No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an indicted defendant who asserts that a pretrial order restraining potentially forfeitable assets impairs his ability to retain counsel of choice, and who has been afforded a post-restraint hearing, must be permitted to challenge the order by attacking the grand jury's determination of probable cause to indict the defendant on the offenses as to which forfeiture is sought.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 677 F.3d 1316. A prior opinion of the court of appeals (Pet. App. 48-93) is reported at 579 F.3d 1246. The opinions of the district court and the magistrate judge (Pet. App. 38-47 and 94-112) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2012. A petition for rehearing en banc was denied on July 17, 2012 (Pet. App. 113-114). The petition for a writ of certiorari was filed on October 11, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2007, a federal grand jury in the Southern District of Florida returned a superseding indictment charging

petitioners with conspiracy and substantive offenses relating to the transportation of stolen goods in interstate commerce, in violation of 18 U.S.C. 2314. The indictment also sought criminal forfeiture of property traceable to or involved in the offenses. Pursuant to 21 U.S.C. 853(e)(1)(A), the district court granted the government's ex parte request for a pretrial restraining order barring petitioners from transferring or disposing of the relevant property. Petitioners moved to vacate the order, alleging that it prevented them from retaining counsel of their choice, and sought a pretrial hearing to challenge the restraint. The district court denied the motion without holding the hearing petitioners requested; on interlocutory appeal of that ruling, however, the court of appeals remanded the case for further consideration of whether a hearing was warranted. Pet. App. 48-93. The district court then held a hearing, at which petitioners challenged only the grand jury's determination that there was probable cause to believe they had committed the charged criminal offenses; they did not dispute the existence of probable cause to believe that the restrained assets were connected to the alleged criminal conduct. The district court held that only the latter question was properly at issue and denied petitioners' request to vacate the restraint. *Id.* at 43. The court of appeals affirmed. *Id.* at 1-37.

1. Forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States* v. *Ursery*, 518 U.S. 267, 284 (1996). Criminal forfeiture, however, is not a separate crime, or an element of another crime; instead, it is simply "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516

U.S. 29, 39 (1996); see also, *e.g.*, *United States* v. *$8,850*, 461 U.S. 555, 567 (1983) (stating that a "criminal proceeding * * * may often include forfeiture as part of the sentence").

Various procedures regulating criminal forfeiture are set forth in 21 U.S.C. 853, which was enacted in 1984. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. That provision requires "forfeit[ure] to the United States" of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of" certain offenses. 21 U.S.C. 853(a)(1). It also provides a means by which the government can obtain an order before trial "preserv[ing] the availability of property" that may be subject to forfeiture, so that it is not dissipated before a conviction. 21 U.S.C. 853(e)(1).

The statute specifies different procedures depending on whether the government seeks such an order before or after the filing of an indictment. Before the filing of an indictment, the court may enter a restraining order only temporarily and only if it determines, after an "opportunity for a hearing," that "there is a substantial probability that the United States will prevail on the issue of forfeiture"; that "failure to enter the order will result in the property being destroyed, removed * * *, or otherwise made unavailable for forfeiture"; and that "the need to preserve the availability of the property * * * outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. 853(e)(1)(B); see also 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."). Once an indictment has been filed, however, the court

"may enter a restraining order" or take other appropriate action ex parte so long as the indictment charges an offense for which criminal forfeiture may be imposed and "alleg[es] that the property * * * would, in the event of conviction, be subject to forfeiture." 21 U.S.C. 853(e)(1)(A); see Fed. R. Crim. P. 32.2.

Although the statute does not specify any hearing with respect to an order entered after the filing of an indictment, Congress contemplated that a post-restraint hearing with a limited scope might be appropriate in that context. The relevant Senate Report states that a court has the "authority to hold a hearing subsequent to the initial entry of the order," at which time the court can "modify the order or vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment)." S. Rep. No. 225, 98th Cong., 1st Sess. 203 (1983) (Senate Report). But it also states that "at such a hearing the court is not to entertain challenges to the validity of the indictment" or otherwise "look behind" it; rather, "[f]or the purposes of issuing a restraining order, the probable cause established in the indictment * * * is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based." *Id.* at 202-203.

