No. 14-419

In the Supreme Court of the United States

SILA LUIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulation:

Statutes and regulation—Continued: Page

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OPINIONS BELOW

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

JURISDICTION

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

STATEMENT

Following a hearing in the United States District Court for the Southern District of Florida, the district

court entered a preliminary injunction restraining petitioner's assets pursuant to 18 U.S.C. 1345. See Pet. App. 4-34. The court of appeals affirmed. See *id.* at 1-3.

1. a. Criminal forfeitures are imposed "primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States* v. *Ursery*, 518 U.S. 267, 284 (1996); see *Libretti* v. *United States*, 516 U.S. 29, 39 (1995); see also *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014) (explaining that "[f]orfeitures help to ensure that crime does not pay" and are used "to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities"). Such forfeitures are "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti*, 516 U.S. at 39.

Section 853(a) of Title 21, enacted in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, requires "forfeit[ure] to the United States" of "any property constituting, or derived from, any proceeds [a] person obtained, directly or indirectly, as a result of" specified drug offenses, or "any of the person's property used, or intended to be used, * * * to commit, or to facilitate the commission of," such offenses. 21 U.S.C. 853(a)(1)-(2). If "as a result of any act or omission of the defendant" any such forfeitable property cannot be located or has been transferred or placed beyond the jurisdiction of the district court, Section 853(p) mandates the forfeiture of substitute assets—that is, of "any other property of the defendant, up to the value of any [forfeitable] property" that the defendant has hidden or dissipated. 21 U.S.C. 853(p)(1)-(2).

Section 853 also establishes various forfeiture-related procedures. *Inter alia*, Section 853 authorizes a district court to enter a pretrial order "preserv[ing] the availability of property described in subsection (a) of this section for forfeiture," so that the property is not dissipated before a conviction. 21 U.S.C. 853(e)(1).

The provisions of Section 853 apply to the forfeiture of property under other criminal statutes as well. See 28 U.S.C. 2461(c). For instance, 18 U.S.C. 982 provides that a court imposing sentence "on a person convicted of a Federal health care offense" shall "order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." 18 U.S.C. 982(a)(7).[1] Section 982 also provides that "[t]he forfeiture of property under this section * * * shall be governed by the provisions of" Section 853. 18 U.S.C. 982(b)(1); see 18 U.S.C. 982(b)(2) (stating that Section 853(p), governing substitute assets, shall not be used with respect to certain defendants who acted merely as intermediaries in committing money-laundering offenses); see also 28 U.S.C. 2461(c).

b. Special civil procedures apply when a person is "committing or about to commit a Federal health care offense" or is "alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of * * * a Federal health care offense or

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[1] See 18 U.S.C. 24(a) (defining "Federal health care offense" to include, *inter alia*, conspiracy to commit health care fraud (in violation of 18 U.S.C. 1349), conspiracy to defraud the government in relation to a health care program (in violation of 18 U.S.C. 371), and paying kickbacks in connection with a federal health care program (in violation of 42 U.S.C. 1320a-7b(b)(2)(A))).

property which is traceable to such a violation." 18 U.S.C. 1345(a)(1)-(2). If a person is engaging in those acts, the government may commence a civil action to enjoin the commission of the offense and to restrain "any such property or property of equivalent value." 18 U.S.C. 1345(a)(2)(A)-(B). By preserving for later forfeiture or restitution either assets that are directly linked to the federal health care offense or assets "of equivalent value," such an injunction "prevent[s] a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought." 18 U.S.C. 1345(a)(2)(B)(i) and (b).

