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 *AMICUS CURIAE* AMERICANS FOR FORFEITURE REFORM IN SUPPORT OF PETITIONER

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August 25, 2015

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INTEREST OF THE *AMICUS CURIAE*

Americans for Forfeiture Reform[1] ("AFR" or "Amicus") is a non-profit, non-partisan civic group concerned with the government's fearsome power to forfeit private property—a power that is "devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). AFR thus seeks to increase public awareness of government abuses of this power and the urgent need for legal reform. AFR advances this mission through, among other things, filing *amicus curiae* briefs in forfeiture cases.[2]

AFR is interested in the present case because forfeitures "should be enforced only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939). Here, a district court imposed a blanket freeze on Petitioner's property based on an erroneous interpretation of a highly limited forfeiture law. AFR therefore believes the Court should use this case to

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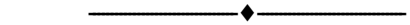
[1] This brief is filed based on Petitioner's written blanket consent filed with this Court and Respondent's written consent to Amicus. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Amicus and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See*, *e.g.*, Brief of *Amicus Curiae* Americans for Forfeiture Reform, *United States v. Moser*, No. 13-55266 (9th Cir. Nov. 1, 2013); *see also United States v. Moser*, No. 13-55266 (9th Cir. Feb. 5, 2015) (order granting AFR's motion under Fed. R. App. P. 29(g) for permission to participate in oral argument).

reaffirm the level of care that courts should take when interpreting and enforcing forfeiture laws.



SUMMARY OF THE ARGUMENT

The freezing or forfeiture of private property is an "exceedingly drastic" government act that has long been disfavored under common law. *One 1936 Model Ford*, 307 U.S. at 226. The government thus may not freeze or forfeit property absent clear legal authority to do so. But no such authority existed in this case—a reality made clear by the hypothetical that the district court offered here to explain why effectively freezing all of Petitioner's property did not violate her Sixth Amendment right to counsel.

The hypothetical went as follows: imagine a suspect is arrested following a $100,000 bank robbery with $100,000 on him and no good account of where this cash came from. *See* P.App.31-32. It would be "reasonable" to deny the suspect use of the $100,000 to pay for a lawyer as it is "obvious" the cash does not belong to the suspect. *Id.* But what if the suspect had already spent the $100,000 before his arrest but also had another $100,000 in legitimate savings? *Id.* The court reasoned that it would be just as fair to deny the suspect the use of his savings to pay for a lawyer as his "decision to spend the $100,000 he stole" could not free him "to hire counsel with the other $100,000 when Congress has authorized restraint of . . . [his] substitute assets." *Id.*

But this logic runs smack into what Congress has actually authorized. Under the Fraud Injunction Act, 18 U.S.C. § 1345—the statute that the district court found authorized a blanket $45 million freeze on Petitioner's property in this case—federal courts may freeze assets only when a person is "alienating or disposing of property, or intends to alienate or dispose of property" that is traceable to certain federal offenses. *Id.* § 1345(a)(2). The Act thus could not authorize a freeze on the hypothetical suspect described above because this suspect *no longer has any property traceable to a federal offense* that he can alienate, much less intend to alienate.

There lies the fundamental problem with the $45 million freeze that was imposed on Petitioner here. Despite the exceedingly drastic nature of this freeze, neither the district court originally nor the Eleventh Circuit on appeal considered whether this freeze was authorized by the full text of the Fraud Injunction Act. *See* P.App.2, 9-11. Both courts instead largely assumed the Act did exactly what the government wanted it to do in this case: ensure that when some assets allegedly "obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." P.App.10.

The Act's text, historical purpose, schematic role, as well as governing legal canons, paint a different picture. Under the Act, a court may freeze *actually tainted property*—i.e., property traceable to a federal offense. Or a court may freeze *constructively tainted property*—i.e., property that is not connected to any

crime but is equal in value to the actually tainted property that a person currently possesses. This untainted property is thus deemed "tainted" by the court either to preserve the status quo (e.g., freezing $100,000 in untainted cash instead of a $100,000 tainted car at risk of depreciation) or to protect third parties who would be harmed if a person's tainted property were to be frozen. At all times, however, the Act requires a freeze to be tied to tainted property that a person *presently holds* (and thus can alienate).

Hence, the 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*. Or, in concrete terms, the Act does not permit a $100,000 freeze on John Doe's bank accounts because Doe allegedly defrauded the government of $100,000 five years ago. 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.

That is what should have happened here. But instead, the district court accepted the government's charge that Petitioner improperly took $45 million from Medicare between 2006 and 2012, and then imposed a sweeping $45 million freeze on all of Petitioner's property without determining whether any of this property was *actually traceable* to Petitioner's

alleged fraud (i.e., tainted) or not. *See* P.App.6, 13. The district court thus failed to acquit its fundamental responsibility when enforcing a forfeiture-related law like the Fraud Injunction Act—to ensure that its order fell "within both letter and spirit of the law." *One 1936 Model Ford*, 307 U.S. at 226. The following plain interpretation of the Act, in turn, exposes the gravity of this error and a clear way to fix it that avoids the constitutional problems spawned by this error.

