No. 20-11615

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

ROBERT ZANGRILLO,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida
1:19-cv-25046-RNS (Hon. Robert N. Scola, Jr.)

BRIEF OF THE FEDERAL TRADE COMMISSION

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Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Pursuant to Eleventh Circuit R. 26.1-1, Plaintiff-Appellee, the Federal Trade Commission, certifies that in addition to the names listed in Appellant's opening brief, the following attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this appeal.

Abbott, Alden F. – FTC General Counsel

Bergman, Michael D. – FTC Attorney

Cartier, Nicholas – FTC Attorney

Cohen, Jonathan – FTC Attorney

Damian, Melanie – Court-Appointed Receiver

Damian & Valori LLP – Law Firm for Receiver/Counsel for Receiver

DiFalco, Fernandez & Kaplan – Counsel for Defendants Arlene Mahon and Waltham Technologies LLC

Grossman, Bradley – FTC Attorney

Marcus, Joel – FTC Attorney

McArdle, Pérez & Franco, P.L. – Counsel for Defendants Arlene Mahon and Waltham Technologies LLC

Murena, Kenneth Dante – Counsel for Court-Appointed Receiver

Weil, Bruce – Attorney at Boies Schiller Flexner LLP and Manager for Defendant OnPoint Capital Partners LLC

Wolfe, Douglas – FTC Attorney

The Federal Trade Commission further states that, to the best of its knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

The FTC believes that oral argument could materially assist the Court in its consideration of this appeal. This Court has yet to decide whether *Luis v. United States*, 136 S. Ct. 1083 (2016), entitles a defendant in a civil case to use frozen assets to pay for defense counsel in a wholly unrelated criminal proceeding.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331 and 1345. On April 8, 2020, the district court entered an order denying Robert Zangrillo's motion to modify a preliminary injunction and asset freeze. Zangrillo filed a notice of appeal on April 27, 2020. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF ISSUES

The FTC brought a civil action against Zangrillo, his associates, and their companies charging that their websites contained false promises to render government services, such as driver's license renewals, in exchange for a fee or for consumers' personal information. The district court found that the FTC was likely to succeed in proving its case and entered a preliminary injunction freezing the defendants' assets to ensure that monetary relief will be available to victims upon final judgment.

Zangrillo is also facing unrelated criminal charges in the District of Massachusetts for allegedly bribing officials at the University of Southern California to admit his daughter to college and paying an admissions consultant to complete his daughter's online high school and college coursework.

The question presented for review is whether the Sixth Amendment to the U.S. Constitution required the district court in the FTC case to release frozen assets to pay for Zangrillo's defense in the unrelated criminal case.

STATEMENT OF THE CASE

A. Zangrillo Controlled A Website Scam

Zangrillo was Chairman of On Point Global, LLC (On Point), FA.132-2 at 273; FA.132-23 at 257-58,[1] which operated or controlled hundreds of websites containing false offers to perform government services. Many of these sites pledged to renew consumers' driver's licenses or their hunting and fishing licenses for a fee. *E.g.*, ZA.132-1 ¶¶ 18-20, 26-31, 39, 42-44, 49, 53-54, 62, 79-80, 85. After taking consumers' money, On Point failed to provide those services, and (at most) provided consumers with PDF documents containing generic, publicly available information about how to renew a license. *E.g.*, *id.* ¶¶ 35-40, 47-48, 50, 59-61, 82-84, 86. The complete facts are set forth in the FTC's brief in Case No. 20-10790.

On Point also operated dozens of sites asking consumers to submit their personal information to determine whether they are eligible for housing assistance, food stamps, veteran's benefits, and similar programs. *E.g.*, *id.* ¶¶ 25, 65-72, 112-

[1] We use the following citation form for the FTC's Supplemental Appendix: "FA.[Tab #] at [district court ECF page #]." We cite Zangrillo's appendix as "ZA.[Tab #] at [district court ECF page #]."

17. But On Point failed to provide any eligibility determinations. *E.g.*, *id.* ¶¶ 25, 76, 121. Instead, it sent consumers generic PDF documents and sold their personal information to other scammers. *E.g.*, *id.* ¶¶ 25, 73-75, 77, 118-20, 122-23, 204.

In addition to serving as On Point's Chairman, Zangrillo is one of its two largest shareholders through his personal holding company, OnPoint Capital Partners, LLC (OCP). FA.132-15 at 132; FA.132-3 at 8-10, 16-17. Zangrillo had "special approval rights" over On Point's activities and sat on its Board of Managers, which possessed "full, complete and exclusive authority, power, and discretion to manage and control the business." FA.132-21 at 28-29, 37. In a related appeal, Zangrillo admits that he had the power to "hir[e] and fir[e] the CEO, President, and CFO."[2] *See* Brief of Appellant Robert Zangrillo, *FTC v. Burton Katz et al.*, Nos. 20-10790 & 20-10859 at p. 41 (11th Cir. filed April 7, 2020).

Zangrillo is also the Chairman and CEO of Dragon Global,[3] which served as On Point's capital-raising arm. FA.132-1 at 185-88. Zangrillo was the lead recruiter for new investors for On Point, giving presentations that touted On

[2] Given Zangrillo's role as Chairman with plenary authority over On Point's activities, his assertion that he is merely a "minority invest[or]" who "has never been … an employee or officer of On Point" is gravely misleading. *See* Br.4.

[3] Dragon Global Management LLC, Dragon Global Holdings LLC, and Dragon Global LLC.

Point's work with "Free Guides," "Paid Guides," "Services," and acquisition of "Third Party Data." FA.132-23 at 247-65. Promoting the lucrative potential of the very websites at issue in this case, Zangrillo garnered millions in third-party investments for On Point, pocketing a share of it in "operational fee[s]." ZA.108 at 30.

Zangrillo resigned as On Point's Chairman in March 2019, just days before his indictment in the college bribery case, known as Operation Varsity Blues. FA.37-3 at 1. *See* Rene Rodriguez & Colleen Wright, *Partner in Little Haiti Project, IMG Academy director charged in college admission probe,* Miami Herald (Mar. 15, 2019), at https://www.miamiherald.com/news/business/real-estate-news/article227455609.html. Zangrillo's holding company OCP has retained his ownership stake in On Point, with control rights and board seat vested in a subsidiary that lists as its "Manager" attorney Bruce Weil of Boies Schiller Flexner LLP, the law firm representing Zangrillo in both the FTC case and the college bribery prosecution. FA.37-15 at 20, 29-30, 69, 75.

B. The FTC Proceedings Against Zangrillo

In December 2019 (nine months after Zangrillo's criminal indictment), the FTC charged On Point and many of its officers, subsidiaries, and affiliates with falsely promising to render government services in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits "unfair or deceptive acts or practices

in or affecting commerce." ZA.1 ¶¶ 112-68. The defendants include Zangrillo, his holding company OCP, and the Dragon Global entities. *Id.* ¶¶ 17-19, 56, 67-68, 84-85, 91-92, 100, 102-03, 106.

The complaint seeks permanent injunctive and monetary relief, including the disgorgement of ill-gotten gains. ZA.1 at 46. Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), courts may impose "the full range of equitable remedies, including … consumer redress and … disgorgement of profits." *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996). *Accord Liu v. SEC*, 140 S. Ct. 1936, 1943 (2020) (confirming that "once a district court's equity jurisdiction has been invoked … a decree compelling one to disgorge profits … may properly be entered") (cleaned up).

The complaint charges that the defendants are collectively liable for the FTC Act violations because the corporate defendants acted as a common enterprise and because Zangrillo and the other individual defendants participated in, controlled, and knew of the deceptive practices. ZA.1 ¶¶ 61-107. *See FTC v. WV Univ. Mgmt., LLC*, 877 F.3d 1234, 1239-40 (11th Cir. 2017); *Gem Merch.*, 87 F.3d at 470. Under principles of equity, courts may impose "collective liability" for restitution against "partners engaged in concerted wrongdoing," especially when

they "knowingly connected [themselves] with and aided in fraud." *Liu*, 140 S. Ct. at 1945, 1949 (cleaned up).[4]

The district court granted the FTC's motion for a TRO with an asset freeze, temporary receivership, and order to show cause why a preliminary injunction should not issue. ZA.17. *See Gem Merch.*, 87 F.3d at 469 (Section 13(b) authorizes "preliminary relief, including an asset freeze, that may be needed to make permanent relief possible"). When Zangrillo and his company Dragon Global moved to dissolve the TRO for lack of evidence tying them to the scheme, the court found that "the Dragon entities were active participants in a common enterprise with the other defendants and that Mr. Zangrillo had sufficient authority, control, and knowledge of the activities to be liable as well." ZA.161 at 21:12-21:18.

