No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an indicted defendant who asserts that a pretrial order restraining potentially forfeitable assets impairs his ability to retain counsel of choice, and who has been afforded a post-restraint hearing, must be permitted to challenge the order by attacking the grand jury's determination of probable cause to indict the defendant on the offenses as to which forfeiture is sought.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

In 2007, a federal grand jury returned a superseding indictment charging petitioners with various offenses and giving notice that the government would seek criminal forfeiture of property traceable to or involved in the offenses. Pursuant to 21 U.S.C. 853(e)(1)(A), the district court granted a pretrial restraining order barring petitioners from transferring or disposing of the relevant property. Petitioners moved to vacate the order, alleging that it prevented them from retaining counsel of choice, and sought a pretrial hearing to challenge the restraint. Ultimately, the district court gave petitioners

an opportunity for a hearing, at which petitioners challenged only the grand jury's determination of probable cause to believe they had committed the charged criminal offenses. The district court refused to hold a hearing on that issue. Pet. App. 43. The court of appeals affirmed. *Id.* at 1-37.

A. The Legal Background

1. Criminal forfeitures are imposed at sentencing "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 (1996). Section 853 of Title 21, enacted in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, includes procedural provisions that apply to criminal forfeitures under nearly all other federal statutes, including the statute at issue in this case. See 28 U.S.C. 2461(c). Among other things, Section 853 authorizes an order before trial "preserv[ing] the availability of property" that may ultimately be forfeited, so that the property is not dissipated before a conviction. 21 U.S.C. 853(e)(1).

Before the filing of an indictment, the court may enter a restraining order only temporarily and only if it determines, after an "opportunity for a hearing," that "there is a substantial probability that the United States will prevail on the issue of forfeiture"; that "failure to enter the order will result in the property being destroyed, removed * * * , or otherwise made unavailable for forfeiture"; and that "the need to preserve the availability of the property * * * outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. 853(e)(1)(B). After an indictment, however, the court "may enter a restraining order" or

take other appropriate action ex parte, so long as the indictment charges an offense for which criminal forfeiture may be imposed and "alleg[es] that the property * * * would, in the event of conviction, be subject to forfeiture." 21 U.S.C. 853(e)(1)(A); see Fed. R. Crim. P. 32.2(a) (providing that an indictment must give notice that the government will seek forfeiture, but "need not identify the property subject to forfeiture").

Although the statute does not specify any hearing with respect to an order entered after the filing of an indictment, the relevant Senate Report states that a court has the "authority to hold a hearing subsequent to the initial entry of the order," at which time the court can "modify the order or vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment)." S. Rep. No. 225, 98th Cong., 1st Sess. 203 (1983) (Senate Report). But it also states that "at such a hearing the court is not to entertain challenges to the validity of the indictment" or otherwise "look behind" it; rather, "[f]or the purposes of issuing a restraining order, the probable cause established in the indictment * * * is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based." *Id.* at 202-203.

2. In *United States* v. *Monsanto*, 491 U.S. 600 (1989), this Court held that Section 853 "authorizes a district court to enter a pretrial order freezing assets in a defendant's possession, even where the defendant seeks to use those assets to pay an attorney" and that "such an order is permissible under the Constitution." *Id.* at 602.

The Court concluded that Section 853 "is unambiguous in failing to exclude assets that could be used to pay

an attorney from its definition of forfeitable property." *Monsanto*, 491 U.S. at 607. The Court also relied on *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), to reject the argument that the Fifth and Sixth Amendments "require[] Congress to permit a defendant to use assets" that are forfeitable under the statute "to pay that defendant's legal fees." 491 U.S. at 614.

Finally, *Monsanto* considered whether the government may "freez[e] the assets in question before [the defendant] is convicted * * * and before they are finally adjudged to be forfeitable." 491 U.S. at 615. The Court held that "assets in a defendant's possession may be restrained" based on "a finding of probable cause to believe that the assets are forfeitable." *Ibid.*

The *Monsanto* Court did not consider, however, "whether a hearing was required by the Due Process Clause" to establish probable cause and, if so, what would make such a hearing "adequate." 491 U.S. at 615 n.10. The Court explained that such consideration was not warranted because the government had "prevailed in the District Court notwithstanding [a] hearing" and the court of appeals had not addressed procedural due process. *Ibid.*

Although this Court did not address the issue in *Monsanto*, the courts of appeals have agreed that a defendant has no right to a pre-restraint hearing. They have also generally agreed that a defendant has no right to a post-restraint hearing except in the limited situation in which he has established that he has no assets other than the restrained funds with which to retain counsel of his choice. See, *e.g.*, *United States* v. *Farmer*, 274 F.3d 800, 804-805 (4th Cir. 2001) (stating that a defendant has no interest in a post-restraint hearing

unless he can show that he does not have "the means to hire an attorney independently of assets that were seized"); *United States* v. *Jones*, 160 F.3d 641, 647 (10th Cir. 1998) ("As a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family."). The lower courts differ as to the proper scope of any such hearing, however. All of the courts that have considered the issue allow a defendant to argue at a hearing that there is no probable cause to believe a nexus exists between the property to be restrained and the offense charged in the indictment. See, *e.g.*, *Farmer*, 274 F.3d at 803-806; *Jones*, 160 F.3d at 648-649. A smaller number of courts also allow a challenge to the grand jury's finding of probable cause to believe that the defendant committed the charged crime giving rise to forfeiture. See *United States* v. *Monsanto*, 924 F.2d 1186, 1200, 1203 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991); *United States* v. *E-Gold, Ltd.*, 521 F.3d 411, 416, 419 (D.C. Cir. 2008). The issue presented in this case is whether the latter courts have correctly held that defendants who have been granted a post-restraint hearing have a due process right to challenge the probable cause underlying the criminal charge.

B. The Present Controversy

1. In January 2005, petitioner Kerri Kaley, then a sales representative with Ethicon Endo-Surgery (a subsidiary of Johnson & Johnson), learned that she and her husband, petitioner Brian Kaley, were targets of a federal grand jury investigation in the Southern District of Florida. Pet. App. 3. The grand jury was investigating a scheme to steal prescription medical devices and resell them for profit. See *ibid.*

Each of the petitioners retained an attorney. Pet. App. 3. The two attorneys explained that they would charge a total of approximately $500,000 to litigate the case through a trial. See *ibid.* To raise the funds, petitioners obtained a home equity line of credit of $500,000, which they used to purchase a certificate of deposit. See *ibid.* They later added funds to the certificate. See 07-cr-80021 Docket entry No. 17, at 7 (S.D. Fla.) (Docket entry No.).

On February 6, 2007, the grand jury indicted petitioners and co-defendant Jennifer Gruenstrass. J.A. 29-40. The indictment charged all three defendants with conspiracy to transport prescription medical devices in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. 371 (Count 1); transportation of stolen devices in interstate commerce, in violation of 18 U.S.C. 2314 (Counts 2-6); and obstruction of justice, in violation of 18 U.S.C. 1512(b)(3) (Count 7). J.A. 31-39. The indictment also notified petitioners of the government's intent, in the event of a conviction, to seek forfeiture of "all property, real and personal, constituting proceeds obtained from the aforestated offense(s) and all property traceable to such property," including the certificate of deposit. J.A. 40; see Fed. R. Crim. P. 32.2(a).

On April 10, 2007, the grand jury returned a superseding indictment that added a count against petitioners and Gruenstrass: conspiracy to launder the proceeds of the Section 2314 offenses, in violation of 18 U.S.C. 1956(h). J.A. 58-59. The superseding indictment alleged that the certificate of deposit and petitioners' residence were "involved in" the commission of the Section 1956(h) offense and were therefore subject to forfeiture. J.A. 60-61.

2. Upon "the filing of [the] indictment," 21 U.S.C. 853(e)(1)(A), the United States moved ex parte to restrain petitioners from transferring or otherwise disposing of the certificate of deposit and other property traceable to the alleged offenses. Pet. App. 4. The district court entered the requested order. Pet. App. 106; J.A. 44-47.[1]

Petitioners sought to vacate the order, arguing that without the restrained assets they would not be able to "retain counsel of choice." Docket entry No. 17, at 8; see Docket entry No. 53, at 6; Pet. App. 51-52. Meanwhile, at the request of a magistrate judge, the government filed under seal the declaration of a special agent "in support of [the] probable cause determination as to [the] restraint of the principal residence and the certificate of deposit." Docket entry No. 79.

On May 2, 2007, the magistrate judge rejected petitioners' arguments and entered an amended restraining order. J.A. 67-68; Pet. App. 5. The judge concluded that "[p]robable cause to * * * restrain defendants' principal residence and certificate of deposit exists," Docket entry No. 80; see Pet. App. 5, and that petitioners were not entitled to a hearing to challenge "the validity of the indictment itself," *id.* at 108-109 (citation omitted).

On review of the magistrate judge's action, the district court "released" $63,007.65 of the amount in the certificate of deposit "from the protective order," but otherwise affirmed. Pet. App. 104. The court agreed that "the United States has demonstrated probable cause to believe that [petitioners'] residence was 'involved in' the money laundering offense charged in the superseding indictment" and that the bulk of "the funds

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[1] The government also filed a notice of *lis pendens* against petitioners' residence. See Docket entry 17, at 7; Docket entry 82, at 2.

used to obtain the certificate of deposit are 'traceable to' the residence." *Id.* at 95-96. Applying *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989), the court also concluded that petitioners did not have a due process right to an evidentiary hearing to "challenge the underlying merits of the indictment" before trial. Pet. App. 97.

