No. 05-232

In the Supreme Court of the United States

ROBERT M. DRASKOVICH AND DEAN Y. KAJIOKA,
PETITIONERS

v.

ROBB EVANS & ASSOCIATES, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
JOHN ANDREW SINGER
Attorneys
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether petitioners had a duty to investigate whether the district court's asset freeze applied to the funds used to pay their attorney's fees, and whether they fulfilled that duty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 410 F.3d 256. The order of the district court concerning petitioner Draskovich (Pet. App. 22a-23a) and its orders concerning petitioner Kajioka (Pet. App. 20a-21a, 24a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2005. The petition for a writ of certiorari was filed on August 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 9, 2003, the Federal Trade Commission (FTC) filed a complaint against a variety of individuals and corporations (led by Kyle Kimoto and his company Assail, Inc. (Assail)) alleging that they had engaged in a deceptive telemarketing scheme in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a),[1] and the FTC's Telemarketing Sales Rule, 16 C.F.R. 310.1-310.9. According to the FTC's complaint, the defendants told consumers that, in exchange for an advance fee, they would receive a pre-approved MasterCard credit card. The defendants debited consumers' bank accounts for $175 or more, but consumers never received the credit cards they were promised. Pet. App. 3a & n.1.

On the same day that the FTC filed its complaint, the district court entered a temporary restraining order (TRO) putting a halt to the defendants' scheme, freezing their assets, and appointing a receiver for the corporate defendants. Pet. App. 3a-4a. On February 4, 2003, the district court issued a preliminary injunction that essentially incorporated the terms of the TRO. Both the TRO and the preliminary injunction applied to all the defendants and to "their . . . attorneys . . . and all other persons or entities in active concert or participation with

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[1] Section 45(a) of Title 15 provides, in relevant part:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

[the defendants] who receive actual notice of this Order." *Id*. at 4a. On January 15, 2003, the receiver took possession of Assail's principal place of business. At the same time, the receiver also took control of the premises of a company known as Valdine Management Co. (Valdine). Valdine was located in the same office complex as Assail, was set up to perform telemarketing on behalf of Assail, and was part of the defendants' deceptive scheme. *Id*. at 5a-6a; FTC C.A. Br. 6 (No. 03-51462). Although Valdine was not named in the FTC's complaint, it was named in the preliminary injunction. Pet. App. 6a.

On September 22, 2003, the district court entered a Stipulated Injunction and Monetary Judgment against Kimoto and Assail (Judgment). The $106 million Judgment required the receiver to use all of the money that he had received from Kimoto or that had been generated from the liquidation of assets that Kimoto controlled to compensate consumers injured by the defendants' scheme. Pet. App. 4a. The Judgment included a provision that permitted counsel for the defendants to apply for payment of attorney's fees from the receivership estate. *Id*. at 4a-5a.

2. a. On January 16, 2003, after receiving notice of the TRO, Kimoto retained petitioner Draskovich to represent him in connection with the FTC's action and in any related criminal matters. The next day, petitioner Draskovich received a retainer of $200,000, which was wired to him by Alliance Solutions, Inc. (Alliance). On January 21, 2003, Draskovich received an additional $10,000, transferred to him from Valdine. Kimoto assured Draskovich that the money used to pay the retainer was not associated with the telemarketing scheme. Pet. App. 4a. In fact, that statement was false.

The record showed that, although separately incorporated, Assail, Valdine, and Alliance operated as one company, transferring assets among each other with no business justification. *Id*. at 11a; FTC C.A. Br. 8-11 (No. 03-51461).

On April 29, 2003, the FTC demanded that petitioner Draskovich return the $210,000 he had received from Alliance and Valdine. Pet. App. 5a. On October 2, 2003 (after the district court had issued the Judgment), Draskovich applied to the district court for permission to retain the $210,000. *Id*. at 4a-5a. On November 13, 2003, the court denied the application and ordered him to turn over the $210,000 to the receiver, finding that, in light of the entire record in the case, "[i]t is clear that the fees paid to Mr. Draskovich were transferred in violation of this [c]ourt's temporary restraining order and preliminary injunction." *Id*. at 22a.

b. On January 20, 2003, Steven Henriksen, who was Valdine's sole officer, shareholder, and employee, retained petitioner Kajioka to represent him and Valdine. Pet. App. 6a-7a. Henriksen used funds from Valdine's bank account to pay Kajioka's retainer in two installments: $10,000 on January 21 and $50,000 on January 22. *Id*. at 6a. On January 23, 2003, Kajioka contacted a representative of the receiver, who informed him that because the receiver believed that Valdine was an entity affiliated with Assail, the receiver would not release possession of Valdine's premises or assets. FTC C.A. Br. 12 (No. 03-51462).

