No. 14-419

In The
Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a pretrial injunction prohibiting a defendant from spending untainted assets to retain counsel of choice in a criminal case violates the Fifth and Sixth Amendments.

PARTIES TO THE PROCEEDING

The petitioner, Sila Luis, was the defendant in the district court and the appellant in the court of appeals. The respondent is the United States of America. Co-defendants Myriam Acevedo and Elsa Ruiz neither contested nor appealed the challenged injunction.

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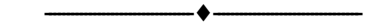
The Government brought this civil action under 18 U.S.C. § 1345 in the Southern District of Florida. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1345. That court's injunction, precluding Ms. Luis from using her assets to retain defense counsel in a criminal proceeding, is at P.App. 4. Its factual findings and legal conclusions, published at *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. 2013), appear at P.App. 8.

The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1292(a)(1). Its opinion, *United States v. Luis*, 564 F. App'x 493 (CA11 2014) (*per curiam*), is at P.App. 1.

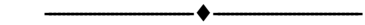
The Eleventh Circuit's order denying rehearing and rehearing en banc entered on July 9, 2014 is reproduced as P.App. 35-36.



STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari was timely filed on October 7, 2014. The Court granted the Petition on June 8, 2015.

The Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law. . . ." U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

18 U.S.C. § 1345 provides:

> (a)(1) If a person is –
>
> (A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title;
>
> (B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or
>
> (C) committing or about to commit a Federal health care offense;
>
> the Attorney General may commence a civil action in any Federal court to enjoin such violation.
>
> (2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a

banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court –

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to –

(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has

been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Two Terms ago, this Court reaffirmed that tainted assets (those traceable to a crime) may be restrained pretrial and forfeited upon conviction, even when those assets are needed to retain counsel of choice in a criminal case. *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090, 1105 (2014); *accord United States v. Monsanto*, 491 U.S. 600, 616 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631 (1989). In rejecting constitutional challenges to pretrial restraints under 21 U.S.C. § 853, it was significant that the restrained assets were tainted. *See Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses").

Addressing a different pretrial restraint statute, 18 U.S.C. § 1345, the Eleventh Circuit upheld an injunction that currently prohibits petitioner from spending any of her assets, including undisputedly untainted funds needed by her to engage private counsel in a related criminal case. In upholding the injunction, the Eleventh Circuit interpreted *Kaley*, *Monsanto* and *Caplin & Drysdale* to "foreclose" petitioner's constitutional challenge to the pretrial restraint of legitimate, untainted funds needed to retain private counsel. The Eleventh Circuit also

cited its prior decision in *United States v. DBB, Inc.*, 180 F.3d 1277, 1284 (CA11 1999), a case that construed section 1345 as explicitly authorizing the restraint of untainted assets and rejected statutory arguments to the contrary. *United States v. Luis*, No. 13-13719, 564 F. App'x 493, 494 (CA11 2014). P.App. 3.

The injunction continues to prevent petitioner from using her untainted assets to retain counsel in the related criminal case. That criminal case has been stayed pending the outcome in this Court.

PROCEDURAL HISTORY AND FACTS

Until her indictment on October 2, 2012, Ms. Luis was in the health-care business, providing care to homebound patients. The indictment charged her and two others with paying and conspiring to pay illegal kickbacks for patient referrals, and conspiring to defraud Medicare by billing for unnecessary or unperformed services. DE58-2:5-14. The indictment alleged that Ms. Luis was the owner and operator of LTC Professional Consultants, Inc. and Professional Home Care Solutions, Inc. DE58-2:6-7. It alleged that, between 2006 and 2012, the two companies fraudulently received $45 million in Medicare reimbursements. The indictment sought a forfeiture in that amount under 18 U.S.C. § 982. DE58-2:14-16. During the pendency of the alleged scheme, the companies earned at least $15 million from sources other than Medicare. J.App. 161-62.

The Government simultaneously brought this civil action seeking a temporary restraining order and an injunction under 18 U.S.C. § 1345 to freeze all of Ms. Luis's personal assets, however obtained. Section 1345 provides that, if "a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of [fraud] or property which is traceable to" fraud, the Government can petition the court to (A) "enjoin such alienation or disposition of property" or (B) obtain "a restraining order to prohibit" the alienation "of any such property or property of equivalent value[.]"

The Government filed under seal its complaint, J.App. 9, and ex parte motion, DE4, supported only by FBI Agent Christopher Warren's declaration summarizing the purported hearsay statements of eight unidentified informants. J.App. 17-29, 40-55. Agent Warren listed real estate and bank accounts belonging to Ms. Luis, her family and related corporate entities. The district court entered the temporary restraining order ("TRO") the next day. J.App. 56-64. With the ex parte TRO, the Government succeeded in freezing bank accounts and filing notices of lis pendens against real estate worth approximately $2 million. DE19-26, 49:1. In addition, Ms. Luis disclosed to the court and the Government bank accounts and properties she owned in Mexico, which she agreed would likewise remain under restraint. J.App. 87-88.

The district court set a hearing on the Government's motion for a preliminary injunction. At the request of one or both parties, the hearing was continued

several times so that the parties could file pleadings and prepare for the hearing. DE18, 37, 44, 54, 79.

Because Ms. Luis has "much less than $45 million in personal assets," DE124:7 – i.e., less than the amount she was restrained from spending – she moved after her arrest to modify the order so she could retain a private attorney and fund her criminal defense. DE46. Investigating the Government's allegations entails reviewing records of services provided to more than 1,900 Medicare patients and 1,000 other patients by more than 200 doctors, 400 nurses and therapists, and 20 laboratories. DE58:2. The cost of defending against such allegations can run into the hundreds of thousands of dollars. DE53:3 n.3.

Constrained by binding circuit precedent construing section 1345 as authorizing the restraint of untainted assets, *see DBB*, 180 F.3d at 1286, Ms. Luis argued that enjoining her from spending her untainted assets to mount a defense to the related criminal charges violated the Fifth and Sixth Amendments. DE46:5. The Government opposed releasing untainted assets for payment of counsel, insisting that even those assets not involved in the alleged fraud should be earmarked to satisfy the criminal monetary judgment for forfeiture and restitution it hoped to obtain should Ms. Luis be convicted.[1] DE49:4. The Government filed

[1] Under 21 U.S.C. § 853(p) and 18 U.S.C. § 982(b), a court may order the forfeiture, after conviction, of "substitute property" of a defendant under certain circumstances if the tainted assets are unavailable.

a supplemental declaration by Agent Warren, in which he claimed that he had traced Medicare proceeds going into the bank accounts and properties of Ms. Luis, her family members and her companies. J.App. 71-75.