2. In January 2005, petitioner Kerri Kaley, then a sales representative with Ethicon Endo-Surgery (a subsidiary of Johnson & Johnson), learned that she and her husband, petitioner Brian Kaley, were targets of a federal grand jury investigation in the Southern District of Florida. Pet. App. 3. The grand jury was investigating a scheme to steal prescription medical devices and re-sell them for profit. See *ibid.*

Each of the petitioners retained an attorney. Pet. App. 3. The two attorneys explained that they would charge a total of approximately $500,000 to litigate the case all the way through a trial. See *ibid.* To raise the necessary funds, petitioners applied for and obtained a home equity line of credit of $500,000 on their residence, the proceeds of which they used to purchase a certificate of deposit. See *ibid.* They later added some additional funds to the certificate. See 07-cr-80021 Docket entry No. 17, at 7 (S.D. Fla.).

3. On February 6, 2007, the grand jury indicted petitioners and co-defendant Jennifer Gruenstrass. Pet. App. 3-4. The indictment charged all three defendants with conspiracy to transport prescription medical devices in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. 371 (Count 1); transportation of stolen devices in interstate commerce, in violation of 18 U.S.C. 2314 (Counts 2-6); and obstruction of justice, in violation of 18 U.S.C. 1512(b)(3) (Count 7). Pet. App. 3. The indictment also included a criminal forfeiture allegation notifying petitioners of the government's intent, in the event of a conviction, to seek forfeiture of "all property, real and personal, constituting proceeds obtained from the aforestated offense(s) and all property traceable to such property," including the certificate of deposit. Docket entry No. 44, at 10 para. 2; see Pet. App. 3-4; see also Fed. R. Crim. P. 32.2(a) (providing that "[a] court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment * * * contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence," and stating that "[t]he notice should not be designated as a count of the indictment"

and "need not identify the property subject to forfeiture").[1]

On April 10, 2007, the grand jury returned a superseding indictment that added an eighth count against petitioners and Gruenstrass: conspiracy to launder the proceeds of the Section 2314 offenses, in violation of 18 U.S.C. 1956(h). The superseding indictment alleged that the certificate of deposit and petitioners' residence were "involved in" the commission of the Section 1956(h) offense and were therefore subject to forfeiture. Pet. App. 4-5, 52; Docket entry No. 44, at 11.[2]

4. Upon "the filing of [the] indictment," 21 U.S.C. 853(e)(1)(A), the United States moved ex parte to restrain petitioners from transferring or otherwise disposing of the certificate of deposit and other property traceable to the alleged offenses. Pet. App. 4. On Feb-

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[1] The forfeiture count in the indictment references 28 U.S.C. 2461(c) and 18 U.S.C. 981(a)(1)(C). Section 2461(c) provides that the government may pursue forfeiture in a criminal case whenever existing law authorizes civil forfeiture in connection with a criminal offense. See 28 U.S.C. 2461(c) (stating that the "procedures" in 21 U.S.C. 853 "apply to all stages of a criminal forfeiture proceeding"). Section 981(a)(1)(C) authorizes civil forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to * * * any offense constituting 'specified unlawful activity' (as defined in [18 U.S.C. 1956(c)(7)]." 18 U.S.C. 981(a)(1)(C). Section 1956(c)(7) defines "specified unlawful activity" to include, among other things, "any act or activity constituting an offense listed in [18 U.S.C. 1961(1)]," which, in turn, lists "interstate transportation of stolen property" in violation of 18 U.S.C. 2314. See 18 U.S.C. 1956(c)(7), 1961(1); Pet. App. 50-51 & nn.3-4.

[2] Pursuant to 18 U.S.C. 982(a)(1), property "involved in" an offense "in violation of" Section 1956 is subject to criminal forfeiture, as is "any property traceable to such property." 18 U.S.C. 982(a)(1); see 28 U.S.C. 2461(c).

ruary 8, 2007, the district court entered the requested order. Pet. App. 106; Docket entry No. 6.

In March and April 2007, petitioners filed various requests to vacate the order, arguing that without the restrained assets they would not be able to "retain counsel of choice." Docket entry No. 17, at 8; see Docket entry No. 53, at 6; Pet. App. 51-52. Meanwhile, at the request of a magistrate judge, the government filed under seal the declaration of a special agent "in support of [the] probable cause determination as to [the] restraint of the principal residence and the certificate of deposit." Docket entry No. 79.