On June 2, 2003, counsel for the receiver demanded that Kajioka return the retainer he had been paid from Valdine's bank account. Pet. App. 6a-7a. Kajioka refused. On August 21, 2003, both the FTC and the receiver filed motions to show cause why Kajioka should

not be held in contempt. *Id.* at 7a. The district court did not hold Kajioka in contempt but, in November 2003, it concluded that the funds paid to him had been "transferred in violation of" the asset freeze. *Id.* at 20a-21a. The court allowed Kajioka to keep $10,000, but required that he remit the remainder to the receiver (minus $10,000 that Kajioka had paid to another attorney and that the receiver had already recovered). *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-19a. The court first rejected petitioners' argument that the funds that they had accepted were not subject to the TRO. *Id.* at 9a-11a. The court observed that the TRO applied to all "'persons or entities in active concert or participation with' the defendants," *id.* at 10a, and concluded that "substantial evidence support[ed] the district court's determination" that "Alliance, Valdine, and Henriksen were acting in concert with the named defendants," *id.* at 10a-11a.

Next, the court of appeals rejected petitioners' argument that they had no duty to investigate whether Alliance and Valdine were acting in concert with the named defendants. The court explained that "[f]or us to hold that an attorney has no duty to investigate the source of his fees in the instant circumstances would essentially be a statement that an officer of the court has no duty to investigate whether he himself is violating a valid court order." Pet. App. 12a. Citing decisions from the Ninth Circuit (*CFTC* v. *Co Petro Mktg. Group, Inc.*, 700 F.2d 1279 (1983)), the Sixth Circuit (*In re Bell & Beckwith*, 838 F.2d 844 (1988)), and a district court case interpreting the criminal forfeiture statute for drug offenses, 21 U.S.C. 853 (*In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D. Va. 1994), aff'd, 83 F.3d 660 (4th Cir. 1996), cert. denied, 519 U.S. 1101 (1997)), the court of

appeals derived "a clear principle that an attorney is not permitted to be willfully ignorant of how his representation is funded." Pet. App. 12a-15a. Rather, the court held, "when an attorney is objectively on notice that his fees may derive from a pool of frozen assets, he has a duty to make a good faith inquiry into the source of those fees." *Id*. at 15a. The court described that duty as a "general ethical obligation to 'audit' a client before accepting potentially tainted funds." *Id*. at 12a.

The court of appeals held that petitioners violated the duty of good-faith inquiry in accepting the fees. With respect to Draskovich, the court concluded that his decision to "simply take his client at his word," Pet. App. 16a, was unreasonable, because Draskovich "knew that his client was accused of perpetrating massive telemarketing fraud, that all of his assets were frozen, and that supposedly unrelated third parties were paying his fees," *id*. at 15a. The court reasoned that this Court's decisions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989), supported its conclusion, because those decisions made clear in a comparable context that "the mere fact that an attorney has read the indictment against his client is enough to put him on notice that his fees are potentially tainted and to destroy his status as a bona fide purchaser for value." Pet. App. 16a.

With respect to Kajioka, the court of appeals held that, although he may not have acted unreasonably in initially accepting the fees, once he spoke to the receiver (three days after receiving the money from Henriksen), he "was given information that put him on notice that" Valdine was affiliated with Kimoto and Assail. Pet. App. 16a-17a. That notice, the court held, "triggered a duty

of inquiry, which Kajioka did not discharge." *Id.* at 17a. The court noted that Kajioka did not dispute that the $10,000 he was permitted to retain was sufficient compensation for the three days of services that he performed before he contacted the receiver. *Ibid.*

Finally, the court of appeals rejected petitioners' contention that the Sixth Amendment trumped the FTC's right to obtain restitution for consumers injured by the defendants' deceptive scheme. The court held that petitioners' claim was "totally without merit," because "[t]he Sixth Amendment right to counsel is inapplicable in civil cases." Pet. App. 17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, this Court's review is not warranted.

