No. 19-61

In the Supreme Court of the United States

MARITIME LIFE CARIBBEAN LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in determining that any error in the district court's determination to allow a victim to intervene in an ancillary civil proceeding under 21 U.S.C. 853(n)—in which the United States contested a third party's asserted interest in property that was subject to a preliminary order of criminal forfeiture—was harmless and did not warrant reversal.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. *Gutierrez*, No. 05-cr-20859 (Sept. 1, 2017)

United States Court of Appeals (11th Cir.):

United States v. *Maritime Life Caribbean Limited, et al.*, No. 17-10889 (Jan. 16, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

No. 19-61

MARITIME LIFE CARIBBEAN LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 913 F.3d 1027. The order of the district court granting a motion to intervene (Pet. App. 31a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2019. A petition for rehearing was denied on April 10, 2019 (Pet. App. 34a-35a). The petition for a writ of certiorari was filed on July 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea by defendant Raul Gutierrez for fraud-related charges in the United States District Court for the Southern District of Florida, the United States obtained a preliminary order of criminal forfei-

ture under 21 U.S.C. 853 for Gutierrez's interest in certain real estate in Florida. Pet. App. 2a. In an ancillary proceeding commenced by petitioner under 21 U.S.C. 853(n) and Federal Rule of Criminal Procedure 32.2(c), the district court rejected petitioner's third-party petition asserting an interest in the property, D. Ct. Doc. 1267 (Feb. 14, 2017), and subsequently entered a final order of forfeiture, D. Ct. Doc. 1307 (Sept. 1, 2017). The court of appeals affirmed. Pet. App. 1a-15a.

1. Raul Gutierrez was involved in a "bid-rigging scheme involving the construction of an airport in Trinidad and Tobago." Pet. App. 2a; see Presentence Investigation Report ¶¶ 10-63. A grand jury in the Southern District of Florida returned an 84-count indictment charging Gutierrez and his co-conspirators with various offenses arising from the scheme. See Second Superseding Indictment 5-30. The government additionally sought the criminal forfeiture of property that was or had been derived from proceeds of the scheme under 18 U.S.C. 982(a)(1) and (b), 982(a)(2) (2006), and 21 U.S.C. 853. Superseding Indictment 31.

In 2006, Gutierrez pleaded guilty to one count of conspiring to commit wire fraud and to transport money obtained by fraud, in violation of 18 U.S.C. 371, and one count of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 2a; Gutierrez Judgment 1; Gov't C.A. Br. 1. The district court sentenced Gutierrez to a total of 72 months of imprisonment, to be followed by five years of supervised release. Gutierrez Judgment 2-3.

In his plea agreement, Gutierrez agreed to a forfeiture money judgment of $22,556,100, "representing the proceeds of his criminal activity." Pet. App. 2a. In partial satisfaction of that judgment, Gutierrez agreed to forfeit his interest in a piece of real property on Red

Road in Coral Gables, Florida (Red Road property), title to which was held by Inversiones Rapidven, S.A. *Ibid.* The plea agreement "exhaustively listed Gutierrez's assets and liabilities," and it did not identify any encumbrance on the Red Road property. *Ibid.*; see Gov't C.A. Br. 2. The government indicated that it intended to use any forfeited assets toward Gutierrez's restitution obligations to his victims. See D. Ct. Doc. 512, at 2 (Apr. 17, 2007); see 21 U.S.C. 853(i)(1). Following Gutierrez's sentencing, the district court entered a preliminary order of forfeiture in the amount of $22,556,100, granting the United States a forfeiture money judgment and forfeiting Gutierrez's interest in, among other things, the Red Road property. Pet. App. 2a.

2. Following the district court's preliminary order of forfeiture, Gutierrez's ex-wife commenced an ancillary civil forfeiture proceeding under 21 U.S.C. 853(n) and Federal Rule of Criminal Procedure 32.2(c). Gov't C.A. Br. 3. Section 853(n) and Rule 32.2(c) establish a procedure through which a third party claiming a cognizable interest in property subject to a preliminary forfeiture order can seek to demonstrate that she is the rightful owner of forfeited assets. 21 U.S.C. 853(n); Fed. R. Crim. P. 32.2(c). Gutierrez's ex-wife asserted an interest in property that Gutierrez had forfeited to the United States, including the Red Road property. Gov't C.A. Br. 3.[1]

---

[1] The district court subsequently authorized an interlocutory sale of the Red Road property, with the proceeds of the sale deemed substitute assets in place of the property. See D. Ct. Doc. 554, at 1-2 (June 12, 2007). The Red Road property was eventually sold for $2.175 million. Gov't C.A. Br. 4.

