No. 14-419

IN THE
Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND THE DKT LIBERTY PROJECT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a "suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree?" *De Beers Consol. Mines, Ltd. v. United States,* 325 U. S. 212, 222 (1945).*

* The answer, as we argue here, is "no, no he can't." *See Grupo Mexicano de Desarrollo, S.A., et al. v. Alliance Bond Fund, Inc., et al.,* 527 U.S. 308 (1999).

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INTEREST OF *AMICI CURIAE*[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The DKT Liberty Project was founded in 1997 to promote individual liberty against all levels of government, and to defend the right to privacy.

This case concerns *amici* because they, like equity, delight in justice.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici agree that the restraining order violates Petitioner's constitutional rights. We respectfully suggest, however, that this case isn't about criminal forfeiture or the Sixth Amendment. This is a case about equity—not "equity" as in fairness, or "natural justice"—but Equity: a discrete body of doctrines that federal courts administer alongside the common law in order to ensure that the strict enforcement of legal rights does not produce substantively unjust results.

Specifically, this case is about a court's equitable power to grant preliminary injunctions. Because such injunctions limit defendants' legal rights before

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[1] Rule 37 statement: Petitioner lodged a blanket consent to the filing of *amicus* briefs. A letter from Respondent consenting to the filing of this brief has been submitted to the Clerk. This brief was not authored in whole or in part by counsel for any party; no person or entity other than *amici* made a monetary contribution its preparation or submission.

any liability or wrongdoing has been proven, they are considered "extraordinary" remedies. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). Not just because they are extraordinarily powerful, or because there is an extraordinary risk of injustice when they are misused, but because they are *extra-ordinary*. Atypical. Supra-normal. Preliminary injunctions are never awarded "as of right," *id*., or in the ordinary course of litigation, *Harrisonville v. Dickey Clay Mfg.*, 289 U.S. 334, 337 (1933), but only when absolutely necessary to protect existing rights "against injuries otherwise irremediable." *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919).

Even where the extraordinary circumstances of a case might justify preliminary relief, a court is under no obligation to issue the injunction—it remains a matter of discretion; discretion bounded by clear limits. These limits were recently restated by this Court in *Winter*. "A plaintiff seeking a preliminary injunction must establish" that:

1) He is likely to win the underlying lawsuit;
2) He will likely suffer harm if the court does not grant an injunction;
3) The threatened injury is irreparable—*i.e.*, there is no legal remedy that could prevent the injury, or properly compensate him for his loss;
4) The harm he would suffer in the absence of an injunction outweighs the burden the injunction imposes on the defendant; and
5) The injunction would not be contrary to the public interest.

555 U.S. at 20.

Other tests must be met in particular cases, but each of the *Winter* criteria is a *sine qua non*, and this Court has made clear that granting preliminary relief in their absence is an abuse of discretion. *See, e.g., Munaf v. Geren*, 553 U.S. 674 (2008) (holding that a court's failure to consider the likelihood of success before issuing injunction is an abuse of discretion); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 546 (1987) (a court errs in assuming an injunction is in the public interest without considering its actual consequences); *Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (courts lack jurisdiction to enjoin future repetition of past constitutional injuries "[a]bsent a sufficient likelihood that [the plaintiff] will again be wronged in a similar way."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (district court abuses its discretion if it fails to consider the impact of its injunction on each party); *Younger v. Harris,* 401 U.S. 37, 43-44 (1971) ("[C]ourts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.").

That brings us to this case. On October 2, 2012, a grand jury handed down a sealed indictment finding that the U.S. Attorney had probable cause to charge the Petitioner and several others with multiple counts of healthcare fraud. Brief in Opp. at 4. That same day, the government filed a civil suit against the Petitioner seeking "disgorgement and restitution" of any "ill-gotten gains," and requesting preliminary relief in the form of a temporary restraining order (TRO) or injunction that would, *inter alia*, enjoin Luis from committing any "federal health care offense," require her to make detailed and ongoing

disclosures to the government about her personal finances, and freeze all of her assets, as well as any assets she might obtain in the future, up to $45 million. JA at 29–30.

The government claimed that the order it sought was authorized by 18 U.S.C. § 1345 and that, with respect to the freezing order, it was "entitled" to an injunction "upon a showing" that the Petitioner was "alienating or disposing" of unlawfully obtained property or intended to do so. The government has conceded that the assets subject to the freezing order are not the proceeds of fraud or otherwise traceable to any criminal violation. Instead, the government asserts that the assets are "property of equivalent value" that may be restrained under § 1345(a)2.

The district court agreed with the government's analysis and issued the requested TRO the next morning. The TRO was continued until June 2013, when it was replaced with a substantively identical preliminary injunction to "remain in force until further Order of the Court."

The lower courts rejected Luis's argument that the Sixth Amendment required the injunction to be modified to allow her to pay for counsel of choice. However the Court answers that question, the injunction itself is invalid—and must be vacated—even if it does not infringe Luis's constitutional rights, for three reasons:

1. *The district court lacked the equitable jurisdiction needed to freeze Luis's assets.*

Equitable courts protect rights, but they do not create them. "A Court of Chancery is not, any more than is a court of law, clothed with legislative power.