Ms. Luis moved to subpoena physicians and laboratories to show that treatments billed to Medicare were, contrary to the Government's allegations, needed and provided, which would prove that there was no fraud in the delivery of services and thereby undermine the informants' credibility. DE58. To avoid having to substantiate its fraud allegations, the Government announced it would rely only on the kickback allegations to support the requested injunction. DE71:9 ("[T]he United States respectfully requests that the Court preclude the introduction of evidence regarding medical necessity at the initial preliminary injunction hearing and limit that hearing to whether the United States has demonstrated probable cause to believe that Defendant Luis conspired to pay or paid health care kickbacks.").[2]

During a case conference, the district court ruled that, if the injunction were based only on kickbacks, evidence demonstrating the legitimacy of the

[2] Confining its allegations to a violation of the anti-kickback statutes should have substantially reduced the amount potentially subject to restitution, because in the Eleventh Circuit, the government's harm from the payment of kickbacks is the amount of the kickback, not the total revenue received from Medicare. *United States v. Bane*, 720 F.3d 818, 827-28 (CA11 2013).

health-care services would be irrelevant to any issue – including the credibility of the informants' contradictory statements. DE87:16. Antithetically, the court expressed misgivings about Ms. Luis having no "opportunity to cross-examine [the informants] to determine whether they're telling the truth or not," and ordered the Government to produce the FBI's reports of informant interviews. DE87:46, 56-57. It also reserved deciding what standard of proof the Government had to meet for the injunction. DE87:63.

The Government produced only those reports that Agent Warren himself wrote, after redacting them to the point of near incomprehensibility. DE86:5-8. Ms. Luis then moved to discover the informants' identities and to exclude hearsay from the preliminary-injunction hearing: "The rules of evidence and the constitutional right to due process and confrontation require at least as much." DE86:10. The Government responded that it need establish only probable cause to believe Ms. Luis defrauded Medicare in an amount exceeding her net worth. Therefore, the indictment and the hearsay summarized in its agent's declarations entitled it to the injunction. DE90:11. Ms. Luis maintained that probable cause was constitutionally inadequate in the circumstances. J.App. 86.

Five days before the hearing, the Government filed a second supplemental declaration by Agent Warren. This one recounted a ninth unnamed informant's claims that Ms. Luis paid illegal kickbacks. J.App. 79-80. It also stated that the "total amount paid by Medicare to [the two companies] for patients

identified by [the eight unnamed informants] as having been paid kickbacks is $4,356,553.85." J.App. 79.

The hearing convened on February 6, 2013. At the outset, the court adopted the Government's view that the indictment itself established probable cause. J.App. 86, 93. Second, over objection that "even in those proceedings where the rules of evidence are relaxed . . . hearsay is not automatically admissible," DE86:9, the court admitted Agent Warren's hearsay declarations in lieu of testimony. J.App. 94-95. The court permitted defense counsel to cross-examine Agent Warren, but denied Ms. Luis's request for a "full adversarial hearing where she should be allowed to cross-examine the [confidential informants]." P.App. 16. The confidential informants were barred from being called to the stand or even being named in open court. J.App. 106.

The cross-examination of Agent Warren revealed he had no personal knowledge of the facts. Rather, he was relying on unsworn debriefings of confidential informants, who had themselves engaged in other criminal activity, had significant credibility issues, and were cooperating with the Government in exchange for leniency. J.App. 95-151. The district court precluded Ms. Luis from establishing that Medicare was billed for medical services that were necessary and delivered. *E.g.*, J.App. 115 ("[AUSA]: Your Honor, if I may object. I believe we previously discussed the issue of medical necessity versus kickbacks. My understanding was that the hearing today would be

focused on the issue of kickbacks. THE COURT: I sustain the objection.").

The only specific evidence in the record regarding the amount of kickbacks paid was the hearsay assertion in the Warren Declaration that one confidential informant claimed to have been paid $186,000. J.App. 46, 131. In Agent Warren's Second Supplemental Declaration, Agent Warren stated that the defendants "withdrew substantial amounts of cash from the companies corporate accounts, *apparently* in order to pay kickbacks." J.App. 80 (emphasis added). Agent Warren attested that the cash withdrawals "total[ed] over $1 million from February 2006 through June 2009." *Id*. At the hearing Agent Warren testified that the withdrawals "indicated a large pull of cash in order to pay these recruiters . . . who brought them patients." J.App. 169.

Before the lunch break, the judge told the parties that it made no difference whether Ms. Luis had untainted assets: "Based on the wording of 1345, substitute properties are assets, are just as good as tainted assets. That's my view. Maybe a stipulation in that regard might be useful to everybody." J.App. 158. The parties stipulated

> that an unquantified amount of revenue not connected to the indictment flowed into some of the accounts and some of the real estate that is currently subject to the temporary restraining order.

> Accordingly, as a result, the government agrees that the defendant has made a sufficient showing that the TRO may currently be restraining substitute assets that would otherwise be available to retain counsel of choice.

J.App. 161. Additionally, Ms. Luis offered un-rebutted evidence that the businesses generated revenue of over $15 million from sources other than Medicare. J.App. 161-62.

In a post-hearing memorandum, Ms. Luis reiterated that an injunction preventing her from retaining private counsel and funding her criminal defense with untainted assets violated her Sixth Amendment right to counsel of choice and her Fifth Amendment rights to "procedural and substantive due process." DE102:22-28.

On June 24, 2013, the district court ruled it would issue the injunction. The injunction stated that

> because the United States' motion is based on 18 U.S.C. § 1345, which expressly authorizes injunctive relief to protect the public interest, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a preliminary injunction in this case.

P.App. 5. Even though the Government had disclaimed any reliance on the theory that Medicare had been billed for medically unnecessary services, the

court nevertheless enjoined Ms. Luis from alienating any property whatsoever "up to the equivalent value of the proceeds of the Federal health care fraud ($45 million)." P.App. 6.

In its published order, the district court recounted as factual findings the informants' hearsay allegations that Agent Warren summarized. P.App. 13-14. The order explained that Agent Warren's declarations and the indictment were sufficient to establish probable cause. P.App. 14-15. The court alternatively found that the Government had also satisfied the preponderance standard. P.App. 15 n.3.[3] The court characterized its proceeding as "evidentiary" even though the Government relied exclusively on hearsay from unsworn, confidential informants, P.App. 19, and Ms. Luis was kept from presenting evidence to refute the allegations of unnecessary or undelivered services. P.App. 24-25.

On appeal, Ms. Luis reiterated her arguments: (i) the Due Process and Right-to-Counsel Clauses disallow the Government's restraint of rightfully owned assets needed to retain chosen counsel; (ii) probable

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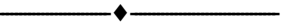
[3] "Even under the preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million dollars, which is 90% of $45 million. This finding is based on the indictment, as well as Special Agent Warren's affidavits detailing the crimes, receipt of Medicare funds, and dissipation of assets, including CW9's statement that 90% of LTC and Professional's patients received kickbacks." P.App. 15 n.3.

cause is a "constitutionally inadequate" standard to restrain assets needed to pay defense counsel; and (iii) the Government's reliance on hearsay to support its motion for the injunction violates due process. Appellant's Brief, *United States v. Luis*, No. 13-13719 (CA11), at 36, 41-42, 44.