The district court then held a two-day preliminary injunction hearing during which the court heard significant evidence regarding the need to keep the defendants' assets frozen pending final judgment. The receiver's report and

[4] Because Zangrillo is individually liable for the proceeds of the scheme he controlled, his liability is not capped at the amount he personally received. Nevertheless, Zangrillo falsely claims that the FTC "conceded that the total amount of funds transferred to Mr. Zangrillo from On Point was approximately $2 million." Br.20-21; *id* at 8-9. Based on an analysis of certain wire transfers, the FTC found that Zangrillo received a *minimum* of $2.8 million, but never suggested this was the maximum. *See* ZA.132-1 at 53-54 ¶ 192.

testimony showed that the defendants' frozen assets were collectively worth (at most) half the amount of a potential monetary judgment. The challenged websites generated over $80 million in just the last two years,[5] a figure that dwarfed the value of the frozen assets. ZA.108 at 20-23, 33-34; ZA.162 at 122:9-122:11.

At the close of the hearing, the district court announced that it would grant a preliminary injunction. The court found that the FTC had met its burden to show that the corporate entities acted as a common enterprise and that the individuals (including Zangrillo) had the requisite control and knowledge to support collective liability. ZA.162 at 314:8-314:18.

The district court entered a preliminary injunction the following day. ZA.126. The court held that the FTC had a "likelihood of success in showing that Defendants have deceived consumers by misrepresenting the services they offer, thus inducing consumers to pay money or divulge personal information under false pretenses." *Id.* at 2. The preliminary injunction bars the defendants from making

[5] In *Liu*, the Supreme Court explained that under the securities laws, wrongdoers may not deduct their expenses from a disgorgement award "when the entire profit of a business or undertaking results from the wrongful activity." 140 S. Ct. at 1945-46, 1950. Here, as discussed, the challenged websites reaped over $80 million by falsely promising government services, a wholly illegitimate undertaking. Deducting the defendants' salaries or the expense of "materials … bought for the purposes of the [fraud]" would be "inequitable." *Id.* at 1945-46 (cleaned up). And, in any event, that is a question best addressed at the remedy stage of the proceeding, not in its opening act.

similar misrepresentations on their websites or from selling consumer data obtained through deception. *Id.* at 4-5. The court also found "good cause" to continue the asset freeze and receivership, *id.* at 2-3, 5-6, 11-17, which were needed to prevent "immediate and irreparable damage to the Court's ability to grant effective final relief for consumers" in the form of "monetary restitution." *Id.* at 2.

Although Zangrillo's counsel had made one passing reference to the Sixth Amendment during the preliminary injunction hearing, *see* ZA.162 at 302:23-303:4, he did not ask the court to release frozen assets to pay Zangrillo's criminal defense fees or explain how much was needed or why Zangrillo lacked other resources.[6] Because Zangrillo did not raise these issues, the court's order granting the preliminary injunction did not address them.

Zangrillo and most of his co-defendants appealed the preliminary injunction; those matters are pending in Nos. 20-10790 and 20-10859 before this Court. The district court denied the defendants' motion to stay the asset freeze pending those appeals, finding that "the Defendants' likely liability for their deceptive activities

[6] Zangrillo briefly alluded to the Sixth Amendment in his motion to dissolve the TRO, but again did not request a specific release of frozen assets to cover his criminal defense fees or include supporting documentation. ZA.37 at 23. Zangrillo did not even *mention* the Sixth Amendment in his memorandum in opposition to the preliminary injunction. FA.69.

exceeds the total amount of frozen assets." FA.174 at 1-2. This Court also declined to stay the freeze. Appeal No. 20-10790, Order of April 28, 2020.

C. The College Bribery Proceeding

Zangrillo is also the subject of criminal charges in the District of Massachusetts wholly unrelated to the FTC case against him. He is accused of routing money through a sham charity to pay a college-admissions consultant to "complete online high school [and college] courses for his daughter, with the understanding that credits earned in those classes would be submitted to colleges on his daughter's behalf, either as part of her college applications or to serve as proof of her high school graduation." Fourth Superseding Indictment, *United States v. Sidoo*, No. 19-cr-10080, at 39 ¶ 253 (D. Mass. Filed Jan. 14, 2020). Zangrillo then allegedly paid "$250,000, to facilitate his daughter's transfer to [the University of Southern California] as a purported crew recruit," submitting an application that "included falsified athletic credentials." *Id.* at 41 ¶¶ 265-67. According to prosecutors, Zangrillo and a co-conspirator agreed that if the IRS were to question him about these payments, he would falsely claim they were charitable donations to aid "underserved kids." *Id.* at 43 ¶ 274, 55 ¶ 350.

Zangrillo is charged with conspiracy to commit mail fraud and wire fraud; conspiracy to commit federal programs bribery; money laundering conspiracy; substantive wire fraud; and honest services wire fraud. *Id*. at 60-66 ¶¶ 369-76.

D. Zangrillo's Motion to Release Assets For His Criminal Defense

In March 2020, *two months* after the district court entered the preliminary injunction in the FTC case, Zangrillo asked the court to modify the asset freeze to allow him to "pay his outstanding legal bills and defend himself in a pending criminal action, pursuant to his Sixth Amendment right to counsel." ZA.171 at 1.[7] Relying on the Supreme Court plurality opinion in *Luis v. United States*, 136 S. Ct. 1083 (2016), Zangrillo sought to liquidate approximately $2.7 million in securities and use the proceeds to compensate his attorneys. *Id.* at 10-12. He did not explain how those fees were calculated or why they were reasonable, and he failed to submit invoices or other evidence. Nor did he show that he lacked other resources to pay counsel, such as family loans or income streams unrelated to the FTC case.

[7] Zangrillo filed his motion under Rule 60(b)(6), which only applies to a "*final* judgment, order, or proceeding." Fed. R. Civ. P. 60(b) (emphasis added). *See, e.g.*, *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679-80 (11th Cir. 1984). When a party seeks to modify a preliminary injunction, it must establish "newly-discovered evidence or manifest errors of law or fact" under Rule 59(e), *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (cleaned up), or otherwise show a "change in circumstances that occurred after entry of the preliminary injunction," *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 337-39 (3d Cir. 1993). Zangrillo does not claim that his belated request to unfreeze assets satisfies any of these standards. *See* Br.10 n.2. He cites two joint motions from this case in which the parties (incorrectly) invoked Rule 60(b). ZA.143, ZA.145. But since those motions involved a change in circumstances, *see id.*, the parties' error was harmless. Here, by contrast, Zangrillo's motion did not point to any change in circumstances.

After the FTC pointed out these deficiencies, Zangrillo attached two declarations from his criminal defense attorneys to his reply brief, *see* ZA.189-1 & 189-3, which the FTC had no opportunity to address. In those belated filings, criminal counsel disclosed that they are billing Zangrillo at their "discounted Florida rate" of $990 to $1,000 an hour, ZA.189-1¶6; 189-3¶6, an amount that would come directly from the funds preserved for consumer redress. Zangrillo did *not* submit a declaration of his own explaining why he needed the money.

The district court denied Zangrillo's motion. ZA.191. It explained that the four-Justice plurality opinion in *Luis* concluded that in a criminal proceeding, "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." ZA.191 at 1 (quoting *Luis*, 136 S. Ct. at 1088 (plurality)). But the "crucial fifth vote" was cast by Justice Thomas, who concurred only in the judgment and made clear that "an incidental burden on a defendant's right to counsel does not violate that right." *Id.* at 1-2 (quoting *Luis*, 136 S Ct. at 1101-02 (Thomas, J., concurring in the judgment)).

The court ruled that the FTC asset freeze had merely an "incidental" effect on Zangrillo's right to counsel in the criminal case. *Id.* at 2. "This is a civil case, and this Court's asset freeze is completely unrelated to the prosecution of Zangrillo for paying bribes to secure his daughter's college admission that is pending in the District of Massachusetts." *Id.* *Luis* "does not address assets held by a receiver in

a civil case," much less an "unrelated case" pending in "another jurisdiction." *Id.* In short, "any effect [the FTC's] asset freezes may have on the right to counsel in unrelated criminal cases is incidental." *Id.*

STANDARD OF REVIEW

The Court reviews a district court's refusal to modify a preliminary injunction for abuse of discretion. *Sea-Land Serv., Inc. v. Int'l Longshoremen's Ass'n of N.Y.*, 625 F.2d 38, 40 (5th Cir. 1980).[8] Zangrillo's claim that the district court violated his Sixth Amendment rights is a legal question subject to de novo review. *United States v. Terry*, 60 F.3d 1541, 1543 (11th Cir. 1995).