It may enforce, in its own appropriate way, the specific performance of an existing legal obligation . . . but it cannot create the obligation." *Atchison, T. & S.F. R. Co. v. Denver & N.O. R. Co.*, 110 U.S. 667, 682 (1884). *See also* John Adams, *The Doctrine of Equity* xxxiv (8ed. 1890) (an equitable court "does not create rights . . . but it gives effectual redress for the infringement of existing rights"). Where a plaintiff has no pre-existing proprietary interest in particular assets, a court has no equitable jurisdiction to interfere with the current title-holder's use or disposition of those assets. This Court has confirmed that when a plaintiff only seeks a personal-money judgement, the rule prevents district courts from freezing the defendant's assets to prevent their dissipation prior to judgment. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,* 527 U.S. 308 (1999). Because the government does not claim any existing interest Luis's property, the district court had no jurisdiction to freeze her assets.

Even if *Grupo Mexicano* weren't directly controlling, the injunction is still invalid for want of jurisdiction. A court only has jurisdiction to grant preliminary equitable relief where the plaintiff is threatened with a serious injury but has no legal remedy. The government is in the same position as an unsecured creditor or tort plaintiff prior to judgment on the merits: All it claims is that Luis owes it a certain amount of money. A plaintiff who would be made whole by a money judgment has suffered no irremediable injury and has no claim on the courts' equitable jurisdiction. *Hipp v. Babin*, 60 U.S. 271, 278 (1857) ("[W]henever a court of law is competent to take cognizance of a right, and has

power [provide] a plain, adequate, and complete remedy . . . the plaintiff must proceed at law.").

2. *The district court failed to properly exercise its equitable discretion.*

Even if the facts *permitted* an injunction, the district court was still obligated to ensure that one was *warranted*. By treating the injunction as a "remedy" that the government was automatically entitled to, the district court broke with a long line of Supreme Court decisions rejecting the argument that Congress's creation of a new statutory basis for injunctive relief strips courts of the discretion to withhold an injunction or controls what factors they can consider. Discretion is necessary if equity is to serve justice: if courts cannot (or do not) consider the impact of preliminary injunctions on defendants (or the public), they cannot be sure that their equitable powers are not being twisted to malicious or unjust ends.

3. The injunction is unjust.

A preliminary junction is unjustified where the burden imposed on the defendant is greater than the threatened injury to the plaintiff. In absolute financial terms, the loss or putative loss to each party is roughly equal: the injunction deprives Luis of the use of $2,000,000, and the government fears that without the injunction it will be less easily able to recover $2,000,000. Where equities are equal, legal rights prevail. But the equities are not equal. Probable constitutional violations aside, the suffering that results from losing $2,000,000, even temporarily, is far greater for an individual—especially when it represents her entire net worth—

than it is for the government, or any other entity with a budget measured in billions and trillions. Nor is it in the "public interest" to restrain assets needed to pay counsel. If the injunction is not modified to allow Luis sufficient funds to hire an attorney, the taxpayers will be forced to foot the bill for her defense. Finally, *Winter* requires a plaintiff to show that, absent the injunction, injury is not just possible, but likely. 555 U.S. at 22. ("We agree . . . that the Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs . . . to demonstrate that irreparable injury is *likely*.") (emphasis in original.).

The probability of future injury to the government was not established by a grand jury's finding that it had "probable cause" to believe assets had been dissipated *in the past*. Other remedies available to the government greatly reduce the likelihood that it would suffer any loss in the injunction's absence. In sum, because the district court issued an injunction that was (a) unnecessary, (b) unjustifiable under *Winter*, and (c) contrary to established Supreme Court precedent, the decision below should be reversed and the injunction vacated.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED ITS EQUITABLE JURISDICTION

"Equity jurisdiction extends to and embraces all civil cases, *and none others*, in which there is not full, adequate, and complete remedy at law." 1 Pomeroy § 132 (emphasis added).

A. The Nature and Scope of the District Court's Jurisdiction

The equitable jurisdiction vested in federal courts "is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution." *Grupo Mexicano*, 527 U.S. at 318 (quoting Armistead Mason Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928)). While that vast jurisdiction defies exact definition or a detailed survey, we know something of the terrain. Equity can be divided into three regions, defined by the justification each offers for equity's interference: its primary jurisdiction (concerning rights and obligations sounding only in Equity); its concurrent jurisdiction (consisting of suits that properly belong to the Law, but become the concern of Equity for some reason—*e.g.*, because one party is a charity); and its auxiliary jurisdiction (instances where Equity interferes with purely legal matters to prevent injustice). 1 Pomeroy § 122.

The government's suit could only be considered under Equity's auxiliary jurisdiction. The government claims no equitable interest in Luis's property. Whether it is called restitution, forfeiture, or compensatory damages, the government's claim that Luis owes it $45 million sounds in Law, not Equity. The claim is based on statute—21 U.S.C. § 853 (by way of 18 U.S.C. § 982(b)(1)), Brief in Opposition at 3—and the "general rule" is that where a statute provides for monetary relief, under any name, that a *legal* remedy for a *legal* cause of action has been created. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990). This presumption is strongest where the remedy is clearly punitive or

compensatory in nature. *See*, *e.g.*, *Feltner v. Columbia Pictures*, 523 U.S. 340 (1998); *Tull v. United States*, 481 U.S. 412 (1987); *Curtis v. Loether*, 415 U.S. 189 (1974). In this case, the government claims a double interest in the monetary award: compensating the victim and punishing the defendant. Combined with the fact that the quantum demanded—$45 million—represents the alleged loss to the victim, rather than Luis's purported profits (which would be characteristic of an equitable remedy), the government's cause of action is obviously legal, not equitable.

