 579 (7th Cir. 2022) (internal quotation marks omitted) (acknowledging but questioning policy concern). Banning amendments does not further that interest. To the contrary, concerns about the impact of amendments on the government's interests are addressed by denying leave to amend if there is a showing of prejudice and exercising the usual case management tools. *See, e.g.*, *Scarborough*, 541 U.S. at 416; *Singleton*, 231 F.3d at 858; *United States v. Glenn*, No. 10-cr-084, 2012 WL 3775965, at *2 (E.D. Okla. Aug. 28, 2012) (court was "confident" that concerns about "false or contrived assertions of ownership" could be addressed in ancillary hearing).

Other courts have concluded that amendments are permitted. In *Furando*, for example, the Seventh Circuit recently addressed a petition that had been dismissed *sua sponte* due to lack of standing. 40 F.4th at 574–75. The panel agreed that the petition (unlike in this case) "was conclusory" and that it failed to properly allege any legal interests in various property, including cash and jewelry. *Id.* at 579. Pointing, however, to the requirement in 21 U.S.C. § 853(o) that the ancillary hearing provisions must be "liberally" construed, along with the need for "workability," the Seventh Circuit remanded to the district court "to provide either a hearing or an opportunity to amend the petition, as this jurisdictional defect is not incurable." *Id.* As the *Furando* panel explained, "it is sensible to give claimants the opportunity to amend their petition to provide information to satisfy § 853(n)(3) (if they have it) and the opportunity for a hearing (if it is warranted)." *Id.* at 579–80; *see also Glenn*, 2012 WL 3775965, at *2 (acknowledging "no clear rule" on whether amendments are permitted but refusing to "oust" claimant's petition "on a technicality," and instead exercising discretion to permit amendment).

These decisions are no anomalies. While a few courts have said that amendments are not permitted, the overwhelming practice by trial courts around the country is to permit amendments.[9]

---

[9] *See, e.g.*, *United States v. Sims*, No. 2:18-cr-00353, 2020 WL 3415576, at *3 (N.D. Ala. June 22, 2020) (allowing "one more opportunity" to amend petition); *United States v. Bardeen*, No. 7:18-cr-179, 2020 WL 1490706, at *1 (E.D.N.C. Mar. 24, 2020) (noting that court had "further directed Clayton to resubmit her petition under penalty of perjury"); *United States v. Simmons*, No. 17-cr-127, 2019 WL 3532113, at *4 (S.D.N.Y. Aug. 2, 2019) (allowing amendment where shortcomings in petition "could easily be cured"); *United States v. Elkins*, No. 3:18-cr-15, 2019 WL 1507407, at *1 (W.D.N.C. Apr. 5, 2019) (noting that petitioner had already had "two chances" to fix shortcomings with petition); *United States v. Soultanali*, No. 14-cr-229, 2018 WL 4008333, at *4 (N.D. Ill. Aug. 20, 2018) (dismissing claims "without prejudice, to allow the Adverse Claimants to properly and specifically plead their interests"); *United States v. Conn*, No. 5:17-cr-043, 2018 WL 2392511, at *2 (E.D. Ky. May 25, 2018) (noting that court had ordered petitioner "to file an amended claim for seized funds which complied with the relevant legal requirements"); *United States v. Couch*, No. 15-cr-0088, 2017 WL 4105769, at *1 (S.D. Ala. Sept. 15, 2017) (the court "deemed" the "amended petition to be timely filed"); *United States v. Salkey*, No. 2:15-cr-146, 2016 WL 3766308, at *1 (E.D. Va. July 11, 2016) (court allowed petitioner "to amend his petition and correct the deficiencies noted in the Order"); *United States v. Natalie Jewelry*, No. 14-cr-60094, 2015 WL 150841, at *2 (S.D. Fla. Jan. 13, 2015), *report and recommendation adopted*, 2015 WL 1181987 (Mar. 13, 2015) (describing earlier "deadlines for curing the alleged defects raised by the Government" with the petition); *United States v. McDonald*, 18 F. Supp. 3d 13, 17 (D. Me. 2014) (to give petitioner "the opportunity to protect his property interest," the court gave petitioner "time to conduct further investigation" before amending petition); *United States v. Sigillito*, 938 F. Supp. 2d 877, 883 (E.D. Mo. 2013) (court had "directed [petitioner] to file an amended petition" that "must comply with the pleading requirements set forth in 21 U.S.C. § 853(n)(3)"); *United States v. Thach*, No. 12-cr-624, 2013 WL 5177311, at *4 (D. Md. Sept. 12, 2013) (permitting amendment where the "failure to comply with the statutory requirement could be easily corrected by amendment").