The appellate court held that Ms. Luis's arguments were "foreclosed by" *Kaley*, *Caplin & Drysdale, Monsanto* and *DBB*. *United States v. Luis*, No. 13-13719, 564 F. App'x 493 (2014) (*per curiam*). P.App. 3. After the Eleventh Circuit denied Ms. Luis's petition for rehearing *en banc*, P.App. 35, this Court issued a writ of certiorari.



SUMMARY OF THE ARGUMENT

The injunction, insofar as it prohibits Ms. Luis from spending her legitimate, untainted assets to defend herself against criminal charges, violates her Sixth Amendment right to counsel of choice and Fifth Amendment right to due process and a fair adversarial proceeding. The lower courts failed to appreciate the significant, historical distinction between tainted assets, whose expenditure may be enjoined pretrial because they never legitimately belonged to the criminal defendant in the first place, with untainted assets which are owned by the defendant and in which the Government has no legitimate interest until it obtains a judgment of conviction. The lower courts improperly elevated the Government's speculative

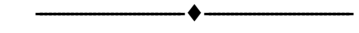
interest in collecting a potential criminal money judgment over Ms. Luis's constitutional rights.

Significantly, 18 U.S.C. § 1345, the statute invoked by the Government to enjoin the expenditure of untainted assets, is susceptible to a common-sense construction which altogether avoids these serious constitutional questions. Specifically, the plain language of the statute authorizes a "restraining order" against tainted and untainted assets (*i.e.,* "property of equivalent value") until "the hearing," at which time the assets proven to be tainted may be enjoined and the untainted assets freed from restraint. Neither the statute nor the federal courts' equitable powers sanction dispossessing a litigant of her rightful property before a money judgment.

Finally, even assuming the injunction against the expenditure of untainted assets on counsel of choice is authorized by statute and not categorically prohibited by the Fifth and Sixth Amendments, the procedures which yield the injunction must comport with due process. Given the stakes, a mere showing of probable cause based on rank hearsay is constitutionally inadequate.

While ordinary seizures may be constitutionally reasonable on probable cause, more is required when a prolonged seizure interferes with the exercise of a constitutional right. Displacing a defendant's chosen advocate in a criminal case undermines the fairness of the proceeding and implicates protected expression; the injunction works a prior restraint like any other.

Probable cause is too low a standard to enable the Government to veto a defendant's choice of counsel and thereby affect the arguments she will propound in court.



ARGUMENT

I. The injunction violates Ms. Luis's rights under the Sixth Amendment by prohibiting her from using her legitimate, untainted assets to retain counsel of choice

The Government obtained, on probable cause to believe the petitioner is guilty of un-adjudicated charges, an injunction preventing her from using indisputably untainted assets to hire private counsel and fund her defense to those same charges. This augurs not only "an error in the trial process itself," but one that degrades "the framework within which the trial proceeds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

A. A criminal defendant's present interest in retaining counsel of choice, and the public's interest in a fair adversarial proceeding, outweigh the Government's speculative interest in preserving untainted assets for collection of a potential future criminal monetary judgment

The Sixth Amendment right to counsel does not merely require that an accused be represented by some lawyer. "It commands . . . that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 U.S. at 146; *accord Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment . . . ."); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). Private lawyers, particularly experienced practitioners, may command higher fees than government-paid lawyers. *Martel v. Clair*, ___ U.S. ___, 132 S. Ct. 1276, 1285 (2012) (finding that Congress provided capital defense lawyers "higher rates of compensation, in part to attract better counsel"). That expense, however, affords the client greater control over and fuller participation in the decisions affecting her fate and in turn fortifies the public's faith in the justice system.

The restraint of untainted assets needed to retain counsel poses a serious threat to the constitutional

right to counsel of choice and the balance of forces in a criminal case. A statute that dispossesses a presumptively innocent defendant of her untainted assets before trial – denying her the financial ability to retain counsel – undermines the adversarial system of justice.

This Court has previously addressed the constitutionality of restraining and forfeiting *tainted* assets earmarked for attorneys' fees. In the context of a different criminal statute, 21 U.S.C. § 853, *Caplin & Drysdale* rejected Fifth and Sixth Amendment challenges to the forfeiture of drug proceeds paid to a criminal defense attorney, reasoning that under the "relation-back" doctrine of the forfeiture statutes, the Government has a vested property interest in tainted property upon commission of the act giving rise to forfeiture. 491 U.S. at 627. The Court reasoned that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel.'" *Id.* at 626 (emphasis added) (citation omitted). This "taint theory" has "long been recognized in forfeiture cases." *Id*. at 627 (citation omitted).

Based on the same reasoning, *Monsanto* upheld the pretrial restraint of *tainted* assets under 21 U.S.C. § 853 against the Fifth and Sixth Amendment challenges. *Monsanto*, 491 U.S. at 616.

And just two Terms ago, *Kaley* held that when the Government restrains *tainted* assets needed to retain counsel of choice under section 853, the Fifth and Sixth Amendments do not require that a defendant be afforded a pretrial hearing to challenge the grand jury's finding of probable cause. *Kaley*, 134 S. Ct. at 1100-05.

These cases all involved tainted assets that were allegedly traceable to, or the instrumentalities of, a crime. *See*, *e.g.*, *Caplin & Drysdale*, 491 U.S. at 629 (describing "ill-gotten gains" and "profits of crime" as forfeitable); *Monsanto*, 491 U.S. at 602 (noting that the indictment alleged that the assets subject to forfeiture "had been accumulated by respondent as a result of his narcotics trafficking"); *Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses"). This circumstance animated the Court's decisions. *See Caplin & Drysdale*, 491 U.S. at 626 (using a bank robbery proceeds hypothetical to explain that a defendant "has no Sixth Amendment right to spend another person's money for services rendered by an attorney . . . ."); *Kaley*, 134 S. Ct. at 1096-97 (recalling the bank robbery proceeds hypothetical to hold that *Caplin & Drysdale,* "cast the die" on the Kaleys' constitutional challenge). No aspect of the Court's holdings in *Caplin & Drysdale*, *Monsanto*, or *Kaley* suggested that the pretrial restraint of *untainted* assets would meet a similar fate.

In its Brief in Opposition to the Petition for a Writ of Certiorari, the Government asserted that this Court implicitly addressed the restraint of substitute assets in *Monsanto* and *Caplin & Drysdale.* While admitting that the facts in those cases involved exclusively the restraint of tainted assets, the Government claimed:

> In both cases, however, the Court repeatedly recognized that the relevant characteristic of the assets was not that they were "tainted" by the crime, but simply that they were forfeitable by statute. *Monsanto*'s holding about the constitutionality of pretrial asset restraint has nothing to do with the specific statutory basis for deeming particular assets to be forfeitable. Rather, the Court held that a pretrial restraint is permissible, even in the face of a claim that the restrained assets are needed to pay for counsel, so long as there is "probable cause to believe that the assets are forfeitable."

