No. 16-4313

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

WILLIAM TODD CHAMBERLAIN,
Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF *AMICI CURIAE* FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CATO INSTITUTE IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct, including those subject to attempts by the government to forfeit property.

NACDL was founded in 1958, and has a nationwide membership of approximately 10,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

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[1] Pursuant to Federal Rule of Appellate Procedure 29, Sergeant Chamberlain, through counsel, consents to the filing of this brief. The government, through Assistant United States Attorney Steve West, does not take a position on the filing of this brief. Counsel for the parties did not author this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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 promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

The present case concerns *amici* because the federal government's aggressive use of pretrial forfeiture proceedings against criminal defendants poses a grave threat to property rights and undermines the presumption of innocence. The strong pecuniary interest that law enforcement has in maximizing forfeiture proceeds distorts police and prosecutorial practices and, in many cases, leads to the restraint or seizure of untainted assets that are not connected to any crime. These threats are particularly acute in the Fourth Circuit, which is currently the only circuit in the country that permits the government to restrain a defendant's untainted, "substitute" assets before it has proven beyond a reasonable doubt that the defendant committed any federal offense.

INTRODUCTION

Over twenty-five years ago, in *In re Billman*, 915 F.2d 916 (4th Cir. 1990), this Court became the first federal court of appeals to address the question whether a criminal defendant's untainted, "substitute" assets can be restrained pending trial, before the defendant has been convicted of any federal crime. While acknowledging that the forfeiture statute at issue did not expressly authorize the pre-trial restraint of substitute assets, this Court held that the statutory provision authorizing the pre-trial restraint of *tainted* assets "must be read in conjunction with [a separate provision authorizing the *post-conviction* restraint of substitute assets] to preserve the availability of substitute assets pending trial." *Id.* at 920-21. Permitting the government to restrain untainted assets pending trial was necessary, in the Court's view, to effectuate the broad remedial purposes of the statute, namely "to preserve the defendant's assets for ultimate forfeiture if he is convicted."[2] *Id.* at 921.

In the quarter century since *Billman* was decided, two developments have cast doubt on the continued validity of the *Billman* rule. First, in a series of

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[2] Although *Billman* itself was a RICO case and thus addressed RICO's specific asset forfeiture provisions, the Court's holding has subsequently been extended to analogous provisions of the general criminal forfeiture statutes. *See United States v. Bollin*, 264 F.3d 391, 421-22 (4th Cir. 2001).

decisions beginning in 1993, every other federal court of appeals to address the issue has held that the criminal forfeiture statutes do *not* authorize the government to restrain untainted, substitute assets prior to conviction. *See United States v. Parrett*, 530 F.3d 422 (6th Cir. 2008); *United States v. Jarvis*, 499 F.3d 1196 (10th Cir. 2007); *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *In re Martin*, 1 F.3d 1351 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993). In repudiating *Billman*, these courts have drawn a bright line between tainted and untainted assets, holding that the plain language of the forfeiture statutes "conveys Congress's intent to authorize the restraint of *tainted* assets prior to trial, but *not* the restraint of *substitute* assets." *Parrett*, 530 F.3d at 431 (emphasis in original). The Fourth Circuit is thus presently the only circuit in which the government is permitted to restrain a defendant's untainted substitute assets before the defendant has been convicted of any federal crime.

Second, in a decision announced just a few months ago, the Supreme Court rejected the reasoning relied upon by this Court in *Billman*, thus lending further support to those circuits that have already rejected the *Billman* rule. In *Luis v. United States*, 136 S. Ct. 1083 (2016), the Supreme Court held that the forfeiture statutes do *not* permit the government to restrain all property—"whether tainted or untainted"—that may be forfeitable to the government upon conviction. *Id.* at

1091. Rather, the Court held that "whether property is 'forfeitable' or subject to pretrial restraint" requires "a nuanced inquiry that very much depends on who has the superior interest in the property at issue." *Id*. In explaining its holding, the Court described 21 U.S.C. § 853(e), the statutory provision at issue in this case, as a provision limited to the pre-trial restraint of *tainted* assets. *Id.* (describing Section 853(e) as a provision "which explicitly authorizes restraining orders or injunctions against 'property described in subsection (a) of this section' (*i.e.*, *tainted* assets)" (emphasis in original)). During oral argument in *Luis*, the Department of Justice itself conceded that – contrary to *Billman* as well as the government's own position in this case – Section 853 does *not* permit the pretrial restraint of a defendant's untainted, substitute assets. Tr. at 45:25-46:3.

