No. 14-419

IN THE
Supreme Court of the United States

SILA LUIS, *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of United States Justice Foundation, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., Lincoln Institute, Abraham Lincoln Foundation, Institute on the Constitution, and Conservative Legal Defense and Education Fund in Support of Petitioner

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org, Gun Owners of America, Inc., and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, and related issues.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Many of these organizations filed an *amicus curiae* brief in Kaley v. United States, 571 U.S. ___ (2014),[2] and at the petition stage in the present case.[3]

SUMMARY OF ARGUMENT

A myriad of federal laws authorize the forfeiture of assets, and the district court was careless in concluding that 18 U.S.C. § 1345 authorized the seizure of Petitioner's untainted assets pending resolution of the case. Such a reading of the statute was not compelled, but rather should have been rejected to avoid jeopardizing an important constitutional right.

The court of appeals failed to do its duty to review Petitioner's constitutional claims *de novo*, claiming without analysis that four prior decisions, including three decisions of this Court, "foreclosed" Petitioner's appeal, when this Court's decisions could never fairly be read to have resolved the issue presented in this appeal.

Asset forfeiture law was designed to permit Government seizure only of property over which the Government has a superior property interest. In disregarding this principle, the courts below abrogated Petitioner's protected common law property rights,

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[2] http://www.lawandfreedom.com/site/constitutional/KaleyvUS_amicus.pdf.

[3] http://www.lawandfreedom.com/site/constitutional/Luis%20USJF%20Amicus%20Brief.pdf.

including the right to expend her property to retain counsel of her choice.

In violation of the Fifth Amendment, the district court improperly seized assets of the Petitioner over which the Government has no valid, current property interest, denying her the right to retain counsel of choice to fight for her rights in violation of the Sixth Amendment.

As Congress and the courts have cooperated in the vast expansion of federal asset forfeiture powers, federal prosecutors have been given tools that no one in Government should have — powers which put the American people in fear not of punishment for crime, but in fear of the exercise of arbitrary power by their own Government.

ARGUMENT

In an apparent effort to employ 18 U.S.C. § 1345 to maximal advantage against the Petitioner below, the Government has adopted a series of extreme legal positions, oblivious to rules of statutory construction, and even to the duty to be candid with the tribunal as to the substance of prior holdings. The Government's positions also would compromise the right to property and right to counsel, as protected by the Fifth and Sixth Amendments.

Audaciously, the Government adopts the following hard-line positions herein:

(i) the statutory language authorizing use of temporary restraining orders of limited duration to seize, in some cases, untainted "property of equivalent value" in 18 U.S.C. § 1345(B)(1) should be judicially imported into a different section of the statute where it does not appear, to authorize injunctions seizing untainted assets that continue until verdict (*see* section I, *infra*);

(ii) the Eleventh Circuit properly found Petitioner's effort to use untainted assets to retain counsel was barred by three decisions of this Court, none of which involved either the statute relied on in this case, or the issue of untainted assets (*see* section II, *infra*);

(iii) the power of asset forfeiture in criminal cases is a well-established power that should be utilized without the need to understand its limits, as revealed by examination of its history (*see* section III, *infra*); and

(iv) the Sixth Amendment does not limit the Government's ability to prevent a criminal defendant from using her own resources to engage counsel of her choice, even though the Government is seeking only to protect a speculative future claim to her property (*see* section IV, *infra*).

Additionally, in matters not addressed herein, the Government asserts that the hearing provided for in section 1345(b) need not protect the defendant's right to cross-examine adverse witnesses, and the court may seize assets over which the Government has no superior property interest based exclusively on hearsay and a finding of mere "probable cause." *See* Brief for the Petitioner ("Pet. Br.") at 43-45.

Demonstrating no reluctance to assert highly aggressive statutory interpretations, as well as positions that impair Petitioner's rights protected by the U.S. Constitution at each turn, the Government seeks every possible advantage over Petitioner. The Government claims that its only objective is to protect the Government's financial interests, but those interests are at best speculative future interests. The only certain effect of the Government's strategy is to facilitate the prosecutor's quest for conviction through the crippling of Petitioner in her ability to defend herself from federal criminal charges.[4]

The implications of these positions in the brave new world of asset seizure and forfeiture, urged by the Government, should send shivers down the backs of the Justices on this Court, who are tasked with guarding the rights of the people against this Government's headlong pursuit of powers typifying those of a totalitarian police state.

