No. 14-419

In the Supreme Court of the United States

SILA LUIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the pretrial restraint of forfeitable substitute assets allegedly needed to retain counsel of choice violates the Fifth or Sixth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement:
A. Statutory background 2
B. The present controversy 5
Summary of argument 13
Argument:
Petitioner's substitute assets were validly restrained to ensure their availability for forfeiture and restitution 17
A. Section 1345 authorizes the restraint of "property of equivalent value" pending the outcome of a criminal case 17
B. Restraining "property of equivalent value" under Section 1345 does not violate the Sixth Amendment 25
C. The hearing held in this case did not violate petitioner's procedural due process rights 42
Conclusion 55
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *United States*, 509 U.S. 544 (1993) 3, 34
Austin v. *United States*, 509 U.S. 602 (1993) 35
Babbitt v. *Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995) 22
Billman, *In re*, 915 F.2d 916 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991) 12
CFTC v. *Muller*, 570 F.2d 1296 (5th Cir. 1978) 38
California ex rel. Cooper v. *Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90 (1981) 49

Cases—Continued: Page

Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) ..... *passim*
Citizens United v. *FEC*, 558 U.S. 310 (2010) 51
Clark v. *Martinez*, 543 U.S. 371 (2005) 18
Crawford v. *Washington*, 541 U.S. 36 (2004) 53
De Beers Consol. Mines, Ltd. v. *United States*, 325 U.S. 212 (1945) 23, 24
Dow Corning Corp., *In re*, 280 F.3d 648 (6th Cir.), cert. denied, 537 U.S. 816 (2002) 24
FTC v. *Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011) 38
Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989) 50, 51
Gentile v. *State Bar*, 501 U.S. 1030 (1991) 50, 51
Grupo Mexicano de Desarrollo, S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) 23, 24, 25
Gucci Am., Inc. v. *Weixing Li*, 768 F.3d 122 (2d Cir. 2014) 24
Kaley v. *United States*, 134 S. Ct. 1090 (2014) ..... *passim*
Kelo v. *City of New London*, 545 U.S. 469 (2005) 19
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Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001) 50
Leis v. *Flynt*, 439 U.S. 438 (1979) 26
Libretti v. *United States*, 516 U.S. 29 (1995) 3, 34
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McConnell v. *FEC*, 540 U.S. 93 (2003) 51
Microsoft Corp. v. *i4i Ltd. P'ship*, 131 S. Ct. 2238 (2011) 22
Morris v. *Slappy*, 461 U.S. 1 (1983) 26
Mullins v. *City of N.Y.*, 626 F.3d 47 (2d Cir. 2010) 53

Cases—Continued: Page

Ohio v. *Robinette*, 519 U.S. 33 (1996) 43
Powell v. *Alabama*, 287 U.S. 45 (1932) 27, 30, 51
Ransom v. *FIA Card Servs.*, 562 U.S. 61 (2011) 35
Robers v. *United States*, 134 S. Ct. 1854 (2014) 21
Rumsfeld v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) 18
SEC v. *Banner Fund Int'l*, 211 F.3d 602 (D.C. Cir. 2000) 25
SEC v. *Unifund Sal*, 910 F.2d 1028 (2d Cir. 1990) 25
United States v. *Bajakajian*, 524 U.S. 321 (1998) 3, 34
United States v. *Brown*, 988 F.2d 658 (6th Cir. 1993) 30
United States v. *Casey*, 444 F.3d 1071 (9th Cir.), cert. denied, 549 U.S. 1010 (2006) 37
United States v. *Cohen*, 152 F.3d 321 (4th Cir. 1998) 22
United States v. *DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999) 13, 18, 19, 22
United States v. *Erpenbeck*, 682 F.3d 472 (6th Cir. 2012) 33
United States v. *Fang*, 937 F. Supp. 1186 (D. Md. 1996) 49
United States v. *Farmer*, 274 F.3d 800 (4th Cir. 2001) 39
United States v. *First Nat'l City Bank*, 379 U.S. 378 (1965) 24
United States v. *Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830, and 449 U.S. 919 (1980) 35
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) 26

Cases—Continued: Page

United States v. *Gordon*, 710 F.3d 1124 (10th Cir.), cert. denied, 134 S. Ct. 617 (2013) 49
United States v. *Hall*, 434 F.3d 42 (1st Cir. 2006) 34
United States v. *Joseph*, 743 F.3d 1350 (11th Cir. 2014) 4
United States v. *Kaley*, No. 07-80021-CR, 2007 WL 1831151(S.D. Fla. 2007) 39
United States v. *McGinty*, 610 F.3d 1242 (10th Cir. 2010)....35
United States v. *McHan*, 345 F.3d 262 (4th Cir. 2003) 33
United States v. *Monsanto*, 491 U.S. 600 (1989)....*passim*
United States v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993) 33
United States v. *Raddatz*, 447 U.S. 667 (1980)....53
United States v. *Stowell*, 133 U.S. 1 (1980)....33
United States v. *Ursery*, 518 U.S. 267 (1996) 34
United States v. *Vampire Nation*, 451 F.3d 189 (3d Cir.), cert. denied, 549 U.S. 970 (2006)....37
United States v. *Wingerter*, 369 F. Supp. 2d 799 (E.D. Va. 2005)....37
University of Tex. v. *Camenisch*, 451 U.S. 390 (1981) 53
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 50, 51, 52
Warger v. *Shauers*, 135 S. Ct. 521 (2014)....18
Washington Educ. Ass'n v. *National Right to Work Legal Def.*, 187 Fed. Appx. 681 (9th Cir. 2006)....20
Wheat v. *United States*, 486 U.S. 153 (1988) 26, 27
Wood v. *Allen*, 558 U.S. 290 (2010)....44
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 43, 44

Case—Continued: Page

Youakim v. *Miller*, 425 U.S. 231 (1976) 18

Constitution, statutes, regulation and rules:

U.S. Const.:
Amend. I 49, 50, 51, 52
Amend. V 25, 27, 29, 43, 46
Due Process Clause 45, 55
Amend. VI .....*passim*
Confrontation Clause 16, 53
Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, § 2521(b)(2), 104 Stat. 4865 19
Criminal Justice Act of 1964, 18 U.S.C. 3006A 41
Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, § 247, 110 Stat. 2018 21
18 U.S.C. 24(a) 2, 5
18 U.S.C. 371 .....5, 2a
18 U.S.C. 982 .....3, 4, 2a
18 U.S.C. 982(a)(7) 4, 5, 2a
18 U.S.C. 982(b)(1) 4, 2a
18 U.S.C. 1345 .....*passim*, 1a
18 U.S.C. 1345(a) 53
18 U.S.C. 1345(a)(1) 2, 1a
18 U.S.C. 1345(a)(2) 2, 3, 19, 21, 26, 49, 1a
18 U.S.C. 1345(a)(2)(A) 19, 21, 22, 23, 1a
18 U.S.C. 1345(a)(2)(B) .....*passim*, 1a
18 U.S.C. 1345(a)(2)(B)(i) 13, 21, 48, 1a
18 U.S.C. 1345(a)(2)(B)(ii) 18, 21, 2a
18 U.S.C. 1345(a)(3) 3, 18, 19, 20, 2a
18 U.S.C. 1345(b) 3, 19, 20, 22, 25, 47, 2a

Statutes, regulation and rules—Continued: Page

18 U.S.C. 1349 .....5, 4a
18 U.S.C. 3142(e)-(g) 5
18 U.S.C. 3142(i) 5
18 U.S.C. 3663A 31, 18a
18 U.S.C. 3663A(a)(1) 4, 18a
18 U.S.C. 3663A(b)(1) 35, 19a
18 U.S.C. 3663A(c) 4, 20a
18 U.S.C. 3664 31
18 U.S.C. 3664(f) 4
18 U.S.C. 3664(f)(1)(A) 4
18 U.S.C. 3771(a)(6) 4
21 U.S.C. 853 .....4, 27, 4a
21 U.S.C. 853(a)(1)-(2) 4, 4a
21 U.S.C. 853(c) 28, 32, 33, 6a
21 U.S.C. 853(e) 39, 46, 54, 7a
21 U.S.C. 853(e)(3) 54, 8a
21 U.S.C. 853(n) 36, 13a
21 U.S.C. 853(p) 4, 30, 35, 40, 16a
21 U.S.C. 853(p)(1)-(2) 4, 16a
21 U.S.C. 881 33
28 U.S.C. 2461(c) 4
42 U.S.C. 1320a-7b(b)(2)(A) 5, 6, 23a
42 C.F.R. 1001.1 *et seq.* 6
Fed. R. Civ. P. 65(b) 13, 18
Fed. R. Crim. P. 32.2(b) 35
Fed. R. Evid. 1101 53
Sup. Ct. R. 14.1 .....18, 43

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted in 564 Fed. Appx. 493. The district court's opinion (Pet. App. 8-34) is reported at 966 F. Supp. 2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2014. A petition for rehearing was denied on July 9, 2014 (Pet. App. 35-36). The petition for a writ of certiorari was filed on October 7, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix. App., *infra*, 1a-27a.

STATEMENT

In 2012, a grand jury returned an indictment charging petitioner with federal health care fraud offenses and giving notice that the government would seek criminal forfeiture. Simultaneously, the government filed this action under 18 U.S.C. 1345, and the United States District Court for the Southern District of Florida entered a temporary restraining order barring petitioner from dissipating assets up to the amount of proceeds obtained from the charged offenses. Following a hearing, the court converted the temporary order into a preliminary injunction. Pet. App. 4-34. The court of appeals affirmed. *Id.* at 1-3.

A. Statutory Background

1. Section 1345 of Title 18 authorizes the Attorney General to commence a civil action against a person who is "committing or about to commit" specified offenses, 18 U.S.C. 1345(a)(1), or against a person who "is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation * * * or a Federal health care offense or property which is traceable to such violation," 18 U.S.C. 1345(a)(2); see 18 U.S.C. 24(a) (defining "Federal health care offense").

Section 1345(a)(2) provides that the government may bring an action "(A) to enjoin such alienation" or "(B) for a restraining order" that bars "any person from withdrawing, transferring, removing, dissipating, or disposing of any such property *or property of equivalent value*." 18 U.S.C. 1345(a)(2) (emphasis added). Those provisions ensure preservation of assets that a criminal court may later order the defendant to forfeit or to provide to victims as restitution.

When the government brings an action "to enjoin" or "for a restraining order," 18 U.S.C. 1345(a)(2), "[t]he court shall proceed as soon as practicable to the hearing and determination of such an action," 18 U.S.C. 1345(b). At "any time before final determination," the court "may * * * enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought." *Ibid.*

A proceeding under Section 1345 "is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure." 18 U.S.C. 1345(b). "A permanent or temporary injunction or restraining order shall be granted without bond." 18 U.S.C. 1345(a)(3).

2. a. Criminal forfeitures are imposed as "a punishment for past criminal conduct." *Alexander* v. *United States*, 509 U.S. 544, 553 (1993). In contrast to "historic *in rem* forfeitures of guilty property," criminal forfeitures operate "*in personam*." *United States* v. *Bajakajian*, 524 U.S. 321, 332 (1998). Such *in personam* forfeitures are "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995). The forfeited funds are used "to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014).