The case presently before the Court squarely raises the issue of whether courts in this Circuit should continue to apply the *Billman* rule. The defendant, Sergeant First Class William Todd Chamberlain, was one of five service members who allegedly conspired to embezzle federal funds while deployed in Afghanistan. Relying on *Billman*, the district court permitted the government to restrain a tract of real property owned by Sergeant Chamberlain that was unrelated to the charged conduct. *United States v. Chamberlain*, No. 5:14-CR-128-2-H, 2016 WL 2899255, at *2 (E.D.N.C. May 17, 2016). In doing so, however, the district court "agree[d]" with Sergeant Chamberlain that – based on *Luis* – "the Supreme Court

may in fact interpret" the general criminal forfeiture statute to prohibit the pre-trial restraint of untainted substitute assets "in the future." *Id.* Because *Luis* did not directly address this issue, however, the district court concluded that it remained bound by this Court's precedent. *Id.*

For the reasons set forth below, *amici* respectfully submit that, post-*Luis*, district courts throughout the Fourth Circuit should no longer be bound by *Billman*. Although *Luis* technically addressed whether a separate forfeiture statute applicable to banking and health care fraud permits the government to restrain a defendant's untainted assets needed to retain counsel, the Supreme Court's reasoning in that opinion cannot be squared with *Billman*, which relied upon an interpretation of earlier precedent expressly rejected by the Supreme Court in *Luis*. Moreover, although this Court did not have the benefit of the views of the other circuits at the time *Billman* was decided, every other appellate court to address the issue has since concluded that the plain language of the statute prohibits the type of pre-trial restraints authorized by *Billman*. Continued adherence to the *Billman* rule thus subjects defendants in this Circuit – who are presumed innocent and have not been convicted of any crime – to a different standard than defendants throughout the rest of the country. Such disparities undermine the basic fairness of the federal criminal justice system, and effectively deprive defendants of the presumption of innocence to which they are entitled under the law.

ARGUMENT

I. THIS COURT'S PRIOR DECISION IN *BILLMAN* IS NOT A VIABLE AUTHORITY AND SHOULD NO LONGER BE FOLLOWED

The government moved to restrain Sergeant Chamberlain's untainted assets under 21 U.S.C. § 853(e)(1)(A), which permits the court to enter a restraining order "to preserve the availability of *property described in subsection (a) of this section* for forfeiture" upon the filing of an indictment "alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture." 21 U.S.C. § 853(e)(1)(A) (emphasis added). Subsection (a) in turn defines the property subject to forfeiture as:

> (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 …, … any of [the person's] interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C. § 853(a). By its terms, Section 853(e)(1)(A) thus permits the government to seek a pre-trial restraining order to preserve a defendant's *tainted* assets, *i.e.*, those assets that are the proceeds of a crime, were used or intended to

be used in the commission of a crime, or that consist of some interest in a continuing criminal enterprise.

A. *Billman* Authorizes The Pretrial Restraint Of Any Property – Whether Tainted Or Untainted – That Might Ultimately Be Forfeited To The Government Upon Conviction

Although Section 853(e)(1)(A) appears on its face to authorize only the pre-trial restraint of defendant's tainted, "subsection (a)" assets, courts in this Circuit – including the district court in this case – have applied a more expansive interpretation of Section 853(e) following this Court's decision in *Billman*. *Billman* involved an analogous provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which permitted the government to seek a pre-trial restraining order to preserve a racketeering defendant's tainted, "subsection (a)" assets. *See* 18 U.S.C. § 1963(d); *Billman*, 915 F.2d at 920-21. Like the general criminal forfeiture statute, the RICO provision defined the "subsection (a)" assets subject to pre-trial restraint as "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity" as well as "any interest … acquired or maintained in violation of" the racketeering laws and "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over" a racketeering enterprise. 18 U.S.C. § 1963(a); *Billman*, 915 F.2d at 920. To restrain a defendant's property before trial, the RICO provision thus appeared to require the

government to demonstrate that the property was tainted, *i.e.*, that it constituted the "proceeds" of racketeering activity or was otherwise involved in the operation of a racketeering enterprise.