3. On interlocutory appeal, the court of appeals reversed and remanded for further consideration of whether a pretrial evidentiary hearing was warranted. Pet. App. 56-72. The Eleventh Circuit agreed that *Bissell* provided the proper framework for the analysis, but held that an evidentiary hearing could address the "propriety" of the restraint even though it could not address petitioners' "guilt or innocence." *Id.* at 68. The court of appeals instructed the district court to "engage in a more searching exposition and calculus" of the possible prejudice that petitioners would suffer if they were unable to "retain * * * counsel of choice" (or "any private counsel" at all) and to determine if a hearing was warranted. *Id.* at 69-71.

Judge Tjoflat specially concurred. He would have applied the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and remanded "with instructions to afford the Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restrain[] their assets." Pet. App. 86, 92-93.

4. On remand, the district court concluded that petitioners were "entitled to an evidentiary hearing." Pet. App. 45. The court stated that the restraint "at issue, if

wrongful, will deprive [petitioners] of their ability to retain counsel of their choice." *Id.* at 46.[2]

At the evidentiary hearing, petitioners stated that they were "not contesting that the assets restrained were involved in and traceable to the conduct" alleged in the superseding indictment. J.A. 107. Rather, their only argument was that the government was not likely to succeed in establishing forfeitability because its "case against them is 'baseless.'" Pet. App. 39. Petitioners supported that argument—which was based on the theory that they were voluntarily supplied with millions of dollars of prescription medical devices and had no obligation to return those devices to Ethicon—by submitting transcripts from Gruenstrass's trial, which had resulted in an acquittal, as well as other documentary evidence. See Pet. App. 7, 22 n.6, 65.[3]

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[2] Petitioners were represented at the time by the very counsel they wished to retain (as they had been from the beginning of the case, and still are); those counsel had entered "temporary" appearances for purposes of litigating the asset-restraint issues. See, *e.g.*, J.A. 100, 147.

[3] The Gruenstrass trial did not include all of the government's evidence against the petitioners, who dealt with entities and obtained and sold devices that Gruenstrass did not. As to the petitioners, the government put on evidence that (*inter alia*) Kerri Kaley was in charge of the scheme to obtain medical devices from hospitals and recruited other pharmaceutical representatives to join it; that Kerri Kaley sometimes told the others to obtain specific products so that she could resell them; that petitioners made millions of dollars from their resale activities and paid their recruits substantial sums by means of checks written from company accounts for Brian Kaley's construction companies; and that petitioners took steps to conceal what they were doing from investigators, including removal of devices stored at their house. See Docket entry No. 184, at 52-53, 59, 85-86, 93-97, 100-102, 148-154, 192, 233-234, 243-244, 271-272; Docket entry No. 185, at 346-348, 353-354.

The district court declined to vacate the asset-restraint order. See Pet. App. 43. The court held that the only question properly before it was "whether the restrained assets are traceable to or involved in the alleged criminal conduct." *Id.* at 43 n.5. The court concluded that because petitioners had confined themselves to "challenging the validity of the indictment," they had not shown that continued restraint of their assets was improper. See *id.* at 42-43.

5. In a second interlocutory appeal, the court of appeals affirmed. Pet. App. 1-37. Agreeing that the "only issue" before it was "the nature and scope" of the post-restraint, pretrial hearing, the court ruled that petitioners were not entitled "to challenge the factual foundation supporting the grand jury's probable cause determinations"—that is, "the very validity of the underlying indictment." *Id.* at 2, 9, 13.

The court first concluded that 21 U.S.C. 853 did not require a hearing on probable cause in order to continue a post-indictment restraining order. Pet. App. 15; see also *id.* at 10-11. Allowing a defendant to challenge "the factual underpinnings of the underlying charges," the court noted, "would be at war with th[e] legislative history," which stated that a court that decides to hold a hearing "*is not to entertain challenges to the validity of the indictment*." *Id.* at 16 (quoting Senate Report 203).

The court rejected the argument that due process nevertheless requires that, once a defendant is granted a hearing, he must be permitted to challenge the existence of probable cause. See Pet. App. 17; see *id.* at 23. The court highlighted a "long line of case authority" that bars a defendant from "challeng[ing] whether there is a sufficient evidentiary foundation to support the grand jury's probable cause determination." *Id.* at 21-22; see

id. at 17-21 (citing *Costello* v. *United States*, 350 U.S. 359 (1956), and stating that "*Costello* and its progeny evince a powerful reluctance to allow pretrial challenges to the *evidentiary* support for an indictment"). And the court explained that petitioners sought to mount just such a "pretrial direct assault on the indictment": they proposed to "lay[] out an elaborate theory that * * * the goods (the prescription medical devices) were not stolen in the first place," and to do so by "adduc[ing] additional evidence not presented to the grand jury." *Id.* at 22.

In the view of the court of appeals, such a challenge would have several damaging effects. First, it would "undermin[e] the grand jury system" and contravene the rule that a facially valid indictment "is enough to call for trial * * * on the merits." Pet. App. 23 (citation and internal quotation marks omitted). Second, it would "effectively require the district court to try the case twice," inserting a "mini-trial" between the grand jury's probable-cause determination and "the trial itself," even though the trial gives a defendant a full opportunity to address "the merits of the underlying charge." *Id.* at 25. Finally, requiring such a "mini-trial" would interfere with "the pretrial preservation of assets" that Congress sought to ensure, since it would force the government to a choice between "prematurely revealing its evidence" and forgoing a restraint that might be the only way to guard against dissipation of forfeitable property. *Id.* at 26, 28-29.

Judge Edmondson concurred in the result, explaining that he would likely "reach a different result" if he were

writing on a blank slate but was not persuaded that the outcome was "definitely erroneous." Pet. App. 32, 37.[4]

SUMMARY OF ARGUMENT

Petitioners, whose assets were restrained before trial for potential forfeiture and who claim a need for those assets to retain counsel of choice, assert a right under the Fifth and Sixth Amendments to a pretrial hearing to contest the grand jury's determination of probable cause. The Constitution guarantees no such right. This Court has settled that potentially forfeitable assets may be restrained before trial on a showing of probable cause, despite a claim that the funds are needed to retain counsel. *United States* v. *Monsanto*, 491 U.S. 600 (1989). And the contention that a pretrial judicial hearing is available to contest the probable cause underlying a grand jury's indictment conflicts with more than a century of precedent holding that a grand jury's finding of probable cause is conclusive in a criminal case.

A. 1. The proper due process test for reviewing petitioners' claim is set forth in *Medina* v. *California*, 505 U.S. 437, 445 (1992): a rule of criminal procedure does not violate due process unless it offends a principle of justice so deeply rooted as to be ranked as fundamental. Petitioners' reliance on the balancing test set forth in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), overlooks the nature of their substantive claim: that the grand jury's indictment, though unreviewable in a criminal case, becomes reviewable when used to support a pretrial restraint of forfeitable assets. That claim intrinsically challenges the deeply rooted rule of criminal procedure immunizing the grand jury's determination of probable

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[4] On remand from the second appeal, the district court stayed the case pending this Court's disposition. Docket entry No. 259.

cause from such inquiries and is therefore governed by the *Medina* test.

2. Petitioners' claim fails under *Medina*. The inviolability of the grand jury's determination of probable cause is itself a deeply rooted principle of American justice. The Bill of Rights makes the grand jury the charging body for serious federal crimes precisely because the Framers recognized that process as a fair method for instituting charges. *Costello* v. *United States*, 350 U.S. 359, 361-363 (1956). As a rule, therefore, challenges to the factual sufficiency of the grand jury's findings are impermissible. *Ibid.* This principle holds true even when the grand jury indictment is used to support a pretrial restraint on the defendant's liberty: the grand jury's finding of probable cause makes a judicial finding on that issue unnecessary. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975). And this Court's confidence in the grand jury rests on functional considerations as well: the grand jury is a constitutionally independent body, composed of disinterested members of the community, and is well suited to determine when charges are justified and when they are not.

Many significant consequences flow from an indictment that impinge on liberty and property interests. An indicted defendant may be arrested and held for trial; he loses any right under the federal rules to an adversary preliminary hearing before trial; he may be presumed a flight risk and a danger to the community under the Bail Reform Act; and he may lose firearms rights, be suspended from his job, or face the loss of government contracts. All of these consequences ensue despite the absence of any right to test the grand jury's probable cause finding in an adversary proceeding.

3. Against that background, petitioners cannot show that the denial of their requested hearing offends fundamental justice. If a defendant can be deprived of *liberty* pending trial based on the grand jury's indictment, without an adversary hearing on probable cause, the same must be true of the defendant's *property* interests.

Petitioners' invocation of the Sixth Amendment's qualified right of counsel of choice does not alter the conclusive character of the grand jury's probable-cause determination. This Court has noted that restrained assets might be used to exercise any number of constitutional rights, and yet no hearing is required; the qualified right to counsel of choice is no different. And allowing such a hearing would create the anomalous prospect of continuing to a criminal trial based on the grand jury's finding of probable cause while releasing the defendant's assets based on a finding that probable cause does not exist.

Petitioners rely on this Court's cases involving post-deprivation hearings in *civil* matters based on *interested parties'* ex parte showings. Those cases have no relevance where independent grand jurors have found probable cause, which has historically been conclusive in the criminal process.

B. Even under the *Mathews* test, petitioners' claim fails.

1. On the defendant's side of the balance: the qualified right of counsel of choice is important, but a pretrial restraint of forfeitable assets does not necessarily limit access to such counsel. Even when it does, the public interest in preserving those assets for forfeiture overrides the defendant's interests when probable cause exists.

