No. 12-464

In the
Supreme Court of the United States of America

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Rules and Statutes

Secondary Sources

INTEREST OF THE AMICUS CURIAE[*]

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary, professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 10,000 and an affiliate membership of almost 40,000, including private criminal-defense lawyers, military-defense counsel, public defenders, law professors, and judges. NACDL is the only national professional bar association for public defenders and private criminal-defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization with full representation in its House of Delegates.

This case implicates NACDL's mission because its resolution will determine whether accused individuals can be deprived of their Sixth Amendment right to counsel of choice based on unsubstantiated allegations.

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[*]The parties' Counsel were timely notified of NACDL's intent to file this brief and agreed to its filing. No party or party's counsel authored any part of it or contributed money intended to fund its preparation or submission. NACDL paid all costs associated with preparing and submitting it.

STATEMENT OF THE CASE

The Petitioners, Kerri and Brian Kaley, retained counsel in 2005 when they came under investigation for selling surplus medical supplies on the grey market. *United States v. Kaley*, 677 F.3d 1316, 1318 (C.A.11 2012). In 2007, the federal government indicted the Kaleys and Jennifer Gruenstrass, charging various fraud offenses. *Id.* Two days later, the prosecution obtained from the court an *ex parte* restraining order it expected would force the Petitioners to discharge their counsel, who was familiar with the case, the government's novel theories of guilt, and the applicable law. *Id.* at 1318.

Initially, the government's theory of forfeiture was that the Petitioners' equity in their home constituted proceeds of the alleged offenses. When a magistrate judge limited the restraint to a fraction of the home's value, the government did not acquiesce in the narrower restraint. *Id.* Instead, it added a money-laundering conspiracy charge. *Id.* This allowed it to rely on a statute permitting the restraint not only of "the proceeds of" the alleged fraud but of all property "involved in" the charged crimes. *Id.*; *see also United States v. Kaley*, 579 F.3d 1246, 1250–51 & n.8 (C.A.11 2009). The district court then restrained the full value of the Petitioners' home without an evidentiary hearing. *Kaley*, 677 F.3d at 1319.

The Petitioners appealed, arguing they were entitled to challenge the restraining order at an adversary hearing because it infringed their right to the assistance of counsel of choice. The Eleventh Circuit agreed and, three years after the restraining

order was lodged, the district court afforded the Petitioners a hearing. *Id.* at 1319. In the interim, a jury had acquitted co-defendant Gruenstrass. *Id.* Two unindicted co-conspirators had reached deals with the government and pled guilty to charges brought by information. Petitioners' Brief at 8–11. From defendant to defendant, the government shifted between contradictory theories regarding the alleged fraud. *Id.* The two district judges who accepted guilty pleas voiced doubt as to whether any crime had occurred. *Id.*

Despite these developments, the district court confined the Petitioners' hearing on the restraining order to whether the restrained assets were traceable to property "involved in" the alleged fraud. The court did not require the prosecution to present any evidence substantiating the underlying fraud allegations nor did it allow the Petitioners to dispute that a fraud occurred. *Kaley*, 677 F.3d at 1319–20. The court approved the broad restraining order, and the Eleventh Circuit affirmed. *Id.* at 1322–23.

SUMMARY OF THE ARGUMENT

The government claims the power to veto the Petitioners' choice of counsel by doing little more than alleging that the Petitioners' assets are "traceable" to property "involved in" alleged crimes. This treads on rights guaranteed by the First, Fourth, Fifth, and Sixth Amendments to the United States Constitution and threatens to impair the functioning of our adversary system of criminal justice.

A seizure that risks erroneously denying an accused the assistance of his counsel of choice in a criminal prosecution requires greater evidential support than the courts required of the government in this case. Seizures of allegedly forfeitable property that threaten the irremediable denial of a constitutional right, such as the right to freedom of expression, require a showing greater than mere probable cause. To prevent unconstitutional prior restraints on speech, the government must adduce in such cases evidence substantiating both the underlying charges and the connection of the restrained assets to those alleged offenses.

The right to the assistance of counsel of choice effectuates a defendant's rights to speak and associate freely and to petition the courts. Denying a defendant the exercise of his right to counsel of choice is tantamount to a prior restraint on speech. It harms the defendant whose speech is suppressed, compromises the reliable functioning of the adversary system, and removes from the Nation's legal discourse certain ideas and viewpoints on issues of public importance. Consequently, seizures of allegedly forfeitable property

that threaten to abridge that right must be supported by evidence sufficient to show that the government is likely to prove that the defendant committed a crime and that the seized property is forfeitable as a result. Additionally, in cases where the property is not the alleged proceeds of crime, the government must also show that the forfeiture would not be unconstitutionally disproportional.

According an accused's assets that could fund his defense the same solicitude as assets having expressive aspects, like books or films, is harmonious with this Court's precedents and resolves the issues that have divided the circuit courts of appeals. Because a seizure of such assets carries the same dangers as any other potentially unconstitutional prior restraint on speech, the government must justify it at an adversary hearing with more than mere probable cause. The risk that lesser procedures would cause a defendant to be mistakenly denied his structural right to the assistance of his counsel of choice is constitutionally intolerable.

