

No. \_\_\_\_\_

---

---

IN THE  
**Supreme Court of the United States**

---

---

WEBUILDTHEWALL, INC.,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

---

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

---

**PETITION FOR WRIT OF CERTIORARI**

---

JUSTIN S. WEDDLE

*Counsel of Record*

JULIA I. CATANIA

WEDDLE LAW PLLC

250 West 55th Street, 30th Floor

New York, New York 10019

(212) 859-3492

[jweddle@weddlelaw.com](mailto:jweddle@weddlelaw.com)

*Counsel for Petitioner*

November 18, 2021

---

---

**QUESTIONS PRESENTED FOR REVIEW**

1. Can a non-party whose assets were restrained by a District Judge presiding over a criminal case, and who was blocked from a timely opportunity to be heard on the propriety of the restraint, appeal either under Section 1292(a)(1)'s authorization to appeal orders refusing to modify an "injunction," or under Section 1291?
2. Do the forfeiture statutes permit prosecutors to obtain an *ex parte* restraint of assets that are not, and never have been, owned by any defendant, and then block that non-party owner of the assets from any opportunity to be heard before the defendants' sentencing?
3. Regardless of the forfeiture statutes, does the Constitution require that a non-defendant, non-party be afforded at least a post-restraint opportunity to be heard regarding the lack of nexus between the non-party's assets and the defendants or the alleged crime?

**PARTIES TO THE PROCEEDING**

All parties to the proceeding are contained in the caption.

**CORPORATE DISCLOSURE STATEMENT**

WeBuildtheWall, Inc. is a Florida not-for-profit corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

**LIST OF RELATED PROCEEDINGS**

*United States v. Kolfage*, No. 20 Cr. 412 (AT), U.S. District Court for the Southern District of New York. Entered Dec. 14, 2020.

*United States v. We Build the Wall, Inc.*, No. 20-4274-cr, U.S. Court of Appeals for the Second Circuit. Entered June 21, 2021.

**TABLE OF CONTENTS**

QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING .....	ii
CORPORATE DISCLOSURE STATEMENT .....	ii
LIST OF RELATED PROCEEDINGS .....	ii
TABLE OF AUTHORITIES .....	vi
OPINIONS AND ORDERS .....	1
JURISDICTIONAL STATEMENT.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	
INVOLVED .....	1
STATEMENT OF THE CASE .....	2
ARGUMENT: REASONS FOR GRANTING CERTIORARI.....	6
I. The Second Circuit’s Finding of No Appellate Jurisdiction Was Incorrect and Conflicts with Decisions of Multiple Other Circuits .....	7
A. Under Section 1292(a)(1), an Order Restraining Property Is Immediately Appealable .....	8
1. Multiple Circuits Have Held that Orders Restraining Assets for Forfeiture Under Section 853(e) and Various Other Statutes Are Appealable Under Section 1292(a)(1).....	8

2.	The Second Circuit’s Requirement that only Orders that “Shut Down the Business” Are Appealable Is Extra-Legal and Incorrect .....	10
B.	The Restraint of a Non-Party’s Assets, Combined with a Denial of the Non-Party’s Request to be Heard, Is Appealable Under Section 1291 .....	12
II.	There Is No Statutory Basis for the Restraining Order, and There Is Likewise No Statutory Bar to WeBuildtheWall’s Request to Be Heard .....	14
A.	The Narcotics Forfeiture Statute Neither Bars WeBuildtheWall’s Requested Relief Nor Authorizes Restraint of Property Never Obtained by Any Defendant.....	15
1.	Section 853’s Provisions Do Not Apply Because WeBuildtheWall’s Accounts Were Never Owned or Obtained by Defendants.....	15
2.	Section 853(e) Does Not Authorize the Indefinite <i>Ex Parte</i> Restraint that Was Ordered Here.....	18
3.	Section 853(k)’s Bar on Intervention Does Not Apply.....	23
B.	The Statutes Invoked Do Not Permit Provisional Relief for the Alleged Proceeds of Simple Wire Fraud .....	26

1. Criminal Versus Civil Forfeiture Statutes.....	27
2. The Statutes Invoked Do Not Permit Pretrial Restraint of Property Subject Only to Civil Forfeiture Statutes.....	28
III. It Is Unconstitutional to Deny WeBuildtheWall a Timely Opportunity to Be Heard .....	31
CONCLUSION.....	35

**APPENDIX  
TABLE OF CONTENTS**

<i>UNITED STATES V. WE BUILD THE WALL, INC.</i> , No. 20-4274-CR, 850 FED. APP’X 125 (MEM) (2D CIR. JUNE 21, 2021).....	1a
<i>UNITED STATES V. KOLFAGE</i> , No. 20 CR. 412 (AT), 2020 WL 7342796 (S.D.N.Y. DEC. 14, 2020).....	6a
U.S. CONSTITUTION AMEND. V .....	41a
18 U.S.C. § 981 .....	42a
18 U.S.C. § 982 .....	63a
18 U.S.C. § 983 .....	69a
21 U.S.C. § 853 .....	92a
28 U.S.C. § 1291 .....	106a
28 U.S.C. § 1292 .....	107a
28 U.S.C. § 2461 .....	112a