2. On October 2, 2012, a grand jury issued a sealed indictment charging petitioner and two co-defendants with conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; conspiracy to pay kickbacks in contravention of Medicare rules, in violation of 18 U.S.C. 371; and paying kickbacks in connection with a federal health care benefit program, in violation of 42 U.S.C. 1320a-7b(b)(2)(A). See Indictment 7-14. The indictment alleges that those "offenses resulted in $45 million of improper Medicare benefits being paid." Pet. App. 12; see Indictment 9. The indictment seeks forfeiture under 18 U.S.C. 982 of specified property "derived * * * from gross proceeds traceable to the commission of the offense" or assets of equivalent value. Indictment 14-16; see Pet. App. 12. Petitioner has not yet been arraigned.[2]

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[2] Petitioner's two co-defendants have cooperated, pleaded guilty, and been sentenced. See 12-cr-20751 Docket entry Nos. 149, 158, 212. The district court ordered one of them to pay $27 million in restitution and the other to pay $45 million in restitution. See *ibid.*

3. a. On the same day the grand jury returned the indictment, the government filed this civil action under Section 1345, seeking to enjoin petitioner from committing further acts of health care fraud and to restrain her assets. See 12-cv-23588 Docket entry No. (Docket entry No.) 1, at 1, 19-20. The government then filed a motion for a temporary restraining order, explaining that "[t]he government has thus far identified losses to federal health care programs of over $45 million stemming from a scheme, implemented through an elaborate web of kickbacks, to submit fraudulent claims for home health services that were neither performed nor medically necessary." Docket entry No. 4, at 1.

In support of that motion, the government submitted a declaration from a case agent explaining how petitioner had carried out her fraudulent scheme. See Docket entry No. 5, at 1-2. Petitioner and her co-defendants owned and operated two home health care agencies, LTC Professional Consultants, Inc., and Professional Home Care Solutions, Inc., which allegedly served diabetic patients entitled to multiple daily home visits to receive insulin injections. See *id.* at 1-2, 7-8. Each of those agencies was an enrolled health care provider with Medicare, see *ibid.*, a federal program that prohibits payment of kickbacks or referral fees to doctors, nurses, health care aides, patient recruiters, and patients, see 42 U.S.C. 1320a-7b(b)(2)(A); 42 C.F.R. 1001.1 *et seq*. The case agent's declaration stated that, despite that prohibition, petitioner had paid kickbacks to nearly everyone associated with her agencies. See Docket entry No. 5, at 5, 9-10. Those kickbacks had gone to nurses who falsified blood sugar readings, patient visit logs, and treatment

notes, see *id.* at 11-14; to recruiters who sought out Medicare beneficiaries who were not actually in need of home health care visits, see *id.* at 13-18; and to beneficiaries who allowed their information to be used to bill Medicare for services that were not needed and were never provided, see *id.* at 14. From 2006 to 2012, petitioner's companies received $45 million from Medicare. See *id.* at 9-10.

On October 3, 2012, the district court entered a temporary restraining order granting the relief that the government had requested. See Docket entry No. 11, at 1-7 (identifying specific restrained assets). After the indictment was unsealed, petitioner moved to release funds from the restraining order to pay her attorney in the criminal case. See Docket entry No. 46, at 1-4. She claimed that the restraint constituted a violation of her Sixth Amendment rights, alleging that without those funds she could not hire her counsel of choice. See *id.* at 4, 8-13.

The district court held an evidentiary hearing at which the government's case agent testified and was cross-examined at length. See Docket entry No. 135. Petitioner and the government stipulated for purposes of the hearing that "an unquantified amount of revenue not connected to the indictment flowed into some of the accounts and some of the real estate" that had been restrained. *Id.* at 90.

After considering the evidence, the district court denied petitioner's motion for release of funds and converted the temporary restraining order into a preliminary injunction barring petitioner from disposing of "proceeds or profits from [her] Federal health care offenses or property of an equivalent value" in which she has an interest. Pet. App. 6-7; see *id.* at 34.

The court found probable cause "to believe that: (1) Federal health care offenses have been committed; (2) $45 million was obtained illegally as a result of those offenses; and (3) * * * there has been a dissipation of those monies," which were used "to purchase luxury items, real estate, automobiles, and for travel." *Id.* at 14-15; see *id.* at 15 n.3 (stating that, "[e]ven under [a] preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million"). The court also rejected petitioner's Sixth Amendment argument, agreeing with the Fourth Circuit's view that "there is no Sixth Amendment impediment" to the restraint of "substitute assets" not directly tied to the commission of the offense so long as those assets are forfeitable by statute. *Id.* at 31 (citing *In re Billman*, 915 F.2d 916, 921-922 (4th Cir. 1990), cert. denied, 500 U.S. 2258 (1991)).