ARGUMENT

I. A seizure of allegedly forfeitable assets needed to retain counsel is constitutionally unreasonable without more evidential support than ordinary seizures require.

A quarter-century ago, this Court rejected broad claims that the Sixth Amendment exempts from forfeiture or from pre-trial restraint assets that are "the proceeds of" crime but needed to retain counsel of choice. *Caplin & Drysdale, CA v. United States*, 491 U.S. 617, 626 (1989); *United States v. Monsanto*, 491 U.S. 600, 615 (1989). The Court reasoned:

> A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.

491 U.S. at 626. This case does not call into question the holding encapsulated in this bank-robber hypothetical. Rather, this case asks, what does the government have to show to substantiate its claim that the money found in the hypothetical bank robber's possession is *in fact* money stolen from the bank? If, for

example, the accused's money bore serial numbers not matching those of the allegedly stolen bills, the government presumably could not seize the pile of cash without additional evidence. Likewise, if the government could not find anyone to say the bank was actually robbed, there would be no basis for seizing the money the defendant had.

Caplin & Drysdale did not wrestle with whether the restrained assets were actually forfeitable because the defendant admitted, as part of a negotiated plea deal, that his assets were "proceeds of" his "massive drug importation and distribution scheme." 491 U.S. at 619–20, 621. It was the defendant's law firm that argued to this Court that the Sixth Amendment precludes the forfeiture of that portion of its client's drug profits needed to settle its fee. The Court rejected that broad argument, holding that title to the drug-crime proceeds vested in the government at the time of the drug deals. *Id.* at 626. The Court noted that the firm's argument had no limiting principle:

> If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercise of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise.

Id. at 628. That is true—and it is why a seizure of property that threatens the right to counsel of choice

triggers the same procedures as one that threatens other enumerated constitutional rights.

Monsanto did not address in detail what type of hearing is required to support a pre-trial restraint of allegedly forfeitable assets because Peter Monsanto was afforded "an extensive" adversarial hearing:

> We do not consider today, however, whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed. ... [T]he District Court held an extensive, 4-day hearing on the question of probable cause.
>
> ... [G]iven that the Government prevailed in the District Court notwithstanding the hearing, it would be pointless for us now to consider whether a hearing was required by the Due Process Clause. Furthermore, because the Court of Appeals, in its *en banc* decision, did not address the procedural due process issue, *we also do not inquire whether the hearing—if a hearing was required at all—was an adequate one*.

491 U.S. at 615 n.10 (emphasis added).

Consequently, Monsanto, like Caplin and Drysdale, argued in this Court for a blanket rule. He contended that the Sixth Amendment categorically bars the restraint of assets needed to retain counsel *despite* the government having shown at the pre-trial hearing that his assets were the proceeds of drug crimes he committed. Monsanto asked this Court to adopt Judge Winter's interpretation of the forfeiture statute. Brief for Petitioner, *Monsanto*, 1988 WL 1115133, at 50 ("The procedural solution devised by Judge Winter

provides a viable means of avoiding the constitutional dilemma ... . Failing that, this Court has no other means of saving the statute but to render it unconstitutional ... ."). Judge Winter (and Monsanto) accepted that a pre-trial hearing on forfeitability "is not to inquire into the evidentiary strength or weakness of the government's case on criminality." *United States v. Monsanto*, 852 F.2d 1400, 1406 (C.A.2 1988) (*en banc*) (concurrence). He envisioned a hearing "to allow an informed balancing of the relative hardships on the parties according to the traditional principles of equity with regard to preconviction restraints upon a defendant's assets." *Id.*

This Court rebuffed Monsanto's invitation to adopt Judge Winter's view, holding that no equitable balancing could justify the payment of attorney's fees with drug proceeds. 491 U.S. at 613 ("[T]he 'equitable discretion' that is given to the judge under [the statute] turns out to be no discretion at all ... ."). In dicta, the five-justice majority asserted "that assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615. Whether probable cause sufficed was not an issue the parties briefed. The Court assumed—but did not decide—throughout Part III.B of the majority opinion that the usual Fourth Amendment probable-cause standard applied. The Court expressly reserved deciding both whether a pre-trial hearing on the seizure of forfeitable assets is required and what the government would have to show at such a hearing. *Id.* at 615 n.10. *See also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not

stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.") (Scalia, J., dissenting).

If *Monsanto*'s assertion that probable cause suffices to restrain the alleged "proceeds of" crime were not dicta, *Monsanto* would conflict with another forfeiture case decided during the 1988 term. *Fort Wayne Books v. Indiana* consolidated two racketeering cases, both predicated on obscenity crimes, for review. 489 U.S. 46, 50–51 (1989). In the first, prosecutors sued Fort Wayne Books under Indiana's civil RICO statute, seizing three bookstores and their contents as property having been "used in the course of ... or realized through" racketeering. *Id.* at 52. The other was a criminal RICO case. *Id.* at 53. Because the criminal defendant had not requested a pre-trial hearing on the question of obscenity and none of his assets had been seized, he was not entitled to a hearing. *Id.* The Court held, however, that Fort Wayne Books was entitled to an adversary hearing at which the prosecutor had to adduce evidence to support the seizure of the allegedly forfeitable assets. *Id.* at 66.