The government was unable to make such a showing in *Billman*, as the property that it sought to restrain before trial had not been traced to any racketeering activity.[3] *Billman*, 915 F.2d at 919. The district court denied the government's request for a pretrial restraining order on that basis, holding that the RICO statute "did not authorize a pretrial injunction to restrain assets … when the assets were not proved to be proceeds of a RICO offense." *Id.* If the property did not constitute tainted, "subsection (a)" property, in other words, the district court held that the property could not be restrained pending trial.

On appeal, however, this Court interpreted RICO's restraining order provision much more broadly. While acknowledging that the restraining order provision expressly referred only to "subsection (a)" (*i.e.*, tainted) property, the

[3] This Court, commenting on the particularly egregious nature of Billman's misconduct, was skeptical of the supposedly "untainted" nature of the funds at issue, highlighting facts in the record "that would justify the inference" that the funds were, in fact, tainted. 915 F.2d at 919-20. The panel nonetheless acknowledged that it had to defer to the district court's finding (following an evidentiary hearing) that the funds were untainted. *Id.* at 920. It is unclear how the Court's views of the record evidence may have affected its analysis, but subsequent decisions have not sought to distinguish *Billman* on this basis.

Court noted that a separate RICO provision, Section 1963(m), authorized the forfeiture of a defendant's untainted, "substitute" assets *upon conviction*, if the defendant's tainted assets were not available for forfeiture.[4] *Billman*, 915 F.2d at 920-21. Even though subsection (m) property was not referenced in the provision authorizing pre-trial restraining orders, this Court looked past the words of the statute and held that, because the "purpose" of the restraining order provision was "to preserve pending trial the availability for forfeiture of property that can be forfeited after trial," that provision "must be read in conjunction with subsection (m) to preserve the availability of *substitute* assets pending trial." *Id.* at 921 (emphasis added). Grafting these two different provisions together was necessary, in the Court's view, in light of the Supreme Court's earlier decision in *United States v. Monsanto*, 491 U.S. 600 (1989), which held that "[t]he government may 'seize property based on a finding of probable cause to believe that the property

[4] Section 1963(m) specifically provides that upon conviction, the court may order the forfeiture of "any other property of the defendant," up to the value of the tainted property forfeitable under subsection (a), if, "as a result of any act or omission of the defendant," the forfeitable property "cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the court; has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty." 18 U.S.C. § 1963(m). The general criminal forfeiture statute at issue in this case, 21 U.S.C. § 853, contains an identical provision. *See* 21 U.S.C. § 853(p).

will ultimately be proven forfeitable.'" *Id.* at 919 (quoting *Monsanto*, 491 U.S. at 615); *see also id.* at 921 (stating that "*Monsanto* confirms [the Court's] conclusion that 1963(d)(1)(A) should be construed to authorize pretrial restraint of those assets specified by subsections (a) and (m) that can be forfeited after conviction"). Because a defendant's substitute assets might "ultimately be proven forfeitable" to the government upon conviction, *Billman* concluded that the government was authorized to restrain such assets before trial, even if they did not fall within the definition of "subsection (a)" property under the statute. *Id.* at 921.

Although *Billman* itself addressed only RICO's specific forfeiture provisions, the same analysis has since been applied to the general criminal forfeiture statute at issue in this case, 21 U.S.C. § 853, which contains virtually identical provisions. *See United States v. Bollin*, 264 F.3d 391, 421-22 (4th Cir. 2001). On that basis, the district court granted the government's motion to restrain Sergeant Chamberlain's untainted substitute assets before trial, noting that "[t]he Fourth Circuit Court of Appeals, unlike other circuits, permits the pretrial restraint of substitute assets." *Chamberlain*, 2016 WL 2899255, at *2. In arriving at its conclusion, the district court expressly relied on *Billman*. *Id.*

B. Every Other Circuit To Address The Issue Has Held That The Statute Does Not Authorize The Government To Restrain A Defendant's Untainted, Substitute Assets Before Trial

Although *Billman* relied upon the "purpose" of the forfeiture statutes to expand the categories of property subject to pretrial restraint, every other federal court of appeals to address the issue has rejected *Billman*'s reasoning. In *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998), for example, the Second Circuit noted that, even if *Billman*'s description of the statute's "purpose" were correct, "the court does not resort … to the purpose of the statute to discern its meaning" when the statutory language is "plain on its face." *Id.* at 149. Because the statute "plainly states what property may be restrained before trial" and that description – referencing "subsection (a) property" – "does *not* include substitute assets," the Second Circuit rejected *Billman* and held that the statute "provides no authority" for the pretrial restraint of substitute property. *Id.* at 149-50 (emphasis added; internal quotations omitted).