BIO 9-10 (citations omitted). Insofar as untainted assets are potentially "forfeitable" as substitute assets after conviction, 21 U.S.C. § 853(p) ("Forfeiture of substitute property"), the Government contended that this Court upheld the constitutionality of restraining untainted assets needed to retain counsel.

But when this Court used the term "forfeitable" in *Monsanto* and *Caplin & Drysdale*, this Court was referring exclusively to tainted assets. This Court cited 21 U.S.C. § 853(a) ("Property subject to criminal

forfeiture") as the source statute "that authorizes forfeiture to the Government of 'property constituting, or derived from . . . proceeds . . . obtained' from" criminal activity. *Caplin & Drysdale*, 491 U.S. at 619-20. The Court never once cited 21 U.S.C. § 853(p) ("Forfeiture of substitute property"). Invoking the bank robber hypothetical, the Court posited:

> A robbery suspect, for example, has no Sixth Amendment right to use *funds he has stolen from a bank* to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the *robbery proceeds* and refuses to permit the defendant to use them to pay for his defense. [N]o lawyer, in any case, . . . has the right to . . . accept stolen property, or . . . ransom money, in payment of a fee. . . . The privilege to practice law is not a license to steal.

491 U.S. at 626 (citation and quotation omitted). *Caplin & Drysdale* cited the "relation-back" provision, 21 U.S.C. § 853(c), a codification of the "taint theory," as "dictat[ing] that 'all right, title and interest in *property' obtained by criminals via the illicit means* . . . 'vests in the United States upon the commission of the act giving rise to forfeiture.'" *Id*. at 627 (emphasis added). In describing "the long-recognized and lawful practice of vesting title to any *forfeitable assets*," the Court specified "assets *derived from the crime*." *Id*. at 627-28 (emphasis added). Any reference in those cases to "forfeitable" assets was shorthand for

tainted assets. *See also id*. at 630 ("'We reject . . . any notion of a constitutional right to use *the proceeds of crime* to finance an expensive defense.'") (citation omitted).[4]

This Court has held that the restraint of tainted assets does not offend the Sixth Amendment because, under the relation-back doctrine, proceeds traceable to the offense do not belong to the defendant in the first place. *Caplin & Drysdale*, 491 U.S. at 627. The Government's right to property traceable to the crime vests upon the commission of the crime, even if title is not perfected until judgment. *United States v. A Parcel of Land* (*92 Buena Vista Avenue*), 507 U.S. 111, 126 (1993).

By contrast, the relation-back doctrine does not apply to untainted assets, either as a matter of statutory construction or common law. *See, e.g.*, *United States v. Erpenbeck*, 682 F.3d 472, 477-78 (CA6 2012); *United States v. Jarvis*, 499 F.3d 1196, 1204 (CA10 2007). *But see United States v. McHan*, 345 F.3d 262 (CA4 2003). Unlike tainted assets, which are never legally owned by a defendant who commits the crime, untainted, substitute assets are

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[4] As petitioner established in her Reply Brief in support of the Petition (at 4-7), the government's briefs in *Monsanto* and *Caplin & Drysdale* repeatedly invited the Court to use the terms "forfeitable," "forfeited" and "tainted" interchangeably. *See* Brief for the United States in *United States v. Monsanto*, No. 88-454, 1989 WL 1115135 at *20-21, 28-31, 37, 41-42; Brief for the United States in *Caplin & Drysdale, Chtd. v. United States*, No. 87-1729, 1988 WL 1026332 (U.S.) at *13, 29, 33, 35-36, 42.

owned by the defendant irrespective of the crime and, by definition, are not criminal proceeds. The Government possesses no property right in a defendant's untainted assets prior to trial.

The law and our nation's history recognize a constitutionally significant distinction between tainted and untainted assets. In England, three kinds of forfeiture had been established when the Sixth Amendment was ratified in the United States: 1) deodand, 2) forfeiture upon conviction for a felony or treason, and 3) statutory forfeiture. *See generally Austin v. United States*, 509 U.S. 602, 612-13 (1993). Deodand (not relevant to this case) reflected the view that the value of an object "causing the accidental death of a King's subject was forfeited to the Crown . . . ." *Id.* at 611 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974)). Forfeiture upon conviction for a felony or treason (*i.e.*, in personam forfeiture) was a forfeiture of estate, which served to punish felons and traitors for violating society's laws. Statutory forfeiture sought to forfeit objects used in violation of the customs and revenue laws – *i.e.*, in rem forfeitures. *Austin*, 509 U.S. at 612.

"Of England's three kinds of forfeiture, only the third took hold in the United States." *Id.* at 613. That is, the only forfeiture recognized by "the common law courts in the Colonies – and later in the states during the period of Confederation" – was in rem forfeiture, based on the fiction that the property itself is guilty of the crime and thereby tainted. *Id.*; *see also 92 Buena Vista Avenue*, 507 U.S. at 121 ("In all of these

early cases the Government's right to take possession of property stemmed from the misuse of the property itself."). The Founding Fathers so disdained in personam "forfeiture of estate" penalties that they banned them in the Constitution for the crime of treason. *See* U.S. CONST., art. III, § 3, cl. 2. "The First Congress [in 1790] explicitly rejected in personam forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries." *United States v. Bajakajian*, 524 U.S. 321, 328 n.7 (1998) (citation omitted). It was not until 1970 that Congress resuscitated the in personam forfeiture penalty for organized crime and major drug trafficking; not until 1984 that these laws authorized ex parte pretrial restraining orders (*e.g.*, 21 U.S.C. § 853(e)); not until 1986 that the laws authorized the forfeiture of substitute assets upon the satisfaction of certain conditions, 21 U.S.C. § 853(p); and not until 1996 that Congress authorized forfeitures for health-care fraud offenses (18 U.S.C. § 982(a)(7)).

The notion that a court, upon request of the Government, would enjoin a presumptively innocent accused from using her own legitimately-earned assets to retain counsel – so that these untainted, substitute assets would be available to the Government as an in personam penalty upon conviction – would have been inconceivable to the Founding Fathers. After all, at the time the Sixth Amendment was ratified, the right to appointed counsel had not yet been recognized as fundamental in all criminal

cases. *See generally Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). In those days, the only lawyer available to a criminal defendant was the lawyer who the defendant could afford to retain.

Of course, it is now well-settled that the Sixth Amendment right to counsel of choice is a "structural right," and the erroneous deprivation of the right to "be defended by the counsel he believes to be the best" is per se reversible, because it affects "the framework within which the trial proceeds." *Gonzalez-Lopez*, 548 U.S. at 146, 148-50. The adversary system of justice depends upon confidence in "an independent bar as a check on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant's chosen advocate strikes at the heart of that significant role." *Kaley*, 134 S. Ct. at 1114-15 (Roberts, C.J., dissenting).

The right to be represented by counsel is among the most fundamental of rights. As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Warren V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956); *cited in Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).