2. On the government's side of the balance: an adversary evidentiary hearing on the merits of the government's case threatens premature disclosure of the government's witnesses and evidence, which can jeopardize the safety of witnesses and the integrity of the fact-finding process at trial. Defendants have powerful incentives to seek premature disclosure of the government's case, and the prospect of such hearings may force the government to abandon post-indictment restraints. That would result in the dissipation of assets Congress intended to be available for criminal punishment and restitution to victims.

3. The benefits of the procedure that petitioners seek do not justify those costs. Despite petitioners' portrayal of the grand jury as a one-sided and ineffectual body, for centuries the criminal process has relied on the grand jury to perform its role faithfully and responsibly. And given the nontechnical nature of the fair-probability threshold for probable cause, a nonadversarial process has always been thought sufficient.

Experience confirms that an adversarial post-indictment hearing would add little if any value. Although such hearings have been available in the Second Circuit for two decades, the government is aware of *no* case in which a court has disagreed with the grand jury's determination of probable cause to believe that the defendant committed a crime. And the high conviction rate in the federal courts suggests that an indictment reflects not just probable cause, but a high likelihood of guilt; even acquittals show only a reasonable doubt, not an absence of probable cause in the first instance.

In a rare case, it is conceivable that an adversary hearing may expose a lack of probable cause, despite the safeguards in the system. But a rule that broadly in-

vites such challenges to winnow out the needle in the haystack cannot be found to be constitutionally compelled, given its serious costs. And nothing in this case suggests that petitioners' case is that truly rare instance in which the grand jury produced an unfounded accusation.

ARGUMENT

PETITIONERS HAD NO RIGHT TO CHALLENGE THE GRAND JURY'S FINDING OF PROBABLE CAUSE

"[A] finding of probable cause to believe that * * * assets are forfeitable," this Court has held, provides a constitutionally valid basis for a pretrial restraining order covering forfeitable "assets in a defendant's possession." *United States* v. *Monsanto*, 491 U.S. 600, 615 (1989). That is so even when a defendant claims that he needs the restrained funds to hire private counsel for his defense. *Id.* at 614-615. Petitioners accept that principle and its application to their case, but contend that the Fifth and Sixth Amendments guarantee them a pretrial evidentiary hearing at which they may challenge the grand jury's determination of probable cause to believe that they committed a crime. Br. 29-32.

That contention contravenes the long-standing principle that a grand jury's determination of probable cause is unreviewable in a criminal case and is not subject to attack based on a claim of evidentiary sufficiency. Petitioners can cite no decision in the history of the grand jury in which this Court has allowed a departure from that rule. And even if it were appropriate to conduct an interest-balancing review to decide whether due process mandates the opportunity for such a challenge to the grand jury's finding, petitioners' claims would fail. Petitioners overstate the private interest affected by a pretrial restraint of assets, while understating the gov-

ernment interest in avoiding a premature attack on its case through a challenge to the probable-cause determination. And, critically, petitioners provide no valid reason to question the time-honored reliability of the grand jury's determination of probable cause—or any reason to think that defendants would prevail in an evidentiary hearing in any but the most rarely encountered case. Rather, experience indicates that such challenges would almost always fail. Under those circumstances, the Due Process Clause does not require overturning the traditional rule that the grand jury's probable-cause determination is conclusive.

A. Reliance On The Grand Jury's Probable-Cause Determination To Justify A Restraint Of Assets Satisfies Fundamental Principles Of Justice

Petitioners contend that their due process claim is governed by the standard for addressing procedural due process challenges announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)—a case that devised a balancing test to determine whether a recipient of social security benefits had a right to an evidentiary hearing before those benefits were terminated. Br. 33-34 & n.12. But petitioners' claim that they have a right to attack the grand jury's probable-cause determination when it is used to support the pretrial restraint of forfeitable assets assertedly needed to retain counsel does not challenge solely an interference with property rights. Rather, it challenges the finding of the grand jury—a body enshrined in the Bill of Rights and historically empowered to initiate criminal prosecutions by making an unreviewable determination of probable cause. In those circumstances, resort to the *Mathews* balancing framework is not appropriate. Rather, the proper due process test is found in cases asking whether a rule of criminal proce-

dure violates fundamental concepts of justice long reflected in the traditions of the United States. Here, the rule that the grand jury's determination of probable cause is sacrosanct reflects, rather than violates, long-settled traditions.

1. The Due Process Clause requires petitioners to establish that the denial of a hearing on probable cause offends a fundamental principle of justice

In *Medina* v. *California*, 505 U.S. 437, 443 (1992), this Court explained that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which * * * are part of the criminal process." Instead, the Court drew on *Patterson* v. *New York*, 432 U.S. 197 (1977), which rejected a due process challenge to a provision placing a burden of proof on the defendant to show an affirmative defense of extreme emotional disturbance. *Patterson* held that a criminal procedure rule does not violate due process unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445 (quoting *Patterson*, 432 U.S. at 202). That test accorded with earlier decisions reviewing both state and federal rules of criminal procedure challenged on due process grounds. See, *e.g.*, *Dowling* v. *United States*, 493 U.S. 342, 352-353 (1990) (asking whether federal procedural rule violated "fundamental conceptions of justice") (quoting *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935))); *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.27 (1975); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), overruled in part on other grounds by *Malloy* v. *Hogan*, 378 U.S. 1 (1964).

The *Medina* Court explained that "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." 505 U.S. at 443. Given that "the criminal process is grounded in centuries of common-law tradition," the Court concluded, "it is appropriate to exercise substantial deference to legislative judgments in this area." *Id.* at 445-446. The *Medina* test applies here because petitioners attack a quintessential and historic feature of the criminal justice system: the unreviewable character of the grand jury's probable-cause determination.

Petitioners attempt to brush aside *Medina* by characterizing this case as involving "the timing and scope of the hearings required when the government interferes with property rights." Br. 34 n.12. But the "interference" with property rights here has not occurred in a vacuum. Rather, the return of the indictment charging petitioners with criminal offenses supplies the very basis for the restraint. 21 U.S.C. 853(e)(1)(A); Senate Report 202 ("[T]he probable cause established in the indictment * * * is, in itself, * * * a sufficient basis for issuance of a restraining order."). Nor can petitioners' due process claim be divorced from the substantive issue they seek to litigate at an evidentiary hearing: whether there is probable cause to believe that they committed the charged criminal offenses. While the Due Process Clause undoubtedly has a role to play in regulating the pretrial restraint of assets in a criminal case, the *particular* procedure at issue here—the grand jury's constitutionally assigned role of assessing probable cause—lies

at the core of the criminal justice system. Under those circumstances, petitioners' claim that Congress has denied them a procedure necessary to provide due process should be reviewed under the *Medina* framework.[5]

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[5] Petitioners effectively acknowledge that 21 U.S.C. 853(e)(1)(A) makes no provision for a post-indictment hearing on whether the grand jury correctly found probable cause to believe that they committed an offense supporting asset forfeiture. Br. 32. The statutory structure makes that concession wise. Compare 21 U.S.C. 853(e)(1)(B) (requiring hearing assessing the "substantial probability that the United States will prevail" when the government seeks to restrain assets before indictment) with 21 U.S.C. 853(e)(1)(A) (permitting pretrial restraint of assets without such an assessment when an indictment charges an offense for which criminal forfeiture may be imposed and "alleg[es] that the property * * * would, in the event of conviction, be subject to forfeiture"); see Pet. App. 11 ("The difference between these two subparagraphs unambiguously demonstrates that Congress contemplated the issue of a hearing, but decided not to require one post-indictment."). And the legislative history leaves no doubt that Congress did not contemplate any post-restraint review of probable cause. While the Senate Report stated that a post-restraint hearing might be held to "vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment)," Senate Report 203, it also emphasized that the court "is not to 'look behind' the indictment or require the government to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order," *id.* at 202. Because petitioners declined to challenge anything at a hearing except the grand jury's finding of probable cause to believe that they committed the offenses charged, Pet. App. 38-40 (noting that petitioners "specifically declined to attempt to rebut the government's claim that the seized assets are traceable to or involved in the activity alleged in the indictment"), no other due process issue is presented in this case.

2. The grand jury's decision to indict has historically been deemed conclusive on the issue of probable cause

Petitioners' claim of a due process right to challenge the grand jury's probable-cause determination cannot be sustained under *Medina*'s fundamental-justice test. To the contrary, reliance on the grand jury's probable-cause determination *defines* a fundamental principle of justice. See *Albright* v. *Oliver*, 510 U.S. 266, 282 (1994) (Kennedy, J., concurring in the judgment) ("With respect to the initiation of charges, * * * the specific guarantees contained in the Bill of Rights mirror the traditional requirements of the criminal process.").

a. This Court has long held that "[a]n indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge on the merits," without any inquiry into the "adequacy of the evidence before the grand jury" to establish probable cause. *Costello* v. *United States*, 350 U.S. 359, 363 (1956). The Court rested that holding on the grand jury's heritage and place in the Constitution. In English practice, the Court recognized, the grand jury was understood "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Id.* at 362. The Court viewed "[i]ts adoption in our Constitution as the sole method for preferring charges in serious criminal cases" as reflecting "the high place it held as an instrument of justice." *Ibid.* And the Court found no authority for "looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *Id.* at 362-363 (quoting *United States* v. *Reed*, 27 Fed. Cas. 727, 738 (C.C.N.D.N.Y. 1852) (No. 16, 134) (Nelson, J.),

and citing *Holt* v. *United States*, 218 U.S. 245, 247-248 (1910) (Holmes, J.)). A rule "permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence," the Court reasoned, rested on "[n]o persuasive reasons" and "would run counter to the whole history of the grand jury institution." *Id.* at 364.