On May 1, 2007, the magistrate judge rejected petitioners' arguments and entered an amended order restraining petitioners from transferring or disposing of the certificate of deposit or their principal residence. Docket entry No. 81, at 1-2; Pet. App. 5. The judge concluded that "[p]robable cause to * * * restrain defendants' principal residence and certificate of deposit exists," Docket entry No. 80; see Pet. App. 5, and that petitioners were not entitled to a hearing to challenge "the validity of the indictment itself," *id.* at 108-109.

Petitioners sought review of the magistrate judge's action. The district court "released" $63,007.65 of the amount in the certificate of deposit "from the protective order," but otherwise affirmed the magistrate judge's ruling. Pet. App. 104. The court agreed that "the United States has demonstrated probable cause to believe that [petitioners'] residence was 'involved in' the money laundering offense charged in the superseding indictment" and that the bulk of "the funds used to obtain the certificate of deposit are 'traceable to' the residence." *Id.* at 95-96. Applying *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989), the

court also concluded that petitioners did not have a due process right to an evidentiary hearing to "challenge the underlying merits of the indictment" before trial. Pet. App. 97 (citing *Bissell*, 866 F.2d at 1349 (citing *United States* v. *$8,850*, 461 U.S. 555 (1983), and *Barker* v. *Wingo*, 407 U.S. 514 (1972)).

5. On interlocutory appeal, the court of appeals reversed and remanded for further consideration of whether a pretrial evidentiary hearing was warranted. Pet. App. 56-72. The Eleventh Circuit agreed that *Bissell* provided the proper framework for the analysis, but held that an evidentiary hearing could address the "propriety" of the restraint even though it could not address petitioners' "guilt or innocence." *Id.* at 68. The court of appeals instructed the district court to "engage in a more searching exposition and calculus" of the possible prejudice that petitioners would suffer if they were unable to "retain * * * counsel of choice" (or "any private counsel" at all) and to determine if a hearing was warranted. *Id.* at 69-71.[3]

6. On remand, the district court concluded that petitioners were "entitled to an evidentiary hearing." Pet. App. 45. The court stated that the restraint "at issue, if wrongful, will deprive [petitioners] of their ability to retain counsel of their choice, which will severely impair [their] ability to defend [themselves]." *Id.* at 46 (internal quotation marks omitted) (brackets in original).[4]

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[3] Judge Tjoflat specially concurred; he would have applied the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and remanded "with instructions to afford the Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restrain[] their assets." Pet. App. 86, 92-93.

[4] Petitioners were represented at the time by the very counsel they wished to retain (as they had been from the beginning of the case,

The evidentiary hearing was held on July 29, 2010. See Pet. App. 39; Docket entry No. 233. Petitioners stated that they were "not contesting that the assets restrained were involved in and traceable to the conduct" alleged to constitute a crime. Docket entry No. 233, at 10. Rather, their only argument was that the government was not likely to succeed in establishing forfeitability because that conduct does not "constitute[] a crime." *Ibid.*; see *id.* at 11; Pet. App. 40. They supported that argument—which was based on the theory that petitioners were voluntarily supplied with prescription medical devices by hospitals and had no obligation to return those devices to Ethicon—by submitting transcripts from Gruenstrass's trial, which had resulted in an acquittal, as well as other documentary evidence. See Pet. App. 7, 22 n.6, 65.[5]

The district court declined to vacate the asset-restraint order. See Pet. App. 43. The court held that the only question properly before it was "whether the restrained assets are traceable to or involved in the alleged criminal conduct." *Id.* at 43 n.5. The court concluded that because petitioners had confined themselves to "challenging the validity of the indictment," they had not shown that continued restraint of their assets was improper. See *id.* at 42-43.

7. In a second interlocutory appeal, the court of appeals affirmed. Pet. App. 1-37. Explaining that the

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and still are); those counsel had entered "temporary" appearances for purposes of litigating the asset-restraint issues. See, *e.g.*, Docket entry No. 233, at 3, 50 (noting "temporary" appearances and stating that counsel had not been paid as of 2010).

[5] The court denied petitioners' request for disclosure of grand jury transcripts and the sealed affidavit addressing probable cause. See Docket entry Nos. 197, 198, 219.

"only issue" before it was "the nature and scope" of the post-restraint, pretrial hearing, the court ruled that petitioners were not entitled "to challenge the factual foundation supporting the grand jury's probable cause determinations"—that is, "the very validity of the underlying indictment." *Id.* at 2, 9, 13; see *id.* at 15, 24 (stating that "a defendant who is entitled to a pretrial due process hearing with respect to restrained assets may challenge the nexus between those assets and the charged crime").

