No. 14-419

IN THE

Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are practicing criminal defense lawyers from across the nation. The National Association of Criminal Defense Lawyers is a nonprofit, voluntary, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 10,000 and an affiliate membership of almost 40,000, including private criminal defense lawyers, military defense counsel, public defenders, law professors, and judges. The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization of criminal defense lawyers with twenty-eight chapters, including its Miami chapter founded in 1963. California Attorneys for Criminal Justice ("CAJC") is a nonprofit statewide organization of criminal defense lawyers founded in 1972, with members across the state of California. The two statewide organizations are among the largest in the nation, and they have a combined membership of over 3,000 attorneys. The members of these organizations are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

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[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief.

Amici are concerned that the decisions of the courts below in this case, if left standing, undermine the constitutional right provided those accused of crimes to be represented in criminal proceedings by their counsel of choice. In light of the Government's increasingly broad use of statutes permitting the restraint and forfeiture of assets unrelated to alleged criminal conduct, clients of *amici's* members are often confronted with the issues raised in this case. The organizations therefore have a particular interest in urging this Court to reverse the ruling by the Court of Appeals.

Amici have appeared in this Court as *amicus curiae* on several occasions, including in *Kaley v. United States* (No. 12-464), in which they argued that the Government's asset forfeiture practices undermine the Fifth and Sixth Amendment rights of persons charged with crimes, including the critically important right to counsel of choice. *Amici* offer their collective professional experience and expertise in the present case to illustrate how the Government's use of asset restraint and forfeiture imperils constitutional rights that are fundamental to the fairness and integrity of our nation's criminal justice system.

SUMMARY OF ARGUMENT

More than two decades ago, this Court ruled that the Sixth Amendment does not shield from restraint and forfeiture assets a criminal defendant has obtained as the result of criminal conduct, even when they are needed to retain counsel. In so holding, the Court concluded that the Government's "strong" interest in a complete forfeiture of such

assets trumped any interest a defendant might have in using her alleged "ill-gotten gains" to fund her criminal defense. In light of these pressing imperatives, the Court held, a defendant can be prevented by the Government from paying for counsel with what might potentially be determined (at the end of the criminal process) to be "someone else's money."

A similar ruling is unwarranted here. As the parties stipulated below, the restraint imposed in this case reaches an "unquantified" amount of assets unconnected to the alleged violations of law—i.e., it reaches "untainted" assets. The distinction between tainted and untainted assets is both statutorily and constitutionally crucial. The comprehensive statutory regime Congress created to govern criminal forfeiture—bypassed by the Government here—meaningfully and deliberately distinguishes between tainted and untainted assets. Only the former are subject to pretrial restraint. The Government's attempt to use a civil injunction statute to restrain for eventual forfeiture assets that forfeiture law does not permit to be restrained circumvents important congressional limits on the Government's already extraordinary powers.

More importantly, the Government's end run around the limits Congress has imposed on criminal forfeiture also fails to comport with the Constitution. This Court has long recognized that the Sixth Amendment guarantees not only that a criminal defendant has the right to counsel, but also that, unless indigent, the accused has the right to retain counsel *of choice*. This constitutional right is fundamental, and its improper deprivation

compromises both the individual guarantee of a fair criminal proceeding and the integrity of the criminal justice system more broadly.

This Court's decisions in *Caplin* and *Monsanto* do not hold otherwise. Both were predicated on a notion that has no application here: that the Government's claim to alleged tainted assets is superior to any claim the accused might have, and a criminal defendant therefore can be prevented from expending such assets, even if they are needed to pay for a lawyer. Whatever its merit, this doctrine does not vest the Government with a superior claim to *untainted* assets. As this Court has repeatedly held, if the Sixth Amendment right to counsel of choice means anything, it means that a criminal defendant can spend her own money to retain the attorney she thinks will best represent her.

The Government's supposed interest in restraining and eventually forfeiting a criminal defendant's untainted assets does not justify dispensing with that right. In *Caplin*, the Court identified three primary interests served by asset forfeiture that would be frustrated if tainted assets were paid over to a defense lawyer: (1) funding law enforcement; (2) providing restitution to victims; and (3) combatting the economic power of organized crime and drug-trafficking enterprises. With the benefit of more than twenty-five years' experience with forfeiture practices since *Caplin* and *Monsanto*, none of these reasons justify pretrial seizure of untainted assets and the corresponding Sixth Amendment violation at issue here. The experience of the last two decades demonstrates how funding law enforcement through forfeiture creates perverse

and dangerous governmental incentives at the local, state, and federal level. And while providing restitution to victims may be a laudable goal, it does not justifying displacing a criminal defendant's fundamental rights.

As this case demonstrates, the Government also does not need to deprive a criminal defendant of legitimate assets needed to retain counsel of choice in order to fight crime effectively. In this and other financial crime cases, the Government's forfeiture authority is already potent; granting it the additional power it seeks here will only stack the deck further in its favor. If the Sixth Amendment right to counsel of choice is to be more than a dead letter, at minimum it requires that a defendant be allowed to use untainted assets to fund her defense. The Court should reverse the decision below.

ARGUMENT

I. The Government's Attempt To Restrain Untainted Assets Circumvents An Essential Limit On The Forfeiture Power.

In affirming the district court's refusal to allow Petitioner to pay for counsel of choice out of untainted assets, the courts below relied on this Court's decisions in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989). *See* Pet. App. 3; *id.* at 30-32. In those cases, however, there was no question that the assets subject to restraint or forfeiture bore the requisite statutory nexus to the criminal conduct in question. *See Caplin*, 491 U.S. at 619-20; *Monsanto*, 491 U.S. at 602-04. This Court

has therefore never confronted the key question presented in this case: Whether the pretrial restraint of *untainted* assets violates the Sixth Amendment when it impairs the accused's right to retain counsel of choice.