In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court confirmed the principle that the grand jury's finding of probable cause conclusively begins the criminal process and governs the ensuing proceedings. *Gerstein* held that a judicial determination of probable cause is ordinarily required to support a post-arrest restraint of the liberty of a person arrested without a warrant. *Id.* at 116-119. But the Court recognized an exception to that rule when a grand jury has determined probable cause by returning an indictment. *Id.* at 117 n.19. The Court noted that it had held that "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' *conclusively determines the existence of probable cause*." *Ibid.* (quoting *Ex parte United States*, 287 U.S. 241, 250 (1932)) (emphasis added). And the Court explained that its "willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution." *Ibid.* (citing *United States* v. *Calandra*, 414 U.S. 338, 342-346 (1974)). Thus, an indictment— which embodies the grand jury's probable-cause determination—can itself justify an "extended restraint of liberty following arrest." *Id.* at 114, 117 n.19.

b. The Court's confidence in the grand jury rests not only on history, but on that body's fitness to evaluate the

prosecutor's evidence dispassionately in light of the common-sense judgment of the community. As the Court has observed, the grand jury "serves the invaluable function * * * of standing between the accuser and the accused, * * * to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). Thus, its "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States* v. *Dionisio*, 410 U.S. 1, 16-17 (1973); see, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 47, 51-52 (1992) (stating that the grand jury serves "as a kind of buffer or referee between the Government and the people" with the "twin historical responsibilities" of "bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution"). The Court has consistently recognized that protective mission of the grand jury. *Gerstein*, 420 U.S. at 117 n.19; *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972); *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906), overruled in part on other grounds by *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964); *Ex parte Bain*, 121 U.S. 1, 10-11 (1887) (quoting grand jury charge of Justice Field), overruled on other grounds by *United States* v. *Cotton,* 535 U.S. 625 (2002); see also 3 Joseph Story, *Commentaries on the Constitution* § 1779 (1833), reprinted in 5 *The Founders' Constitution* 295 (Philip B. Kurland & Ralph Lerner eds. 1987); 4 William Blackstone, *Commentaries* *301-303.

The grand jury's independence equips it to serve as such a buffer. A grand jury is supervised by the court and hears from the prosecutor, but it is separate from both of them, belonging to "no branch of the institutional government." *Williams*, 504 U.S. at 47-48; see *id.* at

53; *Dionisio*, 410 U.S. at 16 (stating that the "constitutional guarantee" of a grand jury "presupposes an investigative body 'acting independently of either prosecuting attorney or judge'") (quoting *Stirone* v. *United States*, 361 U.S. 212, 218 (1960)). Thus, federal grand jurors are charged that they serve as "an independent body" that does not act as "an arm or agent of" the U.S. Attorney's Office, "the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime."[6] Based on the information it obtains, the grand jury's role is to indict if it finds probable cause and to return no true bill if it does not—even if a prosecutor's complaint or information is pending. See Fed. R. Crim. P. 6(f).

c. The serious consequences of an indictment underscore the legal importance attached to the grand jury's unreviewable determination of probable cause. An indicted defendant is required to answer the criminal charges and, absent another disposition, stand trial, all without judicial review of the basis of the charge. *Costello,* 350 U.S. at 363-364. And other specific conse-

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[6] Judicial Conference of the U.S., *Model Grand Jury Charge* (Mar. 2005), http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx; see *id.* ("It is your duty to see to it that indictments are returned only against those who you find probable cause to believe are guilty and to see to it that the innocent are not compelled to go to trial. * * * If the facts suggest that you should not indict, then you should not do so, even in the face of the opposition or statements of the government attorney. You would violate your oath if you merely 'rubber-stamped' indictments brought before you by the government representatives."); Administrative Office of the U.S. Courts, *Handbook for Federal Grand Jurors* 3-4, 14, http://www.uscourts.gov/uscourts/FederalCourts/Jury/grandhandbook2007.pdf (last visited Aug. 29, 2013).

quences of indictment have enormous significance for the defendant's liberty and property.

First, an indictment triggers the issuance of an arrest warrant, without the need for further inquiry into the defendant's likely guilt or innocence. See *Ex parte United States*, 287 U.S. at 249-251; Fed. R. Crim. P. 9(a); see also *Kalina* v. *Fletcher*, 522 U.S. 118, 129 (1997). The arrest on an indictment seriously affects the defendant's privacy, see *Maryland* v. *King*, 133 S. Ct. 1958, 1978 (2013), and liberty interests, *Baker* v. *McCollan*, 443 U.S. 137, 142-143, 145-146 (1979).

Second, an unindicted defendant generally has a right to a preliminary hearing, not later than 21 days after an initial appearance, at which a magistrate judge will determine whether there is "probable cause to believe an offense has been committed and the defendant committed it." Fed. R. Crim. P. 5.1(c), (d) and (e). At that hearing, the defendant "may cross-examine adverse witnesses and may introduce evidence." *Id.* 5.1(e). But no such hearing is required if "the defendant is indicted." *Id.* 5.1(a)(2); see 18 U.S.C. 3060(e). "A post-indictment preliminary examination would be an empty ritual, as the government's burden of showing probable cause would be met merely by offering the indictment." *Sciortino* v. *Zampano*, 385 F.2d 132, 133 (2d Cir. 1967), cert. denied, 390 U.S. 906 (1968).

Third, the grand jury's determination that probable cause exists to believe that a defendant committed certain particularly serious crimes gives rise to a presumption under the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, that the defendant is not eligible for release before the trial because no condition or combination of conditions can assure the defendant's appearance or the safety of the community. See 18 U.S.C. 3142(e)(2)-(3)

and (f); see also, *e.g.*, *United States* v. *Vargas*, 804 F.2d 157, 163-164 (1st Cir. 1986); *United States* v. *Contreras*, 776 F.2d 51, 53-55 (2d Cir. 1985) (concluding that "the presence of an indictment returned by a duly constituted grand jury conclusively establishes the existence of probable cause for the purpose of triggering" that presumption). And even for a defendant to whom such a presumption does not apply, the grand jury's probable-cause determination is never revisited by a court; the court's consideration of the "weight of the evidence" in the detention decision, 18 U.S.C. 3142(g)(2), is relevant only insofar as it sheds light on whether the defendant is likely to flee (because the case against him is so strong) or presents a danger to the community. See, *e.g.*, *United States* v. *Stone*, 608 F.3d 939, 948 (6th Cir.) ("This factor goes to the weight of the evidence of dangerousness, not the weight of the evidence of the defendant's guilt."), cert. denied, 131 S. Ct. 439 (2010); *United States* v. *Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985); see also *United States* v. *Salerno*, 481 U.S. 739, 749-750 (1987).[7]

Fourth, the grand jury's probable-cause determination impinges on a defendant's property interests. As a practical matter, "a formal accusation may," without any further government action, "disrupt [the defendant's] employment" and "curtail his associations." *Lovasco*,

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[7] The single district court decision that petitioners cite (Br. 62) in this regard, *United States* v. *Lopez-De La Cruz*, 431 F. Supp. 2d 200 (D.P.R. 2006), confirms that conclusion. The court in that case looked at the "weight of the evidence" only to decide whether any conditions of release could "reasonably assure the safety of * * * the community," and ruled that the facts presented at the bail hearing—which included community ties and a "health condition"—did not support the view that defendant was too dangerous to release. See *id.* at 203.

431 U.S. at 791 (internal quotation marks and citation omitted); see *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950) (stating that "[t]he harm to property and business can also be incalculable by the mere institution of [criminal] proceedings" by a grand jury). Those effects are almost certainly magnified if the defendant is detained. *Gerstein*, 420 U.S. at 114 (noting that "[p]retrial confinement may imperil the suspect's job" and "interrupt his source of income").

An indictment may also have direct legal consequences for a defendant's property interests and employment. An indictment restricts a person's right to receive or transport a firearm or ammunition in interstate commerce. See 18 U.S.C. 922(n) (making such shipment or receipt unlawful "for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year"). It also may establish grounds for suspending the employment of employees in regulated industries. See *FDIC* v. *Mallen*, 486 U.S. 230, 241, 244 (1988) (holding that such a "suspension is not arbitrary" because there is "little likelihood that the deprivation" of the property right "is without basis" when "an independent body has determined that there is probable cause to believe that the officer has committed a crime").[8] And indictment may justify suspending a government contractor from eligibility for contracting with

[8] The statute in *Mallen* afforded a suspended bank officer "the right to a post-suspension hearing before the agency to demonstrate that his or her continued service would not jeopardize the interests of [bank] depositors or impair public confidence in the bank." 486 U.S. at 235 (describing 12 U.S.C. 1818(g)(3)). But that post-suspension hearing made no provision for revisiting the grand jury's probable-cause finding, and this Court made clear that no such inquiry was required or permitted. *Id.* at 244 (grand jury's finding "*demonstrates* that the suspension is not arbitrary") (emphasis added).