The Third Circuit has been similarly critical of *Billman*, explaining that "*Billman*'s conclusion cannot be reconciled with the normal rule of statutory interpretation that a court does not look to the purpose of a statute when the meaning is clear on its face." *In re Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993). Finding the plain language of the statute "clearly dispositive," the Third Circuit held that the provision authorizing pretrial restraints is limited to "the property

described in subsection (a)," which does not include substitute assets.[5] *Id.* Every other circuit court to address the issue has reached the same conclusion. *See United States v. Parrett*, 530 F.3d 422, 431 (6th Cir. 2008) (holding that "the plain language of 21 U.S.C. § 853 conveys Congress's intent to authorize the restraint of *tainted* assets prior to trial, but *not* the restraint of *substitute* assets"); *United States v. Jarvis*, 499 F.3d 1196, 1204 (10th Cir. 2007) (holding that § 853(e) does not authorize the pretrial restraint of substitute property because the statute "imposes specific preconditions on the government's ability to claim title to the defendant's substitute property … which can only be satisfied once the defendant has been convicted"); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995) (holding that the "unambiguous" statutory language of § 853(e) "authorizes *pretrial* restraint only of property associated with the crime, though subsection (p) allows the government to reach substitute assets *after* conviction"); *United States v. Ripinsky*,

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[5] Although it found the plain language of the statute dispositive, the Third Circuit also engaged in an exhaustive review of legislative history. *See* 1 F.3d at 1359-60. "This legislative history unequivocally establishes that Congress meant what it said in limiting pre-conviction and pre-indictment restraints to subsection (a) property…. *Congress had no purpose of allowing pretrial restraints of all assets, including substitute assets, that ultimately might be forfeitable*." *Id.* at 1360 (emphasis added). Other courts that have examined Section 853's legislative history have reached the same conclusion. *See, e.g.*, *Ripinsky*, 20 F.3d at 363-65; *Field*, 62 F.3d at 249.

20 F.3d 359, 362-63 (9th Cir. 1994) (holding that § 853(e) "clearly states what assets are subject to pretrial restraint" and those assets are "not substitute assets"); *United States v. Floyd*, 992 F.2d 498, 501-02 (5th Cir. 1993) (holding that substitute assets cannot be restrained under Section 853(e) and noting that "[t]o allow the government to freeze [defendant's] untainted assets would require us to interpret the phrase 'property described in subsection (a)' to mean property described in subsection (a) *and (p)*," which separately addresses substitute assets).

The decisions of the other circuits obviously are not binding on this Court, but they do identify two flaws in *Billman*'s reasoning that are of particular importance in light of the Supreme Court's recent decision in *Luis*. First, although the statutory text distinguishes between tainted and untainted property, *Billman* ignored this distinction, treating all property that might be forfeited to the government at the end of the trial as "forfeitable" property in which the government had the same, present interest. *See Billman*, 915 F.2d at 921-22. Such an interpretation is inconsistent with the statutory text and structure, which treats the government's interest in these two types of property very differently. As the Tenth Circuit explained in *Jarvis*:

> [T]he statute treats the United States' interest in substitute property—property that neither comprises the fruits of nor is connected to the defendant's alleged crime—differently than it treats the government's interest in § 853(a) tainted property. Pursuant to § 853(p), forfeiture of substitute property cannot occur until after

> the defendant's conviction and a determination by the trial court that the defendant's act or omission resulted in the court's inability to reach § 853(a) assets…. Unlike the pre-conviction interest the government may claim in tainted § 853(a) property, § 853(c) thus does not explicitly authorize the United States to claim any pre-conviction right, title, or interest in § 853(p) substitute property…. The statute … imposes specific preconditions on the government's ability to claim title to the defendant's substitute property, preconditions which can only be satisfied once the defendant has been convicted.