The Republic of Trinidad and Tobago and several bank entities (collectively, Trinidad) moved to intervene in the ancillary forfeiture proceeding. Pet. App. 3a. Trinidad asserted that it was a victim of Gutierrez's bid-rigging conspiracy and that it had an interest in the forfeiture proceeds. *Ibid.* The district court expressed concerns about permitting Trinidad to intervene, stating that it was "not sure if Trinidad ha[d] standing" under Section 853. *Ibid.* (brackets omitted); see *id.* at 33a. Despite its concerns, the district court granted Trinidad's motion. *Id.* at 31a-32a. The court "directed Trinidad and the government to 'form a committee on the government[/]victim side and decide who will be speaking for that group.'" *Id.* at 3a (brackets in original); see *id.* at 33a. The court stated that it was "not going to have three people arguing the same thing," that the government and victims "should have interests that are in common," and that, "[i]f there [wa]s an issue with that," those parties should inform the court. *Id.* at 33a.

At a status conference several weeks later, "the government expressed concern over a 'potential conflict' between the parties' interests and argued that victims like Trinidad do not 'have standing in a forfeiture proceeding.'" Pet. App. 3a; see *id.* at 28a-29a. The district court adhered to its original determination, stating that Trinidad's participation would ease the litigation burden on the government and that Trinidad "was the party who was 'going to benefit if the government wins on the forfeiture.'" *Id.* at 3a; see *id.* at 29a-30a. Although the government objected to Trinidad's formally intervening in the ancillary proceeding, the government did not object to Trinidad's providing some assistance, such as with discovery. See, *e.g.*, *id.* at 23a-24a.

The ex-wife's third-party claim was ultimately denied in 2012. Gov't C.A. Br. 3.

3. a. Meanwhile, in 2010, petitioner also filed a third-party claim asserting an interest in the proceeds from the sale of the Red Road property under Section 853(n) and Rule 32.2(c). Pet. App. 3a-4a; Gov't C.A. Br. 4. Petitioner's claim was premised on a purported collateral assignment through which Gutierrez allegedly had granted a security interest in the Red Road property to petitioner, as collateral for a loan to Gutierrez's construction company. Pet. App. 4a. The assignment was dated July 24, 2001, and was signed by Gutierrez (in his capacity as president of his company), but the assignment was "never recorded." *Ibid.*

The government and Trinidad opposed petitioner's claim. Pet. App. 4a. "The parties then engaged in protracted discovery in which Trinidad played a significant role," including "leading 14 depositions on behalf of the government." *Ibid.* Petitioner opposed Trinidad's participation, but the district court overruled petitioner's objections. *Ibid.*; see *id.* at 25a-26a. The court reasoned that the government sought the Red Road property for the benefit of victims such as Trinidad, and "the fair thing" was for Trinidad to take "the laboring oar" in handling discovery-related work. *Id.* at 24a, 26a.

At a subsequent hearing at which the district court denied petitioner's motion for summary judgment, the court stated that it would permit Trinidad "to remain" participating in that capacity. Pet. App. 22a. The court noted that, although Trinidad "d[id] not have a direct claim under [Section] 853 or under the [government's] forfeiture claim," it was a victim that would benefit from restitution "in the event that the Government prevails on the Government's forfeiture claim." *Ibid.* The court

concluded that it was appropriate "to allow the Government to rely on the work done by [Trinidad's] lawyers." *Ibid.*; see *id.* at 4a; Gov't C.A. Br. 6.

b. The government and Trinidad subsequently jointly moved for summary judgment. Pet. App. 4a. The district court denied that motion. *Ibid.* The court instead elected *sua sponte* to hold a bifurcated trial. *Ibid.* The "initial phase" of the trial was to be "focused solely on the question whether 'to admit the collateral assignment as being genuine and authentic' under Federal Rule of Evidence 901." *Id.* at 4a-5a. A second phase would then "address the merits of Maritime's interest in the Red Road property." *Id.* at 5a.