As an initial matter, the court of appeals concluded that 21 U.S.C. 853 did not require a hearing as a predicate to the continuation of a post-indictment restraining order. Pet. App. 15; see also *id.* at 10-11. Indeed, the court noted, allowing a defendant to challenge "the factual underpinnings of the underlying charges * * * would be at war with th[e] legislative history," which expressly stated that a court that decides to hold a hearing "is not to entertain challenges to the validity of the indictment." *Id.* at 16 (quoting Senate Report 203).

The court of appeals rejected the argument that due process nevertheless requires that, once a defendant is granted a hearing, he must be permitted to challenge the existence of probable cause. See Pet. App. 17; see *id.* at 23. The court highlighted a "long line of case authority" that bars a defendant from "challeng[ing] whether there is a sufficient evidentiary foundation to support the grand jury's probable cause determination." *Id.* at 21-22; see *id.* at 17-21 (citing, *inter alia*, *Costello* v. *United States*, 350 U.S. 359 (1956), and stating that "*Costello* and its progeny evince a powerful reluctance to allow pretrial challenges to the *evidentiary* support for an indictment"). And the court explained that petitioners sought to mount just such a "pretrial direct assault

on the indictment": they proposed to "lay[] out an elaborate theory that * * * the goods (the prescription medical devices) were not stolen in the first place," and to do so by "adduc[ing] additional evidence not presented to the grand jury." *Id.* at 22.

In the view of the court of appeals, such a challenge would have a number of damaging effects. First, it would "undermin[e] the grand jury system" and contravene the rule that a facially valid indictment "is enough to call for trial * * * on the merits." Pet. App. 23 (citation and internal quotation marks omitted). Second, it would "effectively require the district court to try the case twice," inserting a "mini-trial" between the grand jury's probable-cause determination and "the trial itself," even though the trial gives a defendant a full opportunity to address "the merits of the underlying charge." *Id.* at 25. Finally, requiring such a "mini-trial" would interfere with "the pretrial preservation of assets" that Congress sought to ensure, since it would force the government to a choice between "prematurely revealing its evidence" and forgoing a restraint that might be the only way to guard against dissipation of forfeitable property. *Id.* at 26, 28-29; see Senate Report 196 (discussing "potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims * * * who would be required to testify"), quoted in Pet. App. 27.

The court of appeals counted several circuits that it believed agreed with its approach, but noted that others had reached a different conclusion. See Pet. App. 28-31 (citing cases). According to the court, "[t]he D.C. and Ninth Circuits, like the Second Circuit * * * , have held that the post-restraint hearing must address

whether there is probable cause to believe that the defendant is guilty of the crime that makes the assets forfeitable." *Id.* at 30-31 n.9 (citing *United States* v. *E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008); *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991); and *United States* v. *Roth*, 912 F.2d 1131 (9th Cir. 1990)).

Judge Edmondson concurred in the result. He explained that if he were writing on a blank slate, he would likely "reach a different result and write something largely in line with" the decisions of the Second and D.C. Circuits. Pet. App. 32, 34. Despite his "doubts," however, Judge Edmondson was not persuaded that the majority's conclusion was "definitely erroneous." Pet. App. 37.[6]

DISCUSSION

This case presents an issue that has divided the circuits: whether an indicted defendant whose assets have been restrained and who claims that those assets are necessary to pay for counsel of choice must, if granted a post-restraint, pretrial hearing, be permitted to challenge the existence of probable cause for the criminal charges supporting forfeiture. The court of appeals correctly held that no such requirement exists, and it properly limited the scope of the hearing to an assessment of the probable cause to believe that the restrained assets are sufficiently connected with the charged crimes to be potentially forfeitable. But because the issue of the scope of the hearing is one of importance to

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[6] On September 20, 2012, on remand from the second appeal, the district court stayed the case pending this Court's disposition, while noting that "[t]his case was indicted over five and one-half years ago." Docket entry No. 259, at 1-2.

the administration of the criminal forfeiture provisions as to which the courts of appeals have reached conflicting conclusions, this Court's review is warranted.