b. The court of appeals affirmed. Pet. App. 1-3. The court held that petitioner's Sixth Amendment challenge was "foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631 (1989); [and] *United States v. Monsanto*, 491 U.S. 600, 616, (1989)." Pet. App. 3 (parallel citations omitted); see *ibid.* (noting that the district court had found, based on an evidentiary hearing, that there was probable cause "to believe that [petitioner] committed an offense requiring forfeiture, that she possessed forfeitable assets, and that she was alienating those assets"). The court also cited (see *ibid.*) its own prior decision in *United States* v. *DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999), which had held that Section 1345 permits entry of a prelimi-

nary injunction restraining the dissipation of substitute assets, see *id.* at 1283-1284.

ARGUMENT

Petitioner contends that the preliminary injunction authorized by Section 1345 violates her Fifth and Sixth Amendment rights because pretrial restraint of substitute assets is never permissible when a defendant seeks to use those assets to hire her counsel of choice. The court of appeals correctly rejected that argument, and its unpublished decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. This Court's decisions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989), establish that a statutorily authorized restraint on a defendant's assets does not violate the Constitution if the government has shown probable cause to believe that those assets are forfeitable.

In *Caplin & Drysdale*, the Court considered whether refusal to "authoriz[e] the payment of attorney's fees" out of assets forfeitable as a result of the defendant's conviction infringed the defendant's Sixth Amendment right to counsel of choice or "upset[] the 'balance of power' between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment." 491 U.S. at 622, 624. The Court recognized that, without access to forfeitable assets, a defendant sometimes "will be unable to retain the attorney of his choice." *Id.* at 625. The Court nevertheless rejected the defendant's constitutional challenge, explaining that "[a] defendant has no Sixth Amendment right to spend another person's money" for legal fees, including money that is "for-

feitable" by statute. 491 U.S. at 626; see *Kaley* v. *United States*, 134 S. Ct. 1090, 1096-1097 (2014). The Court in *Caplin & Drysdale* concluded that the "strong governmental interest in obtaining full recovery of all forfeitable assets" trumps "any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." 491 U.S. at 631.

In *Monsanto*, the Court considered Fifth and Sixth Amendment claims arising from a *pretrial* restraint of assets that the government alleged would be forfeitable upon conviction. Relying on *Caplin & Drysdale*, the Court held that "assets in a defendant's possession may be restrained" even "before he is convicted," based on "a finding of probable cause to believe that the assets are forfeitable," regardless of whether "the defendant seeks to use those assets to pay an attorney." *Monsanto*, 491 U.S. at 602, 615; see *Kaley*, 134 S. Ct. at 1096-1097. The Court reasoned that, "if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." 491 U.S. at 616.

b. As the court of appeals correctly held, those decisions are controlling here. As petitioner points out (Pet. 17-18), in both *Caplin & Drysdale* and *Monsanto* the government had sought to forfeit only assets that were directly involved in or traceable to the defendant's crimes. See *Caplin & Drysdale*, 491 U.S. at 619-620; *Monsanto*, 491 U.S. at 602-603. In both cases, however, the Court repeatedly recognized that the relevant characteristic of the assets was not that they

were "tainted" by the crime (*e.g.*, Pet. i), but simply that they were forfeitable by statute. See, *e.g.*, *Caplin & Drysdale*, 491 U.S. at 625-629, 632; *Monsanto*, 491 U.S. at 614-616. *Monsanto*'s holding about the constitutionality of pretrial asset restraint has nothing to do with the specific statutory basis for deeming particular assets to be forfeitable. Rather, the Court held that a pretrial restraint is permissible, even in the face of a claim that the restrained assets are needed to pay for counsel, so long as there is "probable cause to believe that the assets are forfeitable." 491 U.S. at 615; see *Kaley*, 134 S. Ct. at 1095 (describing *Monsanto* as establishing that "a pre-trial asset restraint [is] constitutionally permissible whenever there is probable cause to believe that the property is forfeitable"); *id.* at 1096-1097.