That distinction is crucial. Under the statutory scheme governing criminal forfeiture, the Government can secure pretrial restraint of assets that are connected to the asserted crime—i.e., "tainted" assets. Given the broad terms in which many statutes define these "ill-gotten gains" and the authority the Government has to restrain such assets prior to trial, this power reaches far and wide. What the Government cannot do in criminal forfeiture, however, is precisely what it seeks to do here via a civil proceeding under 18 U.S.C. § 1345—impose similar restraints on *untainted* assets. Congress never intended § 1345 to be used as an expansion of criminal forfeiture law, and the statute should not be read to permit the Government to evade the well-considered limitations Congress has imposed on the forfeiture power.

A. The Government already enjoys considerable authority to seize and forfeit assets held by a criminal defendant.

The Government's power to restrain and forfeit a criminal defendant's assets is exceptionally broad. The statutory regime delineating the Government's criminal forfeiture authority defines what are considered to be forfeitable "tainted" assets in broad terms. The Government can seek to forfeit criminal proceeds obtained "directly or indirectly" from

offense conduct, 21 U.S.C. § 853(a)(1), as well as property obtained "as the result of" a criminal violation, *id.*, and property used to facilitate or commit an offense, *id.* § 853(a)(2). [2] The statutes governing money-laundering offenses similarly authorize the forfeiture of any property "involved in" a money laundering transaction. 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1); *see also* 31 U.S.C. § 5317(c)(1)(A) (mandating forfeiture of all property "involved in" currency-structuring offenses). In a number of instances Congress has also defined the term "proceeds" to permit the pretrial restraint and forfeiture of the gross proceeds of offense conduct. 18 U.S.C. § 981(a)(2)(A) (specifying that the "proceeds" forfeitable to the Government are "not limited to the net gain or profit realized" from the covered offenses); *id.* § 982(a)(7) (covering gross proceeds "traceable" to certain offenses); *see also* 18 U.S.C. § 1963(a)(2)(D) (deeming forfeitable property "affording a source of influence" over a criminal enterprise).

Formulations that allow for the forfeiture of "gross proceeds" or all property "involved in" offense conduct have been construed by lower courts to extend the Government's forfeiture power to assets

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[2] Section 853 provides the procedural framework for most criminal forfeitures; 18 U.S.C. § 982 incorporates the framework by reference. 18 U.S.C. § 982(b)(1). The Racketeer Influenced and Corrupt Organizations Act (RICO) includes its own procedural framework, 18 U.S.C. § 1963, which is nearly identical to that found in § 853. *See United States v. McHan*, 101 F.3d 1027, 1042 (4th Cir. 1996) (noting that courts "generally construe the drug and RICO forfeiture statutes similarly").

far beyond any sums a defendant might have netted from the alleged offense. *See, e.g.*, *United States v. Davis*, 706 F.3d 1081, 1082-84 (9th Cir. 2013) (upholding money laundering forfeiture award for $1.3 million in laundered funds against a defendant who received only $73,782 in commissions for his involvement); *United States v. Puche*, 350 F.3d 1137, 1153-54 (11th Cir. 2003) (upholding forfeiture order of $1.6 million of defendants' assets because it included $22,375.00 in illegally derived funds); *United States v. Bollin*, 264 F.3d 391, 417-19 (4th Cir. 2001) (upholding $1.2 million forfeiture judgment against attorney who received only $30,000 in fees for minor role in securities fraud); *see also United States v. Schlesinger*, 396 F. Supp. 2d 267, 271-72 (E.D.N.Y. 2005), *aff'd*, 514 F.3d 277 (2d Cir. 2008) (citing additional cases).

But criminal forfeiture reaches more broadly still; under § 853 the Government is not limited to seizing assets with a nexus to the offense conduct, but can also forfeit "substitute property" when tainted assets are unavailable. *See* 21 U.S.C. § 853(p). These assets are subject to seizure and forfeiture, but only after the Government convicts the defendant of offense conduct and makes the requisite showing that, as a result of the act or omission of the defendant, directly forfeitable property cannot be located or is unavailable. *See, e.g.*, *United States v. Voigt*, 89 F.3d 1050, 1086 (3d Cir. 1996) ("The substitute asset provision comes into play only when forfeitable property cannot be identified as directly 'involved in' or 'traceable to' money laundering activity."). If the Government makes this post-conviction showing, then a court must order the forfeiture of the defendant's

"substitute property," up to the value of any directly forfeitable property that is unavailable. *See* 21 U.S.C. § 853(p)(2). In short, the Government has significant tools at its disposal to prevent those accused of crime from enjoying the fruits of their illicit labors.

B. The distinction between tainted and untainted assets imposes an important limitation on the restraint and forfeiture power.

If the statutory scheme governing criminal forfeiture allows the Government to reach deeply into a defendant's pockets, it also contains an important limitation: With few exceptions, property is subject to *pretrial* restraint or seizure only when it bears a direct nexus to the underlying alleged offense. Under § 853(e), if there is a substantial probability that property the Government targets will be rendered unavailable for forfeiture upon conviction, the Government can seek a restraining order or injunction to preserve those assets. 21 U.S.C. § 853(e).

Crucially, however, "substitute property" as defined in § 853(p)—i.e., "untainted" assets with no connection to the offense conduct—is *not* subject to pretrial restraint. The statutory text makes this clear. The Government may only seek to restrain for later criminal forfeiture property of the kind described in subsection (a) of the statute. 21 U.S.C. § 853(p)(1). That subsection, in turn, refers *only* to directly forfeitable property, i.e., property that bears the requisite nexus to the offense conduct. 21 U.S.C. § 853(a). Simply put, criminal forfeiture law

generally protects from pretrial restraint property that lacks any connect to the crime alleged.

