No. 19-392

In the
Supreme Court of the United States

MARTIN A. ARMSTRONG,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, UNITED STATES COMMODITY FUTURES TRADING COMMISSION, TANCRED SCHIAVONI, in his capacity as temporary receiver, and THE UNITED STATES OF AMERICA,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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February 18, 2020

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REPLY BRIEF

The government and the receiver spend most of their opposition briefs running away from the questions presented and trying to rewrite the record. But respondents' diversionary tactics only succeed in confirming the need for this Court's intervention. Respondents likewise fail to conceal the conflict among the lower courts on the applicability of *Luis v. United States*, 136 S. Ct. 1083 (2016), to parallel civil enforcement proceedings, or the conflict between the decisions below and basic principles of due process. The Court should grant the petition.

I. The Question Of Whether *Luis* Applies To Parallel Civil And Criminal Enforcement Proceedings Warrants Review.

Just four years ago, this Court held in *Luis* that "a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice." *Id.* at 1096 (Thomas, J., concurring in the judgment); *see also id.* at 1087-88 (plurality op.) (invalidating pretrial asset freeze that "prevent[ed] Luis from using her own untainted funds … to hire counsel to defend her in her criminal case"). Under the decisions below, however, the government can disarm defendants of the right *Luis* respected simply by initiating a civil enforcement action based on the same set of facts that underlie the criminal charges, and freezing assets in the civil proceedings rather than in the criminal case. Pet.32.

Respondents do not dispute that the decisions below effectively nullify *Luis*. Rather, they raise a litany of purported hurdles to this Court's ability to decide the question presented. But none of their

objections withstands close inspection, and neither do their attempts to wave away the clear judicial conflict among the lower courts on the question presented.

Respondents first contend that this claim "is untimely" because Armstrong did not argue "that *Luis* applies in civil enforcement proceedings" until "2017, a decade after he had pleaded guilty in his criminal case and six years after he had completed his prison sentence." US.BIO.9-10; Rec.BIO.18. That is false. As early as October 2000, Armstrong argued that the asset freeze order in the consolidated civil actions precluded him from retaining counsel of choice in his criminal case, and accordingly sought "a *Monsanto* hearing" to secure the release of funds necessary to retain criminal defense counsel. *SEC v. Princeton Econ. Int'l Ltd.*, 2000 WL 1559673, at *5 (S.D.N.Y. Oct. 19, 2000); *see United States v. Monsanto*, 924 F.2d 1186, 1188 (2d Cir. 1991) (en banc) ("the fifth and sixth amendments … require an adversary post-restraint, pretrial hearing in order to continue a restraint … of assets needed to retain counsel of choice"). The district court presiding over the consolidated civil actions denied that request on the ground that "this is not … a criminal case," which it believed meant that the constitutional right to counsel of choice did not apply. 2000 WL 1559673, at *5.

That was not the only time Armstrong made this argument. Armstrong twice raised it in 2002, while he was still confined for civil contempt and long before he pleaded guilty. Tr. of Proceedings 7, 20-21, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Jan. 14, 2002); Tr. of Proceedings 13-15, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Aug. 20, 2002); *see*

Pet.10, 25 n.8. He raised it again in 2007, shortly after he pleaded guilty and was ordered to pay tens of millions of dollars less in restitution than the government had seized and frozen, which proved beyond doubt that the government had frozen assets that Armstrong should have been able to use to secure criminal counsel of choice. *See* Tr. of Proceedings 30-32, *United States v. Armstrong*, No. 99-cr-997 (S.D.N.Y. Apr. 10, 2007) (arguing that the CFTC's attempt to keep the remaining $30 million as a "penalty" had "important legal consequences" given that the money would have been available for counsel of choice in the criminal case). And he made the argument in the Second Circuit, too, specifically invoking *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), which held that denial of counsel of choice constitutes structural error. Mot. to Reopen 14, *Armstrong v. Guccione*, Nos. 04-5448 & 05-0280 (2d Cir. Aug. 20, 2010) ("the freezing of funds denied counsel of choice").[1]