SUMMARY OF ARGUMENT

The Sixth Amendment provides a qualified right to use the criminal defense attorney of one's choosing. It does not entitle defendants to hire an attorney they cannot afford or to pay an attorney with other people's money. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 626 (1989). Nor does it relieve defendants from legal or financial duties *unrelated* to the criminal case, such as paying taxes, even if those duties make it harder to afford an attorney. *Id.* at 631-32 & n.9.

[8] Decisions of the former Fifth Circuit issued on or before September 30, 1981 are binding precedent in this Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Zangrillo has no constitutional right to spend $2.7 million in assets, frozen for the benefit of his consumer victims, on legal fees for his unrelated bribery case. He may not escape financial obligations imposed under the FTC Act to pay his bills with money that the district court has determined likely belongs to his victims.

1.a. The Supreme Court has never recognized a right to pay criminal defense counsel using assets frozen in an unrelated civil case. To the contrary, in *Caplin & Drysdale*, the Court confirmed that the IRS may seize a criminal defendant's assets for tax delinquency even if it strips him of resources to pay counsel. 491 U.S. at 631. If a government agency may seize assets unrelated to a criminal case consistent with the Sixth Amendment, it follows that a court in an unrelated civil case may freeze assets to preserve them for victim redress.

Luis v. United States, 136 S. Ct. 1083 (2016), did not alter that conclusion. That case involved a pretrial asset freeze entered in a civil case directly connected to the criminal one, brought by the same prosecutor on the same facts. In that situation, the defendant is entitled to use assets not traceable to the crime to pay counsel. Neither the plurality nor Justice Thomas, who provided the crucial fifth vote, suggested that the Sixth Amendment applies to civil restraints unrelated to a criminal case.

To the contrary, Justice Thomas confirmed that defendants have no such right. He explained that defendants still must pay taxes and obey other laws, even

when doing so makes it "more difficult" to hire counsel. *Id.* at 1102 (Thomas, J., concurring in the judgment). He limited his concurrence to situations "[w]hen the potential of a conviction is the *only basis* for interfering with a defendant's assets before trial," thus recognizing that the government may have other bases to freeze a criminal defendant's assets. *Id.* (emphasis added). Justice Thomas's views were essential to form a majority, and thus are controlling.

b. It is no surprise that *Luis* is limited to asset freezes imposed in proceedings directly related to a criminal case. Such restraints raise unique constitutional concerns that an FTC asset freeze unrelated to a prosecution does not. Criminal defendants are presumed innocent, but the prosecution may freeze their assets based on a grand jury's *ex parte* finding of probable cause to believe they committed a crime, which defendants may not contest. Here, by contrast, Zangrillo enjoyed no presumption of innocence and had the opportunity to dispute the FTC's charges at a full evidentiary hearing.

c. To show that *Luis* applies to a civil asset freeze unrelated to a criminal case (Br.28), Zangrillo would need to demonstrate that both the plurality and Justice Thomas would support such a holding. He has shown neither.

To the plurality, a criminal defendant's interest in using untainted assets to hire counsel outweighs the government's interest in keeping the assets frozen. *Luis*, 136 S. Ct. at 1090-93 (plurality). The balancing is fundamentally different

where the asset freeze is imposed in an unrelated civil case. On one side of the scale, the civil freeze presents far fewer constitutional problems, and on the other side, Zangrillo's property interest in the frozen assets is far weaker, since the district court has determined after an evidentiary hearing that the money likely belongs to his victims.

To Justice Thomas, the Sixth Amendment does not exempt defendants from monetary obligations unrelated to the crime, such as tax levies. *See id.* at 1102 (Thomas, J., concurring in the judgment). A civil asset freeze unrelated to a criminal case at most "incidentally burden[s] … the right to counsel," *see id.* at 1101-02, in the same way as taxes, child support payments, licensing fees, and government loan repayments.

2.a. This case and the criminal case are completely unrelated; they share no common factual or legal allegations, as Zangrillo admits. In a desperate attempt at a Hail Mary pass, Zangrillo nevertheless charges for the first time on appeal that the FTC conspired with Massachusetts Assistant United States Attorneys to seek the asset freeze to pressure Zangrillo to plead guilty. Even if he had preserved this insulting claim of misconduct, it rests on nothing but abject speculation.

b. Even if Zangrillo had some right to pay his lawyers with money set aside for his victims, he still would have to prove that he needs the frozen assets to pay counsel and that the fees are reasonable. *See Luis*, 136 S. Ct. at 1088, 1096

(plurality). He showed neither. He did not submit a sworn declaration to demonstrate need, but relies on his attorney's declared "understanding" that Zangrillo cannot get a loan. That is insufficient. Indeed, the preliminary injunction allows Zangrillo to keep working at his investment firm and managing his clients' holdings for a fee.

Zangrillo provided nothing to show that $2.7 million in fees are reasonable. He has not revealed necessary information such as counsel's hourly rates, the prevailing rates in the relevant market (Boston), or an estimated number of billable hours.

ARGUMENT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall … have the Assistance of Counsel for his defence." U.S. Const. Amd. VI. It safeguards a criminal defendant's right to "effective counsel," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006), and his right to select "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." *Id.* at 144

(quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989)).[9]

But the Supreme Court has established that the right to counsel of choice is "circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159 (1988). The defendant "may not insist on representation by an attorney he cannot afford." *Id.* Nor may he "spend another person's money" to hire counsel, "even if those funds are the only way that the defendant will be able to retain the attorney of his choice." *Caplin & Drysdale*, 491 U.S. at 626. A "robbery suspect" has no right to use stolen assets "to retain an attorney to defend him if he is apprehended," because the spoils are "not rightfully his." *Id.* The right to choose one's attorney "belongs solely to criminal defendants possessing legitimate, uncontested assets." *United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989).

Importantly, the Sixth Amendment does not excuse a defendant from legal or financial duties *unrelated* to the crime—even if such requirements prevent a criminal defendant from using the money to pay a defense lawyer. For instance,

[9] Zangrillo also refers in passing to the Fifth Amendment, *see, e.g.*, Br.40, but does not argue that it has any relevance here independent of the Sixth. *See Caplin & Drysdale*, 491 U.S. at 633 ("We are not sure that [a Fifth Amendment argument] adds anything to petitioner's Sixth Amendment claim," because the latter Amendment is what "defines the basic elements of a fair trial") (cleaned up).

"[c]riminal defendants … are not exempted from federal, state, and local taxation simply because these financial levies may deprive them of resources that could be used to hire an attorney." *Caplin & Drysdale*, 491 U.S. at 631-32. Similarly, a criminal defendant is not exempt from IRS jeopardy assessments— asset seizures without a prior court order where collection of the tax is "in jeopardy"—even if the seizure deprives the defendant of the ability to pay criminal defense counsel of his choice. *Id.* at 631; *see* 26 U.S.C. §§ 6861; 6331; *Galvez v. IRS*, 448 F. App'x 880, 884-85 (11th Cir. 2011). Beyond these examples, the Supreme Court has noted that "[a] myriad of other law-enforcement mechanisms operate in a [similar] manner," indicating that they, too, are permissible. *Caplin & Drysdale*, 491 U.S. at 632 n.9.

An asset freeze in an FTC consumer protection case is the very sort of law-enforcement mechanism the Supreme Court has recognized as not being limited by the Sixth Amendment. Zangrillo has no right to pay his criminal defense attorneys with funds that a court has determined are likely to belong to his victims in this wholly unrelated matter. The district court found after a full evidentiary hearing that (1) the FTC was likely to show that Zangrillo is personally liable for violating the FTC Act; and (2) the frozen assets are needed to ensure victim redress at final judgment. *See supra* pp. 6-9. Zangrillo cannot avoid his FTC Act obligations

merely because he would rather use the money on high-priced defense counsel in a separate criminal case.

I. THE SIXTH AMENDMENT DOES NOT EXEMPT A CRIMINAL DEFENDANT FROM CIVIL JUDGMENTS AND ASSET FREEZES IN UNRELATED CASES

Zangrillo stakes his appeal on *Luis v. United States*, 136 S. Ct. 1083 (2016), which established a limited Sixth Amendment right to pay counsel with funds that were frozen in conjunction with a criminal proceeding but that are "untainted" because they were not derived from the crime. As explained below, however, the Court's disposition of *Luis* left intact the rule that a defendant remains subject to legal and financial burdens unrelated to the crime. As Justice Thomas—who cast the fifth and deciding vote in *Luis*—concluded, "incidental burdens on the right to counsel of choice would not violate the Sixth Amendment." *Id.* at 1102 (Thomas, J., concurring in the judgment). Because the FTC case has no common facts or law with the criminal charges against Zangrillo, the asset freeze imposes the very sort of incidental burden that *Caplin & Drysdale* and Justice Thomas in *Luis* recognized as permissible.