Thus, "the key distinction for determining whether pretrial restraint of property violates a defendant's Sixth Amendment right is not whether the property is *tainted* or *untainted*, but rather whether it is *forfeitable* or *nonforfeitable*." *United States* v. *Wingerter*, 369 F. Supp. 2d 799, 810 (E.D. Va. 2005). When the government claims that property is forfeitable because it is directly involved in the defendant's crime, then forfeitability turns on an inquiry into whether that property is "tainted"—that is, whether it was used in the crime or is the proceeds of the crime. But when the government claims that property is forfeitable as substitute assets because the defendant has already spent or hidden the proceeds of the crime, then the forfeitability inquiry does not turn on any question of "taint"; it depends on different questions, such as whether proceeds have actually been dissipated and whether the value of the substitute assets

exceeds the value of the dissipated assets. See 21 U.S.C. 853(p).

Here, the unchallenged factual finding of the district court is that probable cause exists to believe that the substitute assets at issue are forfeitable based on proof that petitioner committed federal health care offenses and then dissipated the proceeds of those offenses by spending them on luxury items and travel. See 18 U.S.C. 982(a)(7) and (b); 18 U.S.C. 1345; 21 U.S.C. 853(p); see also *Monsanto*, 491 U.S. at 615. *Monsanto*'s holding is thus fully applicable, and petitioner's desire to spend the substitute assets to hire counsel does not trump the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Caplin & Drysdale*, 491 U.S. at 631; see *Kaley*, 134 S. Ct. at 1094-1095.

Petitioner says little to counter that conclusion. She suggests (*e.g.*, Pet. 21) that, as a policy matter, it is "inconceivable" that she may not use "her own legitimately-earned assets to retain counsel."[3] But if petitioner's position were adopted, then a defendant could effectively deprive her victims of any opportunity for compensation simply by dissipating her ill-gotten gains. It is precisely to avoid that result that Congress provided for the pretrial restraint of substitute assets in cases like this one, thus ensuring protection of the government's interests in providing restitution to victims and in recovering forfeitable assets for other purposes. See *Kaley*, 134 S. Ct. at 1094-1095;

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[3] Petitioner's discussion of the history of civil forfeiture law (see Pet. 20-21) has no bearing on the question presented in this case. As petitioner acknowledges (Pet. 21), *in personam* forfeiture —the type of forfeiture at issue in both *Caplin & Drysdale* and *Monsanto*—is a well-recognized penalty in criminal cases.

see also 18 U.S.C. 1345(b) (specifically authorizing restraint of assets, including "property of equivalent value" to tainted assets, "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").

Petitioner also contends that *Caplin & Drysdale* and *Monsanto* do not apply to substitute assets because the relation-back doctrine, under which the government's interest in forfeitable property relates back to the date of the criminal offense, "does not apply to untainted assets." Pet. 19. Petitioner is incorrect. It is matter of some debate whether Section 853(c), which provides for relation back as a statutory matter, applies to substitute assets. See, *e.g.*, *United States* v. *McHan*, 345 F.3d 262, 272 (4th Cir. 2003). That debate is closely tied to a disagreement (not relevant in this Section 1345 case) about whether Section 853 provides for pretrial restraint of substitute assets. See, *e.g.*, *United States* v. *Peterson*, 820 F. Supp. 2d 576, 584-585 (S.D.N.Y. 2011); pp. 15-16, *infra*. But the analysis in this Court's decisions—and, in particular, in *Monsanto*, which governs pretrial restraint of forfeitable assets—does not turn on application of the relation-back doctrine. See *Monsanto*, 491 U.S. at 615-616; see also *Caplin & Drysdale*, 491 U.S. at 625-633. The government's interests in recovering forfeitable property "override[] any Sixth Amendment interest," *Caplin & Drysdale*, 491 U.S. at 631, regardless of whether a particular statutory provision states that the government's right to that property vests retroactively.