**TABLE OF AUTHORITIES**

**Cases**

<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018).....	10
<i>Cohen v. Beneficial Indus. Loan Corp.</i> , 337 U.S. 541 (1949).....	13
<i>Grupo Mexicano de Desarrollo S.A v. Alliance Bond Fund, Inc.</i> , 527 U.S. 308 (1999).....	19
<i>Honeycutt v. United States</i> , 137 S. Ct. 1626 (2017).....	14, 15, 16, 25
<i>In re Assets of Martin</i> , 1 F.3d 1351 (3d Cir. 1993) .....	9
<i>Kaley v. United States</i> , 571 U.S. 320 (2014).....	9, 31, 34
<i>Korea Shipping Corp. v. New York Shipping Ass’n</i> , 811 F.2d 124 (2d Cir. 1987) .....	11
<i>Luis v. United States</i> , 136 S. Ct. 1083 (2016).....	7, 24, 25
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	7, 31
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998).....	7, 16
<i>United States v. Chamberlain</i> , 868 F.3d 290 (4th Cir. 2017).....	8
<i>United States v. Daugerdas</i> , 892 F.3d 545 (2d. Cir. 2018) .....	25, 33
<i>United States v. E-Gold, Ltd.</i> , 521 F.3d 411 (D.C. Cir. 2008).....	31

<i>United States v. Field</i> , 62 F.3d 246 (8th Cir.1995).....	9
<i>United States v. Floyd</i> , 992 F.2d 498 (5th Cir. 1993).....	9
<i>United States v. Holy Land Foundation for Relief and Development</i> , 445 F.3d 771 (5th Cir. 2006).....	9
<i>United States v. James Daniel Good Real Property</i> , 510 U.S. 43 (1993).....	7, 34
<i>United States v. Kaley</i> , 579 F.3d 1246 (11th Cir. 2009).....	9
<i>United States v. Kirschenbaum</i> , 156 F.3d 784 (7th Cir. 1998).....	9
<i>United States v. Melrose East Subdivision</i> , 357 F.3d 493 (4th Cir. 2004).....	9
<i>United States v. Monsanto</i> , 924 F.2d 1186 (2d Cir. 1991) .....	31
<i>United States v. Musson</i> , 802 F.2d 384 (10th Cir. 1986).....	12
<i>United States v. Rapinski</i> , 20 F.3d 359 (9th Cir. 1994).....	9
<i>United States v. Roth</i> , 912 F.2d 1131 (9th Cir. 1990).....	9
<i>United States v. Spilotro</i> , 680 F.2d 612 (9th Cir. 1982).....	12
<i>United States v. Victoria-21</i> , 3 F.3d 571 (2d Cir. 1993) .....	10



**Statutes**

18 U.S.C. § 1963 .....	27
18 U.S.C. § 981 .....	27, 28
18 U.S.C. § 982 .....	27
18 U.S.C. § 983 .....	28
21 U.S.C. § 853(e) .....	passim
21 U.S.C. § 853(k) .....	passim
28 U.S.C. § 1291 .....	12
28 U.S.C. § 1292(a)(1) .....	8
28 U.S.C. § 2461(c) .....	29

**Other Authorities**

Department of Justice, <i>Asset Forfeiture Policy</i> <i>Manual</i> , (2019) .....	14, 22
S. Rep. 98-225, 98th Cong., 2d Sess. (1983), <i>reprinted in</i> 1984 U.S.C.C.A.N. 3182 .....	26

**Rules**

Fed. R. Crim. P. 41 .....	28
---------------------------	----

**OPINIONS AND ORDERS**

*United States v. We Build the Wall, Inc.*, No. 20-4274-cr, 850 Fed. App'x 125 (mem.) (2d Cir. June 21, 2021).

*United States v. Kolfage*, No. 20 Cr. 412 (AT), 2020 WL 7342796 (S.D.N.Y. Dec. 14, 2020).

**JURISDICTIONAL STATEMENT**

WeBuildtheWall, Inc. seeks review of a June 21, 2021, summary order of the Second Circuit. Pursuant to this Court's July 19, 2021, order, because the challenged order predates July 19, 2021, the deadline for filing this petition is 150 days from the challenged order. This Court has jurisdiction pursuant to Title 28, United States Code, Section 1254.

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

United States Constitution Amendment V.

18 U.S.C. § 981.

18 U.S.C. § 982.

18 U.S.C. § 983.

21 U.S.C. § 853.

28 U.S.C. § 1291.

28 U.S.C. § 1292.

28 U.S.C. § 2461.

**STATEMENT OF THE CASE**

WeBuildtheWall petitions for certiorari to review a Second Circuit summary order that found no appellate jurisdiction to hear WeBuildtheWall's appeal of an order refusing to modify a restraining order. The restraining order restrained WeBuildtheWall's bank accounts and was issued *ex parte* by a District Judge presiding over a criminal case of four defendants, none of whom had ever owned WeBuildtheWall's bank accounts. In other words, both the Second Circuit and the District Court blocked WeBuildtheWall, a non-party to the criminal case, from any timely opportunity to be heard regarding the *ex parte* and indefinite restraint of its bank accounts.

On August 20, 2020, the District Court unsealed an Indictment of Brian Kolfage, Stephen Bannon, Andrew Badolato, and Timothy Shea for conspiracy to commit wire fraud and conspiracy to commit money laundering. (A.2a). The gravamen of the Indictment is that the defendants defrauded donors to WeBuildtheWall, a non-profit entity dedicated to advocating for and privately funding and building wall sections securing the southern border of the United States. (A.2a). As has been widely publicized, WeBuildtheWall (together with others) has successfully built two sections of wall on private property in Sundland Park, New Mexico and Mission, Texas. The Indictment alleges that the defendants falsely stated that no donated money would go to WeBuildtheWall's

founder and CEO, Brian Kolfage, and then the defendants allegedly orchestrated a diversion of funds from WeBuildtheWall, some of which was allegedly funneled to Mr. Kolfage. (A.7a).