As an accused makes her way through the criminal legal process, her confidence in the independence of her counsel is of the utmost significance. Her ability to choose that counsel is the first step. An accused's choice is not merely a matter of identifying an attorney with technical skills. The accused wants an attorney in whom she can trust and who will consider her views in the handling of the case. "An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citations and quotations omitted). The attorney exercises authority to manage most aspects of the defense without obtaining the client's approval. *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988).

Trust and confidence, therefore, is the bedrock of the attorney-client relationship. "[T]he ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." *United States v. Laura*, 607 F.2d 52, 57 (CA3 1979). Indeed, "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps

most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." ABA Standard 4-3.1, commentary, 149-50.

When the court and/or the prosecution intervenes to deny the accused her chosen counsel without justification, the accused's capacity to trust any counsel is invariably diminished. The offer of a "public" lawyer under the circumstances tends to breed suspicion in the mind of the accused – not a healthy start to a relationship that necessarily depends upon collaboration and trust to make life-altering decisions.

So when that appointed attorney urges a course of action, say "a 'fast track' plea bargain . . . in exchange for a reduced sentence recommendation," *United States v. Ruiz*, 536 U.S. 622, 622 (2002), the accused may doubt counsel's allegiance, even though he is faithfully discharging his constitutional duty. *See Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1408 (2012) ("[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). Our justice system entrusts to counsel strategy decisions that can determine the accused's fate, sometimes a matter of life or death. *See Florida v. Nixon*, 543 U.S. at 181 (affirming death sentence of a defendant whose appointed counsel conceded guilt at trial without the defendant's express consent); *Haynes v. Cain*, 298 F.3d 375, 382-83 (CA5 2002) (en banc) (affirming life sentence of a

defendant whose appointed counsel conceded guilt at trial, over client's objection).

Forbidding the accused to retain a private attorney with her rightful assets has broad implications, for it erodes the public's confidence in the justice system. The public has an interest in the availability of legal services independent of the sovereign that prosecutes. The private criminal defense bar provides a significant check on the power of the prosecutor and judge. An independent defense bar thus serves a unique role in the adversarial system of justice.

> Simply put, the Constitution treats the activities of criminal defense attorneys differently precisely because they are different, from an institutional perspective, from other members of the profession. . . . In the context of the criminal justice system, the defendant's attorney must utilize the adversary system to accomplish an additional function – to exercise the systemic restraints placed upon the power of government in our society of liberties.

Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying An Institutional Role Theory To Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1, 1-4, 8-9.

In complex criminal prosecutions, much time, energy and resources must be devoted to properly prepare for litigation against the Government. "[T]he quality of a criminal defendant's representation frequently may turn on his ability to retain the best

counsel money can buy." *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in result). No one expects private counsel to undertake the representation gratis.

Without access to her untainted property, an accused has no meaningful way to exercise her right to counsel of choice. The deprivation of property, albeit temporary, works a permanent deprivation of the right: "The defendant needs the attorney now if the attorney is to do [her] any good." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417-18 (CADC 2008) (citations omitted). The deprivation upsets the "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The injunction prevents her from mounting a no-holds-barred defense that she could otherwise afford but for the restraint.

It is true that "the Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159 (1988). A court must concern itself with "[n]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases." *Id.* at 160. For example, a court may disallow a particular advocate from participating as counsel in a case if he is not a member of the bar or if he labors under a conflict of interest. *Id*.

But there is no "institutional interest" in preventing an accused from meaningfully exercising her

constitutional right to retain a private lawyer and finance her defense. The injunction only serves the Government's interest. The Government claims a possible future interest in Ms. Luis's untainted assets. The Government's claim is speculative, at best. Because the assets at issue are not tainted, the Government has no property interest in those assets. This is not the proverbial bank loot. *See Caplin & Drysdale*, 491 U.S. at 626.

Any Government interest in laying claim to an accused's rightfully owned assets at the beginning of the litigation is outweighed by the significant individual and societal interests in the underlying constitutional rights. In balancing the competing interests, the Government has no cognizable interest in gaining a tactical advantage by "beggar[ing] those it prosecutes in order to disable their defense at trial." *Caplin & Drysdale*, 491 U.S. at 635 (Blackmun, J., dissenting). Nor does the Government have a sufficiently weighty interest in confiscating those assets as a punishment, even if to satisfy a possible restitution order in the event of conviction. Given the Government's reliance exclusively on a "kickback" theory of criminal liability – eschewing the allegations that Ms. Luis defrauded Medicare by billing for unnecessary or undelivered services – the Government strains to quantify the harm it alleges. *See United States v. Bane*, 720 F.3d 818, 827-28 (CA11 2013) (the Government's harm from the payment of kickbacks is the amount of the kickback, not the total revenue received from Medicare).

The Fourth Circuit explained: "While . . . there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [the defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice." *United States v. Farmer*, 274 F.3d 800, 804 (CA4 2001) (emphasis added, citations omitted). Where both tainted and untainted assets have been seized, the accused has a right to a hearing to establish that "the government seized untainted assets without probable cause and that [the accused] needs those same assets to hire counsel" in the criminal case. *Id.* at 805.

The Solicitor General appeared to concede as much at the October 2013 oral argument in *Kaley*. The issue was whether a defendant has a right to a hearing on whether an asset restrained by court order (pursuant to 21 U.S.C. § 853, in *Kaley*) is traceable or related to the crime alleged in the indictment. "At oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question." *Kaley*, 134 S. Ct. at 1095 n.3. It logically follows that if the Government is unable to trace the assets to the alleged crime, then the Constitution forbids the continued restraint of the untainted assets, at least in an amount sufficient to allow the

defendant to retain her counsel of choice and fund her defense.[5]

This Court "[did] not opine on the matter." *Id*. However, the dissenting Justices expressed agreement that the Constitution requires tracing the restrained asset to the charged crime. *Kaley*, 134 S. Ct. at 1108 & n.2 (Roberts, C.J., dissenting) ("Neither the Government nor the majority gives any reason why the District Court may reconsider the grand jury's probable cause finding as to traceability – and in fact constitutionally must, if asked – but may not do so as to the underlying charged offenses.").

Presumably, a court "constitutionally must" trace the asset to the alleged criminal violation because only assets traceable to the crime may be restrained. Conversely, untainted assets may not be restrained – even in the face of a grand jury's finding of probable cause that a crime was committed – when needed for counsel of choice.

Thus, even assuming the statute authorizes an injunction prohibiting the expenditure of "property of equivalent value," 18 U.S.C. § 1345(a)(2)(B)(i), *but see* Argument I.B, *infra*, the injunction must nevertheless accommodate the defendant's constitutional rights to counsel of choice and maintain the "balance of forces" in the courtroom. This is no different than

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[5] In its Brief in Opposition to the Petition, the government offered a different interpretation of that concession. BIO 12-14.

when a court detains a defendant pending trial, *e.g.*, *United States v. Salerno*, 481 U.S. 739 (1987), inasmuch as the court must make reasonable accommodations for a defendant to have access to his counsel of choice. 18 U.S.C. § 3142(i). Any injunction affecting the defendant's untainted assets, therefore, must provide for the release of sufficient funds to pay *bona fide* attorneys fees and legal expenses.