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[4] There once was a day when federal prosecutors were charged to elevate justice over winning. "Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done." Justice Robert Jackson, 24 J. AM. JUD. SOC'Y 18 (1940), 31 J. CRIM. L. 3 (1940) (address at Conference of United States Attorneys, Washington, D.C., April 1, 1940).

I. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1345 IS EXTREME AND UNSUPPORTABLE.

The Government steadfastly refuses to temper its creative reading of the statute that it employed against Petitioner so as to avoid violation of Petitioner's constitutional rights. The statute in question, 18 U.S.C. § 1345, is commonly referred to as the federal Fraud Injunction Statute. Enacted as part of the Comprehensive Crime Control Act of 1984, 98 Stat. 1837, 2152, this statute was amended in 1988 to apply to fraudulent claims against the United States and conspiracies to defraud the United States. The statute was amended again in 1990, "in the wake of the multi-billion dollar savings and loan debacle" to apply to "banking-law violations,"[5] and was otherwise modified into its present form.[6] Section 1345 is just one of scores of federal statutes which govern civil and criminal asset seizures and forfeitures (hereinafter termed "asset forfeiture statutes").[7]

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[5] *See generally* United States v. Brown, 988 F.2d 658, 660-61 (6th Cir. 1993).

[6] The statute was further amended in 1994 and 1996 in other ways not relevant here (except to add "Federal health care fraud" to the list of offenses).

[7] *See generally* S. Cassella, "Overview of Asset Forfeiture Law in the United States," U.S. Attorneys' Bulletin (Nov. 2007); the U.S. Department of Justice's Asset Forfeiture & Money Laundering Statutes compendium runs 349 pages. http://www.justice.gov/criminal/afmls/pubs/pdf/statutes2013.pdf.

Varying significantly, each asset seizure forfeiture statute provides for the forfeiture of different assets, with different procedural protections, and each such statute must be analyzed carefully and individually. Cases interpreting one asset forfeiture statute cannot be imported wholesale as precedent to interpret and determine the operation of different provisions in a different asset forfeiture statute.

Turning to the statute in question, under section 1345(a)(1), the Attorney General is granted authority to "commence a civil action" seeking to enjoin disposition of property associated with a violation of law by a person who is "committing ... a Federal health care offense." Under section 1345(a)(2), should that person be found to be "alienating or disposing of property, or intend[ing] to alienate or dispose of **property, obtained as a result of** ... a Federal health care **offense**," the Attorney General may:

> "commence a civil action ...
> (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**.... [Emphasis added.]

Lastly, under section 1345(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, [i] enter such a restraining order or prohibition, or [ii] 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. [Emphasis added.]

Unlike other asset forfeiture statutes which authorize the Government to enjoin the dissipation only of so-called "tainted" assets which are related to the allegedly criminal behavior (*e.g.*, the fruits of the crime), section 1345 authorizes a "restraining order" against both tainted property and "property of equivalent value." In the first instance, therefore, this case presents a matter of statutory construction as to the scope of the Government's statutory power to seek a restraining order over "property of equivalent value."

Petitioner takes the eminently reasonable position (Pet. Br. at 33-41) that the statute distinguishes between:

> (i) a narrow class of property "obtained as a result of a ... Federal health care offense or property which is traceable to such violation" which can be the subject of an injunction that would remain in place pending the outcome of the criminal case (section 1345(a)(2)(A)); and
>
> (ii) a broader class of property — including "property of equivalent value" — which can be the subject only of a temporary "restraining order" (section 1345(a)(2)(B)).

This second, broader class of property may only be restrained until the hearing provided for in section 1345(b) is held, "at which time the Government must be prepared to identify, through proof, the tainted assets that will be the subject of the injunction." Pet. Br. at 35.

Petitioner urges this Court to follow "the canon of constitutional avoidance" by "considering the statutory basis for reversal to avoid the serious constitutional questions attendant to the restraint of untainted assets." Pet. Br. at 33-34. Justice Scalia's treatise on interpretation of texts distinguishes between two "rules of constitutional avoidance." The first is a rule of interpretation — that "A statute should be interpreted in a way that avoids placing its constitutionality in doubt." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (Thomas/West: 2012) at 251. The second is that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction.... the Court will decide only the latter." *Id*. Here, both rules come into play. As Justice Scalia described it: "[i]n the process of considering the statute first, the court may find that one of its interpretations must be rejected as constitutionally doubtful." *Id*.