Section 982 of Title 18 provides that a court "imposing sentence on a person convicted of a Federal health care offense" shall "order the person to forfeit

property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." 18 U.S.C. 982(a)(7). Section 982 also provides that "[t]he forfeiture of property under this section * * * shall be governed by the provisions of" 21 U.S.C. 853. 18 U.S.C. 982(b)(1); see 28 U.S.C. 2461(c).

Section 853, which requires "forfeit[ure] to the United States" of the proceeds of specified drug offenses (and other property), 21 U.S.C. 853(a)(1)-(2), provides for "[f]orfeiture of substitute property," 21 U.S.C. 853(p). If, "as a result of any act or omission of the defendant," any directly forfeitable property has been transferred or cannot be located, "the court shall order the forfeiture of any other property of the defendant, up to the value of any [otherwise forfeitable] property" that the defendant has hidden or dissipated. 21 U.S.C. 853(p)(1)-(2).

b. When sentencing a defendant who has committed a fraud crime "in which an identifiable victim or victims has suffered a * * * pecuniary loss," a district court is required to order restitution. 18 U.S.C. 3663A(a)(1) and (c); see 18 U.S.C. 3664(f), 3771(a)(6). The restitution order must mandate that the defendant compensate "each victim in the full amount of each victim's losses," without "consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A). A defendant "is not entitled to offset the amount of restitution owed to a victim by the value of property forfeited to the government, or vice versa." *United States* v. *Joseph*, 743 F.3d 1350, 1354 (11th Cir. 2014) (per curiam).

B. The Present Controversy

1. On October 2, 2012, a grand jury charged petitioner and two co-defendants with conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; conspiracy to pay kickbacks in contravention of Medicare rules, in violation of 18 U.S.C. 371; and paying kickbacks in connection with a federal health care benefit program, in violation of 42 U.S.C. 1320a-7b(b)(2)(A)—all Federal health care offenses under 18 U.S.C. 24(a). See Indictment 7-14 (12-cr-20751 S.D. Fla.). The indictment alleges that those "offenses resulted in $45 million of improper Medicare benefits being paid." Pet. App. 12; see Indictment 9. It seeks forfeiture under 18 U.S.C 982(a)(7) of property "derived * * * from gross proceeds traceable to the commission of the offense" or—if the traceable assets have been dissipated—of substitute assets of equivalent value. Indictment 14-16; see 12-cr-20751 Docket entry Nos. 88, 162.

Petitioner has not yet been arraigned. See, *e.g.*, 12-cr-20751 Docket entry Nos. 91-92, 127.[1] The district court initially ordered petitioner detained and confined, see 18 U.S.C. 3142(e)-(g) and (i), finding a risk of flight based on her possession of multiple foreign passports, her large number of foreign trips, her extensive and scattered property holdings (including property abroad), the "extraordinary sums of money from Medicare" received by petitioner and her family members "during the period of allegedly fraudulent

[1] Petitioner's co-defendants have cooperated, pleaded guilty, and been sentenced. See 12-cr-20751 Docket entry Nos. 149, 158, 212. The district court ordered one of them to pay $27 million in restitution and the other to pay $45 million in restitution. See *id.* No. 158, at 5; *id.* No. 212, at 5.

activity," and repeated transfers of money and property among that group, 12-cr-20751 Docket entry No. 37, at 2-4; see *id.* No. 52, at 10-23, 32-35, 51-53. The court later released petitioner to home confinement, where she remains. See *id.* Nos. 107, 109-110, 144.

2. a. On the same day the grand jury returned the indictment, the government filed this civil action under Section 1345 seeking to enjoin petitioner from committing further acts of health care fraud, to restrain her from dissipating assets, and to obtain disgorgement, restitution, and an accounting. See J.A. 29-30. The government simultaneously filed a motion for a temporary restraining order, explaining that it had "identified losses to federal health care programs of over $45 million stemming from a scheme, implemented through an elaborate web of kickbacks, to submit fraudulent claims for home health services." 12-cv-23588 Docket entry (Docket entry) No. 4, at 1.

In support, the government submitted a declaration from FBI Special Agent Clint Warren explaining—based on his investigation and the statements of eight unnamed cooperating witnesses, many of whom worked with petitioner—the details of the fraudulent scheme. See J.A. 32-33, 39-41. Petitioner and her co-defendants owned and operated two home health care agencies, LTC Professional Consultants, Inc., and Professional Home Care Solutions, Inc., which allegedly provided physical therapy and served diabetic patients entitled to daily home visits to receive insulin injections. See J.A. 33, 39-41. Each of those agencies was an enrolled health care provider with Medicare, see J.A. 40-41, which prohibits payment of kickbacks or referral fees, see 42 U.S.C. 1320a-7b(b)(2)(A); 42 C.F.R. 1001.1 *et seq.* Agent

Warren's declaration stated that, despite that prohibition, petitioner had paid kickbacks to nurses who falsified blood sugar readings, patient visit logs, and treatment notes; to recruiters who sought out Medicare beneficiaries who were not in need of home visits; and to beneficiaries who allowed petitioner to use their information to bill Medicare. See J.A. 41-49.

Agent Warren's declaration also detailed the dissipation of the fruits of the scheme. From 2006 to 2012, petitioner's companies received $45 million from Medicare, of which petitioner paid herself approximately $4.49 million. See J.A. 50. But only "a fraction" of the money could be located by Agent Warren, who stated that petitioner "used Medicare monies for foreign travel," to "purchase multiple properties," for "luxury cars" and "personal luxury items," and for payment of kickbacks. J.A. 50-51; see J.A. 50 ("shell companies" used).

b. On October 3, 2012, the district court entered a temporary restraining order preventing petitioner and those acting in concert with her from alienating or dissipating proceeds from "Federal health care offenses or property of an equivalent value" of such proceeds. J.A. 56–64. The order listed more than 30 bank accounts and more than ten properties that petitioner controlled or owned. See J.A. 58-61; see also, *e.g.*, J.A. 65-70 (amending order).

Petitioner moved to release funds from the temporary restraining order to pay her attorney in the criminal case. See Docket entry No. 46, at 1-3. While that motion was under consideration, and at petitioner's urging, the district court extended the order on numerous occasions, eventually appointing a receiver to

oversee some of the restrained property. See, *e.g.*, *id.* Nos. 57, 60.

Meanwhile, Agent Warren filed two supplemental affidavits. In the first affidavit, he explained that petitioner transferred money obtained from Medicare to family members and companies they owned, including almost $1.5 million to her husband and more than $1.6 million to her children and other family members; that she took 35 trips to foreign countries in the relevant time period; that she "transferred Medicare monies overseas * * * to Mexico," where she has holdings; and that she used $250,000 to purchase jewelry. J.A. 72-74. He also explained that the United States had traced Medicare proceeds into every bank account owned by petitioner listed in the temporary restraining order as well as into "the purchase or maintenance" of multiple properties. J.A. 74-75; see J.A. 153-157. In the second affidavit, Agent Warren discussed a new cooperating witness who stated that "about 90%" of the purported patients of both of petitioner's agencies received kickbacks. J.A. 80. He also noted cash withdrawals of over $1 million from a single LTC account, identifying "at least two occasions" when petitioner and multiple family members "within minutes of each other[] all cashed checks" drawn from that account for "$10,000 or just below that amount." *Ibid.*; see J.A. 82-83 (withdrawals chart).

c. The government produced to petitioner reports of interviews by government agents of the cooperating witnesses. See, *e.g.*, Docket entry No. 90, at 3. With the district court's approval, the government redacted the reports to remove identifying information. See, *e.g.*, *id.* at 3, 6-10. In addition, the government produced to petitioner in the criminal case all required

discovery, and petitioner was permitted (in both cases) to subpoena medical records. See *id.* at 3; see also *id.* No. 67, at 8-14; *id.* No. 97.

Petitioner proposed to present large quantities of evidence at an evidentiary hearing in the civil case, all of which related to whether the services that petitioner's agencies allegedly rendered were medically necessary. See Docket entry No. 71, at 1 (evidence included "documents from over 200 doctors, over 400 nurses, physical therapists, or aides, and over 20 laboratories") (emphasis omitted). The district court rejected that plan. The court ruled that if the government sufficiently established at a hearing that petitioner had given kickbacks to patients, then the amount that Medicare paid for the care of those patients was necessarily a result of fraud. See, *e.g.*, *id.* No. 87, at 15-20, 37-43. On that basis, the court decided that the only evidence relating to criminal activity that would be permitted at the hearing was evidence relating to kickbacks—although, if the government failed to meet its burden on that issue, an additional hearing on medical necessity would be needed. See, *e.g.*, J.A. 115; Docket entry No. 67, at 12-13; *id.* No. 71, at 6 n.3; *id.* No. 87, at 32, 42-43.

d. On February 6, 2013—before this Court's 2014 decision in *Kaley*—the district court held the evidentiary hearing. See J.A. 84-193. Agent Warren provided his declarations and testified, explaining (among other things) that petitioner and her family members received millions from Medicare fraud; that petitioner had opened and closed well over 40 bank accounts; and that she had withdrawn large amounts of cash to pay kickbacks and hide the proceeds of her scheme. See J.A. 168-174; see also J.A. 155 ("You can't trace

cash"). Agent Warren was also cross-examined at length, with particular emphasis on the cooperating witnesses' credibility and motives to lie. See J.A. 104-151. Petitioner deduced all of their names but one before the hearing, and the government confirmed that those deductions were correct. See J.A. 106-107; see also J.A. 113-118.

The parties stipulated for purposes of the hearing that "an unquantified amount of revenue not connected to the indictment flowed into some of the accounts and some of the real estate" that had been restrained. J.A. 161; see J.A. 159. Petitioner's counsel submitted a compilation of computer records from petitioner's businesses purporting to show $15 million in revenue from sources other than Medicare. See J.A. 161-162. But the government stated that it had not had an opportunity to look at the document and reserved the right to challenge that amount—and Agent Warren said, when asked, that analysis of information reflected in the document was not yet complete. See J.A. 162; see also J.A. 153.[2]

Petitioner did not otherwise present evidence. In particular, she did not submit evidence about what fees her chosen counsel would charge to represent her in the criminal case, although counsel asserted that the fees would be comparable to the hundreds of thousands of dollars he requested to be paid in *Kaley*. See Docket entry No. 53, at 3 n.3.[3]

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[2] In light of the district court's legal rulings, the government had no need to revisit the issue of the $15 million number below. It therefore remains open. See J.A. 179-181; Docket entry No. 87, at 58-59.

[3] The record is also not clear on whether petitioner might be able to call on family members or others to help pay for criminal

3. a. The district court converted the temporary restraining order into a preliminary injunction and denied petitioner's request to release assets to pay for counsel. Pet. App. 5-8, 34.

The district court stated that to obtain a preliminary injunction under Section 1345, the government must show probable cause that "a Federal health care offense has been committed"; that the defendant obtained a certain "amount of proceeds * * * from the criminal activity"; and "that there has been dissipation of assets received as a result of the criminal activity." Pet. App. 9-11. Thus, "when some of the assets that were obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." *Id.* at 10. Relying in part on the grand jury's probable-cause finding and in part on the information supplied by Agent Warren, the court found that the government had met its burden. See *id.* at 14-15. As to the existence of fraud, the court found that "[f]ederal health care offenses have been committed" and that "$45 million was obtained illegally as a result of those offenses." *Id.* at 13-16; see *id.* at 25-27. As to the dissipation of assets, the court found that petitioner "transferred monies from LTC and Professional" to herself, "directly and by the use of shell corporations that were owned by [her] family members," and that she used the over $4 million she obtained "to purchase luxury items, real estate, [and] automobiles" and "to travel." *Id.* at 13-14; see *id.* at 15 ("only a fraction of the assets" paid by Medicare "could be located").

