No. 25–352

In The
Supreme Court of the United States

JASMINE YOUNGE,

Petitioner,

v.

FULTON JUDICIAL CIRCUIT
DISTRICT ATTORNEY'S OFFICE, GEORGIA,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus curiae in important civil procedure cases. *See, e.g.*, *Enbridge Energy, LP v. Nessel*, 146 S. Ct. 1074 (2026); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

WLF has a strong interest in the proper application of forfeiture doctrines and the party-presentation principle in federal civil litigation. WLF also recognizes the well-established discretion of reviewing courts to consider forfeited issues on the merits when the particular circumstances of a case warrant it—such as when the issue presents a pure question of law, the interests of justice so require, or considerations of judicial economy counsel in favor of reaching the merits. These principles help ensure that procedural rules facilitate, rather than obstruct, the resolution of cases on their substantive merits.

[1] Pursuant to Supreme Court Rule 37.6, amicus states that (a) no counsel for any party authored this brief in whole or in part; and (b) aside from amicus, its members, and its counsel, no entity or person made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question presented here focuses on the doctrine of forfeiture. Petitioner argues that an unpleaded affirmative defense is forfeited and cannot be raised on summary judgment absent a timely request to amend the answer.

While WLF takes no position on the question presented, it submits this brief to explain that, even if Petitioner is correct, there are still well-established rules under which courts can and should consider a forfeited defense at the summary judgment stage or on appeal. This Court's opinion should not disturb or inadvertently cast doubt on those well-established rules.

The first rule is forfeiture of forfeiture. Rule 8 of the Federal Rules of Civil Procedure is a claim-processing rule: it promotes efficiency by requiring that parties do certain things (state their affirmative defense) at a certain time (when they file their answer). But a claim-processing rule must be properly invoked. While such rules "assure relief to a party properly raising them," they "do not compel the same result if the party forfeits them." *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

Indeed, this Court has repeatedly held that a party forfeits the argument that the opposing party failed to comply with a claim-processing rule when that argument is not timely raised. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (holding that "a claim-processing rule . . . even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point").

Lower courts regularly apply the forfeiture of forfeiture rule, including to circumstances analogous to those presented here: the failure to timely raise a claim or defense. And courts have even held that a district court abuses its discretion and violates the principle of party presentation if it *sua sponte* raises waiver or forfeiture of a non-jurisdictional defense.

Thus, while a defendant's pleading deficiency may provide a compelling argument for forfeiture, the plaintiff must still *make* that argument. Only *then* can the district court refuse to consider the merits of the defense on the basis of forfeiture. If the plaintiff fails to properly raise the argument, he will have forfeited it. Consideration of the merits of the defense would then not only be appropriate, but required under the principle of party presentation.

The second rule is a discretionary one. This Court has long held that a reviewing court retains the discretion to consider forfeited issues when the facts or circumstances of a particular case warrant doing so. And reviewing courts have long exercised that discretion. The most common circumstance under which courts do so is when the forfeited issue presents a pure question of law. But courts also exercise their discretion when the interests of justice warrant it, or when the policy reasons for the forfeiture rule do not apply given the procedural history of the case.

Regardless whether the exercise of this discretion is warranted on the facts here, the Court's opinion may implicate that practice because the core issue here—forfeiture of a defense—is closely related to that discretion. The Court should thus make clear that, whatever its holding, it does not disturb the appellate courts' well-established discretion to

consider forfeited issues on the merits when the facts or circumstances of the case warrant doing so.

ARGUMENT

I. A court must consider the merits of a forfeited defense if the plaintiff fails to argue forfeiture.

Under Rule 8(c)(1) of the Federal Rules of Civil Procedure, a party responding to a pleading "must affirmatively state any avoidance or affirmative defense." That is an example of what this Court refers to as "claim-processing rules," i.e., "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *see Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 192 (2019) (explaining that, because a time limitation was "found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule"). Claim-processing rules "assure relief to a party properly raising them." *Eberhart*, 546 U.S. at 19.

But they "do not compel the same result if the party forfeits them." *Id.* Indeed, this Court has repeatedly held that a party forfeits the argument that the opposing party failed to comply with a claim-processing rule when the party does not timely raise that argument. *See id.*; *Manrique v. United States*, 581 U.S. 116, 121 (2017) ("Mandatory claim-

processing rules may be forfeited 'if the party asserting the rule waits too long to raise the point.'"); *Hamer v. Neighborhood Hous. Servs. of Chi.,* 583 U.S. 17, 20 (2017) ("If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited.").