Where legal and equitable jurisdictions have been joined, the distinction between these three "regions" of Equity is largely obsolete, but it is still relevant when determining the availability of equitable relief. All remedies are available in cases arising under Equity's primary jurisdiction, but in all other cases Equity's remedial jurisdiction only extends to suits involving "rights, recognized and protected by [the law], where a . . . complete remedy cannot be had in the Courts of Common Law." 1 Story § 33.

B. The Government Has Adequate Legal Remedies

While § 853 makes it clear that the government's asserted right is "recognized and protected" in Law, the government still has the burden of showing that it has no adequate legal remedy—that it faces an "irreparable" injury—a rather Herculean task given § 853's creation of an exceptionally generous legal remedy and the longstanding rule that legal damages are a complete remedy for pure economic loss. Cf. *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993) ("[W]hat petitioners in fact seek is

nothing other than compensatory *damages*—monetary relief for all losses . . . Money damages are, of course, the classic form of *legal* relief.") (emphasis in original). For a freezing order to be remotely near the district court's equitable jurisdiction, the government would have to show that a legal money judgment—either damages generally, or the specific remedies provided by the forfeiture statutes—would not be an adequate remedy. *See*, *e.g.*, *Grupo Mexicano*, 527 U.S. at 340 (Ginsburg, J., dissenting) ("[P]rovisional freeze orders would be appropriate in damages actions only upon a finding that, without the freeze, the movant would be unable to collect a money judgment." (quotations omitted).

While not explicitly pleaded, the government's argument on this point seems to be that, without the injunction, a money award would not be an adequate remedy because the government would not be made whole if Luis is permitted to dissipate or shelter her assets before the judgment could be executed.

This is a superficially plausible argument. Historically, it was well within an equitable court's jurisdiction to provide injunctive or other equitable relief where circumstance made the available legal remedies inadequate or inefficient. 1 Pomeroy § 139. Here, that argument is foreclosed by this Court's precedents and further invalidated by the availability of sufficient preliminary legal remedies.

1. This case is controlled by *Grupo Mexicano*.

This is not a question of first impression. This Court has explicitly held that district courts lack "the power to issue a preliminary injunction preventing [a] defendant from transferring assets in which no

lien or equitable interest is claimed." *Grupo Mexicano,* 527 U.S. at 310.

Here, the government's position is the same as the plaintiff's in *Grupo Mexicano*. Both claimed to be owed a fixed sum of money. Neither claimed an existing legal or equitable interest in their respective defendants' property. Both feared that their defendants would (willfully or otherwise) become insolvent before a favorable judgment on the claimed debt could be obtained and executed. Out of this fear, both sought freezing orders.

In *Grupo Mexicano*, this Court ruled that a pre-judgment freezing order where a plaintiff only sought money damages was unequivocally beyond a district court's equitable jurisdiction. Fifteen years later, there is no reason to revisit that decision, especially given that "[n]o relief of this character has been thought justified in the long history of equity jurisprudence." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 223 (1945).

That "long history" extends at least as far back as Francis Bacon's tenure as Lord Chancellor. In an attempt to curb the injustices that were common under his immediate predecessors, Bacon promulgated his *Ordinances for the Better and More Regular Administration of Justice in the Chancery*, a set of rules standardizing the scope of equitable courts' powers and limiting their discretion. One rule Bacon thought it necessary to codify was that "[i]njunctions for possession are not to be granted before a decree." Ordinance 26. Reprinted in Vol. II *The Works of Francis Bacon* 485 (Philadelphia, 1841).

Luis's legal title is not contested, and the district court correctly recognized that the freezing order was a deprivation of property that implicated her rights under the Due Process Clause. While the court weighed that deprivation against government interests to determine whether Luis was entitled to a *Mathews* hearing, Pet. App. at 16-17, it failed to consider whether those same interests were sufficient to justify that deprivation *in equity*.

The rule reflected in Bacon's *Ordinances* and *Grupo Mexicano*, is the logical consequence of the maxim that "equity follows the law," and equitable courts' historic reluctance to interfere with legal title. It is a truism "admitting of no dispute" that "wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights . . . but in all such instances the maxim *equitas sequitur legem* is strictly applicable." *Magniac v. Thomson*, 56 U.S. 281, 299 (1853).

2. There is a legal alternative to § 1345.

The dissent in *Grupo Mexicano* argued, not without merit, that the equitable jurisdiction of American courts ought to be defined "in relation to the principles of equity existing at the separation of this country from England," not just "the specific practices and remedies of the pre-Revolutionary Chancellor." 527 U.S. at 336 (Ginsburg, J., dissenting). One of the limiting (or defining) principles of equity this Court "long ago recognized" is that courts "properly exercise their equitable jurisdiction where the remedy in equity could alone furnish relief," and, for that reason, the dissent would have allowed the injunction since the plaintiff

had shown that it had "no adequate remedy at law." *Id.* (citation and quotations omitted).

Both opinions in *Grupo Mexicano* agreed that for every form of equitable relief requested—be it final or preliminary in nature—the plaintiff must show that he has no suitable remedy in law. Justice Joseph Story tells us that "the remedy must be plain; for, if it be doubtful or obscure at law, Equity will assert a jurisdiction." 1 Story § 33. The question then becomes whether or not there is an obvious and adequate *legal* alternative to a freezing order?