B. As a matter of statutory construction, 18 U.S.C. § 1345 does not authorize a district court to enjoin the expenditure of untainted assets

In the courts below, petitioner was constrained from challenging whether 18 U.S.C. § 1345, as a matter of statutory construction, authorizes an injunction against the expenditure of untainted assets. That issue had been foreclosed by prior precedent of the Court of Appeals. *See United States v. DBB*, 180 F.3d 1277, 1286 (CA11 1999) ("Subsection (a)(2)(B) . . . explicitly provides broader relief for situations where the property obtained through fraud is not as easily identified. It allows the government to prevent the withdrawing, transferring, removing, and dissipating of an amount of the defendant's assets equal to that obtained through fraud . . . .").

In this Court, however, the canon of constitutional avoidance counsels in favor of considering the statutory basis for reversal to avoid the serious constitutional questions attendant to the restraint of

untainted assets. That canon "allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis in original). "It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (citation omitted).

When first enacted, section 1345 authorized district courts only to enjoin fraudulent acts, which codified the courts' common-law power. Though equity traditionally would not enjoin the commission of crime, it would abate an interference with vested property rights. *See In re Debs*, 158 U.S. 564, 593 (1895). In 1990, Congress amended the statute to provide that, if the Government shows that "a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of [fraud] or property which is traceable to" fraud, courts can (A) "enjoin such alienation or disposition of property" or (B) issue "a restraining order to prohibit" the alienation "of any such property or property of equivalent value[.]" 18 U.S.C. § 1345(a)(2).

The statute's structure thus distinguishes between property derived from or traceable to fraud,

whose alienation can be "enjoin[ed]," § 1345(a)(2)(A), and "property of equivalent value," § 1345(a)(2)(B)(i), which can be impacted only by "a restraining order." Restraining orders and injunctions are, now as when the provision was enacted, different things. An injunction forbids a defendant from "doing some act" which is "unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law." Black's Law Dictionary 784 (6th ed. 1990). A restraining order "is distinguishable from an injunction in that the former is intended only as a restraint until the propriety of granting an injunction can be determined and it does no more than restrain the proceeding until such determination." *Id.* at 1314. *See* Fed. R. Civ. P. 65 (distinguishing between restraining orders and injunctions); *see also United States v. Cohen*, 152 F.3d 321, 324 n.4 (CA4 1998) (noting the distinction between restraining orders and injunctions under section 1345(a)(2)). Thus, the most sensible interpretation of the statute contemplates a restraining order of "property of equivalent value" (*i.e.*, tainted and untainted assets) until such time as "the hearing," at which time the Government must be prepared to identify, through proof, the tainted assets that will be the subject of the injunction.

Notwithstanding the statute's plain language, the Eleventh Circuit, in a case dating back to 1999, rejected this construction of the statute, instead adopting the Government's view that section 1345(a)(2)(B)(i) authorizes courts to restrain through the criminal trial all assets that may ultimately be

forfeited or ordered as restitution. *DBB*, 180 F.3d at 1283-84. The defendant in *DBB* urged the Eleventh Circuit to interpret section 1345 according to its text, but the court insisted that Congress could not have meant what it said:

> Under this interpretation, if a defendant is alienating or disposing of property obtained by fraud (or intends to do so), the government may obtain a TRO to freeze "property of equivalent value." But under Fed.R.Civ.P. 65(b) this TRO generally will expire in no more than 10 or 20 days, after which the defendant would be free to transfer the "property of equivalent value" which had been frozen unless by then the government could trace the property to health care fraud. Given the realities and practicalities of litigation, such a TRO would be of dubious value to the government. Congress could not have intended such a result unless it thought that 10 or 20 days would suffice to enable the government to establish that the "property of equivalent value" frozen by the TRO was traceable to the fraud in question and to obtain a preliminary injunction. Common sense requires that we reject the idea that Congress entertained any such notion.

DBB, 180 F.3d at 1283-84.

Common sense actually points the other way. A few days' time suffices for the Government, which as the plaintiff can bring the action when it pleases, to identify tainted assets among the assets the court has

restrained. If the Government cannot then make the requisite showing, it has no right to prevent the defendant from using her property to hire counsel. In contrast, the Government's interpretation, which the Eleventh Circuit accepted, is at odds with the adversarial judicial process:

> [U]nder the United States' interpretation of the statute, the Attorney General would have broad power to freeze assets and prevent the dissipation of them prior to a final judgment. The Attorney General could obtain an *ex parte* TRO upon the filing of the complaint to freeze assets of equivalent value until a hearing on a motion for a preliminary injunction could be held. At the hearing, the United States could obtain an injunction freezing assets of equivalent value and secure the appointment of a temporary receiver to administer the assets pending a final decision in the case. This construction of the statute would preserve the defendant's assets until a judgment requiring restitution or forfeiture could be obtained.

180 F.3d at 1284. This gloss not only ignores the statute's text, it renders part of it surplusage. If "restraining order" means "any form of injunctive relief," as *DBB* held, then § 1345(a)(2)(A) is superfluous because § 1345(a)(2)(B) provides "broader relief" and "overlapping remedies." *Id.* at 1286.

The text aside, accepting the Government's interpretation entails ascribing to Congress the intent to preserve potentially forfeitable assets at all costs,

without regard to settled legal practice, due process, or the right to counsel. One must believe that Congress went about this implicitly, verbosely, ambiguously, redundantly, and through hollow proceedings. If probable cause suffices to freeze Ms. Luis's assets, why would Congress not directly say what the Government claims it meant – that an indictment's forfeiture count automatically effectuates an asset freeze? The obvious reason is that the pretrial restraint of a defendant's untainted property raises serious constitutional concerns.

This statutory interpretation – that section 1345 authorizes a *temporary* restraint, but not an injunction, against the expenditure of untainted assets – is supported by, and consistent with, the historical role of injunctions as instruments of equity. Nothing in the language of section 1345 suggests that Congress intended to expand that historical role or purpose in the context of a federal fraud prosecution seeking a criminal monetary judgment as a sentencing penalty.

Federal courts have no inherent, equitable power to dispossess an owner of her rightful assets to secure a potential future judgment for legal damages. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-27 (1999) ("*GMD*"); *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 222-23 (1945). Equity can do no more than protect a plaintiff's *existing* right to property held by the defendant to avert irreparable harm that will befall the plaintiff before judgment can be had. Because the Government has no claim to Ms. Luis's untainted

assets, the relief it wants is simply unavailable: "Even in the absence of historical support, we would not be inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment. It seems to us that question goes to the substantive rights of all property owners." *GMD*, 527 U.S. at 322-23.

GMD recognized that pretrial asset freezes to secure anticipated judgments erode the integrity of the adversary system by fostering gamesmanship:

> A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants.