To be sure, Armstrong did not style this argument as a "*Luis*" claim until 2017. *See* US.BIO.9-10. But this Court did not decide *Luis* until March 2016. As of 2000 (and 2002, 2007, 2009, and 2010), relying on the Second Circuit's en banc *Monsanto* decision—and specifically arguing that the right to use one's own untainted assets to secure counsel of choice in a

[1] The government concedes that Armstrong "made a version of his current argument in 2009," but faults Armstrong for "not fil[ing] a petition for a writ of certiorari seeking this Court's review at that time." US.BIO.10 n.3. That argument is perplexing. A party does not forfeit an issue he raised many times in many fora by declining to file an interlocutory certiorari petition.

criminal case should extend to situations in which one's assets are frozen in a parallel civil enforcement action—was the best a defendant could do. To hold that Armstrong failed to preserve this claim would thus be to hold that clairvoyance is required to preserve constitutional rights. That is not the law.

Respondents next contend that Armstrong "affirmatively waived" the argument "that *Luis* applies in civil enforcement proceedings." Rec.BIO.18; *accord* US.BIO.10. Respondents misstate the record again. Although the receiver tried to get Armstrong to agree to waive his rights to his lawful property, Armstrong steadfastly refused, and the receiver ultimately agreed not to sell or abandon any tangible assets held in storage. The submission respondents cite in support of their contrary contention in no way purported to waive claims to assets that the receiver improperly seized. Indeed, the submission they cite was filed not by Armstrong, but by "then-counsel … *on its own behalf*." Pet.13 n.7 (emphasis added). Respondents' argument therefore boils down to the claim that someone other than counsel of choice can "affirmatively waive[]" *both* the claim that a defendant was unconstitutionally denied counsel of choice *and* the defendant's right to untainted assets that he could have used to secure counsel of choice. That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013).[2]

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[2] That the government nonetheless would make this argument is par for the course in these proceedings. This Court decided *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), which held that federal courts' equitable authority does not extend to unsecured or foreign creditors, mere

The receiver alternatively argues that "the *Luis* rule" does not apply here because "the assets held in the receivership never belonged to petitioner." Rec.BIO.14. That argument blinks reality. *Even the receiver admits* that some of the property swept up by the asset freeze order is, and always was, "personal to [Armstrong]." Rec.BIO.19. The receiver listed a number of items under the heading "personal property" when he produced an interim (and woefully incomplete) description of the seized assets. And the final consent judgment the court entered in 2008 required the government to "assist the Court, receiver and/or the parties in returning to Armstrong property that *belongs to him*." Pet.App.5-6 (emphasis added).[3]

The obvious implication of that order is that some assets held in the receivership *always* "belonged to [Armstrong]," Rec.BIO.14, *always* were "outside the scope of the receiver's authority," Pet.28; *see* n.3, *supra*, and *always* should have been available to him to secure counsel of choice in the criminal case. After all, assets that properly belong to Armstrong *even now*, after he has pleaded guilty, served his criminal sentence, and paid restitution in full, are "untainted" by definition. So, although the receiver asserts that "an essential element of petitioner's fraud was to separate himself from the companies where assets

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months before the SEC and CFTC sought an asset freeze order here against unsecured foreign creditors. Despite that hot-off-the-presses authority, the government never brought the case to the court's attention and proceeded as if it never had been issued.

[3] Of course it did: The asset freeze swept up property that Armstrong has held since adolescence, which obviously does not derive from the fraud the government claims he perpetrated.

were deposited," Rec.BIO.15 n.7, that eleventh-hour attempt to muddy the waters is belied by the law and facts of the case.[4]

The government similarly argues that "the right-to-counsel claim" is stillborn because Armstrong does not "seriously contest" that the frozen assets he could have used to pay counsel of choice "belonged exclusively to the victims of [his] fraud." US.BIO.11. That assertion beggars belief. Armstrong very much does "contest" that conclusion, and has contested it from the start. *See* Pet.28 (noting Armstrong's "many attempts to secure the return of" property that "obvious[ly]" was "outside the scope of the receiver's authority," and noting that these attempts "went ignored").