Jarvis, 499 F.3d at 1204. As a matter of property law, the Tenth Circuit thus concluded that "the United States does not have a ripened interest in § 853(p) substitute property until (1) after the defendant's conviction and (2) the court determines the defendant's § 853(a) forfeitable property is out of the government's reach for a reason enumerated in § 853(p)(1)(A)-(E)." *Id.* *Billman* did not engage in a similar property law analysis, but rather assumed—based upon its own reading of prior Supreme Court precedent as well as the statute's "purpose"—that the government had a valid interest in restraining *all* potentially "forfeitable" property before trial. *See Billman*, 915 F.2d at 919-22.

Second, although *Billman* held that allowing the government to restrain untainted substitute assets before trial was necessary to effectuate the statute's broad remedial "purpose," the other circuits have recognized that such a one-sided interpretation actually frustrates legislative purpose by upsetting the careful balance struck by Congress. *See, e.g.*, *Field*, 62 F.3d at 249; *Ripinsky*, 20 F.3d at

364-65. While the government undoubtedly has an interest in preserving criminal proceeds for possible forfeiture, criminal defendants in this country are presumed innocent until proven guilty, and thus have an interest in maintaining their own untainted assets—their homes, businesses, savings accounts, and college funds—free of government restraint pending trial.

Section 853 "represents a balance" struck by Congress between "the rights of the government and those of the accused," allowing the government to freeze some assets (tainted assets) and not others (untainted assets) while the defendant awaits trial. *Field*, 62 F.3d at 249. Contrary to this Court's broad holding in *Billman*, permitting the government to restrain *more* property than the plain language of Section 853 authorizes does *not* "'effectuate the remedial purposes' of the statute," but rather "put[s] a thumb on the scales" and upsets the balance struck by Congress. *Field*, 62 F.3d at 249; *see also Ripinsky*, 20 F.3d at 364. The power to restrain allegedly tainted property before trial is already a powerful weapon for the government to use against criminal defendants. The power to restrain property unconnected to any crime is "an even more powerful weapon" that Congress simply did not intend the government to use against those who are still presumed innocent. *Ripinsky*, 20 F.3d at 365. For that reason, the provision addressing untainted substitute assets (Section 853(p)) applies only when the trial court has

proceeded to an order of forfeiture, *i.e.*, after the defendant has been convicted and is no longer presumed innocent. *See* 18 U.S.C. § 853(p).

C. *Luis* Rejected The Argument That The Government Is Authorized To Restrain All Property That Might Ultimately Be Forfeited To The Government Upon Conviction

Despite the split in authority described above between the Fourth Circuit and every other circuit to address the issue, the Supreme Court has yet to squarely address whether the criminal forfeiture statutes authorize the pretrial restraint of substitute assets. In *Luis v. United States*, however, the Supreme Court provided the clearest indication yet that it disagrees with this Court's decision in *Billman*. The plurality opinion and Justice Thomas's concurring opinion in *Luis* undermine *Billman*'s holding, for several reasons.

1. *Luis* Expressly Rejects The Broad Reading Of *Monsanto* Relied Upon By This Court In *Billman*

As noted above, this Court's decision in *Billman* was premised in large part upon its reading of the Supreme Court's earlier opinion in *United States v. Monsanto*, 491 U.S. 600 (1989). The Court relied upon *Monsanto* in the first sentence of its legal analysis, citing *Monsanto* for the broad proposition that "[t]he government may 'seize property based on a finding of probable cause to believe that the property will ultimately be proven forfeitable.'" *Billman*, 915 F.2d at 919 (quoting *Monsanto*, 491 U.S. at 615). Applying that broad proposition to the statutory provision at issue, *Billman* held that the government is authorized to

restrain substitute property before trial because such property may ultimately be forfeitable to the government after trial. *Id.* at 921. *Monsanto* "confirm[ed]" such an interpretation, in the Court's view, because *Monsanto* "reasoned that if there was probable cause to believe that these assets could be forfeited in postconviction proceedings, pretrial restraint was permissible." *Id.*