Petitioner moved to preclude Trinidad from participating in the trial. D. Ct. Doc. 1227 (Oct. 27, 2016). In its response, filed at the district court's direction, the government reiterated its position that Trinidad "lack[s] standing to pursue [third-party] claims in the ancillary hearing," and that therefore neither Trinidad nor its counsel "w[ould] be presenting evidence and witnesses or cross-examining witnesses on behalf of the United States at any of the ancillary hearings." D. Ct. Doc. 1235, at 6 (Nov. 15, 2016). Instead, the government explained that government attorneys would present evidence and cross-examine witnesses at the bench trial on petitioner's claim and would "mak[e] any other litigation decisions on the United States' behalf." *Ibid.* The government emphasized that Trinidad "d[id] not speak on behalf of the United States and c[ould not] dictate the United States' litigation decisions." *Id.* at 4. The government observed, however, that neither Section 853 nor any other provision of law prohibited Trinidad and its attorneys from "providing assistance to the United States

during the ancillary process." *Ibid.* The district court denied petitioner's motion. Gov't C.A. Br. 7.

c. At the bench trial on petitioner's claim, only the government and petitioner presented evidence and cross-examined witnesses. Gov't C.A. Br. 7. The trial evidence included testimony from depositions at which Trinidad had participated, which was used to aid in the impeachment of one of petitioner's witnesses. See, *e.g.*, Pet. App. 13a. The government had been represented at all of the depositions that the district court received in evidence at trial. Gov't C.A. Br. 38.

At the conclusion of the first phase of the trial, the district court found that petitioner "had failed to carry its burden of proving the authenticity of the collateral assignment 'by the greater weight of the evidence.'" Pet. App. 6a. The court explained that various circumstantial evidence as well as discrepancies on the face of petitioner's purported collateral assignment cast doubt on its authenticity. See *ibid.* The court also found that expert testimony concerning the document was inconclusive, that petitioner's fact witnesses (Gutierrez himself and Lesley Alfonso, who previously was an employee, and later was a director, of petitioner) were not credible, and that no evidence corroborated the authenticity of the assignment. See *id.* at 6a-7a.

Having determined at the first phase of the trial that the collateral assignment on which petitioner's third-party claim was premised was not authentic, the district court found it unnecessary to proceed to the second phase of the trial. See Pet. App. 7a. The court accordingly denied petitioner's third-party claim, see *ibid.*;

D. Ct. Doc. 1267, and subsequently entered a final order of forfeiture of the property, D. Ct. Doc. 1307.[2]

4. The court of appeals affirmed. Pet. App. 1a-15a.

As relevant here, the court of appeals concluded that the district court had erred by permitting Trinidad "to intervene in the ancillary proceeding." Pet. App. 12a; see *id.* at 12a-13a. The court of appeals reasoned that Trinidad did not "have standing to intervene to defend its own interests" under 21 U.S.C. 853(n), and that it could not litigate on behalf of the United States, which is represented in court only by attorneys appointed pursuant to certain statutes. Pet. App. 13a; see *id.* at 12a-13a. The court agreed with the government, however, that any error was harmless and did not warrant reversal. See *id.* at 13a-15a; cf. Gov't C.A. Br. 34 & n.8, 39-43 (arguing that the district court had not erred in allowing "Trinidad to assist the government," because no statute "preclude[s] the government from enlisting the assistance of victims with preparation of discovery, dispositive motions, and other pretrial matters"; taking "no position on the district court's 'intervention'" decision as such; and arguing that any error in that decision was harmless because "Trinidad's participation did not affect [petitioner's] substantial rights").

---

[2] At the time petitioner filed its notice of appeal of the district court's denial of petitioner's claim, D. Ct. Doc. 1279 (Feb. 27, 2017), the district court had not yet entered a final order of forfeiture. See Gov't C.A. Mot. to Dismiss 4 (June 5, 2017). The court of appeals denied the government's motion to dismiss petitioner's appeal, which had argued that the appeal was jurisdictionally premature given that the district court had not yet issued a final order of forfeiture. 8/17/2017 C.A. Order 1-2. The district court thereafter issued a final order of forfeiture. D. Ct. Doc. 1307.