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representation. See Docket entry No. 87, at 62; *id.* No. 58, at 20 n.4; 12-cr-20751 Docket entry No. 52, at 45-47.

The district court also found that even under a preponderance-of-the-evidence standard, the government had "carried its burden of proof to enter an injunction restraining at least $40.5 million dollars." Pet. App. 15 n.3. That amount far exceeds the assets in petitioner's possession. See J.A. 179 (petitioner had about $2 million in assets in the United States); Docket entry No. 87, at 33.

Finally, the district court declined to release funds to pay criminal counsel. The court agreed with the Fourth Circuit that "no Sixth Amendment impediment" prevents the restraint of "substitute assets" so long as those assets are forfeitable by statute. Pet. App. 31 (citing *In re Billman*, 915 F.2d 916, 921-922 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991)). The court concluded that such a rule was "common sense": if a bank robber indicted for stealing $100,000 may not use that forfeitable money to hire criminal counsel, despite protesting his innocence, then a bank robber who has "spent the $100,000 that he stole" but "just so happens" to have "another $100,000 that he obtained legitimately" is not entitled to spend that forfeitable money either, lest the amount stolen never be "available for return." *Id.* at 31-32. The court added that petitioner "was represented throughout the [Section] 1345 proceedings by competent counsel" and "will be appointed counsel if she cannot afford [criminal] representation." *Id.* at 33.

b. The court of appeals affirmed, per curiam. Pet. App. 1-3. The court explained that "[t]he district court conducted an evidentiary hearing * * * and found, based on the hearing and the indictment, that there was probable cause to believe that [petitioner] committed an offense requiring forfeiture, that she

possessed forfeitable assets, and that she was alienating those assets." *Id.* at 3. In light of those findings, the Eleventh Circuit ruled that petitioner's Sixth Amendment challenge was "foreclosed" by *Kaley, Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989). Pet. App. 3; see *id.* at 2-3 (citing *United States* v. *DBB, Inc.*, 180 F.3d 1277, 1283-1284 (11th Cir. 1999), which held that Section 1345 permits preliminary injunction restraining "'property of equivalent value' to that actually traceable to the alleged fraud").

SUMMARY OF ARGUMENT

A. Petitioner's assets were validly restrained under 18 U.S.C. 1345. Section 1345(a)(2)(B)(i) authorizes a court to enter a restraining order for assets of "equivalent value" to assets obtained from a federal health care offense when the government establishes that a person is alienating or disposing of such assets. Contrary to petitioner's contention (advanced for the first time in her merits brief, as a purported means of avoiding a constitutional issue), a "restraining order" is not limited to the brief period before a hearing on the government's complaint. In contrast to the "temporary restraining order" authorized under Federal Rule of Civil Procedure 65(b), the "restraining order" authorized by Section 1345 is one of the ultimate forms of relief the government may seek in order to preserve assets. Moreover, the statute specifically authorizes a "permanent or temporary * * * restraining order," and it permits such relief "at any time before final determination"—refuting petitioner's suggestion that the order can last only until a hearing.

Interpreting Section 1345 to permit only a brief, temporary restraint of property "of equivalent value" when a person is dissipating directly forfeitable property as well as other assets would frustrate Section 1345's purpose. The government may forfeit substitute assets when the defendant has placed directly forfeitable property out of reach. But if the person is free to dissipate such property after a Section 1345 hearing, nothing may be left to forfeit, or to compensate victims, upon conviction.

Allowing a restraining order to last past the hearing does not render other portions of the statute superfluous. Nor does it violate limitations on common law equitable powers identified in this Court's cases. Congress may, and has, provided for an asset freeze broad enough to achieve its purposes, covering equivalently valued property to that obtained from crime.

B. The restraint of substitute assets under Section 1345 is consistent with the Sixth Amendment. This Court's decisions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989), establish that a convicted defendant has no constitutional right to use assets subject to forfeiture to pay counsel for her defense and that a pretrial restraining order to preserve those assets pending trial is similarly valid when the court finds "probable cause to believe that the assets are forfeitable," *id.* at 615. Those cases involved directly forfeitable proceeds of crime, rather than substitute assets subject to forfeiture because the proceeds have been dissipated. But neither the holdings nor rationales of those cases are so limited.

Petitioner argues that the "relation back" principle justifies the freeze of assets traceable to the offense

because such assets are not the defendant's at all, and she contrasts that with untainted substitute assets, which, she notes, are forfeitable only upon conviction. But *Monsanto* did not rely on the "relation back" principle in deeming an asset freeze constitutional. For sound reason: that principle does not give the government ownership rights until the defendant is convicted. Until then, it provides only a potential for forfeiture—the same as with substitute assets that become forfeitable upon conviction if directly forfeitable assets are dissipated.

Equally fundamental, the justification for criminal forfeiture is not that the property is guilty or tainted; it is, rather, to impose *in personam* punishment for commission of an offense. The measure of punishment is tied to the property obtained from or involved in the offense. But the punishment equally applies whether the defendant has retained the directly forfeitable assets, or has dissipated them and retains other sources of wealth. That is why substitute assets are forfeitable. Freezing substitute assets serves the same purpose as freezing directly forfeitable assets. It would make no sense, and would give rise to absurd results, if a defendant could dissipate her proceeds of crime, while retaining other assets, and then immunize herself from a properly substantiated asset freeze under *Monsanto*.

Allowing the defendant to pay counsel of choice with potentially forfeitable substitute assets is no more essential to the integrity of the criminal justice system than allowing her to use directly forfeitable assets to do so. Rather, the balance of interests is the same: given an adequate showing that the government is likely to prevail at trial, it will have a right to

forfeiture, and the defendant's Sixth Amendment interests in hiring counsel of choice do not outweigh the public's and victims' interests in preserving forfeitable assets.

C. The hearing in this case to support the asset freeze complied with due process.

That issue was neither posed nor fairly included in the question presented in the petition, and it is not properly before the Court. Regardless, *Monsanto* established that probable cause that the defendant committed a crime justifies pretrial restraint, and *Kaley* v. *United States*, 134 S. Ct. 1090 (2014), held that a grand jury's finding of probable cause is conclusive at a pretrial asset-seizure hearing. The grand jury's finding here also extended to the amount of proceeds obtained from the crime, and no further hearing was required on that issue. On the issues of dissipation and the amount of substitute assets to be frozen, a probable cause standard is likewise constitutionally sufficient. Since the grand jury did not determine those issues, which lie outside its core function, a hearing on them is warranted. But the government presented evidence, and the district court found, that probable cause (indeed, a preponderance of the evidence) supported the restraint.

Petitioner's claim of a due process right to confront witnesses in this civil proceeding relies on inapplicable Confrontation Clause precedents. And even in criminal cases, longstanding holdings allow use of hearsay statements in similar preliminary proceedings.

ARGUMENT

PETITIONER'S SUBSTITUTE ASSETS WERE VALIDLY RESTRAINED TO ENSURE THEIR AVAILABILITY FOR FORFEITURE AND RESTITUTION

After petitioner was indicted for criminal health-care violations from which she amassed, and dissipated, many millions of dollars in improper Medicare payments, the district court restrained the dissipation of assets that are of equivalent value to funds that petitioner obtained from the charged crimes. Petitioner argues that the restraining order was not authorized by 18 U.S.C. 1345; that the restraint of assets not obtained from criminal violations, although forfeitable as substitute assets, violates her Sixth Amendment right to pay her counsel of choice; and that the procedures used to impose the restraint violated due process. None of those arguments has merit.

A. Section 1345 Authorizes The Restraint Of "Property Of Equivalent Value" Pending The Outcome Of A Criminal Case

Petitioner does not dispute that Section 1345 authorizes a "restraining order" preventing dissipation of assets of "equivalent value" to those that were "obtained as a result of" criminal activity but that are being disposed of or alienated. 18 U.S.C. 1345. For the first time in this Court, however, she argues (Br. 33-41) that Section 1345 authorizes only a temporary restraining order, which may not extend past the date of an evidentiary hearing. According to petitioner (Br. 33-34), that interpretation is justified to avoid constitutional questions. But the "canon of constitutional avoidance comes into play only when * * * the statute is found to be susceptible of more than one

construction," *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005), and Section 1345 is not susceptible to petitioner's strained reading. Accordingly, the avoidance canon "has no role to play," *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014).[4]

1. In Section 1345, "Congress used the phrase 'restraining order'" to encompass "all forms of injunctive relief," *United States* v. *DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir. 1999), including an order to preserve assets pending the outcome of a parallel criminal case. That conclusion flows from Section 1345's text, structure, and purpose.

In contrast to Federal Rule of Civil Procedure 65(b) (Pet. Br. 35), Section 1345 does not mention a "temporary restraining order"—even though the word "temporary" appears twice in that provision. Fed. R. Civ. P. 65(b) (providing for brief entry of "temporary restraining order" (TRO) until "hearing" on preliminary injunction motion); 18 U.S.C. 1345(a)(2)(B)(ii) and (3). While "restraining order" may sometimes be shorthand for the limited-duration order that Rule 65(b) describes, see Pet. Br. 35, the term standing

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[4] Petitioner did not raise her current statutory argument in the district court or the court of appeals, neither of which addressed it. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); see also J.A. 92. Nor did she raise it in her certiorari petition. Rather, her petition stated that "[t]he statute under review explicitly authorizes district courts to restrain property traceable to the alleged fraud, as well as 'property of equivalent value,'" thus "properly fram[ing]" the "constitutional issue." Pet. 29-30. Nevertheless, because this Court has discretion to consider an unpreserved statutory interpretation issue that is a predicate to a constitutional question, see *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 55-57 (2006); see also Sup. Ct. R. 14.1, this brief addresses it.

alone has a broader meaning, encompassing any "court order entered to prevent the dissipation or loss of property." *Black's Law Dictionary* 1429 (9th ed. 2009); see *DBB*, 180 F.3d at 1282 (citing 1981 dictionary definition). This Court has used "restraining order" in that broader fashion numerous times, including in cases that predate the enactment of Section 1345(a)(2) in 1990 (Pub. L. No. 101–647, § 2521(b)(2), 104 Stat. 4865). See, *e.g.*, *United States* v. *Monsanto*, 491 U.S. 600, 603-604, 612-615 (1989) (discussing 21 U.S.C. 853(e), which refers separately to a "restraining order" and a "temporary restraining order"); *Kelo* v. *City of New London*, 545 U.S. 469, 475 (2005) (referring to a "permanent restraining order" prohibiting taking of property).

"[R]estraining order" necessarily carries that broader meaning in Section 1345. First, Section 1345(a)(2) permits the government to bring "a civil action" either "to enjoin" certain acts "*or* * * * for a restraining order." 18 U.S.C. 1345(a)(2)(A) and (B) (emphasis added). It thus authorizes pursuit of the restraining order described in Section 1345(a)(2)(B) as ultimate relief in an action rather than a mere interim measure. A district court must proceed "to the hearing and determination of such an action," just as it must in an action seeking the injunctive relief described in Section 1345(a)(2)(A). 18 U.S.C. 1345(b). But the hearing cannot mark the last moment that a restraining order may remain in place, because the propriety of such an order may be the final "determination" the government seeks.