Moreover, there are additional rules of construction applicable here. In identifying the property that may be seized, 18 U.S.C. § 1345(a)(2)(A) and (B) track F.R.Civ.P. Rule 65 in distinguishing between an injunction and a temporary restraining order:

- Subsection 1345(a)(2)(A) allows for injunction against defendant's transfer of tainted property; and
- Subsection 1345(a)(2)(B) authorizes a temporary restraining order over both tainted and untainted property to prevent a defendant, who is in danger of indictment, from disposing of tainted assets currently in his possession until the court can determine which assets are tainted and which are not.

Subsection (B) cannot be read to supersede section (A), as the Government urges. If subsection (B) is read independently of (A); then a court would be authorized to issue a permanent injunction extending not just to tainted assets, as provided in § 1345, but even to untainted assets, beyond the scope of tainted asset protection provided by § 1345(a)(2)(A). In other words, 18 U.S.C. § 1345(a)(2)(B) cannot be read to provide for a permanent injunction that extends to "property of equivalent value," because to do so would subtract from 18 U.S.C. § 1345(a)(2)(A) the limiting phrase "obtained as a result of a ... Federal health care offense or property which is traceable to such violation." Such a reading of the statute would violate the "surplusage canon" that, "[i]f possible, "every word and every provision is to be given effect." Reading Law at 174. After all, what would be the point of an initial finding that an asset was not traceable and, thus not subject to the court's injunctive power under (A), if the court could turn around and invoke its restraining power under (B) to enjoin the property of equal value?

Moreover, to read the grant of authority to issue a restraining order — other than one that is temporary and limited in purpose, as Petitioner has argued — would not comport with the § 1345 text as a whole, as required by the whole-text canon. Reading Law at 167.

18 U.S.C. § 1345(a)(1)(C) serves as a prophylactic measure to be employed by a Government prosecutor investigating an alleged ongoing conspiracy to defraud the United States. As applied here, the statute authorizes the Government to institute a "civil action" to enjoin a person **if** that person is currently "alienating or disposing of property, or intend[ing] to alienate or dispose of property, **obtained as a result of** ... a federal health care offense which is **traceable** to such violation."

The statute, then, is designed to keep the status quo by the issuance of an injunction to stop a suspect from further alienating or disposing of traceable property that he currently has in his possession. Its purpose is not to sweep up tainted property that the person has previously alienated or disposed of by setting aside "property of equivalent value" as a hedge against a future shortfall should the Government fail to prove a loss exceeding the tainted property protected by a § 1345(a)(2)(A) injunction. In short, § 1345 was not designed, as a whole, by Congress to destroy the distinction between tainted and untainted assets so as to eliminate altogether the risk that a

convicted defendant may have insufficient assets to satisfy a future judgment in favor of the Government.[8]

II. THE COURT OF APPEALS BASED ITS RULING ON THREE DECISIONS OF THIS COURT, NONE OF WHICH ADDRESSED, MUCH LESS DECIDED, THE ISSUE PRESENTED HERE.

The Government appears to contend that there is no need to carefully analyze the statutory text, because the issue in this case has already been decided by this Court in three prior cases, cited and relied on by the Eleventh Circuit. In truth, none of those three cases addressed the issue presented here.

In opposing the petition herein, the Government revealed what it doubtless will be arguing in its merits brief — that the Eleventh Circuit was completely correct in ruling that the issue presented here has already been decided by this Court. Br. in Opposition at 9-10.[9] However, the court below was lax — if not

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[8] The legitimate scope of asset forfeiture can be seen to parallel the historic limitations on Fourth Amendment searches and seizures: "warrants that authorized seizures of items other than fruits of a crime, instrumentalities of a crime, or contraband were invalid." C. Whitebread, Criminal Procedure, § 5.04(a), 119 (Foundation Press: 1980).