The court of appeals had observed in a different portion of its opinion that "Federal Rule of Civil Procedure 61 permits reversal based on a trial error only where the error has caused substantial prejudice to the affected party (or, stated somewhat differently, affected the party's substantial rights or resulted in substantial injustice)." Pet. App. 9a (citation and internal quotation marks omitted). And the court had further explained that an error would have "prejudiced [petitioner] only if there is a reasonable likelihood that the outcome would have been different" but for that error. *Ibid.* (citation and internal quotation marks omitted). Applying that standard, the court of appeals determined that the district court's error in permitting Trinidad to participate "d[id] not warrant reversal" because it did not prejudice petitioner. *Id.* at 13a; see *id.* at 13a-14a.

The court of appeals rejected petitioner's assertion that it had been prejudiced because the district court had "relied on deposition testimony elicited by Trinidad in finding a material inconsistency in the testimony of Alfonso"—petitioner's only fact witness other than Gutierrez. Pet. App. 13a. The court of appeals observed that the district court itself had expressly "stated" that "its ruling against [petitioner] did not depend on its rejection of Alfonso's testimony" and would have been the same "'even if' Alfonso 'were credible.'" *Id.* at 14a. The court of appeals additionally noted that, separate from the deposition testimony used to discredit Alfonso's account, "[t]he district court also had another, independent ground for discounting [her] testimony": that as "a former employee and current director of [petitioner]," "she was not 'an unbiased witness'" and "had an obvious incentive to tailor her testimony to support [petitioner's] interests." *Ibid.*

The court of appeals also rejected petitioner's alternative argument that permitting Trinidad to participate was "structural error" under *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787 (1987), that warranted reversal irrespective of whether it prejudiced petitioner. Pet. App. 14a-15a. The court explained that, "[i]n *Young*, a plurality of [this] Court concluded that the 'appointment of an interested prosecutor' in a criminal contempt proceeding is a structural error," but that "[t]his rule does not apply to an ancillary proceeding conducted under section 853(n) because such a proceeding is civil in nature." *Id.* at 15a. The court additionally observed that, "if there were a constitutional prohibition on interested private parties representing the United States in civil actions, the validity of statutes such as the False Claims Act, 31 U.S.C. § 3730, would be doubtful." *Ibid.*[3]

ARGUMENT

Petitioner contends (Pet. 10-23) that the court of appeals erred applying harmless-error review to the district court's grant of permission to Trinidad to participate in the litigation to assist the government. Peti-

[3] The court of appeals also upheld the district court's determination on the merits that the collateral assignment was not authentic. See Pet. App. 7a-12a (concluding that the district court erred by placing the burden on petitioner at the first phrase of the bifurcated trial of proving the assignment's authenticity but that the error was harmless because "the district court inevitably would have reached the same answer" to that question "when it acted as the finder of fact" at the second phase, which "would have been a bench trial," given all the evidence of the assignment's inauthenticity). Petitioner has not sought review of that portion of the decision below in this Court.

tioner specifically argues that the district court committed structural error that warranted reversal irrespective of the absence of any prejudice to petitioner. The court of appeals correctly rejected that argument. Its decision does not conflict with any decision of this Court, and petitioner does not contend that the decision conflicts with a decision of any other court of appeals. Further review is not warranted.

1. Criminal forfeiture proceedings are governed, in relevant part, by 21 U.S.C. 853 and Federal Rule of Criminal Procedure 32.2. Rule 32.2 requires that, "[a]s soon as practical after * * * a plea of guilty * * * , on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute." Fed. R. Crim. P. 32.2(b)(1)(A). If the district court finds that property is subject to forfeiture, it must enter a preliminary order of forfeiture "without regard to any third party's interest in the property." Fed. R. Crim. P. 32.2(b)(2)(A). Instead, "[d]etermining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c)." *Ibid.* Section 853(k) specifies that a third party cannot intervene in a criminal case involving the forfeiture of property and may assert an interest in the property only as provided in Section 853(n). 21 U.S.C. 853(k); see *Libretti* v. *United States*, 516 U.S. 29, 44 (1995) ("Once the Government has secured a stipulation as to forfeitability, third-party claimants can establish their entitlement to return of the assets only by means of the hearing afforded under 21 U.S.C. § 853(n).").