ARGUMENT

I. The Fraud Injunction Act ("FIA") allows a court to freeze only tainted property—the Act does not govern untainted property.

The Fraud Injunction Act, 18 U.S.C. § 1345, empowers the Attorney General to enjoin people from committing certain fraud-based federal offenses and from dissipating property traceable to these offenses (i.e., "tainted property"). The Act does not, however, enable the Attorney General to obtain "the functional equivalent of an order of attachment" against all of a defendant's property. *United States v. Jones*, 652 F. Supp. 1559, 1560 (S.D.N.Y. 1986). Indeed, as detailed below, a plain reading of the Act reveals that in authorizing property freezes, the Act is not concerned with how much property the accused may have illegally taken—it is only concerned with how much illegal property the accused *actually has*.

A. The FIA lets a court freeze a person's property only if the property is "traceable to" fraud (i.e., tainted).

To understand the property freezes authorized by section (a)(2) of the Fraud Injunction Act, the entire Act must be considered. The Act's first major section states "the Attorney General may commence a civil action in any Federal court to enjoin": (1) a person who is "violating or about to violate" any anti-fraud provision under Chapter 63 of Title 18 of the U.S. Code; (2) a person who is "committing or about to commit a banking law violation"; and (3) a person who is "committing or about to commit a Federal health care offense." 18 U.S.C. § 1345(a)(1).

The point of § 1345(a)(1), then, is to enable the Attorney General to stop fraudulent conduct *before* or *while* it is happening—not to remediate such conduct after the fact. This is reflected by the consistent use of the present tense in § 1345(a)(1), which authorizes injunctions against people who are "committing" or who are "about to commit" certain violations, versus speaking of people who *have committed* a violation. *Cf., e.g.*, 42 U.S.C. § 1320a-7a(k) (allowing injunctive relief against any person who "has engaged" in health care fraud). Federal courts have thus limited any grant of injunctive relief under § 1345(a)(1) to situations where the alleged fraudulent scheme to be stopped is "ongoing and there exists a threat of continued perpetration," thereby emphasizing that "the statutory equitable remedy [under § 1345] is not available for solely past violations." *United States v.*

William Savran & Assocs., Inc., 755 F. Supp. 1165, 1178 (E.D.N.Y. 1991) (collecting examples).

Section (a)(2) of the Fraud Injunction Act carries the same present-tense emphasis as (a)(1). It states that "the Attorney General may commence a civil action" to enjoin any person who is "alienating or disposing of property, or intends to alienate or dispose of property" that was "obtained as a result of" or "is traceable to" a banking or health care violation. Section 1345(a)(2) thus covers only those people who *presently have* tainted property (i.e., property "traceable to" a violation). And this makes sense: a court cannot logically order a person to keep property they do not have; nor can a court rightfully order a person to stop using legitimate property.

This leads to § 1345(b), which also speaks in the present tense like § 1345(a). It states that where the Attorney General has filed suit under § 1345(a) to stop either fraudulent conduct or the dissipation of tainted property, the court may take any other action "warranted to prevent a continuing and substantial injury to the United States or to any person . . . for whose protection the action is brought." *Id.* This does not grant any new form of power to the court—it merely confirms that a court may use its traditional, limited equitable powers in enforcing §§ 1345(a)(1) and (a)(2). *See Jones*, 652 F. Supp. at 1559-60.

With this context in mind, the plain meaning of §§ 1345(a)(2)(A) and (B) becomes accessible. These provisions delineate two distinct forms of relief that

the Attorney General may choose between in seeking a court order under § 1345(a)(2) to prevent tainted property from being hidden or dissipated. As such, under § 1345(a)(2)(A), where a person "is alienating or disposing of" tainted property—or where a person "intends" to do this—the Attorney General may seek a court order to "enjoin such alienation or disposition of property." In some cases, this may be more than enough. For example, barring a jailed defendant from spending tainted cash in his personal bank account will preserve the status quo value of this cash.

But in cases where a simple injunction will not protect the value of tainted property, § 1345(a)(2)(B) comes into play. Unlike (a)(2)(A), this provision lets the Attorney General obtain a court order that "prohibit[s] any person"—not just the person who happens to possess the tainted property—from "withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value." This provision accordingly entails an important departure from Federal Rule of Civil Procedure 65(d)(2), which in general limits injunctive relief in civil actions to just the named parties and those acting in concert with them. Section (a)(2)(B) also empowers the court to "appoint a temporary receiver to administer such restraining order."

This provision thus enables the government to preserve the status quo value of tainted property in the face of third-party claims to this property. On this score, consider a hypothetical fraud suspect who uses tainted cash to buy a car that he then allows his

innocent son to drive. As long as the son keeps using the car (i.e., depreciating its value), the fact that the father is barred from selling the car will not preserve the car's value. Section (a)(2)(B) avoids this problem by enabling the court to enter an order that prohibits "any person" from "dissipating" the car, thus barring the son from using the car even though the son is not a named defendant in the Attorney General's civil action under § 1345 against the father.

