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

PETITIONER'S REPLY

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REPLY BRIEF FOR PETITIONER

This is the first time that the Government has asked the Court to uphold a pretrial restraining order that prevents a criminal defendant from using her indisputably untainted assets to exercise her Sixth Amendment right to retain counsel of choice. To the extent that the Government insists that the Court already decided this issue, it was resolved in Petitioner's favor.

> Whatever 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."

Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617, 626 (1989) (emphasis added) (ellipses in original).

In the face of that declaration, the Government nonetheless argues that the Court in *Caplin & Drysdale*, and its companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), rejected Petitioner's Sixth Amendment right to use her untainted assets to retain counsel of choice First, the Government argues that the Court *actually decided* the issue because its general use of the term "forfeitable" in those cases was meant to include both "directly forfeitable" (i.e., tainted) and "substitute" (i.e., untainted) assets. GB:30. Second, the Government argues that the Court *necessarily decided* the issue because the

Government's pre-judgment property interest in both tainted assets and untainted assets is exactly the same. GB:32-35.

The Government misreads the holdings of *Monsanto* and *Caplin & Drysdale*, blurs the significant distinction between tainted and untainted assets, and diminishes the historical importance of the Sixth Amendment right to counsel of choice. In so doing, the Government has advocated a position with dangerous implications to the Sixth Amendment, the adversarial system of justice, and the perception of fairness. Acceptance of the Government's position would mean that, in every indicted case alleging a crime for which the court may impose a monetary judgment upon conviction – whether for forfeiture, restitution, a criminal fine, or even the costs of prosecution – there is no constitutional impediment to the pretrial restraint of a defendant's untainted assets. Few citizens accused of a crime would have sufficient resources to withstand the restraint and still have funds left with which to retain private counsel.

I. The Court Has Never Condoned The Restraint Of Untainted Assets Needed For Counsel Of Choice

When the Court decided *Monsanto* and *Caplin & Drysdale*, at issue was the pretrial restraint and forfeiture of drug money. In neither case did the Government seek to restrain or forfeit assets that were not traceable to a criminal offense. *See* Transcript

of Oral Argument in *Monsanto* (available at https://www.oyez.org/cases/1988/88-454) (Solicitor General: "But assuming that he has other assets, and assuming that those assets are untainted, it's our position that it will very often be the case that he will be able to hire a lawyer, and he simply won't be able to use the tainted assets."). Thus, the constitutionality of restraining untainted assets necessary to retain counsel was neither raised nor argued by the litigants, much less decided by the Court in the Government's favor. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.") (Scalia, J., dissenting).

The Court's statement in *Caplin & Drysdale* that an individual has the "right to spend his own money to obtain the advice and assistance of . . . counsel," 491 U.S. at 626 (ellipses in original), was hardly controversial, for the Government acknowledged at the time that "[t]he Constitution requires [ ] that a court afford a defendant a 'fair opportunity to secure counsel of [his] choice' using whatever *assets he has at his lawful disposal*." Brief for the United States in *Caplin & Drysdale, Chtd. v. United States*, No. 87-1729, 1988 WL 1026332, at *42 (emphasis added) (brackets in original) (internal citations omitted).

In *Monsanto* and *Caplin & Drysdale*, the Court upheld the restraint of only tainted assets, which it described as "forfeitable." The Court spoke of "forfeitable" assets in the context of property tainted by criminal activity, 21 U.S.C. § 853(a); there is not a single reference to substitute asset forfeiture under 21 U.S.C. § 853(p). Nevertheless, seizing on the word "forfeitable," the Government argues that the Court meant to extend its holdings to reach all assets that might ultimately be subject to forfeiture, including tainted (i.e., "directly forfeitable") and untainted (i.e., "substitute") assets. *See* GB:30.