A. Criminal Defendants Must Meet Financial Duties Unrelated To The Pending Charges Even If This Prevents Them From Hiring Counsel Of Choice

The essence of Zangrillo's argument is that under *Luis*, he has the right to hire an attorney using assets sequestered in a civil case unrelated to pending

criminal charges. *See, e.g.*, Br.28. Examination of the Supreme Court's Sixth Amendment decisions shows that no such right exists.

In *Caplin & Drysdale*, the Court ruled that the Sixth Amendment does not confer on criminal defendants a right to use whatever assets are in their possession to pay attorney's fees. 491 U.S. at 632. The federal asset-forfeiture statute at issue there deemed title in the property to vest in the United States at the time of the offense. *Id.* at 627. Thus, although the money was held by the criminal defendant, it did not legally belong to him. In that circumstance, "no constitutional principle" entitled him to use "another's property" in order to exercise the right to counsel. *Id.* at 628. As the Court explained, when a court orders a convicted felon to turn over his assets, the government has a "strong … interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals" to use that money "to pay for their defense." *Id.* at 631.

Caplin & Drysdale did not only address post-trial forfeitures; it also held that the Sixth Amendment allows "the Government [to] freeze[] or take[] some property in a defendant's possession *before [or] during* … a criminal trial," even if doing so deprives the defendant of funds to hire attorneys. *Id.* (emphasis added). Thus, IRS jeopardy assessments and a "myriad of other law-enforcement mechanisms" comport with the Sixth Amendment even if those mechanisms render a defendant unable to pay counsel in a pending criminal case. *Id.* at 631-32 & n.9.

"Criminal defendants … are not exempt from … financial levies [that] may deprive them of resources that could be used to hire an attorney." *Id.* at 631-32.

Accordingly, in *United States v. Monsanto*, 491 U.S. 600 (1989)—decided the same day as *Caplin & Drysdale*—the Court held that a criminal defendant had no right to compensate his attorney with funds subject to a pretrial asset freeze. Once the district court found "probable cause to believe that the assets are forfeitable," they could constitutionally be placed beyond a defendant's reach for payment of counsel. *Id.* at 615. Indeed, the "Government may restrain *persons*" before trial based on probable cause, and thus could "restrain property" based on a similar showing to prevent the defendant from "dissipating his assets prior to trial." *Id.* at 615-16.

Luis did not change the basic Sixth Amendment principles established in *Caplin & Drysdale* and *Monsanto*. *Luis* involved a pretrial freeze, obtained in concert with a criminal prosecution, of assets that were not derived from the underlying crime. 136 S. Ct. at 1088 (plurality). The Court held that in that context, "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Id.*; *id.* at 1096-97 (Thomas, J., concurring in the judgment). As shown below, however, *Luis* does not apply to assets frozen as part of an unrelated civil case.

Importantly, *Luis* produced no majority opinion. A plurality of four Justices would have distinguished *Monsanto* on property law grounds. To them, a criminal defendant has an "imperfect" interest in assets traceable to the crime, since under the forfeiture statutes, title to those assets passed to the government at the time of the offense. *Id.* at 1090 (plurality). The government thus has a "substantial interest in the tainted property sufficient to justify the property's pretrial restraint." *Id.* at 1092 (cleaned up). But, the plurality reasoned, the government lacks an "equivalent … interest" in "*un* tainted property," since it stands as an "unsecured creditor." *Id.* According to the plurality, in these circumstances a criminal defendant's right to pay his attorney of choice outweighs "the Government's contingent interest in securing its punishment of choice" using non-traceable assets. *Id.* at 1093.[10]

The plurality's views are "neither the law of the land, binding precedent, nor sufficient to overcome previous holdings by a majority of the Supreme Court." *Martin v. Dugger*, 891 F.2d 807, 808-09 & n.2 (11th Cir. 1989), *overruled on other grounds by Johnson v. Singletary*, 991 F.2d 663 (11th Cir. 1993). *Luis* has changed the law only to the extent that the plurality reached "common ground"

[10] The plurality acknowledged that the government's interests in recovering non-traceable assets were "importan[t]," but asserted that "compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system." 136 S. Ct. at 1093 (plurality).

with Justice Thomas, who cast the pivotal fifth vote and concurred only in the result. *Id.* at 809 n.2. *Accord United States v. Robison*, 505 F.3d 1208, 1221-22 (11th Cir. 2007). "When … no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

Justice Thomas eschewed the plurality's property-law and balancing analyses, relying instead on historical materials to conclude that "[t]he common law limited pretrial asset restraints to tainted assets" in criminal cases. *Luis*, 136 S. Ct. at 1097, 1099-1101 (Thomas, J., concurring in the judgment). Justice Thomas "[r]ead[] the Sixth Amendment to track the historical line between tainted and untainted assets." *Id.* at 1101.

But Justice Thomas made clear that the government often has *other* bases—unrelated to the criminal prosecution—to take or encumber a defendant's assets without violating Sixth Amendment rights. "Numerous laws make it more difficult for defendants to retain a lawyer. But that fact alone does not create a Sixth Amendment problem." *Id.* at 1102. Justice Thomas thus "lean[ed] toward[s] the principal dissent's view that incidental burdens on the right to counsel of choice would not violate the Sixth Amendment." *Id.* That dissenting opinion, authored by Justice Kennedy and joined by Justice Alito, took the position that the asset

freeze in *Luis* "does not result in a Sixth Amendment violation any more than high taxes or other government exactions that impose a similar burden." *Id*. at 1105 (Kennedy, J., dissenting).

Justice Thomas agreed with Justices Kennedy and Alito that "criminal defendants must still pay taxes" even if those funds are necessary to hire their preferred counsel. *Id.* at 1102 (Thomas, J., concurring in the judgment). For this point, he relied on *Caplin & Drysdale*, which (as discussed) advised that IRS jeopardy assessments and similar law-enforcement mechanisms do not violate the Sixth Amendment even if they render a criminal defendant unable to pay counsel. *Id.* (citing 491 U.S. at 631-32).

Luis thus did not upend the settled principle that the Sixth Amendment does not relieve defendants of legal or financial burdens unrelated to their criminal case. As the district court here correctly observed, *Luis* "does not address assets held by a receiver in a civil case." ZA.191 at 2. The plurality confined its analysis to "pretrial restraint[s]" imposed under criminal forfeiture statutes—18 U.S.C. § 1345(a)(2) and 21 U.S.C. § 853(c)—pending a criminal trial and conviction. *See* 136 S. Ct. at 1088, 1091-92, 1093. Indeed, Justice Thomas *explicitly* stated that he was finding a Sixth Amendment violation only where the objective of the asset freeze was "*simply to secure potential forfeiture upon conviction*." *Id.* at 1097 (Thomas, J., concurring in the judgment) (emphasis added); *see also id.* at 1102

(same). He added that the government's "bare expectancy of criminal punishment" did not empower it to freeze assets needed for counsel. *Id.* at 1097. He thus found a Sixth Amendment right to pay counsel using non-traceable assets "[w]hen the potential of a conviction is the only basis for interfering with a defendant's assets before trial." *Id.* at 1102.

Zangrillo therefore is wrong when he claims that the "holding" of *Luis* applies to "*any* governmental freeze of a criminal defendant's untainted assets," even if the freeze "is not based on the same underlying facts as the criminal case." Br.28. In reality, *Luis* did nothing to change the prevailing rule from *Caplin & Drysdale* that criminal defendants remain subject to government financial obligations unrelated to the criminal case even if the obligation prevents them from paying for defense counsel.

B. Asset Freezes Related To Criminal Cases Raise Constitutional Concerns That Do Not Apply In An Unrelated Civil Matter

There is a good reason why *Luis* applies only to asset freezes issued as part of a related criminal case. That situation poses unique constitutional problems that unrelated civil proceedings under statutes like the FTC Act do not.