Section 853(n) and Rule 32.2(c) establish a procedure through which a third party claiming a cognizable interest in property subject to a preliminary forfeiture order can seek to demonstrate that it is the "'rightful owner[]' of forfeited assets." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 629 (1989); see 21 U.S.C. 853(n); Fed. R. Crim. P. 32.2(c). A third party claiming such an interest may file a petition with the district court requesting that the court conduct "a hearing to adjudicate the validity of [the third party's] interest in the property," and must set forth in the petition the "facts supporting the [third-party] petitioner's claim." 21 U.S.C. 853(n)(2) and (3). After conducting the hearing, the court "shall amend the order of forfeiture" if it finds that the third party "has established by a preponderance of the evidence" either of two things: (A) that the third party had a vested right in the property superior to that of the defendant "at the time of the commission of the acts which gave rise to the forfeiture of the property under this section," such that the "order of forfeiture" is "invalid in whole or in part"; or (B) that the third party was "a bona fide purchaser for value" of the property "and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. 853(n)(6); see Fed. R. Crim. P. 32.2(c)(2) (requiring court to "enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights" upon third party's establishment of valid ownership interest).

2. The question whether the district court erred by permitting Trinidad to participate in the case as it did is not before this Court. The court of appeals concluded that Trinidad's participation in the litigation was inconsistent with those provisions, and no party has sought

this Court's review of that conclusion. Instead, the only question is whether the court of appeals correctly determined that the error it identified was harmless and did not warrant reversal. That determination is correct and does not warrant further review.

As the court of appeals explained, Federal Rule of Civil Procedure 61 directs courts in civil cases to disregard harmless errors. Pet. App. 9a. Rule 61 provides that,

> [u]nless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Fed. R. Civ. P. 61. Rule 61 departed from the rule that governed "[a]t common law," under which "any error in the process of rendering a verdict, no matter how technical or inconsequential, could be remedied only by ordering a new trial." *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1895 (2016). "[M]odern trial practice did away with th[at] system" and "replac[ed] it with the harmless-error standard now embodied in Rule 61." *Ibid.* (citing *Kotteakos* v. *United States*, 328 U.S. 750, 758, 760 (1946)).

"While in a narrow sense Rule 61 applies only to the district courts, it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984) (citation omitted). And "Congress has further reinforced the application of Rule 61 by enacting the harmless-error statute, 28 U.S.C. § 2111, which applies directly to appellate

courts and which incorporates the same principle as that found in Rule 61." *Ibid.* Section 2111 provides that, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111.

The court of appeals correctly considered and rejected petitioner's contention that petitioner was prejudiced by Trinidad's participation in the litigation of this case. Pet. App. 13a-15a. As the court explained, the only putative prejudice that petitioner identified was that the district court had relied on certain deposition testimony that Trinidad's lawyers had elicited from one witness (Alfonso) to discredit the trial testimony of that same witness. *Ibid.* The court of appeals determined that the error "did not affect [petitioner's] 'substantial rights,'" *id.* at 15a (citation omitted), for two reasons: first, the district court had expressly stated that its ultimate decision did not depend on its rejection of Alfonso's testimony; second, the district court had a basis independent of Alfonso's deposition testimony to discount her trial testimony. *Id.* at 14a. In this Court, petitioner does not challenge that determination, and in any event that highly factbound question of the proper application of well-established harmless-error principles to the particular circumstances of this case would not warrant this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

3. Petitioner's sole contention (Pet. 10-23) is that the court of appeals should not have applied harmless-error analysis at all. Petitioner asserts (Pet. 11) that "[t]he

District Court appointed a private prosecutor over the United States' objection," which the court "ha[d] no power to" do, and that "[s]uch an error is never subject to harmless error review." That contention lacks merit.

