NO. 12-464

IN THE

Supreme Court of the United States

KERI L. KALEY AND BRIAN P. KALEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners

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QUESTION PRESENTED

When a post-indictment restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pre-trial hearing at which the defendant may challenge the evidence and legal theories underlying the charges against him?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves a threat to the integrity of the adversarial legal system and thus to constitutional due process.

SUMMARY OF ARGUMENT

The right to counsel of choice preserves the integrity of the adversarial process by ensuring that the defendant, not the government, controls whom he trusts with his case. It does not guarantee a fair trial or a good lawyer, but provides "a particular guarantee of fairness—to wit, that the accused be defended by the counsel he believes to be best." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). Although the Supreme Court held in *Caplin & Drysdale* v. *United States*, 491 U.S. 617 (1989),

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

that the right to counsel of choice does not protect tainted assets, it does represent a compelling individual interest that courts must take seriously.

As a general matter, the Due Process Clause of the Fifth Amendment requires that individuals be given adequate notice and a hearing before any significant deprivation of property. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court formulated a balancing test to test a given deprivation is consistent with due process. Courts are to consider three factors: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation, and whether additional procedures would reduce the probability of error (3) the government's interest.

While this Court and the overwhelming majority of courts of appeal have used *Mathews* to determine what process is due when the government seeks to restrain contested assets prior to civil or criminal forfeiture, the Eleventh Circuit has long applied a test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). In *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir. 1989), the Eleventh Circuit applied the four-factor test that the *Barker* Court used to evaluate speedy trial claims. (This, even though the *Bissell* defendants never claimed that the government delayed their trial. They instead challenged the absence of a hearing between asset restraint and trial.) And in ruling on two interlocutory appeals in the instant case, it reiterated that *Barker*, not *Mathews*, is the appropriate test. *United States* v. *Kaley,* 579 F.3d 1246 (11th Cir. 2009) ("*Kaley I*"); *United States* v. *Kaley*, 677 F.3d 1316 (11th Cir 2012) ("*Kaley II*").

The Eleventh Circuit was wrong to use the *Barker* rather than the *Mathews* test in *Bissell*, and it continues to err here. The *Barker* test inadequately protects the rights of criminal defendants in this context. As this Court noted in *United States* v. *$8,850*, 461 U.S. 555 (1983), *Barker* dealt with the Sixth Amendment, not the Fifth Amendment. *$8,850* used the *Barker* test as "the relevant framework for determining whether the delay in filing a forfeiture action was reasonable" in a *civil asset* forfeiture case, *id*. at 556, whereas *Bissell* concerned criminal forfeiture. There is a stark difference between civil and criminal asset forfeiture. The consequences of losing at a criminal trial are likely to be far more serious because a criminal defendant may be accused of multiple charges, some of which form the predicate for the restraint and forfeiture of assets, while others do not. The *Bissell* court did not take account of this distinction in choosing to apply a standard that is far less demanding than *Mathews*.

Under *Mathews*, where the government seeks to restrain contested assets that would otherwise be used to retain counsel of choice, an adversarial hearing should be required in which defendants can challenge the underlying indictment used to support forfeiture. Because the expansion of forfeiture has given rise to well-documented abuses, the risk of error is great and the individual interests at stake are highly compelling. *Ex parte* hearings are insufficient to reduce the probability of error and the countervailing government interests are insufficient to tip the balance.

Of the lower courts that have applied the *Mathews* test, only those following *United States* v. *Jones*, 160 F.3d 641 (10th Cir. 1998), have held that

the defendants may not challenge the underlying indictment in a pretrial hearing. In *Jones*, the Tenth Circuit held that the Due Process Clause requires nothing more than a hearing to determine if the asset is "traceable to the commission of the offense." *Id.* at 646. It reasoned that allowing defendants to challenge the underlying indictment would violate the Supreme Court's instructions in *Costello* v. *United States*, 350 U.S. 359 (1956).