The Government made this same argument in its Brief in Opposition to the Petition for a Writ of Certiorari in this case, BIO:9, and continues to press this argument without acknowledging that its own Briefs in *Monsanto* and *Caplin & Drysdale* repeatedly used the terms "forfeitable" and "forfeited" to refer exclusively to tainted assets. *See* Brief for the United States in *Caplin & Drysdale* at *13 ("[I]t is only tainted assets that are subject to forfeiture."); *id.* at *29, *33, *35-36, *42; Brief for the United States in *United States v. Monsanto*, No. 88-454, 1989 WL 1115135, at *21 ("The property that Section 853 declares forfeited is . . . the defendant's drug-tainted property . . . ."); *id.* at *20, *28-31, *37, *41-42. Petitioner catalogued those references twice, first in her Reply Brief in support of the Petition (at 4-7), and again in her Brief on the Merits (at 22 & n.4). The Government offers no retort.

2. Petitioner Has A Sixth Amendment Right To Use Her Own Untainted Assets To Retain Counsel Of Choice

The Government argues that, at this stage of the proceeding, its property interest in Petitioner's untainted assets is no different than the interest it had in the tainted assets in *Monsanto*, where the Court approved the pretrial restraint against a Sixth Amendment challenge. GB:32-33. Relying on the principle that its interest in tainted assets under the relation back doctrine is not *perfected* until judicial condemnation, GB:33 (citing *Caplin & Drysdale*, 491 U.S. at 627, and *United States v. A Parcel of Land (92 Buena Vista Ave.)*, 507 U.S. 111, 125-29 (1993)), the Government claims that it had no "established interest" in the tainted assets in *Monsanto*, just as it has no established interest in Petitioner's untainted assets here. GB:33. In the Government's view, as to both tainted and untainted assets, its rights are merely "potential – rights that might spring into being at some time in the future if a condition is satisfied that does not yet exist." GB:33; *see also* GB:33-34 ("[T]he demonstrated potential for the government to prevail and take ownership – not a present property interest – justifies the pretrial restraint."). The Government reasons that, by approving the restraint of tainted assets in *Monsanto*, the Court necessarily approved the restraint of untainted assets as well. GB:32-34.

The Government's argument gets it wrong, both by understating the property interest it has in tainted

assets, like those at issue in *Monsanto*, and by ignoring the significance of Petitioner's own "good title" in her untainted assets, which defendant in *Monsanto* did not have. *Buena Vista* addressed the question of when the Government's title in tainted property is *perfected* under the relation back doctrine.[1] 507 U.S. at 124-26. Prior to *Buena Vista*, the Government mistakenly believed that, under the relation back doctrine, it was automatically the *owner* of tainted property upon the commission of the criminal act. *See Buena Vista*, 507 U.S. at 131 ("[T]he name of the doctrine is not wrong; the Government's understanding of it is.") (Scalia, J., concurring). The Court rejected that view, reasoning that "under the common-law rule the fictional and retroactive vesting was not self-executing," and the Government's title was not "perfected until judicial condemnation." *Id.* at 126 (plurality opinion of Stevens, J.); *see also id*. at 134 (Scalia, J., concurring).

But it is one thing to say, as *Buena Vista* did, that the Government's title to the tainted res is not *perfected* until judgment; it is another thing entirely to say, as the Government does now, that it has no "established interest" at all in the tainted res at the moment of the illegal act or that its rights have yet to "spring into being." GB:33. As the Court recognized in

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[1] In *Buena Vista*, the issue was whether an innocent donee of tainted property could, under the statutory "innocent owner" exception, defeat the Government's forfeiture claim to the property.

Caplin & Drysdale, the relation back doctrine, or "taint theory," does give the Government "property rights" in the tainted res even prior to judicial condemnation. 491 U.S. at 627 ("[T]he property rights given the Government by virtue of the forfeiture statute are more substantial than petitioner acknowledges") (citing 21 U.S.C. § 853(c)); *see also Buena Vista*, 507 U.S. at 126 ("[T]he forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation* . . . .") (quoting *United States v. Stowell*, 133 U.S. 1, 16-17 (1890)).