But what if our fraud suspect instead puts his tainted cash into a bank account to pay his innocent mother's hospital bills? Prohibiting "any person" from "dissipating" this account—including both the mother and the hospital—would preserve its value. It would also harm the mother's health, presuming she has no other way to pay her hospital bills. And there lies the importance of the fact that § 1345(a)(2)(B) permits a court to prohibit the use of *either* tainted property "*or* property of equivalent value." Hence, instead of freezing the tainted cash relied upon by the mother, the court may freeze other untainted property of equal value that the suspect holds (e.g., real estate), constructively transferring the "tainted" status of the former cash onto the latter property. And the court may do the same where the value of tainted property is better preserved by freezing untainted property of equal value than by freezing the tainted property itself, which may be subject to depreciation (e.g.,

freezing $100,000 in untainted cash rather than a tainted car valued at $100,000).

The phrase "or property of equivalent value" in § 1345(a)(2)(B) thus does not authorize the freezing of a person's untainted property as a mere substitute for tainted property that cannot be located or that may have already been dissipated. Instead, this phase codifies the far more limited notion that "restraining orders entered before forfeiture should be concerned with preserving assets equivalent in value to the potentially forfeitable property, and not necessarily the precise property." *United States v. Regan*, 858 F.2d 115, 121 (2d Cir. 1988) (interpreting the pre-trial asset freezes authorized under 18 U.S.C. § 1963(d)(1)(A)). And by codifying this notion, this phrase balances the extraordinary injunctive reach of § 1345(a)(2)(B) to "any person" with a quantum of respect for the legal reality that "orders directed at third parties are strong medicine and should not be used where measures that are adequate and less burdensome on the third parties are available." *Regan*, 858 F.2d at 121.[3]

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[3] This reading of § 1345(a)(2)(B) consequently explains why (a)(2)(B) explicitly provides for the appointment of a temporary receiver while (a)(2)(A) does not. A temporary receiver may well be needed to ensure that third-party access to actually tainted property is not abused, and that constructively tainted property is properly managed to preserve its value. *See*, *e.g.*, *Regan*, 858 F.2d at 121 (affirming court appointment of a monitor to administer pretrial asset freeze affecting third parties).

So, to recap: § 1345(a)(2) lets a court preserve the value of tainted property in one of two ways. The court may freeze *actually tainted property*—i.e., property traceable to a banking or federal health care violation. Or the court may freeze *constructively tainted property*—i.e., untainted property that is equal in value to a person's actually tainted property and then is treated as "tainted" by the court in order to preserve the status quo or to ensure that innocent third parties are still able to use actually tainted property. In practical terms, this means that where a person is accused of perpetrating a $10 million fraud and examination of their property reveals that they hold just a $5 million house traceable to the fraud and $5 million in cash acquired long before the fraud, the court may freeze *either* the tainted house *or* the untainted cash as "property of equivalent value" to the tainted house. But § 1345(a)(2) does not allow *both* the cash and the house to be frozen on the ground that the accused allegedly took $10 million and freezing these two properties would ensure the government a full recovery upon conviction.[4]

Indeed, were the plain terms of § 1345(a)(2) meant to be interpreted in this latter way—as a law enabling the government to impose a pretrial blanket freeze on a person's assets in an amount equal to the

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[4] *See Caldwell v. United States*, 49 U.S. 366, 379-80 (1850) (holding that where a forfeiture-related law gives the government a disjunctive choice between two ways to forfeit property, the government may choose either option).

putative fraud committed by the person—then the law would read this way. It does not. The clearest proof of this can be seen by comparing § 1345(a)(2) to 12 U.S.C. § 1818(i)(4), a banking law that actually does authorize prejudgment attachment. Both sections were enacted under the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Title XXV of the Crime Control Act of 1990, Pub. L. No. 101-647, § 2521, 104 Stat. 4859, 4864-65 (1990). *See United States v. DBB, Inc.*, 180 F.3d 1277, 1284 (11th Cir. 1999) (using § 1818(i)(4) to interpret § 1345(a)(2)).

Unlike § 1345(a)(2), § 1818(i)(4) is explicitly entitled "Prejudgment attachment." *Cf. Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (the "heading of a section" is a tool of statutory construction). The operative language of § 1818(i)(4), in turn, contains none of the terms in § 1345(a)(2) that limit the asset-freezing power of § 1345(a)(2) to actually or constructively tainted property. Section 1818(i)(4) instead provides that incident to a civil or administrative legal proceeding against an insured depository institution, a court may "prohibit[ ] any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of **any funds, assets or other property**."