[9] The court of appeals represented that it would "review questions of law, such as a statute's constitutionality and whether a preliminary injunction violates an individual's constitutional rights, *de novo*" (United States v. Luis, 564 Fed. Appx. 493, 494 (11th Cir. 2014)), but then did so in only the most superficial

careless — in its analysis, giving only cursory attention to Petitioner's claims, and no thoughtful attention whatsoever to the holdings of the precedents on which it relied, concluding simply that:

> [t]he arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, ___U.S. ___, 134 S.Ct. 1090, 1105, 188 L.Ed.2d 46 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631, 109 S. Ct. 2646, 2655, 105 L.Ed.2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 616, 109 S.Ct. 2657, 2667, 105 L.Ed.2d 512 (1989); and *United States v. DBB, Inc.*, 180 F.3d 1277, 1283-84 (11th Cir. 1999). Accordingly, we affirm the district court's order granting the government's motion for a preliminary injunction. [Pet. App. at 3.]

The Eleventh Circuit apparently never noticed that none of this Court's three decisions addressed the Government's claimed authority to seize untainted assets under 18 U.S.C. § 1345.

Kaley v. United States involved seizure of an indicted defendant's assets prior to trial under 21 U.S.C. § 853(e), which governs criminal forfeitures. Unlike here, no untainted assets were seized in Kaley. Indeed, writing for the Court, Justice Kagan described the purpose of criminal forfeitures as being "imposed

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manner.

upon conviction to confiscate assets used in or gained from certain serious crimes." Kaley at 1094. "There must be probable cause to think ... that the property at issue has the requisite connection to that crime." *Id.* at 1095. Moreover, the Court noted that, "[a]t oral argument, the Government agreed that a defendant has a constitutional right to a hearing on" whether "the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Id.* at 1095 and n.3. The Court was clear that it was focused on tainted assets, stating that "the Government sought a restraining order ... to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses ... except as to $63,000 that it found ... was not connected to the alleged offenses." *Id.* at 1095-96.

Caplin & Drysdale v. United States also involved 21 U.S.C. § 853, which "authorizes forfeiture to the Government of 'property constituting, or derived from ... proceeds ... obtained' from drug-law violations...." *Id.* at 619-20. Justice White stated that "[t]he forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Id.* at 625. Nevertheless, "[t]here is no constitutional principle that gives one person the right to give another's property to a third party [attorney]." *Id.* at 628. United States v. Monsanto, decided the same day as Caplin & Drysdale, also involved a pretrial seizure under 21 U.S.C. § 853, as well as a claim that the statute should be interpreted to allow use of seized tainted funds to retain counsel. Justice White described this statute as providing "that a person convicted of the offenses charged ... 'shall

forfeit ... any property' that was derived from the commission of these offenses." *Id.* at 607. The Court found "no exemption" from this provision "for assets which a defendant wishes to use to retain an attorney." *Id.* at 614. Like Kaley, neither case involved untainted assets.[10]

In opposing the petition for certiorari, the Government adopted a new argument to explain why it is irrelevant that all of these three prior Supreme Court decisions involved tainted assets in the context of a different statute, 21 U.S.C. § 853, and that none involved substitute assets. These central legal and factual differences from this case appear to have been deemed irrelevant because the Government now asserts that none of the Justices sitting on those three

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[10] The fourth case cited by the Eleventh Circuit was its own panel's decision, United States v. DBB, Inc., which did involve 18 U.S.C. § 1345, and an injunction which would allow the seizure of "property of equivalent value" as in the instant case. However, the court made clear that "[b]oth parties agree that subsection (a)(2)(A) authorizes injunctions to freeze property obtained through fraud or traceable to fraud and that subsection (a)(2)(B) authorizes TROs that freeze property of equivalent value." The only issue litigated was "whether subsection (a)(2)(B) ... also authorizes the court to grant injunctions" to freeze those categories of property. The defendant challenged only whether a seizure of "property of equivalent value" was permitted in an injunction, rather than a restraining order. The Government's authority to seize "property of equivalent value" in some form was conceded. The parties never briefed, and the court of appeals never decided, whether "property of equivalent value" could be seized, and thus the issue could not have been "foreclosed" to the Petitioner in the present case, as claimed by the panel below.

cases cared whether the assets in question were tainted.

The Government adopts this position even after the Government's brief opposing certiorari admits the importance of "taint" in identifying the central holding of Caplin & Drysdale, as "[t]he Court ... explain[ed] that '[a] defendant has no Sixth Amendment right to spend **another person's money**' for legal fees..." Br. Opp. at 8 (emphasis added). Then, ignoring even its own analysis of Caplin & Drysdale, the Government displays supernatural insight into the mind of the Caplin & Drysdale and Monsanto Courts when it asserts as fact that the only issue the Court found "relevant" was not "taint[]" but rather that the assets "were forfeitable by statute." *Id*. at 9-10.