The district court did not appoint Trinidad as a "private prosecutor." Pet. 11. The ancillary forfeiture proceeding in this case was not a criminal prosecution. As the court of appeals explained, it was a civil proceeding to determine property rights. See Pet. App. 15a; *United States* v. *Davenport*, 668 F.3d 1316, 1322 (11th Cir.) (explaining that "ancillary proceedings to a criminal forfeiture prosecution are considered civil cases"), cert. denied, 566 U.S. 1035 (2012); *United States* v. *Gilbert*, 244 F.3d 888, 907 (11th Cir. 2001); see also *United States* v. *Bradley*, 882 F.3d 390, 392-393 (2d Cir. 2018) (explaining that a Section 853(n) proceeding is a civil proceeding governed by civil rules for the deadline for filing a notice of appeal); *United States* v. *Corpus*, 491 F.3d 205, 208-209 (5th Cir. 2007) (explaining that, even though an ancillary proceeding under Section 853(n) "arises in the context of criminal forfeiture," it "closely resembles a civil proceeding"); Gov't C.A. Br. 35. Rule 32.2(c) specifies that parties in ancillary proceedings must conduct discovery pursuant to the "Federal Rules of Civil Procedure," and they may thereafter move for summary judgment under the civil rules. Fed. R. Crim. P. 32.2(c)(1)(B). Indeed, petitioner acknowledged below that "[t]hird party proceedings ancillary to a criminal forfeiture prosecution, such as this, * * * are civil in nature," D. Ct. Doc. 901, at 4 (Sept. 10, 2012), and it again acknowledges that in this Court, see Pet. 22 ("the third-party ancillary proceeding is 'civil' in nature").

Petitioner's reliance (Pet. 11, 13, 20-23) on *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787 (1987), is therefore misplaced. In *Young*, a plurality of this Court concluded that the appointment of an interested prosecutor to represent the government in a criminal contempt proceeding was structural error because it "undermine[d] confidence in the integrity of the criminal proceeding." *Id.* at 810. In reaching that conclusion, the plurality reasoned that

> [a] prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity.

Id. at 807.

The court of appeals determined, in accord with other courts of appeals, that the *Young* plurality's conclusion does not extend to civil proceedings. Pet. App. 15a; see *Portland Feminist Women's Health Ctr.* v. *Advocates for Life, Inc.*, 877 F.2d 787, 790 (9th Cir. 1989) (explaining that "[appellants'] reliance on *Young* is misplaced because *Young* applies only to criminal contempt proceedings," while appellants "were held in civil contempt"); *EEOC* v. *Sears, Roebuck & Co.*, 839 F.2d 302, 359 (7th Cir. 1988) (explaining that "*Young* was a criminal proceeding involving the public interest in vindication of the court's own authority," and distinguishing *Young* from "a civil case without the potential to adversely affect liberty interests or the court's

authority"). The *Young* plurality's reasoning regarding the breadth of a prosecutor's discretion in a criminal proceeding has no application to conduct of litigation over property disputes. In addition, it is unclear whether or in what circumstances an error in trial-court proceedings in a civil case would ever properly be viewed as structural error immune to the harmless-error standard prescribed by 28 U.S.C. 2111 and Federal Rule 61. Cf. *Al Haramain Islamic Found., Inc.* v. *United States Dep't of the Treasury*, 686 F.3d 965, 988 (9th Cir. 2012) (noting that this Court "has never held that an error in the *civil* context is structural"). The "rationales" the Court has previously identified for deeming particular errors to be structural in criminal cases have been focused on the criminal context. *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

In any event, even assuming arguendo that the principle articulated by the *Young* plurality applied outside the context of criminal prosecutions, as petitioner urges (Pet. 22), it is inapposite here. As the government explained in the court of appeals, the United States remained in charge of the litigation throughout the ancillary proceeding. Trinidad merely assisted the government's efforts. See Gov't C.A. Br. 33-39. The government made the decision to forfeit the Red Road property in the first instance and to litigate third-party claims for more than a decade. See, *e.g.*, D. Ct. Doc. 974, at 1 n.1 (July 10, 2014) (district-court order stating that "the Government, not the Trinidad entities, is the party asserting forfeiture rights against Raul J. Gutierrez" and that the court had permitted Trinidad "to intervene for the purpose of assisting the Government"); 7/9/2014 Tr. 7 (court stating that "the Government is the party

that has the claim for restitution and is objecting to or fighting [petitioner] on [its] claim under Section 853(n)").