1. Petitioners argue that they "had no independent duty or obligation to engage in some type of 'due diligence' to learn the source of the funds that [they were] paid as a fee," Pet. 11, and that the court of appeals' decision holding otherwise conflicts with decisions issued by other courts of appeals, Pet. 24-28.[2] Petitioners are

[2] Petitioners contend that the court required them to "audit" their clients prior to accepting a fee. See Pet. 3, 4, 11, 23, 24, 30. Although the court of appeals did state that, in circumstances such as those presented in this case, an attorney may have an ethical obligation to "'audit' a client before accepting potentially tainted fees," Pet. App. 12a, it is clear that the court did not intend to require attorneys to conduct the sort of sophisticated financial analysis that an accountant would perform. Instead, the court held only that, when an attorney is on notice that fees may come from a pool of frozen assets, he has "a duty to make a good faith inquiry into the source of those fees." *Id.* at 15a. Thus, the court used the word "audit" merely as a shorthand for the

incorrect on both counts. In holding that an attorney has a duty of good-faith inquiry "when he is put on notice that his fee may derive from a pool of frozen assets," Pet. App. 11a, the court of appeals relied on a leading treatise on the law governing attorneys' ethical obligations, see *id.* at 11a-12a (quoting 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 9.32, at 9-136 (3d ed. Supp. 2005)), the "well established doctrine" that an attorney is "an officer of the court," *id.* at 12a, decisions from other courts, *id.* at 12a-14a, and asset forfeiture provisions in the federal criminal code, *id.* at 15a. Petitioners do not explain why the court's reliance on any of those sources is misplaced, and they do not identify any decision or rule that conflicts with the court's holding.[3]

First, the decision below does not establish "completely different standards" (Pet. 24) than those set forth in the Sixth Circuit's decision in *In re Bell & Beckwith*, 838 F.2d 844 (1988), on which the court of appeals here relied. See Pet. App. 13a-14a. In that case, a bankruptcy trustee sought to recover fees that an attorney had been paid by an insolvent debtor who was also the target of a fraud investigation. The court held

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duty to conduct a good-faith inquiry—one that goes beyond merely taking the client at his word.

[3] Petitioners' contention (Pet. 10-11) that the TRO was void for vagueness lacks merit. The TRO was not vague. It applied to, *inter alia*, those "persons or entities in active concert or participation with" the defendants. Pet. App. 4a. The record showed that Alliance and Valdine were entities that clearly fit that description. *Id.* at 5a-6a, 11a; see pp. 3-4, *supra*. Petitioners' vagueness claim thus reduces to their contention that they had no duty to investigate the source of their fee. The court of appeals correctly held that the circumstances presented to petitioners triggered such a duty, Pet. App. 15a-17a, and that fact-bound conclusion does not merit further review.

that, under Ohio law, "if the totality of the circumstances surrounding the conveyance of the assets given to [attorney] Connelly aroused suspicion, Connelly should have inquired as to the source of the property he received." 838 F.2d at 849. The court reviewed the circumstances and held that Connelly was under a "duty of inquiry as to the source of his fee." *Ibid.* Thus, *Beckwith* is entirely consistent with the decision below. See Pet. App. 15a (holding that suspicious circumstances imposed on petitioners a "duty to make a good faith inquiry" as to the source of their fees).

Second, the court of appeals' decision is not "at odds with" (Pet. 3) another case on which it relied, *CFTC* v. *Co Petro Mktg. Group, Inc.*, 700 F.2d 1279 (9th Cir. 1983). See Pet. App. 12a-14a. In *Co Petro*, the Ninth Circuit held that a law firm had to return the proceeds of a $60,000 check that it received from its client, whose assets had been frozen by the district court in an action charging it with violations of the Commodity Exchange Act, 7 U.S.C. 1 *et seq*. Because the law firm was aware that a receiver had been appointed and that a decision adverse to its client had been entered by the district court, the Ninth Circuit concluded that the law firm violated the permanent injunction by depositing the check without "inquir[ing] as to the exact terms of the district court's decision." 700 F.2d at 1285. Consistent with *Co Petro*, the court of appeals here held that petitioners had a duty to inquire about the source of their fee, given that the asset freeze applied not only to the named defendants but also to those "persons or entities in active concert or participation with" them. Pet. App. 4a, 15a.