The Courts of Appeals agree. In light of the express textual limitation on the type of assets that are subject to pretrial restraint, all but one of the federal circuits to have considered the statute's scope have concluded that "the plain language of § 853(e) conveys Congress's intent to authorize the restraint of tainted assets prior to trial, *but not the restraint of substitute assets*." *United States v. Parrett*, 530 F.3d 422, 431 (6th Cir. 2008) (emphasis added); *see also United States v. Field*, 62 F.3d 246, 248-49 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *United States v. Floyd*, 992 F.2d 498, 500-02 (5th Cir. 1993); *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998) (similar restraint provision in the Racketeer Influenced and Corrupt Organizations (RICO) statute "does not authorize the pretrial restraint of substitute assets"); *In re Assets of Martin*, 1 F.3d 1351, 1355-56 (3d Cir. 1993) (same).[3]

[3] The Fourth Circuit stands alone in holding that the RICO statute allow pretrial restraint of substitute assets. *See In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990). As other circuits have recognized, that decision cannot be reconciled with the relevant statutory text. *See, e.g.*, *In re Assets of Martin*, 1 F.3d at 1358-59; *Gotti*, 155 F.3d at 149. The Fourth Circuit's infringement of a criminal defendants' right to counsel of choice produces absurd results. *See, e.g.*, *United States v. Wingerter*, 369 F. Supp. 2d 799, 804 (E.D. Va. 2005) (preventing defendant from using inheritance from great aunt to pay for a lawyer).

The near-unanimity with which the Courts of Appeals have interpreted § 853 and its statutory analogues accords with legislative history. Prior to 1984, the Government could only seize assets associated with an underlying crime, and even then only after indictment. *See Ripinsky*, 20 F.3d at 364. To prevent defendants from avoiding forfeiture by transferring or concealing their assets in advance of conviction, Congress amended § 853(e) to allow the Government to restrain tainted assets prior to indictment. *See id.* (citing S. Rep. No. 98-225, at 202 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3385). But as the Ninth Circuit has explained, "[n]othing Congress did [in § 853] … suggests ... the substitute asset provision and the temporary restraining order provision should be read in conjunction to provide the government with an even greater governmental power: the pre-indictment restraint of substitute assets." *Id.* at 364-65.[4]

[4] Several courts have similarly rejected governmental attempts to use state lis pendens laws to prevent the alienation prior to trial of real property with no connection to the alleged offense conduct. *See, e.g., United States v. Jarvis*, 499 F.3d 1196, 1203-05 (10th Cir. 2007); *United States v. Boyer*, 58 F. Supp. 3d 173, 176 (D. Mass. 2014); *United States v. Coffman*, No. 09-cr-181-KKC, 2010 WL 3984886, at *3 (E.D. Ky. Oct. 7, 2010); *cf. also United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991) (recording of lis pendens serves the same purpose as a restraining order under § 853(e)), *abrogated on other grounds by Kaley v. United States*, 134 S. Ct. 1090 (2014).

C. The Government's use of 18 U.S.C. § 1345 in this case is contrary to the statutory scheme governing criminal forfeiture.

In this case, the Government deliberately sought to avoid the constraints that typically limit its pretrial seizure power. At the outset of its criminal case against Petitioner, the Government faced a conundrum. At the same time that it secured an indictment against her, it wanted to seize her assets for eventual forfeiture or restitution. *See* Proposed Order Granting Preliminary Injunction at 1, *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. 2013) (No. 12-cv-23588-PCH), ECF No. 99-1. But an unquantified amount of those assets bore no nexus to the offense conduct, i.e., they were untainted. J.A. 161. And neither the criminal forfeiture nor victim restitution laws permit pretrial restraint of untainted assets.[5]

[5] Congress did not pass legislation proposed by the Justice Department that would have authorized the pretrial restraint of assets for eventual restitution. *See* Restitution for Victims of Crime Act of 2007, S. 973, 110th Cong. § 102 (introduced Mar. 22, 2007). At the time, the current Chief of the Department of Justice Criminal Division's Fraud Section testified that the restraint proposal was "contrary to the long tradition and jurisprudence of pre-conviction asset restraint and forfeiture." *Legislative Proposals to Amend Federal Restitution Laws: Hearing on S. Res. 973 and H.R. 4110 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 47 (2008) (statement of Andrew Weissman).

Faced with these barriers, the Government pursued a dangerous work-around: a separate civil action under 18 U.S.C. § 1345 to restrain both property Petitioner allegedly obtained from criminal conduct and her legitimate assets. Section 1345 is a seldom-used anti-fraud statute that authorizes the Government to civilly restrain any property "obtained as a result of … a Federal health care offense" or "property of equivalent value"—i.e., untainted assets. *Id.* § 1345(a)(2).[6] In other words, the Government expressly sought to do via § 1345 what it freely acknowledged the text of § 853 forbids—restrain untainted property prior to trial in order to keep those assets under lock and key for eventual criminal forfeiture. *See* J.A. 90 (Assistant United States Attorney noting that "1345 allows for freezing of assets of equivalent value. The forfeiture statutes do not.").

For Petitioner, the end result of this statutory two-step is the restraint of *all* her assets, including those she could have used to retain her counsel of choice. The district court enjoined Petitioner from

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[6] In 2006, the Department of Justice represented to Congress that it uses § 1345 infrequently. Letter from William Moschella, Assistant Attorney General, to Hon. J. Dennis Hastert, Speaker, U.S. House of Representatives (May 25, 2006), http://tinyurl.com/pnaa5ua. And in the rare instances where it has pursued an injunction under § 1345 in tandem with a criminal asset forfeiture action, courts on several occasions have allowed for the release of funds to pay attorney's fees. *See United States v. Petters*, No. 08-5348 ADM/JSM, 2009 WL 803482, at *3-4 (D. Minn. Mar. 25, 2009); *United States v. Payment Processing*, 439 F. Supp. 2d 435, 440–41 (E.D. Pa. 2006).

disposing of any assets up to $45 million—an amount that represented *all* of the revenue her businesses had received from Medicare during a given period—despite testimony from a government witness that Petitioner had retained only a fraction of that amount.[7] Pet. App. 12-14. Because the $45 million figure represented an amount many times greater than Petitioner's net worth, *id.* at 12, 18, the order reached both the proceeds from the alleged crime currently in her possession and assets with no connection to it—i.e., property of "equivalent value," *id.* at 18. The Government and Petitioner stipulated that the restraint would likely reach assets that would otherwise be available to retain counsel. J.A. 161.