Second, Section 1345(a)(3) provides that a "restraining order" may be more than a temporary measure by stating that *"[a] permanent or temporary*

injunction or *restraining order* shall be granted without bond." 18 U.S.C. 1345(a)(3) (emphasis added). The phrase "permanent or temporary" modifies both "injunction" and "restraining order"—the two categories of relief separately authorized in the preceding subsection—because "restraining order" is not preceded by its own article (or by a different modifier). Had Congress wanted "permanent or temporary" to modify only "injunction," it would have referred to "a permanent or temporary injunction or *a* restraining order." See, *e.g.*, *The American Heritage Book of English Usage* 53 (1996) ("[I]f you set up a series of nouns with the first modified by an adjective, the reader will expect the adjective to modify the rest of the series as well. * * * If you want to restrict a modifier to only one noun, repeat the article for each noun."); see also *Washington Educ. Ass'n* v. *National Right to Work Legal Def.*, 187 Fed. Appx. 681, 682 (9th Cir. 2006). If a "restraining order" can endure past final judgment, it does not automatically dissolve when an evidentiary hearing is held.

Third, Section 1345(b) makes clear that a "restraining order" may extend beyond the hearing. Under Section 1345(b), the court is to "proceed" to "the hearing and determination" of an action and "may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury." 18 U.S.C. 1345(b).[5] That power extends to any period of time between "the hearing" and the "final determination"—and so the "restraining order"

[5] Section 1345(b), which petitioner ignores, independently supports the restraining order in this case, which was entered before final determination.

may come after the hearing itself. *Ibid.* The broad use of "restraining order" in Section 1345(b) suggests a similarly broad meaning for the same term in Section 1345(a)(2)(B). See *Robers* v. *United States*, 134 S. Ct. 1854, 1857 (2014).

Finally, restricting the "restraining order" authorized in Section 1345(a)(2) to the scope of a Rule 65(b) TRO conflicts with the provision's purpose. Congress enacted Section 1345(a)(2) in response to the savings and loan scandals of the 1980s, to "expand[] * * * the remedy that can be obtained" under Section 1345, H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 178 (1990), and ensure "recover[y of] funds from the S&L wrong-doers," 136 Cong. Rec. 36,926 (1990) (Statement of Rep. Fish); see, *e.g.*, 136 Cong. Rec. at 36,929 (Statement of Rep. Schumer) ("We provide for prejudgment attachment and [as]set freezes. You do not want the savings and loan crooks to abscond and escape with their money. This bill will stop it.").[6]

Limiting a Section 1345(a)(2)(B) restraining order to only a brief period would frustrate that purpose. Such a rule would allow the court to preliminarily enjoin only alienation or disposition of criminally obtained property by the defendant himself, and not transfer or dissipation of the property by "any person" with access to it (such as a signatory on an account). Compare 18 U.S.C. 1345(a)(2)(A) with 18 U.S.C. 1345(a)(2)(B)(i). It would bar use of a receiver to oversee property that the defendant was preliminarily enjoined from alienating, although a receiver may be necessary to ensure that property maintains its value. See 18 U.S.C. 1345(a)(2)(B)(ii). And it

[6] A 1996 amendment made the provision applicable to health-care fraud as well. See Pub. L. No. 104–191, § 247, 110 Stat. 2018.

would allow a defendant who dissipated or sequestered most of his criminal proceeds before the Section 1345 suit commenced to dissipate any "property of equivalent value" as soon as an evidentiary hearing was held, thus preventing the government from obtaining an authorized forfeiture of substitute assets and his victims from obtaining recompense. That cannot be what Congress intended in tightening the net around the perpetrators of serious financial fraud. See *DBB*, 180 F.3d at 1283.

2. a. Petitioner contends (Br. 37) that reading "restraining order" to allow more than temporary relief would render Section 1345(a)(2)(A) superfluous, because Section 1345(a)(2)(B) would authorize all of the relief that the preceding subsection permits.[7] But on petitioner's own reading of the statute, Section 1345(a)(2)(B) would authorize only temporary restraining orders barring certain specific injurious actions, and it would thus be entirely swallowed by Section 1345(b), which authorizes any restraining order entered before "final determination" that "is warranted to prevent a continuing and substantial injury." 18 U.S.C. 1345(b). The canon against superfluity "assists only where a competing interpretation gives effect 'to every clause and word of a statute,'" *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (citations and internal quotation marks omitted), which petitioner's interpretation does not. Rather, the relevant tenet here is that a certain amount of "overlap reflects the broad purpose" of the statute. *Babbitt* v. *Sweet Home Chapter of Cmtys. for*

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[7] The only case petitioner cites to support her view (Br. 35) adverts to the issue only in a single conclusory sentence in a footnote. *United States* v. *Cohen*, 152 F.3d 321, 324 n.4 (4th Cir. 1998).

a Great Or., 515 U.S. 687, 698 n.11, 703 (1995); see *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004) ("[O]ur preference for avoiding surplusage constructions is not absolute. * * * We should prefer the plain meaning.").

In any event, Section 1345(a)(2)(A) and Section 1345(a)(2)(B) have different functions. Section 1345(a)(2)(A) allows injunctive relief only against the defendant to prevent "alienation or disposition" of criminally obtained property (or traceable property). In contrast, Section 1345(a)(2)(B) authorizes an order restraining "any person" from taking actions that may affect criminally obtained property or "property of equivalent value"—and thus may reach property no longer in the defendant's hands, as well as substitute assets that remain.[8]

b. Petitioner contends that Section 1345 should be read to embody the principle applied in *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), and *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945), that federal courts lack "inherent, equitable power to dispossess an owner of her rightful assets to secure a

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[8] Amicus Americans for Forfeiture Reform advances a different reading: that Section 1345(a)(2)(B)'s authorization to restrain "property of equivalent value" cannot be used to restrain substitute assets once criminally obtained (or traceable) property has been dissipated. Amicus Br. 3-4, 6, 19-20. That argument is wrong. If a defendant has been disposing of $1000 a week for three weeks before the Section 1345 action is filed and is likely to continue to do so, the defendant is engaged in an ongoing pattern of alienation or disposition, and the initial $3000 is part of the property that the defendant "is alienating or disposing of" under Section 1345(a)(2)(B).

potential future judgment for legal damages." Pet. Br. 38. That principle has no relevance here.

The limitation described in those cases constrains only district courts' inherent equitable powers and does not apply when a statute expressly authorizes the government to obtain an injunction for some specified end. See *Grupo Mexicano*, 527 U.S. at 317, 326 n.8 (citing *De Beers*, 325 U.S. at 219); see also, *e.g.*, *In re Dow Corning Corp.*, 280 F.3d 648, 657-658 (6th Cir.), cert. denied, 537 U.S. 816 (2002); *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 131 n.11 (2d Cir. 2014). *Grupo Mexicano* expressly distinguished a case in which assets were frozen under a statute similar to (although more generally worded than) Section 1345.

In *United States* v. *First National City Bank*, 379 U.S. 378 (1965), a tax case, this Court approved a preliminary injunction "preventing a third-party bank from transferring any of the taxpayer's assets which were held in a foreign branch office of the bank." *Grupo Mexicano*, 527 U.S. at 325. *Grupo Mexicano* explained that the asset freeze in *First National* was proper because "it involved not the Court's general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing issuance of tax injunctions." *Id.* at 325-326; see *id.* at 325 (explaining that the tax-related statute gave "district courts the power to grant injunctions necessary or appropriate for the enforcement of the internal revenue laws") (citations and internal quotation marks omitted); see also *id.* at 322, 333 (explaining that "Congress is in a much better position than we * * * to design the appropriate remedy"). In addition, *Grupo Mexicano* noted that *First National* involved

"the doctrine that courts of equity will go much farther * * * in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Id.* at 326 (citations and internal quotation marks omitted).

Both of the features that distinguished *First National* from *Grupo Mexicano* are present here. Section 1345 expressly authorizes the district court to enter a restraining order covering "property of equivalent value" or any other restraining order that may be necessary to avoid injury. It also permits only the government, and not a private party, to commence a suit seeking to freeze assets, while noting the centrality of the public interest to a court's decision to grant relief. See 18 U.S.C. 1345(a)(2)(B) and (b). Accordingly, background principles that apply in the absence of legislation have no role to play in this case.[9]

B. Restraining "Property Of Equivalent Value" Under Section 1345 Does Not Violate The Sixth Amendment

Petitioner contends (Br. 17-33) that Section 1345 violates the Sixth Amendment by authorizing restraint of "property of equivalent value" that a defendant needs to hire counsel of choice in a criminal case. That contention lacks merit. This Court has held, in rejecting a Fifth and Sixth Amendment challenge, that "assets in a defendant's possession may be

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[9] Those background principles are also irrelevant when the government seeks equitable relief, such as disgorgement, and requires an asset freeze to ensure the availability of funds at the conclusion of the suit. See *Grupo Mexicano*, 527 U.S. at 324-327; see also, *e.g.*, *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 607, 612 (D.C. Cir. 2000); *SEC* v. *Unifund SAL*, 910 F.2d 1028, 1041-1042 (2d Cir. 1990). The complaint here sought, *inter alia*, disgorgement and restitution. J.A. 29-30.

restrained" before a criminal trial if there is "probable cause to believe that the assets are forfeitable," even if the defendant asserts that those assets are necessary to pay for private criminal representation. *Monsanto*, 491 U.S. at 615. That principle applies here. The assets that a court may freeze under Section 1345, including "property of equivalent value" to criminally obtained property that has been dissipated, are assets that will upon criminal conviction belong to the government via forfeiture. They may also be necessary to satisfy a mandatory restitution order compensating victims of the crimes listed in Section 1345(a)(2) for their losses. The Constitution permits Congress to decide that, when probable cause exists to believe that the defendant will be subject to such a forfeiture, a district court may enter a restraining order to preserve the assets for remedies that will be imposed upon conviction.

1. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. Although representation by counsel of choice is the "root meaning" of the Sixth Amendment, that right "is circumscribed in several important respects." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144, 147-148 (2006) (quoting *Wheat* v. *United States*, 486 U.S. 153, 159 (1988)). A defendant may not insist on representation by counsel with a conflict of interest that could undermine the proceedings, see *Wheat*, 486 U.S. at 164, or by counsel unable to meet the requirements of the court's docket, see *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983), or by a person who is not a member of the bar, see *Leis* v. *Flynt*, 439 U.S. 438, 441-444 (1979) (per

curiam). Nor does a defendant have a Sixth Amendment right to representation "by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Wheat*, 486 U.S. at 159.

In those situations, the defendant's inability to retain her counsel of choice is the incidental consequence of restrictions that serve legitimate and important public purposes. Where the defendant has been afforded a "fair opportunity" to secure counsel of choice under generally applicable rules, those rules do not result in an "arbitrar[y]" interference with the representation of the defendant by her preferred lawyer. *Powell* v. *Alabama*, 287 U.S. 45, 53, 69 (1932).

