No. 16-964

In The

Supreme Court of the United States

SALVADOR MAGLUTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF ASSOCIATIONS OF CRIMINAL DEFENSE ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are practicing criminal defense lawyers from across the nation.[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. Founded in 1958, NACDL has a nationwide membership of 10,000 and an affiliate membership of almost 40,000, including private criminal defense lawyers, military defense counsel, public defenders, law professors, and judges. The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization of criminal defense lawyers with twenty-eight chapters, comprised of more than 2000 criminal defense practitioners. Its Miami chapter, founded in 1963, encompasses the United District Court for the Southern District of Florida and has the highest concentration of criminal defense lawyers in Florida.

Amici are concerned that the decision below, if left standing, will undermine the constitutional right guaranteed those accused of crimes to be represented in their criminal proceedings by counsel of their own choice. Further, it would effectively eviscerate the safe

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[1] The parties were given timely notice and have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel has made any monetary contribution to the preparation or submission of this brief.

harbor provision of 18 U.S.C. section 1957(f)(1) which excepts from the term "monetary transaction" "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." Finally, it will deter the private lawyer members of *amici* organizations from undertaking their Sixth Amendment responsibilities out of fear that accepting payment for their legal services may entangle them in their potential clients' criminal cases. In light of the government's increasingly broad use of statutes infringing on the Sixth Amendment's structural right to counsel of choice, *amici*'s members and their clients are often confronted with the issues raised in this case. The organizations therefore have a strong interest in urging this Court to reverse the ruling below by the Eleventh Circuit Court of Appeals.

Amici have appeared in this Court as *amicus curiae* on several occasions, including in *Luis v. United States*, 136 S.Ct. 1083 (2016), and *Kaley v. United States*, 571 U.S. ___, 134 S.Ct. 1090 (2014), in which they argued, *inter alia*, that the government's asset forfeiture practices undermine the Sixth Amendment rights of criminal defendants to counsel of choice. *Amici* offer their collective professional experience and expertise in the present case to illustrate how the Eleventh Circuit's overly lax interpretation section 1956(a)(1)(B)(i)'s phrase "the transaction is designed ... to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" imperils constitutional

rights that are fundamental to the fairness and integrity of our nation's criminal justice system.

SUMMARY OF ARGUMENT

The right to counsel is preeminent among those reserved to criminal defendants. If paying counsel were a criminal act, the right would be meaningless.

Title 18, U.S.C. sections 1956 and 1957 criminalize money laundering. Section 1957 sweeps broadly, criminalizing simple, sometimes virtually innocent, transactions over $10,000, where a person knows the property is criminally derived. There is no intent requirement. But transactions necessary to preserve a person's Sixth Amendment right to counsel are excepted. Section 1956 has no counsel safe harbor but requires a heightened *mens rea,* conducting the transaction for the *purpose* of concealing or disguising the nature, source, ownership, or control of the illegally derived moneys. This Court highlighted the importance of this heightened *mens rea* requirement in *Regalado Cuellar v. United States*, 533 U.S. 550 (2008), and directed courts to examine not *how* one moves the money, but *why* one moves the money.

The decision below substantially dilutes the heightened *mens rea* element emphasized in *Regalado Cuellar*. It held that Petitioner Magluta's circuitous path to meet his lawyers' conditions for payment satisfied the government's burden to prove an intent or design to conceal. By diluting the *mens rea* requirement, the court leaves Petitioner and others

like him open to punishment for exercising their rights to counsel of choice. It further deters private lawyer members of the *amici* organizations from undertaking their Sixth Amendment responsibilities.

Amici fully concur in Petitioner's statutory construction arguments. But this case also presents the Court with the opportunity to reconsider issues of great importance in preserving access to counsel. In *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989), the Court construed the Sixth Amendment as offering no constitutional protection to the payment of counsel of choice with the proceeds of *alleged*, but not yet *proven*, criminal conduct. This case represents an ideal vehicle to determine whether the validity of the decisions should be reconsidered, as Justice Kagan, in *Luis v. United States*, 136 S. Ct. 1083, 112 (2016) (Kagan, J., dissenting), suggested might now be appropriate.

ARGUMENT

A. The Sixth Amendment Right to Counsel demands a strict construction of section 1956(a)(1)(B)(i)'s heightened intent requirement.