The *Jones* court misapplied *Mathews*. In *United States* v. *Monsanto,* 924 F.2d 1186 (2d Cir. 1991) (en banc), the Second Circuit correctly distinguished *Costello* as not involving the deprivation of assets needed to retain counsel of choice—and thus the "the additional sixth amendment considerations attendant upon [such deprivations]" were not present. *Id.* at 1196. The Tenth Circuit did not properly consider the gravity of the interests at stake and thus reached the wrong conclusion.

Applying *Mathews* rather than *Barker* to the facts of the present case yields a different result. The restraint of their certificate of deposit not only prevents the Kaleys from retaining some hypothetical counsel of choice, but the very counsel that had represented them since the grand jury investigation began. Indeed, it may prevent them from retaining any attorney at all. Further, the assets at issue are contested, unlike those in *Caplin & Drysdale*. On these facts, *Mathews* requires an adversarial hearing in which the Kaleys can challenge the underlying indictment—not merely the connection between the contested assets and their allegedly illegal activities.

ARGUMENT

I. THIS COURT SHOULD APPLY *MATHEWS*, NOT *BARKER*, BECAUSE ASSET RESTRAINTS THAT PREVENT DEFENDANTS FROM RETAINING THEIR COUNSEL OF CHOICE ARE SIGNIFICANT DEPRIVATIONS OF PROPERTY

A. The Right to Counsel of Choice Is a Compelling Individual Interest

The Sixth Amendment right to counsel of choice preserves the integrity of the adversarial process by ensuring that the defendant, not the government, controls whom the defendant trusts with his case. It is different from the right to effective assistance of counsel because it protects the defendant's choice, rather than providing any substantive guarantee of quality. This Court recognized in *Flanagan* v. *United States*, 465 U.S. 259 (1984), that the right to counsel of choice "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id*. at 268. Thus, it does not guarantee a good lawyer, but provides "a particular guarantee of fairness—to wit, that the accused be defended by the counsel he believes to be best." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). As the Eleventh Circuit explained in *United States* v. *Koblitz*, "were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." 803 F.2d 1523, 1528 (11th Cir. 1986) (quoting *Linton* v. *Perini*, 656 F.2d 207, 209 (6th Cir. 1981)).

The right to counsel of choice is not absolute. In *Caplin & Drysdale* v. *United States*, 491 U.S. 617 (1989), this Court upheld an asset forfeiture over the defendant's objection that he needed the assets to retain counsel. The defendant had already pled guilty to bank robbery, so the "strong governmental interest in obtaining full recovery of all forfeitable assets" trumped "any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id.* at 631. It reasoned that "[t]here is no constitutional principle that gives one person the right to give another's property to a third party." *Id.* at 628.

In sum, even though it cannot protect tainted property from forfeiture, the right to counsel of choice is a compelling individual interest because it is critical to the integrity of the adversarial process.

B. *Mathews* Applies to State Deprivations of Property

As a general matter, the Fifth Amendment's Due Process Clause requires that individuals be given notice and a hearing before they may be deprived of life, liberty, or property. *See, e.g., Mullane* v. *Cent. Bank & Hanover Trust Co.*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *Connecticut* v. *Doehr*, 501 U.S. 1, 18 (1991) (requiring prior notice and a hearing in the absence of "exigent circumstance[s]"). In *Fuentes* v. *Shevin*, this Court held that "[a]ny significant taking of property by the

state is within the purview of the Due Process Clause." 407 U.S. 67, 86 (1972). A temporary, non-final deprivation of property is still a deprivation. *See generally Sniadach* v. *Family Finance Corp*., 395 U.S. 337 (1969); *Bell* v. *Burson*, 402 U.S. 535 (1971).