Since, under the Government's distinction-crushing approach, tainted and untainted assets are to be treated the same, the Government erroneously concludes this Court's rulings concerning the absence of a right to use tainted money to pay for defense counsel are fully applicable to untainted assets as well as to tainted funds. Clearly, that view cannot be supported by any reasonable reading of this Court's decisions.

III. ASSET FORFEITURE LAWS SHOULD BE VIEWED WITH DISFAVOR AND APPLIED NARROWLY.

At present, section 1345 applies to only three types of cases: (i) a conspiracy to defraud the United States or any agency thereof, including false statements

under 18 U.S.C. § 1001); (ii) a banking law violation; and (iii) a Federal health care offense. However, if past is prologue, there is every reason to believe that Congress could continue to expand the scope of this statute. If the Government's position that it may use this statute to seize not just tainted property, but also untainted property, is adopted, one could envision a serious weakening of the private federal criminal defense trial bar. Denied the opportunity to spend their own assets to hire an attorney on the open market, defendants would be totally reliant on federal public defenders. And all parties involved in meting out justice — judges, prosecutors, and defenders — increasingly will all look to the Government for their paychecks.

In the face of such a display of raw federal prosecutorial power, it becomes important to place the asset forfeiture power into the context of the realities of the modern federal criminal justice system. Until relatively recently, asset forfeiture was never considered to be a legitimate power of the federal Government. In her Petition for Certiorari, Petitioner recited some of this relevant history of forfeiture law in America. In response, the Government bristled and tried to slam the door shut on a historical perspective, asserting that "*in personam* forfeiture — the type of forfeiture at issue in both *Caplin & Drysdale* and *Monsanto* — is a **well-recognized penalty in criminal cases**." Br. Opp. at 11 (emphasis added). Instead, as the Government now attempts to expand its asset seizure and forfeiture powers, this Court should consider the present case in the context of the historically disfavored power of asset forfeiture.

A. Asset Forfeiture Was Disfavored by the Founders.

The doctrine of asset forfeiture can be traced to the reign of merciless Oriental despots who did not generally consider themselves to be constrained by any law.[11] Asset forfeiture has some predicate in early English common and statutory law, as Justice William J. Brennan succinctly summarized:

> At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a **deodand**.... Forfeiture also resulted at common law from **conviction for felonies and treason**.... In addition, English Law provided for statutory forfeitures of offending objects used in violation of the **customs and revenue laws**.... [Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 680-82 (1974) (emphasis added, footnotes omitted).]

In the United States, however, Justice Brennan explained that, except for *in rem* "forfeiture of commodities and vessels used in violations of customs and revenue laws" (*id.* at 683), criminal forfeiture was not favored:

> Deodands did not become part of the common-law tradition of this country.... Nor

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[11] *See, e.g.,* Karl Wittfogel, Oriental Despotism: A Comparative Study of Total Power (Vintage Books: 1981) 72-78.

> has forfeiture of estates as a consequence of federal criminal conviction been permitted.... Forfeiture of estates resulting from a conviction for treason has been constitutionally proscribed by Art. III, § 3, though forfeitures of estates for the lifetime of a traitor have been sanctioned.... [*Id.* at 682-83 (footnotes omitted).]

The first Congress prohibited "forfeiture of estate" for violation of any federal crime (Act of April 30, 1790, Sec. 24, 1 Stat. 112, 117), a statute that remained in effect (at least in part) until 1984, when it was repealed by the Comprehensive Forfeiture Act (Pub. L. 98-473). Until 1970, there was no federal criminal asset forfeiture statute of any sort. *See, e.g.*, United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) ("Indeed, the forfeiture of a portion of an individual's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of [18 U.S.C.] § 1963. Such a penal foray bespeaks a need for circumspection.").[12]

Broad new criminal powers enacted in 1970 changed the course of federal criminal asset forfeiture.