Following *Heien v. North Carolina,* 135 S. Ct. 530 (2014), governments and their officers are no longer presumed to have knowledge of every statutory provision they enforce. That being said, Cornell University has made the entire U.S. Code available online, and if you Google "federal prejudgment remedies" the first result is "28 U.S.C. § 3101 - Prejudgment Remedies." https://goo.gl/7y1ZVx (last visited Aug. 23, 2015). While it doesn't merit a mention in the U.S. Attorneys Manual, or the new special "Asset Forfeiture Manual," U.S. Attorneys in Florida have used such remedies to ensure the availability of assets in Medicare fraud cases. *See*, *e.g.*, *Ex rel. Doe v. DeGregorio,* 510 F. Supp. 2d 877 (M.D. Fla. 2007).

Attachment is a "remedy at law" over which "equity has no jurisdiction." It is a "proceeding to create and enforce a lien. It is a remedy for the collection of an ordinary debt by a preliminary levy upon property of the debtor, to preserve it to the creditor until his lien shall have been perfected by judgment. It is a remedy entirely statutory." John

Lawson, 7 *Rights, Remedies, and Practice* § 3498-99 (San Francisco, 1890).

Federal law allows the government to obtain a writ of attachment at any point during a suit to recover a debt—including claims based on the imposition of a "fine, assessment, penalty, restitution, [or] damages" 28 U.S.C. § 3002(3)(b)—where there is "reasonable cause to believe" that the defendant is going to flee the jurisdiction or "assign, dispose, remove, conceal, ill treat, waste, or destroy property," 28 U.S.C. § 3101(b). An application for a writ of attachment need only be supported by an affidavit "establishing with particularity to the court's satisfaction . . . the probable validity of the claim for a debt" the amount of the debt, and the grounds justifying the writ. 28 U.S.C. § 3101(c).

Assets subject to a writ of attachment include "any property in the possession, custody, or control of the debtor, and in which the debtor has a substantial nonexempt interest," up to the full value of the debt, plus interest and costs, 28 U.S.C. §§ 3102 (a) & (b)—*i.e.*, any property that could actually be used to satisfy an eventual judgment. No bond is demanded of the government, and the U.S. Marshal's office is given broad power to execute and enforce the writ, including taking physical possession of property in order to secure it. Further writs will issue to garnish earnings, sequester income, and appoint receivers.

Since pre-judgment attachment is an obvious and satisfactory legal remedy, the government had neither the need nor the right to invoke a court's equitable jurisdiction. But it still wanted to, possibly because injunctions are *really* convenient. And why should the government be inconvenienced in 2015 by

centuries-old "prudential restrictions on the use of equity powers [that] arose in practice from the historical circumstance that actions at law and suits in equity were originally entertained by different courts, which were at once both jealous of their own prerogatives and conscious of the need to preserve comity by observing certain boundaries"? Brief of the United States as *Amicus Curiae* in Support of Respondent at 11, *Grupo Mexicano,* 527 U.S. 308 (1998). For that matter, why should the government be so inconvenienced as to afford property owners basic procedural protections, like notice and a hearing—as it would have to in order to obtain a writ of attachment?

After all, that ancient dispute between the Chancellor and the Chief Justice was just two silly old men fighting over who had the biggest wig; it had nothing to do with fundamental concepts of fair play, judicial independence, or limiting the power of public officials to throw men into the dungeon whenever they thought public morals demanded it.

II. THE DISTRICT COURT'S FAILURE TO EXERCISE ITS EQUITABLE DESCRETION INVALIDATES THE INJUNCTION

In the hands of a Bacon, Eldon, Kent, Camden, or Story, the discretion of equity is its greatest strength and virtue. "It goes without saying that an injunction is an equitable remedy. It is not a remedy which issues as of course." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982) (internal quotations omitted). Holding that any party—even (especially?) the government—is generally entitled to injunctive relief is contrary to the very "essence of equity

jurisdiction," which is the courts' power "to mould each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). The decision to issue an injunction is an exercise of "equitable discretion," a discretion "which must include the ability to deny as well as grant injunctive relief." *Weinberger*, 456 U.S. at 320.

Here, the government has claimed that it is "entitled" to a freezing order whenever it can make "a showing" that allegedly forfeitable property has or will be dissipated. *See*, *e.g.*, JA at 21. Though entirely unjustified given this Court's clear restatement in *Winter* that a "preliminary injunction is an extraordinary remedy never awarded as of right," 555 U.S. at 24, this argument persuaded the district court to rule that "because the United States' motion is based upon 18 U.S.C. § 1345, which expressly authorizes injunctive relief to protect the public interest, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a temporary restraining order in this case." JA at 57.[2]

Because preliminary relief can impose significant burdens on defendants, this Court has made it very clear that this exercise of equitable discretion can only even be considered once the moving party establishes "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

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[2] An almost identical paragraph was included when the TRO was converted to a preliminary injunction. Pet. App. at 5.

the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

The district court failed to give any consideration to these factors on the basis that "a reasonable reading of § 1345" only requires the government to establish "that: (1) a Federal health care offense has been committed; (2) the total amount of proceeds obtained from the criminal activity; and (3) that there has been dissipation of assets received as a result of the criminal activity." Pet. App. at 10.[3]

A. Statutory Authorization Does Not Relieve a Court of the Need to Exercise Sound Discretion

The proposition that "every matter that happens inconsistent with the design of the legislator . . . may find relief in Equity" is "untenable." 1 Story § 14. While Congress does have the power to statutorily restrict a federal court's equitable discretion, the bare "grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger*, 456 U.S. at 313. Akin to the manner in which Congress legislates against the backdrop of the common law, there is a strong presumption that when Congress creates a basis for injunctive relief, it

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[3] This Court has held that a court's failure to consider *one* of the traditional factors before granting injunctive relief is an abuse of discretion. See *supra* at 3-4. *A fortiori* failure to consider all of the *Winter* factors is not just an abuse of discretion, but clearly erroneous.

does so knowing the "requirements of equity practice" arising from "several hundred years of history." *Hecht*, 321 U.S. at 329.