The court noted that the injunction would not have been permissible under the criminal forfeiture statutes. *See* J.A. 89-91. What it did not acknowledge was that § 1345 was not designed to provide the Government with an alternative means of depriving a criminal defendant of the ability to hire a lawyer. In contrast to the criminal forfeiture statutes, § 1345 does not operate as a punishment designed to deprive the accused of her "ill-gotten gains." The statute itself does not mention forfeiture or restitution, and its injunctive provisions are meant to "prevent a continuing and substantial injury" to

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[7] In entering the injunction, the court relied on the Government's allegation that Petitioner's *businesses* received $45 million from Medicare, Pet. App. 13-15, even though § 1345 allows only for an injunction against a "person" who intends to dispose of property "obtained as a result of … a Federal health care offense" or "property of equivalent value," 18 U.S.C. § 1345(a).

the Government or others resulting from ongoing fraud, not to remedy past harms. 18 U.S.C. § 1345(b). Congress's concern in passing the statute was that, given the time often required to complete a criminal investigation, "innocent people [would] continue to be victimized while the investigation [was] in progress." S. Rep. No. 98-225, at 402 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3540; *see also id.* ("Experience has shown that even after indictment or the obtaining of a conviction, the perpetrators of fraudulent schemes continue to victimize the public.").

Nothing in the statute's text or history indicates that Congress intended the "equivalent property" provision to be used to enjoin a defendant from using funds for her criminal defense. And nothing suggests Congress meant § 1345 to be used to avoid the carefully crafted pretrial restraint limits in criminal asset forfeiture laws. Rather than giving the Government a claim to the proceeds of crime, § 1345 focuses on preventing further injury to victims until a criminal investigation is completed. *See United States v. Payment Processing*, 439 F. Supp. 2d 435, 441 (E.D. Pa. 2006) ("Section 1345 features no … title reversion and instead focuses on preventing further injury to victims until a criminal investigation is completed.").

Using a civil remedy to help effectuate the criminal forfeiture the Government sought in this case also runs counter to the general principle that *civil* forfeiture is not available against untainted, "substitute" assets. Such actions—which are directed against the property itself, not its possessor—proceed on the fiction that the asset in question is

the wrongdoer, and is therefore subject to forfeiture. David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 2.02 (2015). Accordingly, untainted—i.e. "innocent"—assets do not come within civil forfeiture's reach. Given that a federal court's traditional equitable powers do not include the authority to restrain assets pending judgment, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-27 (1999), the Government's use of § 1345 to do what it could not via criminal forfeiture law is troubling.

There is a good reason that Congress and the courts have refused to condone pretrial restraint of substitute assets. Such power allows the Government to reach beyond a criminal defendant's alleged "ill-gotten gains" and potentially seize *all* of an individual's assets, crippling businesses and destroying livelihoods. *Ripinsky*, 20 F.3d at 364. Accordingly, courts have refused to extend the "drastic remedy" of pretrial restraint to the untainted assets of an individual merely accused of a crime. *See id.* at 365.

Recognizing that the "very potency" of pretrial asset restraint "demands that it be reasonably contained within ascertainable limits," *United States v. Saccoccia*, 354 F.3d 9, 15 (1st Cir. 2003), a number of Courts of Appeals have also held that due process requires that a defendant be granted a hearing to contest the forfeitability of property the Government wants to restrain under 21 U.S.C. § 853(e) and similar statutes. *See United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001) (listing cases); *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998); *United States v. Monsanto*, 924 F.2d 1186, 1197 (2d

Cir. 2001); *United States v. Moya-Gomez*, 860 F.2d 706, 725-30 (7th Cir. 1988); *cf. Kaley v. United States*, 134 S. Ct. 1090, 1108 (2014) (Roberts, C.J., dissenting) (noting that at a defendant's request a district court "constitutionally *must*" reassess a grand jury finding that the property in question is traceable to the alleged crime).[8] The deleterious effects that pretrial asset restraint can have on the Sixth Amendment right to counsel have figured prominently in such decisions. *See, e.g.*, *Jones*, 160 F.3d at 646 (under *Mathews v. Eldridge* balancing, the "essential" Sixth Amendment right to counsel of choice weighs in favor of requiring a pretrial traceability hearing).

The import of these decisions is clear: The "very potency" of the Government's broad authority to restrain a defendant's assets prior to trial demands that such authority be subject to meaningful constraints.

II. The Government's Interest In Forfeiture Does Not Outweigh A Defendant's Right To Spend Her Own Money On Counsel Of Choice.

The Government's circumvention of the limitations in criminal forfeiture law not only transgresses the statutory boundaries established by

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[8] At oral argument in *Kaley v. United States* the Government, too, acknowledged that due process "entitle[s]" a criminal defendant to a hearing "to show that the assets that are restrained are not actually the proceeds of the charged criminal offense." Transcript of Oral Argument at 45, *Kaley*, 134 S. Ct. at 1108.

Congress; it also violates a defendant's Sixth Amendment rights. As this Court has repeatedly recognized, the right to counsel of choice is a fundamental protection for criminal defendants facing charges of alleged wrongdoing. Denial of that right is not just an individual harm; improperly depriving the accused of the right to choose who will represent her undermines the integrity of the criminal justice system as a whole.