Accordingly, given the vast difference between a law like § 1818(i)(4) that reaches "any" property and a law like § 1345(a)(2) that only reaches property "traceable to" fraud, it is no surprise that most courts

have enforced § 1345(a)(2) with a careful eye towards freezing only tainted property.[5] In *United States v. Brown*, for example, the Sixth Circuit reversed a property freeze under § 1345(a)(2) on all funds held by defendants "at any financial institution except for an allowed withdrawal of $10,000 per month for business expenses." 988 F.2d 658, 664 (6th Cir. 1993). The Sixth Circuit emphasized that only assets "related to the alleged fraud" were freezable and thus criticized the district court for failing to "distinguish between the proceeds from the alleged . . . fraud and [defendants'] untainted [business] funds." *Id.*

Here, however, the government, district court, and Eleventh Circuit read § 1345(a)(2) in a way that eliminated any need on their part to identify the amount of tainted property held by the Petitioner, much less distinguish this property from Petitioner's

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[5] *See*, *e.g.*, *United States v. Cacho-Bonilla*, 206 F. Supp. 2d 204, 209 (D.P.R. 2002) (holding that § 1345 receiver could only administer property traceable to a violation); *United States v. Sriram*, 147 F. Supp. 2d 914, 947 (N.D. Ill. 2001) (finding nothing in the language of § 1345 to show it "embrace[d] assets not only traceable to the violation but also assets sufficient to secure an ultimate money judgment"); *United States v. Fang*, 937 F. Supp. 1186, 1194, 1201 (D. Md. 1996) ("[A]ny assets to be frozen [under § 1345] must in some way be traceable to the allegedly illicit activity."); *United States v. Quadro Corp.*, 916 F. Supp. 613, 618-19 (E.D. Tex. 1996) (denying § 1345 freeze where the government failed to link "any specific assets" to an alleged fraud); *see also United States v. Mercy Reg'l Health Sys., Ltd.*, No. 08-cv-0188, 2008 U.S. Dist. LEXIS 19362, at *10 (S.D. Ill. Mar. 13, 2008) ("[T]he Court will only restrain assets in bank accounts . . . traceable to the violations alleged.").

untainted holdings. Such rewriting of § 1345(a)(2) should not be sustained by this Court.

B. Construing the FIA to reach untainted property rewrites the FIA.

While the Fraud Injunction Act, § 1345(a)(2) has been read by most courts to authorize the freezing of only tainted property (either actual or constructive), the government, district court, and Eleventh Circuit in this case took a different view. The government read § 1345(a)(2) as allowing a court to freeze as much of a person's property as is needed to "ensure that sufficient assets are available to satisfy any judgment requiring restitution or forfeiture." Cert. Pet. 8 (quoting the government). The district court buttressed this view, finding the "equivalent value" language in § 1345(a)(2)(B) meant that "when some of the assets . . . obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." P.App.10. The Eleventh Circuit then essentially rubber-stamped this view by affirming the district court without any substantive analysis of § 1345(a)(2) or how this provision has been construed by most courts. *See* P.App.1-3.

If the government and district court's reading of § 1345(a)(2) is to be taken seriously, however, then it means effectively rewriting this provision using the past tense and rendering key parts of it surplusage. Here is what § 1345(a)(2) looks like as interpreted by the government, the district court, and

the Eleventh Circuit in this case, with the grey bars reflecting the language in § 1345(a)(2) that is rendered surplusage by this interpretation:

> (2) If a person [has] is alienat[ed] or dispos[ed] of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322 (d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court—
>
> > (A) to enjoin such alienation or disposition of property; or
> >
> > (B) for a restraining order to—
> >
> > > (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and
> > >
> > > (ii) appoint a temporary receiver to administer such restraining order.

Under this view of § 1345(a)(2), the government may freeze a person's assets without ever needing to show that the person holds even a single dollar that is "traceable to" a banking or health care violation. The government need only show that sometime in the past, a person "alienat[ed]" tainted property, thus letting the court freeze the person's untainted property in an amount "equivalent" to the alienated tainted property. This places § 1345(a)(2) in stark tension

with every other part of § 1345 (which are all focused on *present*, not past, conduct), makes the simple injunction under § 1345(a)(2)(A) irrelevant (as this injunction only serves to restrict a person from alienating tainted property they *now* have), and detaches the "property of equivalent value" language in § 1345(a)(2)(B) from the words immediately before it ("any such property or") that most naturally serve to answer the question "equivalent to what?"

Such an interpretation of § 1345(a)(2) thus flies in the face of this Court's precedents, which express "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990). Indeed, the very goal of statutory interpretation is to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Finally, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[6] *Botany Worsted Mills v. United States*, 278 U.S. 282, 288 (1929).

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[6] This principle is of particular relevance in dealing with forfeiture-related statutes, because "the legislature may provide that its forfeitures shall take effect differently from the course prescribed by the common law." *United States v. 1960 Bags of Coffee*, 12 U.S. 398, 408 (1814) (Story, J., concurring).

Yet, the reading of § 1345(a)(2) advanced here by the government, the district court, and the Eleventh Circuit does not follow any of these principles. This reading instead elides those words in § 1345(a)(2) that limit when property may be frozen and what kinds of property may be frozen, thereby granting the government an unprecedented amount of "leverage" to "exert against a potential criminal fraud defendant." *Fang*, 937 F. Supp. at 1202. Such an outcome, in turn, squarely conflicts with this Court's decision last term in *Yates v. United States*.