The Indictment also alleges that in late 2019, WeBuildtheWall specifically and publicly disclosed on its website that Mr. Kolfage would be compensated for his work starting in January 2020. In other words, the false information upon which the alleged scheme rests was publicly corrected in late 2019. The Indictment alleges that the conspiracy continued until the date the Indictment was returned (in August 2020), but it contains no allegations of fraudulent conduct (or additional proceeds of fraudulent conduct) occurring after the website was updated in late 2019.

In addition to its allegations of the charged crime, the Indictment provided notice of the government's intent to require *the defendants* to forfeit all of *the defendants'* interests in certain identified property, including WeBuildtheWall's bank accounts. (A.8a). The Indictment does not reflect any finding by the Grand Jury that the defendants had or have any ownership interest in WeBuildtheWall's bank accounts, or that the funds contained in those bank accounts have any nexus with the fraud alleged against the defendants.

Four days later, without any notice to WeBuildtheWall or its lawyers, the government submitted to the District Court an *ex parte* and sealed application for an order restraining WeBuildtheWall's

bank accounts. (A.8a). According to the District Court’s sealed order, entered the same day, the application was made pursuant to “Title 18, United States Code, Sections 981, 982, and Title 21, United States Code, Section 853 [and] based on the Affidavit of U.S. Postal Inspector Troy Pittenger.” (A.8a).

On October 13, 2020, non-parties WeBuildtheWall and Kris Kobach (WeBuildtheWall’s general counsel and a board member) filed a motion requesting that the sealed restraining order be modified to release funds unconnected with the charged offenses—donations received on or after February 1, 2020 (i.e., well after Mr. Kolfage’s compensation was disclosed and thus after any alleged misinformation in the donor community had dissipated). (A.9a). In the alternative, the motion sought access to the sealed application, and a hearing at which WeBuildtheWall and Mr. Kobach could be heard on whether there was any nexus between the funds restrained and the alleged fraud or any defendant. (*Id.*). WeBuildtheWall and Mr. Kobach did not seek to intervene in the criminal case or to challenge whether there was probable cause to believe the crimes alleged had been committed. (A.27a n.5). The motion argued that the statutes upon which the order purported to rest were inapplicable by their plain terms and did not authorize the *ex parte* restraint of a non-party’s assets or block the non-party from an opportunity to be heard. The motion further argued that if the cited statutes purported to establish such a power, the Due Process Clause of the Fifth

Amendment to the U.S. Constitution would override them and permit WeBuildtheWall a timely opportunity to be heard on the propriety of the restraint. The prosecutors opposed.

On December 14, 2020, the District Court denied the motion. (A.2a). The District Court “construe[d] the motion . . . as in effect requesting to intervene in this case to object to the Restraining Order, on the ground that it encompasses funds not subject to forfeiture.” (A.23a). The District Court held that “third parties are statutorily barred from intervention in a criminal case to challenge a forfeiture order.” (*Id.*). WeBuildtheWall timely filed a notice of appeal.

After full briefing and argument, the Second Circuit issued a summary order finding no appellate jurisdiction. The Second Circuit stated that the restraining order was issued pursuant to statute, and therefore did not qualify as an “injunction” that is appealable pursuant to Section 1292(a)(1). (A.3a-4a). The Second Circuit also stated that the order was not appealable pursuant to Section 1291 or the collateral order doctrine, even though WeBuildtheWall is not a party to the criminal case and the District Court’s order blocking it from any opportunity to be heard (except in an ancillary proceeding after the sentencing of the criminal defendants) about the seizure of its bank accounts was final as to WeBuildtheWall. (A.4a-5a).

**ARGUMENT: REASONS FOR GRANTING CERTIORARI**

The Court should grant the petition and reverse the Second Circuit's order. The Second Circuit's finding that an *ex parte* restraining order seizing WeBuildtheWall's bank accounts is not an "injunction" under Section 1292(a)(1) is in error. The Second Circuit's decision conflicts with decisions of the Third, Fourth, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits, all of which have held that restraining orders issued under forfeiture statutes are "injunctions" and immediately appealable under Section 1292(a)(1). In addition, the Second Circuit's decision that the order was unappealable under Section 1291 conflicts with decisions of the Ninth and Tenth Circuits.

The case also presents a significant, and if not corrected, dangerous expansion of the use of a narcotics forfeiture statute not only to seize property that is subject to no criminal forfeiture statute at all, but also property that is not and never has been owned by any defendant, based on an *ex parte* sealed application by prosecutors in a criminal fraud case. Even worse, the District Court's misreading of the statutes (compounded by the Second Circuit's erroneous interpretation of appellate jurisdiction) purports to block WeBuildtheWall from any opportunity to be heard regarding the propriety of this *ex parte* restraint of its assets until after the defendants' sentencing. The result conflicts with decisions of this Court, which have emphasized that criminal forfeiture proceedings are

*in personam* and “cannot be imposed upon innocent owners,” *United States v. Bajakajian*, 524 U.S. 321, 332 (1998), and that only *tainted* property is subject to pretrial restraint, *Luis v. United States*, 136 S. Ct. 1083, 1092 (2016).

Even if the statutes at issue arguably set up such a scheme, it would constitute a clear violation of WeBuildtheWall’s due process rights, and the lower court decisions would together conflict with decisions of this Court. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 50-52 (1993) (the Fourth and Fifth Amendments apply to forfeiture-related *ex parte* seizures); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (due process requires “the opportunity to be heard at a meaningful time and in a meaningful manner”).