The distinction between tainted and untainted assets is significant in this respect. In *Caplin* this Court rejected the Petitioner's constitutional argument largely on the ground that the Sixth Amendment gives a defendant no right to "spend another person's money" for her defense. Even assuming that principle was a sound basis for the Court's earlier decisions, it has no application here: When a criminal defendant seeks to use untainted assets to hire a lawyer, she is spending no one's money but her own. The Government has no claim of priority to legitimate funds sufficient to overcome constitutional guarantees. And none of the justifications the *Caplin* Court offered for privileging the Government's interest in forfeiture over a defendant's Sixth Amendment rights withstand scrutiny.

A. The Constitution protects a criminal defendant's "vital interest" in retaining counsel of choice.

This Court has long recognized that the Sixth Amendment does not simply guarantee that a criminal defendant will have *a* lawyer; it also protects against government interference with the

accused's ability to select *the* lawyer she believes will best secure her rights. Given the crucial role an attorney plays in every aspect of an accused's defense, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), selection of a lawyer is effectively a decision about how best to preserve one's liberty in the face of the Government's power to punish, *see Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman ... requires the guiding hand of counsel at every step in the proceedings against him."). To deny a defendant the right to choose her lawyer is effectively to deprive her of the ability "to make [her] defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). It is therefore "hardly necessary to say that ... a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell*, 287 U.S. at 53.

In light of this tradition, the right to counsel of choice cannot be considered as simply an ancillary privilege to be discarded in favor of the government's interest in fighting crime; it is in fact "the root meaning of the constitutional guarantee" that the Framers of the Constitution enshrined in the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 147-48. Accordingly, while this Court has held that no one has a right to specific counsel they cannot afford, and no defendant can insist on being represented by a particular attorney who is unwilling to take on the task, *Caplin*, 491 U.S. at 624, as a general matter denial of the right to counsel of choice constitutes structural error, *Gonzalez-Lopez*, 548 U.S. at 150, mandating automatic reversal of a conviction because the error "undermine[s] the fairness of a criminal proceeding as a whole," *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013).

The damage wrought by improper deprivation of this right is not simply an individual concern. Our adversary system is predicated on the notion that robust advocacy "on both sides of a case" will help ensure that "the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) ("[F]airness can rarely be obtained by … one-sided determination of facts decisive of rights."). As a result, when the Government denies a defendant the right to be represented by counsel of choice, it is not only the accused who is injured; the judicial process itself equally suffers the consequences. *Cf. Kaley*, 134 S. Ct. at 1114 (Roberts, C.J., dissenting) (an "independent bar" serves as "a check on prosecutorial abuse and government overreaching").

Despite this Court's longstanding recognition of a defendant's "vital interest" in retaining counsel of her choosing, *id.* at 1102, the courts below in this case gave insufficient consideration to this right. To its credit, the district court at least acknowledged that the question of "whether a criminal defendant has a Sixth Amendment right to use untainted, substitute assets to retain counsel of choice" was "more difficult" than the questions addressed in *Caplin* and *Monsanto*. Pet. App. 30. But relying on a modified version of the bank robber analogy employed by this Court, the district court easily concluded that someone who steals and subsequently dissipates $100,000 has no right to use funds legitimately in his possession to pay for a lawyer. Pet. App. 32; *see also Caplin*, 491 U.S. at 626 ("A robbery suspect … 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 Court of Appeals was even less deliberate; in a perfunctory opinion it simply asserted that Petitioner's Sixth Amendment argument was "foreclosed" by this Court's precedents. Pet. App. 3.

This conclusion was wrong. True, in *Caplin* this Court permitted the Government to interfere with a defendant's right to use *tainted* funds in her possession to hire counsel. The Sixth Amendment, the Court asserted, does not protect an individual's right "to spend another person's money" on a lawyer. *Caplin*, 491 U.S. at 626. While the Court admitted that limitations on the use of tainted assets necessarily impaired the ability of a defendant to select her counsel of choice, it found that the "strong governmental interest" in forfeiture overcame any constitutional objections. But the Court noted that nothing in its ruling prevented a defendant from using *legitimate* funds to pay for a lawyer. *See id.* at 625 ("The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing.").

The distinction between tainted and untainted assets—brushed aside by the courts below—makes all the difference. In the *Caplin* Court's view, a criminal defendant cannot legitimately transfer tainted assets to her lawyer because under the "relation back" doctrine, title to such assets vested in the government at the very moment the alleged offense was committed. *Id.* at 627; *see also* 21 U.S.C. § 853(c) ("All right, title, and interest in property described in [§ 853] vests in the United States upon the commission of the act giving rise to forfeiture

under this section."); *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 125 (1993) ("Under the relation back doctrine, a decree of forfeiture ha[s] the effect of vesting title to the offending res in the Government as of the date of its offending conduct."). Because title to the assets vests in the Government the instant the crime occurs, any subsequent transfer—including to an attorney—is deemed a nullity. *See Caplin*, 491 U.S. at 627 ("[The defendant] cannot give good title to such property to [his lawyer] because he did not hold good title ….").

Whatever the merit of this logic, it is limited to tainted assets—it does not extend to the legitimate, untainted assets a defendant might have in her possession. By its terms, the relation-back provision in 21 U.S.C. § 853(c) does *not* apply to "substitute property." *See id.* (vesting in the United States title to property "described in subsection (a)," which does not address "substitute property" identified in subsection (p)); *United States v. Erpenbeck*, 682 F.3d 472, 477 (6th Cir. 2012) ("The relation-back clause [in § 853(c)] extends only to tainted property …."); *United States v. Jarvis*, 499 F.3d 1196, 1204-05 (10th Cir. 2007) (similar). *But see United States v. McHan*, 345 F.3d 262, 272 (4th Cir. 2003) (holding that title to "substitute property" vests in the Government "at the time of the commission of the acts giving rise to the forfeiture").