In *Yates*, this Court rejected "the Government's unrestrained reading" of 18 U.S.C. § 1519, which penalizes the destruction of records, documents, and tangible objects relevant to a federal investigation—a law the government argued could be read to reach the disposal of illegally-caught fish. 135 S. Ct. 1074, 1078-79, 1081 (2015) (plurality op.). The Court noted that while it might be "advisable" for Congress to enact "a coverall spoliation of evidence statute," the Court could not morph § 1519 into such a broad statute absent "clear and definite" language in § 1519 supporting this view. *Id.* at 1088-89.

Yates thus stands for the simple proposition that a law should not be read to give extraordinary power to the government, however "advisable" this power might be, absent clear language in the law to support this reading. But here, the government, the district court, and the Eleventh Circuit all read § 1345(a)(2) to operate as a prejudgment attachment on *all* of a criminal defendant's property (tainted or not)—an

extraordinary remedy[7]—not by pointing to clear and definite language in § 1345(a)(2) supporting this conclusion (e.g., a putative section heading like "pre-judgment attachment"), but rather by *ignoring* the clear and definite language in the law supporting the exact opposite conclusion (e.g., use of the present-tense and the "traceable to" requirement).

As such, the Court should reject this reading of § 1345(a)(2) with the same vigor it rejected the government's overreaching in *Yates*. The better reading of § 1345(a)(2) belongs to Amicus, because only Amicus reads this provision in a way that gives meaning to every word in this provision while harmonizing this provision with every other part of the Fraud Injunction Act. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into a[ ] harmonious whole." (internal citations and quotation marks omitted)).

C. Under a plain reading of the FIA, the district court's freeze of Luis's assets lacked statutory authorization.

Once the Fraud Injunction Act, § 1345(a)(2) is read in plain terms—as set forth in Part I.A above—it becomes clear that the $45 million property freeze

[7] *See infra* Part IV; *Sriram*, 147 F. Supp. 2d at 947-48.

that the district court entered against Petitioner here lacked proper statutory authorization. *See* P.App.4-34. This is true in two main respects:

First, in order to freeze Petitioner's property under § 1345(a)(2), the district court had to find that Petitioner "is alienating or disposing" or "intends to alienate or dispose" of property obtained from or traceable to a banking law violation or health care offense. The district court did not find this. What the district court held was that Petitioner "**has** alienated or disposed of property, and unless enjoined **could continue to alienate or dispose of property**" from a health care violation. P.App.5 (emphasis added). The district court thus froze almost all of Petitioner's property based on a combination of past conduct and speculative reasoning about Petitioner's future conduct—not on what Petitioner was *actually doing* or *intended to do*. By contrast, in *United States v. Gupta*, a district court froze a defendant's assets under § 1345(a)(2) after finding that the defendant "**is now** dissipating assets traceable to his fraud." No. 11-3329, 2011 U.S. Dist. LEXIS 97264, at *11 (C.D. Ill. Aug. 30, 2011) (emphasis added).

Second, to freeze Petitioner's property under § 1345(a)(2), the district court had to identify the property held by Petitioner that was "obtained from" or "traceable to" Petitioner's alleged health care offense. This is because under § 1345(a)(2)(A) and (B), the only property that the Petitioner can be enjoined

from dissipating is either tainted property now in her possession[8] or untainted property equal in value to the tainted property now in her possession. But the district court made no effort to analyze Petitioner's current holdings.[9] Instead, the district court looked to the fact that Petitioner's alleged health care offenses "resulted in $45 million of improper Medicare benefits being paid" to Petitioner, and then imposed a blanket $45 million freeze on all property belonging to Petitioner—even though it was undisputed that Petitioner "has much less than $45 million in personal assets." P.App.6,12.

But even if Petitioner did obtain $45 million through the offenses she is accused of, § 1345(a)(2) still requires the court to determine how much of this $45 million is *presently* in the Petitioner's *possession*. As such, the only way the district court could freeze all of Petitioner's property (as it effectively did here) is by finding that all of Petitioner's property could be traced to the tainted $45 million. *Cf. United States v. Barnes*, 912 F. Supp. 1187, 1198 (N.D. Iowa 1996) (freezing under § 1345(a)(2) all bank accounts held by

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[8] By "possession," Amicus means *all* forms of possession, actual and constructive. *See Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015).

[9] Had the district court performed this analysis, it could have readily identified property in Petitioner's possession that was tainted and thus freezable under § 1345(a)(2)—a reality made clear by the court's acknowledgement of the government's "evidence that [Petitioner] used . . . [tainted] funds to purchase luxury items, real estate, [and] automobiles." P.App.13-14.

defendants because all the cash in these accounts was traceable to defendants' alleged fraud).

The district court did not make such a finding here—nor could it given Petitioner's showing that at least $15 million of her property came from untainted sources. Cert. Pet. 12. The district court's broad $45 million freeze could, of course, be read as treating this untainted $15 million as "property of equivalent value" to Petitioner's tainted holdings. But the district court never found that Petitioner held $15 million in tainted property. Plus, even if the district court had made this finding, the court then could freeze *either* Petitioner's actually tainted $15 million *or* her untainted $15 million (which, once frozen, would be constructively tainted). Not both.