the United States. See, *e.g.*, *James A. Merritt & Sons* v. *Marsh*, 791 F.2d 328, 330-331 (4th Cir. 1986) (explaining that grand jury's finding of probable cause has "sufficient indicia of reliability" to support a suspension without a hearing, despite indicted defendant's argument that suspension would result in "irrecoverable monetary losses"); see also 48 C.F.R. 9.407-2 (explaining that "[i]ndictment for" fraud or various other specified crimes "constitutes adequate evidence for suspension"); 48 C.F.R. Ch. 2, App. H-102 ("In a suspension action based upon an indictment * * * , there will be no fact-fi[nd]ing proceeding concerning the matters alleged in the indictment.").[9]

d. Those restrictions on an indicted defendant's rights are imposed without affording the defendant the opportunity to present his own evidence or employ the various "formalities and safeguards designed for trial," such as "confrontation and cross-examination" of witnesses. *Gerstein*, 420 U.S. at 121-122; see *Williams*, 504 U.S. at 51-52 (tracing the history of this aspect of grand-jury procedure back to 18th-century England and the early days of the United States). That is because the existence of probable cause to believe that a person committed a crime "can be determined reliably without

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[9] The history of the grand jury supports reliance on its probable-cause determination to impose consequences like these. See, *e.g.*, Edward Coke, *The Second Part of the Institutes of the Laws of England* 50 (1642 ed.) (stating "that no man [can] be taken, imprisoned, or put out of his free-hold without process of the Law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the Common law"); *id.* at 54 ("A Commission was made under the great Seale to take I.N. (a notorious felon) and to seize his lands, and goods: This was resolved to be against the Law of the Land, unlesse he had been endicted, or appealed by the party, or by other due Process of Law.").

an adversary hearing." *Gerstein*, 420 U.S. at 120; see *id.* at 121-123 (explaining that the value of additional safeguards in determining probable cause would be "too slight" and "the Constitution does not require" them); see also *Williams*, 504 U.S. at 51-52 (stating that "to make the assessment" of probable cause "it has always been thought sufficient to hear only the prosecutor's side"); *Baker*, 443 U.S. at 143. The reliability of a less elaborate procedure stems from the "nature of the determination itself"; ascertaining whether probable cause exists "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt." *Gerstein*, 420 U.S. at 121-122; see *Williams*, 504 U.S. at 53 (explaining that the grand jury may "choose[] to hear no more evidence than that which suffices to convince it an indictment is proper"); *Brinegar* v. *United States*, 338 U.S. 160, 174-175 (1949).

A defendant thus has no right to attack the grand jury's probable-cause finding as based on a one-sided presentation, or to demand additional procedural rights in seeking a new, more favorable finding from a different decisionmaker. This Court has repeatedly rebuffed attempts to impose on the grand-jury process restrictions or requirements intended to make it more trial-like. See *Williams*, 504 U.S. at 52-55 (rejecting requirement that prosecutor present exculpatory evidence to a grand jury); *Costello*, 350 U.S at 361-364 (rejecting challenge to indictment on the ground that "there was inadequate or incompetent evidence before the grand jury"); *Lawn* v. *United States*, 355 U.S. 339, 348-350 (1958) (rejecting claim that defendants had a

right to a preliminary hearing to determine whether grand jury may have relied on evidence obtained in violation of their Fifth Amendment rights); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943) (rejecting view that a "mere challenge, in effect, of the regularity of a grand jury's proceedings * * * cast[s] upon the government the affirmative duty of proving such regularity"; "[n]othing could be more destructive of the workings of our grand jury system or more hostile to its historic status").

3. Reliance on the grand jury's determination of probable cause affords defendants the process constitutionally due

As the court of appeals recognized (Pet. App. 17-31), those deeply rooted principles are dispositive. Petitioners seek a post-restraint hearing to ask precisely the same question that the grand jury already answered: whether probable cause exists to believe that they committed the charged crimes. But petitioners have not argued that the grand jury was biased or improperly constituted, or that the indictment is invalid on its face. See *Costello*, 350 U.S. at 363. Accordingly, the workings of the grand jury—including exercise of that body's core function of protecting the wrongly accused from indictment—satisfy the requirements of due process, without the need for a post-indictment opportunity for a judicial determination of probable cause.

a. That conclusion flows logically from *Gerstein*, *supra*. If the grand jury's determination of probable cause is "conclusive[]" when a defendant's *liberty* is at stake pending trial—precisely because the judicial system has confidence in the grand jury's historic role of protecting individuals against unfair accusations (420 U.S. at 117 n.19)—the same must be true when a defendant's *prop-*

erty interest is at stake as the result of an order restraining potentially forfeitable assets. Each restraint is designed to preserve the government's ability to prosecute the case to conclusion and obtain the judgment authorized by law, given the threshold finding of probable cause to believe that the defendant committed a crime. And in each instance the historic balance has been struck in favor of treating the grand jury's unreviewable determination that probable cause exists as inviolable.

Petitioners' position appears to be that an indicted defendant's rights with respect to assets that the government seeks to restrain are subject to greater procedural protections than his or her other liberty and property rights. But this Court has already remarked on the illogic of such an assertion, explaining that "it would be odd to conclude that the Government may not restrain" such assets, "based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." *Monsanto*, 491 U.S. at 615-616; see *Mallen*, 486 U.S. at 241. As *Monsanto* explained, because a defendant can be "subjected to pretrial restraint if deemed necessary to 'reasonably assure [his] appearance [at trial] and the safety of . . . the community,'" no "constitutional infirmity" inheres "in [21 U.S.C.] § 853(e)'s authorization of a similar restraint on [a defendant's] property to protect its 'appearance' at trial and protect the community's interest in full recovery of any ill-gotten gains." 491 U.S. at 616.

Petitioners' reliance (Br. 32) on the qualified Sixth Amendment right of counsel of choice does not alter the conclusive character of the grand jury's determination

of probable cause. In the context of the liberty interests restricted by a pretrial restraint of the person, a purported effect on the defendant's defense does not give rise to a due process right to challenge the grand jury's determination. See *Gerstein*, 420 U.S. at 123 (pointing out that "pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense"). The same analysis applies when a defendant seeks to bolster the property interests affected by a pretrial restraint of assets by asserting a desire to use those assets to retain counsel. This Court has already factored in the possibility that a defendant might wish to use forfeitable assets to exercise Sixth Amendment rights and has found "no such distinction between, or hierarchy among, constitutional rights." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 628 (1989). After all, "[i]f defendants have a right" to challenge probable cause in order to seek the release of forfeitable assets to spend "on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel?" *Ibid.* "The full exercise of these rights, too, depends in part on one's financial wherewithal," the Court has noted, and pretrial restraint "may similarly prevent a defendant from enjoying these rights as fully as he might otherwise." *Ibid.* Yet the Court declined "to recognize an antiforfeiture exception for the exercise of each such right; nor does one exist for the exercise of Sixth Amendment rights." *Ibid.*

For the same reasons, petitioners' desire to use the restrained property to pay for counsel cannot elevate their claim above any other constitutionally protected use of financial or other resources. And the addition of the Sixth Amendment to their due process claim thus

does not overcome the historic unreviewability of the grand jury's determination of probable cause.

b. Affording petitioners an opportunity to second-guess the grand jury could have anomalous and destabilizing consequences. To the extent that petitioners seek a window into the grand jury's deliberations to determine whether the evidence presented to it actually rose to the level of probable cause—that is, to hold "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury," *Costello*, 350 U.S. at 363—that exercise would invade the closely guarded secrecy of the grand-jury process. See *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 424-425 (1983); Fed. R. Crim. P. 6(d) and (e). Such judicial intrusion into the workings of the grand jury is not in keeping with its constitutional status as an entity that belongs to neither the executive nor the judicial branch. See *Calandra*, 414 U.S. at 349-352 (placing weight on "the potential injury to the historic role and functions of the grand jury"); *Costello*, 350 U.S. at 363 (ruling that such a duplicative effort "is not required by the Fifth Amendment").

It seems more likely that petitioners seek a separate inquiry that does not peer into the grand jury's workings and may well involve evidence that the grand jury never heard. See, *e.g.*, Br. 25-27; Pet. App. 22. That type of inquiry could produce highly "incongruous" results, however. *Contreras*, 776 F.2d at 55. "Should the judicial officer determine that for the purpose of the * * * hearing no probable cause exists that the defendant committed the crime for which he was indicted, presumably the defendant would still be brought to trial upon the same indictment." *Ibid.* (finding no right to challenge the grand jury's probable-cause finding in a

detention hearing); see *Sciortino*, 385 F.2d at 133 (stating that a preliminary examination is not necessary for an indicted defendant because "[e]ven if the [judicial officer] disagreed with the grand jury, he could not undermine the authority of its finding").

Thus, petitioners seek a system in which the defendant might simultaneously be told that probable cause exists to believe that he committed a crime for purposes of proceeding to trial (and, if appropriate, restraining him in prison) but no probable cause exists to believe that he committed a crime for purposes of restraining his assets. This legal cognitive dissonance can only jeopardize the integrity of the criminal justice system. Not only would it damage the public's confidence in the criminal proceedings, but it would also undercut the grand jury's status as the "sole method for preferring charges in serious criminal cases" and diminish the "high place it [has] held as an instrument of justice." *Costello*, 350 U.S. at 362.

c. None of this Court's civil cases evaluating the right to a pre- or post-seizure hearing, on which petitioners rely (see Br. 36-45, 57), gave rise to such dangers. Indeed, none of those cases arose in a criminal proceeding after a determination of probable cause by a grand jury—a procedural context with its own history and its own "safeguards," including specific constitutional protections. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 50, 62 n.3 (1993). And none involved a prior determination on the very issue in dispute after consideration of evidence by a neutral arbiter like the grand jury.