The Right to Counsel is preeminent among those reserved to criminal defendants in the Bill of Rights. This Court has recognized this right is vital because it is the means through which most other procedural rights guaranteed to criminal defendants by the

Constitution, and necessary to achieve justice, are exercised. *See, e.g., United States v. Cronic,* 466 U.S. 648, 653–54 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963). But this right would be meaningless if the act of securing it—paying counsel—were itself criminal. Persons charged with crimes, fearful that hiring counsel would be charged as another crime, would decline retaining private counsel. This would further burden an already overtaxed indigent defense system. Moreover, private criminal defense attorneys, wary of becoming entangled in their clients' potentially criminal acts, would be loath to undertake their constitutional responsibilities except in those rare cases where the legal path for payment was immediately verifiable beyond reproach.

In the mid-1980s, Congress enacted Title 18, U.S.C. sections 1956 and 1957, the federal anti-money laundering statutes. Their laudable purpose was to combat drug trafficking and other organized crimes which proved difficult to eradicate directly. *See United States v. Rutgard,* 116 F.3d 1270, 1291 (9th Cir. 1997). By strangling the ability of criminals to use their ill-gotten gains, effectively making "the drug dealers' money worthless," it was believed law enforcement could eliminate the financial incentive for these crimes and thereby kill the root of their scourge on society.

Congress swept broadly in enacting Title 18, U.S.C. section 1957, titled "Engaging in monetary transactions in property derived from specified activity." It criminalized simple transactions, in excess

of $10,000, where a person merely "knows" the transaction involves criminally derived property. "The intent to commit a crime or the design of concealing criminal fruits is eliminated." *Rutgard,* 116 F.3d at 1291. "A type of regulatory crime has been created where criminal intent is not an element." *Id.* at 1292. "This draconian law, so powerful by its elimination of criminal intent, freezes the proceeds of specific crimes out of the banking system." *Id.* at 1292. "Such a powerful instrument of criminal justice should not be expanded by judicial invention or ingenuity." *Id.* Congress assigned a ten-year maximum sentence for this offense.

Courts have since recognized that much of this criminalized activity is virtually innocent, encompassing almost any bank or other commercial transaction in which one of the parties is clandestinely using criminally derived funds. *See, e.g., United States v. Piazana,* 421 F.3d 707, 725 (8th Cir. 2005) (agreeing that "section 1957 prohibits a wider range of activity other than money laundering as traditionally understood) (quotation omitted); *Rutgard,* 116 F.3d at 1291 (interpreting section 1957 to reach almost any bank transaction conducted by a defendant); *United States v. Allen,* 129 F.3d 1159, 1165 (10th Cir. 1997) (same). Recognizing the broad sweep of this statute and the paramount right of the accused to procure the counsel they choose for their defense, in 1988 Congress amended section 1957 to create a "safe harbor" for all such monetary transactions "necessary to preserve a person's right to representation as guaranteed by the

Sixth Amendment to the Constitution." 18 U.S.C. § 1957(f)(1).

Congress also enacted the "companion" and overlapping Title 18, U.S.C. section 1956, titled "Laundering of monetary instruments." This is the statute Petitioner Magluta was convicted of violating. It criminalizes the commission of financial transactions with the proceeds of criminally derived funds. Subsection (a)(1) prohibits transfers in the form of "financial transactions," while subsection (a)(2) prohibits transfers effectuated through the literal "transportation" of currency. Both subsections, however, require that the government prove the defendant conducted the financial transactions or transportations knowing that they were "*designed* in whole or in part to conceal and disguise the nature, location, source, ownership, and control" of the funds. *Id.*(emphasis added). Congress assigned a maximum prison term of twenty (20) years for these offenses.

But in doubling the section 1957 sentence maximum, Congress acted with circumspection. Given the complexities of national and global financial markets and commerce, Congress recognized it would sweep too broadly to prescribe such harsh penalties for potentially innocent financial transactions, knowingly conducted with the proceeds of unlawful acts. So it added a layer of intent to render these financial transactions worthy of double punishment—the need for the government to prove the transaction was conducted for the *purpose* of promoting, avoiding tax or

reporting requirements for, concealing, or disguising the underlying illegal activity. But the statute was not intended to undermine or weaken 1957's integral safe harbor for transactions necessary to preserve a defendant's Sixth Amendment right to counsel. Although section 1956 did not itself have a Sixth Amendment safe harbor provision, *see United States v. Elso*, 422 F.3d 1305, 1309-10 (11th Cir. 2005), its heightened *mens rea* requirement provided similar protection for criminal defendants and their attorneys for transactions necessary to secure legal counsel.