In other words, a criminal defendant's untainted assets are not the Government's "property" at the time of the criminal offense. To the extent that the Government has any interest in such assets, it is inchoate and contingent upon securing a criminal conviction and substitute asset order. *See Jarvis*, 499

F.3d at 1205 ("The government's interest in [substitute property], if any, is only a potential and speculative future interest."). Analogizing to bankruptcy law, if the relation-back doctrine grants the Government the status of a secured creditor with a superior claim to the contested assets, the Government's interest in *untainted* assets is analogous to that of an unsecured creditor. Notably, such a creditor may be entitled to distribution from the debtor's estate only after the debtor's attorney's fees have been paid in full. *See* 11 U.S.C. § 507(a)(2) (administrative expenses have priority over general unsecured claims); *id.* § 503(b)(2) (debtor attorney's fees generally qualify as an administrative expense).

Accordingly, when a court refuses to release untainted assets, it is not preventing a defendant from "spend[ing] another person's money" to hire a lawyer. *Caplin*, 491 U.S. at 626. It is effectively forbidding the accused from spending *her own money* to exercise a fundamental constitutional right. *See Caplin*, 491 U.S. at 626 (noting an "individual's right to spend his own money to obtain the advice and assistance of ... counsel" (internal quotation marks omitted)); *Powell*, 287 U.S. at 53 (a defendant should have the opportunity "to secure counsel of his own"); *Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (noting "the right to be heard through [one's] own counsel"). Nothing in the Constitution or this Court's precedents permits such an infringement of a criminal defendant's fundamental rights.

B. The governmental interests in forfeiture identified by this Court carry little weight in the present context.

In addition to relying on the legal fiction of government title to criminal proceeds, the *Caplin* Court identified three government interests that, in the Court's view, justified interference with a defendant's ability to use such assets to pay for counsel: funding law enforcement operations, providing restitution to victims, and combatting the economic power of criminal syndicates. *Caplin*, 491 U.S. 626-33; *see also Monsanto*, 491 U.S. at 616 (adopting the *Caplin* interest analysis). These "strong governmental interest[s]" in forfeitable assets, the Court found, outweighed any interest a defendant might have in using those assets to hire her counsel of choice. *Caplin & Drydale*, 491 U.S. at 631.

This aspect of *Caplin*'s reasoning has not survived the passage of time, and it certainly has no application to untainted assets. When viewed in light of the Government's actual practice in modern forfeiture cases, the Court erred in concluding that the "limited" burden forfeiture imposes on a defendant's right to counsel is justified by the Government's "strong" interest in taking possession of her assets. In short, the well-established right to retain counsel of choice far outweighs any interest the Government has in assets unrelated to the alleged offense.

1. The governmental interest in funding law enforcement through forfeited property does not justify denial of the right to use untainted funds to pay counsel of choice.

In describing the interest the Government had in being able to "obtain[] full recovery of all forfeitable assets," the *Caplin* Court first discussed the important role such property plays in funding law-enforcement activities. *Caplin*, 491 U.S. at 629. Assets deposited into the Department of Justice Assets Forfeiture Fund "support[] law-enforcement efforts in a variety of important and useful ways." *Id.* at 629; *see also Kaley*, 134 S. Ct. at 1094 (describing how law enforcement uses forfeited assets for activities such as police training). Because the funding generated for law enforcement activities is "substantial," the Government's interest in using forfeited assets in this way "should not be discounted." *Caplin*, 491 U.S. at 629.

Four years later, however, the Court recognized that the Government's direct pecuniary stake in asset forfeiture raises a real risk of overreach. In ruling that an adversarial hearing is required to justify seizures of real property, the Court emphasized that strong due process protections were of particular importance when "the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good*, 510 U.S. 43, 56 (1993); *see also Harmelin v. Michigan*, 501 U.S. 957, 978-79 n.9 (1991) (Scalia, J., concurring) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

The concern expressed in *James Daniel Good* over the Government's skewed incentives was a major change from *Caplin* and *Monsanto*, where the Court treated the Government's dependence on funding from asset forfeiture as a factor weighing *in favor* of deprivation of established constitutional rights. *See Caplin*, 491 U.S. at 629. But in the intervening four years a troubling fact had emerged: In 1990 the Attorney General issued a memorandum urging United States Attorneys to make "[e]very effort … to increase forfeiture income" so as to meet the Department of Justice's annual budget goal. Executive Office for United States Attorneys, U.S. Dep't of Justice, 38 United States Attorney's Bulletin 180 (1990), *quoted in James Daniel Good*, 510 U.S. at 56 n.2. From the Court's perspective, the advent of "policing for profit" meant that the constitutional protections a defendant enjoys were all the more important for ensuring that the Government did not abuse its powers. *See id.* at 55 ("The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking."); *cf. Kaley*, 134 S. Ct. at 1114 (Roberts, C.J., dissenting) (an "independent bar" serves as "a check on prosecutorial abuse and government overreaching").

The concern articulated by the Court in *James Daniel Good* is even more pressing today. In fact, the Government's pecuniary stake in asset forfeiture prosecutions has become a topic of increasing public concern. In response to media reports of abusive

seizures in currency-structuring cases,[9] in October 2014 the Treasury Department significantly scaled back Internal Revenue Service asset seizures in cases in which the assets seized came from wholly legitimate sources, but had been deposited in a way that technically violated federal law governing currency transactions. *Statement of Richard Weber, Chief of I.R.S. Criminal Investigation*, N.Y. Times, Oct. 25, 2014. The Justice Department followed suit about six months later. U.S. Dep't of Justice, Policy Directive 15-3, Mar. 31, 2015. Along the same lines, the federal government has dramatically scaled back programs enabling local and state police to make seizures and then have them "adopted" by federal agencies, an approach that critics say evades state-law restrictions on asset seizure and threatens civil liberties. Press Release, U.S. Dep't of Justice, Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), http://tinyurl.com/pq6hsck (last visited Aug. 21, 2015).[10]

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[9] *See, e.g.*, Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times, Oct. 25, 2014; George F. Will, *The Heavy Hand of the IRS*, Wash. Post, Apr. 30, 2014; Nick Sibila, *IRS Seizes Over $100,000 From Innocent Small Business Owner, Despite Promise To End Raids*, Forbes Mag., May 5, 2015.