The Court began by assuming "that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from," racketeering. *Id.* at 65. Notwithstanding that assumption, the Court held—unanimously—that the bookstores could not be seized on mere probable cause:

> [W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may

> be seized on probable cause ... it is otherwise when materials presumptively protected by the First Amendment are involved.

Id. at 63; *id.* at 68 (Blackmun, J., joining majority's Part III); *id.* at 70 (O'Connor, J., joining majority's Part III); *id.* at 83 (Stevens, J., dissenting on other grounds).The Fourth and First Amendments do not permit the pre-trial restraint of expressive works until the government shows at an adversary hearing that it can prove both "the elements of a RICO violation" and that "the assets seized were forfeitable[.]" *Id.* at 66. It is "the risk of prior restraint"—*i.e.*, the risk that the seizure would irremediably abridge expression—"that motivates this rule." *Id.* at 63–64.

Fort Wayne Books recognizes, like other decisions of this Court, that a property seizure may implicate provisions of the Bill of Rights in addition to the Fourth Amendment. *See, e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture, but it does not follow that the Fourth Amendment is the sole constitutional provision in question when the Government seizes property subject to forfeiture.") (citation omitted); *Soldal v. Cook County*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."). And, like other cases, *Fort Wayne Books* recognizes that the procedural protections that attend a seizure vary with the effect that seizure might have. Where a seizure risks abridging constitutional rights in addition to those the Fourth Amendment alone guarantees, additional

safeguards are constitutionally required to prevent government overreaching. *See, e.g.*, *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.").

The restraint of the Petitioners' assets implicates the Fourth, Fifth, Sixth, and First Amendments. The seizure is a "meaningful interference with [the Petitioners'] possessory interests" in their assets. *United States v. Jones*, 132 S.Ct. 945, 951 n.5 (2012). The Petitioners have not been afforded due process in contesting the restraint. It threatens their structural right to the assistance of their counsel of choice. Legal advocacy is protected speech; a seizure that denies a defendant the right to counsel of choice, no less than a seizure of books or films, denies an individual his right to speech, denies society access to that speech, and depletes the marketplace of protected ideas. As with other prior restraints on speech, restraints on the right to counsel of choice have unknowable and potentially grave consequences. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Furthermore, legal advocacy (particularly against the government) constitutes political speech. Thus, a seizure that threatens to irremediably deny a defendant his right to counsel of choice is constitutionally unreasonable when it is supported by only probable cause. Rather, the procedural safeguards that attend potential prior restraints on speech require the government to adduce additional evidence. Otherwise, the government could veto a defendant's choice of counsel with bare allegations.

Applying *Fort Wayne Books* to pre-trial restraints on assets needed to retain counsel is harmonious with this Court's precedents. It also promotes judicial efficiency by providing a single framework courts can apply whether the forfeiture targets "the proceeds of" or property "involved in" a crime. This defers for another day the open question of whether the Sixth Amendment categorically precludes restraining legitimately earned assets (as opposed to alleged proceeds of crime) needed to hire counsel of choice.[1]

A. The right to counsel of choice is of a nature with the rights to speak, associate, and petition the government.

By articulating defendants' cases to prosecutors, judges, and jurors, the Nation's criminal defense

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[1]The rationale of *Caplin & Drysdale* and *Monsanto* is limited to proceeds of a crime, title to which vests in the sovereign when the crime is committed. *Caplin & Drysdale*, 491 U.S. at 627; *Monsanto*, 491 U.S. at 614. It is unclear that the "relation-back" doctrine can constitutionally apply to property only "involved in" an alleged crime, like the Petitioners' home, because such assets were legitimately earned. *United States v. Bajakajian* recognizes that distinction because it holds that the Excessive Fines Clause requires that a forfeiture of property "involved in" a crime not be "grossly disproportional to the gravity of the defendant's offense." 524 U.S. 321, 334 (1998). *Bajakajian* further recognizes the distinction by holding that proportionality of the forfeiture depends on the circumstances of the crime and the offender's characteristics. *Id*. at 338 (noting that the undeclared currency "was the proceeds of legal activity" and that the defendant was "not a money launderer, a drug trafficker, or a tax evader.").

lawyers enable defendants to efficaciously exercise their First Amendment rights to speak against the government and to petition the courts. Accordingly, this Court has repeatedly said that the Sixth Amendment right to counsel effectuates the right to be *heard*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. 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 inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Powell, 287 U.S. at 68–69 (quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938)). The importance of having the assistance of counsel of choice can hardly be overstated. It is "fundamental" to due process in every individual case, *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932), as well as a structural component of the adversary system, *Gonzalez-Lopez*, 548 U.S. at 150.