GMD, 527 U.S. at 330 (quotations omitted). The travel of this case shows how the Government might avail itself of this tactical advantage. It opposed requests for information supporting its contentions. It opposed identifying the accusers. And it opposed

meaningful confrontation of those accusers.[6] "There is the possibility that prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets. The loss of such legitimate assets would improperly cripple a defendant's ability to retain counsel." *United States v. Bissell*, 866 F.2d 1343, 1355 (CA11 1989).

In *De Beers*, the Government brought an equitable civil antitrust action against several foreign mining companies and obtained a preliminary injunction freezing all the defendants' domestic assets "to provide security for performance of a future order which may be entered by the court." 325 U.S. at 219. The frozen assets were not the subject matter of the suit. Equating the injunction to a writ of sequestration, the Court vacated it as beyond the district court's power:

> To sustain the challenged order would create a precedent of sweeping effect. . . . Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods,

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[6] The government's secretiveness is incompatible with its posture as a civil plaintiff seeking extraordinary relief. Neither is it usual for the government to prosecute by ambush: "[I]t is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial." *Will v. United States*, 389 U.S. 90, 99 (1967).

> impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. . . . No relief of this character has been thought justified in the long history of equity jurisprudence.

Id. at 222-23.

GMD and *De Beers* confirm that courts of equity are not empowered to interfere with a prospective debtor's use of her own property to preserve assets for collection of a prospective money judgment of an uncertain amount. The language of section 1345(a)(2) is consistent with that principle. It permits an injunction against a person's alienation of property "obtained as a result of" an enumerated offense, but not against "property of equivalent value."

The Government is not entitled to extraordinary equitable relief against Ms. Luis's untainted assets. Ms. Luis should be permitted to spend her untainted assets to exercise her constitutional right to hire counsel of her choosing and mount a vigorous defense to the pending criminal charges.

II. Even assuming that enjoining the expenditure of untainted assets on counsel of choice is authorized by statute and not categorically prohibited by the Sixth Amendment, the procedural safeguards employed by the district court violated Due Process

The Due Process Clause of the Fifth Amendment requires adequate safeguards before assets may be restrained. *Mathews v. Eldridge*, 424 U.S. 319 (1976). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest" because the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Rest. Workers Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 894-95 (1961). However, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (suspension of welfare benefits invalid if not preceded by an evidentiary hearing giving the recipient an opportunity to confront witnesses and present evidence and argument orally).

To determine the process due in any particular setting, the *Mathews* test considers three factors:

> First, *the private interest* that will be affected by the official action; second, *the risk of an erroneous deprivation* of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, *the Government's interest*, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335 (emphasis added); *accord United States v. James Daniel Good Realty*, 510 U.S. 43, 53 (1993).

The statute that authorized the restraint of untainted assets in this case, 18 U.S.C. § 1345(b), actually provides for a "hearing and determination of such an action," and provides further:

> A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

18 U.S.C. § 1345(b). Section 1345 is silent about the scope of the hearing, the standard of proof and whether the Federal Rules of Evidence apply. *Compare* 21 U.S.C. § 853(e)(3) ("The court may receive and consider, at a hearing held pursuant to this

subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.").

In the courts below, Ms. Luis urged that the Government should bear the burden of proving, through competent evidence, its entitlement to an injunction of untainted assets beyond a reasonable doubt, the same standard of proof that will govern the pending criminal trial and determine whether the assets will ultimately be subject to forfeiture. J.App. 86. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 429 (2006) ("[T]he burdens at the preliminary injunction stage track the burdens at trial."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("And what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher.").

After acknowledging that "[s]everal courts have applied the preponderance of the evidence standard to claims for injunctive relief under section 1345," the district court concluded that probable cause was the applicable standard and that it could be established exclusively through hearsay. P.App. 11. The Court of Appeals affirmed, citing *Caplin & Drysdale, Monsanto, Kaley* and *DBB*. P.App. 3.

To be sure, the Court in *Monsanto* and *Kaley* applied the probable cause standard in evaluating whether the restraint of tainted assets interfered with counsel of choice. But the question of which standard of proof *should apply* was not squarely presented in either case.

Monsanto held that drug proceeds can be restrained pretrial, even if needed for attorney's fees, but reserved deciding how courts might identify illegal proceeds. 491 U.S. at 615. Monsanto's assets were frozen after "an extensive, 4-day" adversarial hearing at which the Government proved they were drug proceeds. *Id*. at 615 n.10. The adequacy of the hearing was not at issue. *Id.* Nonetheless, the five-justice majority assumed throughout Part III-B of its opinion "that assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615.

The petitioners in *Kaley* did not squarely challenge the probable-cause standard; they instead argued that they had a right to judicial review of an ex parte restraining order that was based solely on an indictment: "With probable cause, a freeze is valid. *The Kaleys little dispute that proposition*; their argument is instead about who should have the last word as to probable cause." 134 S. Ct. at 1097 (emphasis added). Relying on *Monsanto*'s dicta, the Court denied relief: "When we decided *Monsanto*, we effectively decided this case too. If the question in a pretrial forfeiture case is whether there is probable cause to

think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides." *Id*. at 1105.

Kaley's characterization does not transform *Monsanto*'s dicta into a holding. *See United States v. Dixon*, 509 U.S. 688, 706 (1993) ("Quoting [a] suspect dictum multiple times . . . cannot convert it into case law."); *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) (collecting cases). And whatever the force of *Kaley*'s probable cause discussion, it was in the context of restraining assets admittedly traceable to the alleged crime, not untainted assets.

This Court has never held that probable cause is a constitutionally adequate standard for all seizures or restraints, whatever their effect. Indeed, *Caplin & Drysdale* and *Monsanto* were but two of the three majority opinions concerning forfeitable assets authored by Justice White in 1989. The third, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 50-51 (1989), is the only one that squarely addressed what process must attend a pretrial asset seizure. *Fort Wayne Books* unanimously held that the Government must show more than "mere probable cause" to seize the alleged proceeds and instrumentalities of crime where the seizure chills freedom of speech. *Id.* at 66; *id.* at 68 (Blackmun, J., joining majority's Part III); *id.* at 70 (O'Connor, J., joining majority's Part III); *id.* at 83 (Stevens, J., dissenting on other grounds). That decision's rationale applies with equal force to asset seizures that chill the right to counsel – particularly

where the assets are neither the proceeds nor instrumentalities of the alleged crime.

Fort Wayne Books consolidated for review two racketeering cases, predicated on obscenity crimes. 489 U.S. at 50-51. In the pertinent case, prosecutors sued Fort Wayne Books under Indiana's civil RICO statute, seizing three bookstores and their contents as property "used in the course of . . . or realized through" racketeering. *Id.* at 51. The Court held that the bookseller was entitled to an adversarial, evidentiary hearing at which the prosecutor had to show *more* than probable cause to believe the assets were forfeitable:

> Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved.