What process is due depends on the context. Any procedures must be tailored to "the capacities and circumstances of those who are to be heard," *Goldberg* v. *Kelly*, 397 U.S 254, 268-69 (1970), to ensure that they are given a meaningful opportunity to present their case. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court created a test for determining whether a deprivation is consistent with due process. Courts are to consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Because asset restraint temporarily prevents individuals from using or possessing property, it constitutes a significant deprivation. *See United States* v. *Moya-Gomez*, 860 F.2d 706, 725-26 (7th Cir. 1988) ("While the restraining order does not divest definitively the ownership rights of the defendant, it certainly does remove those assets from his immediate control and therefore divest him of a

significant property interest."). Accordingly, this Court, together with the overwhelming majority of lower courts, has used *Mathews* to determine what process is due when the government seeks to restrain contested assets prior to civil or criminal forfeiture. *Mathews* "is the traditional test employed in order to determine what process is due before a deprivation of property at the hands of the state may be sustained." *Kaley I*, 579 F.3d at 1260. In *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), the Supreme Court applied *Mathews* to a restraint of real property. The Second, Third, Fourth, Fifth Seventh, Ninth, Tenth Circuits, and D.C. Circuits have also applied *Mathews* to asset restraint. *See, e.g.*, *United States* v. *Monsanto,* 924 F.2d 1206 (2d Cir. 1991) (en banc); *United States* v. *Yusuf,* 199 Fed. Appx. 127(3d Cir. 2006); *United States* v. *Farmer,* 274 F.3d 800 (4th Cir. 2001); *United States* v. *Holy Land Found.,* 493 F.3d 469 (5th Cir. 2007) (en banc); *United States* v. *Moya-Gomez,* 860 F.2d 706 (7th Cir. 1988); *United States* v. *Roth,* 912 F.2d 1131 (9th Cir. 1990); *United States* v. *Jones,* 160 F.3d 641, 648 (10th Cir. 1998); *United States* v. *E- Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008).

C. The *Bissell* and *Kaley* Courts Erred in Applying *Barker* Instead of *Mathews*

In the face of this near-universal agreement that *Mathews* is the proper test for asset restraint, the Eleventh Circuit has long applied a test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). *Barker* concerned a criminal defendant who claimed that his Sixth Amendment right to a speedy trial had been violated. In *Bissell*, the Eleventh Circuit applied *Barker*'s four-factor test and considered (1) the length of the delay before the defendants received

their post-restraint hearing; (2) the reason for the delay; (3) the defendants' assertion of the right to such a hearing pretrial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States' interest in the subject property. 866 F.2d at 1352 (citing *Barker*, 504 U.S. at 530). The *Kaley I* court, considering itself bound by precedent, also reluctantly applied *Barker*.[2]

As this Court noted in *$8,850*, *Barker* dealt with the Sixth Amendment, not the Fifth. *United States* v. *$8,850*, 461 U.S. 555, 564 (1983) ("*Barker* dealt with the Sixth Amendment right to a speedy trial, rather than the Fifth Amendment right against deprivation of property without due process of law.") Indeed, the *Barker* Court explicitly sought to "set out the criteria by which the speedy trial right is to be judged." *Barker*, 407 U.S. at 516. This Court applied *Barker* in *$8,850* because the Fifth Amendment claim at issue "challenge[d] only the length of time between the seizure and the initiation of the forfeiture trial" and thus "mirror[ed] the concern of undue delay encompassed in the right to a speedy trial." *$8,850*, 461 U.S. at 564.

But the *Bissell* defendants did not claim that the government delayed their trial (but rather complained of the absence of a hearing between asset restraint and trial). And where no delay has been alleged, *Barker* is inapplicable. Subsequent to *Bissell*, the Seventh and Tenth Circuits thus rightly distinguished between two types of challenges to the

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[2] The *Kaley I* court noted in dicta, however, that "[i]f we were writing on a blank slate today we would be inclined . . . to apply the test announced by the Supreme Court in *Mathews*." *Kaley I*, 579 F.3d at 1259.