2. Applying Sixth Amendment principles, this Court has twice considered whether a defendant is entitled to use forfeitable assets to pay the fees of a criminal lawyer.

a. In *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), the Court held that a *convicted* defendant has no entitlement under the Fifth or Sixth Amendment to use assets adjudged forfeitable under 21 U.S.C. 853 to pay the attorney who conducted his criminal defense. See 491 U.S. at 619-620. The Court first observed that "the burden the forfeiture law imposes on a criminal defendant is limited" because "nothing in [Section] 853 prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel, * * * hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Id.* at 624-625 (citing *Wheat*, 486 U.S. at 153, 159); see *id.* at 633 n.10 (rejecting argument that such an arrangement would be improper contingency fee). In any event, the Court

concluded, "[a] defendant has no Sixth Amendment right to spend another person's money"—in the case of forfeitable assets, the government's money—"for services rendered by an attorney, even if those funds are the only way that [the] defendant will be able to retain the attorney of his choice." *Id.* at 626; see *id.* at 632 ("We therefore reject petitioner's claim of a Sixth Amendment right of criminal defendants to use assets that are the Government's—assets adjudged forfeitable * * * —to pay attorney's fees."); *id.* at 626 (stating that when a "robbery suspect" wants "to use funds he has stolen from a bank to retain an attorney," the government can "seize[] the robbery proceeds and refuse[] to permit the defendant to use them" in that manner).

In so concluding, the Court relied on several grounds. The Court noted that, after conviction, the "relation-back" provision in Section 853(c) "vest[s] title" to certain forfeitable assets in the United States as of the time of the underlying criminal act. 491 U.S. at 627-628. The Court also stated that if an exception to forfeiture were to be made for the exercise of Sixth Amendment rights, no reason existed why an exception need not be made for exercise of "the right to speak, practice one's religion, or travel," all of which "depend[] in part on one's financial wherewithal." *Id.* at 628. And, most importantly, the Court recognized "a strong governmental interest in obtaining full recovery of all forfeitable assets," which "overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id.* at 631; see *id.* at 629-630 (noting government interest in using forfeited assets to "return[] property" to fraud victims). If the defendant's inter-

est were deemed paramount, the Court reasoned, "there would be an interference with a defendant's Sixth Amendment rights whenever the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial," including for collection of unpaid taxes. *Id.* at 631.

b. In *United States* v. *Monsanto*, 491 U.S. 600 (1989), decided on the same day as *Caplin & Drysdale*, the Court considered the constitutionality of an order that "freez[es]" assets "*before* [the defendant] is convicted." *Id.* at 615 (emphasis added); see *id.* at 614. "[B]ased on a finding of probable cause to believe that the assets are forfeitable," the Court concluded, a court may restrain them pretrial consistent with the Fifth and Sixth Amendments. *Id.* at 615. The Court noted that it had "previously permitted the Government to seize property" in civil forfeiture cases (a more "severe" remedy than mere restraint) "based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." *Ibid.* The Court also explained that "it would be odd to conclude that the Government may not restrain property * * * based on a finding of probable cause, when we have held that * * * the Government may restrain *persons*" on such a finding. *Ibid.*

The Court stated that no "departure from [the] established rule of permitting pretrial restraint of assets based on probable cause" was necessary in light of "the nature of the Government's property right in forfeitable assets" or the defendant's planned use of the assets to retain an attorney. 491 U.S. at 616. The Court had already "weigh[ed] * * * these very interests" in *Caplin & Drysdale*, it explained—and given the holding in that case that the government

may after conviction "obtain forfeiture of property that a defendant might have wished to use to pay his attorney," a "pretrial restraining order does not 'arbitrarily' interfere with a defendant's 'fair opportunity' to retain counsel." *Ibid.* (citing *Powell*, 287 U.S. at 53, 69).

3. Both *Caplin & Drysdale* and *Monsanto* involved assets that were the proceeds of a crime rather than "substitute assets," which are forfeitable because the defendant has already dissipated all or some of those proceeds. See 491 U.S. at 619-620; 491 U.S. at 602-603. But in neither decision did the Court limit its holding to cases involving directly forfeitable assets; instead, the Court referred to assets that are "forfeitable," regardless of which specific statutory provision makes them so. 491 U.S. at 619, 632; 491 U.S. at 615-616. And the reasoning underlying *Monsanto*'s approval of a pretrial freeze of assets determined likely to be forfeitable applies fully to substitute assets.

As the district court ruled, to obtain a preliminary restraint of assets under Section 1345 the government must show a sufficient probability that the defendant has committed "a Federal health care offense" (or other qualifying offense), has obtained a specified "amount of proceeds * * * from the criminal activity," and is engaging in "dissipation of assets received as a result of the criminal activity." Pet. App. 10 (citing *United States* v. *Brown*, 988 F.2d 658, 663 (6th Cir. 1993)). Such a showing provides sufficient reason to believe that "property of equivalent value" (18 U.S.C. 1345(a)(2)(B)) to the dissipated assets will be forfeitable under Section 853(p), which requires forfeiture of substitute assets if criminal proceeds have "been transferred or sold" or "cannot be located." 21

U.S.C. 853(p). Moreover, at least when the defendant's gain from the crime also represents loss to the victim, the Section 1345 showing indicates that the defendant is disposing of amounts that will be payable to the victim as restitution at the end of the criminal case. See 18 U.S.C. 3663A, 3664.

Accordingly, all of the reasons given in *Monsanto* for permitting a pretrial asset freeze hold equally true here. If the government prevails in the criminal case, as it has shown at least probable cause to believe it will, then the "property of equivalent value" covered by the Section 1345 restraining order will not belong to the defendant; it will belong to the Attorney General (who may well use it for restitutionary purposes, see *Caplin & Drysdale*, 491 U.S. at 629-630) or to the victim of the crime. The government and the victim thus have a powerful interest in ensuring that those assets will ultimately be available. See *Monsanto*, 491 U.S. at 616 (pretrial restraint of assets "protect[s] the community's interest in full recovery of any ill-gotten gains" upon conviction). The effect of the restraint of "property of equivalent value" on the defendant is "limited," *Caplin & Drysdale*, 491 U.S. at 624-625, because it does not bar her from retaining any attorney willing to represent her without advance payment. And if the restraint is unconstitutional because the defendant wishes to pay a criminal lawyer, then the same reasoning would appear to invalidate a prejudgment tax lien on untainted funds when the defendant claims a need for the funds to pay criminal counsel. For that matter, the defendant could seemingly demand the right to use restrained substitute assets to exercise constitutional rights other than the right to counsel. See *id.* at 628-630.

4. a. Petitioner does not attack *Monsanto* (or *Caplin & Drysdale*), on which this Court recently relied in *Kaley* v. *United States*, 134 S. Ct. 1090, 1096-1097, 1105 (2014). Instead, she accepts *Monsanto* but contends that it is distinguishable. According to petitioner (Br. 20-23, 30), "untainted" assets are special because the government has no property rights in them—whereas in *Monsanto*, she says, the restrained assets were "loot" in which the defendant had no legitimate interest. Absent government property rights in substitute property, she concludes, pretrial restraint is impermissible. That argument rests on a misunderstanding of the nature of criminal forfeiture proceedings.

Initially, petitioner relies on the relation-back principle in 21 U.S.C. 853(c) to explain *Monsanto*, but that principle does not assist her. Section 853(c) provides that "[a]ll right, title, and interest in property described in subsection (a) of this section"—that is, proceeds of the crime (or property used in committing it)—"vests in the United States upon the commission of the act giving rise to forfeiture under this section." But the relation-back principle was not mentioned in *Monsanto*'s constitutional analysis of the asset freeze in that case. 491 U.S. at 615-616. For good reason: *Monsanto* upheld a pretrial restraint of assets, and at that time, *before* the criminal case has reached a conclusion, the government does not yet have a vested property interest in the forfeitable assets. *Monsanto*'s rule thus does not turn on relation back.[10]

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[10] Even in *Caplin & Drysdale*, which dealt with assets that had been adjudged forfeitable after the defendant was convicted, relation back was only a factor in the Court's analysis. See 491 U.S. at 627. And whether the relation-back doctrine in Section 853(c)

Under both the statute and common law, until the defendant has actually been found guilty of some "act giving rise to forfeiture," 21 U.S.C. 853(c), the government's rights are potential—rights that might spring into being at some time in the future if a condition is satisfied that does not yet exist. See *Caplin & Drysdale*, 491 U.S. at 627 ("judicial condemnation" is needed to "perfect" title under relation back) (quoting *United States* v. *Stowell*, 133 U.S. 1, 19 (1890)); *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 125-129 (1993) (opinion of Stevens, J.) (discussing analogous relation-back provision in 21 U.S.C. 881 and common-law relation-back doctrine); accord *id.* at 131-132 (Scalia, J., concurring in the judgment). If those rights do spring into being, the legal consequence is that they are deemed to reach back to an earlier date. But that does not mean that before the triggering event takes place the government has any established interest in the relevant property.

Monsanto deals with a point in time before the triggering event has occurred—a point when the defendant might yet prevail in the criminal case, so that neither Section 853(c) nor any other criminal forfeiture enforcement mechanism ever comes into play. The "property" interest at stake in the *Monsanto* context, then, is the same property interest at stake in this case: an interest in preserving property that does not yet belong to the government but which there is probable cause to believe ultimately will. In both contexts, the demonstrated potential for the govern-

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applies to substitute assets remains unsettled in the lower courts. Compare, *e.g.*, *United States* v. *McHan*, 345 F.3d 262, 270-272 (4th Cir. 2003), with *United States* v. *Erpenbeck*, 682 F.3d 472, 477-478 (6th Cir. 2012).

ment to prevail and take ownership—not a present property interest—justifies the pretrial restraint.

Petitioner's argument also fails to recognize that the government's interest in the direct proceeds of a crime—the actual dollar bills obtained by the robber or fraudster—is not any more real or worthy of protection than its interest in substitute assets when the direct proceeds have been dissipated. Unlike *in rem* civil forfeiture, which was historically "directed against 'guilty property,' rather than against the offender himself," *United States* v. *Bajakajian*, 524 U.S. 321, 330 (1998), criminal forfeiture is a means of punishing the defendant *personally* for the commission of a crime by depriving her of ill-gotten gains (and, under some statutory schemes, of other property, see, *e.g.*, *Kaley*, 134 S. Ct. at 1095-1096). See *Libretti* v. *United States*, 516 U.S. 29, 39 (1995); *Alexander* v. *United States*, 509 U.S. 544, 553 (1993); see also *United States* v. *Ursery*, 518 U.S. 267, 293-297 (1996) (Kennedy, J., concurring) (contrasting *in rem* and *in personam* forfeiture).

The government's right to obtain forfeiture of the proceeds of the crime thus is not a right that inheres in a particular piece of property because it is "tainted." If a defendant obtained $45 million from a robbery and carefully placed the whole amount in an empty safe in her office, then that money would undoubtedly be forfeitable. But if instead the defendant dissipated $43 million and had only $2 million left in the safe, depriving her of only the $2 million that remained would allow her to benefit significantly from her wrongdoing. See *United States* v. *Hall*, 434 F.3d 42, 59 (1st Cir. 2006). That is why the government is entitled to substitute assets in an amount equivalent

to the dissipation—in the hypothesized case, up to $43 million that the defendant is holding in a different safe and obtained through some unindicted activity. See 21 U.S.C. 853(p) (listing circumstances in which forfeiture of substitute assets is mandatory). And if the defendant does not have substitute assets in an amount sufficient to account for all of the criminal proceeds, the government is entitled to a money judgment against the defendant to cover the missing amount. See, *e.g.*, Fed. R. Crim. P. 32.2(b); *United States* v. *McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (collecting cases); see also Stefan D. Cassella, *Asset Forfeiture Law in the United States* §§ 15-3, at 571, 19-4, at 691-693, 22-2, at 762-763 (2d ed. 2013) (Cassella).[11] Accordingly, by recognizing the basic principle that "[m]oney is fungible," *e.g.*, *Ransom* v. *FIA Card Servs.*, 562 U.S. 61, 79 (2011), the law ensures that "crime does not pay," *Monsanto*, 491 U.S. at 614.[12]

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[11] Along the same lines, in a case involving property loss the federal restitution statutes authorize courts to order a defendant either to return the property or pay an amount equal to its value. 18 U.S.C. 3663A(b)(1).