With respect to tainted property, the relation back doctrine gives the Government, at the time of the illegal act, a superior claim to the tainted property vis-a-vis a third party who thereafter acquires the property unless the third party satisfies a statutory exception (e.g., bona fide purchaser for value).[2] So, contrary to the Government's current understanding, GB:33, the Government's property rights do "spring into being" upon the commission of the offense, even if its title is not perfected until judgment.

The Government's pre-judgment property interest in the defendant's drug proceeds animated the

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[2] For example, the statutory exception for an "innocent donee," at issue in *Buena Vista*, was eliminated as part of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 144 Stat. 202. *See United States v. Hooper*, 229 F.3d 818, 823 (CA9 2000).

Court's decision in *Monsanto*. The Government disputes this, claiming that "the relation back principle was not mentioned in *Monsanto*'s constitutional analysis of the asset freeze," GB:32 (citing *Monsanto*, 491 U.S. at 615-16), but the Government's view is myopic. In addressing the defendant's Sixth Amendment challenge earlier in the opinion, the *Monsanto* Court expressly relied on the conclusion reached that same day in *Caplin & Drysdale*, 491 U.S. at 614, which, the Government acknowledges, considered the relation back doctrine as a factor in its analysis. GB:32 n.10.[3] Later in the opinion, the Court implicitly invoked the relation back doctrine in "weighing" the Government's pre-judgment "property right in forfeitable assets" against the defendant's proposed use of the tainted assets, and finding that the "pretrial restraining order does not 'arbitrarily' interfere with a defendant's 'fair opportunity' to retain counsel." *Monsanto*, 491 U.S. at 616.

The Court has never indicated that the Government has such a property right in a defendant's untainted assets, and for good reason. The relation back principle gives the Government no property right in Petitioner's untainted assets at this stage; its

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[3] Even earlier in the opinion, the *Monsanto* Court noted the application of the "powerful 'relation-back' provision of §853(c)," refusing to sanction the defendant's use of assets which "under this provision, will become the property of the United States if a conviction occurs . . . ." *Monsanto*, 491 U.S. at 613 (emphasis added).

claim is superior to no one's and will never relate back to any date. For her part, Petitioner's current right, title, and interest in her untainted property is superior to everyone's. She holds "good title," *Caplin & Drysdale*, 491 U.S. at 627, which is neither voidable nor defective. *Compare Buena Vista*, 507 U.S. at 140-42 (Kennedy, J., dissenting) (describing the drug dealer as holding "voidable" and "defective" title in the drug proceeds). Accordingly, Petitioner does not seek the judicial creation of a Sixth Amendment exception to the relation back doctrine, for the Sixth Amendment has always recognized "the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." *Caplin & Drysdale*, 491 U.S. at 626 (ellipses in original).

The Government barely acknowledges the Sixth Amendment right at stake. The right to retain private counsel was "the root meaning of the constitutional guarantee." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006).

> At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited, that is how the right inevitably played out: A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure.

Id. at 154 (Alito, J., dissenting); *accord Bute v. Illinois*, 333 U.S. 640, 660-61 (1948). As it was originally envisioned, "[t]he Sixth Amendment . . .

encompasse[d] a non-indigent defendant's right to select counsel who [would] represent him in a criminal prosecution . . . ." *Gonzalez-Lopez*, 548 U.S. at 153 n.1 (Alito, J., dissenting) (quoting Brief for United States in *Gonzalez-Lopez*, at *11). It was understood that, in the main, the exercise of this constitutional right depended largely on a defendant's access to legitimate funds with which to retain private counsel. Prohibiting a "non-indigent" defendant from using her rightfully owned funds to employ counsel would have been tantamount to denying counsel altogether. *See generally* Amicus Brief of Rutherford Institute.