asset-forfeiture process: 1) whether and how forfeitability can be challenged; 2) issues relating to the speed of forfeiture proceedings. *Mathews* applies to cases that do not involve delay. *See*, *e.g.*, *Smith* v. *City of Chicago*, 524 F.3d 834, 837 (7th Cir. 2008) ("*8,850* concerns the speed with which the civil forfeiture proceeding itself is begun—a different question from whether there should be some mechanism to promptly test the validity of the seizure"); *Jones*, 160 F.3d at 645 n.3 ("Defendants here complain that the statutory scheme deprives them of a property interest without due process, not that dilatory conduct on the part of the government has deprived them of the right to a hearing at a meaningful time.").

Further, *$8,850* concerned civil forfeiture, while *Bissell* concerned criminal forfeiture. The consequences of a criminal trial can be far more serious than a civil trial, threatening the loss of liberty and even life in addition to property. A criminal defendant may be accused of multiple charges—some of which form the predicate for the restraint and forfeiture of assets, while others do not. The *Bissell* court did not take into account this distinction in choosing to apply a standard that is far less demanding.

The Eleventh Circuit repeated its *Bissell* error here. Like the defendants in *Bissell*, the Kaleys did not argue that forfeiture proceedings had been delayed for too long, but that there should be a mechanism in place to test the validity of the seizure. Given that there was no timing issue, the court should have applied *Mathews* to decide whether to order a pretrial hearing in which the Kaleys could challenge the facts foundation of their indictment.

II. THE *MATHEWS* TEST REQUIRES AN ADVERSARIAL HEARING IN WHICH THE DEFENDANT CAN CHALLENGE THE UNDERLYING INDICTMENT

Having explained why the *Kaley* court erred in applying *Barker* rather than the *Mathews*, this brief now considers what process is due under *Mathews*.

A. The Risk of Error Is High in Forfeiture Cases, and *Ex Parte* Hearings Will Not Reduce It

The first prong of *Mathews* focuses on the probability of an erroneous deprivation of life, liberty, or property, and the probable value, if any, of additional procedures. Forfeiture use has greatly expanded over the past few decades.[3] With such expansion comes opportunity for abuse. In the first place, government actors can use forfeiture simply to raise revenue for law enforcement, rather than interrupt the flow of illicit commerce, compensate victims, or punish the guilty.[4]

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[3] In the 22 years from 1989 to 2010, an estimated $12.6 billion in assets was seized by U.S. Attorneys in asset forfeiture cases. Maguire, Kathleen, ed., "Sourcebook of Criminal Justice Statistics," U.S. Department of Justice, Bureau of Justice Statistics (Albany, NY: University of Albany, School of Criminal Justice, Hindelang Criminal Justice Research Center, 2009) Table 4.45.2010, http://www. albany.edu/sourcebook/pdf/t4452010.pdf.

[4] By statute, the DOJ uses forfeited assets to fund its own operations. In 1990, the Attorney General distributed a memorandum to all U.S. Attorneys encouraging them "to significantly increase production"—that is, "the volume of forfeitures in order to meet the Department of Justice's annual budget target." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993)(citing Exec. Office for U.S. Attorneys, U.S. Dept. of Justice, 38 U.S. Attorney's Bulletin 180 (1990)).

Second, prosecutors can use forfeiture to strategically disarm the defense. David B. Smith, co-chair of the forfeiture abuse task force of the National Association of Criminal Defense Lawyers and former deputy chief of asset forfeiture at the U.S. Department of Justice, describes the results of forfeiture expansion thus:

> Abuses are common both in civil and criminal cases. Police and prosecutors become bounty hunters. The assets of suspects, including the innocent, become the bounty. Law enforcement agents not only lust after the assets of the accused, they have come to depend on the revenues they get through forfeiture.

Quoted in Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 Campbell L. Rev. 527, 528 n.9 (1997).