[12] Petitioner's discussion of historical forms of forfeiture (Br. 23-24) involving different rationales and procedures than those described above is entirely beside the point. As petitioner states, *in personam* forfeiture did not exist in this country until 1970—but it was the very type of forfeiture at issue in *Monsanto*, and it has long been an accepted penalty in criminal cases. Forfeiture of substitute assets is simply a form of *in personam* forfeiture (and cannot be equated with "forfeiture[] of estate," which required a felon to forfeit *all* property to the Crown without regard to the gain realized from, or the loss caused by, his crime, *Austin* v. *United States*, 509 U.S. 602, 612 (1993); see *United States* v. *Grande*, 620 F.2d 1026, 1038 (4th Cir.), cert. denied, 449 U.S. 830, and 449 U.S. 919 (1980)).

Because petitioner misunderstands the nature of forfeiture, she also misunderstands (Br. 21, 30) the import of the robbery hypothetical in *Caplin & Drysdale*. The reason that the robber cannot use his spoils to pay counsel is not that the specific money he took is somehow dirty; it is that the money is "rightfully" the government's as a matter of forfeiture law (assuming the robber is convicted). 491 U.S. at 626; see 21 U.S.C. 853(n) (permitting third party with claim to forfeited property to assert that claim in court). If dissipation of the stolen money is established, then the robber's "untainted" funds, in an amount equivalent to the dissipation, are also rightfully the government's under forfeiture law, and the robber has no more right to those funds than she has to the bag of cash she carried out of the bank. See Pet. App. 32 (district court decision explaining that if a robber spent the money that he stole but "just so happens" to have an equivalent amount of money that "he obtained legitimately," those "substitute, untainted assets" must be "kept available for return" to the victim or for forfeiture).

Against that background, treating "property of equivalent value" differently than directly forfeitable assets, for purposes of a constitutional rule about which pretrial restraining orders are permissible, would give rise to absurd and unfair results. A criminal who uses the proceeds of her crime to pay her day-to-day expenses, thus enabling her to save in a bank account "untainted" money that she would otherwise have spent during the same period, wields "undeserved economic power" when it comes time to hire criminal counsel, *Caplin & Drysdale*, 491 U.S. at 630, to the exact same extent that she would if she had

spent the "untainted" money on the expenses and left the criminal proceeds in the bank. See, *e.g.*, *United States* v. *Casey*, 444 F.3d 1071, 1074 (9th Cir.) (criminal "who dissipates the profits or proceeds" of his crimes for fleeting purposes "has profited from [the crime] to the same extent as if he had put the money in his bank account") (citation omitted), cert. denied, 549 U.S. 1010 (2006). And yet, under petitioner's view, that criminal would be constitutionally entitled to use the "untainted" money to pay for counsel—even though that money will belong to the government (or to her victims) if she is convicted. In contrast, a less wily criminal who segregates the proceeds of her crime in a bank account, while using up all of her remaining funds to cover her living expenses, has—petitioner agrees—no constitutional entitlement to spend the money in the account to pay counsel of her choice to defend her in the criminal case.

Such a constitutional rule would treat similarly situated defendants differently without any justification, while ignoring both the purpose of criminal forfeiture and the rights of victims. See Cassella § 17-14, at 638 (observing that "the victims of the offense," who are "most directly interested" in the government obtaining forfeiture, "have the same interest in having the property preserved regardless of what theory of forfeiture applies"); *id.* § 22-5, at 772 & n.42; see also *United States* v. *Wingerter*, 369 F. Supp. 2d 799, 810 (E.D. Va. 2005). And the only practical consequence of such an approach would be to reward the rapid dissipation of criminal proceeds, see, *e.g.*, *United States* v. *Vampire Nation*, 451 F.3d 189, 202 (3d Cir.), cert. denied, 549 U.S. 970 (2006)—a lesson that the

sophisticated criminals covered by Section 1345(a)(2)(B) will quickly learn.[13]

b. Petitioner's additional arguments in support of her Sixth Amendment claim also lack merit.

i. Petitioner argues (Br. 31-32) that the government made a concession relevant to the question presented here at oral argument in *Kaley*. The Court stated that, at argument, the government "agreed that a defendant has a constitutional right to a hearing" on "whether probable cause exists to believe that the assets" sought to be restrained pretrial "are traceable or otherwise sufficiently related to the crime charged in the indictment"—a matter that the Court described as a "requirement[] for forfeiture." 134 S. Ct. at 1095 & n.3.[14] That statement does not undermine the conclusion that *Monsanto* controls this case.

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[13] The effects of petitioner's proposed constitutional rule could well extend beyond Section 1345. Civil enforcement actions may involve fraudulent schemes that are also the subject of federal criminal charges—and some civil-enforcement statutes authorize prejudgment asset freezes, to preserve assets for defrauded consumers and investors, without requiring the frozen assets to be traced dollar-for-dollar to the underlying unlawful activities. *See, e.g.*, *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011); *CFTC* v. *Muller*, 570 F.2d 1296, 1301 (5th Cir. 1978); see also *Caplin & Drysdale*, 491 U.S. at 631-632 (discussing IRS "jeopardy assessments"). Any constitutional requirement that reaches such cases could undermine the government's ability to collect a final judgment from a defendant who was careful to spend the direct proceeds of her unlawful scheme while husbanding her other assets.

[14] See 10/16/13 Tr. at 45, *Kaley*, *supra* (No. 12-464) (Court asks: "in the general run case, so you agree that due process does require a traceability hearing"; government answers: "Yes. The defendants are entitled to show that the assets that are restrained are not actually the proceeds of the charged criminal offense or

In *Kaley*, although the indictment gave notice that the government might claim substitute assets, the pretrial restraining order that the government defended in this Court, which was entered under 21 U.S.C. 853(e), covered only directly forfeitable assets: "proceeds obtained from" or property involved in "the [charged] offense(s) and all property traceable to such property." J.A. at 40, *Kaley*, *supra* (No. 12-464); see *id.* at 44-47, 67-68; *United States* v. *Kaley*, 2007 WL 1831151, at *1-*2 (S.D. Fla. 2007). When assets sought to be frozen pretrial are claimed to be forfeitable on a proceeds or involved-in basis alone, then traceability or other direct relation to the crime is indeed a "requirement[]" that must be met when the defendant shows a need for funds to hire counsel. *Kaley*, 134 S. Ct. at 1095; see *id.* at 1099 n.9; see also *United States* v. *Farmer*, 274 F.3d 800, 801-802, 804 (4th Cir. 2001) (collecting cases).

But traceability is *not* a forfeiture requirement for substitute assets, and the government's statement in *Kaley* did not address the distinct situation in which dissipation of criminal proceeds has been established and a pretrial order restraining substitute assets has been sought. No reason existed for the government to do so, because no substitute-assets restraint was before the Court in that case—consistent with the fact that six out of seven circuits to have considered the issue have ruled that Section 853(e)'s authorization for pretrial restraint of assets as part of a criminal case does not encompass substitute assets. See Cassella § 17-14, at 638-639 & nn.123-124 (noting that Section 853(e) refers to restraint of property "described in

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another way—"; answer was not completed when the Court asked the next question).

subsection (a)" and substitute assets are forfeitable only under subsection (p)).

The situation in this case differs. As the district court correctly recognized, because "property of equivalent value" is alleged to be forfeitable because it stands in for "tainted" property that has been dissipated, and because Section 1345 authorizes pretrial restraint of substitute assets, an inquiry into whether the property to be restrained is itself "tainted" serves no purpose. See J.A. 159 ("substitute properties are just as good as tainted properties"). Instead, under *Monsanto*, the only question for a district court in deciding whether the property may be frozen is whether probable cause exists to believe that it is "forfeitable." 491 U.S. at 615.

ii. Petitioner also contends (*e.g.*, Br. 27-28) that allowing a defendant to pay a member of the private bar is necessary to maintain "the public's confidence in the justice system" and the defendant's own "capacity to trust" her lawyer. But even if petitioner's speculations about how various actors bestow trust and confidence were accurate, the considerations she identifies do not distinguish this case from *Monsanto*. By approving a pretrial freeze of directly forfeitable assets, that decision barred a class of defendants from accessing funds needed to pay for a lawyer of choice—and the Court concluded that such a bar is appropriate upon an adequate showing that the property is forfeitable. 491 U.S. at 615-616.

In any event, petitioner's speculations are unsupported. To the extent that petitioner suggests (*e.g.*, Br. 28-29) that a privately retained criminal lawyer always provides more effective representation than a federal defender or a private lawyer appointed from a

Criminal Justice Act (CJA) panel (see 18 U.S.C. 3006A), the suggestion is unwarranted. See, *e.g.*, Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 Stan. L. Rev. 317, 319, 325-326 & nn.30-31 (2011) (2008 survey of federal judges, who ranked federal public defenders the best of all types of civil and criminal attorneys who appeared before them and considered CJA lawyers and privately retained counsel to provide representation of essentially equal quality); Caroline Wolf Harlow, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* 1 (Nov. 2000) (explaining that federal defendants "with publicly financed or private attorneys had the same conviction rates" (including by plea) and about the same average sentences); see also *Kaley*, 134 S. Ct. at 1102 n.13. And to the extent that petitioner suggests that appointed counsel is unworthy of or unlikely to earn a defendant's respect (Br. 26-28), the suggestion is unjustified. Federal defenders and other appointed counsel vigorously contest the government's positions, and they build client relationships, just as private attorneys do, through their advice and advocacy. Petitioner cites no evidence that clients doubt their "allegiance" on the ground that they are somehow "'public' lawyer[s]." Br. 27.

5. If Congress believed that a defendant like petitioner should always have access to some or all of the property in her hands to pay for an attorney of her choice, it could change the law. "Congress could disapprove of *Monsanto*," *Kaley*, 134 S. Ct. at 1105, or

alter Section 1345 to exclude restraint of "property of equivalent value" under some or all circumstances.[15]

But, as in *Kaley*, the Constitution "does not command those results." 134 S. Ct. at 1105. Congress has authorized pretrial restraint of substitute assets under Section 1345 in cases involving banking law or federal health-care offenses, and the district court in this case therefore refused to release hundreds of thousands of dollars from a restraining order that—because of petitioner's extensive dissipation of assets—captures only a small percentage of the proceeds from the massive fraud alleged in the indictment. The Sixth Amendment does not mandate a different outcome.