Because Petitioner has a Sixth Amendment right to spend her rightful assets free from governmental interference, the law enforcement interests and policy considerations cited by the Government, GB:35-37, are beside the point. The Government surely has an interest in convicting a guilty defendant, but that would not, for example, justify forcing her to incriminate herself, twice putting her in jeopardy for the same offense, or denying her a jury trial. The policy arguments advanced by the Government were considered by the Court in *Caplin & Drysdale*, but there was no Sixth Amendment right at stake in that case. *Caplin & Drysdale*, 491 U.S. at 626 ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney"); *id.* at 628 ("There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to

complete the exchange wishes to do so in order to exercise a constitutionally protected right.").

Regardless, none of the policy considerations advanced by the Government trumps Petitioner's constitutional right. *See generally* Amicus Brief of National Association of Criminal Defense Lawyers, et al. at 24-33. The Government argues that permitting Petitioner to pay her counsel with untainted assets would reward the "sophisticated criminal," ignore "the purpose of criminal forfeiture and the rights of victims," and lead to "absurd and unfair results." GB:35-37.

The Government envisions the "sophisticated criminal" studying and exploiting the nuances of Supreme Court forfeiture jurisprudence in structuring her finances, suggesting that the more wily criminal will dissipate tainted assets first and save untainted assets for the retention of counsel. GB:36-38. Aside from the improbability of that scenario, the "sophisticated criminal" would not have been so wily after all because, on that rainy day of her arrest, she will be facing more time in prison for having laundered the tainted assets. *See* 18 U.S.C. §§ 1956 and 1957; U.S.S.G. § 2S1.1.

The Government also exaggerates the impact on criminal forfeiture. There is no doubt that criminal forfeiture is big business, having generated more than $3.77 billion last year for the Department of

Justice Asset Forfeiture Fund.[4] The relative effect on the public fisc of permitting an accused to pay her attorney of choice with untainted assets is de minimis; and the net effect is even less, considering that the government would have to foot the bill for appointed counsel in any event.[5]

Likewise, the Government's professed concern for crime victims is overstated. A convicted defendant may be ordered to pay both forfeiture and restitution. *See, e.g.*, *United States v. McGinty*, 610 F.3d 1242 (CA10 2010). But when there is not enough money available to go around, "[f]orfeiture and restitution, as a matter of fact, frequently compete for the same assets of a convicted defendant." *United States v. Rubin*, 558 F. Supp. 2d 411, 420-21 (E.D.N.Y. 2008). The Government, which is responsible for collecting the criminal judgment, disclaims any legal obligation to apply forfeited funds to restitution. *See* GB:31; *United States v. Pescatore*, 637 F.3d 128, 138 (CA2 2011); Department of Justice Asset Forfeiture Policy

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[4] *See* Report No. 15-08, Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements, Fiscal Year 2014, Office of the Inspector General (January 2015), available at http://www.justice.gov/afp/annual-financial-statements.

[5] Amici National Association of State Legislatures, et al. claim to fear "a massive unwarranted preemption of validly-enacted state laws," Amicus Brief at 4, if the Court rules in favor of Petitioner. While Amici (Amicus Brief at 8-9) cite state laws that authorize the *forfeiture* of substitute assets (which would not be affected by the outcome of this case), they do not cite a single state statute, similar to Section 1345, that even authorizes the *pretrial restraint* of substitute assets.

Manual (2013) at 167-68; *see also* 28 C.F.R. § 9.8(b)(5) (requiring that the victim demonstrate no "recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.").