[10] *See, e.g.*, Karen Dillon, *Taking Cash Into Custody: Across U.S., Police Dodge State Seizure Laws*, Kan. City Star, May 21, 2000; Michael Salah, Robert O'Harrow, Jr. & Steven Rich, *Stop and Seize*, Wash. Post. Sept. 6, 2014; Sarah Stillman, *Taken*, New Yorker, Aug. 12, 2013.

This Executive Branch backpedaling has occurred against a backdrop of renewed Congressional interest in asset forfeiture reform. One proposed reform would eliminate law enforcement's financial interest in the outcome of a forfeiture matter by requiring that forfeited assets be deposited directly into the Treasury's General Fund rather than the Assets Forfeiture Funds. Fifth Amendment Integrity Restoration Act of 2015, H.R. 540, 114th Cong. § 3(b) (introduced Jan. 27, 2015). Other reforms would reach more broadly still. *See, e.g.*, *The Need to Reform Asset Forfeiture: Hearing Before the S. Comm. On the Judiciary*, 114th Cong. (Apr. 15, 2015) (statement of Sen. Grassley) ("A group of bipartisan, bicameral legislators is at work to develop a bill to reform asset forfeiture.").

In sum, what the Court in *Caplin* and *Monsanto* perceived to be a strong governmental interest that weighed in favor of a "full" forfeiture, including pretrial seizure, has proven through experience to promote skewed incentives and raise collateral hazards for civil liberties. This is all the more true in the context of untainted assets. As the Court acknowledged in *James Daniel Good*, the possibility that the Government's forfeiture conduct is shaped by its funding priorities is troubling enough when dealing with the disposition of assets allegedly derived from criminal conduct. When the Government is trying to take away a defendant's own assets—money that is needed to pay for counsel to defend against the charges at issue—the constitutional threat is that much greater.

2. The desire to provide restitution to victims does not justify denying an accused the right to spend her own funds on counsel of choice.

The *Caplin* Court described a second government interest justifying the power to seize assets needed to pay for counsel: Securing an "undiminished" forfeiture helps effect restitution—that is, "returning property … to those wrongfully deprived or defrauded of it." 491 U.S. at 629. In particular, the Court noted that under § 853, "rightful owners" of forfeited assets could make claims to those assets "before they are retained by the Government." *Id.*

Even in regard to allegedly tainted assets, that asserted interest turns out to be far less weighty than *Caplin* assumed. The Court's analysis rested on § 853(n)(6)(A), a statutory provision allowing third parties with legitimate claims to seized assets to intervene before forfeiture is awarded to the Government. In practice, however, the Government has consistently opposed petitions for compensation by fraud victims under § 853(n)(6)(A). *See* U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 172 (2013) (instructing government attorneys to generally oppose efforts by fraud victims to interpose a claim of constructive trust in such cases).[11]

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[11] The Government prefers to deal with the interests of fraud victims through separate remission and restoration processes that occur after it succeeds in forfeiting the property, particularly in multiple-victim cases. *See* U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 172 (2013) (expressing preference for restitution through the "orderly" government

Even when a victim can overcome government opposition, recovery for fraud victims under § 853(n)(6) is not available in cases—like this one—involving untainted assets. Because a fraud victim is generally deemed to have surrendered title to his property when the fraudulent transaction is complete, victims have invoked constructive trust theory to assert a preexisting and specific interest in fraud proceeds sufficient to confer standing to maintain a § 853(n)(6)(A) petition as the rightful owner. *See, e.g.*, *Willis Mgmt. (Vermont), Ltd. v. United States*, 652 F.3d 236, 242-46 (2nd Cir. 2011); *United States v. Wilson*, 659 F.3d 947, 952-55 (9th Cir. 2011).

A constructive trust, however, can only reach assets obtained through wrongdoing or property traceable to those assets. *See* Stefan D. Cassella, *Asset Forfeiture Laws in the United States* 850 (2d ed. 2013) ("[T]he *sine qua non* of a constructive trust is the ability to trace the lost or fraudulently obtained property …."). By definition, untainted "equivalent value" assets of the kind at issue in this case do not derive from the alleged offense conduct. Accordingly, a fraud victim seeking restitution of

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remission process rather than individual victim claims under § 853(n)(6)). The mechanisms the Government uses to provide restitution, however, afford victims limited rights of appeal, *see* 28 C.F.R. § 9.3(j)(3), and are often inferior to alternative means such as involuntary bankruptcy or the administration of a constructive trust, *see United States v. Frykholm*, 362 F.3d 413, 417 (7th Cir. 2004) (Easterbrook, J.) (noting that, unlike involuntary bankruptcy cases, the Government's standard asset-forfeiture approach to restitution "does not create a comprehensive means of collecting and distributing assets").

such assets via § 853(n) will not be able use constructive-trust theory to satisfy the requirement of a preexisting legal interest in the property. The restitution the *Caplin* Court envisioned, in other words, will be hard to come by.

3. The Government does not need to preclude defendants from hiring counsel in order to combat the kinds of crimes alleged here.