This Court has grown increasingly concerned about these government abuses and urged tighter scrutiny of forfeiture practice. Justice Blackmun sounded the alarm early in his *Caplin & Drysdale* dissent, asserting that "forfeiture statutes place the Government in the position to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case." 491 U.S. at 650 (Blackmun, J., dissenting). He reasoned that the "Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client's behalf—the attorney who is better than what, in the Government's view, the defendant deserves." *Id.* In *James Daniel Good Real Property*, the Court acknowledged the government's

"direct pecuniary interest in the outcome of (forfeiture) proceeding(s)," and asserted that courts should "scrutinize action more closely when the State stands to benefit." 510 U.S. at 56 (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 979, n.9 (1991) (Scalia, J.)). Justice Thomas in particular has urged that forfeiture be given a hard look because of the potential for abuse. In his *James Daniel Good* concurrence, he stated that, in light of "ambitious modern [forfeiture] statutes and prosecutorial practices . . . [i]t may be necessary . . . to reevaluate our generally deferential approach to legislative judgments in this area." *Id*. at 81 (Thomas, J., concurring in part, dissenting in part). Similarly, in *Bennis* v. *Michigan*, he warned that if it were "improperly used, forfeiture could become more like a roulette wheel employed to raise revenue." 516 U.S. 442, 456 (1999) (Thomas, J., concurring).

Courts of appeals have heeded these warnings. In *United States* v. *Funds Held ex rel. Wetterer*, the Second Circuit noted the "potential for abuse" and "corrupting incentives" of a system where the Department of Justice "conceives the jurisdiction and ground for seizures, and executes them, [and] also absorbs their proceeds." 210 F.3d 96, 110 (2d Cir. 2000). *See also Krimstock* v. *Kelly*, 306 F.3d 40, 63 (2d Cir. 2002) (considering the City's "pecuniary interest in the outcome [of a forfeiture]" in the course of its "inquiry into the risk of error"). The *Bissell* court expressed concern that "prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets" in order to disarm the defense. *Bissell*, 866 F.2d at 1354-55. In his *Kaley I* concurrence, Judge Tjoflat explained that a prosecutor "has everything to gain

by restraining assets that ultimately may not be forfeited. . . . [H]e can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel." *Kaley I*, 579 F.3d at 1267 (Tjoflat, J., concurring).

Because the expansion of asset forfeiture has created perverse incentives for law enforcement officers and prosecutors and because *ex parte* hearings do not sufficiently protect defendants, there is a high probability of error in asset restraint and it is unlikely that additional procedures will reduce it.

B. Defendants Have Compelling Individual Interests in Contested Assets that Are Necessary to Pay for Counsel of Choice

Because the state has no effective cap on the resources it can expend, the adversarial process by its very nature favors the prosecution. Asset restraint can enable prosecutors, on the strength of a probable cause showing, to prevent defendants from compensating attorneys, investigators, paralegals, and consultants. It can also prevent them from paying expenses arising from trial preparation or the development of trial strategy. This dynamic exacerbates the resource disparity between prosecution and defense and compromises the integrity of the adversary process. As the Seventh Circuit explained, "[i]f one party can skew the process to its advantage, the integrity of the entire process is harmed." *Moya-Gomez*, 860 F.2d at 729.

Accordingly, in cases where asset restraint would prevent defendants from obtaining the counsel of their choice, numerous courts of appeals have required adversarial hearings. In *United States* v. *Michelle's Lounge*, the Seventh Circuit held that a

hearing is required where "the government has seized through civil forfeiture all of the assets a criminal defendant needs to obtain counsel." 39 F.3d 684, 700 (7th Cir. 1994). The D.C. Circuit reached the same conclusion in *United States* v. *E-Gold*, concluding that due process demands that defendants be given a hearing "at least where access to the assets is necessary for an effective exercise of the Sixth Amendment right to counsel." 521 F.3d 411, 421 (D.C. Cir. 2008).