The district court's imposition of a pretrial blanket $45 million freeze on Petitioner's property therefore cannot be reconciled with the plain requirements of § 1345(a)(2). And while the district court may well have viewed this freeze as consistent with the idea that the government should be able to recover in full even when "some of the assets that were obtained as a result of fraud cannot be located," that is not what § 1345(a)(2) is meant to do. P.App.10. Indeed, this provision has a much narrower purpose: to prevent fraud suspects from concealing or dissipating the tainted property they actually possess.

II. Construing the FIA to reach only tainted property accords with the FIA's historical purpose: to prevent the concealment and dissipation of tainted property.

Congress enacted the Fraud Injunction Act, 18 U.S.C. § 1345, as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1205(a), 98 Stat. 1837, 2152 (1984). At that time, the Act did not explicitly authorize property freezes—it just allowed courts to enjoin imminent and ongoing fraudulent conduct. *See Jones*, 652 F. Supp. at 1559. It was only through the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 that § 1345 was finally amended to empower courts to freeze property. *See DBB, Inc.*, 180 F.3d at 1282. The Sixth Circuit effectively traces the course of this evolution in *United States v. Brown*, 988 F.2d at 660-61. *See also Fang*, 937 F. Supp. at 1192-94.

Ultimately, the main point to be taken from the historical genesis of the Fraud Injunction Act, both before and after Congress amended it to authorize property freezes, is that the Act's core purpose has always been *to prevent imminent or ongoing harm*—not penalize or remediate such harm after the fact. As Congress took care to observe in explaining why it was necessary to adopt the Act in the first place: "Experience has shown that even after indictment or the obtaining of a conviction, the perpetrators of fraudulent schemes continue to victimize the public. . . . [T]he Attorney General should be empowered to bring suit to enjoin the fraudulent acts or

practices." S. Rep. No. 98-225, at 402 (1983). And the original text of § 1345—now present at § 1345(b)—bears out this understanding, empowering courts to enjoin fraud violations only so far "as is warranted **to prevent** a continuing and substantial injury to the United States."

That purpose did not change in 1990, when Congress amended the Fraud Injunction Act to give courts the power to freeze property traceable to fraudulent conduct. Indeed, as the Sixth Circuit notes: "By amending section 1345, Congress wanted to respond to the savings and loan scandal because 'executives of thrift institutions and other[s] associated with them enriched themselves by fraudulently diverting immense amounts of funds from those institutions.'" *Brown*, 988 F.2d at 662 (quoting H.R. Rep. No. 101-681(I)). Accordingly, to ensure these tainted funds were not concealed or dissipated before the government could recover them, Congress gave courts the power under § 1345(a)(2) to freeze these funds, "enhanc[ing] the United States' ability **to prevent** . . . the wrongful disposition of assets after . . . violations have occurred." *Id.* (emphasis added).

Even the government has acknowledged this to be the purpose of § 1345(a)(2), as may be seen in a 1997 bulletin published by the Executive Office for U.S. Attorneys which clarifies that the government "may feasibly seek an injunction [under § 1345(a)(2)] long after the underlying bank fraud or health care fraud has stopped if one can prove *imminent*

alienation or disposal of the proceeds of the fraud."[10] Indeed, § 1345(a)(2) enables a court to freeze a person's property *to prevent them* from hiding or spending tainted money. But once a person has spent this money (or if the money cannot be located), then any freeze on a person's property serves a totally different purpose: to remediate harm after the fact by guaranteeing a person's capacity for restitution. That *punitive*—as opposed to *preventative*—purpose[11] cannot be found in the historical genesis of § 1345, and thus furnishes additional grounds for the Court to favor Amicus's prevention-driven interpretation of § 1345(a)(2) over one that treats this law as a broad authorization of prejudgment attachment.

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[10] *See* Michael Runyon (Asst. U.S. Att'y, M.D. Fla.) & David Jennings (Asst. U.S. Att'y, W.D. Wash.), *Practicing in the Field of Injunctions*, 45 USABULLETIN, no. 2, April 1997, *available online* http://www.justice.gov/sites/default/files/usao/legacy/2007/01/11/usab4502.pdf (at PDF p.41) (emphasis added).

[11] *See United States v. Logal*, 106 F.3d 1547, 1551-52 (11th Cir. 1997) (" '[T]hough restitution resembles a judgment for the benefit of a victim, it is penal . . . .' "); *see also Johnson v. United States*, 135 S. Ct. 2551, 2566 n.1 (2015) (Thomas, J., concurring) ("[A] law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal.").

III. Construing the FIA to reach only tainted property accords with the exclusive power of the Health and Human Services Secretary to exact monetary penalties and restrain assets in Medicare fraud cases.