The Government fails to consider the "absurd and unfair" results that would arise if the Court accepted its invitation to treat an accused's untainted assets as if they are already tainted for Sixth Amendment purposes. Upon indictment, a court could constitutionally restrain as much of a defendant's legitimate wealth as may be needed to satisfy the potential criminal judgment which, in addition to forfeiture and restitution, might also include costs of prosecution, *see* 28 U.S.C. § 1918, and a fine, which may be "the greater of twice the gross gain or twice the gross loss" from an offense. 18 U.S.C. § 3571(d). Nearly every imaginable wrongful act from A to Z – covering everything from Arson (18 U.S.C. § 81) and Aviation crimes (49 U.S.C. § 46504), to importation of Zebra mussels (18 U.S.C. § 42) and causing property damage at a Zoo (18 U.S.C. § 43) – may be punished by financial penalties. The amount of such penalties can multiply quickly. *See generally, e.g.*, 33 U.S.C. § 1319 (per day); 42 U.S.C. § 6928 (per day); 22 U.S.C. § 2778(c) (per violation).

In the context of 18 U.S.C. § 1345, the Government has tested the limits of its power, in one case obtaining a restraining order (which was eventually vacated) in an amount sufficient to cover treble damages. *See United States v. Sriram*, 147 F. Supp. 2d

914, 947 (N.D. Ill. 2001). Presumably, in the Government's view, so long as there is probable cause, there is no constitutional impediment to a pretrial restraint that covers as much of a defendant's untainted assets as might be needed to satisfy any financial penalty, even when the amount of the penalty may be grossly disproportionate to the actual amount of loss to the victim or gain to the defendant. *See, e.g.*, *United States v. Cano-Flores*, 796 F.3d 83, 91, 95-96 (CADC 2015) (vacating $15 billion forfeiture that was based upon a theory of joint and several liability). And, presumably, in the Government's view, a grand jury indictment would be sufficient to establish probable cause such that a Section 1345 hearing is not even constitutionally required. *See Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014).

Meanwhile, the Government has persuaded grand juries to indict and petit juries to convict on legal theories later determined by the Court to be misguided. *E.g.*, *Yates v. United States*, 135 S. Ct. 1074 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014); *Skilling v. United States*, 561 U.S. 358 (2010); *Cuellar v. United States*, 553 U.S. 550 (2008); *United States v. Santos*, 553 U.S. 507 (2008); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Cleveland v. United States*, 531 U.S. 12 (2000); *Neder v. United States*, 527 U.S. 1 (1999); *United States v. Aguilar*, 515 U.S. 593 (1995); *McNally v. United States*, 483 U.S. 350 (1987); *see also United States v. Newman*, 773 F.3d 438, 444-45 (CA2 2014), *cert. denied*, (U.S. Oct. 5, 2015). Based on flawed theories

of prosecution, the Government can obtain staggering forfeitures, fines, restitution awards, and other financial penalties. *E.g.*, *Skilling*, 561 U.S. at 375 ($45 million in financial penalties); *Newman*, 773 F.3d at 444-45 ($8 million in total financial penalties for two defendants). Pretrial restraints of untainted assets in most such cases would financially cripple the average citizen, making it impossible for her to retain private counsel of choice that she could otherwise afford.

It is no answer that the newly-beggared defendant is entitled to appointed counsel. Nor is it sufficient that the appointed attorney will provide equally as, or even more, effective representation than many private attorneys would. *See* GB:40-41. While a lawyer may not be deficient for failing to "go looking for a needle in a haystack." *Maryland v. Kulbicki*, No. 14-848, ___ S. Ct. ___, 2015 WL 5774453, at *2 (Oct. 5, 2015), a non-indigent defendant is entitled to hire a lawyer who will. That was the "root" guarantee of the Sixth Amendment, *Gonzalez-Lopez*, 548 U.S. at 147-48, which is in danger of being eviscerated by the pretrial restraint of legitimate assets needed for counsel of choice.