Unlike civil defendants, criminal defendants enjoy a presumption of innocence and their guilt must be proven beyond a reasonable doubt. *See, e.g.*, *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 267 (1877); *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). And yet, the prosecution need only show

probable cause to freeze their assets before a criminal trial. *Monsanto*, 491 U.S. at 615-16. What's more, "[a] defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime." *Kaley v. United States*, 571 U.S. 320, 333 (2014), *aff'g* 677 F.3d 1316 (11th Cir. 2012). Because "[t]he grand jury's determination is conclusive," a criminal defendant may not contest an asset freeze arising from the criminal case by showing that he is innocent. *Id.* at 331. When a person's assets are frozen under the criminal forfeiture laws after indictment, his only defense is a limited right to argue that the assets are not "traceable to or involved in the charged conduct." *See Kaley*, 677 F.3d at 1330.

Given the lax standards for obtaining a freeze and the high bar for securing a conviction, asset freezes associated with criminal cases raise a serious risk of prosecutorial overreach. Because "the same government that prosecutes also restrains alienation of assets and does so upon an *ex parte* showing of probable cause," the fear is that "prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets," all in an effort to deny the defendant his choice of counsel. *Bissell*, 866 F.2d at 1354-55.

No such concerns exist when a court imposes an asset freeze in a *separate* civil proceeding unrelated to the prosecution. For starters, the defendant does not enjoy a presumption of innocence in that proceeding. *See, e.g.*, *In re Winship*, 397

U.S. 358, 363-65 (1970). And, unlike criminal asset freezes, civil defendants have the right to *contest* a freeze by rebutting the evidence that they committed the underlying violation, and the court must find that the misconduct "likely" occurred. *See, e.g.*, *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1233-34 (11th Cir. 2014). Here, Zangrillo's counsel participated in a two-day evidentiary hearing in which they examined witnesses and presented thousands of pages of exhibits. *See supra* pp. 6-9. After the hearing, the district court found that Zangrillo likely had violated the FTC Act and would be liable to pay restitution in an amount exceeding the value of the frozen assets. *Id.*

That situation presents none of the concerns that led to the outcome in *Luis*. Both the *Luis* plurality and Justice Thomas based their decisions on the unique constitutional issues raised by asset freezes associated with criminal prosecutions. They feared that a contrary result would allow Congress to authorize massive criminal fines and pre-trial restraints that could strip virtually any criminal defendant of the money to hire counsel, thereby neutering the Sixth Amendment right to counsel of choice. *See id.* at 1094-95 (plurality) ("To permit the Government to freeze Luis' untainted assets would unleash a principle of constitutional law that would have no obvious stopping place."); *id.* at 1098 (Thomas, J., concurring in the judgment) ("If the Government's mere expectancy of a total forfeiture upon conviction were sufficient to justify a complete pretrial

asset freeze, then Congress could render the right to counsel a nullity in felony cases."). No similar outcome is possible when the FTC enforces its statutes in a civil case unrelated to any criminal prosecution.[11]

Zangrillo asserts that "*Luis* was a civil case, too," but that is not quite right. *See* Br.26, 39, 42 n.12. To be sure, *Luis* was captioned as a civil forfeiture matter, but the whole point of it was to restrain assets pending a *criminal* trial based on "probable cause to believe that Luis committed a [criminal] offense requiring forfeiture." *United States v. Luis*, 564 F. App'x 493, 494 (11th Cir. 2014), *rev'd* 136 S. Ct. 1083. When the government engages in "simultaneous pursuit" of "civil and criminal sanctions" based on common facts, the case is in reality a "single, coordinated prosecution." *United States v. One Single Family Residence Located at 18755 N. Bay Rd., Miami*, 13 F.3d 1493, 1499 (11th Cir. 1994).[12] Indeed, a defendant facing post-indictment civil forfeiture has no right to dispute the asset

[11] Zangrillo claims that the plurality and Justice Thomas were concerned about all government asset freezes, even in an unrelated civil matter. Br.32-34. Nothing in *Luis* supports that view. Again, the Court's fear was that "Congress could write more statutes authorizing pretrial restraints" and "postconviction forfeiture[s]" that could render every criminal defendant indigent and unable to pay an attorney. 136 S. Ct. at 1094 (plurality); *id*. at 1098 (Thomas, J., concurring in the judgment).

[12] "Since the earliest years of this Nation, Congress has authorized the government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events." *United States v. Ursery*, 518 U.S. 267, 274 (1996).

freeze by demonstrating her innocence, as she would have in a civil case. *See Kaley*, 571 U.S. at 333 (defendants may not "contest[] the seizure of their property" by "relitigat[ing] … a grand jury finding"). Asset forfeiture litigation conducted in tandem with criminal prosecution bears no resemblance to separate, unrelated proceedings under the FTC Act or another purely civil statute.[13]

C. *Luis* Does Not Release Criminal Defendants From Incidental Burdens Imposed By Unrelated Civil Asset Freezes

Zangrillo argues that *Luis* entitles criminal defendants to pay for counsel with untainted assets subject to any "government-initiated asset freeze," even if unrelated to the prosecution. Br.28. Because no single opinion represents a majority of the Supreme Court, Zangrillo needs to show that *both* the plurality opinion and Justice Thomas's concurrence would have required a release of frozen assets in these circumstances. *See Marks*, 430 U.S. at 193; *Robison*, 505 F.3d at 1221; *Martin*, 891 F.2d at 808-09 & n.2.

He has shown neither. Zangrillo's argument contravenes the approaches of both the plurality and Justice Thomas. Lower courts applying *Luis* have rejected Zangrillo's position, which would produce absurd consequences.

[13] Zangrillo argues that the holding of *Luis* applies to criminal forfeiture statutes "beyond [18 U.S.C. §] 1345(a)(2)." Br.42-43. That is irrelevant; the point is that it does not govern civil enforcement proceedings unrelated to a criminal prosecution.

1. The plurality's balancing approach does not support Zangrillo's argument

In Zangrillo's view, the *Luis* plurality's balancing of governmental and defense interests "has equal applicability to the facts of this case." *Id.* at 34-35, 47. That claim is meritless. Zangrillo's interests in property frozen under the FTC Act are far weaker than the criminal defendant's property interests were in *Luis*. As the plurality explained, when the government freezes a criminal defendant's untainted assets based on probable cause, the defendant can "reasonably claim that the property is still 'mine,' free and clear." 136 S. Ct. at 1092 (plurality). Because the defendant enjoys "the presumption of innocence," *Kaley*, 571 U.S. at 1096, a court may presume that the frozen assets are "innocent" as well. FTC civil enforcement is quite a different story, since the district court found after a contested evidentiary hearing that Zangrillo likely violated the FTC Act and that the frozen assets therefore likely belongs to his victims.[14] *See supra* pp. 7-9. Unlike Ms. Luis, Zangrillo cannot "reasonably claim that the property is still 'mine,' free and clear." *Luis*, 136 S. Ct. at 1092 (plurality).

Moreover, as shown in Part I.B above, a civil asset freeze unrelated to a criminal prosecution does not raise the same constitutional concerns as one

[14] The FTC Act does not require that disgorged assets be traceable to the underlying violations. *See FTC v. Leshin*, 719 F.3d 1227, 1234 (11th Cir. 2013).

imposed under the asset-forfeiture laws. *See also Luis*, 136 S. Ct. at 1093 (plurality) (weighing the competing interests in order to promote a "fair, effective criminal justice system").

Because this case does not implicate the same property interests or constitutional difficulties as *Luis*, the plurality's balancing test would almost certainly yield a different result. As *Luis* recognized, the government has an "important" interest in "securing restitution" for victims, *Luis*, 136 S. Ct. at 1093 (plurality); that interest far outweighs Zangrillo's interest in paying a lawyer with property that he likely does not own. "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney." *Caplin & Drysdale*, 491 U.S. at 626.

2. Justice Thomas's incidental-burdens approach does not support Zangrillo's argument

Zangrillo's argument also fails under Justice Thomas's framework. He directly repudiated Zangrillo's thesis that the Sixth Amendment allows defendants to pay criminal defense counsel with money from a civil asset freeze in an unrelated case.

Justice Thomas recognized that criminal defendants still must obey laws that may deny them the resources to hire counsel, and that they may be subject to tax levies. *See supra* pp. 23-25; *Luis*, 136 S. Ct. at 1102 (Thomas, J., concurring in the judgment). *See also Caplin & Drysdale*, 491 U.S. at 631-32 ("Criminal defendants

… are not exempt from … financial levies [that] may deprive them of resources that could be used to hire an attorney."). The IRS may levy "*all* property and rights to property" of a delinquent taxpayer, including "accrued salary or wages," 26 U.S.C. § 6331(a) (emphasis added), without exemption for assets needed to pay an attorney in an unrelated criminal case. When the IRS issues a jeopardy assessment, it does not merely *freeze* a defendant's assets pretrial, but *seizes* them outright without any prior hearing or court order.[15] *Galvez*, 448 F. App'x at 885-86. *See United States v. Rogers*, 984 F.2d 314, 316 (9th Cir. 1993) (IRS jeopardy assessments do not violate Sixth Amendment right to counsel); *United States v. Thomas*, 577 F. Supp. 2d 469, 471, 475 (D. Maine 2008) (same).