A statutorily authorized appeal to a court's equitable powers should be decided according to the traditional rules and principles that have historically governed an equitable court's discretion. Creating a presumption that the government is *entitled* to injunctive relief without demonstrating a likelihood of "irreparable harm and other usual prerequisites for injunctive relief," *Rondeau v. Mosinee Paper Co.,* 422 U.S. 49 , 65 (1975), would be a "major departure from that long tradition" and should not "be lightly implied." *Hecht,* 321 U.S. at 330. Even if *one* "reasonable reading" of § 1345 imposes this incredible limit on equitable discretion, that reading does not govern so long as another legitimate interpretation exists "which affords a full opportunity for equity courts to treat enforcement proceedings under [§ 1345] in accordance with their traditional practices." *Id*.

The district court's interpretation of § 1345 is incompatible with this Court's admirable unwillingness to see "the great principles of equity" yield to "light inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. 497, 503 (1836). The "comprehensiveness" of equitable discretion is too important to be "limited or denied" on the basis of a prosecutor's mere "reasonable reading" of the law. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946).

B. The Government's Reading of § 1345 Is Not Even Reasonable

Although *Porter* requires a "clear and valid legislative command," *id.*, before recognizing any curtailment of equitable discretion, even if the far lower standard of a "reasonable reading" were to be applied, §1345 does not support the construction urged by the government.

In *Hecht*, this Court declined several invitations to treat § 205(a) of the Emergency Price Control Act of 1942 (EPCA) as imposing any limitation on its equitable discretion. Section 205(a) read:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation [of] this Act . . . he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

56 Stat. 23, 50 U.S.C. App. Supp. II, §§ 901, 925, as quoted in *Hecht*, 321 U.S. at 321-22.

As here, the respondent in *Hecht* insisted "that the mandatory character" of the statute was "clear from its language, history, and purpose." 321 U.S. at 326. This Court disagreed. The EPCA didn't compel courts to issue injunctions, even though the statute said that such orders "shall" be granted, because it was "apparent on the face of § 205(a) that there is

some room for the exercise of discretion on the part of the court. For the requirement is that a 'permanent or temporary injunction, restraining order, or other order' be granted. Though the Administrator asks for an injunction, some 'other order' might be more appropriate." *Id.* at 328.

Two years later, this Court rejected a similar yet distinct argument. In *Porter*, the government asked for equitable restitution as well as injunctive relief. The defendant argued that there was no jurisdiction to order restitution, because § 205(a) only authorized injunctive relief. This Court disagreed: by authorizing injunctive relief, §205(a) was a clear invocation of the courts' "inherent equitable jurisdiction" and though subsection (a) did not expressly provide for restitution (or other non-injunctive relief), there was no "other provision of the Act that expressly or impliedly preclude[d] a court from ordering restitution in the exercise of its equity jurisdiction." *Porter*, 328 U.S. at 403. Section 205(a) could not reasonably be read as imposing any limits on the courts' equitable discretion.

The operative language in § 1345 is practically identical to § 205(a); if anything, it's more permissive. Both statutes provide that the responsible government official (the EPCA administrator and the attorney general, respectively) "may" apply to the courts for injunctive relief in certain circumstances, and both statutes explicitly authorize the courts to grant injunctions or other relief—in the case of §205(a), some "other order," and under § 1345 "other [remedial] action, as is warranted."

The only significant difference between the two provisions is that § 205(a) was written as one continuous paragraph while § 1345 is broken into sections and subsections. As a result, while both say that any order "shall be granted without bond," in the case of §205(a), the imperative "shall" could arguably (if not reasonably) be read as applying generally: if the government shows XYZ, then the court *must* grant relief and no bond will attach. In contrast, the structural arrangement of § 1345 makes clear that the identical phrase ("shall be granted without bond") does not obligate the grant of any order. The only reasonable interpretation is that the court cannot require the government to put up a bond as a condition for granting whatever relief, if any, it deems appropriate.

C. Congress Can't Compel Injunctive Relief

A recurring theme in these cases is that Congress possesses the power to direct and control a court's equitable discretion, but only if that power is explicitly and undeniably invoked. That is a huge misinterpretation of the relationship between the legislative and judicial branches. If § 1345 read, "whenever a person is alienating or dissipating property possibly obtained through healthcare fraud, a district court *must* grant a TRO or preliminary injunction freezing all the defendant's assets," would this Court seriously consider that to be a valid exercise of the legislative power?

If so, where is the limit? Can Congress compel courts to hold individuals in contempt? If Congress can legislatively entitle the executive to preliminary injunctions, what about permanent injunctions? Could it vary or do away with other equitable

principles? Could it simply reverse this Court's recent decision in *United States v. Wong*, 135 S. Ct. 1625 (2015), by passing a law saying that even a nonjurisdictional statute of limitations cannot be equitably tolled? Could it obliterate an innocent spouse's equitable interests as against the IRS?