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[12] *Cf.* United States v. Schmalfeldt, 657 F. Supp. 385 (W.D. Mich. 1987) ("The only exception was the Confiscation Act passed by the Radical Republican Congress in 1862 which authorized President Lincoln to forfeit the property of Confederate sympathizers. While the President doubted its constitutionality, the statute was ultimately upheld by the Supreme Court, not on the basis that criminal forfeitures were generally constitutional, but rather because the statute had been passed by virtue of Congress's War Powers." *Id.* at 387 (citations omitted).).

That year brought with it the Racketeer Influenced and Corrupt Organization's Act ("RICO"), section 901(a) of the Organized Crime Control Act of 1970, Pub. L. 91-452, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513. All three statutes included powers of criminal asset forfeiture, but none contained a power of pre-conviction seizure of assets which would be subject to forfeiture upon conviction.

Not until 1984 did amendments to these laws statutorily authorize *ex parte*, pretrial seizure of assets. *See* 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e). Then, as part of the Civil Asset Forfeiture Reform Act of 2000, Congress extended criminal asset seizure and forfeiture to any criminal case where a civil or criminal forfeiture otherwise would be authorized. *See* 28 U.S.C. § 2461(c). This expansion of authority has resulted in a dramatic increase in criminal forfeiture judgments, which already had eclipsed civil forfeiture judgments in every year since FY 1995. *See* Congressional Research Service, "Crime and Forfeiture," No. 97-139, (Jan. 22, 2015) at 13 n.73.

B. The Modern Federal Criminal Justice System Operates Oppressively against the People of the United States.

In the last reported one-year period (ending March 2014), there were 89,403 criminal defendants whose cases were "disposed of" in the federal system.[13] Of

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[13] Administrative Office of the United States Courts, "Caseload Statistics 2014: Table D-4 Defendants Disposed of, by Type of

those, 7,319, or only 8.2 percent, were "Not Convicted," while 91.8 percent were "Convicted and Sentenced." *Id.* But of those who were convicted and sentenced, an amazing 80,111 — or 97.6 percent of total "convictions" — were concluded by a plea of guilty. *Id.*

There is a well-established trend toward capitulation of defendants to prosecutors; indeed, the percentage of convictions through guilty pleas had been 94.5 percent in 2001,[14] 92.3 percent in 1997,[15] and 84 percent in 1990.[16] In 1974, the percentage of resolutions through convictions was 60.5 percent, but just 33.7 percent in 1908. Michael O. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 293, 314 (Dec. 1975).

While there may be several reasons for the remarkable increase in guilty pleas, it is widely recognized that "[i]n most cases it is pressure — the promise of leniency in sentencing, a reduced charge, or the desire to avoid pretrial detention — that induces

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Disposition and Offense," http://www.uscourts.gov/file/10657/download

[14] http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2001/jun01/d04jun01.pdf.

[15] http://catalog.hathitrust.org/Record/003435589.

[16] G. Fields & J. Emshwiller, "Federal Guilty Pleas Soar As Bargains Trump Trials," *Wall Street Journal*, Sept. 23, 2012, http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html.

guilty pleas." Finkelstein, *supra*, p. 293. Additionally, prosecutors often over-charge crimes that they know they could never hope to prove beyond a reasonable doubt, so that they can retain bargaining power to accept guilty pleas for lower offenses.[17] *See, e.g., id.* at 294. Indeed, guilty pleas can "secure convictions that could not otherwise be obtained." *Id.* at 309. Prosecutors also "stack" charges for the same conduct, a practice which has been condoned by this Court, so long as each crime requires proof of an additional element that another does not.[18]

Public defenders at both state and federal levels are badly overworked, and it is "no wonder that many [public defenders can fall] into a 'meet 'em and plead

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[17] Overcharging is no problem for federal prosecutors when it comes to a trial, since juries are permitted to find defendants guilty of so-called "lesser included offenses," despite that practice's questionable constitutionality. *See, e.g.*, J. Shellenberger & J. Strazzella, "The Lesser Included Offense Doctrine and the Constitution," 79 MARQUETTE L. REV. 3 (Spring 1996). Indeed, this Court required states to permit juries to find lesser included offenses, recognizing that this "rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged," but believing that its operation "can also be beneficial to the defendant...." Beck v. Alabama, 447 U.S. 625, 633-34 (1980).