If an IRS jeopardy assessment that prevents a criminal defendant from affording counsel passes constitutional muster, so too must an asset freeze under the FTC Act. In FTC cases, the defendant receives far greater procedural rights than a delinquent taxpayer, since he may dispute the claims in an evidentiary hearing before a federal judge. The tax example also refutes Zangrillo's claim that

[15] "[I]f the IRS determines that the collection of an assessed tax is in jeopardy, the IRS may provide notice and demand for immediate payment, and if the taxpayer fails or refuses to pay the assessed tax, the IRS may collect the tax by jeopardy levy." *Galvez*, 448 F. App'x at 885 (citing 26 U.S.C. § 6331(a)). The IRS needn't give advance notice of the levy so long as it offers an after-the-fact administrative hearing. *Id.* (citing 26 U.S.C. §§ 6330(f), 6331(d)(3)). A taxpayer whose assets were seized must exhaust administrative remedies before obtaining judicial review. *Id.* at 885-86 (citing 26 U.S.C. § 7429(b)).

Luis applies to all federal-government asset freezes because they involve the "same sovereign" as the criminal prosecution. Br.3, 39 n.10. The IRS, too, is an arm of the "same sovereign" as the United States Attorney, but that doesn't immunize criminal defendants from paying taxes or undergoing a jeopardy assessment.

When the government obtains a civil asset freeze in a case unrelated to a criminal prosecution, it—at most—incidentally burdens the right to counsel in the criminal case. As Justice Thomas explained, "a generally applicable law placing only an incidental burden on a constitutional right does not violate that right." *Luis*, 136 S. Ct. at 1101-02 (Thomas, J., concurring in the judgment). In a First Amendment case, the Supreme Court reasoned that a "generally applicable and otherwise valid provision" passes constitutional scrutiny even if it prevents the exercise of fundamental rights, where doing so "is not the object of the [law] but merely the incidental effect." *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 878 (1990); *see also Ruggiero v. FCC*, 317 F.3d 239, 244 (D.C. Cir. 2003) ("structural" regulation of broadcast industry receives "[m]inimal" constitutional scrutiny despite "indirect effect upon speech"). Here, when the FTC obtains an asset freeze under a generally applicable civil statute, preventing the defendant from obtaining counsel in an unrelated criminal case is not "the object" of the freeze but at most an "incidental effect."

Zangrillo gets no help from Justice Thomas's conclusion that the criminal asset freeze in *Luis* was "not merely an incidental burden on the right to counsel of choice; it targets a defendant's assets, which are necessary to exercise that right, simply to secure forfeiture upon conviction." Br.45-46, citing 136 S. Ct. at 1102 (Thomas, J., concurring in the judgment). The argument misses the key language in that quotation: an asset freeze may violate the right to counsel when its objective is "simply to secure forfeiture upon conviction." *Id.* The corollary is that when an asset freeze has some other objective—such as to secure a tax, ensure child support, or maintain funds for victim redress under the FTC Act—the burden is incidental and does not violate Sixth Amendment rights.

This Court has applied that very framework when analyzing government asset freezes, suggesting that the Sixth Amendment is not implicated when the "government[ ] [acts] to collect an indebtedness *coincidentally* with the prosecution of criminal charges" and attempts to "seize[] or restrain assets … to be applied to that indebtedness." *Bissell*, 866 F.2d at 1350 (emphasis added). That scenario is very different from when a prosecutor attempts to restrain the defendant's assets before trial on the theory that they were "derived from, or utilized in, the criminal activities condemned." *Id.*

Indeed, without a distinction between direct and incidental burdens, the Sixth Amendment would produce absurd consequences. Zangrillo's position is

that criminal defendants have an "affirmative right[] … to use untainted assets to pay their lawyers"—"full stop." Br.31-32. By that logic, a criminal defendant would be exempt not only from asset freezes, but from all monetary obligations to the government so long as the money was not "tainted" by crime. It would confer immunity from taxation, child support, licensing and permit fees, environmental cleanup burdens, customs duties, immigration fees, government loan repayments, and fines unrelated to the criminal case (*e.g.*, speeding tickets).[16] Nothing in *Luis* suggests that the Court intended to immunize criminal defendants from all of these duties so that they could hire the best defense attorneys money can buy. Justice Thomas expressly premised his dispositive vote on the decision *not* having that effect. *See supra* pp. 23-25.

Zangrillo's position would open the floodgates in another way. He claims he is immune from financial obligations to the government because he needs the

[16] As a law review article cited by Zangrillo (Br.44) explains, "The government takes money from individuals all the time, without regard for whether they're facing criminal charges, and it's never thought to raise a Sixth Amendment issue. Taxation is only the most salient example." John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2016 Sup. Ct. Rev. 117, 137. "[A]ll sorts of agencies—say, the Securities and Exchange Commission or Customs and Border Protection—are empowered to restrain assets in pursuit of their regulatory objectives." *Id.* The IRS may "file[] a jeopardy assessment" without "sound[ing] Sixth Amendment alarms." *Id.* at 138. And "no one would think collection of a fine imposed in an unrelated criminal matter would violate a defendant's right to counsel of choice in a new prosecution." *Id.* at 139.

money to "vindicat[e]" his constitutional right to counsel. Br.31. If so, could Zangrillo also claim a similar exemption in order to "vindicate" his rights "to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal," which could be imperiled by the "threat of forfeiture." *Caplin & Drysdale*, 491 U.S. at 628. The Supreme Court rejected this sort of thinking when it held that the government does not violate the constitution when it incidentally places financial burdens on fundamental rights. *Id.* at 631-32. Just as the district court had no duty to unfreeze Zangrillo's assets so that he could make political donations, practice a religion, travel, or bear arms, it had no duty to release those assets to pay his defense counsel in an unrelated case.

Next, Zangrillo claims that the asset freeze here did not merely impose incidental burdens, since it was "targeted squarely at a specific defendant." Br.45-46. He contends that unlike "generally applicable" "taxes or lien laws," the FTC Act requires the Commission to "specifically identif[y] and affirmatively sue[] particular defendants" and then "move to freeze a particular amount of assets." Br. 46.

That distinction is nonsense. *All* laws "target squarely a specific defendant" when the government enforces that law against an individual. The IRS "targets squarely" a specific taxpayer whenever it assesses his tax obligations, issues a

payment demand, and levies his assets upon nonpayment. *Galvez*, 448 F. App'x at 885-86. The government "targets squarely" a deadbeat parent when it sues him for delinquent child support and levies his assets. Zangrillo's argument would prevent the government from ever enforcing a financial obligation against a person who would rather spend the money on high-priced counsel in an unrelated criminal case.

Of course, Zangrillo's argument is not the law. The government may enforce generally applicable laws against specific individuals provided that it avoids doing so in a "selective manner" that targets the exercise of constitutional rights. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 879-80 (11th Cir. 2011) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993)). Thus, in *Employment Division*, the Supreme Court held that a generally applicable drug law was constitutional even though it enabled the government to prosecute particular religious worshipers for smoking peyote. 494 U.S. at 878. Here, as shown in Part II.A below, the FTC neutrally applied the FTC Act when it sought the asset freeze; it did not selectively target Zangrillo's assets in order to deprive him of counsel in the unrelated case.

Zangrillo posits that *even if* an asset freeze imposes only an incidental burden on the right to counsel, the court must still release frozen assets whenever that burden is "substantial" (unless recovering the money is "essential"). *See*

Br.46-49. This is just another way of saying that the Sixth Amendment exempts criminal defendants from laws "mak[ing] it more difficult for defendants to retain a lawyer"—the very thing Justice Thomas rejected when casting the deciding vote in *Luis*. 136 S. Ct. at 1102 (Thomas, J., concurring in the judgment). Indeed, as a law review article cited by Zangrillo explains, "to treat every incidental burden as calling for heightened scrutiny would render effective government regulation impossible in a wide range of situations." Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1251 (1996).[17] In any event, the district court found that freezing the assets *is* essential to ensure complete relief to Zangrillo's victims, ZA.126 at 2-3, since "the Defendants' likely liability for their deceptive activities exceeds the total amount of frozen assets," including Zangrillo's, FA.174 at 1-2.