1. The court of appeals correctly held that the scope of a pretrial hearing on restrained assets is limited to whether the assets have a sufficient connection to the charged offense to justify the restraint.

a. In *United States* v. *Monsanto*, 491 U.S. 600 (1989), this Court held that Section 853 "authorizes a district court to enter a pretrial order freezing assets in a defendant's possession, even where the defendant seeks to use those assets to pay an attorney," and that "such an order is permissible under the Constitution." *Id.* at 602. The defendant in *Monsanto* was subject to an ex parte restraining order entered under Section 853 and claimed that the order interfered with his ability to pay for counsel; the district court subsequently held a four-day hearing and concluded that the government "had 'overwhelmingly established a likelihood' that the property in question would be forfeited at the end of the trial." *Id.* at 604-605. The defendant proceeded to trial, where he was represented by a court-appointed attorney. See *id.* at 605.

This Court rejected a variety of statutory and constitutional challenges to the pretrial restraint. First, the Court concluded that Section 853 "is unambiguous in failing to exclude assets that could be used to pay an attorney from its definition of forfeitable property." *Monsanto*, 491 U.S. at 607; see *id.* at 612-613 (explaining that Section 853(e)(1)(A), which authorizes a post-indictment, pretrial restraint, "cannot sensibly be construed to give the district court discretion to permit the dissipation of the very property that § 853(a) requires be forfeited upon conviction").

Second, the Court relied on *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), to reject the argument that the Fifth and Sixth Amendments "require[] Congress to permit a defendant to use assets" that are forfeitable under the statute "to pay that defendant's legal fees." *Monsanto*, 491 U.S. at 614. In *Caplin & Drysdale*, which was decided the same day as *Monsanto* and involved a defendant who sought to pay attorneys' fees out of assets forfeited after a guilty plea, the Court concluded both that Section 853 is not "invalid under the Due Process Clause of the Fifth Amendment" and that "there is a strong governmental interest in obtaining full recovery of all forfeitable assets * * * that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id.* at 619, 625-626, 631-634; see *id.* at 631 (explaining that were the rule otherwise "there would be an interference with a defendant's Sixth Amendment rights whenever the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial").

Finally, *Monsanto* considered a constitutional issue that was not directly presented in *Caplin & Drysdale* because of the procedural posture of that case: whether the government may "freez[e] the assets in question before [the defendant] is convicted * * * and before they are finally adjudged to be forfeitable." *Monsanto*, 491 U.S. at 615. The Court concluded 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." *Ibid.* Noting that the defendant "was not ousted from his property, but merely restrained from disposing of it," the Court explained that "it would be odd to conclude that the

Government may not restrain property * * * based on a finding of probable cause" when it may "restrain *persons*" based on that same finding. *Ibid.*

The *Monsanto* Court did not consider, however, "whether a hearing was required by the Due Process Clause" or whether the hearing that was held "was an adequate one." 491 U.S. at 615 n.10. The Court explained that such consideration was not called for because the government had "prevailed in the District Court notwithstanding the hearing" and the court of appeals had not addressed procedural due process. *Ibid.*

b. This case presents an issue about the scope of a post-restraint, pretrial hearing that *Monsanto* did not resolve: whether a defendant at such a hearing must be permitted to challenge the grand jury's finding of probable cause to believe that he committed the charged crimes. Nothing in Section 853 permits a defendant to raise such a challenge, and the legislative history unequivocally states that any hearing should not "look behind" the indictment in that fashion. Senate Report 202. The only remaining question is whether the Constitution imposes such a requirement. The court of appeals correctly ruled that it does not.

First, as the Eleventh Circuit explained, allowing a defendant to contest probable cause before trial would impermissibly attack the grand jury's probable cause determination. This Court's decisions exhibit "profound reluctance" to "allow pretrial challenges to a grand jury's probable cause determination" on the elements of an offense. Pet. App. 17. See *Costello* v. *United States*, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge

on the merits. The Fifth Amendment requires nothing more."); see also *United States* v. *Williams*, 504 U.S. 36, 54-55 (1992) ("Our words in *Costello* bear repeating: Review of facially valid indictments on [the] grounds [of inadequate evidence] 'would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it.'") (quoting *Costello*, 350 U.S. at 364)); *Bank of N.S.* v. *United States*, 487 U.S. 250, 261 (1988) (explaining that a facially valid indictment is not subject to "a challenge to the reliability or competence of the evidence presented to the grand jury," because "a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient"); *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974) ("[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence."); *Lawn* v. *United States*, 355 U.S. 339, 349 (1958) ("[A]n indictment returned by a legally constituted nonbiased grand jury, * * * if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.").