The Supreme Court, however, expressly rejected such a broad reading of *Monsanto* in *Luis*. Like the instant case, *Luis* involved the government's attempts to restrain a defendant's untainted assets before trial. *See Luis*, 136 S. Ct. at 1088. To justify the pretrial restraining order, the Court noted that some (including the *Luis* dissenters) relied upon *Monsanto* "for the proposition that property—whether tainted or untainted—is subject to pretrial restraint, so long as the property might someday be subject to forfeiture." *Id.* at 1091. But the Court rejected such a reading out of hand, explaining that *Monsanto* "concerned only the pretrial restraint of assets *that were traceable to the crime*," which the forfeiture statutes plainly allowed the government to restrain before trial. *Id.* (emphasis in original). Because *Monsanto* "involved the restraint only of *tainted* assets," the Court held that it provided "no occasion to opine … about the constitutionality of pretrial restraints of other, *untainted* assets." *Id.* (emphasis added).

Rather than adopting the broad reading of *Monsanto* espoused by this Court in *Billman*, *Luis* thus limited *Monsanto* to cases involving the pretrial restraint of

tainted property. *Billman*, of course, did not involve the pretrial restraint of tainted property, but rather was the first appellate decision applying *Monsanto* to the pretrial restraint of *untainted* property. In light of *Luis*, such a holding is no longer viable.

2. *Luis* Holds That The Proper Inquiry Is To Examine The Parties' Respective Property Rights Under The Statute

In addition to clarifying that *Billman*'s interpretation of prior Supreme Court precedent was incorrect, *Luis* also describes the inquiry that is necessary to determine whether the criminal forfeiture statutes authorize the government to restrain a defendant's assets before trial. According to the plurality, "whether property is 'forfeitable' or subject to pretrial restraint under Congress' scheme" requires a "nuanced inquiry that very much depends on who has the superior interest in the property at issue."[6] *Luis*, 136 S. Ct. at 1091. *Billman* did not engage

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[6] In a concurring opinion, Justice Thomas explained that he would have gone even further by holding that "[w]hen the potential of a conviction is the only basis for interfering with a defendant's assets before trial, the Constitution requires the Government to respect the long-standing common-law protection for a defendant's untainted property." *See Luis*, 136 S. Ct. at 1102-03 (Thomas, J., concurring). Justice Thomas noted that "the common law drew a clear line between tainted and untainted assets," and "prohibited pretrial freezes of criminal defendants' untainted assets." *Id.* at 1099. In Justice Thomas's view, the fact that "[p]retrial freezes of untainted forfeitable assets did not emerge until the late 20th century" serves as "the most telling indication of a severe constitutional problem," as "blanket asset

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in this sort of "nuanced" property law analysis, relying instead on the blanket proposition – rejected in *Luis* – that all potentially "forfeitable" property can be restrained before trial. The plurality opinion in *Luis*, however, demonstrates that under the proper inquiry, untainted substitute assets *cannot* be restrained before trial under Section 853. *See Luis*, 136 S. Ct. at 1090-92; *see also Jarvis*, 499 F.3d at 1203-04 (analyzing the property interests at stake under Section 853 and concluding that the government "does not have a ripened interest in § 853(p) substitute property" before trial).

As Justice Breyer explained in *Luis*, the nature of the government's (and the defendant's) interests in tainted and untainted property differs substantially before trial. "As a matter of property law the defendant's ownership interest [in tainted property] is imperfect," because "title to property used to commit a crime (or otherwise 'traceable' to a crime) often passes to the Government at the instant the crime is planned or committed." *Luis*, 136 S. Ct. at 1090. For that reason, "[t]he government may well be able to freeze, perhaps to seize, assets of the … 'tainted' kind before trial," because the government maintains a superior right to ownership

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freezes are so tempting that the Government's prolonged reticence would be amazing if they were not understood to be constitutionally proscribed." *Id.* (internal quotations omitted).

of tainted property. *Id.* The government's interest in tainted property is reflected in Section 853, which expressly authorizes the government to restrain tainted, "subsection (a)" assets (assets "used in" or "constituting, or derived from, any proceeds" of a crime) before trial. *See* 21 U.S.C. §§ 853(a), (e).