For instance, the statutes at issue in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), instructed a "court clerk" or a "prothonotary" to issue a seizure order "summarily"

on receipt of a private person's "bare assertion * * * that he is entitled to one." *Id.* at 73-74; see *id.* at 75-77; *North Ga. Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 604 n.2, 607 (1975) (involving a similar state statute). Similarly, the statute at issue in *Connecticut* v. *Doehr*, 501 U.S. 1 (1991), permitted an attachment on the basis of a private person's "skeletal affidavit" and "conclusory" complaint, documents so spare that they permitted "no realistic assessment concerning the likelihood of an action's success." *Id.* at 13-14. And in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 604-606, 610 (1974), the Court upheld a statute permitting an ex parte sequestration order for household goods, in part because the debtor "may immediately have a full hearing on the matter of possession following the execution of the writ," but the initial basis for the seizure in that case—an affidavit by the *creditor* seeking repossession—hardly reflected the decision of a neutral party constitutionally charged with "shielding the innocent from unfounded accusation and prosecution." *Williams,* 504 U.S. at 51.

The few *civil* forfeiture decisions that involve a relevant probable-cause determination made in a criminal case are consistent with holding that such a determination is a sufficient basis for a restraint of assets. See *Monsanto*, 491 U.S. at 615-616 (noting "our established rule of permitting pretrial restraint of assets based on probable cause" and citing *United States* v. *$8,850*, 461 U.S. 555 (1983), and *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)). Most relevant is *$8,850*, in which this Court upheld a civil seizure of property for forfeiture when a grand jury had found probable cause to believe the owner had committed a crime giving rise to forfeiture, the criminal proceeding

was unfolding for a period of time before civil forfeiture proceedings were commenced, and the property was retained by the government pending the institution of those proceedings. See 461 U.S. at 560-561, 567, 569-570.[10]

In short, no basis exists here for departing from the centuries-old rule that the grand jury provides the appropriate procedure for deciding whether probable cause exists to believe a crime has been committed. As

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[10] The issue in *$8,850* was whether delay in filing a civil forfeiture proceeding deprived the property owner of due process. 461 U.S. at 561-562. The Court resolved that issue by borrowing the four-factor speedy-trial inquiry set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). See *$8,850*, 461 U.S. at 564-565. That test does not readily correspond to the nature of the claim at issue here. Petitioners do not argue that their trial on the merits is unjustifiably delayed, but rather that the pretrial seizure of their property is not validly based on probable cause and is causing them immediate harm. A later trial is therefore not a substitute for what petitioners seek: an immediate pretrial hearing to address the probable-cause issue because of the pretrial restraint's impact on their access to counsel of choice to defend against the criminal charges. Cf. *United States* v. *Von Neumann*, 474 U.S. 242, 249 (1986) ("Implicit in this Court's discussion of timeliness in *$8,850* was the view that the [ultimate] forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest."). But see Pet. App. 6, 56-63 (applying *$8,850* framework based on *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989)). Regardless, the applicability of *$8,850* is not pivotal here: petitioners already *had* a pretrial hearing where they were afforded the opportunity to challenge the nexus between the restrained assets and the charges against them. The question is whether petitioners were also entitled at that hearing to challenge the grand jury's finding of probable cause. See Pet. App. 8-9, 21-22 (recognizing that a hearing was held under *Bissell*, but holding that "a defendant cannot challenge whether there is a sufficient evidentiary foundation to support the grand jury's probable cause determination").

Congress correctly recognized in enacting Section 853, second-guessing that venerable body is not required by "justice []or the concept of a fair trial." *Costello*, 350 U.S. at 364.

B. Even Applying the *Mathews* v. *Eldridge* Balancing Test, Petitioners Would Not Be Entitled To Any Additional Process

Petitioners argue that the balancing test set forth in *Mathews*, *supra*, should govern the due process analysis in this case. For all of the reasons set forth above, the *Mathews* test has no application here. But even if the Court applied that test, petitioners would not prevail. *Mathews* outlined a three-factor test that considers "the private and governmental interests at stake" as well as "the nature of the existing procedures"—that is, "the risk of an erroneous deprivation * * * through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335, 340. The private interest at stake here is not as powerful as petitioners contend, and the government interest is far more substantial than they portray. And, critically, the risk of erroneous deprivation is low without the requested evidentiary hearing, and that additional procedure would have little or no value.

1. Petitioners' interest in retaining counsel of choice, although real, is not as dominant as they contend

Petitioners' interest does not tip the *Mathews* balance in their favor. Petitioners argue (Br. 51-55) that their interest in disposing of the restrained assets while the criminal case proceeds is overwhelming because

they need the assets to pay for counsel of choice.[11] The qualified constitutional right to retain counsel of choice is, of course, a significant interest. But this Court has already concluded that the "burden placed on defendants" by Section 853 in that regard is "a limited one." *Caplin*, 491 U.S. at 624-625; see *Monsanto*, 491 U.S. at 616. A pretrial asset-restraint case "does not involve a situation where the Government has asked a court to prevent a defendant's chosen counsel from representing the accused." *Caplin*, 491 U.S. at 625. Petitioners can use their nonforfeitable assets, to the extent available, to "retain[] any attorney of [their] choosing." *Ibid.*[12] And even assuming that petitioners have no unre-

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[11] Petitioners also assert more generally (Br. 51-52) that they have "long-standing title to their home and CD." The restraint at issue here is not, however, a physical seizure. It is therefore a less serious intrusion than the ones at issue in the civil-forfeiture cases on which petitioners rely. See *Good*, 510 U.S. at 57-58 (identifying *lis pendens* as appropriate procedure with respect to real property in civil forfeiture context); *Monsanto*, 491 U.S. at 615.

[12] Although the courts below proceeded on the premise that the pretrial restraint of assets would deprive petitioners of counsel of choice, Pet. App. 13, 46, petitioners' assets were last scrutinized several years ago, and even then they had $325,000-$350,000 available for counsel, although tapping those funds would have triggered taxes and penalties. Pet. App. 110. Their financial situation may well have improved since that time. See Docket entry No. 252, at 6 n.10 ("The United States recognizes that in the intervening 3+ years, some alteration of the economic circumstances of the defendants may have occurred. In fact, the government is aware that the lead defendant [Kerri Kaley] is actively employed in the healthcare industry, owns her own boutique and has been profiled regarding the financial success of that company in the media."). Whatever this Court's disposition, the issue of whether the restraint in this case actually impairs petitioners' ability to pay for counsel should be left open for further proceedings in the district court. See pp. 4-5, *supra*.

strained assets available, they might still "be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Ibid.*; see *id.* at 632 n.10 (explaining that such an arrangement would not represent the kind of "contingency fee" that is forbidden in a criminal case).[13]

Petitioners protest that even the "limited" burden identified in *Caplin* is too onerous, because their counsel of choice have declined to proceed unless the restraint on the assets is released. But the right to select one particular desired counsel is often—and quite permissibly—restricted by principles of general applicability serving important public purposes. For instance, a defendant cannot insist on representation by a lawyer who is not a member of the relevant bar or whose schedule cannot conform to the "demands" of the court's calendar; a defendant also lacks entitlement to select counsel whose rates she cannot afford (unless that counsel is willing to represent her anyway), or to use someone else's property to pay those rates, or to avoid taxation on the ground that the money is needed for legal representation. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144-145, 151-152 (2006); see *Caplin*, 491 U.S. at 624-626, 631 ("Otherwise, there would be an interference with a defendant's Sixth Amendment rights whenever

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[13] Moreover, in no event could a restraint on assets deprive petitioners of representation sufficient to ensure fair proceedings. The Sixth Amendment requires the appointment of counsel for an indigent defendant on trial for a serious crime, *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and counsel must play "the role necessary to ensure that the trial is fair," *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). The vast majority of criminal defendants proceed with appointed counsel.

the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial. * * * Criminal defendants * * * are not exempted from federal, state, and local taxation simply because these financial levies may deprive them of resources that could be used to hire an attorney."); *Wheat* v. *United States*, 486 U.S. 153, 159 (1988) (stating that the right to counsel of choice is "circumscribed in several important respects"). That does not amount to the kind of "arbitrar[y]" interference with a defendant's choice that this court has deemed problematic. *Monsanto*, 491 U.S. at 616 (quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932)).

Those principles apply here. Petitioners' inability to pay the full fee of the particular counsel they wish to hire results from policies that promote general public interests. It is not the product of an effort to disrupt their relationship with any particular lawyer. See *Monsanto*, 491 U.S. at 616 (stating that "a pretrial restraining order" under Section 853 "does not 'arbitrarily' interfere with a defendant's 'fair opportunity' to retain counsel"). The interest weighing on their side of the *Mathews* balance, therefore, cannot be deemed paramount to all other considerations in the criminal justice system.

2. The governmental interests that would be compromised by a hearing on probable cause are substantial

The government has substantial interests in proceeding under Section 853(e)(1)(A) to preserve potentially forfeitable assets without the pretrial evidentiary hearing petitioners seek. The additional procedure that petitioners advocate would add a layer of complexity and expense to pretrial proceedings in cases involving a post-restraint hearing and would risk damaging disclo-

sures of the government's case and trial strategy. See *Mathews*, 424 U.S. at 335 (stating that the burdens associated with using different procedural safeguards weigh on the "Government's interest" side of the balance).

a. Pretrial restraint of assets serves to "protect the community's interest in full recovery of any ill-gotten gains" upon conviction, *Monsanto*, 491 U.S. at 616, and "there is a strong governmental interest in obtaining full recovery of all forfeitable assets," *Caplin*, 491 U.S. at 631. First, criminal forfeiture helps ensure that crime does not pay, thereby punishing wrongdoing, deterring future bad acts, and draining the economic power from existing "organized crime and drug enterprises" and other criminals—including the "undeserved economic power * * * to command high-priced legal talent." *Id.* at 630 (internal quotation marks and citation omitted); see *id.* at 634 ("Forfeiture provisions are powerful weapons in the war on crime.").