At trial, counsel works to ensure that the defendant's case is informed by independent, professional judgment about what to say, when to say it, and how to say it. The Sixth Amendment deprives a trial court of any discretion to preclude defense counsel from making a closing summation, even at an "open and shut" bench trial. *Herring v. New York*, 422 U.S. 853, 862–63 (1975). It guarantees that a defendant can confer with his counsel during an overnight trial recess. *Geders v. United States*, 425 U.S. 80, 88 (1976). It reserves to a defendant and his lawyer the choices of whether and when to present the defendant's testimony. *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972).

Counsel plays even more crucial a role before trial. In a reactive prosecution, like the rape case in *Powell*, "the most critical period of the proceedings for [the] defendants" will be "from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important ... ." 287 U.S. at 57. The Sixth Amendment recognizes the importance of preparing to meet the government's case by guaranteeing counsel throughout a "criminal prosecution," not just at trial. When formal charges are preceded by a years-long investigation, counsel's work begins well before arraignment. Throughout the investigatory phase, defense counsel speaks to and negotiates with the prosecution on his client's behalf, often obviating the need for a trial. Two unindicted co-conspirators in this case, for example, reached deals with the government before indictment and pled guilty to informations. Petitioner's Brief at 8–11.

The essence of defense counsel's work throughout a prosecution, then, is to speak for the client. Accordingly, while a criminal defense attorney's speech in service of his client can be regulated, this Court unanimously agreed that it is protected by the First Amendment. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (Kennedy, J., for a plurality); *id.* at 1075 (Rehnquist, C.J., for the Court); *id.* at 1082 (O'Connor, J., concurring).

Moreover, a defense lawyer's speech on behalf of a client—in and out of the courtroom—is of the highest constitutional order:

> The [First Amendment vagueness] inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

Id. at 1051 (Kennedy, J., for the Court). Dominic Gentile's speech on behalf of his client "concern[ed] allegations of police corruption" in the case and "question[ed] the judgment of an elected public prosecutor." *Id.* at 1035–36. Other criminal cases have likewise brought to light embarrassing and corrupt government practices. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318–19 (2009) ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials."). A government veto

over the defendant's choice of counsel insulates official corruption and incompetence from exposure.

Correspondingly, this Court has recognized that the First Amendment protects legal advocacy in civil cases, in which there is no express constitutional right to counsel. "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

Button is one of several cases recognizing that the First Amendment protects litigants' access to specialized counsel—especially when the government would prefer those litigants to have other counsel or no counsel. *Button* invalidated a Virginia statute intended to criminalize the referral of potential desegregation cases to the NAACP, "which has a corporate reputation for expertise in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *Id.* at 422; *see id.* at 445–46 (Douglas, J., concurring). This Court reasoned that the referral of legal causes disfavored by the state to capable counsel implicates protected expression: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. That same concern is implicated when the government uses an unsubstantiated forfeiture allegation to veto the defendant's choice of counsel, as in this case.

The following year, the Court held that Virginia could not prevent a labor organization from referring its members to counsel skilled in railroad tort cases,

reasoning that specialized lawyers are indispensable to the vindication of statutory rights as well as constitutional rights:

> It soon became apparent to the railroad workers, however, that simply having these federal statutes on the books was not enough to assure that the workers would receive the full benefit of the compensatory damages Congress intended they should have. Injured workers or their families often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar.

Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 3–4 (1964). *Accord Union Mine Workers of Am. Dist. 12 v. Illinois State Bar*, 389 U.S. 217, 222 (1967).

Likewise, defendants denied their choice of counsel can "fall prey on the one hand to persuasive [prosecutors] eager to gain [large forfeitures] for their [employer], or on the other to lawyers ... too willing to settle" a case. The Department of Justice keeps forfeited assets. *See* 28 U.S.C. § 524(c) (establishing the DOJ Assets Forfeiture Fund). And DOJ exhorts its prosecutors to use the forfeiture laws aggressively to ensure it meets its annual budget targets. *See James Daniel Good*, 510 U.S. at 55–56 & n.2. Forfeitures make up an ever-burgeoning share of DOJ's budget: "Annual revenues into the Assets Forfeiture Fund from

forfeited assets increased from $500 million in 2003 to $1.8 billion in 2011 ... .” GAO, Report to Congressional Requesters, Justice Assets Forfeiture Fund at 1 (July 2012) (www.gao.gov/assets/600/592349.pdf). The government’s self-interest in forfeiting people’s property may explain its unconventional theory in this case and is itself a matter of public concern that is discussed only when counsel is retained.

The First Amendment also prevents the government from indirectly curtailing a litigant’s ability to raise legitimate arguments. *Legal Servs. Corp. v. Velasquez* held that Congress could not condition funds for legal aid organizations on those organizations’ not raising legal challenges to state welfare laws. 531 U.S. 533, 548–49 (2001). The majority reasoned that the provision was meant to keep ideas disfavored by the government out of court: “The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of courts to consider.” *Legal Services*, 531 U.S. at 546. Four justices dissented but only because they believed Congress could constitutionally fund one type of suit but not another: “No litigant who, in the absence of LSC funding, would bring a suit challenging existing welfare law is deterred from doing so by” the challenged statute. *Id.* at 554 (Scalia, J., dissenting). The dissent did not take issue with the majority’s premise that government action that “operates to insulate current [laws] from constitutional scrutiny and certain other legal challenges [implicate] central First Amendment concerns.” 531 U.S. at 547.