The government also seems to think all Sixth Amendment problems are cured by the receipt of effective assistance of counsel. *See* US.BIO.11 (highlighting finding that "petitioner had been 'amply represented by an able team of four lawyers'" (quoting Pet.App.11)). But, because "[i]t is impossible to know what different choices … counsel [of choice] would have made, and then to quantify the impact of those different choices on the outcome of the proceedings," the denial of the right to counsel of choice is structural, and thus is not rendered harmless even if a defendant ultimately receives adequate representation from someone else. *Gonzalez-Lopez*, 548 U.S. at 148, 150.

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[4] The receiver's claim that it "used expert forensic accounting techniques to trace all of the assets held in the receivership to … the Princeton noteholders," Rec.BIO.5, is likewise untrue. The receiver never traced the funds used to purchase, among other things, the tangible assets held in the storage units.

Indeed, if the government's miserly view becomes the law of the land, then the right enshrined in *Luis* will be worth even less than Armstrong initially surmised, given the low standard of "effectiveness" under *Strickland v. Washington*, 466 U.S. 668, 686-91 (1984), and its progeny. That is reason enough to grant review.

Rather than engage with the merits of this critical constitutional issue, respondents argue it is too late to do anything about it even if Armstrong's rights were violated, because Armstrong "has already served his entire sentence." Rec.BIO.24. That is a remarkable argument, particularly given the reality of these proceedings. From the beginning, Armstrong has suffered injury atop injury, indignity atop indignity. First he was stripped of the ability to secure counsel of choice. Then the government played the civil and criminal proceedings against each other to deprive Armstrong of procedural rights to which he was entitled. Then he was subjected to the longest stint of federal confinement for civil contempt in American history—eleven years' imprisonment on a charge with a five-year maximum. And, finally, he ultimately was dispossessed of tangible personal property, in violation of due process. To be sure, Armstrong cannot get back the years he wrongly spent in a prison cell or the personal property that was wrongly taken and distributed to others. But he can have his constitutional rights respected—and it is never too late to right constitutional wrongs.

Further confirming the need for review is the fact that the lower courts have reached divergent conclusions on the question presented, *i.e.*, whether

the constitutional right to counsel of choice applies where a criminal defendant's assets are frozen in a parallel civil action. *Compare, e.g.*, *Estate of Lott v. O'Neill*, 165 A.3d 1099 (Vt. 2017), *with, e.g.*, *CFTC v. Walsh*, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010). That is particularly true given that a subsidiary split exists among courts that extend counsel-of-choice principles to civil actions. Whereas the Third, Fourth, and Tenth Circuits have held that a defendant is not entitled to a *Monsanto*-like hearing absent a formal, prima facie showing that the frozen funds were illegitimately restrained, *see United States v. Yusuf*, 199 F. App'x 127, 132 & n.4 (3d Cir. 2006); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998), the Second Circuit explicitly rejected that approach in *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013).[5]

Respondents do not dispute that lower courts have reached divergent conclusions on these critical issues of constitutional law. *See* Pet.22-25. Nor do they dispute that a published "decision from a state court of last resort" is among the conflicting decisions. Rec.BIO.21. Instead, they insist that the clear judicial conflict does not "merit[] review" because some of the decisions constituting the split are "unpublished." Rec.BIO.21. But certworthiness does not turn on whether a lower court decided to publish its decision. Nor does it make a difference that the "results in th[e] cases" that constitute the division of authority were all "record-specific." US.BIO.12-13; *see also* Rec.BIO.22-

[5] Underscoring the confusion in this area (and the need for this Court's intervention), however, the Second Circuit appeared to retreat from *Bonventre* in this case.

23. After all, *every* court decision is "record-specific" and is "tied to the specific facts of th[e] case" in one way or another. Rec.BIO.23.