Untainted property, however, stands on a different footing. The government lacks any ownership interest in such property before trial because, as a matter of property law, untainted property "belongs to the defendant, pure and simple." *Luis*, 136 S. Ct. at 1090. Substitute property "is not loot, contraband, or otherwise 'tainted,'" and title to the property therefore does not pass from the defendant to the government prior to conviction. *Id.* Unlike tainted assets, the government's interest in untainted assets is therefore limited and contingent. "[I]f this were a bankruptcy case, the Government would be at most an unsecured creditor. Although such creditors someday might collect from a debtor's general assets, they cannot be said to have any present claim to, or interest in, the debtor's property." *Id.* at 1092.

The government's limited, contingent interest in untainted property is also reflected in Section 853, which authorizes the government to seek forfeiture of "substitute property" only after the defendant has been convicted and, "as a result of any act or omission of the defendant," the defendant's tainted property is unavailable for forfeiture. *See* 21 U.S.C. § 853(p). As the Tenth Circuit

recognized in *Jarvis*, these preconditions mean that the government "does not have a ripened interest" in a defendant's untainted assets before trial, and therefore cannot claim "any pre-conviction right, title, or interest in § 853(p) substitute property." *Jarvis*, 499 F.3d at 1204.

This Court's decision in *Billman* overlooks this distinction, conflating the government's interests in tainted and untainted assets. After *Luis*, conflating those distinct interests not only violates fundamental tenets of property law, but also is inconsistent with Supreme Court precedent.

3. *Luis* Describes Section 853 As Permitting Only The Pretrial Restraint Of *Tainted* Assets, And The Government Agreed With The Court's Description During Oral Argument

Luis itself involved a separate forfeiture statute applicable in cases of healthcare and banking fraud, which authorized the government to restrain not only tainted property but also other "property of equivalent value." *Luis*, 136 S. Ct. at 1087 (describing 18 U.S.C. § 1345). In the course of holding that the statute could not authorize the government to restrain untainted assets needed to retain counsel without violating the Sixth Amendment, the Court (and the parties) also had occasion to address several provisions of the general criminal forfeiture statute at issue in this case, 21 U.S.C. § 853. *See, e.g.*, *id.* at 1091-92. While the Court's observations regarding Section 853 are arguably *dicta*, *Luis*'s discussion of Section 853 is nonetheless significant in at least two respects.

First, after holding that the courts must engage in a "nuanced inquiry" to determine whether property is subject to pretrial restraint under "Congress' scheme," Justice Breyer cited Section 853(e) as one example of the type of provision that reflects "who has the superior interest in the property at issue." *Luis*, 136 S. Ct. at 1091. In doing so, Justice Breyer described Section 853(e) – the provision upon which the government relies in this case – as "explicitly authoriz[ing] restraining orders or injunctions against 'property described in subsection (a) of this section' (*i.e.*, *tainted* assets)." *Id.* (emphasis in original). Justice Breyer's opinion thus indicates that, like those circuits that have already rejected *Billman*, at least a plurality on the Court also interprets the plain language of Section 853(e) to authorize only the pretrial restraint of *tainted* assets.

Second, during oral argument in *Luis*, the Department of Justice itself expressed the view that – contrary to its position before this Court – Section 853(e) does *not* authorize the pretrial restraint of a defendant's untainted substitute assets. In an exchange with Justice Sotomayor, Deputy Solicitor General Michael Dreeben answered as follows:

> JUSTICE SOTOMAYOR: Mr. Dreeben, you're taking Monsanto out of context, because 853, by its nature, was limited to tainted funds. This is the first statute if – that I know of that permits the government to come in and take untainted funds. The incidence of the tainted funds concept was, you can't spend another person's money. You stole their money somehow, and you can't spend that money because it belongs to

> someone else. It really doesn't belong to you. But it's not until a judgment – and this is what your adversary is trying to say – that the money that's untainted, the money that – or the property that he bought before this crime, this untainted property becomes yours. It's not until that moment, the judgment, that the property is forfeitable.
>
> MR. DREEBEN: That's true.
>
> ….
>
> JUSTICE SOTOMAYOR: Frankly, I expect within three to five years, if we rule in your favor, 853 will be changed to have this same language [regarding the restraint of "equivalent property" in the banking and health care fraud statute].
>
> MR. DREEBEN: So 853, Justice Sotomayor, does permit forfeiture of substitute property.
>
> JUSTICE SOTOMAYOR: Yes, but not pretrial.
>
> MR. DREEBEN: Not – not pretrial. [The banking and health care fraud statute] is different because it has a different function and a different purpose.