#### **I. THE SECOND CIRCUIT’S FINDING OF NO APPELLATE JURISDICTION WAS INCORRECT AND CONFLICTS WITH DECISIONS OF MULTIPLE OTHER CIRCUITS**

The Second Circuit incorrectly found that an order refusing to modify a restraining order restraining the bank accounts of WeBuildtheWall, a non-party, based on the prosecution’s noticed intention to forfeit the criminal defendants’ (non-existent) interest in those accounts was not an appealable “injunction,” nor an appealable “final order” or collateral order. The decision conflicts with the settled law in multiple Circuits,



and this Court should grant the petition and reverse the Second Circuit’s anomalous ruling.

**A. Under Section 1292(a)(1), an Order Restraining Property Is Immediately Appealable**

The Second Circuit incorrectly decided that an asset seizure ostensibly pursuant to a narcotics forfeiture statute—21 U.S.C. § 853(e)—is not an “injunction” subject to immediate appeal pursuant to 28 U.S.C. § 1292(a)(1). The Second Circuit’s decision conflicts with decisions of seven Circuits, all of which have held that restraining orders issued under forfeiture statutes are appealable “injunctions.” This Court should grant the petition and resolve this conflict among the circuits by confirming that an order restraining property issued pursuant to statute, such as the Section 853(e) *ex parte* restraining order issued against non-party WeBuildtheWall’s bank accounts, is appealable under Section 1292(a)(1).

**1. Multiple Circuits Have Held that Orders Restraining Assets for Forfeiture Under Section 853(e) and Various Other Statutes Are Appealable Under Section 1292(a)(1)**

The Fourth, Fifth, Ninth, Eleventh, and D.C. Circuits have all confirmed that a Section 853(e) order restraining assets is appealable under Section 1292(a)(1). *United States v. Chamberlain*, 868 F.3d 290, 293 (4th Cir. 2017); *United States v. Floyd*, 992

F.2d 498, 500 (5th Cir. 1993); *United States v. Holy Land Foundation for Relief and Development*, 445 F.3d 771, 780 n.4 (5th Cir. 2006); *United States v. Rapsinski*, 20 F.3d 359, 361 (9th Cir. 1994); *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990); *United States v. Kaley*, 579 F.3d 1246, 1252 (11th Cir. 2009); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 414-15 (D.C. Cir. 2008), *abrogated on other grounds*, *Kaley v. United States*, 571 U.S. 320 (2014). Indeed, Section 853(e) itself uses the words “restraining order or injunction” with no indication that Congress intended them to have any non-traditional meaning.

Other Circuits have found that restraining orders issued under other forfeiture statutes are likewise appealable under Section 1292 as injunctions. *See United States v. Melrose East Subdivision*, 357 F.3d 493, 498 n.2 (4th Cir. 2004) (stating that a restraining order under 18 U.S.C. § 983(j)(1)(A) (a civil asset forfeiture provision) is appealable as an injunction under Section 1292(a)(1)); *United States v. Kirschenbaum*, 156 F.3d 784, 788 (7th Cir. 1998) (restraining order under 18 U.S.C. § 982(b) (a criminal forfeiture statute) is immediately appealable as an “injunction”); *In re Assets of Martin*, 1 F.3d 1351, 1355 (3d Cir. 1993) (stating that restraining order under RICO, 18 U.S.C. § 1963(d)(1), is appealable as an injunction); *see also United States v. Field*, 62 F.3d 246, 248 (8th Cir. 1995) (reviewing post-indictment *ex parte* restraining order under 18 U.S.C. § 982(b)(1) without analyzing jurisdiction).

## 2. The Second Circuit’s Requirement that only Orders that “Shut Down the Business” Are Appealable Is Extra-Legal and Incorrect

By contrast to the above-described Circuit decisions, the decision below, and other Second Circuit cases, have engrafted an additional requirement that appears nowhere in the statute—that an order seizing assets for forfeiture is only appealable if it has “shut down the business.” (A.4a); *see United States v. Victoria-21*, 3 F.3d 571, 574-75 (2d Cir. 1993).<sup>1</sup> This rule also goes beyond this Court’s decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). *Abbott* stated that whether an order is an “injunction” is determined not by the label attached to it, but by its “practical effect.” 138 S. Ct. at 2319. Under the Second Circuit’s re-reading of Section 1292, traditional orders in equity are appealable, but to obtain appellate review of statutorily-authorized orders with the “practical effect” of an injunction, an appellant must also demonstrate “serious, perhaps irreparable consequences.” (A.3a (quoting *Korea Shipping Corp. v. New York Shipping Ass’n*, 811

---

<sup>1</sup> WeBuildtheWall satisfies even the Second Circuit’s extra-statutory test—it has largely ceased operations, is unable to pay its bills, and is functioning only because its general counsel and others are continuing to serve on a voluntary basis. There was no opportunity to develop or present these facts to the Second Circuit.

F.2d 124, 126 (2d Cir. 1987))). The Second Circuit's additional requirement should be rejected.