The district court froze Petitioner's property in this case based on government evidence that Petitioner had committed several federal health care offenses, including billing fraud and paying kickbacks. *See* P.App.12-14. It should not be assumed, however, that the Fraud Injunction Act, 18 U.S.C. § 1345(a)(2), was the only law that the government could rely on to offset Petitioner's alleged $45 million fraud. *See id.* In fact, the government could have relied on 42 U.S.C. § 1320a-7a(k), which, unlike § 1345(a)(2), is a prejudgment attachment statute meant to be used in health care fraud cases. The existence of this law, in turn, only further affirms why § 1345(a)(2) cannot be read as a prejudgment attachment statute.

Under 42 U.S.C. § 1320a-7a(k), whenever the Secretary of the U.S. Department of Health and Human Services ("HHS") "has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject to a civil monetary penalty" under § 1320a-7a—which includes both billing fraud and illegal kickbacks[12]—"the Secretary may bring an action in an

[12] *See* 42 U.S.C. §§ 1320a-7a(a)(1) (civil monetary penalty for Medicare fraud); 1320a-7a(a)(7) (civil monetary penalty for kickbacks, as prohibited by 42 U.S.C. § 1320a-7b(b)).

appropriate district court . . . to enjoin the person from concealing, removing, encumbering, or disposing of assets which may be required in order to pay a civil monetary penalty." And the monetary penalties established under § 1320a-7a for various federal health care offenses are substantial (e.g., a $50,000 penalty for every illegal kickback plus up to three times the value of all such kickbacks).[13]

The plain language of § 1320a-7a(k) thus enables the government to do what the plain language of § 1345(a)(2) does not: rely upon solely past conduct to freeze a person's untainted property in anticipation of restitution. But why, then, did the government not use § 1320a-7a(k) in this case? Perhaps because only the HHS Secretary can invoke § 1320a-7a(k)—not the Attorney General. And that is the whole point. Indeed, § 1320a-7a(k) serves to reflect the important reality that "Congress has actively developed a comprehensive bifurcated civil and criminal scheme for addressing fraudulent and abusive payment practices in federal health care programs." *Reliable Ambulance Serv. v. Mercy Hosp. of Laredo*, No. 4-02-0188-CV, 2003 WL 21972724, at *6 (Tex. App. Aug. 20, 2003) (detailing how this scheme works).

This bifurcated scheme means that while the Attorney General may prosecute kickback and billing

[13] *See* 42 U.S.C. § 1320a-7a(a).

violations as crimes,[14] only HHS may exact monetary penalties and freeze health care provider assets for these same offenses. And for good reason:

First, HHS's exclusive monetary-exaction power goes hand-in-hand with HHS's exclusive ability (albeit after consulting with the Attorney General) to eliminate kickback offenses entirely by creating "safe harbors" that exempt persons from prosecution. *See Reliable*, 2003 WL 21972724, at *4; *see also* 42 C.F.R. § 1001.952 (setting out 25 safe harbors). HHS can even forgive conduct that facially violates the anti-kickback law and does not fall within a safe harbor so long as the HHS Office of the Inspector General deems the conduct to "pose[ ] little risk of fraud and abuse." *Reliable*, 2003 WL 21972724, at *5 (citing HHS OIG Advisory Op. 01-18 (Nov. 7, 2001)).

Second, HHS's exclusive monetary-exaction power goes hand-in-hand with HHS's statutory duties both to afford due process to those it targets with this power (*see* 42 U.S.C. § 1320a-7a(c)(2)) and to use all money collected from violators to reimburse defrauded health care programs (*see id.* § 1320a-7a(f)(3)). By contrast, all money collected by the Attorney General through criminal forfeiture—even if based on a federal health care offense that caused a financial

[14] Federal law limits the nature of such prosecution. Under 42 U.S.C. § 1320a-7b(a) & (b), both fraudulent Medicare billing and illegal kickbacks are criminally punishable by only a fine of up to $25,000 and a prison term of up to five years.

loss to Medicare—goes into the Attorney General's coffers. *See* 28 U.S.C. § 524(c)(4)(A) ("all amounts from the forfeiture of property under any law enforced" by the Attorney General "shall be deposited" in the U.S. Department of Justice's Assets Forfeiture Fund, with certain exceptions that are not relevant here).

Third, and finally, HHS's exclusive monetary-exaction power goes hand-in-hand with HHS's unique expertise and institutional responsibility. Simply put, freezing a health care provider's funds carries the grave risk of shuttering vital medical services, even where a provider may have engaged in some amount of fraud. *See*, *e.g.*, *Mercy Reg'l Health*, 2008 U.S. Dist. LEXIS 19362, at *6 (rejecting the Attorney General's "extraordinary request" under § 1345 "to shut down" what was "the largest ambulance service in the area" around Benton, Ill.). Being responsible for the entire federal health care system, HHS retains the experience and objectivity needed to appreciate this risk, while the Attorney General, driven by the "often competitive enterprise of ferreting out crime," does not. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Only HHS may thus impose broad asset freezes on health care providers. And where Congress has made "a basic decision . . . on how to allocate responsibility among different federal agencies," this decision must be respected. *Am. Bankers Ass'n v. SEC*, 804 F.2d 739, 755 (D.C. Cir. 1986). Hence, to stretch the Fraud Injunction Act, § 1345(a)(2) to grant power to the Attorney General that Congress wanted only HHS to have—as the government, the district court,

and the Eleventh Circuit effectively did here—is tantamount to a "unilateral[ ] changing [of] the rules of the game." *Id.* Such interpretive gymnastics should not be sustained by this Court regardless of whatever "beneficial purpose or . . . regulatory need" could be offered to justify them. *Id.*

IV. Construing the FIA to reach only tainted property accords with the traditional reach of federal equity practice, which does not include prejudgment asset freezes.

