No. 25-465

In the Supreme Court of the United States

TIMOTHY BARTON,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

BRIEF FOR U.S. SENATOR CYNTHIA LUMMIS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

U.S. Senator Cynthia Lummis (R-WY) seeks to preserve Congress's institutional role in exercising legislative power to decide questions of policy. See U.S. Const. art. I, § 1. She is concerned that the decisions below allow administrative agencies and courts to impermissibly expand statutory language—an expansion that not only threatens Congress's prerogatives, but also has significant implications for citizens' Sixth Amendment right to counsel in criminal cases. For that reason, she has a significant interest in this case.*

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* Under Rule 37.2, *amicus* provided timely notice of her intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and apart from Lakshmi Narayanan, no person other than *amicus curiae* and her counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Pre-trial forfeiture of assets is an aggressive tool that Congress has generally permitted only for certain offenses with defined limits and procedural protections. These parameters have constitutional significance, especially when a defendant's Sixth Amendment right to counsel is implicated. The Sixth Amendment protects a criminal defendant's right to hire counsel of his choice, using his own means. Thus, deprivation of the means to hire counsel raises Sixth Amendment concerns.

The decisions below, however, let an agency and a receiver use a generic statutory authorization of "equitable relief" to transgress ordinary bounds of forfeiture—and deprive a defendant of the means to hire counsel. That statutory reading is neither the most natural one, nor the one most consistent with constitutional principles. Because pushing the bounds of forfeiture to constitutional limits is a policy judgment that should be reserved to Congress, the Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. The Sixth Amendment protects the right to hire counsel in criminal cases.

This case implicates the fundamental Sixth Amendment right to hire a lawyer in criminal cases. See U.S. Const. amend. VI (protecting the right of "the accused" in "all criminal prosecutions" "to have the Assistance of Counsel for his defence"). As this Court has put it, "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to

hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624–25 (1989).

"No one doubts the fundamental character of a criminal defendant's Sixth Amendment right to the 'Assistance of Counsel.'" *Luis* v. *United States*, 578 U.S. 5, 10 (2016) (plurality opinion). The Sixth Amendment "commands" "that a particular guarantee of fairness be provided—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); cf. *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). "[T]he wrongful deprivation of the right to counsel" is "a structural error that so affects the framework within which the trial proceeds that courts may not even ask whether the error harmed the defendant." *Luis*, 578 U.S. at 11 (plurality opinion) (cleaned up).

Thus, Petitioner Timothy Barton has "a vital interest at stake: the constitutional right to retain counsel of [his] own choosing." *Kaley* v. *United States*, 571 U.S. 320, 336 (2014). That is "the root meaning" of the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 147–48.

This right encompasses the ability to use available means to retain counsel. After all, "[c]onstitutional rights . . . implicitly protect those closely related acts necessary to their exercise." *Luis*, 578 U.S. at 26 (Thomas, J., concurring in judgment). For instance, the First Amendment prohibits indirect regulation via

differential taxes on paper and ink. *Minneapolis Star & Trib. Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 593 (1983). And the Second Amendment protects "necessary concomitant[s]" like "the right to take a gun outside the home for certain purposes." *N.Y. State Rifle & Pistol Ass'n* v. *City of New York*, 590 U.S. 336, 364 (2020) (Alito, J., dissenting).

In the same way, the government's deprivation of a defendant's means to retain counsel implicates the Sixth Amendment. See *Luis*, 578 U.S. at 19 (plurality opinion) (noting that taking a defendant's means away "[c]ould seriously undermine that constitutional right" to retain counsel).

"The modern, judicially created right to Government-appointed counsel does not obviate these concerns." *Id.* at 28 (Thomas, J., concurring in judgment). For one, "the original understanding of" the Sixth Amendment was that it "protected a defendant's right to retain an attorney he could afford"—so using today's possibility of appointed counsel to evade that right "nullifies" the original meaning. *Ibid.* (cleaned up); see generally *Garza* v. *Idaho*, 586 U.S. 232, 260 (2019) (Thomas, J., dissenting, joined by Gorsuch, J.).