The Second Circuit's test also requires the Court of Appeals to engage in a factual inquiry (i.e., an inquiry into the harm that may flow from delaying an appeal) that is unaccompanied by factual development. Here, the District Court did not conduct factual development. Instead, the District Court ruled that WeBuildtheWall was statutorily barred (under the narcotics forfeiture statute invoked by the prosecutors) from being heard on the propriety of the restraint and rejected WeBuildtheWall's request for a hearing. The Second Circuit, for its part, made its own factual findings about the purported lack of harm from delaying an appeal that were based on no factual record. The Second Circuit found that "WBTW remains able to transact certain business, as it has paid to lift a temporary administrative dissolution in Florida." (A.4a). Because there was no factual development, the Second Circuit had no basis to conclude that WeBuildtheWall made this payment (as opposed to WeBuildtheWall's general counsel personally making this payment), and that this less-than-\$250 payment to maintain legal status means it can "transact certain business." Nor was there any record developed below or in the Court of Appeals of the other "serious, perhaps irreparable consequences" WeBuildtheWall faces from the indefinite restraint of its bank accounts. The Second Circuit's test of appealability thus

requires a factual showing by the appellant that the appellant is barred from presenting.

The Second Circuit’s test should be rejected, and this Court should clarify that orders with the “practical effect” of an injunction—including the restraining order at issue here—are appealable under Section 1292, regardless of whether they derive from traditional equity proceedings or statute, and without any additional showing of harm by the appellant.

**B. The Restraint of a Non-Party’s Assets, Combined with a Denial of the Non-Party’s Request to be Heard, Is Appealable Under Section 1291**

Even if the restraining order was not appealable as an injunction under Section 1292, it is appealable pursuant to Title 28, United States Code, Section 1291, either as a final order or under the “collateral order” doctrine. The Second Circuit’s finding otherwise conflicts with the law in two Circuits. The Tenth Circuit has held that a Section 853(e) restraining order is immediately appealable under the collateral order doctrine under Section 1291. *See United States v. Musson*, 802 F.2d 384, 385 (10th Cir. 1986). Similarly, the Ninth Circuit has held that a restraint ordered under 18 U.S.C. § 1963(d), a RICO forfeiture provision that is identical to Section 853(e), is appealable under the same doctrine. *See United States v. Spilotro*, 680 F.2d 612, 615 (9th Cir. 1982).

The challenged restraining order satisfies the three-part test of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). *First*, it left nothing unfinished—it interpreted WeBuildtheWall’s motion as a request to intervene in the criminal case, a request it denied. (A.23a). *Second*, the decision regarding WeBuildtheWall’s accounts was not a step toward final disposition of the merits of the criminal case. WeBuildtheWall did not seek to challenge the allegations of the Indictment or the merits of the case against the defendants. Rather, WeBuildtheWall’s motion was directed at the legal and constitutional basis for seizing assets that do not and never have belonged to any defendant, and the nexus (or not) between the charged fraud and WeBuildtheWall’s later-received and not-diverted assets. *Third*, WeBuildtheWall’s right to use its funds during the years that the criminal case is pending impairs an important property right that is irreparably lost absent review.

This Court should grant the petition and resolve the circuit split created by the Second Circuit’s decision by confirming that an order rejecting a non-party’s attempt to be heard on the propriety of an order restraining its assets is immediately appealable under Section 1291.

## II. THERE IS NO STATUTORY BASIS FOR THE RESTRAINING ORDER, AND THERE IS LIKEWISE NO STATUTORY BAR TO WEBUILDTHEWALL'S REQUEST TO BE HEARD

The Second Circuit's finding of no appellate jurisdiction rests on its unexplained statement that "the funds were restrained pursuant to the statutory authority provided to the district court by the interaction of 18 U.S.C. § 981(c), 21 U.S.C. § 853(e), and 28 U.S.C. § 2461(c)." (A.3a-4a). The statutes invoked only apply to property "subject to forfeiture" thereunder and, therefore, do not authorize any restraint of a non-defendant's property. As this Court held in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), criminal forfeiture under Section 853 "is limited to property the defendant himself actually acquired as a result of the crime." *Id.* at 1635; *see id.* at 1632-33. Indeed, restraining property that has never been owned by a defendant, as the prosecution did here, violates the Department of Justice's own published manual on Asset Forfeiture, which states: "*because only property of the defendant can be forfeited in a criminal case, the prosecutor should make reasonable efforts to establish that any property alleged to be forfeitable, and particularly property sought to be restrained as forfeitable, is property of the defendants within the meaning of the applicable forfeiture statutes,*" Department of Justice, *Asset Forfeiture Policy Manual*, Chap. 6, Sec. B.4 (p.114) (2019) (emphasis added). As the Department of Justice's Asset Forfeiture manual concedes,

faithful application of the plain words of the statutes at issue demonstrates that they do not permit restraint of property never obtained by a defendant. Nor do they permit provisional restraint where there is only a civil forfeiture predicate charged. This Court should grant the petition and reverse the decision below as contrary to this Court's precedent and the statutes at issue.

**A. The Narcotics Forfeiture Statute Neither Bars WeBuildtheWall's Requested Relief Nor Authorizes Restraint of Property Never Obtained by Any Defendant**

The plain language of the narcotics forfeiture statute (Section 853) demonstrates that neither Section 853(k)'s bar on intervention nor Section 853(e)'s authorization of orders restraining property applies here. *See Honeycutt*, 137 S. Ct. at 1635 n.2 (stating that although Section 853 directs that it should be "liberally construed to effectuate its remedial purposes," the "Court cannot construe a statute in a way that negates its plain text").

**1. Section 853's Provisions Do Not Apply Because WeBuildtheWall's Accounts Were Never Owned or Obtained by Defendants**

The provisions of Section 853 invoked by the courts below (Section 853(e) and Section 853(k)) only apply where certain property is "subject to forfeiture under this section." Here, under this Court's



precedents, as well as the plain language of Section 853, only property owned or obtained *by the defendants* is “subject to forfeiture under this section.” Because no defendant ever owned or obtained WeBuildtheWall’s bank accounts or the funds therein, no defendant can be ordered to forfeit that restrained property, and therefore the restraining order is not permitted under Section 853(e), and Section 853(k) does not apply.