3. The Avoidance Canon Compels A Construction Of 18 U.S.C. § 1345 That Avoids The Constitutional Question

The Government contends that the constitutional avoidance doctrine is inapplicable because Section

1345 is susceptible to a single, unambiguous interpretation that authorizes the pretrial restraint of substitute assets needed to retain counsel. The Government advances the same interpretation here that it advanced in *United States v. DBB, Inc.*, 180 F.3d 1277, 1281-82 & n.7 (CA11 1999). Although the Government's interpretation prevailed as a matter of pure statutory construction, that case did not involve a constitutional question and the Eleventh Circuit expressly found the statute to be ambiguous. *Id*. at 1281-82 & n.7. And what the Government dismisses as Petitioner's "strained reading" of the statute, GB:18, was deemed by the Eleventh Circuit to be "consistent with common usage and dictionary definitions." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 n.4 (CA11 2001).

Where a statute, like this one, is deemed ambiguous, the "canon of constitutional avoidance comes into play" precisely because "the statute is found to be susceptible of more than one construction . . . ." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). The Government cannot sidestep this principle merely by critiquing Petitioner's construction, particularly when its own reading is so far from perfect. *See* Amicus Brief of Cato Institute, et al. at 19 ("[Section] 1345 does not support the construction urged by the government."); Amicus Brief of Americans for Forfeiture Reform at 4 ("[T]he Act does not authorize the freezing of a person's untainted property based on the sum value of property that a person may have improperly obtained or used in the past."); Amicus Brief of United States

Justice Foundation, et al. at 6-12 ("The Government's interpretation of [Section] 1345 is extreme and unsupportable.") (capitalization modified).

Petitioner has offered a construction of the statute that averts the constitutional questions. So too have amici. *See* Amicus Brief of Americans for Forfeiture Reform at 4 ("The Act instead requires the government to show the total amount of money in Doe's accounts that is traceable to the alleged fraud today (whether $1 or $100,000) and further show that Doe intends to spend this tainted cash. The Act then enables the court to freeze either the tainted cash or untainted property belonging to Doe of equivalent value – but not both."); Amicus Brief of United States Justice Foundation, et al. at 11 ("The statute, then, is designed to keep the status quo by the issuance of an injunction to stop a suspect from further alienating or disposing of traceable property that he currently has in his possession."); Amicus Brief of American Bar Association at 22-23 ("This plain-language, commonsense reading of [Section] 1345" authorizes "[t]emporary restraints . . . only with respect to imminent transfers of tainted assets.").

The Government's reading of Section 1345 gives rise to a nesting-doll statute, in which one provision is completely swallowed by a subsequent provision, which is completely swallowed by a third provision, all within the same statute. *See Yates v. United States*, 135 S. Ct. at 1085 ("We resist a reading . . . that would render superfluous an entire provision passed in proximity as part of the same Act."). Yet the

Government refuses to cede that its reading is in any way problematic or to acknowledge that any other competing construction is even plausible.

Start with Section 1345(a)(2)(A): This provision allows the Government to commence a civil action "to enjoin such alienation or disposition of property" which is "obtained as a result of" or is "traceable to" a specified criminal offense. It authorizes the Government to seek an injunction for an undefined duration, but only against the named defendant, GB:23, for a narrow class of crimes (banking and health care offenses), and for a narrow class of assets (tainted).

Section 1345(a)(2)(B) comes next: This provision allows the Government to commence a civil action "for a restraining order" to "prohibit any person" from dissipating any tainted assets or any "property of equivalent value." If, as the Government reads it, "restraining order" means more than just a "*temporary* restraining order," then this provision swallows the provision that came before it. The Government does not claim otherwise. *See* GB:22. The Government offers no explanation for the obvious superfluity, which it prefers to characterize as an "overlap." GB:22-23.[6]

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[6] The Government has previously conflated the definitions of overlap and superfluity, although they mean two different things. *Yates*, 135 S. Ct. at 1085. Overlap occurs when two provisions share a common ground in particular "applications," or do the same work in a particular case. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 n.11

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Petitioner's alternative interpretation gives meaning to both provisions. In contrast to the previous provision, Section 1345(a)(2)(B) reaches more people ("any person") and more assets (tainted and untainted), but for a shorter duration (temporary instead of indefinite).