Finally, petitioner argues (Pet. 22-23) that the government made a concession in *Kaley* that is relevant

to the question presented here. At oral argument in *Kaley*, counsel for the government "agreed that a defendant has a constitutional right to a hearing on" the question "whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment"—a matter that the Court described as a "requirement[] for forfeiture under federal law." 134 S. Ct. at 1095 & n.3. That statement does not undermine the conclusion that *Monsanto* controls this case.

In *Kaley*, the government had sought and obtained a pretrial order restraining under Section 853(e) only directly forfeitable assets—that is, "proceeds obtained from" or involved in "the [charged] offense(s) and all property traceable to such property." *Kaley* J.A. 40; see *id.* at 44-47, 67-68; *United States* v. *Kaley*, No. 07-80021-CR, 2007 WL 1831151, at *1-2 (S.D. Fl. 2007) (stating that, "[b]ecause there exists probable cause to believe that the property in question was 'involved in' money laundering activity or is 'traceable to such property,' the protective order has been properly entered"). As noted above, when the government claims entitlement to forfeiture of such assets and no others, traceability or other direct relation to the crime is indeed a "requirement[] for forfeiture." *Kaley*, 134 S. Ct. at 1095. In that situation, if the government obtains a restraint on a bank account or other asset that the defendant contends is not directly forfeitable, then the defendant is entitled to a hearing on that question if he lacks other funds to retain counsel. See *ibid.* (noting that the courts of appeals have "uniformly" allowed such a hearing); *id.* at 1099 n.9.

Thus, government counsel in *Kaley* conceded only that a defendant is entitled to a hearing on traceabil-

ity when that is the rationale invoked by the government in support of a pre-trial restraint. By contrast, in a case (like this one) where a restraint on substitute assets is authorized by Section 1345, a defendant cannot defeat the restraint by showing that the property is not "tainted," because the property is forfeitable even in the absence of any taint. At most, a defendant might be able to show at a hearing that a restraint on substitute assets is improper because some statutory "requirement[] for forfeiture" of such assets, *Kaley*, 134 S. Ct. at 1095, cannot be satisfied. See, *e.g.*, *United States* v. *Patel*, 888 F. Supp. 2d 760, 771 (W.D. Va. 2012) (stating in a case involving pretrial restraint on substitute assets that the defendant was entitled to challenge at a hearing whether probable cause existed to believe that the government would be able to satisfy the requirements set forth in Section 853(p) for substitute-asset forfeiture).

2. The unpublished decision below does not conflict with any decision of this Court or of another court of appeals. Indeed, the government is not aware of any case in which a court has expressed doubt about the constitutionality of Section 1345 or has recognized (after *Caplin & Drysdale* and *Monsanto*) a constitutional right to use assets forfeitable by statute—including forfeitable substitute assets—to hire counsel.

a. Contrary to petitioner's contention (Pet. 25-26 & n.8), the decision below does not conflict with the Fourth Circuit's decision in *United States* v. *Farmer*, 274 F.3d 800 (2001).

The defendant in *Farmer* was charged with a scheme involving counterfeit merchandise, and the government seized (pursuant to civil forfeiture stat-

utes) 3000 boxes of the merchandise as well as motor vehicles and $540,000 in cash and cashier's checks. See 274 F.3d at 801. The indictment alleged that the seized items were "subject to forfeiture as either *instruments or proceeds* of [defendant's] alleged trademark and money laundering violations"—that is, that they were directly forfeitable. *Id.* at 802 (emphasis added). The court of appeals held that the defendant was entitled to a hearing "for the limited purpose of determining whether untainted assets have been seized and whether [defendant] requires those assets to hire counsel." *Id.* at 801. Given the theory of forfeiture on which the government had proceeded, the court's distinction between tainted and untainted assets was simply a means of distinguishing between assets that were ultimately subject to forfeiture and those that were not. See *id.* at 802 (stating that this Court has held that "any Sixth Amendment right to obtain counsel of choice does not extend beyond the individual's right to spend his own legitimate, nonforfeitable assets"); see also *Wingerter*, 369 F. Supp. 2d at 810.