This Court has held that defendants may not be ordered to forfeit property that they themselves did not acquire. *Honeycutt*, 137 S. Ct. at 1631-32 (rejecting attempt to engraft joint and several liability onto forfeiture under Section 853); *see also Bajakajian*, 524 U.S. at 332 (*in personam* criminal forfeitures “serve no remedial purpose, [are] designed to punish the offender, and *cannot be imposed upon innocent owners.*” (emphasis added)). Some of the same statutory language that this Court relied upon to conclude that Section 853 does not permit “joint and several” forfeiture orders against defendants demonstrates that Section 853 does permit restraints against non-defendants of property never obtained by a defendant.

Section 853(a)’s definitions of forfeitable property all specifically reference the defendant’s ownership. Thus, Section 853(a)(1) permits the forfeiture of “any property constituting, or derived from, any proceeds *the person* obtained, directly or indirectly, as the result of such violation [i.e., a narcotics offense].”

(emphasis added). No defendant ever obtained WeBuildtheWall’s bank accounts or the money therein; the money was donated to and obtained by WeBuildtheWall. Because the money remains in WeBuildtheWall’s bank accounts, it by definition is not included in the money that the defendants allegedly diverted to themselves as part of the fraud; the money that *was* diverted is no longer in WeBuildtheWall’s bank accounts and was instead obtained by the defendants.<sup>2</sup> Likewise, the other portions of Section 853(a) (and other criminal forfeiture statutes) apply only to property possessed by the defendant. *See* 21 U.S.C. § 853(a)(2) (“any of *the person’s property* used . . . to commit . . . such violation [i.e., a narcotics offense]” (emphasis added)); *id.* § 853(a)(3) (“in the case of a person convicted of engaging in a continuing criminal enterprise . . . *the person* shall forfeit . . . *any of his interest in* . . . the continuing criminal enterprise.” (emphasis added)); *see, e.g.*, 18 U.S.C.

---

<sup>2</sup> This case does not present a situation in which a defendant constructively owns funds that are not paid directly to the defendant but instead are directed, at the defendant’s discretion and for the defendant’s own benefit, to a third party. Here, the gravamen of the fraud is the opposite: donors’ funds were *diverted from* WeBuildtheWall to the personal benefit of the defendants. In other words, if donors sent funds directly to WeBuildtheWall on the understanding that those funds would be used to pursue WeBuildtheWall’s mission (and would not be diverted for the personal benefit of the defendants), and those funds were or will be so used, then those funds reflect the donors’ intent and are not the proceeds of fraud.

§ 982(a) (stating, repeatedly, that the court “shall order that *the person* forfeit” (emphasis added)).<sup>3</sup>

Thus, both the statutory language and this Court’s reasoning in *Honeycutt* demonstrate that “property subject to forfeiture under this section” does not include property never owned or obtained by a defendant. Here, WeBuildtheWall’s bank accounts fall outside that definition of forfeitable property, and therefore neither Section 853(e) nor Section 853(k) applies.

## **2. Section 853(e) Does Not Authorize the Indefinite *Ex Parte* Restraint that Was Ordered Here**

Section 853(e) does not authorize the indefinite *ex parte* restraint of assets imposed here by the District Court. Section 853(e), which is entitled “Protective Orders,” permits the entry of a “restraining order or injunction” under certain specified conditions that do

---

<sup>3</sup> By contrast, the civil forfeiture statute that applies to the proceeds of simple wire fraud defines forfeitable property without reference to its owner. *See* 18 U.S.C. § 981(a)(1)(C) (by cross-reference, authorizing civil forfeiture of property that is or is derived from “proceeds” of simple wire fraud); *id.* § 981(a)(2) (defining “proceeds” without reference to anyone’s (such as a defendant’s) ownership or receipt of the funds). This distinction in the statutory language makes sense because civil forfeiture proceedings are *in rem* actions against the property itself, require notice to all “interested parties,” and afford due process to any person filing a claim. 18 U.S.C. § 983 (“General rules for civil forfeiture proceedings”).

not apply here. It is critical to analyze the words of the statute. Pursuant to Section 853(e)(1)(A), such an order is permitted “to preserve the availability of property described in subsection (a) for forfeiture under this section.”

Upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section.

*Id.*<sup>4</sup>

This language establishes five requirements for a restraining order, none of which is met here.

- (1) **The restraining order must be “to preserve the availability of property described in subsection (a).”** Subsection (a) specifically describes

---

<sup>4</sup> WeBuildtheWall is not a guarantor for any monetary sanction or restitution order that may be imposed on any defendant, and thus there is no basis for holding WeBuildtheWall responsible for any such sanction, let alone for restraining assets to secure the future payment of any such non-existent obligation. *See Grupo Mexicano de Desarrollo S.A v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 330-33 (1999) (declining to “craft a ‘nuclear weapon’ of the law”—provisional restraint of another’s assets to secure a potential future legal remedy—because “before judgment (or its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor.”).

certain property of a defendant, namely the proceeds of certain narcotics offenses, property used in the commission of certain narcotics offenses, and property affording control over a continuing criminal narcotics enterprise. *See* 21 U.S.C. § 853(a). The restraining order issued here has no such purpose. There are no narcotics-offense-related proceeds or property involved here, and thus the sole statutorily authorized purpose for a restraining order does not exist. And, as discussed above, the property never belonged to a defendant.