Eberhart is instructive. The defendant filed a motion for a new trial that was untimely under the Federal Rules of Criminal Procedure. *Eberhart*, 546 U.S. at 13. The government did not argue that the motion was untimely, and the district court granted the motion. *Id.* at 13–14. The government raised the untimeliness argument for the first time on appeal, and the Court of Appeals reversed the grant of a new trial on the basis of that argument. *Id.* at 14. But this Court reversed, explaining that, because the government had "failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense." *Id.* at 19. "The Court of Appeals should therefore have proceeded to the merits." *Id.*; *see Kontrick*, 540 U.S. at 458 (holding litigant forfeited defense based on claim-processing rule by failing to timely raise it).

That holding is based on the rule commonly known as "forfeiture of forfeiture": if a litigant does not timely argue that their opponent forfeited a claim, defense, or argument, then that litigant has forfeited the forfeiture argument. Courts regularly apply this rule. *See Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) (en banc) (holding defendant "forfeited the forfeiture argument"); *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1139 (10th Cir. 2010) ("Plaintiffs have themselves forfeited any forfeiture argument."); *Petaluma FX Partners, LLC v. Comm'r*,

792 F.3d 72, 78 (D.C. Cir. 2015) ("[A] forfeiture argument can itself be forfeited.").

In fact, courts have applied the rule to circumstances analogous to those presented by Petitioner, i.e., the failure to timely plead a claim or defense. In *Robertson v. U.S. Bank, N.A.*, two homeowners sued their lender during a foreclosure dispute. 831 F.3d 757, 759–60 (6th Cir. 2016). The district court granted the lender's motion for summary judgment. *Id.* at 760. On appeal, the homeowners argued that the defendant had forfeited a compulsory counterclaim by failing to raise the claim in its answer to the plaintiffs' complaint. *Id.*; see Fed. R. Civ. P. 13(a)(1) ("A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party."). The Sixth Circuit rejected the plaintiffs' argument, holding the homeowners had "forfeited this forfeiture argument" because they had not raised it until after the district court had granted summary judgment for the lender. *Robertson*, 831 F.3d at 764.

The forfeiture of forfeiture rule flows naturally from the principle of party presentation—the "rule that points not argued will not be considered," which "distinguishes our adversarial system of justice from an inquisitorial one." *Margolin v. Nat'l Ass'n of Immigr. Judges*, No. 25-767, 2026 WL 1463466, at *2 (U.S. May 26, 2026) (per curiam) (quoting *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in judgment)). As this Court explained in *United States v. Sineneng-Smith*, the judicial system "is designed around the premise" that the parties "know what is best for them, and are responsible for advancing the facts and argument entitling them to

relief." 590 U.S. 371, 375–76 (2020) (quoting *Castro v. United States*, 540 U.S. 375, 381–83 (2003) (Scalia, J., concurring in part and concurring in judgment). Courts are "passive instruments of government"—they "do not, or should not, sally forth each day looking for wrongs to right," and they "normally decide only questions presented by the parties." *Id.* at 376 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring)). This Court has repeatedly demonstrated its seriousness about the party-presentation principle in recent months. *See Margolin*, 2026 WL 1463466, at *2 (summarily reversing Court of Appeals decision that raised merits argument parties had not briefed and district court had not ruled on); *Clark v. Sweeney*, 607 U.S. 7, 9–10 (2025) (per curiam) (same).

Courts therefore hold that a district court abuses its discretion and violates the principle of party presentation if it *sua sponte* raises waiver or forfeiture of a non-jurisdictional defense. *See In re Chrysler Pacifica Fire Recall Prods. Liab. Litig.*, 143 F.4th 718, 722, 725–26 (6th Cir. 2025); *United States v. Sainz*, 933 F.3d 1080, 1082–87 (9th Cir. 2019).

The foregoing presents a clear limiting principle that this Court should keep in mind as it resolves the question presented. Petitioner argues that an unpleaded affirmative defense is forfeited, and that a district court cannot consider the defense at summary judgment without a timely motion for leave to amend the answer. Pet'r's Br. 12–14.

Assuming Petitioner is correct, the Court's opinion should clarify that the forfeiture argument must still be "properly invoked." *Hamer*, 583 U.S. at 20. In other words, while a defendant's pleading deficiency

may provide a compelling argument for forfeiture, a plaintiff must still *make* that argument at the appropriate time. Only *then* can the district court refuse to consider the merits of the defense on the basis of forfeiture. If the plaintiff fails to timely argue forfeiture, she will have forfeited the forfeiture argument, *see supra* pp. 4–6, and the district court would violate the principle of party presentation and abuse its discretion if it *sua sponte* raised forfeiture, *see Margolin*, 2026 WL 1463466, at *2; *Clark*, 607 U.S. at 9–10; *Sineneng-Smith*, 590 U.S. at 375–76. The Court's opinion here should not disturb or inadvertently cast doubt on these well-established principles.