The third government forfeiture interest identified in *Caplin*—preventing racketeers from using crime proceeds to hire high-priced attorneys—also holds little sway. *See* 491 U.S. at 630. The objective of lessening the economic power of organized crime has little to do with this case, or with most actions the Government brings. Only a tiny sliver of federal prosecutions involve such organizations. *See* U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report* 11 (2013) (only 0.3% of all criminal prosecutions initiated by the United States Attorneys' in fiscal year 2013 fell into the category of organized crime). And whatever the merit of Congress's belief that the Government needs robust forfeiture authority because "traditional criminal sanctions" are "inadequate to deter" large-scale and highly profitable criminal enterprises, S. Rep. No. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N 3182, 3374, ordinary measures are more than adequate to the task here. If the Government's goal is to cripple Petitioner's allegedly fraudulent medical businesses, it does not need to freeze all of her untainted assets and deny her a lawyer to do so; a simple felony criminal conviction for a health care offense will suffice. *See*

42 U.S.C. § 1320a-7(a)(1) (Secretary of Health and Human Services must exclude from participation in any Federal health care program anyone convicted of a criminal offense related to the delivery of services under Medicare).

Moreover, the Government is already well-equipped to take the profit out of crime even without the cudgel it seeks in this case. As explained above, statutes that define forfeitable property in very broad terms have been applied to empower the Government to seek forfeiture of assets far beyond what a defendant gained from her conduct. *See supra* 6-8. And courts have interpreted 21 U.S.C. § 853 in ways that enlarge the Government's forfeiture authority even further. For example, when a defendant is charged with conspiracy, courts have repeatedly held that forfeitable assets are not limited to property acquired wholly by the defendant, but jointly and severally encompasses property derived from those acting in concert. *See, e.g.*, *United States v. Roberts*, 660 F.3d 149, 165 (2d Cir. 2011) (joint and several liability in narcotics conspiracy); *United States v. Corrado*, 227 F.3d 543, 553 (6th Cir. 2000) (RICO conspiracy); *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) (money laundering conspiracy). *But see United States v. Cano-Flores*, No. 13-3051, 2015 WL 4666891, at *7 (D.C. Cir. Aug. 7, 2015) ("§ 853(a)(1) … does not authorize imposition of a forfeiture based on the total revenues of a conspiracy simply because they may have been reasonably foreseeable.").

Courts have also failed to heed this Court's reminder that "forfeiture applies only to specific assets." *Kaley*, 134 S. Ct. at 1102 n.11. They

routinely grant the Government's request for a forfeiture "money judgment"—i.e., a forfeiture order against the defendant's general assets, to be paid out of assets she might acquire in the future (including after release from prison). *See United States v. Hampton*, 732 F.3d 687, 691 (6th Cir. 2013) (citing cases). This despite the fact that § 853's plain language limits forfeiture to "property constituting, or derived from, any proceeds the [defendant] obtained" as a result of her alleged criminal conduct. 21 U.S.C. § 853(a)(1). As a result, the Government asserts criminal forfeiture authority that effectively crosses the line from criminal proceeds to assets legitimately earned or acquired by the defendant long after the criminal case is over.

Even if the tools already at the Government's disposal were insufficient to combat effectively large-scale criminal organizations, the notion that the Government can deliberately tip the scales of justice in its favor by depriving a defendant of assets needed for her defense—even allegedly tainted ones—is disquieting, to say the least. *See Caplin*, 491 U.S. at 630 (it "may be somewhat unsettling" to imagine that the Government has a legitimate interest in using forfeiture to undermine a defendant's right to counsel of choice); *id.* at 635 (Blackmun, J., dissenting) ("[I]t is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial."). The idea that such hobbling can be effectuated by seizing a defendant's *legitimate* assets is more than troubling—it is indefensible.

C. The Sixth Amendment mandates reversal of the decisions below.

It is regrettable that for more than twenty-five years the balance between the Government's desire to recover assets and a defendant's Sixth Amendment right to counsel has been defined by *Caplin* and *Monsanto*. The Court was sharply divided in both of those cases, and it gave too much credit to governmental interests that have proven illusory or unjustified. Yet these two precedents now require the Court to decide whether the Sixth Amendment preserves the right of an accused to spend her own money to defend against felony criminal charges.

The courts below concluded too easily that the reasoning underlying this Court's prior cases mandates that the answer be no. The Sixth Amendment, they held, ultimately has nothing to say about pretrial restraint of substitute assets needed to pay for counsel of choice. As the preceding discussion explains, the opposite is true: The Sixth Amendment's guarantee of the right to counsel of choice *requires* that a court release from restraint sufficient funds for a criminal defendant to hire a lawyer.

The district court did not simply reject this categorical argument; in fact, in deciding whether to grant the injunction requested by the Government, the court declined to give any weight to Petitioner's Sixth Amendment rights at all. This, too, was a mistake. Despite the fact that proceedings under 18 U.S.C. § 1345 are governed by the Federal Rules of Civil Procedure, the court concluded that it did not

need to weigh the traditional factors governing injunctive relief, which include balancing the equities on both sides.[12] *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Had it done so, the court would have properly concluded that Petitioner's strong interest in exercising her right to representation by counsel of choice far outweighs the Government's interest in restraining assets that properly belong to her in the first instance. At minimum, this Court should reverse and remand so that the courts below can give proper consideration to the meaningful protections the Sixth Amendment offers criminal defendants against the Government's prosecutorial power.

CONCLUSION

Amici ask that this Court reverse the decision below.

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[12] The district court concluded that it did not need to apply the traditional factors because § 1345 expressly authorizes injunctive relief to protect the public interest. Pet. App. 5; *see also United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 28 (2d Cir. 1972) (a statute that authorizes injunctive relief may be read as an implied Congressional finding that statutory violations harm the public). The court was wrong. Even if an injunction to prevent ongoing violations of § 1345 might in principle serve the public interest, preventing Petitioner from spending her own money to hire counsel does not. And the mere fact that Congress enacted § 1345 does not justify ignoring the other preliminary injunction factors—in particular, the balancing of the equities and the need to narrowly tailor injunctive relief to avoid burdening Constitutional guarantees.

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