- (2) **There must be an indictment or information “charging a violation of this subchapter or subchapter II.”** “This subchapter” refers to illegal distribution of narcotics; “subchapter II” relates to illegal import and export of narcotics. The Indictment filed in this case charges no such narcotics violations. Instead, it charges a wire fraud conspiracy and a money laundering conspiracy, neither one of which is a violation of any subchapter of Title 21, let alone the particular subchapters referenced in Section 853(e).<sup>5</sup>

---

<sup>5</sup> Where such an indictment has not been issued, Section 853(e) permits the issuance of a 90-day restraining order “after notice to persons appearing to have an interest in the property and opportunity for a hearing,” 21 U.S.C. § 853(e)(1)(B), *or* “without notice or opportunity for a hearing,” if a particularized showing is made, the restraining order expires within fourteen days, and a hearing is held “at the earliest possible time and prior to the

- (3) **The violation must be one “for which criminal forfeiture may be ordered under this section.”** Section 853(a) specifies that forfeiture is permitted only for narcotics violations “punishable by imprisonment for more than one year.” As further discussed below (*infra* Part II.B), there is no criminal forfeiture proceeding and this case charges no narcotics violations at all, so there is no applicable violation “for which *criminal* forfeiture may be ordered *under this section*.” (emphasis added).
- (4) **The indictment must allege “that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture.”** As the government specifically conceded below, the restraining order was not based on any grand jury finding or allegation that any property was subject to forfeiture. The Indictment made no claim that the grand jury found that any property was subject to forfeiture. Instead, the Indictment included only the government’s notice that, upon the conviction of one or more of the defendants, it intends to seek forfeiture of certain assets. The Indictment therefore does not contain the grand jury allegations or findings that are required to trigger Section 853(e). The absence is particularly striking because the

---

expiration of the temporary restraining order.” 21 U.S.C. § 853(e)(2).

Department of Justice's own Asset Forfeiture Policy Manual concedes: "If the indictment only gives notice of forfeiture rather than alleging that particular property is forfeitable, and no explicit probable cause finding is included in the notice, then arguably the filing of the indictment would not bar collateral litigation over the property." Department of Justice, *Asset Forfeiture Policy Manual*, Chap. 6, Sec. B.3 (p. 112) (2019).

- (5) **The indictment's allegation must be that property is subject to forfeiture "under this section."** Even if the Indictment contained an allegation that property is subject to forfeiture (rather than simple notice of the government's intent to seek forfeiture in the future), it does not allege that any property is subject to forfeiture *under Section 853*. As noted above, Section 853 applies only to property of the defendant that is the proceeds of certain narcotics offenses, or property used in the commission of narcotics offenses or a continuing criminal narcotics enterprise. *See* 21 U.S.C. § 853(a). Because this case has nothing to do with any narcotics offense or a continuing criminal narcotics enterprise and was not owned by any defendant, there is no such allegation in the Indictment.

Congress did not, as the prosecution appears to contend, state that an *ex parte* indefinite restraining order may be issued upon the return of any indictment

giving any kind of notice of the government’s intent to forfeit any kind of property as the proceeds of any kind of crime. Congress could have created such a regime using simpler language, such as: “upon the filing of an indictment giving notice of an intent to forfeit property as the proceeds of crime, the court may enter a restraining order against that property.” The statutory language enacted is more precise—and more demanding—than that. None of the statutory prerequisites for a Section 853(e) restraining order was met, and thus this Court should grant the petition and reverse.

### **3. Section 853(k)’s Bar on Intervention Does Not Apply**

A faithful application of the plain language of Section 853(k) likewise demonstrates that the District Court below was incorrect in stating that Section 853(k) barred WeBuildtheWall from being heard on the propriety of the restraint of its accounts, except in a post-sentencing ancillary proceeding.

Section 853(k) provides:

Except as provided in subsection (n), no party *claiming an interest in property subject to forfeiture under this section* may—(1) *intervene in a trial or appeal* of a criminal case involving the forfeiture of such property under this section; or (2) *commence an action at law or equity* against the United States concerning the validity of his alleged interest in the property



*subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.*

21 U.S.C. § 853(k) (emphasis added).

“Property subject to forfeiture under this section” has a plain meaning—indeed, Section 853(a) is headed “Property subject to criminal forfeiture” and clearly and repeatedly limits its scope to a *defendant’s* property. A non-defendant’s property is not “subject to forfeiture under this section.” Moreover, not all property that belongs to the defendant is “subject to forfeiture” under Section 853(a). As this Court has held, even within the universe of property that belongs to a defendant, only *tainted* property is property that can be restrained, because the government has no present property interest in a defendant’s untainted (or substitute) assets. *See Luis*, 136 S. Ct. at 1092. In other words, Section 853(k) by its terms is limited to claimants who claim an ownership interest in *the defendants’ tainted property*, and seek to assert a superior ownership interest or a supervening ownership interest to that of the government (by substitution for the defendant). WeBuildtheWall sought to be heard on the legal basis for the restraint of non-party funds, and the legal and factual nexus (or not) between the restrained funds and the alleged fraud.