As far as *amici* can tell, the only case to actually suggest that this power exists is *TVA v. Hill,* 437 U.S. 153 (1978), a case which has almost certainly been misinterpreted. *Hill* is to Equity what *Chaplinksy* is to the First Amendment. Both cases are frequently cited for legal propositions that are only recognized to be distinguished, probably don't actually exist, and wouldn't be constitutionally valid if they did. Despite being the obligatory (and sole) cite whenever a court wants to acknowledge that Congress *could have* mandated injunctive relief, but didn't—that was not the basis on which *Hill* was decided.

Hill was resolved through the direct application of standard principles of equity—not slavish deference to Congress. The Court was faced with a conflict between a law telling every government agency: "whatever you do, don't kill snail darters. As far as the Federal Government is concerned, these fish are more important than your average non-American human being" and a government construction project that would have killed every snail darter in existence. *Id.* at 161-62. If the threatened injury was allowed to occur, nothing could be done to "turn back the clock." Once extinct, snail darters would be gone forever.

An injunction was *compelled* in *Hill*, but not by Congress. The Endangered Species Act (ESA) did not

specifically command the courts to enjoin the completion of the dam, or even more generally any activity that threatened endangered species. What compelled the injunction was the absence of any other remotely suitable remedy. Damages wouldn't bring snail darters back to life and while fines might "punish" the government agency (*i.e.*, the tax payer), the ESA's primary purpose was not punitive but protective. The only way to fulfill that purpose and save the fish was to enjoin completion of the dam.

III. THE INJUNCTION WAS UNJUSTIFIED

A. The Government Has Not Shown that It Is Likely to Succeed on the Merits

A preliminary injunction is improper unless the plaintiff provides sufficient evidence to show that he is likely to prevail in his "ultimate legal claim." *Winter*, 555 U.S. at 20. The government's underlying claim is based on § 853. To secure forfeiture of substitute assets under § 853(p), the government needs to prove: (1) all the elements of the alleged health care fraud; (2) that Luis at one point possessed property that could be specifically identified as the proceeds of the underlying fraud; and (3) that she alienated or hid those assets. Because forfeiture is a punitive measure in addition to whatever sentence accompanies conviction for the underlying fraud, the government's case on each point will have to be "submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000); *see also S. Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012).

In order for the injunction to be valid, the government must have shown that it had a

sufficiently strong case justifying the district court's conclusion that the government would "likely" be able to prove all the elements of its claim to a criminal jury. Given that the only real "evidence" presented to the court was the affidavit of an investigating agent, this seems unlikely. In addition to the Petitioner's detailed discussion of the insubstantiality of the government's case, *e.g.*, Pet. Br. 7-14, *amici* offer two further arguments:

1. The indictment is irrelevant.

Kaley v. United States held that where a statute required the government to prove certain facts under a "probable cause" standard as a prerequisite to freezing a defendant's assets, the district court should not look behind a grand jury's findings because a "true bill" containing those facts is conclusive evidence that probable cause exists, and the grand jury's authority in these matters is "inviolable." 134 S. Ct. 1090, 1097-98 (2014).

Whatever validity there is in the reasoning behind that rule, it does not extend to the analysis required by *Winter*. Even if an indictment is conclusive evidence that there is probable cause to believe the government's claims—*i.e.,* the case is not "baseless," *id.* at 1097, the government is proceeding on something more than a merely reasonable suspicion, and there exist "facts and circumstances sufficient to warrant a prudent man in believing" that the allegations are true, *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (internal quotations omitted)—that is all it conclusively establishes. Evidence, however "inviolable," that the government was able to convince a grand jury that a prosecution isn't just based on a hunch, doesn't establish that prosecutors

will be able to prove everything required by § 853(p) beyond a reasonable doubt.

2. On its face, the facts alleged in the complaint contradict the government's claim for relief.

Section 853 only allows forfeiture of substitute assets where the government can show that the defendant possessed "property constituting, or derived from, any proceeds" of the underlying criminal act, 21 U.S.C. § 853(a)(1), which she then caused to be unavailable. The injunction reaches all of Luis's assets up to $45 million. But if everything in the government's complaint is taken as true, Luis never possessed anywhere near that amount—and if substitute assets are only reachable "up to the value" of forfeitable property that was once in the defendant's possession, 21 U.S.C. § 853(p)(2), Luis's liability is capped at the amount of tainted funds alleged to have been in her possession, or "approximately $4.49 million." JA at 27.

Even for that lesser amount, Luis's liability is dubious. The government acknowledges that at least some of that money consisted of Luis's salary as an employee of LTC and Professional Home Care. *Id*. at 50. A salary, even if paid by the employer from unlawfully acquired funds, cannot be considered to be the "proceeds" of crime. *See*, *e.g.*, *United States v. Santos*, 128 S. Ct. 2020 (2008) (holding that "salaries" paid to the *de facto* employees of an illegal gambling operation were not the proceeds of crime.).

B. The Government's Injury Is Not the Sort that Merits Injunctive Relief

Under *Winter,* the moving party must demonstrate that an injunction is the only way to

prevent a legally incurable injury. The injury must not just be "irreparable"—it must also be substantial, for equity "will not restrain an act the injurious consequences of which are merely trifling." *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900). And, most importantly, the injunction must be able to prevent the injury. *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975) ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that, in the absence of its issuance, he will suffer irreparable injury.").