Although Trinidad aided the government's efforts, it did not assume the decisionmaking authority vested in government attorneys or represent the government before the district court. It "did not speak on behalf of the government or dictate its litigation decisions." Gov't C.A. Br. 34. Unlike the private prosecutor in *Young*, Trinidad "had no authority, among other things, to decide whether to press charges, who should be used as witnesses, whether to enter plea bargains, or whether to grant immunity." *Id.* at 36. And Trinidad "neither presented evidence nor cross-examined witnesses at trial." *Id.* at 33. Instead, Trinidad "merely engaged in civil discovery and pretrial motion practice in conjunction with the government." *Id.* at 37-38. Although the government benefited from Trinidad's assistance in depositions and other discovery matters, government attorneys were "present at every deposition that the district court received in evidence at trial," *id.* at 38, and decided which—if any—of the discovered evidence to present in court.

For those reasons, the government argued below that Trinidad's limited role in the litigation—like other victims who aid the government in gathering information and otherwise preparing for judicial proceedings—was not improper. See Gov't C.A. Br. 33-39. The government regularly and permissibly receives litigation assistance from third parties, including counsel, experts, researchers, and victims, many of whom also potentially have a financial or other interest in the outcomes of the cases with which they assist. Even the plurality opinion in *Young* recognized that an interested party may provide assistance to a prosecutor without running afoul of constitutional prohibitions. See *Young*, 481 U.S. at 806

n.17 (observing that private counsel's greater familiarity with the case might properly have "be[en] put to use in *assisting* a disinterested prosecutor in pursing the contempt action," even though it "cannot justify permitting counsel for the private party to be in control of the prosecution"); see also *United States* v. *Siegelman*, 786 F.3d 1322, 1329 (11th Cir. 2015) ("[A]lthough *Young* categorically forbids an interested person from *controlling* the defendant's prosecution, it does not categorically forbid an interested person from having *any involvement* in the prosecution."), cert. denied, 136 S. Ct. 798 (2016). Trinidad's participation here was not akin to outsourcing the government's prosecutorial authority to a private party.

The record does not support petitioner's suggestion (Pet. 10-11, 16), that the district court forced the government to allow Trinidad to control the litigation over the government's objection. Although the government objected to Trinidad formally intervening in the proceeding, the government accepted Trinidad's assistance when the government deemed it helpful. See, *e.g.*, Pet. App. 23a. On other occasions, it declined Trinidad's assistance. See, *e.g.*, *id.* at 18a (district court deferring to government's position that only government attorneys conduct the trial proceeding and question witnesses).

Petitioner errs in suggesting (Pet. 20, 22 n.1) that the government's withdrawal of its motion to dismiss the forfeiture of the Red Road property shows that the district court divested the government of its exclusive authority over the litigation. The government's intent at all times was to use the forfeited property to provide restitution to the victims of the fraud. See 21 U.S.C. 853(i)(1). Although the government at one point moved to dismiss the forfeiture proceeding—believing that

restitution proceedings would be an adequate vehicle for obtaining the property for the victims, see D. Ct. Doc. 512, at 1-8—it withdrew that motion one week later "[u]pon further review of the pleadings * * * and further consideration[] of the issues," D. Ct. Doc. 520, at 1 (Apr. 24, 2007). It was the government's prerogative to reconsider its position based on its evaluation of all of the circumstances. The fact that the government exercised that prerogative, in a filing submitted by government attorneys, does not show that the government abdicated its decisionmaking authority or that its deliberative process was foreordained by the district court.[4]

4. Petitioner does not contend that the court of appeals' decision applying harmless-error principles to the circumstances of this case conflicts with the decision of any other circuit. We are not aware of any contrary holding by any court of appeals, and the circumstances of the case are sufficiently idiosyncratic that they are unlikely to recur with any frequency—if they recur at all. Further review is not warranted.

---

[4] Likewise, that Trinidad allegedly took a position "inconsistent" with the government's theory of forfeiture at one point in the litigation (Pet. 22 n.1) does not demonstrate that Trinidad controlled the United States' litigation position. To the contrary, it shows the two entities made independent decisions. Moreover, the district court denied Trinidad's motion taking that alleged position, and therefore it had no effect on petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
SANGITA K. RAO
Attorney

NOVEMBER 2019