Indeed, as *Monsanto* points out, an indictment that is fair on its face and returned by a properly constituted grand jury is a sufficient predicate for subjecting the defendant to restraints on his liberty pending trial. See *Monsanto*, 491 U.S. at 615-616; see also, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975) (stating that the grand jury "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry"). An analogous probable cause determination therefore must amount to a consti-

tutionally adequate basis for the much less intrusive step of imposing restraints on the alienation of certain property pending trial. See *Monsanto*, 491 U.S. at 615-616.

Second, mandating a pretrial hearing at which the defendant may address guilt or innocence, rather than simply traceability, would unduly burden the government's interest in the relevant property. As the court of appeals observed, a rule allowing petitioners to challenge the existence of probable cause to believe they committed the charged offenses would risk the premature disclosure of the government's case and trial strategy and could even jeopardize the safety of testifying witnesses, including victims and cooperators. Pet. App. 27; see also, *e.g.*, *United States* v. *Monsanto*, 924 F.2d 1186, 1206 (2d Cir.) (en banc) (Cardamone, J., dissenting) ("The prosecution's ability to prepare its case without being forced to 'tip its hand' prematurely was of paramount importance to the drafters and provides a persuasive reason for delaying a full adversarial hearing on the merits of the government's case during the post-restraint, pretrial period."), cert. denied, 502 U.S. 943 (1991).[7] If the government were to forgo a pretrial re-

[7] Petitioners suggest (*e.g.*, Pet. 29 n.6) that those concerns are not salient in this case because Gruenstrass's trial has already taken place. But the government's case against petitioners is not identical to the case against Gruenstrass and, as a general matter, significant risks are posed by prematurely requiring disclosure of the government's witnesses and evidence. See, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 631-633 (2002) (discussing the importance of avoiding "premature disclosure of Government witness information"); *United States* v. *Celis*, 608 F.3d 818, 828-837 (D.C. Cir.) (rejecting due process challenge to limits on "[d]isclosure of government witness lists and of exculpatory or impeachment information and evidence" in drug trafficking case in light of "concern about witness security"),

straint on the property in order to avoid those adverse effects, then the property could well be dissipated before the end of the trial, and a convicted defendant would escape an important part of the penalty for the crime. See *Monsanto*, 491 U.S. at 616 (discussing importance of "protect[ing] the community's interest in full recovery of any ill-gotten gains").

Accordingly, the court of appeals correctly concluded that the additional process that petitioners seek is unwarranted. *Monsanto* established that "probable cause to believe that the assets are forfeitable" is sufficient to justify a pretrial restraint. 491 U.S. at 615. That is exactly the determination that the grand jury has already made (and, in this case, that the district court has also made independently based on an ex parte submission by the government, see Pet. App. 95-96; Docket entry No. 80). No reason exists to think that an extra layer of procedure on that score—one that could be undertaken only at significant cost—would be beneficial, much less that it is constitutionally mandated.

2. Petitioners appear to suggest that this Court should resolve what they describe as a disagreement among the circuits over the proper standard for determining whether a post-restraint, pretrial hearing is required at all. See Pet. 28-37, 39; NACDL Amicus Br. 3. But this case does not implicate any such disagreement. The district court concluded that petitioners were entitled to a post-restraint evidentiary hearing because the restraint impinged on their ability to retain counsel of their choice, and it held such a hearing at which petitioners submitted evidence. See Pet. App. 7, 22 n.6; Docket entry No. 233. The court of appeals did not

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cert. denied, 131 S. Ct. 620 (2010); see also Pet. App. 3 (noting that petitioners were charged with obstruction of justice).

dispute that an evidentiary hearing was warranted here. Accordingly, any inquiry in this case into the correct framework for determining entitlement to a hearing in the first instance would be entirely advisory. Cf. *Monsanto*, 491 U.S. at 615 n.10 ("[G]iven that the Government prevailed in the District Court notwithstanding the hearing, it would be pointless for us now to consider whether a hearing was required by the Due Process Clause.").[8]

This case does, however, implicate a conflict among the circuits over the scope of such a hearing—an issue that almost all circuits have now addressed. See Pet. App. 28-31. Several courts of appeals have agreed with the Eleventh Circuit's conclusion that "[d]ue process does not require that a defendant be allowed to challenge * * * whether there is probable cause to believe that he committed the underlying offenses" and that the hearing should be restricted to examining whether the