Finally, allowing amendments to relate back to the original petition filing date would be consistent with how the Supreme Court and this Circuit have analyzed similar filing deadlines. In *Scarborough*, for example, the Supreme Court addressed whether a timely fee application under the Equal Access to Justice Act (EAJA) could be amended after the initial 30-day filing deadline. 541 U.S. at 406. Just as the government and lower court here have insisted that § 853(n) should be strictly construed to protect the government against false or frivolous claims, the government in *Scarborough* asserted that EAJA's filing deadline should be strictly construed because it constituted a waiver of sovereign immunity. *Id.* at 419–20.

The Supreme Court rejected that reasoning. It noted that it had applied the relation-back doctrine to filing deadlines in all manner of circumstances, including unsigned notices of appeals and unverified Title VII discrimination charges. *See id.* (citing *Becker v. Montgomery*, 532 U.S. 757 (2001); *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002)). Nor could the Court identify any reasons why EAJA applications should be different. *Id.* Thus, because the "amended application 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth' in the initial application," the Court concluded that the EAJA application at issue there was capable of amendment. *Id.* at 418–19 (quoting Fed. R. Civ. P. 15(c)); s*ee also Singleton*, 231 F.3d at 858 (statutory requirements "that [EAJA] applications

be filed within a certain time period, must be distinguished from the 'pleading requirements' of the statute").

What is true for all other civil pleadings, notices of appeal signatures, discrimination charges, and EAJA applications is true here. If anything, § 853(n) petitions are closer to traditional civil pleadings, and thus a more natural fit for the relation-back doctrine, than those other situations where the Supreme Court has applied it. The Court should therefore conclude that § 853(n) petitions are subject to amendment consistent with the terms of Federal Rule of Civil Procedure 15.

CONCLUSION

For the foregoing reasons, the district court's order dismissing Interested Parties-Appellants' petition under 21 U.S.C. § 853(n) should be reversed.

Dated: September 6, 2022

Respectfully submitted,

By: /s/ Joseph Gay

Joseph Gay
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
jgay@ij.org

Wesley Hottot
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because the brief contains 5,828 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: September 6, 2022

/s/ Joseph Gay
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this September 6th, 2022, I caused the foregoing Brief of *Amicus Curiae* Institute for Justice in Support of Interested Parties – Appellants and in Support of Reversal to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following CM/ECF users:

Juan D. Berrio
BERRIO & BERRIO, P.A.
2333 Brickell Avenue, Suite A1
Miami, FL 33129
(305)358-0940
jdberrio@hotmail.com

Stephen F. Raiola
PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP
7108 Fairway Drive, Suite 130
Palm Beach Gardens, FL 33418
(412)263-4373
sfr@pietragallo.com

Counsel for Interested Parties-Appellants

Lisa T. Rubio
U.S. ATTORNEY'S OFFICE
Southern District of Florida
99 NE 4TH St, Floor 5
Miami, FL 33132
(305)961-9114
lisa.rubio@usdoj.gov

Counsel for Plaintiff-Appellee

/s/ Joseph Gay
Counsel for Amicus Curiae