The Fraud Injunction Act explicitly provides that all proceedings under the Act, including ones to freeze property, are "governed by the Federal Rules of Civil Procedure." 18 U.S.C. § 1345(b). This places the Act within the ambit of federal equity practice—a tradition in which prejudgment attachment is "a type of relief that has never been available before." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). This tradition, in turn, furnishes another key reason why the Act's property-freezing power must be read in a far more restrained manner than was employed by the government, the district court, and the Eleventh Circuit here.

Congress may, of course, enable federal courts to grant forms of equitable relief beyond what has been traditionally available at common law. As this Court has explained, "[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position

. . . to perceive them and to design the appropriate remedy." *Grupo*, 527 U.S. at 322. At the same time, any such remedy must be read with care. This follows from the longstanding judicial canon that statutes in derogation of common law are to be strictly construed—or, put more precisely, "statutes will not be interpreted as changing the common law unless they effect the change with clarity."[15]

Hence, in *United States v. Sriram*, a federal district court rejected the government's argument that § 1345(a)(2) should be interpreted as allowing the court to freeze not only tainted property but also "a sum that accounts for trebled damages and civil penalties." 147 F. Supp. 2d 914, 947 (N.D. Ill. 2001). The court first highlighted the plain language of § 1345(a)(2), finding the statute meant "just what it says: that an injunction is authorized to put a hold on the fruits of the criminally fraudulent activity." *Id.* The court then noted there was "nothing in the language" of § 1345(a)(2) to support the government's view that § 1345(a)(2) further authorized a freeze on "assets sufficient to secure an ultimate money judgment." *Id.* And this led the court to emphasize the need for "caution in expanding the sweep of that authority to freeze assets beyond the specific grant of authority made by Congress," as this power was "not generally available" at common law. *Id.* at 948.

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[15] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012).

The district court and Eleventh Circuit should have performed the same analysis here. Had they done so, caution would have militated against accepting the government's view that § 1345(a)(2) authorized all of Petitioner's property to be frozen to secure "any judgment requiring restitution or forfeiture." Cert. Pet. 8. That such caution was absent in these courts' respective decisions, in turn, confirms their hasty "creat[ion] [of] a precedent of sweeping effect" without proper regard for the plain language of § 1345(a)(2) or the narrower manner in which this language could have been read (*see* Part I.A). *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 222 (1945). The Court should not allow that error to stand.

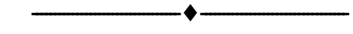
V. Construing the FIA to reach only tainted property accords with the rule that forfeitures are not favored in law.

The Fraud Injunction Act, 18 U.S.C. § 1345(a)(2) is not only a statute in derogation of common law but also one that forfeits property.[16] This demands even more caution in how courts enforce the Act, because "[f]orfeitures are not favored" in the law and should be enforced "only when within both letter and spirit of the law." *One 1936 Model Ford*, 307 U.S. at 226. Yet, here, the government, the district court, and the

[16] While the Act merely freezes property *pendente lite*—rather than seizing it permanently—the Act still works a forfeiture. *Cf. Krimstock v. Kelly*, 306 F.3d 40, 43-44 (2d Cir. 2002).

Eleventh Circuit took the exact opposite approach, reading § 1345(a)(2) in a way that enabled this law to freeze all of Petitioner's property, tainted or not.

It remains the case, however, that when "two constructions can be given to a statute, and one of them involves a forfeiture, [then] the other is to be preferred." *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875). On this score, the view of § 1345(a)(2) advanced by the government, the district court, and the Eleventh Circuit in this case involves the blanket forfeiture of untainted property. The view of § 1345(a)(2) advanced by Amicus—and supported by most courts—does not. And that fact alone should be reason enough for this Court to favor Amicus's interpretation of § 1345(a)(2).



CONCLUSION

This Court has already concluded that a pretrial freeze of a criminal defendant's tainted property does not raise any constitutional concerns. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). And that is all the Fraud Injunction Act, 18 U.S.C. § 1345, authorizes. *See* Part I.A. The lower courts in this case failed to realize this, however, and imposed a blanket freeze on Petitioner's untainted assets based on a reading of the Act unsupported by its plain text, historical purpose, schematic role, and common law nature. Accordingly, consistent with the "cardinal principle that this Court will first ascertain

whether a construction of [a] statute is fairly possible by which [a] [constitutional] question may be avoided," the Court should adopt the reading of the Act advanced by Amicus in this brief so as to avoid the constitutional questions presented by this case. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Respectfully submitted,

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Dated: August 25, 2015