Section 1345(b) is last: This section provides procedures to resolve the "civil action" commenced by the Attorney General under Section 1345(a). Perhaps recognizing that its own construction of the statute renders Section 1345(a)(2)(A) superfluous, the Government claims that under Petitioner's reading of the statute, Section 1345(a)(2)(B) is "entirely swallowed by Section 1345(b)." GB:22. Not so. It is the Government's position in this case, and in others like it, that gives rise to the additional layer of superfluity. *See* GB:20 n.5 ("Section 1345(b) . . . independently supports the restraining order in this case"); *United States v. Brown*, 988 F.2d 658, 661 (CA6 1993) (The United States maintains that the court is empowered

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(1995). Superfluity, on the other hand, occurs where one word or one provision of a statute is completely covered and rendered completely redundant by the application of another in every application and in every case.

Under the Government's reading, nothing would change if Section 1345(a)(2)(A) were stricken because Section 1345(a)(2)(B) provides the same relief and more. *Compare Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (overlap exists where each section has applications that "the other section does not reach") *with Yates*, 135 S. Ct. at 1085 (superfluity exists where the Government fails to "explain what independent function" each provision could serve).

to attach funds through [Section] 1345(b)" even for offenses beyond those enumerated in Section 1345(a)). Under Petitioner's reading, by contrast, Section 1345(a) defines the relief that the Government may seek, whereas Section 1345(b) establishes procedures for the court to grant such relief.

Petitioner's interpretation of Section 1345 is plausible because it gives meaning to all of the provisions of the statute and leads to sensible results (albeit not quite as draconian as the Government would like). Regardless of whether the Government's alternative interpretation is more plausible, less plausible, or equally plausible, an ambiguity exists. And where there is an ambiguity, the Court must enforce the interpretation that avoids constitutional doubts.

4. The Section 1345 Hearing Failed To Comport With Due Process

Petitioner maintains that no amount of procedural due process can justify the denial of the right to use one's own money to retain counsel of choice in a criminal case. But Petitioner nonetheless challenged the constitutional adequacy of the Section 1345 hearing in the lower courts. In the Petition, she framed the "Question Presented" as a challenge to the pretrial restraint under both the Fifth and Sixth Amendments, noting that she had objected to the procedures used to deny her counsel of choice. Petition at 13 n.4; *see also* Reply Brief in Support of

Petition, at 13 n.4. While Petitioner did not articulate a stand-alone due process argument in the Petition, the level of process necessary before counsel of choice is denied (assuming no categorical bar) is necessarily intertwined with Petitioner's Sixth Amendment challenge. The issue is "fairly included" in the Question Presented, fully-briefed, and the Court should exercise its discretion to consider it.

The Government insists that *Monsanto* and *Kaley* foreclose Petitioner's challenge to the standard of proof. The Government characterizes the application of the probable cause standard as essential holdings of both cases. GB:45. It is true that in both cases the Court applied the probable cause standard. But the propriety of a probable cause standard was not at issue in *Monsanto* nor squarely disputed in *Kaley*, so the question remains open.

While it may appear "odd" to the Government that a different standard might apply, GB:46, it is only because the Government insists on treating a defendant's lawfully earned assets as if they are tainted. But they are different. A defendant surely has a greater interest in the fruits of her life's *lawful* labor than she does in the proceeds of an alleged crime. So it creates no legal dissonance to require more proof where the seizure of those lawfully earned funds are needed to exercise her constitutional right to counsel. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (requiring more than "probable cause" to justify seizure of allegedly pornographic books because the books were "presumptively

protected by the First Amendment"); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993) (a seizure can implicate more than just one constitutional right) (citing *Soldal v. Cook County*, 506 U.S. 56, 70 (1992)).