Legal Services recognized that government action that has the effect of removing certain arguments from the courtroom implicates the First Amendment—particularly when the government is the adverse party. *Button* and *Brotherhood of Railroad Trainmen* recognized that erecting barriers to the retention of specialized counsel keeps such speech out of the courtroom. The belated money-laundering charge and forfeiture allegation in this case will result in the withdrawal of the lawyers familiar with the facts, the government's theories, and the relevant law—the lawyers best positioned to spot issues and raise arguments against the government's novel theory of prosecution. If unjustified by substantial evidence, this will effect an unconstitutional prior restraint on speech, whether the prosecution intends that result or it is merely incidental to its money-laundering and forfeiture allegations.

B. The retention or appointment of alternate counsel does not mitigate the threatened constitutional violations.

The speech that a defendant's counsel of choice enables is important not only for its contribution to the Nation's political discourse, but also because it is a critical component of the criminal justice system itself. That is the import of the fact that the right to counsel is a *structural* right. *Gonzalez-Lopez*, 548 U.S. at 150. A defendant forced to proceed to trial without his counsel of choice because his assets were wrongfully restrained suffers an irremediable constitutional injury regardless of the quality of his alternate counsel:

> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez-Lopez, 548 U.S. at 148.

Underpinning the right to counsel (as well as the related rights to confrontation and compulsory process) is the idea that the adversary system reliably yields accurate outcomes only if each side has symmetrical skill. *See* Akhil Reed Amar, *The Bill of Rights* 115–16 (1998) (discussing "the symmetry principle" reflected in the Sixth Amendment). "[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 402–03 (1938). This symmetry is indispensable to our faith that the system reliably yields just outcomes, whether they are the product of trial or plea. In fact, the rationale for why plea bargaining does not undermine confidence in our justice system's outcomes depends on that symmetry. *See Brady v. United States*, 397 U.S. 742, 752 (1970) (reasoning that plea

bargaining is acceptable because it is predicated on a "mutuality of advantage" to both parties).

The adversary system relies most heavily on parity of skill between the parties in cases like this, where the government brings a novel and potentially flawed theory of prosecution. Because judges in a common-law system depend on able counsel to expose and analyze the issues, the system presupposes a robust market for legal services: "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Legal Services*, 531 U.S. at 545. The health of our adversarial criminal justice system contributes, in turn, to the overall vitality of our democracy. "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state ... ." *Gentile*, 501 U.S. at 1035 (plurality).

The person facing conviction has the greatest incentive to identify and retain the best lawyer he can. Thus, this Court has never doubted that an accused is constitutionally entitled (subject to court rules and the like) to "be defended by the counsel he believes to be the best." *Gonzalez-Lopez*, 548 U.S. at 145; *accord Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment ... ."); *see also Powell*, 287 U.S. at 53 ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). To a great degree, then, the system

relies for its proper functioning on defendants' election of counsel to supply the requisite symmetry:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. ... Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.

Gideon, 372 U.S. at 344.

Allowing the prosecution to interfere with the defendant's choice of counsel on a minimal evidential showing compromises symmetry and harms the system. Prosecutors are not indifferent as to who represents a defendant:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

Gonzalez-Lopez, 548 U.S. at 150.

If protected from undue interference, individual defendant's choices redound, through Adam Smith's invisible hand, to everyone's benefit, inspiring public confidence in judicial outcomes. A robust, independent defense bar contributes more and better speech to the criminal prosecutions of citizens by their government.

On the other hand, members of a defense bar beholden to prosecutors for their ability to earn a living can hardly be expected to put the government to its burden in every case. "An informed, independent judiciary presumes an informed, independent bar." *Legal Services*, 531 U.S. at 545.

The *Gonzalez-Lopez* holding is just one of many recognizing the reality that money amplifies speech. A well-funded defense may be stronger than one that only meets constitutional standards. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[T]he Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy ... ."). By capping the amount a defendant can spend on his defense, the prosecution (and the court) abridge his speech:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by

> attacking all levels of the production and dissemination of ideas.

McConnell v. FEC, 540 U.S. 93, 251 (2003) (opinion of Scalia, J.) (citations omitted). The right to counsel of choice is no more absolute than the right to other forms of speech, but a limit on the amount an accused can spend for his defense demands the same scrutiny as any other prior restraint on speech.

Citizens United v. FEC recognized that government efforts to muffle speech by limiting a person's spending are a form of prior restraint: "The rule that political speech can not be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." 558 U.S. 310, 350 (2010). This applies as much to political speech in the courtroom as to political speech on the campaign trail: "A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life *which are hardly within the power, let alone the duty*, of a State to correct or cushion." *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (emphasis added).