In *Regalado Cuellar v. United States*, 553 U.S. 550 (2008), this Court demonstrated the importance of the strict *mens rea* requirement for section 1956 prosecutions. The petitioner was charged with international concealment-design transportation money laundering under 18 U.S.C. section 1956(a)(2)(B)(ii). *Id.* at 554. Like the parallel concealment-design transaction money laundering offense Petitioner was convicted of, section 1956(a)(1)(B)(i), this not only required the government to prove that the defendant knew the moneys he was transporting were derived from unlawful activities, but also that the transportation was "designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control" of the funds. *Id.* at 557, 561.

The Court rejected the government's argument that the great lengths the defendant went to conceal the money—bundling it in plastic bags, concealing it in

a hidden compartment under a car's rear floorboard, and covering it with animal hair to mask its smell—was sufficient to prove knowledge that *the transportation was designed to conceal or disguise the nature, location, source ownership, or control of the money*. *Id.* at 561–63. The Court discerned Congress' intent, as reflected in the plain language of the statute, that the design requirement went to the *purpose* of the transportation, not its *manner*. *Id.* at 563–67. "There is a difference between concealing something to transport it, and transporting something to conceal it." *Id.* at 566. *See, e.g., United States v. Slagg,* 651 F.3d 832, 845 (8th Cir. 2011) (applying *Regalado Cuellar's* distinction in context of section 1956(a)(1)(B)(i) transaction money laundering); *United States v. Faulkenberry,* 614 F.3d 573, 586 (6th Cir. 2010) (same and declaring: "Concealment, even deliberate concealment, as mere facilitation of some other purpose, is not enough to convict"); *United States v. Ness*, 565 F.3d 73, 77–78 (2d Cir. 2009) (reversing conviction where evidence showed "only an intent to conceal the transportation, not an intent to transport in order to conceal").

By its decision below in *Magluta v. United States*, 660 Fed.Appx. 803 (11th Cir. 2016), the Eleventh Circuit has substantially diluted the heightened *mens rea* requirement of section 1956 that this Court highlighted in *Regalado Cuellar*. It held that because of the elaborate steps Petitioner took to effect payment of his lawyers' fees—utilizing a bank account in Israel under a fictitious name—he *must have* done

so, "at least in part, to conceal the drug proceeds' nature, source, or ownership." *Id.* at 807–08. It reasoned that because Petitioner could not explain why he needed to take these measures, this *proved* the purpose was to conceal the criminal nature of the moneys from the government. *Id.* at 808. But Petitioner explained that his attorneys insisted they be paid by check (perhaps to limit the amenability of the funds to forfeiture). *Id.*

The record showed no other purpose for the checking account than to provide Petitioner with a means to pay criminal defense counsel. Use of the checking account was apparently the most efficient method available to Petitioner to satisfy the attorneys' check payment requirement. There was no claim that he was using these attorney fee payments as a "front" to funnel money back to himself or for any unlawful venture. To the contrary, the record undisputedly establishes that transacting with the funds was a bona fide effort to vindicate his Sixth Amendment right to counsel of choice—a right this Court found to be "the root meaning" of the Sixth Amendment, thereby making it a "structural" right in our criminal justice system. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 147, 150 (2006). Petitioner's mere use of this circuitous route to conduct these transactions cannot satisfy the strict *mens rea* requirements of section 1956, where the sole purpose of conducting the transactions, notwithstanding any concealment that facilitated them, was to pay lawyers for his defense. As the court held in *Faulkenberry,* "Concealment, even

deliberate concealment, as mere facilitation of some other purpose, is not enough to convict." *Id.,* 614 F.3d at 586.

The government and the Eleventh Circuit framed the issue presented in this case solely in terms of statutory construction. They seemingly would have agreed that if Petitioner had simply sent a grocery bag full of cash to his attorneys for their fees, he would have been immune from criminal prosecution under the safe harbor created by 18 U.S.C. section 1957(f)(1). This immunity, the government and the Eleventh Circuit posit, disappeared solely due to the circuitous manner in which the payment was orchestrated, thereby permitting Petitioner's criminal prosecution under 18 U.S.C. section 1956(a). Of course, section 1956 lacks the payment-of-counsel safe harbor of section 1957.