Given that the Government must prove Petitioner guilty beyond a reasonable doubt in order to forfeit her untainted assets, and given that enjoining her from using those assets pretrial will permanently deprive her of her constitutional right to private counsel of choice, a standard of proof more demanding than preponderance of evidence should be required.

Whatever the standard, it is not enough that the hearing consist of little more than the sworn proffer of a government agent parroting the unsworn interviews of confidential informants and summarizing bank records. The district court categorically prohibited Petitioner from examining any of the informants, P.App. 16,[7] and prohibited Petitioner from presenting evidence that the home health companies in fact provided medically necessary services to its Medicare patients. DE87:16; J.App. 115. Yet the district court concluded that all of the $45 million in revenues received from Medicare were unlawfully obtained and dissipated. P.App. 12-15. It enjoined Petitioner from spending any (all) of her assets up to $45 million, even though the loss for purposes of restitution is the

[7] The Government mistakenly states that Petitioner made a "strategic judgment" not to call them to the stand. GB:54-55.

amount of the kickbacks, not the total revenue received from Medicare. *United States v. Bane*, 720 F.3d 818, 827-28 (CA11 2013).

Even if the Confrontation Clause has no direct application in the Section 1345(b) hearing, GB:53, due process and the Federal Rules of Civil Procedure do apply and require "an effective opportunity to defend by *confronting* any adverse witnesses and by *presenting* his own . . . evidence." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added).

5. The Pretrial Restraint Of Untainted Assets Threatens The Adversarial System Of Justice

A statute that gives a litigant the power to control the purse strings of its adversary upsets the "balance of forces" in the courtroom. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The Government construes Section 1345 to do just that. At any point in its contest with the accused, the Government can invoke the statute to freeze her untainted assets needed for a defense.

Because the restraint reaches "any person," it would restrain the attorney who is holding funds in trust for the fees and costs of the criminal litigation. 18 U.S.C. §1345(a)(2)(B). It makes no difference that, before accepting the client's funds, the attorney vetted the sources to assure himself (correctly) that the funds were derived exclusively from lawful sources; the funds would be locked down just the same.

The power to freeze untainted assets thus allows the Government to exert unprecedented "leverage" over the client *and the attorney*. Amicus Brief of New York Council of Defense Lawyers at 7. The restraint would prohibit the attorney from paying associates, paralegals, investigators, experts and other litigation expenses. In complex, document-intensive cases of longer duration – where discovery is measured in terabytes rather than bankers boxes – few attorneys could withstand the cash-crunch that the restraint would impose.

Some attorneys would withdraw from the representation. Others would be prohibited from doing so by court rule. *See*, *e.g.*, Rule 88.7, Local Rules of the Southern District of Florida.[8] Either way, the Government would then have the defense bar under its thumb. Working without pay, no attorney could be expected to ignore the powerful financial incentive to avoid a long, drawn-out trial by accepting any settlement at all (i.e., a plea). One that exempts from forfeiture the untainted funds earmarked for fees and

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[8] Rule 88.7(a) provides:

> Retained criminal defense attorneys are expected to make financial arrangements satisfactory to themselves and sufficient to provide for representation of each defendant until the conclusion of the defendant's case at the trial level. Failure of a defendant to pay sums owed for attorney's fees, or failure of counsel to collect a sum sufficient to compensate him for all the services usually required of defense counsel, will not constitute good cause for withdrawal after arraignment.

expenses would appear especially attractive to the attorney, if not to his client. Feeling the pinch of the restraint, how could an attorney discharge his duty to provide conflict-free advice about whether the client should proceed to trial or waive her rights and cop a plea, when his own financial interests are at stake? *See generally Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1384 (2012). In a country that lauds the virtues of an *adversarial* system of justice, the image of once-fearless defense attorneys "negotiat[ing] [plea deals] with the government in order to receive payment for their services," Amicus Brief of New York Council of Defense Lawyers at 8, is, to say the least, unsettling.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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