II. Reviewing courts have discretion to consider forfeited defenses and arguments in the first instance.

A plaintiff's failure to argue forfeiture is not the only time when a court may consider the merits of a forfeited affirmative defense. This Court has long held that the "particular circumstances" of a case may "prompt a reviewing or appellate court" to consider forfeited issues in the first instance on appeal. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

This Court confers that discretion on reviewing courts because "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat

them." *Hormel*, 312 U.S. at 557. "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice," and a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." *Id.*

One of the most common scenarios in which the appellate courts exercise that discretion is when the forfeited issue presents a pure question of law that requires no additional factual development beyond the district court record. *See D'Addario v. D'Addario*, 901 F.3d 80, 102 n.11 (2d Cir. 2018) ("[I]in view of the complexity of this matter and the purely legal nature of this argument, we elect to exercise our discretion on appeal to address this [forfeited] contention."); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) ("We often exercise that discretion to entertain [forfeited] arguments that turn on pure issues of law."); *Bastidas v. Chappell*, 791 F.3d 1155, 1161 (9th Cir. 2015) (addressing forfeited issue because it was "a purely legal one . . . and the record has been fully developed"); *see also Kalu v. Spaulding*, 113 F.4th 311, 344 n.21 (3d Cir. 2024); *Cox v. Glanz*, 800 F.3d 1231, 1245–46 (10th Cir. 2015); *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314–15 (8th Cir. 1991); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992); *Jazz Pharms., Inc. v. Avadel CNS Pharms., LLC*, 136 F.4th 1075, 1084 (Fed. Cir. 2025).

Reviewing courts also exercise that discretion when doing so would advance the interests of justice or important policy concerns. For example, courts

have considered forfeited issues when declining to do so "would unjustly deprive class members of . . . an opportunity to which they are entitled by statute." *Morrow v. Jones*, 140 F.4th 257, 261–62 (5th Cir. 2025). Consideration of a forfeited issue also advances the interests of justice when "the issue is one that implicates the integrity of [the] proceedings," *Shen v. Garland*, 109 F.4th 1144, 1159 n.5 (9th Cir. 2024), or when "the proper resolution [of the issue] is beyond any doubt," *Multimedia Techs., Inc. v. City of Atlanta*, 172 F.4th 1286, 1290 (11th Cir. 2026) (quoting *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (en banc)). Finally, reviewing courts sometimes exercise their discretion where the forfeited issue "is one of public importance." *Kalu*, 113 F.4th at 344 n.21.

A reviewing court's exercise of discretion to consider forfeited issues is also appropriate when the policy considerations underlying the forfeiture doctrine do not apply. In *Blanchet v. Charter Communications, LLC*, the Sixth Circuit explained that the forfeiture doctrine has "two main policy goals": it "eases appellate review by having the district court first consider the issue," and it "ensures fairness to litigants by preventing surprise issues from appearing on appeal." 27 F.4th 1221, 1228 (6th Cir. 2022) (quoting *Thomas M. Cooley L. Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 528 (6th Cir. 2014)). The *Blanchet* court exercised its discretion to consider a forfeited issue because, while technically forfeited, the issue "was fully briefed before and considered by the district court," and the parties briefed the merits of the issue on appeal. *See id.*; *see also Lesesne v. Doe*, 712 F.3d 584, 589 (D.C. Cir. 2013)

(exercising discretion to consider forfeited issue in part because "both parties have had ample opportunity to address the issue").

Judicial economy is also an important consideration. The Second Circuit has explained that, although it is usually inefficient to address forfeited issues, in some cases "*not* doing so may be more wasteful." *Palin v. N.Y. Times Co.*, 113 F.4th 245, 274–75 (2d Cir. 2024). Thus, *Palin* addressed forfeited issues because it was remanding the case for a new trial, and "correcting the district court's errors now, even though forfeited, will best conserve judicial resources." *Id.*

As these cases demonstrate, varied circumstances have led the courts of appeals to exercise their discretion to resolve forfeited arguments or defenses. That mirrors this Court's guidance that whether to consider a forfeited argument is a question best "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton*, 428 U.S. at 121.

The Court's opinion in this case should not disturb or inadvertently cast doubt on that well-established discretion. Regardless whether such an exercise of discretion is warranted on these facts, the core issue here—forfeiture of a defense—is closely related to that discretion. The Court should therefore make clear that, whatever its holding, it does not disturb the appellate courts' longstanding discretion to consider forfeited merits issues when the circumstances warrant it.

CONCLUSION

WLF takes no position on how this Court should resolve the question presented. Whatever it holds, this Court should not cast doubt on the well-established forfeiture of forfeiture rule. The Court should make clear that a party relying on the claim-processing requirements in Rule 8 must still properly invoke those requirements. And the Court should not undermine the appellate courts' longstanding discretion to consider forfeited issues on the merits when warranted.

Respectfully submitted,

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