Absent the vital protection of section 1956's heightened *mens rea* requirement stripped away by the decision below, and without the benefit of section 1957's safe harbor, Petitioner and others are left to be double punished for exercising their Sixth Amendment rights. And with this exposure to entanglement in their potential clients' criminal prosecutions, the private lawyer members of the *amici* organizations will be reluctant, if willing at all, to undertake their constitutional responsibility to provide the representation to these defendants that the Sixth Amendment is supposed to guarantee.

B. The Flawed Reasoning of *Caplin & Drysdale* and *Monsanto*.

Caplin & Drysdale and *Monsanto* are now routinely cited by the lower courts and the Government as holding that the Sixth Amendment does not shield the payment of attorney's fees to counsel-of-choice even *prior* to conviction, thereby permitting the Government to restrain a defendant from funding his defense through assets currently "owned" by the defendant but which the Government claims would be forfeited if and when the defendant was convicted. The Court's reasoning to that effect in *Monsanto* can be traced to the unique procedural posture of *Caplin & Drysdale*, decided the same day.

The defendant in *Caplin & Drysdale*, was charged with running a continuing criminal enterprise (CCE) in violation of 21 U.S.C. section 848. Relying on 21 U.S.C. section 853, the district court entered a restraining order forbidding the defendant from transferring any of the potentially forfeitable assets. Once the indictment and restraining order were returned, the defendant's counsel of choice —who had been paid to represent him pre-indictment and pre-restraining order—moved the district court to modify the restraining order to permit the defendant to use some of the restrained assets to pay their attorney's fees and to exempt those assets from any post-conviction forfeiture. However, before the court could rule on the motion, the defendant entered into a plea agreement with the Government in which he agreed to

forfeit all his assets, including the portion requested by his counsel. Counsel thereafter claimed that the funds for their fees should be excluded from the forfeiture judgment under the Sixth Amendment. This Court, however, rejected the argument. In a passage that has affected the Court's Sixth Amendment jurisprudence ever since, the Court likened the defendant's request to a robber demanding to spend the property he stole to defend himself:

> This submission is untenable. Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond "the individual's right to spend his own money to obtain the advice and assistance of ... counsel." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 370, 105 S.Ct. 3180, 3215, 87 L.Ed.2d 220 (1985) (STEVENS, J., dissenting). A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the

> Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense. "[N]o lawyer, in any case, ... has the right to ... accept stolen property, or ... ransom money, in payment of a fee. ... The privilege to practice law is not a license to steal." *Laska v. United States*, 82 F.2d 672, 677 (CA10 1936). Petitioner appears to concede as much, *see* Brief for Petitioner 40, n. 25, as respondent in *Monsanto* clearly does, *see* Brief for Respondent in No. 88–454, pp. 36–37.

491 U.S. at 625.

There are several aspects of this reasoning that warrant further consideration. First, the Court equated stolen property—which, by definition, assumes a pre-existing "owner" of the property with fully vested property rights prior to the attempted transfer for use as attorney's fees—with the proceeds of the sale of contraband. Contraband, unlike money in a bank, has no pre-existing "owner" that the law would recognize. Second, by the time the district court was asked to rule, the defendant had already pled guilty—thereby fully vesting ownership of the funds in the Government. Third, the Court was ruling, in part, based on concessions by the parties in both *Caplin & Drysdale* and *Monsanto*.

Of these three issues, the most problematic was the first. The Court ruled that the statutory "relation-back" fiction served to vest title to the drug proceeds in the Government by operation of law at the time the proceeds were first obtained by the defendant, regardless (apparently) of whether the defendant had been convicted at the time of the payment to counsel. 491 U.S. at 627. Thus, the Court concluded: "There is no constitutional principle that gives one person the right to give *another's property* to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right." *Id.*