The court in *Farmer* did not discuss whether substitute assets may be frozen pending trial when the defendant asserts that those assets are needed to pay for counsel.[4] But the Fourth Circuit—the sole court of

[4] That question likewise is not addressed in any of the court of appeals decisions cited by amicus Associations of Criminal Defense Attorneys (at 19-20), which deal with the more general question whether a defendant may obtain a hearing with respect to a pretrial asset freeze. The decision identified by amicus U.S. Justice Foundation (at 16) as conflicting with the decision below is similarly irrelevant. In that case, the Sixth Circuit interpreted a now-superseded version of Section 1345(a)(2), the subsection that permits restraint of "property of equivalent value," to cover only

appeals to have held that the pretrial restraint of substitute assets is permissible under Section 853(e), see Pet. 7 n.1—has repeatedly upheld such restraints without suggesting that they create any constitutional problem. See *In re Billman*, 915 F.2d 916, 919, 921-922 (4th Cir. 1990), cert. denied, 500 U.S. 2258 (1991); *United States* v. *Bollin*, 264 F.3d 391, 421-422 (4th Cir.), cert. denied, 524 U.S. 935 (2001) and 535 U.S. 989 (2002); *United States* v. *Bromwell*, 222 Fed. Appx. 307, 311 (4th Cir. 2007) (per curiam).[5] And numerous district courts in the Fourth Circuit have permitted pretrial restraints of substitute assets in the face of the very constitutional challenge that petitioner raises here. See, *e.g.*, *Wingerter*, 369 F. Supp. 2d at 810; *In re Restraint of Bowman Gaskins Fin. Grp. Accounts*, 345 F. Supp. 2d 613, 627-628 (E.D. Va. 2004); *United States* v. *Helms*, No. 700CR00074, 2001 WL 1057751, at *2 (W.D. Va. 2001); see also *United States* v. *Ziadeh*, 230 F. Supp. 2d 702, 704 (E.D. Va. 2002).[6]

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cases involving banking-law violations. See *United States* v. *Brown*, 988 F.2d 658, 663-664 (6th Cir. 1993).

[5] Indeed, the district court in this case understood itself to be following the same approach that the Fourth Circuit has taken. See Pet. App. 31 (discussing *In re Billman*).

[6] Petitioner cites (Pet. 27) *United States* v. *Najjar*, 57 F. Supp. 2d 205 (D. Md. 1999), for the proposition that a substitute asset should not be restrained in the face of a claim that the asset is needed to pay counsel. To the extent that *Najjar* rests on the proposition that forfeiture of substitute assets is discretionary, see *id.* at 208-209, it is not good law. See *United States* v. *Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary; rather, the statute mandates forfeiture of substitute assets when the tainted property has been placed beyond the reach of a forfeiture.") (internal quotation marks omitted); see also *United States* v. *Patel*, 949 F. Supp. 2d 642, 662 n.18 (W.D. Va. 2013).

b. Petitioner suggests that the decision below is inconsistent with this Court's decision in *Kaley*. See, *e.g.*, Pet. 25. In *Kaley*, the Court held that a criminal defendant seeking to lift a pretrial restraint on her property in order to pay counsel of her choice is not "constitutionally entitled" to a hearing "to contest a grand jury's prior determination of probable cause to believe [she] committed the crimes charged." 134 S. Ct. at 1094. The Court's holding rested on the "fundamental and historic commitment of our criminal justice system" to entrust grand juries with that probable-cause determination, *id.* at 1097, as well as on an assessment that the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), would (if applicable) tip against affording the further process that the defendant sought, see 134 S. Ct. at 1100-1104.

Here, petitioner does not seek any additional process to contest the preliminary injunction entered by the district court under Section 1345. Indeed, that court has already afforded petitioner a thorough hearing at which she cross-examined the government's case agent and disputed the existence of probable cause to believe that she had committed a federal health care offense. See Pet. App. 16-20; see also *Kaley*, 134 S. Ct. at 1094; *Dowling* v. *United States*, 493 U.S. 342, 352 (1990). Rather, petitioner's claim is that the Constitution bars pretrial restraint of substitute assets in every case in which the defendant needs funds to pay for counsel. *Kaley* offers no support for such a rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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