Id. at 63. This was so despite the Court's assuming "that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from," racketeering.[7] *Id.*

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[7] A bare majority of the Court in a later case held that expressive works in fact are forfeitable after trial like other instrumentalities of crime, while reaffirming *Fort Wayne Books*. *Alexander v. United States*, 509 U.S. 544, 551 (1993) (Forfeiture

(Continued on following page)

at 65. The Court held the seizure could be sustained only if the state adduced evidence showing *both* that the defendant committed racketeering and that "the assets seized were forfeitable[.]" *Id.* at 66. "[M]ere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation." *Id.* It is "the risk of prior restraint" – *i.e.*, the risk that the seizure would irremediably abridge protected expression – "that motivates this rule." *Id.* at 63-64.

This reasoning applies as much to governmental interference with property rights that abridges the right to chosen counsel. The Court has repeatedly affirmed that legal advocacy (particularly against the Government) constitutes protected political speech, the First Amendment's core concern. The power to choose an adversary's lawyer is the power to suppress that person's speech and stifle public debate on government actions. No less than the seizure of pornographic books and films, a seizure of assets needed to retain a criminal defense attorney must be supported by greater proof of forfeitability than mere probable cause.

"only deprives him of specific assets that were found to be related to his previous racketeering violations. Assuming, of course, that he has sufficient untainted assets to open new stores . . . petitioner can go back into the adult entertainment business tomorrow . . . without any risk of being held in contempt for violating a court order.").

The Right-to-Counsel Clause recognizes that criminal defense attorneys articulate their clients' defenses to prosecutors, judges, and jurors more effectively than most clients themselves could. Accordingly, this Court has said repeatedly that the right to counsel effectuates the First and Fifth Amendment right to be *heard*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell*, 287 U.S. at 68-69 (quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938)). Thus, the essence of defense counsel's work is to speak for the client – to provide independent, professional judgment about what to say, when to say it, and how to say it.

While an attorney's speech in his clients' service can be regulated, this Court unanimously held in *Gentile v. State Bar of Nevada* that the First Amendment protects it. 501 U.S. 1030, 1034 (1991) (plurality); *id.* at 1075 (majority); *id.* at 1082 (O'Connor, J., concurring). Moreover, that case held that a defense lawyer's speech on his client's behalf – in and out of the courtroom – is of the highest constitutional order: "The [First Amendment vagueness] inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State." *Id.* at 1051 (majority). *Gentile*, which "concern[ed] allegations of police corruption," *id.* at 1035-36, illustrates that experienced defense attorneys are sometimes the only check on official

malfeasance. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318-19 (2009) ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials.").

Correspondingly, this Court has recognized that the First Amendment protects legal advocacy even in civil cases, which carry no express constitutional right to counsel. "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

Given that "[d]ifferent attorneys will pursue different strategies," *Gonzalez-Lopez*, 548 U.S. at 141, it follows that depriving defendants of the resources needed to defend complex cases eases the prosecution's burden by ensuring that certain arguments are never raised. Government action that has the effect of removing advocates and their arguments from the courtroom constitutes an unconstitutional prior restraint on speech. *Cf. Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 548-49 (2001) (Congress could not condition funds for legal aid organizations on those organizations' not raising legal challenges to state welfare laws.).

If prosecutors can expend limitless amounts and veto a defendant's choice among lawyers, they

abridge speech and gain an unconstitutional advantage that undermines the system's integrity:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.

McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J.) (citations omitted), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

Our system's foundational premise that confrontation between the prosecution and the accused reliably separates the guilty from the not-guilty depends on the endurance of "a healthy, independent defense bar" to ensure "a truly equal and adversarial presentation of the case." *Caplin & Drysale*, 491 U.S. at 647-48 (Blackmun, J., dissenting). An undemanding standard for denying counsel of choice corrodes the structural right to chosen counsel and threatens the

"'virtual socialization of criminal defense work in this country.'" *Id.* at 647.

Consequently, a restraint of untainted assets that threatens the right to choose one's counsel demands the same constitutional scrutiny as any prior restraint on speech. And, as *Citizens United v. FEC* recognized, Government efforts to muffle speech by limiting a person's spending are a form of prior restraint: "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." 558 U.S. 310, 350 (2010). This consequence prevails in the courtroom as much as on the campaign trail: "A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring). *Citizens United* also recognized that the Government censors speech by favoring one group of speakers over another. 558 U.S. at 340-41. An injunction barring the accused from retaining private counsel allows the Government to choose who will speak for the accused.

"An informed, independent judiciary presumes an informed, independent bar." *Legal Servs.*, 531 U.S. at 545. A robust, independent defense bar contributes more and better speech to criminal jurisprudence, which promotes justice: "By seeking to prohibit the analysis of certain legal issues and to truncate

presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* The health of our adversarial criminal justice system contributes, in turn, to the overall vitality of our democracy. "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state . . . ." *Gentile*, 501 U.S. at 1035 (plurality).

The *Fort Wayne Books* Court's unanimous holding that a probable-cause finding is constitutionally inadequate to support a seizure that might restrain protected speech should apply with equal force to injunctions that restrain untainted property needed for choice of counsel.

Section 1345 does not mandate any standard, much less the probable cause standard that the district court applied, and the Eleventh Circuit affirmed.[8] Indeed, the district court acknowledged that "[r]egarding the applicable burden of proof, there is considerable disagreement in the case law. Several

[8] Although the district court alternatively found that the government had also satisfied the preponderance standard, *see* note 3, *supra*, the Eleventh Circuit did not affirm on that ground. Rather the Eleventh Circuit affirmed on the basis that "[t]he district court conducted an evidentiary hearing where it heard arguments and testimony and found, based on the hearing and the indictment, that there was probable cause to believe that Luis committed an offense requiring forfeiture, that she possessed forfeitable assets, and that she was alienating those assets." P.App. 3.

courts have applied the preponderance of the evidence standard to claims for injunctive relief under section 1345. Other courts have concluded that a showing of only probable cause is required." P.App. 11 (citations omitted).

The constitutional rights at stake and their relationship to a pending criminal proceeding require the application of a substantially more demanding standard of proof than probable cause. *See California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (recognizing that "the 'clear and convincing' standard [is] reserved to protect particularly important interests in a limited number of civil cases," but noting that the Court "has never required the 'beyond a reasonable doubt' standard to be applied in a civil case.").

Whatever the appropriate standard on the spectrum from "preponderance of the evidence" to "beyond a reasonable doubt," the court cannot enjoin untainted assets needed to retain criminal counsel based solely on hearsay and double hearsay from unsworn confidential informants who were not "test[ed] in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Given the constitutional rights at stake, the denial of a meaningful opportunity to confront and rebut the accusers violated Due Process. *See Goldberg*, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *United States v. Frazier*, 26 F.3d 110, 114 (CA11 1994)

(finding due process violation because district court, in revoking supervised release, "made no finding that the hearsay was reliable, nor did it weigh Frazier's right of confrontation against the government's reasons for not producing the witness.").

The district court entered an injunction, financially crippling the accused based on a minimal standard of proof with a minimal evidential showing. Under this framework, the Government can, in virtually every fraud case, control the strength and identity of its adversary based on unsworn information from nameless, faceless accusers. Due process requires more.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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