Government can also abridge freedom of speech by favoring one group of speakers (like court-appointed lawyers) over another group of speakers (like privately retained lawyers):

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By

> taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United, 558 U.S. at 340–41.

As with all prior restraints, allowing the government to restrain an accused's assets by meeting a minimal burden threatens both an individual and a societal constitutional harm. A Department-of-Justice-imposed cap on the amount that criminal defendants can spend on their defense favors the government's views on criminal-justice issues by diminishing or silencing opposing views. Indeed, this case is exceptional in that the defendants and their counsel have managed to bring this Court their challenge to the restraining order through two interlocutory appeals. "'[M]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.'" *Citizens United*, 558 U.S. at 335–36 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

Our system's faith that confrontation between the prosecution and the accused reliably separates the guilty from the not-guilty depends on the endurance of "a healthy, independent defense bar" to ensure "a truly equal and adversarial presentation of the case." *Caplin & Drysale*, 491 U.S. at 647–48 (Blackmun, J., dissenting). The unjustified denial of counsel of choice corrodes this pillar of our system by threatening "to decimate the criminal defense bar" and bring about the "'virtual socialization of criminal defense work in this country.'" *Id.* at 651, 647 (Blackmun, J., dissenting).

II. Recognizing that seizures of assets needed to retain counsel pose the same dangers as other prior restraints on protected speech resolves the issues dividing the courts of appeals.

The circuit courts of appeals have splintered over the process due defendants who are denied use of assets presumptively theirs for their defense. The circuits differ, first, in the framework they employed to analyze the issue. Most circuits used the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to decide what process is due. *See United States v. E-Gold, Ltd.*, 521 F.3d 411, 417 (C.A.D.C. 2008); *United States v. Holy Land Foundation for Relief*, 493 F.3d 469, 475 (C.A.5 2007); *United States v. Jamieson*, 427 F.3d 394, 406 (C.A.6 2005); *United States v. Farmer*, 274 F.3d 800, 803–04 (C.A.4 2001); *United States v. Jones*, 160 F.3d 641, 645 (C.A.10 1998); *United States v. Michelle's Lounge*, 39 F.3d 684, 694–96 (C.A.7 1994); *United States v. Monsanto*, 924 F.2d 1186, 1193 (C.A.2 1991) (*en banc*); *United States v. Crozier*, 777 F.2d 1376, 1383 (C.A.9 1985). The Eleventh relied on the speedy-trial

test of *Barker v. Wingo*, 407 U.S. 514 (1972). *Kaley*, 677 F.3d at 1321. No circuit considered the applicability of *Fort Wayne Books v. Indiana.*

The courts of appeals appear divided also over what, if anything, a defendant has to show before a court is required to convene a hearing on a pre-trial asset seizure. At least three circuits in addition to the Eleventh Circuit have admonished that "'[d]ue process does not automatically require a hearing and a defendant may not simply ask for one.'" *Farmer*, 274 F.3d at 805 (quoting *Jones*, 160 F.3d at 647); *see Jamieson*, 427 U.S. at 407 (adopting *Jones*). These courts require a defendant to show he lacks other assets with which to retain counsel as a prerequisite to challenging the government's seizure. Language in the decisions of other circuits suggests hearings are more generously afforded in those parts of the country. *See E-Gold*, 521 F.3d at 419; *Holy Land Foundation*, 493 F.3d at 474; *Monsanto*, 924 F.2d at 1198; *United States v. Roth*, 912 F.2d 1131, 1134 (C.A.9 1990); *United States v. Lewis*, 759 F.2d 1316, 1324–25 (C.A.8 1985); *United States v. Long*, 654 F.2d 911, 915 (C.A.3 1981).

When a hearing is afforded, the circuits disagree about which party bears the burden of proof and what standard of proof is required.[2] Characterizing the Petitioners as "the movants," the Eleventh Circuit burdened them with demonstrating that there was no probable cause to believe the restrained assets were

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[2] "Burden of proof" and "standard of proof" are used in the same way as the Court used these terms in *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S.Ct. 2238, 2245 n.4 (2011).

forfeitable. *Kaley*, 677 F.3d at 1322. Without stating a reason, the Fourth Circuit likewise requires defendants to negate the government's claim to restrained assets. *Farmer*, 274 F.3d at 805. Other circuits task the government with demonstrating that there is probable cause to believe the assets are forfeitable. *E-Gold*, 521 F.3d at 419; *Holy Land*, 493 F.3d at 474; *Monsanto*, 924 F.2d at 1197; *Roth*, 912 F.2d at 1134; *Lewis*, 759 F.2d at 1324–25; *Long*, 654 F.2d at 915.