Finally, petitioners' contention that the decision below conflicts with prior decisions of the same court in *FSLIC* v. *Dixon*, 835 F.2d 554 (5th Cir. 1987) (Pet. 25),

and *United States* v. *Thier*, 801 F.2d 1463 (5th Cir.), modified on reh'g, 809 F.2d 249 (5th Cir. 1986) (Pet. 26-28), does not justify review by this Court. This Court does not sit to resolve alleged intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no conflict. In both cases, the defendants argued that the district court should release frozen funds to pay attorney's fees. As the court in *Thier* explained, whether such a release should be allowed, and the amount of funds that should be released, depends on the specific facts of each case. 801 F.2d at 1474. Neither *Dixon* nor *Thier* involved an attorney's attempt to keep funds paid out in violation of an asset freeze.

In sum, petitioners have failed to identify any conflict among the circuits created by the decision below.[4] Their claim that they had no duty to investigate the source of their fee thus merits no further review.

2. Petitioners contend (Pet. 14-19) that the Sixth Amendment entitles them to keep the money they received in violation of the asset freeze. That claim is meritless. It is well settled that, as the court of appeals held (Pet. App. 17a), the Sixth Amendment right to

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[4] *In re Dolen*, 265 B.R. 471 (Bankr. M.D. Fla. 2001), cannot create a circuit conflict because it is not, as petitioners mistakenly contend, a decision of the Eleventh Circuit. See Pet. 4, 25-26. In any event, *In re Dolen* is irrelevant. It merely holds that, if the FTC obtains an asset freeze, and if the target of that freeze invokes the protection of the Bankruptcy Code, the automatic stay provision of the Code precludes the FTC from enforcing the freeze against assets that were obtained by the debtor subsequent to the bankruptcy petition and that were unrelated to the conduct challenged by the FTC. 265 B.R. at 485. Unlike *In re Dolen*, there was no bankruptcy at issue here and no indication in the record that the funds paid to petitioners were obtained after entry of the asset freeze.

counsel does not apply to civil cases. See *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 25 (1981).[5] Petitioners nevertheless contend that the Sixth Amendment applies because they were retained not only for the FTC's civil action, but also for "pending criminal investigations." Pet. 16. Even assuming a criminal investigation had been commenced by some agency other than the FTC (which has only civil enforcement authority, see 15 U.S.C. 57b), the Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotation marks omitted); see *Fellers* v. *United States*, 540 U.S. 519, 523 (2004). Because petitioners do not even allege that such proceedings occurred here, their Sixth Amendment claim lacks merit and does not warrant further review.[6]

3. Petitioners also ask this Court (Pet. 9-14, 19-22) to review the inquiries they did conduct upon receiving the fees, and to find that those inquiries were sufficient

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[5] Indeed, every case cited by petitioners in support of their argument involved a criminal, not a civil, defendant (or counsel for a criminal defendant). See *Wheat* v. *United States*, 486 U.S. 153 (1988) (Pet. 15); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (Pet. 15); *Gandy* v. *Alabama*, 569 F.2d 1318 (5th Cir. 1978) (Pet. 15); *Thier*, *supra* (Pet. 15); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989) (Pet. 17); *United States* v. *Monsanto*, 491 U.S. 600 (1989) (Pet. 17).

[6] Moreover, even if petitioners' clients had been subject to formal criminal proceedings, this Court made clear in *Caplin & Drysdale* that the Sixth Amendment only "guarantees defendants in criminal cases the right to adequate representation," 491 U.S. at 624, not "representation by an attorney that [they] cannot afford," *ibid.* (quoting *Wheat*, 486 U.S. at 159).

under the circumstances. As the court of appeals recognized, the nature of the appropriate inquiry that an attorney must conduct depends on the particular fact situation. Pet. App. 15a-17a. The court here carefully examined the record and found that, whereas petitioner Draskovich should have been aware from the outset that "something was awry," *id.* at 15a, and thus "needed to do far more than simply take his client at his word that the fees were not tainted," *id.* at 16a, petitioner Kajioka may not have received such inquiry notice until three days after he was paid, *id.* at 16a-17a. Accordingly, the court held that Draskovich had to return his entire fee, but Kajioka could keep $10,000 of the amount he received. That fact-bound conclusion does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
JOHN ANDREW SINGER
Attorneys
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