C. The Hearing Held In This Case Did Not Violate Petitioner's Procedural Due Process Rights

Petitioner claims (Br. 42-55) that even if the restraint of property of equivalent value is sometimes permissible, it was not permissible here. She asserts that the standard of proof to which the government was held and the use of hearsay at the evidentiary hearing did not comport with the demands of proce-

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[15] While Congress was considering civil forfeiture reform in the late 1990s, the Department of Justice proposed alterations to criminal forfeiture procedures, including a proposed amendment to Section 853(e) that would have expressly permitted pretrial restraint of substitute assets and permitted courts to exempt such assets from restraint if needed to pay attorneys' fees (and some other expenses). See *Civil Asset Forfeiture Reform Act: Hearing Before the House Comm. on the Judiciary*, 104th Cong., 2d. Sess. 166 (1996); see also *id.* at 91 (Department's explanation that "substitute assets" are "untainted assets which may be exempted from forfeiture for certain limited purposes"). That proposal was not enacted.

dural due process. That challenge is not properly before this Court, because it is not fairly included in the scope of the question presented in the petition for certiorari. In any event, the challenge lacks merit. Existing precedent makes clear that the probable-cause standard governs and that hearsay is permissible at a Section 1345 hearing, and petitioner supplies no reason for this Court to depart from that precedent.

1. The procedural due process arguments now raised by petitioner are not "fairly included" in the question presented in the petition. Sup. Ct. R. 14.1(a). That question is "[w]hether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments." Pet. i-ii. Petitioner thus asked this Court to decide only whether such a restraint necessarily violates the Constitution, whatever the procedures employed in imposing it. Determining whether the district court's procedures were adequate is "perhaps complementary to the [question] petitioner[] presented," but raises a separate issue that "would not assist in resolving" that question. *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992) (emphasis omitted); see, *e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996).

It is true that the question presented mentions the Fifth Amendment. That Amendment is relevant to the categorical question that petitioner actually posed, however. See, *e.g.*, *Monsanto*, 491 U.S. at 614. And, as demonstrated by this Court's decision in *Yee*, *supra*, the mere mention of a particular constitutional provision in the question presented does not sweep

any argument arising under that provision within the ambit of the question. See 503 U.S. at 537 (explaining that reference in question presented to takings "under the fifth and fourteenth amendments" did not encompass issue of whether regulatory taking occurred because the question and petition focused on distinct issue of physical taking). Here, because the petition failed to raise petitioner's procedural arguments, the question presented cannot be "[f]airly construed" to include them. *Ibid.*[16]

By omitting her procedural due process challenge from the petition, petitioner deprived the government of "any opportunity * * * to argue that such [a] question[]" is not "worthy of review." *Yee*, 503 U.S. at 536. Had that opportunity been offered, the government could have noted the absence of any disagreement among the courts of appeals and could have explained that the choice between a probable-cause standard and a preponderance-of-the-evidence standard makes no difference to the outcome of this case (because the district court found that either standard had been satisfied, see Pet. App. 15 & n.3).[17]

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[16] In her petition-stage reply brief, petitioner asserted (at 13 n.4) that she "has challenged, in the alternative," the procedures employed in this case. But she cited only pages of the petition's fact statement, not the reasons for granting the petition. And in any event, discussion in the text of a petition of an issue not subsumed in the question presented does not bring an issue before the Court. See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010).

[17] The district court found that under a preponderance-of-the-evidence standard the government had established that petitioner obtained $40.5 million from fraud and that under a probable-cause standard the government had established that petitioner obtained $45 million. The gap between those numbers makes no practical

2. a. *Monsanto* held that, under the Due Process Clause, "assets in a defendant's possession may be restrained" pretrial under Section 853(e) "based on a finding of probable cause to believe that the assets are forfeitable." 491 U.S. at 614-615. The selection of the probable-cause standard formed a significant part of the Court's analysis and served as the foundation for the Court's conclusion that the restraint before it was constitutional. See *id.* at 615-616.

That holding was reaffirmed and applied in *Kaley*. Use of the probable-cause standard to restrain assets pretrial—which *Kaley* repeatedly described as *Monsanto*'s "holding"—was, in fact, the central premise of *Kaley*, undergirding the conclusion that the grand jury's probable-cause determination as to the commission of a crime was "conclusive" in the asset-restraint context. 134 S. Ct. at 1095, 1099; see *id.* at 1094, 1096-1101. Further, when the *Kaley* Court applied the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), to consider if a broader hearing was warranted, it did not balk at incorporating *Monsanto*'s rule "that a seizure of * * * property is erroneous only if unsupported by probable cause." *Kaley*, 134 S. Ct. at 1001; see *id.* at 1105 (stating that Fifth and Sixth Amendments do not require pretrial seizures of property to be held "to a higher standard than probable cause"); see also *Monsanto*, 491 U.S. at 614, 616 (relying on a "weighing of" the defendant's and the government's "interests").

Because the showing made by the government under Section 1345 is equivalent to a showing that the restrained assets are likely forfeitable, see pp. 30-31,

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difference, because everyone agrees that the total value of petitioner's assets is far less. See p. 12, *supra*.

supra, *Monsanto* and *Kaley* are controlling on the probable-cause question here as well. It would be odd if the Fifth Amendment mandated one standard of proof with respect to directly forfeitable assets and a different standard in Section 1345 cases involving "property of equivalent value," since the "weighing" of interests in each of those contexts, *Monsanto*, 491 U.S. at 616, is so similar. The interests in restraining the property here include not only the government's interest in ensuring that assets are preserved for forfeiture, see *Kaley*, 134 S. Ct. at 1101-1102; U.S. Br. at 40-47, *Kaley*, *supra* (No. 12-464), but also the victim's interest in ensuring that the defendant can satisfy a restitution order. And the defendant's interest is no different than in *Monsanto* or *Kaley*. When a defendant needs assets claimed to be forfeitable to pay his counsel of choice, the strength of his interest in selecting that counsel hardly depends on the particular statutory basis on which the government makes its claim to the assets. After all, a defendant who possesses only property alleged to be directly forfeitable is affected just as strongly by a freeze order as a defendant whose sole property is alleged to be forfeitable as substitute assets. Because the balance of interests does not tip more favorably to the defendant here than in *Monsanto* or *Kaley*, and because the risk of error is no higher here than when dealing with directly forfeitable assets in the Section 853(e) context, the Fifth Amendment does not require a more stringent standard of proof than existing precedent affords. See *Mathews*, 424 U.S. at 343 (noting importance of considering "fairness and reliability of the existing * * * procedures"); Pet. Br. 42-46 (in-

voking *Mathews* test but failing to analyze any of its components).

Examining each of the prerequisites for a Section 1345 restraining order demonstrates the fairness of applying the probable-cause standard—although in cases in which "an indictment has been returned against" the Section 1345 defendant, 18 U.S.C. 1345(b), the force of the indictment in carrying the government's burden in the civil case may vary depending on the issue. As to the question of whether a relevant crime has been committed, all of the considerations discussed in *Monsanto* and *Kaley* are applicable. Reaching a conclusion about the likelihood of guilt under a probable-cause standard is the central function of the grand jury, and the grand jury's determination is sufficiently reliable both to restrain the defendant (as petitioner here has been restrained) and to set a criminal trial in motion. Probable cause is therefore also enough to restrain property that will not belong to the defendant if the government prevails in a criminal case. And where an indictment exists, *Mathews* balancing does not require the court to permit a Section 1345 defendant to second-guess the grand jury's probable-cause assessment—an enterprise that would create significant "dissonance" with the pending criminal case. *Kaley*, 134 S. Ct. 1098-1099, 1101-1105; see *Monsanto*, 491 U.S. at 614-616.

Making a finding about how much money or property the defendant obtained from the criminal activity is part and parcel of assessing whether the defendant has committed a crime, what the nature of the crime was, and how the crime was carried out. A probable-cause standard is therefore just as appropriate on the question of amount as on the question of whether a

crime has occurred. Indictments do not always allege a specific amount of criminal gain; that amount is rarely an *element* of a federal crime, and it is therefore a matter outside "the grand jury's core competence and traditional function." *Kaley*, 134 S. Ct. at 1099 n.9. But where, as here, the grand jury does make such a finding, it has made a "reliable" determination, *id.* at 1098, in the course of examining the defendant's wrongdoing. The merits of that probable-cause determination need not be revisited by the court.

As for dissipation of property obtained from or traceable to a criminal offense, the grand jury will likely have nothing to say on that topic, and it is very far removed from the grand jury's central functions. Accordingly, it is open to the parties to litigate dissipation at a Section 1345 hearing. But the government should not be required to show more than probable cause on that point. At least where restraint of "property of equivalent value" is at issue, 18 U.S.C. 1345(a)(2)(B)(i), dissipation is an integral part of the showing that in the event of a conviction, "the assets" will be "forfeitable." *Monsanto*, 491 U.S. at 614-615. A unitary standard of proof is also most administrable, and petitioner does not argue that the standard should differ among Section 1345's prerequisites.

In any event, applying the usual civil standard for preliminary injunctions in assessing whether the government has adequately established dissipation is unlikely to affect the outcome. That standard would require the government to show a substantial likelihood of proving dissipation by preponderance of the evidence—a test that is quite similar to the probable-cause standard, because it requires less than the pre-

ponderance showing needed ultimately to prevail. See *United States* v. *Fang*, 937 F. Supp. 1186, 1197 (D. Md. 1996); see also *United States* v. *Gordon*, 710 F.3d 1124, 1165-1166 (10th Cir.) (forfeiture under Section 853(p) requires showing by the preponderance of the evidence), cert. denied, 134 S. Ct. 617 (2013). Further, the government's proof of dissipation in a Section 1345 case usually consists (as here) of direct evidence of financial transactions—withdrawals, transfers of property, and the like—involving assets linked to the crime by an accounting analysis. Such proof is sufficient to show *greater* than probable cause to believe that a defendant is "alienating or disposing of property * * * obtained as a result of" a relevant offense. 18 U.S.C. 1345(a)(2).[18]

b. Other than insisting that *Monsanto*'s holding was dicta, petitioner advances (Br. 46-55) only one argument that a probable-cause standard is not sufficiently demanding: that any government interference with a criminal defendant's choice to hire a particular lawyer amounts to a prior restraint on the defendant's speech in violation of the First Amendment. Although a similar argument was made by respondent in *Monsanto*, see Resp. Br. at 34 n.16 (No. 88-454), and by an amicus in *Kaley*, see NACDL Amicus Br. at 10-20

[18] Petitioner intimates (Br. 44, 54) that a beyond-a-reasonable-doubt standard of proof might be appropriate, but no court has ever accepted that extreme suggestion. See Pet. App. 11; see also *California ex rel. Cooper* v. *Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (per curiam) (Court "has never required the 'beyond a reasonable doubt' standard to be applied in a civil case"); Cassella § 15-3, at 570. Among other things, it would force the government to try its entire criminal case prematurely in a civil preliminary-injunction hearing. See *Kaley*, 134 S. Ct. at 1098-1102.

(No. 12-464), the Court did not accept it in either case, and it is fatally flawed in multiple respects.