Because dicta in this Court's *Monsanto* opinion suggested that mere probable cause sufficed, the Fifth and Second Circuits lowered the standard of proof they required the government to meet. *See Holy Land*, 493 F.3d at 474 & n.6; *Monsanto*, 924 F.2d at 1195. On remand from *Monsanto*, the Second Circuit stopped requiring the government to "demonstrate the likelihood that the assets are forfeitable." *Monsanto*, 924 F.2d at 1189. Similarly, before *Monsanto*, the Fifth Circuit required adherence to the same procedures that Federal Rule of Civil Procedure 65 specifies for injunctions and restraining orders, imposing "a higher burden than probable cause." *Holy Land*, 493 F.3d at 474 n.6. The Third, Eighth, and Ninth Circuits still apply Rule 65 to pre-trial restraints on allegedly forfeitable assets and require the government to show it will likely prove both the underlying crimes and the traceability of the restrained assets. *Roth*, 912 F.2d at 1134; *Lewis*, 759 F.2d at 1324–25; *Long*, 654 F.2d at 915. Were it not for *Monsanto*'s dicta, other circuits, like the D.C. Circuit which addressed the issue only recently, might have imposed a higher standard of proof. *See E-Gold*, 521 F.3d at 419.

Those circuits that accept probable cause as the standard of proof disagree on whether an indictment conclusively establishes probable cause to believe the defendant committed the alleged crime underlying the forfeiture claim. Some circuits require a court evaluating a restraint on allegedly forfeitable assets to consider the weight of the government's evidence on the underlying charges as well as on the connection of the assets to the alleged crimes. *E-Gold*, 521 F.3d at 419; *Monsanto*, 924 F.2d at 1197. But, reasoning that a defendant can not question the allegations in the indictment until trial, the Sixth, Tenth, and Eleventh Circuits limit the inquiry to whether there is probable cause to believe the restrained assets are traceable to the charged offenses. *Kaley*, 677 F.3d at 1327; *Jamieson*, 427 F.3d at 406; *Jones*, 160 F.3d at 648.

To achieve consistency across circuits and with this Court's precedents, government seizures of assets that could fund a criminal defense must be analyzed consistently with other, similar seizures. When a seizure threatens to abridge enumerated constitutional rights, the Fourth Amendment requires that a strong evidential showing support it. *Fort Wayne Books*, 489 U.S. at 63–64. That is why a seizure that will take ideas out of circulation pending trial must be justified at an adversary hearing by proof that the seized items are likely to be forfeited after trial. *Id.* When the government seizes only one or two copies of an allegedly obscene work, in contrast, a showing of probable cause suffices because there is no threat to the marketplace of ideas. *Id.*; *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874–75 (1986); *Heller v. New York*, 413 U.S. 483, 492 (1973).

Fort Wayne Books thus answers the question left open in *Monsanto*: When a restraint on allegedly forfeitable property might frustrate the exercise of the right to counsel of choice, the government must show at an adversary hearing more than mere probable cause to sustain the seizure. Otherwise, a defendant could erroneously be denied the assistance of counsel of choice on the basis of an untested, one-sided presentation—a risk as constitutionally grave as that entailed in a seizure of books and films. That the DOJ stands to benefit financially from any error heightens the need for an adversary hearing. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceedings." *James Daniel Good*, 510 U.S. at 55–56 (footnote omitted). DOJ's dependence on forfeiture for its operations now almost reaches the two-billion-dollar mark. GAO, Report to Congressional Requesters, Justice Assets Forfeiture Fund at 1 (July 2012) (www.gao.gov/assets/600/592349.pdf). This dependence continues to deepen; the government's appetite for forfeiture is apparently insatiable.

At the adversary hearing, the government bears the burden of proving that the assets it wants restrained are likely to be forfeited. It is the government that seeks to displace the *status quo* when it seizes property in a person's possession based on unsubstantiated allegations. No reason is apparent for why pornographic books and films are presumptively protected while other allegedly forfeitable assets are presumptively the materialization of the "economic

power of organized crime." *Caplin & Drysdale*, 491 U.S. at 630. This is especially so given the Court's assumption in *Fort Wayne Books* that the seized books and films were "forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from," racketeering. 489 U.S. at 65. Just as expressive works are presumed protected, the law presumes that the Petitioners own their house. *See Bradshaw v. Ashley*, 180 U.S. 59, 63 (1900) ("Generally speaking, the presumption is that the person in possession is the owner ... . If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title."); *Ricard v. Williams*, 20 U.S. 59, 105 (1822) ("Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership ... .") (Story, J.). Accordingly, the government has the burden because it seeks a change in the presumptively legal state of affairs. The fact that the government initially moves for the restraining order *ex parte* and without notice neither alters the common-law presumption of ownership nor shifts the burden.

The government does not meet its burden by showing mere probable cause to believe the accused committed the underlying offenses and that the assets are the proceeds of or were involved in the crimes. Rather, the rationale of *Fort Wayne Books* requires the government to show that it is likely to prove at trial that a crime was committed and that the assets are traceable to that crime in a way that renders them forfeitable. It has to show, in other words, that it will likely prove every element necessary to the forfeiture

of the assets. This follows from the acknowledgment that a restraint on the accused's right to counsel of choice is no less serious than any other prior restraint on speech: It stifles the defendant's speech, hinders the adversary system, impoverishes the marketplace of ideas on matters of public concern, and discriminates against speakers on the basis of wealth.