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[8] The courts below premised the decision that petitioners were entitled to a hearing on the conclusion that, because of petitioners' financial situation, the restraint "at issue, if wrongful, will deprive [petitioners] of their ability to retain counsel of their choice, which will severely impair [their] ability to defend [themselves]." Pet. App. 46; see also *id.* at 13. Given the passage of time, however, it is not clear whether that premise remains true; petitioners' financial situation may have improved since their assets were last scrutinized several years ago. See Docket entry No. 252, at 6 n.10 ("The United States recognizes that in the intervening 3+ years, some alteration of the economic circumstances of the defendants may have occurred. In fact, the government is aware that the lead defendant [Kerri Kaley] is actively employed in the healthcare industry, owns her own boutique and has been profiled regarding the financial success of that company in the media."). Whatever this Court's disposition, the issue of whether the restraint in this case continues to impair petitioners' ability to pay for counsel of their choice should be left open for further proceedings in the district court.

restrained assets have a sufficient connection to the charged crimes. *Id.* at 23. For instance, in *United States* v. *Jones*, 160 F.3d 641 (10th Cir. 1998), the Tenth Circuit ruled that where a defendant is entitled to a post-restraint, pretrial hearing on restraint of potentially forfeitable assets, the government need not "reestablish probable cause to believe that defendants are guilty of the underlying * * * offense." *Id.* at 648. Such a requirement, the court said, "would add nothing to protect defendants' interests and does more damage than necessary to section 853(e)(1)(A) and the role of the grand jury." *Ibid.* Accordingly, in the Tenth Circuit "[t]he district court must take th[e] allegations of the indictment as true and assume at the hearing that the underlying offense has been committed," and the hearing is restricted to the question of whether "the assets are traceable to the underlying offense." *Id.* at 648-649.

Several circuits have indicated approval of the Tenth Circuit's approach. See *United States* v. *Jamieson*, 427 F.3d 394, 406-407 (6th Cir. 2005) (stating that the court had "no quarrel with the district court's decision to apply *Jones*"), cert. denied, 547 U.S. 1218 (2006); see also *United States* v. *Farmer*, 274 F.3d 800, 803-806 (4th Cir. 2001) (citing *Jones* with approval in case in which defendant's "assets were seized pursuant to civil forfeiture, based on the same allegedly illegal activities underlying his current criminal indictment," which "placed [him] in the same position as a criminal defendant whose assets are seized pursuant to criminal forfeiture," and concluding that the hearing was "for limited purposes" and should cover whether "the government seized untainted assets without probable cause").[9]

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[9] In *United States* v. *Yusuf*, 199 Fed. Appx. 127 (3d Cir. 2006), cert. denied, 129 S. Ct. 2764 (2009), a nonprecedential decision, the Third

Other courts of appeals have reached the opposite conclusion, however. For instance, in *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991), the Second Circuit held that at a post-restraint, pretrial hearing a defendant who needs the restrained assets to retain counsel of choice must be permitted, as a matter of due process, to challenge a grand jury's probable cause determination that "the defendant committed crimes that provide a basis for forfeiture." *Id.* at 1203. The en banc court therefore interpreted "section 853(e)(1)(A) to allow consideration of [such] probable cause issues in post-indictment hearings, in order to avoid potential constitutional infirmity of that statutory provision under the fifth and/or sixth amendments." *Id.* at 1200; see *id.* at 1197 (stating that "a pretrial adversary hearing addressing the existence of probable cause as to both the commission of a narcotics offense and the forfeitability of the specified property affords a procedural safeguard of substantial value"); *id.* at 1203-1204 (Oakes, J., concurring).

The D.C. Circuit adopted that reasoning in *United States* v. *E-Gold, Ltd.*, 521 F.3d 411 (2008). The court

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Circuit adopted "the framework outlined in *Jones*" and stated that "[t]he post-restraint inquiry at the adversarial hearing is limited to the traceability of the restrained assets, and, thus, the government need not reestablish probable cause to believe that defendants are guilty of the underlying offense." *Id.* at 132-133. As the court below pointed out, the Third Circuit previously held in *United States* v. *Long*, 654 F.2d 911 (1981), that "the government must demonstrate that it is likely to convince a jury * * * that the defendant is guilty of" the underlying offense in order to obtain a restraint on assets. *Id.* at 915; see Pet. App. 30 n.9. But *Long*, which *Yusuf* did not cite, did not involve Section 853 and was decided before this Court's ruling in *Monsanto*; its continuing relevance is therefore questionable. See *ibid.*