[18] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

'em' routine...."[19] Of course, it does not help that the prosecution's budget invariably exceeds that of the defense by several orders of magnitude. *Id.* Actual guilt, however, does not correlate directly with guilty pleas, even though the judicial system generally assumes "that defendants who were convicted on the basis of negotiated pleas of guilt would have been convicted had they elected to stand trial." Finkelstein, p. 293.

It is into this setting that the court of appeals yielded to the Department of Justice's demands for even greater power over defendants, and an even more dangerous tilt of the playing field, as even more defendants are stripped of the means to effectively defend themselves against federal prosecutors.

IV. AS APPLIED BY THE COURTS BELOW TO FREEZE HER UNTAINTED ASSETS, 18 U.S.C. § 1345 VIOLATES PETITIONER'S SIXTH AMENDMENT RIGHT "TO HAVE THE ASSISTANCE OF COUNSEL FOR [HER] DEFENSE."

Pursuant to its interpretation of 18 U.S.C. § 1345(a)(2)(B)(ii), "the Eleventh Circuit upheld an injunction that currently prohibits petitioner from spending any of her assets, including undisputedly untainted funds needed by her to engage private

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[19] H. Levintova, J. Lee, and B. Brownell, "Why You're in Deep Trouble If You Can't Afford a Lawyer," *Mother Jones* (May 6, 2013). http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts.

counsel in a related criminal case." Pet. Br. at 4. Petitioner contends that, as applied to her, § 1345(a)(2)(B)(ii) deprives her of her Sixth Amendment constitutional right to the assistance of counsel for her defense in the criminal case. Petitioner is correct.

A. The Sixth Amendment Secures a Preexisting Right of the Assistance of Counsel in All Criminal Cases.

The Sixth Amendment guarantee of the right "in all criminal prosecutions ... to have the Assistance of Counsel for his defense" – like all the rights spelled out in the 1791 federal Bill of Rights[20] — protects a preexisting right. Indeed, the right to counsel was recognized in the colonies as far back as 1701 in the Pennsylvania Charter of Privileges. *See* Powell v. Alabama, 287 U.S. 45, 61 (1932). In an abrupt departure from a long-established English rule that denied counsel to defendants in serious criminal cases, "[a] marked advance over English law was made by Article V [of the Pennsylvania Charter], which provided that criminals should have the **same right to counsel as their prosecutors**." Sources of Our Liberties, p. 252 (R. Perry & J. Cooper, eds., Rev. 2d ed., ABA Foundation 1978) (emphasis added). In England, while "[p]ersons charged with misdemeanors were allowed counsel," it was not until 1836 that "by act of Parliament the full right was granted in respect of felonies generally." Powell at 60. "But to the credit

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[20] *See, e.g.,* District of Columbia v. Heller, 554 U.S. 570, 657 (2008).

of her American colonies ... so oppressive a doctrine ... never obtained a foothold []here." *See id.* at 65.

Indeed, the English rule was "rejected by the colonies [b]efore the adoption of the federal Constitution." Powell at 61. After surveying the State constitutions and practices that preceded its ratification, this Court concluded "that in at least twelve of the thirteen colonies the rule of the English common law ... had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes...." *Id.* at 64-65.

While there were some variations among the states, and between the states and the federal bill of rights, there is no question that, by 1791, the right to assistance of counsel extended to "all criminal prosecutions," without exception. As this Court in Powell observed, quoting from Thomas Cooley's great treatise on Constitutional Limitations: "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel." Powell at 70.

B. The Right to Assistance of Counsel Secured by the Sixth Amendment Is Absolutely Essential to Ensure Petitioner a Fair Trial.

As it was first recognized in the American colonies, the right to assistance of counsel limited the criminal defendant's choice of counsel. The 1641 Massachusetts

Body of Liberties allowed the defendant the "Libertie to imploy any man against whom the Court **doth not except**, to helpe him, Provided he give him **noe fee or reward** for his paines." Sources at 151 (emphasis added). Under this provision, the choice of counsel was subject to judicial veto. Further, the defendant could not compensate his counsel for his services.

These twin limits were lifted in the 1701 Pennsylvania Charter of Privilege, which not only allowed the defendant to engage defense counsel of his choice, but to enjoy the "same Privileges of **Witnesses and Council** as their Prosecutors." Sources at 258 (emphasis added). In its coupling the privilege of calling witnesses with the right to employ counsel, the Pennsylvania Charter marked the beginning of recognition that the right to the assistance of counsel was inextricably intertwined with other rights deemed necessary to a fair trial. Hence, Article IX of the 1776 Pennsylvania Constitution read:

> That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy trial, by an impartial jury ...; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers. [Constitution of Pennsylvania, Art. IX in Sources at 330.]