Finally, Zangrillo cites academic commentary suggesting that Justice Thomas's distinction between direct and incidental burdens may be unsound. Br.44. That is irrelevant and does not change the fact that Justice Thomas's views

[17] "Virtually every government decision is likely to have some incidental effect on some constitutionally protected value." Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 Wm. & Mary L. Rev. 779, 784 (1985).

are dispositive in this case because they were essential to form a majority.[18] In any event, the alleged unsoundness discussed in the academic literature is that Justice Thomas's framework is *too protective* of a criminal defendant's interests.[19]

3. Courts have rejected Zangrillo's argument

Unsurprisingly, courts have refused to read either the *Luis* plurality or Justice Thomas's concurrence as recognizing a general right to use frozen assets to pay criminal defense attorneys in an unrelated case. As one noted, *Luis* concluded only that "the restraint of defendant's untainted assets, frozen pretrial *under the criminal forfeiture statutes*" may violate the Sixth Amendment. *United States v. Johnson*, No. 2:11-cr-501-DN, 2016 WL 4087351, at *3 (D. Utah Jul. 28, 2016) (emphasis added). *Luis* did not address "assets held by the receiver in a civil case."

[18] Zangrillo also notes Justice Thomas's remark that the "usual" version of the incidental burdens doctrine "might be inapt" in the Sixth Amendment setting. Br.43-45, 47-48 (citing *Luis*, 136 S. Ct. at 1102 (Thomas, J., concurring in the judgment)). But Justice Thomas was unequivocal in confirming that criminal defendants still must pay their taxes and obey other laws that make it harder to retain counsel, and that *Caplin & Drysdale* remains good law on these subjects. *Supra* pp. 23-25. Those are the points that control this case.

[19] Indeed, one article cited by Zangrillo found it "not clear that direct burdens always raise the same degree of suspicion under the Sixth Amendment as under the First," since the Sixth Amendment likely "would not block the government from collecting on a judgment awarded against a criminal defendant in a *related* civil case." Rappaport, 2016 Sup. Ct. Rev. at 139. *See also supra* n.16 (excerpts from the same commentator explaining that the government routinely takes money from criminal defendants without any Sixth Amendment issues).

Id.[20] Another held that "[n]othing in the *Luis* plurality or concurrence suggests a holding applicable outside the context of remedies created by a criminal proceeding," namely "asset forfeiture" in support of "the ultimate conviction." *Estate of Lott v. O'Neill*, 165 A.3d 1099, 1104-05 (Vt. 2017). There, the Vermont Supreme Court ruled that a murder defendant's Sixth Amendment rights were not violated by a pretrial attachment in a civil wrongful-death action that prevented her from retaining private counsel. *Id.* This was true even though the civil case "ar[o]se out of a core of facts in common with the criminal case." *Id.* at 1105.

In response, Zangrillo produces three pages of string citations, Br.36-38, but only two of the nine cases are even relevant. One district court, applying *Luis*, allowed a civil defendant to use untainted assets to hire defense counsel in a "companion criminal case." The court did not suggest that the defendant could do so in an unrelated case. *SEC v. Morgan*, No. 1:19-cv-00661 EAW, 2019 WL

[20] As Zangrillo notes (Br.30), the district court in *Johnson* also ruled that it lacked authority over the frozen assets since the FTC civil case was pending in a different forum. 2016 WL 4087351, at *3. Even so, the court read *Luis* as only applying in the context of the criminal forfeiture statutes. The Tenth Circuit affirmed on the former ground without reaching the scope of *Luis*. *United States v. Johnson*, 732 F. App'x 638, 651 & n.9 (10th Cir. 2018).

2385395, at *11 (W.D.N.Y. June 5, 2019) (quotation omitted).[21] The court candidly acknowledged that the Sixth Amendment "would not, standing alone, prevent the court from issuing an asset freeze," but treated it as a "further consideration" to which the court should "pay particular attention" when applying its equitable discretion. *Id.*

The other case allowed a defendant to use frozen, untainted assets to hire counsel in an unrelated criminal proceeding. *United States v. Price*, No. 1:18CV00027, 2018 WL 4927269 (W.D. Va. Oct. 11, 2018). But *Price* involved both a criminal forfeiture case seeking an asset freeze pending conviction and an unrelated criminal prosecution. *Id.* at *3. The court found it "appropriate" to allow the defendant to use frozen assets for both the related prosecution and the

[21] Zangrillo cites three pre-*Luis* decisions that reached a similar conclusion. *See SEC v. Thibeault*, 80 F. Supp. 3d 288, 295 (D. Mass. 2015); *SEC v. FTC Capital Mkts., Inc.*, No. 09 Civ. 4755 (PGG), 2010 WL 2652405, at *7 (S.D.N.Y. Jun. 30, 2010); *CFTC v. Walsh*, No. 09 Civ 1749 (GBD), 2010 WL 882875, at *3 (S.D.N.Y. Mar. 9, 2010).

unrelated one. *Id.* at *2. Here, of course, there is only one criminal prosecution, and it is wholly unrelated to the FTC's enforcement case.[22]

II. THE DISTRICT COURT'S DECISION DECLINING TO RELEASE FROZEN ASSETS DID NOT VIOLATE ZANGRILLO'S SIXTH AMENDMENT RIGHTS

As shown above, a criminal defendant has no constitutional right to pay counsel using frozen assets from an unrelated civil case. The district court correctly applied that principle here, explaining that since "[t]his is a civil case, and this Court's asset freeze is completely unrelated to the prosecution of Zangrillo for paying bribes to secure his daughter's college admission that is pending in the District of Massachusetts," Zangrillo had no right to use money set aside for victim compensation to pay his legal bills. ZA.191 at 2.

Zangrillo attempts to show that the district court got it wrong because the two matters are in fact linked. He raised the claim below only in a footnote to a reply pleading. ZA.189 at 7 n.6. Before this Court, he asserts for the first time that

[22] The remaining cases cited by Zangrillo do not address whether *Luis* applies to assets frozen in a separate civil proceeding. In *Powers v. Federal Bureau of Prisons*, 699 F. App'x 795 (10th Cir. 2017), the court held only that *Luis* does not govern when the defendant seeks "to retain legal counsel to pursue post-conviction remedies and civil rights actions" rather than to represent him at trial. *Id.* at 798. In three other cases, the court refused to consider releasing frozen assets since the defendants "have not yet been charged with a crime" or the criminal case was otherwise dormant. *CFTC v. Rust Rare Coin Inc.*, No. 2:18-cv-00892-TC-DBP, 2019 WL 7562424, at *3 (D. Utah Apr. 4, 2019); *SEC v. Santillo*, No. 18-cv-5491 (JGK), 2018 WL 3392881, at *4-5 (S.D.N.Y. July 11, 2018); *SEC v. Ahmed*, No. 3:15-cv-675 (JBA), 2017 WL 5515903, *1 (D. Conn. Jan. 6, 2017).

the FTC and Massachusetts federal prosecutors conspired to deprive him of criminal representation in order to coerce a guilty plea in the college bribery case. Br.27, 33. The claim, a serious charge of malfeasance, comes too late. But as we show below, it lacks any support, resting entirely on speculation and innuendo.

Finally, even if Zangrillo did—in principle—have a Sixth Amendment right to pay criminal defense attorneys using frozen assets from this unrelated civil case, he has failed to show either that he needs the money or that counsel's fees are reasonable, both of which are required to release the funds.

A. The FTC Case Is Unrelated To The Massachusetts College Bribery Case

Zangrillo concedes that the FTC's civil case has no facts or law in common with the criminal case; he admits directly that "the FTC case is based on allegations of consumer deception in On Point's websites, whereas the criminal case is based on allegations of misconduct in college admissions." Br.26-28. That should end this appeal.

Zangrillo nevertheless claims the matters are related. The claim has two principal parts. First, he contends that three passing references to the criminal charges in FTC court filings below show a relationship between the two cases. Br.7, 27 (citing ZA.3 at 2; ZA.4 at 22; ZA.38 at 3). Next, he pivots to the accusation that the FTC and the Massachusetts prosecutors "work[ed] in tandem to effect an asset freeze in the FTC case" in order to deprive Zangrillo of counsel,

thereby "applying unconstitutional pressure on Mr. Zangrillo to coerce a guilty plea." Br.27, 33. The alleged proof of that conspiracy is that when Zangrillo's lawyer asked an FTC investigator at the preliminary injunction hearing whether "anybody from your team in this case [has] been in contact with anybody from the prosecution team," FTC counsel objected on work-product grounds. Br.27, citing ZA.161 at 133. The accusation is as unfounded as it is scurrilous.