"join[ed] the Second Circuit" in holding that defendants who "are not financially capable of retaining counsel of choice without the seized property" are constitutionally entitled to challenge at a hearing probable cause as to both the question of "guilt" and the question of the "forfeitability of the specified assets." *Id.* at 419 (citation and internal quotation marks omitted); see *id.* at 416 ("The Second Circuit * * * determined the question before us in the present case, and we find its reasoning most instructive.").[10]

Those decisions cannot be reconciled with the decision below (or the decisions of the other courts of appeals that have staked out a position similar to that of

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[10] The law in the Seventh and Ninth Circuits is murkier, but they appear to follow the same approach. See, *e.g.*, *United States* v. *Roth*, 912 F.2d 1131, 1133-1134 (9th Cir. 1990) (holding that probable cause was established at a post-restraint, pretrial hearing by evidence that apparently addressed the defendant's guilt as well as the traceability of the assets); *United States* v. *Dejanu*, 37 Fed. Appx. 870, 873 (9th Cir. 2002) (holding that district court had erred in stating that it did not need to address "probable cause to believe Dejanu had committed the crimes with which he was charged" at a hearing on the restraint of defendant's assets); *United States* v. *Moya-Gomez*, 860 F.2d 706, 725-731 (7th Cir. 1988) (requiring hearing that addresses "the sufficiency of the factual basis for [the government's] assertion that the funds subject to the restraining order eventually would be forfeited to the United States"), cert. denied, 492 U.S. 908 (1989); *United States* v. *Michelle's Lounge*, 39 F.3d 684, 700 (7th Cir. 1994) (relying on *Moya-Gomez* and stating that when "the government has seized through civil forfeiture all of the assets a criminal defendant needs to obtain counsel" an adversary hearing must be held in the civil case at which "the defendant could rebut the government's showing of probable cause" by proving "innocent ownership, or that a government informant is unreliable, or that the property had no connection to drugs").

the Eleventh Circuit). This Court's intervention is necessary to resolve the conflict.

3. This case is a suitable vehicle for the Court to rule on the scope of a post-indictment, pretrial hearing challenging the restraint of potentially forfeitable assets. Petitioners adequately preserved their claim that they were entitled to attack the grand jury's probable cause finding on the underlying crimes, and that was their only challenge. See Pet. App. 42 (stating that the "basic thrust" of petitioners' challenge "is that the government's case has no merit" and petitioners "have not attempted to challenge" the traceability question); *id.* at 8 (stating that petitioners "did not attempt to challenge traceability in any way" but instead "argu[ed] only that the government's underlying case had no merit"). The lower courts held that no such opportunity was constitutionally required. And while petitioners' challenge may well have failed on the merits, their motion to lift the restraint on their assets was denied on the ground that the challenge was not properly within the scope of the district court's task.

Normally, the fact that a case is in an interlocutory posture would weigh against this Court's review. Here, petitioners have not even been arraigned yet, even though more than five years have elapsed since they were indicted. See Docket entry No. 252, at 1-2, 8. This Court "generally await[s] final judgment in the lower courts before exercising * * * certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Cases presenting the question at issue here, however, typically arise in an interlocutory posture, since orders

relating to the restraint of assets are treated as orders "granting, continuing, modifying, refusing, or dissolving injunctions" for purposes of 28 U.S.C. 1292(a)(1). See, *e.g.*, *E-Gold*, 521 F.3d at 414 (collecting cases). And, while deprivation of counsel of choice at trial is structural error, entitling a defendant to reversal of a conviction without regard to a harmless-error analysis, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147-152 (2006), it is not at all clear that petitioners' due process claim would survive conviction. The jury's finding of guilt beyond a reasonable doubt, rendered in a proceeding in which the defendants enjoyed the effective assistance of counsel, may be both fair and reliable. See *id.* at 145 (stating that deprivation of counsel of choice can occur even when "the trial is, on the whole, fair"). And such a verdict may well render harmless any failure to accord a hearing before trial to determine whether probable cause exists to believe the defendants are guilty. Cf. *United States* v. *Mechanik*, 475 U.S. 66, 67 (1986) ("[T]he petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted."). In this particular context, then, in which resolution of the question presented could significantly affect the way that the remainder of the proceedings below are conducted and review at a later time may not be possible, the recurring issue presented in this case may appropriately be resolved on interlocutory review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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