Crucially, the assets in *Michelle's Lounge* and *E-Gold* were contested. In *United States* v. *Farmer*, the Fourth Circuit clarified that its holding only applied where "a defendant claims that a portion of the assets restrained . . . are untainted." 274 F.3d 800, 803 (4th Cir. 2001). That court interpreted *Caplin & Drysdale* to stand for the proposition that "there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds." *Id.* at 804.

Where the government seeks to restrain contested assets that are necessary to retain counsel of choice, compelling individual interests that go to the integrity of the adversary process are implicated.

C. The Government's Interests in Avoiding a Hearing in which Defendants Can Challenge the Underlying Indictment Are Not Compelling

Under *Mathews*, courts must balance the government's interests in avoiding additional process against the individual's interests in receiving it. In its brief, the government focuses on two interests: (1) preventing "premature disclosure of the government's case and trial strategy" and (2) protecting "[the] safety of testifying witnesses,

including victims and cooperators." Gov't Brief at 17.

But, of course, the government can avoid tipping its hand to the defense by not seeking pretrial restraint in the first place. *See*, *e.g.*, *Monsanto*, 924 F.2d at 1198 (pointing out that the government "always has the option of forgoing the restraint and obtaining forfeiture after conviction").

Concerns about safety can also be addressed procedurally. In *E-Gold*, the D.C. Circuit explained that "[i]t is not necessarily the case that affording indicted defendants a right to be heard before the deprivation of their property rights and liberty interests under the Fifth and Sixth Amendments entails an invasion of grand jury secrecy or an evisceration of the important goals of that secrecy." 521 F.3d at 419. It suggested that *in camera* hearings and appropriate application of the normal rules of evidence could protect the grand jury proceedings against unwarranted invasion, thus, the safety of the participants. *Id.*

The government's interest in avoiding additional judicial process are simply not compelling.

D. Where the Government Seeks to Restrain Assets that Are Necessary to Pay for Defendants' Counsel of Choice, *Mathews* Requires Such a Hearing

This Court has consistently held that the features of the "notice and hearing" required before any given deprivation of liberty or property must be determined contextually. In *Morrissey* v. *Brewer*, for example, it stated that "due process is flexible and calls for such procedural protections as the particular situation demands." 408 U.S. 471, 481 (1972).

Except for the aberrant Tenth and Eleventh Circuits, lower courts have understood the uniquely sensitive circumstances that arise when there is a pretrial restraint of assets that are needed by the defendant to retain counsel of choice. In *United States* v. *Monsanto*, this Court did "not consider . . . whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." 491 U.S. 600, 615 n.10 (1989). On remand, the Second Circuit ruled that the Fifth and Sixth Amendments, "considered in combination," require an "adversary, post-restraint, pretrial hearing as to probable cause that (a) the defendant committed crimes that provide a basis for forfeiture, and (b) the properties specified as forfeitable in the indictment are properly forfeitable, to continue a restraint of assets" that are needed to both "retain counsel of choice" and "ordered *ex parte* pursuant to 21 U.S.C. § 853(e)(1)(A) (1988)." *Monsanto*, 924 F.2d at 1203. It specified that the court could "receive and consider at such a hearing evidence and information that would be inadmissible under the Federal Rules of Evidence." *Id.* Most importantly, it asserted that "grand jury determinations of probable cause may be reconsidered in such a hearing"—that is, defendants can challenge the underlying criminal indictment on the merits, not merely the connection between the restrained assets and their alleged criminal activity. *Id.* In *E-Gold*, the D.C. Circuit followed *Monsanto*, holding that due process in such cases required a hearing "at which defendant can challenge 'the existence of probable cause as to both the [predicate criminal offense] and the forfeitability of the specified property.'" 521 F.3d at 418 (quoting *Monsanto*, 924 F.2d at 1197).