First, as the Court explained in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985), which rejected constitutional challenges to a $10 cap on the fee payable to an attorney representing a veteran seeking benefits, "numerous conceptual difficulties" stand in the way of establishing the highly "questionable proposition" that individual litigants have a First Amendment right to "pay" a lawyer to act as "their surrogate speaker." *Id.* at 334-335. A particular defendant's desire to hire particular counsel may be dashed by any number of government actions, including a court's admission or conflict-of-interest rules, a judge's decisions on scheduling, see pp. 26-27, *supra*, or the very pretrial freeze of directly forfeitable assets that this Court approved in *Monsanto*. If petitioner were correct (Br. 50) that any "[g]overnment action that has the effect of removing advocates and their arguments from the courtroom constitutes an unconstitutional prior restraint on speech," then no such restrictions would be permissible. It is thus unsurprising that petitioner cannot point to a single case holding that a defendant has the First Amendment right she claims, let alone that a practical bar to obtaining representation brings into play the "special rules" governing a prior restraint. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 65 (1989); cf. *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1074 (1991).[19]

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[19] All of the cases petitioner cites are readily distinguishable. For instance, *Gentile* is about a lawyer's own free-speech rights in giving a press conference. See 501 U.S. at 1033-1034 (opinion of Kennedy, J.). *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 549 (2001), is about restrictions on which arguments a lawyer obtaining

Indeed, the Court that decided *Fort Wayne Books*, on which petitioner's argument heavily relies (*e.g.*, Br. 46-48), plainly did not think that the First Amendment prior-restraint concepts at issue in that case carried over to cases involving a pretrial freeze of assets that would otherwise be used to pay counsel. That is because *Fort Wayne Books* was decided just four months before *Monsanto*—and the *Monsanto* Court, with *Fort Wayne Books* firmly in mind, held that probable cause was the applicable standard when deciding whether to enter such an asset-freezing order. Compare 489 U.S. 46 with 491 U.S. 600; see *Caplin & Drysdale*, 491 U.S. at 628 ("If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak?").

Second, the First Amendment adds nothing to a due process analysis in a dispute over a litigation procedure like the standard of proof. See *Walters*, 473 U.S. at 335 (noting that respondents' "First Amendment arguments" were "inseparable from their due process claims" and had "no independent significance"); see also *Caplin & Drysdale*, 491 U.S. at 628 (explaining that no "distinction between, or hierarchy among, constitutional rights" exists in assessing the constitutionality of an asset-freeze order); cf. *Gentile*, 501 U.S. at 1071-1074. Indeed, petitioner herself relies on the due process principle of a "right to be heard." *Powell*, 287 U.S. at 68-69, cited in Br. 49. If a probable-cause standard is sufficient to guarantee due

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certain funds can make. And *Citizens United* v. *FEC*, 558 U.S. 310 (2010), and *McConnell* v. *FEC*, 540 U.S. 93 (2003), are about political speech by citizens in elections. Cf. *Walters*, 473 U.S. at 335 n.13 (distinguishing "the constitutional analysis of a regulation that restricts core political speech").

process to a party facing a pretrial asset freeze, then it is also sufficient to protect that party's interest in "mak[ing] a meaningful presentation" of her views in court. *Walters*, 473 U.S. at 335; see Ronald D. Rotunda & John E. Nowak, 3 *Treatise on Constitutional Law* § 17.10 (2012).

Last, even if the First Amendment were somehow relevant here, a defendant in petitioner's position has not experienced any restriction on her free-speech rights. Although petitioner characterizes (Br. 48) an action under Section 1345 as an attempt to gain "[t]he power to choose an adversary's lawyer," application of a law serving legitimate interests that incidentally restricts a defendant's access to funds to hire counsel does not prevent anyone—including counsel of choice, who may still elect to represent the defendant—from saying anything. See pp. 27-28, 31, *supra* (citing *Caplin & Drysdale*, 491 U.S. at 624-625, 632 n.10). And every defendant, no matter how impecunious, will ultimately have the right to "articulate" her "defenses" (Br. 49) through an effective representative. See *Kaley*, 134 S. Ct. at 1102 n.13.

c. In any event, the standard of proof makes no difference to the outcome in this case, and the Court need not reach the issue. As for dissipation of Medicare proceeds, the government's evidence was direct and overwhelming, and petitioner made no effort to contest it. As for commission of a crime and the amount obtained thereby, the only way in which the district court thought the standard of proof mattered was in determining amount—and since the lower amount the court identified far exceeds petitioner's assets, any difference in standard has no practical

effect on the operation of the restraining order. See p. 44, *supra*.

3. Finally, petitioner briefly argues (Br. 54-55) that as a matter of due process a court "cannot enjoin untainted assets needed to retain criminal counsel based solely on hearsay * * * from unsworn confidential informants." The district court's decision to accept hearsay evidence at the hearing in this case was unremarkable, however, and does not violate petitioner's constitutional rights.

Petitioner points to the Confrontation Clause (Br. 54-55 (citing, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004))), but that Clause has no application in a Section 1345 case, which Congress has expressly designated a "civil action" (albeit one governed by criminal discovery rules when an indictment has issued). 18 U.S.C. 1345(a); see Amend. VI (setting forth rights available in "criminal prosecutions"). The decision whether to award preliminary injunctive relief in a civil case is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, it is well established that district courts may rely on affidavits and hearsay evidence at the preliminary-injunction stage. See *Mullins* v. *City of N.Y.*, 626 F.3d 47, 51-52 (2d Cir. 2010) (collecting cases). A district court judge receiving such evidence will understand its nature and can give it whatever weight it warrants. See *ibid.*[20]

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[20] Even in a criminal case, preliminary proceedings do not implicate the right to confrontation. See, *e.g.*, *United States* v. *Raddatz*, 447 U.S. 667, 679 (1980) (in suppression hearings due process does not require avoidance of hearsay or disclosure of identity of confidential informants); Fed. R. Evid. 1101 (Rules of Evidence do not

Nothing about an injunction freezing a defendant's assets mandates a different procedure, regardless of whether the defendant asserts that those assets are necessary to pay counsel. Petitioner appears to concede (Br. 43-44, 54) that when a court is considering a pretrial restraint of directly forfeitable assets in a criminal case under Section 853(e), "[t]he court may receive and consider[] at a hearing * * * evidence and information that would be inadmissible under the Federal Rules of Evidence." 21 U.S.C. 853(e)(3). Petitioner provides no reason why it would be constitutional to consider hearsay evidence at a Section 853(e) hearing involving directly forfeitable assets but unconstitutional to consider such evidence in a Section 1345 hearing involving substitute assets, even if the defendant in each case will be unable to pay counsel of choice without the assets in question.

In this case, the district court's acceptance of hearsay at petitioner's hearing did not result in any unfairness. Acting before this Court's decision in *Kaley*, the district court held a more extensive hearing than necessary. Petitioner was aware of the identity of all but one of the cooperators, see p. 10, *supra*, and she used the hearing to attack their credibility, extracting admissions from Agent Warren that they were cooperating to get a better deal for themselves and that some of them did not initially implicate her, *e.g.*, J.A. 108-112.[21] And the court's factual findings were not

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apply in grand jury proceedings or "miscellaneous proceedings," including proceedings on extradition, search warrants, detention, sentencing, or revocation of supervised release).

[21] Indeed, because petitioner independently deduced the identity of almost all of the cooperators, nothing prevented her from seeking to call them to the stand (so long as their names did not appear

"based solely" on information originating with "unsworn confidential informants" (Br. 54); rather, the court had before it significant other evidence (including financial records and Agent Warren's testimony on matters as to which he had personal knowledge) that corroborated the cooperators' accounts and independently established petitioner's dissipation of assets. See pp. 6-10, *supra*. The Due Process Clause requires no more.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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in the public record). She chose not to do so—presumably reflecting a strategic judgment that their testimony would not prove helpful to her cause. Nor did she exercise her right to put on other witnesses.

APPENDIX

1. 18 U.S.C. 1345 provides:

Injunctions against fraud

(a)(1) If a person is—

(A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title;

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

(C) committing or about to commit a Federal health care offense;

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing 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.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

2. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. 982 provides in pertinent part:

Criminal forfeiture

* * * * *

(a)(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

* * * * *

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary

who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

4. 18 U.S.C. 1349 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. 21 U.S.C. 853 provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT

(A) IN GENERAL—Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY—Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court

shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any

person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under

this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(*l*) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section

without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered

forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(*o*) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

6. 18 U.S.C. 3663A provides:

Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and

treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

7. 42 U.S.C. 1320a-7b provides in pertinent part:

Criminal penalties for acts involving Federal health care programs

* * * * *

(b) Illegal remunerations

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to—

(A) a discount or other reduction in price obtained by a provider of services or other entity under a Federal health care program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under a Federal health care program;

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

(C) any amount paid by a vendor of goods or services to a person authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under a Federal health care program if—

(i) the person has a written contract, with each such individual or entity, which specifies the amount to be paid the person, which amount may be a fixed amount or a fixed percentage of the value of the purchases made by each such individual or entity under the contract, and

(ii) in the case of an entity that is a provider of services (as defined in section 1395x(u) of this title), the person discloses (in such form and manner as the Secretary requires) to the entity and, upon request, to the Secretary the amount received from each such vendor with respect to purchases made by or on behalf of the entity;

(D) a waiver of any coinsurance under part B of subchapter XVIII of this chapter by a Federally qualified health care center with respect to an individual who qualifies for subsidized services under a provision of the Public Health Service Act [42 U.S.C. 201 et seq.];

(E) any payment practice specified by the Secretary in regulations promulgated pursuant to section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 or in regulations under section 1395w-104(e)(6)[1] of this title;

(F) any remuneration between an organization and an individual or entity providing items or services, or a combination thereof, pursuant to a written agree-

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[1] See References in Text note below.

ment between the organization and the individual or entity if the organization is an eligible organization under section 1395mm of this title or if the written agreement, through a risk-sharing arrangement, places the individual or entity at substantial financial risk for the cost or utilization of the items or services, or a combination thereof, which the individual or entity is obligated to provide;

(G) the waiver or reduction by pharmacies (including pharmacies of the Indian Health Service, Indian tribes, tribal organizations, and urban Indian organizations) of any costsharing imposed under part D of subchapter XVIII of this chapter, if the conditions described in clauses (i) through (iii) of section 1320a-7a(i)(6)(A) of this title are met with respect to the waiver or reduction (except that, in the case of such a waiver or reduction on behalf of a subsidy eligible individual (as defined in section 1395w-114(a)(3) of this title), section 1320a-7a(i)(6)(A) of this title shall be applied without regard to clauses (ii) and (iii) of that section);

(H) any remuneration between a federally qualified health center (or an entity controlled by such a health center) and an MA organization pursuant to a written agreement described in section 1395w-23(a)(4) of this title;

(I) any remuneration between a health center entity described under clause (i) or (ii) of section 1396d(*l*)(2)(B) of this title and any individual or entity providing goods, items, services, donations, loans, or a

combination thereof, to such health center entity pursuant to a contract, lease, grant, loan, or other agreement, if such agreement contributes to the ability of the health center entity to maintain or increase the availability, or enhance the quality, of services provided to a medically underserved population served by the health center entity; and

(J) a discount in the price of an applicable drug (as defined in paragraph (2) of section 1395w-114a(g) of this title) of a manufacturer that is furnished to an applicable beneficiary (as defined in paragraph (1) of such section) under the Medicare coverage gap discount program under section 1395w-114a of this title.

* * * * *

(f) "Federal health care program" defined

For purposes of this section, the term "Federal health care program" means—

(1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5); or

(2) any State health care program, as defined in section 1320a-7(h) of this title.

(g) Liability under subchapter III of chapter 37 of title 31

In addition to the penalties provided for in this section or section 1320a-7a of this title, a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of subchapter III of chapter 37 of title 31.

(h) Actual knowledge or specific intent not required

With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.