What's more, this Court has said that "[d]eprivation 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." *Gonzalez-Lopez*, 548 U.S. at 148. "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." *Ibid.*

Plus, "as a practical matter," excusing Sixth Amendment infringements based on the possibility of appointed counsel would "erode the right to counsel" to a "great[] extent." *Luis*, 578 U.S. at 20 (plurality opinion). "[P]ublicly paid counsel" tend to be "overworked and underpaid public defenders" with "limited resources." *Id.* at 21 (cleaned up). Forcing defendants to rely on them—thereby "increasing the government-paid-defender workload"—while the U.S. government has near-unlimited resources at its disposal to prosecute cases would "render less effective the basic right the Sixth Amendment seeks to protect." *Id.* at 22.

In short, the Sixth Amendment protects Mr. Barton's use of his means to hire counsel to defend him in his criminal case.

II. A proper interpretation of the receivership statute accounts for the Sixth Amendment and historical equitable principles.

The Fifth Circuit's near-limitless interpretation of the scope of permissible receiverships under 15 U.S.C. § 78u(d)(5) brings the statute into extreme tension with the Sixth Amendment's right to counsel. By allowing courts (at SEC's request) to impose receiverships over almost any asset with the most tenuous connection to alleged wrongdoing, the interpretation below will often deprive defendants of any practical ability to hire counsel. That tension between the statute and the Sixth Amendment is unnecessary because, properly read in historical

context, the statute's equitable authority is more limited. Giving the statute a more tailored scope would thus be most consistent with text, history, and the Constitution.

As this Court has said, "[f]orfeiture provisions are powerful weapons" whose "impact can be devastating when used unjustly." *Caplin & Drysdale*, 491 U.S. at 634. "*In rem* proceedings often enable the government to seize" property with only minimal "predeprivation judicial process"—and then hold on to that property for years, if not forever. *Leonard* v. *Texas*, 580 U.S. 1178, 1179 (2017) (statement of Thomas, J., respecting the denial of certiorari).

For better or worse, modern Congresses have authorized some types of these forfeitures. Cf. *id.* at 849 (noting that "historical forfeiture laws were narrower in most respects than modern ones"). These statutes often authorize pre-trial forfeiture before any finding of liability or guilt, even though "[a]t 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." *Luis*, 578 U.S. at 52 (Kagan, J., dissenting) (quoting *Kaley*, 571 U.S. at 327).

In recognition of the inherent dangers of pre-trial forfeitures, most modern statutes draw careful limits in terms of offenses and assets subject to forfeiture. For instance, many have detailed definitions of property subject to forfeiture, along with extensive procedural and disposition provisions, and they are geared toward serious offenses. See, *e.g.*, 18 U.S.C. § 981; 21 U.S.C. §§ 853, 881. These statutes often include relief valves that allow for mitigation or

rescission "in the interest of justice." 21 U.S.C. § 853(i)(1); see also *id.* § 881(d); 18 U.S.C. § 981(d) (referencing 19 U.S.C. § 1618). In short, "whether property is 'forfeitable' or subject to pretrial restraint under Congress' scheme" tends to be "a nuanced inquiry." *Luis*, 578 U.S. at 15 (plurality opinion).

Sometimes, Congress has flown too close to the sun. When it tried to extend forfeiture to include "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice," this Court rejected that extension as a violation of the Sixth Amendment. *Id.* at 10. That rejection was based on the reality that a "legal conflict" exists between taking a defendant's funds away and letting the defendant "obtain counsel of choice" as the Sixth Amendment allows. *Id.* at 18.

That preserving funds needed to obtain counsel for the defendant could lead to a reduced recovery to the United States or alleged victims was not dispositive: "compared to the right to counsel of choice," "the interests in obtaining payment of a criminal forfeiture or restitution order" "would seem to lie somewhat further from the heart of a fair, effective criminal justice system." *Id.* at 19; see also *id.* at 34–35 (Thomas, J., concurring in judgment) ("When 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 longstanding common-law protection for a defendant's untainted property.").

The point is that Congress has spoken with specificity when it comes to forfeitures, especially when it wants to sweep broadly. That specificity

underscores the fundamental due process and right-to-counsel issues inherent in pre-trial forfeitures.