Taking the government at its word, the feared injury is that Medicare will be unable to recover $45 million. Is this injury so "great" as to justify equity's interference? This must be judged in context. $45 million *sounds* like a lot of money, but it represents less than 3% of Medicare's *daily* expenditures. Centers for Medicare & Medicaid Services, *NHE Fact Sheet,* available at https://goo.gl/VauCNI (last modified July 28, 2015). If *everything* the government says is true, then Luis defrauded Medicare of an amount that it normally spends every 40 minutes.[4] Given that Medicare is expected to run out of money in about 15 years, Nick Timiraos, *Social Security, Medicare Outlook: Better but Still Bleak*, Wall St. J., July 22, 2015, available at http://goo.gl/xOTEQ9, arguing that its inability to recover $45 million would be a noticeable, let alone "great," injury is about as reasonable as claiming

[4] The number is further overstated because, even as the government argues that all of the money Medicare paid was "tainted" by fraud, it accepts that some services were rendered.

that a fish is the legal equivalent of a filing cabinet, or that seizing a farmer's raisins is not a taking.

Nor can the government argue that this *specific* injunction is necessary to deter broader Medicare fraud. Questions of general deterrence, like punitive damages, are not proper considerations when granting equitable relief. Equity is concerned with protecting *particular* rights, not preventing criminal behavior generally. 1 Pomeroy § 129.

As a factual matter, it is simply not true "that unless the injunction sought is available, federal law will exercise no deterrent effect in these circumstances." *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). Fraudsters still face significant criminal sentences, along with all the other accessory consequences of conviction. The government is also able to protect its prejudgment interests with attachment orders, and any unsatisfied portion of a forfeiture or restitution order becomes a non-dischargeable debt that can be enforced against any future bounty. 11 U.S.C. § 523(7). "Considering the availability of other avenues of relief [and deterrence] open to respondents for the serious conduct they assert," the injunction was improper. *O'Shea*, 414 U.S. at 504.

Finally, this is not even an injury that the injunction prevents. Luis does not have $45 million, or even the $4.5 million that the government specifically alleges she obtained through fraudulent means. Including the full value of property and accounts in which she has a partial interest, the district court estimated Luis's net worth to be "a

couple million dollars." JA at 87.[5] With or without a freezing order, Medicare will not be able to squeeze anywhere near $45 million out of Sila Luis.

Yet "equity will not do a vain and imperfect act." *Tobey v. County of Bristol*, 3 Story 800 § 70 (1845) (dismissing plaintiff's bill because no permissible injunction would afford "any relief whatsoever to the plaintiff, however strong his claims may be"). Because freezing Luis's comparatively meagre assets does not offer Medicare any protection against a significant injury, the order is incompatible with *Winter*'s requirement that the plaintiff be "likely to suffer irreparable harm in the absence of preliminary relief." 555 U.S. at 20.

C. The Government's Loss Pales in Comparison to Luis's

The government argues that there is no need to "balance the equities" where a statute authorizes injunctive relief because the statute is itself the result of Congress's balancing of competing policy interests. As weak as this argument is, it is an indispensable part of the government's claim: If there was no statutory preemption, the government would have to make a clear showing that its feared injuries outweighed the burden the injunction imposes on Luis—a showing it cannot make.

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[5] While these assets are subject to the freezing order, they may not actually be available for satisfaction of any judgment under 11 U.S.C. § 522 and other exemption provisions.

1. This is a decision for the courts, not Congress.

Eight years ago in *Winter*, the solicitor general argued that a statutorily authorized injunction had to be set aside because the "Ninth Circuit fundamentally misapplied established equitable principles" by failing to make "any attempt to weigh the magnitude of potential harm to one party against the harm to the other." Brief of the Petitioner, 18 & 47, *Winter*, 555 U.S. 7 (2008). This Court agreed with that part of the government's argument but rejected the further claim that once "Congress has established the priority of interests . . . courts of equity lack authority to disregard that balance." *Id*. at 18.

While the Court ultimately ruled in the government's favor, it did so because "the balance of equities . . . [tipped] strongly in favor of the Navy." *Winter*, 555 U.S. at 26. Importantly, the Court reached that conclusion after reviewing the entire record and the harms alleged by each party and did not consider its equitable discretion limited by a statutorily expressed "priority of interests." The lower courts abused their discretion in *Winter,* not because they failed to defer to Congress's judgment but because they failed to properly exercise their own. Specifically, they "failed to give sufficient weight" to the injuries the injunction inflicted. *Id*. at 29.

2. Where equities or injuries are equal, the law prevails.

Before granting injunctive relief, the Court must weigh the parties' "competing claims of injury and must consider the effect on each party of the

granting or withholding of the requested relief." *Amoco Prod. Co.,* 480 U.S. at 553. In a normal case, this requires the sort of subjective comparisons of inherently immeasurable values and interests that pervade constitutional law: which is more important, a well-trained Navy or the health of whales? You can't put a price on either. The infinitely variable ways in which these values can conflict necessitates a resolution by a court with casuistic discretion. A bright-line rule would be entirely unworkable.

But this isn't your typical case. The nature of a freezing injunction means that the court knows, prior to its decision and with absolute certainty, the injuries facing each party. More importantly, those injuries will not just be of the same kind, they will be identical—at least in an absolute fiscal sense. Here there are two parties arguing over a pot of money. This isn't "whales" versus "national security," it's "I want the money" versus "I want the money." Freezing orders create a zero-sum game: the only way to give a benefit to one party is to work an equal injury to the other.

Courts cannot come up with a solution that minimizes the amount of harm their decisions will inflict, they can only choose which party ought to bear the burden. For this, there is a bright-line rule: where equities are equal, the law will prevail. Pre-judgment, a court will not interfere with clearly established legal rights unless the plaintiff demonstrates that the loss it will suffer without the protection of preliminary relief far exceeds the harm the injunction would do to the plaintiff.