Second, the government uses forfeited money to "return[] property * * * to those wrongfully deprived or defrauded of it" and to improve conditions in communities affected by the crimes giving rise to the forfeiture. *Caplin*, 491 U.S. at 629; see, *e.g.*, 28 C.F.R. 9.8; Office of the Attorney General, *Order No. 2088-97* (June 14, 1997); U.S. Dep't of Justice, *Returning Forfeited Assets to Crime Victims*, www.justice.gov/criminal/afmls/forms/pdf/victms-faqs.pdf.[14] The interest in ensuring

[14] The United States has returned "more than $1.5 billion in forfeited assets to more than 400,000 crime victims since January 2012." *DOJ returned $1.5 billion to victims of crime*, Arizona Daily Independent, Apr. 29, 2013; see, *e.g.*, Patricia Hurtado, *Adelphia Fraud Funds Give More Than $728 Million to Victims*, Bloomberg News, Apr. 30, 2013 (citing *United States* v. *Rigas*, No. 02-cr-1236

that victims are compensated by those who harm them is compelling. *Caplin*, 491 U.S. at 629 (describing the interest at issue as "virtually indistinguishable from [the government's] interest in returning to a bank the proceeds of a bank robbery").

Third, the government uses forfeited funds to "support[] law-enforcement efforts in a variety of important and useful ways," *Caplin*, 491 U.S. at 629, including maintenance of prisons and training of law enforcement personnel. The "interest in using the profits of crime to fund these activities should not be discounted." *Ibid.*

Thus, petitioners and their amici are quite wrong in suggesting that the government acts to preserve potentially forfeitable assets in the hopes of swelling its coffers. See Br. 56 (citing Cato Amicus Br. 11). Forfeited money is used to compensate victims, fight crime, and serve the public, and significant benefits will be lost if forfeiture cannot be accomplished because assets have been dissipated.[15]

(S.D.N.Y.)); Anna Griffin, *Café au Play succeeds at site of former Portland drug-plagued property*, The Oregonian, Sept. 10, 2010.

[15] The force of the government's interest in preserving assets for forfeiture is reflected in the relation-back principle of Section 853(c), which provides that the government's interest in forfeitable property relates back to the date of the criminal offense. See 21 U.S.C. 853(c). Petitioners are correct (Br. 61) that Section 853(c) does not give the government a present ownership interest in their property. But the government's interest is nevertheless very real, because a grand jury has determined that probable cause exists to believe that the government will obtain a guilty verdict and a forfeiture order pursuant to which "[a]ll right, title, and interest" in the property will be deemed "vest[ed] in the United States" as of "commission of the act giving rise to forfeiture." 21 U.S.C. 853(c); see *Caplin*, 491 U.S. at 627 (characterizing "the property rights given the Government by virtue of the forfeiture statute" as "substantial").

b. The extra procedure that petitioners seek would significantly burden the government's interests in a variety of ways. Petitioners envision an elaborate evidentiary proceeding—in effect, a trial before they have even been arraigned. See Pet. App. 22 & n.6; *id.* at 25-26 (stating that hearing on probable cause of guilt would "effectively require the district court to try the case twice"). Adding such a supplementary procedure will consume scarce prosecutorial resources, and divert overburdened trial judges and magistrates from speedily disposing of criminal cases, in order to revisit a determination the grand jury has already made. See *Monsanto,* 491 U.S. at 605 (district court held a four-day hearing on whether to continue restraining order); *Gerstein*, 420 U.S. at 122 n.23 ("Criminal justice is already overburdened by the volume of cases and the complexities of our system."); *Costello*, 350 U.S. at 363; see also pp. 33-34, *supra* (explaining the possibility of conflicting probable-cause determinations in the same case).

More importantly, holding a "mini-trial" on guilt well in advance of the trial itself could damage the integrity of the ensuing criminal case. Pet. App. 25-26. As the court of appeals observed, such a procedure would risk the premature disclosure of the government's case and trial strategy. *Id.* at 27 (citing Senate Report 162); see *United States* v. *Monsanto*, 924 F.2d 1186, 1206 (2d Cir.) (en banc) (Cardamone, J., dissenting), cert. denied, 502 U.S. 943 (1991). Although petitioners are correct (Br. 61-62) that the government is required to make evidentiary disclosures at some point in the proceedings, a post-restraint hearing on guilt would give the defendant access to that evidence well in advance of the deadlines set by the relevant rules—indeed, even before arraignment. See, *e.g.*, Fed. R. Crim. P. 26.2(a) (requiring dis-

closure of prior statement of testifying witness only after witness has testified at trial); see also Fed. R. Crim. P. 16(a)(2); *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977); *United States* v. *O'Keefe,* 128 F.3d 885, 898-899 (5th Cir. 1997), cert. denied, 523 U.S. 1078 (1998). Savvy defendants would therefore seek to exploit the proposed mini-trial to evade the careful limitations of the discovery rules—and they might do so not only for their own benefit, but also for the use of associates who are fugitives or who have not yet been indicted. See Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law*, 32 Am. J. Crim. L. 55, 63 (Fall 2004) (explaining that "defendants tend to demand the hearing not because they are aggrieved by the restraining order, but to afford defense counsel an early opportunity to discover the nature of the Government's criminal case and to cross-examine some of the Government's witnesses"); see also *United States* v. *Holy Land Found. for Relief*, 493 F.3d 469, 475-476 (5th Cir. 2007) (en banc) (referring to the danger of "frivolous challenges that might impede [the government's] ongoing criminal investigations"); Pet. App. 26 n.8 (noting that such a "sneak preview" would never be available to a defendant without assets that the government seeks to restrain, "even if he faces capital charges").[16]

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[16] Amici suggest that the risk of disclosure is no greater than in other contexts in which the government might be asked to put on proof of a factual question during pretrial proceedings. See, *e.g.*, Amicus Br. of Cal. Attorneys for Crim. Justice 11-28. All of the examples provided by amici, however, go to discrete factual questions rather than to the overarching question of whether probable cause exists to believe that the defendant committed the crime charged. Accordingly, none presents the same risks as the disclosure that petitioners seek. See, *e.g.*, pp. 25-26, *supra* (discussing statutory requirements of the Bail Reform Act).

Premature disclosure of evidence could, in turn, jeopardize the safety of witnesses, including victims and cooperators. See Pet. App. 27 (citing Senate Report 162); *United States* v. *Jones*, 160 F.3d 641, 647 (10th Cir. 1998). That problem would be particularly acute in cases involving terrorism, drug trafficking, organized crime, and political corruption, because those are crimes as to which "witness tampering is part of the criminal culture." Edward S.G. Dennis, Jr., *The Discovery Process In Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 Wash. U.L.Q. 63, 68 (Spring 1990); see, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 631-633 (2002) (discussing importance of avoiding "premature disclosure of Government witness information"); *United States* v. *Celis*, 608 F.3d 818, 828-837 (D.C. Cir.) (per curiam) (rejecting due process challenge to limits on "[d]isclosure of government witness lists and of exculpatory or impeachment information and evidence" in drug trafficking case in light of "concern about witness security"), cert. denied, 131 S. Ct. 620 (2010).[17] It might be possible in some cases to mitigate the safety risks through use of hearsay evidence at the hearing or other protective measures. But in others, establishing probable cause will inevitably reveal sensitive information.

In this case, petitioners contend (Br. 63), premature disclosure of the government's case is not a serious

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[17] Between 2006 and 2010, the United States obtained convictions of at least 605 persons for tampering with or retaliating against government witnesses, victims, or informants. See Bureau of Justice Statistics, Federal Criminal Case Processing Statistics, http://bjs.gov/fjsrc/tsec.cfm (reflecting convictions under 18 U.S.C. 1512 (witness tampering) and 1513 (retaliation), but not other provisions under which witness tampering may also be prosecuted such as 18 U.S.C. 1503 (obstruction of justice)); see also Pet. App. 3 (noting that petitioners were charged with obstruction of justice).

concern because the Gruenstrass trial has already taken place. Those idiosyncratic circumstances will not obtain in the mine run of cases in which the government seeks a post-indictment restraint on assets pursuant to Section 853. In any event, however, petitioners are mistaken. The evidence against petitioners is, naturally, not the same as the evidence against Gruenstrauss or other defendants, see, *e.g.*, J.A. 138-139; the government alleges that petitioners were the ringleaders of the scheme for obtaining and reselling millions of dollars in prescription medical devices that belonged to others, and petitioners dealt with various entities and trafficked in various devices that the other defendants did not. See J.A. 52-57; see also, *e.g.*, Docket entry No. 184, at 93-94, 101-102, 148-149, 233-234, 243-244, 271-272; Docket entry No. 185, at 346.[18]

In view of these dangers, the government might, as petitioners suggest (Br. 63), be forced to "elect to forgo interim remedies" altogether to avoid disclosures in particular cases—a result that some defendants would attempt to achieve as a matter of strategy, regardless of the perceived strength or weakness of the government's case. See Jon May, *Attorney Fees and Government Forfeiture*, Champion 20, 23 (Apr. 2010) (publication for criminal defense counsel advising that "[e]ven if defense counsel cannot prevail on the facts or the law, he may be

[18] Petitioners' presentation to this Court highlights the ways in which the government might be pressured to disclose a great deal of its case and strategy at an early stage. Based on dispositions as to other defendants, petitioners repeatedly insist (*e.g.*, Br. 10-11, 20-23, 63) that the evidence against them is thin and that the government does not have a viable theory. But petitioners have not yet even been arraigned, and the record does not reflect the government's evidence against them.

able to prevail anyway," because "[s]ometimes the government will decide to give up its restraint on a piece of property rather than engage in litigation that will result in early discovery"). In that event, some defendants would use the unrestrained assets to pay for counsel; some might use them for other purposes, including criminal enterprises, or simply attempt to remove them from the reach of the court. Either way, it might well be that the assets would never be recoverable in the event of a guilty verdict, frustrating Congress's instruction that criminally derived or used assets be forfeited. The government's interest in avoiding such a result is weighty.