Tr. at 44:18-45:8, 45:22-46:5. In a subsequent exchange with Justice Scalia, Mr. Dreeben again stated that "[the banking and health care fraud] provision is different, as Justice Sotomayor pointed out, from the basic forfeiture statute in permitting pretrial restraint of *any* assets." *Id.* at 48:2-5 (emphasis added).

When asked a series of questions premised upon the notion that the general criminal forfeiture statute does *not* authorize the pretrial restraint of untainted assets, the government not only agreed with that assessment, but attempted to

distinguish the banking and health care fraud statute at issue in *Luis* by arguing that, *unlike the general statute*, the fraud statute *did* contain a provision authorizing pretrial restraint. Following *Luis*, this Circuit thus appears to be the only court in the land in which the government still attempts to defend *Billman*.

II. *EN BANC* PROCEEDINGS ARE NOT NECESSARY TO OVERRULE *BILLMAN* IN THIS CASE

Amici recognize that, as a general rule, a panel of this Court cannot overrule a prior decision of another panel. *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (*en banc*). In the normal course, this panel would therefore be bound to follow *Billman* even if it suspected that *Billman* was wrongly decided, just as the district court viewed itself as bound by precedent below.

When a prior decision of this Court "has been sufficiently undermined by subsequent Supreme Court decisions," however, a panel of this Court is free to determine that the prior decision "should no longer be followed." *Faust v. S.C. State Highway Dep't*, 721 F.2d 934, 936 (4th Cir. 1983). In *Faust*, for example, a prior Fourth Circuit opinion appeared to require the panel to affirm the district court, which had held that the State of South Carolina had impliedly waived sovereign immunity in a personal injury case. *Id.* at 940. The panel declined to do so, however, because the prior Fourth Circuit decision "embodied a reading of [Supreme Court precedent] which later Supreme Court decisions have shown is untenable." *Id.* Although the prior Fourth Circuit decision had yet to be overruled,

the panel concluded that it was "not a viable authority and should no longer be followed" because subsequent Supreme Court decisions had "sharply curtailed" the authority upon which it relied. *Id.* at 940-41. In declining to follow the earlier decision, the panel noted that its conclusion was "in accord with every other court of appeals which has considered this issue." *Id.* at 941.

This case is on all fours with *Faust*. Although *Billman* has yet to be formally overruled, it "embodie[s] a reading of" *Monsanto* "which later Supreme Court decisions have shown is untenable." *Id.* at 940. Whereas *Billman* relied upon *Monsanto* for the proposition that the government has the right to restrain any property (whether tainted or untainted) that may prove forfeitable after trial, 915 F.2d at 919, the Supreme Court expressly rejected any such interpretation in *Luis*, limiting *Monsanto* to cases (unlike the instant case) involving the pretrial restraint of tainted assets. 136 S. Ct. at 1091. *Billman* has thus been "sufficiently undermined by" *Luis* "that it should no longer be followed." *Faust*, 721 F.2d at 936.

Moreover, if this Court were to conclude that Section 853(e) does *not* authorize the government to restrain untainted assets before trial, then, as noted above, its conclusion would be "in accord with every other court of appeals which has considered this issue." *Faust*, 721 F.2d at 941. This Court obviously is not obligated to align its precedents with those of the other circuits, but as the Seventh

Circuit recently noted, "being alone among the circuits justifies giving the subject a fresh look." *Fowler v. Butts*, No. 15-1221, 2016 WL 3916012, at *2 (7th Cir. July 20, 2016). In this case, the plain language of the statute, the considered views of every other circuit to address the issue, and the Supreme Court's intervening decision in *Luis* all compel the conclusion that *Billman* "is not a viable authority and should no longer be followed." *Faust*, 721 F.2d at 940.

CONCLUSION

For the reasons set forth above, this Court should hold that 21 U.S.C. § 853 does not authorize the pretrial restraint of a defendant's untainted substitute assets. This Court's prior decision in *Billman* should no longer be followed, as the reasoning of that opinion is no longer viable following the Supreme Court's decision in *Luis*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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DATED: August 10, 2016

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I hereby certify that, on August 10, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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