Of the lower courts that have applied the *Mathews* test to similar fact patterns, only those following the Tenth Circuit have prevented the defendant from challenging the underlying indictment. In *Jones*, the Tenth Circuit held that the Due Process Clause requires only a hearing to determine if the asset to be restrained is "traceable to the commission of the offense." 160 F.3d at 646. It reasoned that allowing defendants to challenge the underlying indictment would violate the Supreme Court's instructions in *Costello* v. *United States*, 350 U.S. 359 (1956). It cited *Costello* for the proposition that "[d]efendants are not entitled . . . to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Id*. at 364.

Yet the *Jones* court misapplied *Mathews*, just as the Eleventh Circuit did here. The *Monsanto* court correctly distinguished *Costello* on the grounds that it did not involve the deprivation of assets needed to retain counsel of choice and, thus, the "the additional sixth amendment considerations attendant upon [such deprivations]" were not present. *Monsanto*, 924 F.2d at 1196. Remembering that due process analysis is situational, the fact that the *Costello* Court declined to allow a challenge to the underlying indictment should not have been dispositive.

III. UNDER *MATHEWS*, THE KALEYS ARE ENTITLED TO AN ADVERSARIAL HEARING IN WHICH THEY CAN CHALLENGE THE MERITS OF THE INDICTMENT

We have seen that, where the government seeks to restrain contested assets that are necessary for defendants to retain the counsel of their choice, *Mathews* requires an adversarial hearing in which the merits of the underlying indictment used to support the restraint may be challenged.

The restraint at issue prevents the Kaleys from retaining the attorneys of their choice. The Kaleys were informed that it would cost them approximately $500,000 to take the case through trial, and they applied for and obtained a home equity line of credit in that amount on their residence. They used the proceeds to buy a certificate of deposit (CD). The indictment against the Kaleys sought criminal forfeiture of all property traceable to their allegedly illegal activities, including the CD. Absent the CD, the Kaleys could not continue to retain the attorneys that had represented them for two years.

Unlike the assets in *Caplin & Drysdale*, the funds in the Kaleys' CD are contested. They were restrained after a probable cause hearing focused solely on whether the assets were traceable to their allegedly illegal activities. The Kaleys do not deny that the funds in the CD are connected to the activities for which they have been indicted, but they do deny that those activities were illegal.

These two features of the case alone are sufficient under *Mathews* to require a hearing in which the underlying indictment can be challenged. Simply

identifying them does not capture the full weight of the burden that the restraint places on the Kaleys, however, which the *Kaley I* court described as "serious and substantial." *Kaley I*, 579 F.3d at 1259.

For the Kaleys, being deprived of their counsel of choice is particularly burdensome because of counsel's longstanding involvement in their case—since the grand jury investigation began. The *Kaley I* court emphasized that restraining the CD would, for the Kaleys, entail "losing access to long-time counsel who have already invested substantial time into learning the intricacies of the Kaleys' case and preparing for trial." *Id.* at 1258.

Indeed, this restraint may prevent the Kaleys from hiring any attorney at all. The *Kaley I* court found that in order to retain any private counsel, the Kaleys would have to incur a $183,500 non-recoverable liquidation and tax penalty in order to release their only remaining unrestrained assets (retirement and college savings accounts). Accessing the $323,000 contained in their 401(k) plan at the time the district court considered their motion would cost them a $168,000 penalty for early withdrawal as well as income taxes, leaving them with only $155,000 for legal fees. Finally, to access the $111,000 contained in college savings accounts, the Kaleys would have to pay $15,000 in liquidation penalties and capital gains taxes that they could never recover.

Applying *Mathews* here rather than *Barker* yields a different result: An adversarial hearing in which the Kaleys could challenge the underlying indictment, not merely the connection between the contested assets and their allegedly illegal activities.

Indeed, the Eleventh Circuit acknowledged that if it were to apply *Mathews*, the Kaleys "would be entitled to a pretrial hearing on the merits of the protective order." *Kaley I*, 579 F. 3d at 1260.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and remand the case, with instructions to grant the Kaleys a pretrial hearing at which they can show that the government did not have probable cause to restrain their assets.

Respectfully submitted,

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