The premise for that aspect of the Court's reasoning was later undermined by the Court's ruling in *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111 (1993). In that case, the plurality opinion squarely held that the "relation-back" doctrine does not convert a defendant's property into the Government's property until *after* the Government has obtained a conviction or a judgment after adversarial litigation: "We conclude, however, that neither the [1984] amendment nor the common-law [relation back] rule makes the Government an owner of property before forfeiture has been decreed … . Until the Government does win such a judgment, however, someone else owns the property." 507 U.S. at 123–24, 127 (emphasis added). Justice Scalia wrote a concurring opinion in *Buena Vista*, agreeing that "[t]he relation-back rule applies only 'in cases where the [Government's] title has been consummated by seizure,

suit, and judgment, or decree of condemnation.'" *Id.* at 131–32 (Scalia, J., concurring in the judgment). Therefore, a person holding legal title to an asset and claiming innocent-owner status is "genuinely the 'owner' ... prior to the decree of forfeiture ... ." *Id.* at 134. This problem did not exist in *Caplin & Drysdale* due to the peculiar procedural aspect of the case. The problem did exist in *Monsanto* but was not addressed by the Court until *Buena Vista*.

Caplin & Drysdale also was decided some 17 years before *Gonzalez-Lopez.* In *Caplin & Drysdale*, the Court did not address—as it later would in *Gonzalez-Lopez*—the fundamental nature of the Sixth Amendment violation of stripping the defendant of his counsel of choice. Indeed, the *Caplin & Drysdale* Court believed that the promise made by the Sixth Amendment was sufficiently fulfilled so long as the defendant received "adequate representation ... by an otherwise qualified attorney...." *Caplin & Drysdale*, 461 U.S at 624; *see also id.* ("The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers *have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts*.") (emphasis added). That view of the Sixth Amendment was overruled in *Gonzalez-Lopez* in no uncertain terms:

> The right to select counsel of one's choice, by contrast, has *never been derived from the Sixth Amendment's purpose of*

> *ensuring a fair trial*. It has been regarded as the root meaning of the constitutional guarantee. [Citations omitted.] Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, *regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed*.

461 U.S. at 144–45 (emphasis added).

Finally, the reasoning of *Caplin & Drysdale* was also flawed because it was based upon an improbability: that defendants who have all their assets frozen could nonetheless convince a highly skilled private attorney to represent them on, essentially, a contingency basis. Thus, the Court reasoned that "Defendants ... may 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. The burden placed on the defendants by the forfeiture law is therefore a limited one." 461 U.S. at 625. Putting aside the fact that virtually every state's legal code of ethics makes it unethical for a lawyer to take a criminal case on a contingency basis,[2] the Court's assumption that lawyers in private practice—essentially entrepreneurs—would be willing to risk weeks or even months in trial on the mere hope that their clients will ultimately be acquitted has no empirical support and is completely contrary to the experience of the *amici*.

Despite the fact that the reasoning of *Caplin & Drysdale* and *Monsanto* has now either been overruled or shown to be unsupportable as to assumptions about the practice of law, the Court in *Kaley v. United States,* 571 U.S. ___, 134 S.Ct. 1090 (2014), and *Luis*, has continued to adhere to them.

Dissenting in *Luis,* Justice Kagan strongly questioned whether the Court should continue to follow them:

> I find *Monsanto* a troubling decision. It is one thing to hold, as this Court did in *Caplin & Drysdale*, that a convicted felon has no Sixth Amendment right to pay his lawyer with funds adjudged forfeitable. Following conviction, such assets belong

[2] Brief of American Bar Association, *Luis v. United States* (No. 14-419), 2015 WL 5169101, ** 5–6 (Aug. 25, 2015).

> to the Government, and "[t]here is no constitutional principle that gives one person the right to give another's property to a third party." But it is quite another thing to say that the Government may, prior to trial, freeze assets that a defendant needs to hire an attorney, based on nothing more than "probable cause to believe that the property will ultimately be proved forfeitable." At that time, "the presumption of innocence still applies," and the Government's interest in the assets is wholly contingent on future judgments of conviction and forfeiture. I am not altogether convinced that, in this decidedly different circumstance, the Government's interest in recovering the proceeds of crime ought to trump the defendant's (often highly consequential) right to retain counsel of choice.

Luis, 136 S. Ct. at 112 (Kagan, J., dissenting).

This case provides the perfect vehicle to apply Justice Kagan's observations and overrule *Caplin & Drysdale* and *Monsanto* or, at the very least, to resolve the conflict in the circuits regarding the scope of the concealment money laundering provision, section 1956(a)(1)(B)(i), and the extent to which the safe harbor of section 1957(f)(1) protects the Sixth Amendment right to counsel.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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