Subsequent state constitutions continued this pattern,[21] leading ultimately to the Sixth Amendment itself, which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

Thus, as this Court observed in Johnson v. Zerbst, 304 U.S. 458 (1938), the right to assistance of counsel, alongside the other rights listed in the Sixth Amendment, "is one of the safeguards ... deemed **necessary** to insure fundamental human rights of life and liberty." *Id.* at 462 (emphasis added). Indeed, six years before Zerbst, Justice Sutherland celebrated the constitutional guarantee of right to counsel with the observation that, without the assistance of one trained in the law, even the most "intelligent and educated layman has small and sometimes no skill in the science of law," such that:

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[21] *See, e.g.,* Delaware Declaration of Rights, Sect. 14 (Sept. 11, 1776), reprinted in Sources at 339; Constitution of Maryland, Article XIX (Nov. 3, 1776), reprinted in Sources at 348; and Constitution of Vermont, Article X (July 8, 1777), reprinted in Sources at 366.

> If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. [Powell at 69.]

In short, as Chief Justice Roberts has recently observed: "[T]o have the Assistance of Counsel for his defence ... is the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys." Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1107 (2014) (Roberts, C.J., dissenting).

C. The Right to Assistance of Counsel Requires Giving Petitioner a Fair Opportunity to Secure Defense Counsel of Her Choice.

In 1963 in Gideon v. Wainwright, 372 U.S. 335 (1963), this Court ruled "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial

unless counsel is provided for him." *Id.* at 344. Thus, the Court ruled that counsel must be appointed to represent those defendants who cannot afford to hire a lawyer. Otherwise, the guarantee would fall short of its scope, a right to be enjoyed in "all criminal prosecutions," not just in those cases where a defendant has been able to secure assistance of counsel.

It would be a mistake, however, to think that this Court is only concerned with those who cannot afford to purchase the services of a lawyer. Rather, as this Court had decided 31 years before Gideon, the right secured by the Sixth Amendment is one that "afford[s] a fair opportunity to secure counsel of **his own choice**." Powell at 53 (emphasis added). Thus, the right declared in Gideon only completed the picture of a flourishing market of able lawyers available to those who could afford to pay their fees. Indeed, the Gideon Court extolled the virtues of the free market system to have created a vital and vigorous defense bar:

> [t]hat government hires lawyers to prosecute and **defendants who have the money hire lawyers to defend** are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. [*Id.* at 344 (emphasis added).]

Since Gideon, this Court has affirmed that the "right to select counsel of one's choice [is] the root

meaning of the constitutional guarantee." United States v. Gonzales-Lopez, 548 U.S. 140, 147-48 (2006). And, further, as explained by this Court, "the Sixth Amendment right to counsel of choice" does not command that a "trial be fair," but "that the accused be defended by the counsel he believes to be best." *Id.* at 146. To be sure, this laissez-faire principle has its limits, but as Chief Justice Roberts asserted in his Kaley dissent, "none of those limitations is imposed at the unreviewable discretion of a prosecutor — the party who wants the defendant to lose at trial." Kaley at 1107. Nor should the right to counsel be subject to the discretion of the Court, lest the right to counsel of one's choice revert all the way back to the 1641 Massachusetts Body of Liberties, which conferred upon the court the unfettered power to veto a defendant's choice of counsel. *See* Sources at 151.

Under the Government's theory, the prosecution would continue to be free to employ all the assets it needs to build a case against Petitioner, while Petitioner would be denied full use of her untainted assets for her defense. This constitutes a step backwards from the principle of equivalency expressed in Article V of the 1701 Charter of Privileges, which secured "that all criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." *See* Sources at 258. If the prosecution, with the assistance of the court, is allowed to exercise the type of broad authority to tie up a criminal defendant's untainted assets, 18 U.S.C. § 1345 will present an open invitation to an ever more powerful federal government to deprive defendants in criminal cases of counsel of their choice, in violation of the Sixth

Amendment, and ultimately to the undermining of the entire federal criminal justice system.

CONCLUSION

For the reasons stated above, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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