The statute here, 15 U.S.C. § 78u(d)(5), is nothing like these other forfeiture statutes. It is not tied to specific offenses, but applies "[i]n any action or proceeding brought or instituted by the [SEC] under any provision of the securities laws." 15 U.S.C. § 78u(d)(5). It does not list out the types of properties that could be subject to a receivership, or delineate the necessary connection between those properties and the underlying alleged violation. All it says is that the SEC "may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." *Ibid.*

Absent more specific congressional instruction, there is no reason to stretch permissible "equitable relief" to its breaking point. As this Court recently reiterated, "[s]tatutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it." *FCC* v. *Consumers' Research*, 606 U.S. 656, 691 (2025); see also *Clark* v. *Martinez*, 543 U.S. 371, 384 (2005) ("[S]tatutes should be construed to contain substantive dispositions that do not raise constitutional difficulty."). That canon applies with force here, given that pre-trial forfeitures commonly raise sensitive constitutional questions. That is why Congress has been specific about other pre-trial forfeitures. Deciding what funds are tainted and how to balance fairness to the defendant with potential interests in restitution are policy questions that Congress should answer.

When Congress has not specifically answered those questions—as it has not in the statute here—

there is no reason "to force [the statute] past the Constitution's breaking point." *Consumers' Research*, 606 U.S. at 691. The statute's generic reference to "equitable relief" does not naturally suggest that forfeiture is authorized to (and beyond beyond) constitutional limits. This Court has repeatedly reined in excess assertions of power under "equitable" theories. See, *e.g.*, *Trump* v. *CASA, Inc.*, 606 U.S. 831, 841 (2025) ("[E]quitable authority is not freewheeling."); *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (limiting scope of statutory reference to "equitable relief").

The receivership orders below appear to exceed a historical understanding of equitable relief. "[S]tatutory references to a remedy grounded in equity must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Liu* v. *SEC*, 591 U.S. 71, 87 (2020) (cleaned up). The district court's original order said that a purpose of the receivership was "to penaliz[e] past unlawful conduct and deter[] future wrongdoing." Pet. 188a. Putting aside that no "unlawful conduct" had been adjudicated, equitable relief historically did not involve punishment. "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall* v. *City of Vicksburg*, 82 U.S. 146, 149 (1872); see *Tull* v. *United States*, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."); see also *Liu*, 591 U.S. at 83–84.

What's more, the SEC "presented alleged evidence that only 25 of the 54 companies the district court ultimately placed into the new receivership had some connection" to the alleged wrongdoing—it was only at the receiver's insistence that "dozens more" were added. Pet. 10–11. Sanctioning relief beyond what even the opposing party argues is appropriate is a dubious exercise of equitable power. Cf. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("[T]he traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims.").

The Fifth Circuit also faulted Mr. Barton for "paying lawyers." Pet. 3a. But it is hard to see how Mr. Barton's exercise of his Sixth Amendment right to counsel as the government was pursuing criminal charges against him is a fault of any kind, much less one that would weigh *against* him in fashioning equitable relief. Cf. *Liu*, 591 U.S. at 91–92 ("courts must deduct legitimate expenses" from equitable relief). The Fifth Circuit blamed Mr. Barton too for making "mortgage payments on the residence [he] lived in." Pet. 3a; see also Pet. 11a ("Barton continued his spending spree even after he had been indicted."). But Mr. Barton's "right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 53–54 (1993).

Neither the district court nor the Fifth Circuit meaningfully grappled with these constitutional and equitable limitations—or how these limitations should have affected a proper interpretation of the

statute. Even if the dubious policy judgments made by the courts below were right, Congress is the institution that should make them, not agencies or courts stretching the concept of "equity." This conclusion is bolstered by the reality that federal agencies serving as prosecutors have a conflict of interest in seeking to deprive defendants of assets that could be used to fund their defense. Cf. *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring in judgment) ("Aware . . . that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way.").

In sum, the district court and SEC below adopted a very aggressive view of what assets could be placed in a receivership before trial. See Pet. 13–15, 19–20. That aggressive view has little foundation in the statute passed by Congress, and it contradicts Congress's decisions elsewhere to specify exactly how far these types of pre-trial forfeitures should go—and in what circumstances they may be appropriate. Congress is best situated to weigh the effect of pre-trial forfeiture on the fairness of judicial proceedings against the need to secure funds for remedial purposes. The test used below appears to exceed the scope of permissible "equitable relief," especially in light of the ramifications of that test—centrally, depriving a defendant of his Sixth Amendment right to counsel. Because the decisions below assume authority that could only—if ever—be conveyed by Congress, and those decisions raise significant constitutional doubts, this case warrants consideration by this Court.

CONCLUSION

For these reasons, the Court should grant certiorari.

Respectfully submitted,

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