3. The value of an adversary evidentiary hearing to revisit the grand jury's probable-cause determination is minimal

Given the important government interests that a hearing on probable cause would impair, that additional procedure would have to be highly effective in avoiding erroneous restraints on assets to justify a ruling that the procedure Congress chose in Section 853 is unconstitutional. But revisiting the grand jury's probable-cause determination would not, in fact, be effective in that way, let alone highly so. To the contrary, a post-indictment, post-restraint hearing addressing guilt would be a "safeguard[]" of little or no value. *Mathews*, 424 U.S. at 334-335.

a. Petitioners' assertion that a hearing would avoid unwarranted restraints of assets is primarily framed as an attack on the reliability of the grand-jury procedure. See Br. 57-59. For all of the reasons given above, however, the Court has justifiably placed a great deal of trust in the grand jury's independence, the thoroughness of its investigation, and its ability to assess the existence of probable cause based on the evidence before

it—which is no doubt why so many serious consequences flow directly from the grand jury's determination. See pp. 29-36, *supra* (distinguishing the procedures at issue in the civil forfeiture cases cited in Br. 57); see also, *e.g.*, Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of* Princeton/Newport, 65 Notre Dame L. Rev. 1009, 1026-1027 (1990) (stating that a hearing on likelihood of conviction "can have no genuine function" in light of existing grand-jury determination).[19]

Petitioners nevertheless contend (Br. 57) that the grand jury may err because it has heard only a "one-sided presentation[]"—that is, that defendants may be able to come forward with convincing exculpatory evidence that was never before the grand jury. But in the vast majority of cases such evidence will not be sufficiently exculpatory to demonstrate a lack of probable cause. See *Williams*, 504 U.S. at 51-52 (explaining that to determine probable cause "it has always been thought sufficient to hear only the prosecutor's side"). "The grand jury does not sit to determine the truth of the

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[19] The government's "direct pecuniary interest" in the outcome of a criminal case involving forfeiture (Br. 56 (quoting *Good*, 510 U.S. at 56)) does not decrease the reliability of the grand-jury procedure. The grand jury—the charging body—has no financial stake in the outcome. And this Court has already rejected the notion that a prosecuting agency's receipt of monetary benefit as a result of a successful prosecution taints the decision of a neutral body as to the defendant's guilt. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 243, 247-249, 250-251 (1980) (distinguishing *Tumey* v. *Ohio*, 273 U.S. 510 (1927)); see also *U.S. Dep't of Justice Overview* 6, available at http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf (data showing that in 2012 only 2.5% of Department of Justice budget was attributable to "credit" from Assets Forfeiture Fund); 28 U.S.C. 524(c); pp. 41-42, *supra*.

charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial." *Bracy* v. *United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., in chambers). This standard—the same nontechnical standard required for an arrest or a search (see *Gerstein*, 420 U.S. at 120)—asks whether the evidence shows a "fair probability" that the defendant has committed an offense, not whether, all things considered, he is likely guilty. *Florida* v. *Harris*, 133 S. Ct. 1050, 1055 (2013); see *Gerstein*, 420 U.S. at 121-122 (contrasting reasonable-doubt and preponderance standards, and emphasizing the reliability of an ex parte determination of probable cause).

Experience demonstrates the unlikelihood that an adversarial hearing will refute probable cause. When pre-*Williams* decisions considered claims that a prosecutor wrongfully failed to present exculpatory evidence at the indictment stage, those claims were almost invariably rejected on the ground that the evidence on which the defendant relied did not negate the probability of guilt. See U.S. Br. at 24 & n.10, *Williams*, *supra* (No. 90-1972) (citing, *inter alia*, *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987)). And in the decades since the Second Circuit sustained the due process claim petitioners make here and authorized post-restraint evidentiary hearings at which the government must show probable cause, see *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991), the government is unaware of even a single case in which a district court, after a hearing, has disagreed with the grand jury's determination.

Indeed, a grand jury's indictment is a highly accurate indicator not just of the probability of guilt but of guilt itself. For more than a decade, over 90% of defendants indicted by a federal grand jury have concluded their cases with a conviction, either by plea or trial verdict. See *United States Attorneys' Annual Statistical Report, Fiscal Year 2012* (*Statistical Report*) 8 (noting that in fiscal year 2012 the figure was 93%). That means that the percentage of defendants deemed not guilty after indictment is (at best) approximately half of the percentage of Social Security disability beneficiaries whose benefits were erroneously terminated in *Matthews*—a case in which this Court found that the risk of an erroneous denial was not high enough to justify additional procedural protection. Compare *Matthews*, 424 U.S. at 346 n.29 (stating that "one must also consider the overall rate of error" and noting an error rate of 12.2%), with *Statistical Report* 8 (noting that only 7% of indictments in cases terminated in fiscal year 2012 ended in a disposition other than conviction). And while an erroneous impairment of counsel for one's defense is a serious matter, even a 10% acquittal rate would not suggest an error in the grand jury's original assessment: a finding of not guilty at trial hardly suggests that the grand jury lacked the evidence to establish the far lower showing of probable cause.

It is of course possible that, despite the many safeguards against unfounded prosecutions, courts might rule in a handful of cases that the evidence at a post-restraint hearing does not rise to the level of probable cause.[20] But a rule that broadly invites defendants to

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[20] Department of Justice policies, in addition to the grand jury's independent check on prosecutors, make it highly unlikely that many such instances would occur. Although disclosure of exculpatory

challenge pretrial restraining orders based on disagreement with the grand jury's finding of probable cause, on the chance that this would be the rare case in which the government cannot legitimately show probable cause—or perhaps the more frequent case in which the government is unwilling to bear the risks of premature disclosure to establish it—would impose significant burdens on the criminal justice system without sufficient off-setting benefits.

b. In this particular case, petitioners have already been afforded significant procedural protections: not only the grand-jury process, but also the participation of the district court in issuing—and narrowing—the asset-restraint order, see 21 U.S.C. 853(e)(1); Pet. App. 24-25, 98, and an adversarial hearing at which they could have challenged the nexus between the restrained assets and the charged crimes but elected not to do so, Pet. App.

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evidence to the grand jury is not required under *Williams*, the government's policy is that prosecutors must disclose to the grand jury any substantial exculpatory evidence in their possession. See *United States Attorneys' Manual* 9-11.233 (1997) ("It is the policy of the Department of Justice * * * that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury."). Such a procedure is unquestionably prudent. Prosecutors have little incentive "to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *Lovasco*, 431 U.S. at 791. Indeed, federal prosecutors are instructed that, "both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." *United States Attorneys' Manual* 9-27.220 (1997).

40.[21] A co-defendant's acquittal by a trial jury applying the beyond-a-reasonable-doubt standard says nothing about whether probable cause exists as to petitioners—especially because the evidence against petitioners differs from the evidence presented at that trial. Under those circumstances, the Fifth and Sixth Amendments do not guarantee petitioners an evidentiary hearing at which they may revisit the grand jury's probable-cause determination as a condition of continuing the pretrial restraint of their forfeitable assets.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[21] In addition, the magistrate judge who issued the restraint here requested and relied on an affidavit submitted by the government (and filed under seal) discussing the evidence against petitioners. See Pet. App. 108-109. Although that procedure is not constitutionally required, it reinforces the conclusion that the government had evidence showing probable cause to believe that petitioners committed the offenses charged. See *Gerstein*, 420 U.S. at 120 (probable cause "can be determined reliably without an adversary hearing").

APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 21 U.S.C. 853 provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

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

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

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

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

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

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

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

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

(c) Third party transfers

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

(d) Rebuttable presumption

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

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

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

(e) Protective orders

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

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

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

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

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

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

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

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

(4) ORDER TO REPATRIATE AND DEPOSIT

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

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

(f) Warrant of seizure

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

shall issue a warrant authorizing the seizure of such property.

(g) Execution

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

(h) Disposition of property

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

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

(i) Authority of the Attorney General

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

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

(2) compromise claims arising under this section;

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

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

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

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

(j) Applicability of civil forfeiture provisions

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

(k) Bar on intervention

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

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

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

(*l*) Jurisdiction to enter orders

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

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

(m) Depositions

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

(n) Third party interests

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

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

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

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

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

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

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

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

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

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

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

(*o*) Construction

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

(p) Forfeiture of substitute property

(1) In general

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

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

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

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

(D) has been substantially diminished in value; or

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

(2) Substitute property

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

(3) Return of property to jurisdiction

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

(q) Restitution for cleanup of clandestine laboratory sites

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

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

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

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