The claims are baseless. The FTC referred to the criminal case three times below: in two papers seeking an *ex parte* TRO and "sealing order" to prevent Zangrillo from "hid[ing] assets and destroy[ing] evidence upon notice of the Complaint," ZA.3 at 2, ZA.4 at 25; and again when describing the context behind Zangrillo's decision to resign as On Point's chairman a just few days prior to the indictment, *see* ZA.38 at pp. 3-4 n.5. These brief mentions prove no substantive connection between the cases, and they clearly do not show that the FTC sought the asset freeze in order to deprive Zangrillo of his Sixth Amendment rights. Indeed, as Zangrillo admits, "58 other defendants" in the FTC's case are subject to the same asset freeze. Br.11, 47.

Zangrillo's charge of conspiracy is rankly speculative. To begin with, the claim is waived because he did not raise it below, presenting it for the first time in his appeal brief. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1327-29 (11th Cir. 2004). To prove a constitutional violation, Zangrillo would need to

make a "specific case[] of prosecutorial misconduct," *Caplin & Drysdale*, 491 U.S. at 634, demonstrating that the authorities acted in "bad faith" to deprive him of assets he could lawfully spend on counsel, *Bissell*, 866 F.2d at 1355. He has not even begun to make that showing.

The FTC's assertion of privilege does not come close to the required "specific case" of "bad faith." Zangrillo spins the assertion as the FTC's having "acknowledged that it is working with the prosecutors in the criminal action," Br.27, but the existence of privileged communications does not show that the FTC is "working with the prosecutors." The FTC routinely informs federal and state criminal authorities before bringing a new case against a common defendant in order to avoid any conflict between the two matters. Such ministerial contacts do not support even an inference of misconduct.

Zangrillo's pointing out that "[t]he FTC has not yet produced a privilege log of … communications," Br.7 n.1, provides no more substance. He has never *requested* a privilege log, and because he raised this point for the first time in this Court, the FTC has never had a chance to respond until now. His counsel's representation that the FTC "refus[ed] to make a record" of "coordination with the criminal prosecution team in Massachusetts," Br.33, is thus flatly misleading.

Had Zangrillo requested a privilege log, it would have shown

- two brief phone calls, one seven months before filing the complaint and another three months before filing the complaint, both regarding deconfliction of unrelated matters involving the same defendant; and
- two email threads (containing, respectively, five emails and three emails each) setting up those calls.

That's it. Nothing in that record undermines the district court's determination that the FTC's case is "completely unrelated" to the criminal case. ZA.191 at 2. The asset freeze is merely "coincidental[] with the prosecution of criminal charges" against Zangrillo in another forum. *Bissell*, 866 F.2d at 1350.

B. Zangrillo Has Not Shown That He Needs The Frozen Assets Or That His Attorneys' Fees Are Reasonable

Even if *Luis* applies here, Zangrillo still must show that (1) the funds are "needed to retain counsel of choice," *Luis*, 136 S. Ct. at 1088 (plurality), and (2) counsel's proposed fees are "reasonable," *id.* at 1096. The district court did not reach those fact-bound questions and should have that opportunity in the first instance. *See* ZA.191. Although Zangrillo asks this Court to find the relevant facts in his favor (Br.22-26), that is not the proper role of an appellate court. Even if it were, Zangrillo's submissions do not justify a release of assets.

1. Need. Zangrillo must prove a "*bona fide* need to utilize assets subject to the restraining order to conduct his defense." *United States v. Kielar*, 791 F.3d 733, 737 (7th Cir. 2015) (quotation omitted). Doing so requires "a sufficient

evidentiary showing that there are no sufficient alternative, unrestrained assets to fund counsel of choice." *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013).

Zangrillo presents no evidence at all of his financial need. He relies solely (Br.22 n.5) on a declaration from attorney Matthew L. Schwartz, who is representing him in both the FTC matter and the criminal matter, attesting that "it is my understanding" that Zangrillo is unable to get a loan. ZA.189-1 at 2 ¶ 7. This is not evidence. Worse, it wasn't even properly before the district court because Zangrillo submitted it only with his reply memorandum. ZA.189 at 8. *See* S.D. Fla. Local R. 7.1(c) (a "reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum of opposition without reargument of matters covered in the movant's initial memorandum of law").

Zangrillo could have submitted his own sworn declaration, but he decided not to. Instead, he denies that the Sixth Amendment even requires evidence of need, asserting that he need not "beg and borrow to fund his … defense before seeking relief from the courts." Br.22 n.5. But *Luis*, *Kielar*, and *Bonventre* say otherwise. Because the funds are "coming out of the pockets of defrauded [victims]," Zangrillo must establish that the "amount requested" is "truly necessary." *SEC v. FTC Capital Mkts., Inc.*, No. 09 Civ. 4755 (PGG), 2010 WL 2652405, at *9 (S.D.N.Y. June 30, 2010).

Zangrillo asserts—without record citation—that he needs the money because "*all* of his assets are frozen." Br.22. Because Zangrillo has not submitted a sworn declaration, he is simply asking the Court to take his word for it that he has no other unfrozen assets. Regardless, Zangrillo remains fully capable of obtaining additional money beyond the frozen assets and may already be doing so. The asset freeze does not prevent Zangrillo from doing legitimate work and using the new earnings to pay his attorneys. *See* ZA.126 at 6, sec. III.D (excluding from the asset freeze earnings after December 13, 2019 unless "derived from" the deceptive conduct at issue in the FTC case).

Indeed, Zangrillo describes himself as a "successful private equity, venture capital, and real estate investor" who manages third-party investments across a wide range of industries. Br.5. Zangrillo may still work at his investment firm, Dragon Global, since the preliminary injunction excludes Dragon Global's "employees and operations" from the receivership. ZA.126 at 4, Def. H. And Zangrillo remains free to manage his clients' investment holdings (for a fee), some of which the FTC has already agreed to release from the asset freeze under a clause of the preliminary injunction permitting it to do so. *See id.* at 6, sec. III.D (FTC and defendants may agree to release of assets held solely for third parties' benefit

without court intervention). Zangrillo may also obtain support from friends or family or seek unsecured loans.[23]

Zangrillo's arguments amount to a "mere recitation" of financial need, not the genuine demonstration necessary to justify a release of frozen assets. *Bonventre*, 720 F.3d at 128. Because Zangrillo has presented no valid evidence of need, the Court may affirm on this ground even if it concludes that *Luis* applies to the civil asset freeze in this case. *See United States v. Al-Arian*, 514 F.3d 1184, 1189 (11th Cir. 2008) (appeals court may affirm for any reason supported by the record).

2. Reasonable Fees. Zangrillo has also failed to show that the proposed $2.7 million in attorney's fees are "reasonable," as required by *Luis*. 136 S. Ct. at 1096 (plurality). "Under the lodestar method, courts determine attorney's fees based on the product of the reasonable hours spent on the case and a reasonable hourly rate." *In re Home Depot Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019). A "reasonable" rate is "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and

[23] Zangrillo has never asked the district court to unfreeze assets to pay his living expenses, so he must have some other source of money. Indeed, Zangrillo took a trip to Mexico rather than appear at the preliminary injunction hearing even though he was subject to a TRO and asset freeze at the time. ZA.161 at 30.

reputation." *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988).

Zangrillo asks this Court to perform its own reasonable-fee analysis in the first instance (Br.22-26), but that isn't how this works. The *district court* must calculate reasonable fees, which this Court reviews for abuse of discretion. *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008). Besides, Zangrillo's brief fails to supply the facts essential to a lodestar analysis, including (1) his attorneys' hourly rates; (2) the prevailing rates in the relevant legal community (Boston); or (3) an estimate of billable hours. Zangrillo omitted all of this information from his district court motion as well. *See* ZA.171 at 9-12.[24]

Thus, even if Zangrillo could show that *Luis* applies to the asset freeze here and that he needs the money to pay his counsel of choice, the most he can hope for is a remand to determine what fees are reasonable. But Zangrillo *already* had an opportunity to make that very showing and failed to provide any of the relevant information. This Court need not give him another bite at the apple.

[24] Zangrillo waited until his district court reply memorandum to reveal that his attorneys were billing him at rates of $990 to $1000 an hour. ZA.189-1 at 2; ZA.189-3 at 2. But he did not demonstrate that these rates were reasonable for Boston or estimate the number of billable hours. ZA.189.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order denying Zangrillo's motion for limited relief from the asset freeze.

Respectfully submitted,

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July 22, 2020

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,167 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word 2010 in 14 point Times New Roman type.

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CERTIFICATE OF SERVICE

I certify that on July 22, 2020, I served the foregoing brief on counsel of record using the Court's electronic case filing system. All counsel of record are registered ECF filers.

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