Interpreted most charitably, the government has alleged an injury that, in monetary terms, is

identical to the loss it asks the court to impose on Luis. Adding in a more substantive analysis that looks beyond financial terms to the consequences to each party, the inequity of the injunction is obvious. In relative terms, the potential pecuniary injury claimed by the government is insignificant. Without the injunction, it may have a slightly harder time recovering an amount of money that (1) would not come anywhere near to compensating it for the loss it claims, and (2) is essentially a rounding error on Medicare's daily budget.

Compare that with the impact the injunction has on Luis's day-to-day life. She cannot to pay for a lawyer to defend her against multiple felony charges. She cannot put any of her assets to a productive use. As long as this order remains in place, Sila Luis is incapable of engaging in even the most basic commercial transactions. She is legally prohibited from alienating or disposing of any property that comes into her possession. Prisoners, who are still allowed to earn money and make purchases from a commissary, have more economic freedom than Sila Luis, who has yet to be arraigned. Even if that doesn't violate her constitutional rights, it certainly constitutes a burden exponentially greater than any loss the government would suffer in the absence of this injunction.

D. Grossly Unfair Injunctions Are Not "in the Public Interest"

The government has never seriously tried to justify this injunction on the basis of a legitimate proprietary interest or a fear of irreparable injury. Its only argument in this case—and too many others to count—is that these obviously punitive, grossly

disproportionate and inherently inequitable restraining orders "are in the public interest." This is wrong on many levels, but entirely consistent with the government's insistence that it be afforded preferential treatment.

The solicitor general's *amicus* brief in *Grupo Mexicano* is instructive. The government first argued that the Court need not fear the consequences of approving statutory pre-judgment freezing orders because "even where the prerequisites for relief are met, the decision whether or not to issue a preliminary injunction, and on what terms, rests in the sound discretion of the district court." Brief of the United States in support of Respondents at 14, *Grupo Mexicano*, 527 U.S. 308 (1998). It went on to argue that the protection afforded by preserving courts' discretion should only obtain in cases between private parties and urged the Court to exclude the government from any adverse ruling because

> the federal government often seeks various forms of monetary relief through civil actions, and that the ability to obtain prejudgment orders preventing defendants from dissipating or secreting assets is therefore important to the effective enforcement of federal law. Whatever the outcome of this case with regard to the private parties involved, we respectfully request that the Court take account of the important public interest in the availability of prejudgment orders in government litigation.

Id. at 27. This Court declined to create a "government injunction" exception, but the government keeps insisting that one exists.

The government's argument rests on a fundamental misunderstanding of the significance of "the public interest" as a factor to be considered under *Winter*. Save when prosecuting public nuisances, the amorphous "public interest" is not an independent basis which can justify the grant of an injunction. 1 Story § 14. Even then injunctions issue "only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting, and the injury to the public, that alone will constitute a ground for withholding this extraordinary interposition." 2 Story § 924a.

Outside nuisance cases. "public interest" serves as a restriction on the grant of preliminary relief. Because Equity will not lend itself to work an injustice, "if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result." *Beasley v. Texas & Pacific R. Co.,* 191 U.S. 492, 498 (1903). That is not an argument that works the other way around: "a court of equity, which, in its discretion, may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest…would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer," the public interest may cause equity to deny discretionary protection, but it will not compel it to enact a discretionary harm. *Pennsylvania v. Williams* 294 U.S. 176, 185 (1935).

But if the "public's interest" in this case *is* considered, it favors dissolving the injunction, or, at the very least, modifying it to release assets to pay for counsel. The only demonstrable interest the public has here is financial—but that interest is purely utilitarian. What matters to the taxpayers is the overall gain or loss to the government. Any moral interest in seeing that a guilty party makes restitution is, at most, a distant second.

Is this injunction in the economic interests of the public? Superficially, yes, to the extent that it might make it easier to recover $2,000,000 of public funds. But that speculative gain has to be weighed against its costs. The most obvious costs are those associated with the government's efforts to obtain and defend the injunction. Assuming the injunction is a net gain for the public, refusing to release funds to pay counsel is still indefensible. As the district court noted, restraining Luis's assets would not deprive her of assistance of counsel because, if she's unable to pay counsel, the court would assign counsel. That lawyer would ultimately be paid with public money. The fees for a felony charge are normally capped at $10,000, but, given the complexity of this case and the estimated trial length of 15 days, a waiver would certainly be granted. Is it better for the taxpayers to foot the bill for a public defender, or is it better to let Luis pay for her own lawyer with assets that might then be unavailable to satisfy judgment?

Assuming comparable amounts would be spent, allowing Luis to pay for her own counsel costs the public nothing and minimizes the Treasury's exposure. The worst case scenario is where Luis is represented at public expense and wins: the

government not only doesn't recover any of the money Medicare lost, it is also stuck with her legal bill. The best case scenario is where Luis pays her lawyer and loses: the government still gets a large judgment—which becomes a non-dischargeable lien—and has no out-of-pocket expenses.

CONCLUSION

All of this assumes that the government is acting rationally, is genuinely motivated by concern for the best interests of the common taxpayer, and is not using the § 1345 proceeding as a questionable litigation tactic meant to take advantage of liberal civil discovery procedures and to pressure Luis into a plea-bargain—as her co-indictees did.

In that case, *amici* do not suggest that the Court should let the world perish, but just this once: *Fiat justitia, et pereat Medicare.* This Court should reverse the Eleventh Circuit.

Respectfully submitted,

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