Those courts that have precluded any inquiry into the weight of the government's evidence on the underlying charges incorrectly believed probable cause was the applicable standard of proof. They also incorrectly believed that *Costello v. United States*, 350 U.S. 359 (1956), made a grand jury's probable-cause determination sacrosanct. A grand jury's finding of probable cause "is enough to call for trial of the charge on the merits." *Id.* at 363. That is no trifling matter, as innumerable double-jeopardy cases discussing the "'embarrassment, expense and ordeal'" entailed in a criminal prosecution attest. *Evans v. Michigan*, 133 S.Ct. 1069, 1075 (2013). But it does not follow that a grand jury's probable-cause finding is incontestable when the government seeks to impose additional, onerous burdens on an accused. The pre-trial detention of a defendant, for example, entails considering the strength of the government's case in an adversary hearing:

> Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by

> statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. The Government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. The Act's review provisions provide for immediate appellate review of the detention decision.

United States v. Salerno, 481 U.S. 739, 751–52 (1987) (citations omitted). *See Monsanto*, 924 F.2d at 1194–95.

Costello held only that a defendant is not entitled to a trial on the question of whether there is enough evidence to justify a trial. 350 U.S. at 363–64. The decision is grounded in judicial economy, not on any mystique about the grand jury's function. That is evident from the fact that the holding encompasses informations as well as indictments: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Id.* at 363 (footnote omitted). Moreover, the opinion, by its own terms, is not controlling when a defendant raises a question about the fairness of his upcoming trial: "Defendants are not entitled ... to a rule which would result in interminable delay *but add nothing to the assurance of a fair trial*." *Id.* (emphasis added). A hearing on whether the government has solid grounds for denying the defendant his counsel of choice substantially contributes to a fair trial.

The strength of the government's overall case is also relevant to whether the pre-trial restraint is proportional to those crimes the government can ultimately prove. In some cases, the government will restrain assets "involved in" a crime that is not serious enough to support the forfeiture. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding that the forfeiture of $357,144 was an unconstitutional punishment for failing to declare the exportation of currency because it was disproportional to the offense). There are two reasons why federal prosecutors can be relied upon to seek in every case the broadest restraining order its allegations can trigger without regard to proportionality. The first is that DOJ is dependent on forfeiture for its operating revenue. The second is that the prosecution gains a tactical advantage whenever it forces a defendant to trial without his first-choice counsel—even if it ultimately can not prove the charges supporting the forfeiture. This case is illustrative. The government added the money-laundering conspiracy charge only when it became clear that the charges it initially brought would not justify a restraining order broad enough to force the Petitioners to discharge the lawyers already familiar with the case. The government then convinced the district court and the Court of Appeals that the validity of the restraining order in no way depended on whether it could ever substantiate the money-laundering charge.

The money-laundering charge pays its way for the prosecution if it only hobbles the Petitioners' defense against the original fraud charges. And those are weak. The government has not been able to identify any

entity that considers itself a victim of the supposed fraud. Petitioners' Brief at 8–11. In that regard, this case recalls *Morissette v. United States*, 342 U.S. 246 (1952). Joseph Morissette hauled rusting, spent bomb casings off a government bombing range, flattened them, sold the metal for scrap, and was surprised to be convicted of stealing government property. He admitted knowingly taking the casings from government land but denied any intent to steal, maintaining since his arrest that he believed the casings were discarded. *Id.* at 247–49. This Court reversed Morisette's conviction without dissent, stating that a jury properly instructed that Morisette's specific intent to steal was an essential element "might have refused to brand Morissette as a thief." *Id.* at 276. It is probably for similar reasons that a jury acquitted the Petitioners' co-defendant.

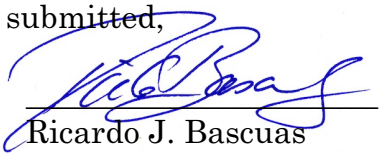
Recognition that the right to counsel of choice is a form of protected expression and affording *Fort Wayne Books'* safeguards to seizures that threaten that right resolves the issues vexing the appellate courts. First, it unequivocally requires an adversarial, evidentiary hearing when the accused challenges the restraint. Second, it makes clear that the government, as the party requesting the restraint, has the burden of proof. Third, it requires that the government adduce evidence sufficient to show that it is likely to prove *both* that the assets are "the proceeds of" or were "involved in" the charged crimes *and* that the defendant in fact committed those crimes. It does all this without resort to the vagaries of the *Eldridge* balancing test. It is simply the logical result of the fact that, to be reasonable under the Fourth Amendment, a seizure

threatening to deny fundamental rights, silence speech, and harm the adversary system requires greater evidential justification than one that does not pose those risks.

CONCLUSION

This Court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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No. 12-464

In the

Supreme Court of the United States of America

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.1(h), I certify that the Brief of Amicus Curiae National Association of Criminal Defense Lawyers comprises 8,976 words, excluding the parts exempted from the word limit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the Fifth of July, 2013.

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