What is not record- or case-specific in the least, however, is the threat that the decisions below pose to criminal defendants' constitutional rights. Under the Second Circuit's decision, the government will be able to nullify the Sixth Amendment right to counsel of choice whenever a defendant is charged with crimes that can also form the basis of a civil enforcement action. The reasoning of the courts below gives cover to a troubling trend by the government of conflating civil and criminal proceedings in order to deprive defendants of valuable procedural safeguards. The Bill of Rights exists in no small part to protect defendants from such machinations.

II. The Question Of Whether Failure To Return Untainted Property Violates Due Process Warrants Review.

The final consent judgment in the consolidated civil enforcement actions required the government to "assist the Court, receiver and/or the parties in returning to Armstrong property that belongs to him." Pet.App.5-6. That court-mandated assistance never came. Instead, Armstrong was unconstitutionally deprived of his personal property without due process of law. Rather than confront the merits of this claim, respondents insist that procedural hurdles block this Court from reviewing it. As with their arguments on the counsel-of-choice issue, however, respondents' nothing-to-see-here approach is contrary to the record. This Court should grant review of Armstrong's claim.

Respondents contend that Armstrong "forfeited" his due process claim. US.BIO.13-14; Rec.BIO.18. But the receiver's failure to return personal property did not implicate Armstrong's due process rights until the receiver *actually failed to return personal property*. That did not occur until August 2017, when the receiver sought to close the estate without having returned to Armstrong all improperly seized assets. Once it became apparent that the receivership would be used to dispossess him of untainted assets for good, Armstrong swiftly and repeatedly argued that the failure to return his personal property would violate his rights under the Due Process Clause. *See, e.g.*, Ltr. from Thomas V. Sjoblom to Tancred Schiavoni 6, 14-16 (Dec. 26, 2017); Ltr. from Thomas V. Sjoblom to the Honorable Judge P. Kevin Castel (Aug. 8, 2017).

Respondents next argue that Armstrong received all the process he was due because "[t]he receiver held numerous hearings on the nature of the assets" it seized. US.BIO.14. But due process demands more than a token opportunity to be heard before a nakedly partial adjudicator. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("an impartial decision maker is essential"); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (due process protections extend to all cases in which an adjudicator's interests or prejudices "might lead him not to hold the balance nice, clear, and true"). Due process demands that an individual who was left to languish in federal prison for over a decade on a five-year-maximum sentence receive a true and meaningful opportunity to retrieve all of the personal property the government wrongly took from him.

The process that Armstrong received came nowhere close to clearing that constitutionally mandated threshold. That is especially evident in light of the fact that the government effectively shifted the burden to Armstrong to disprove that seized property was "tainted." This Court has long held that the government violates due process when it shifts burdens of proof or persuasion onto the accused. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Despite these myriad due process problems, respondents argue that all constitutional violations were cured when the receiver permitted Armstrong to "inspect" the "storage lockers" in which "corporate" property was kept and to take "any items … personal" to him. Rec.BIO.9; *see also* US.BIO.14. This argument is insulting. Yes, Armstrong was allowed to "inspect" the storage lockers. What respondents fail to mention is that these storage lockers span *9,000 square feet* of tangible assets, some of which respondents claimed was properly seized, some of which they claimed properly belonged to Armstrong. And although they provided interim (and incomplete) inventories of the assets seized pursuant to the 1999 freeze order and subsequent injunction, neither the receiver nor the government ever provided a comprehensive inventory of the corpus of tangible assets they had taken from him.[6] Armstrong thus had no way to determine which assets were "personal to

[6] Even the receiver's own agent admitted that the receiver never provided a complete inventory for the storage facility. *See* Appellant's Opp'n to Appellee-Receiver's Mot. to Strike 20 n.12, *SEC v. Princeton Econ. Int'l Ltd.*, No. 17-3572 (2d Cir. Nov. 23, 2018), Dkt. 164.

him" even under the miserly conception the government and receiver applied.

As a result, the process Armstrong received at the end of his decades-long persecution at best was incomplete, and at worst was calculated specifically to deprive him of property that is rightfully his. Either way, it was far less than he was due under the Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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