The District Court’s view that an ancillary proceeding pursuant to Section 853(n) would provide adequate process to WeBuildtheWall (A.36a) is incorrect

and highlights the error of the lower courts' failure to apply the "property subject to forfeiture under this section" language. This is because a Section 853(n) ancillary proceeding does not permit any challenge regarding whether property is "subject to forfeiture under this section." Instead, it assumes that property is "subject to forfeiture under this section"—i.e. that the property was "obtained by" a defendant and is tainted property, see *Honeycutt*, 137 S. Ct. at 1631-32; *Luis*, 136 S. Ct. at 1092—and permits only claims asserting that a claimant has a superior ownership interest to that of a defendant's, or that a claimant is a bona fide purchaser for value post-dating the defendant's ownership. In a different case, the Second Circuit has solved this "glitch" by essentially finding the statute unconstitutional and permitting additional challenges in a Section 853(n) ancillary proceeding. See *United States v. Daugerdas*, 892 F.3d 545, 555, 557-58 (2d. Cir. 2018) (Lynch, J.).

A simpler path is to apply the words of Section 853(k) as written. Unless the challenge is by people claiming "an interest in property subject to forfeiture under this section," which WeBuildtheWall expressly was not, the challengers fall outside the plain language of Section 853(k) and there is no statutory bar to their ordinary due process rights to challenge a government seizure of their property.<sup>6</sup>

---

<sup>6</sup> This straightforward reading of the statute is supported by its legislative history. The Senate Report accompanying the

This Court should grant the petition and clarify that the language of Section 853 should be applied as written, with the result that neither its provisions for restraining orders, nor its purported bar on intervention, authorizes the actions below.

**B. The Statutes Invoked Do Not Permit Provisional Relief for the Alleged Proceeds of Simple Wire Fraud**

Not only are Section 853(e) and 853(k) inapplicable here because the various prerequisites described above have not been met, but they are also inapplicable because this case is neither a narcotics case nor a case involving any statute that incorporates the provisional remedy provisions of Section 853. Section 853 does not directly apply to the underlying criminal case because it involves an alleged simple wire fraud, not a narcotics crime. The courts below incorrectly stated that Section 853 was made applicable to the restraint of WeBuildtheWall's accounts by operation of Title 28, United States Code, Section 2461(c). A faithful application of the plain language of Section 2461(c) demonstrates that it does not authorize the invocation of

---

identical provision of the RICO statute, 18 U.S.C. § 1963(i), specifically noted that its bar on intervention “is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however.” S. Rep. 98-225, 98th Cong., 2d Sess., 206 n.593 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3389 n.593.

Section 853 in a simple wire fraud case because simple wire fraud is not a predicate crime for any *criminal* forfeiture statute. Instead, it is only a predicate for *civil* forfeiture.

### 1. Criminal Versus Civil Forfeiture Statutes

Congress has enacted *criminal* forfeiture provisions that apply to various predicate crimes. *See, e.g.*, 18 U.S.C. § 982 (entitled “Criminal Forfeiture” and applying to enumerated felonies, not including wire fraud unless certain specific characteristics (not present here) are also involved); 18 U.S.C. § 1963 (entitled “Criminal Penalties” and relating to RICO crimes); 21 U.S.C. § 853 (entitled “Criminal Forfeitures” and relating to narcotics crimes).

Congress has also enacted *civil* forfeiture provisions that apply to some of the same predicates that trigger criminal forfeiture, as well as additional predicates that are not covered by any criminal forfeiture statute. The wire fraud charged in this case is not a predicate for any *criminal* forfeiture statute and therefore is only an enumerated predicate (by cross-reference) in a *civil* forfeiture statute—Title 18, United States Code, Section 981. While some criminal forfeiture statutes, such as Section 982 cross-reference Title 21, United States Code, Section 853, *see* 18 U.S.C. § 982(b), the Section 981 civil forfeiture statute does not.

Both criminal and civil forfeiture provisions contain authority for obtaining provisional relief. Thus, the prosecutors here could have commenced an *in rem* civil forfeiture action against the funds in WeBuildtheWall's accounts pursuant to Section 981. Doing so would have required the prosecutors to provide notice to WeBuildtheWall and would have provided immediate due process to WeBuildtheWall to contest the forfeiture action. *See* 18 U.S.C. § 983. As part of such a proceeding, the prosecutors could have sought provisional seizure of the accounts either with a warrant issued pursuant to Fed. R. Crim. P. 41, or (after complaint) with an arrest warrant issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. *See* 18 U.S.C. § 981(b)(2).

The prosecution did not do this. Instead, it used an *in personam* forfeiture action against the defendants to seize WeBuildtheWall's accounts. These accounts are not and never have been owned or obtained by any defendant. The prosecutors then invoked the same inapplicable *in personam* forfeiture statutes to block WeBuildtheWall from challenging the restraint. The statutory scheme does not permit such an end-run.

## **2. The Statutes Invoked Do Not Permit Pretrial Restraint of Property Subject Only to Civil Forfeiture Statutes**

The Second Circuit incorrectly stated that Section 853's provisions were made applicable to

WeBuildtheWall by operation of Title 28, United States Code, Section 2461(c). That statute only permits invocation of Section 853's provisions where a criminal forfeiture predicate has been alleged. There is no such predicate here, so Section 2461(c) does not invoke Section 853's restraining order provisions, or its purported bar on intervention.

Title 28, United States Code, Section 2461(c) provides:

If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

28 U.S.C. § 2461(c). Nothing about the wording of this statute suggests that Congress intended to erase the

distinction between civil and criminal forfeiture predicates, or that it intended to make the procedure of Section 853 applicable to all cases in which there is a notice provision in the indictment of the prosecution's intent to forfeit property.

On the contrary, the statute treats civil and criminal forfeiture predicates the same for some purposes (i.e., in giving the government power to include a notice provision in an indictment, and in authorizing the court to enter an order of forfeiture at a defendant's sentencing), but its cross-reference to Section 853 is limited to a "criminal forfeiture proceeding." The statute nowhere purports to declare that if a civil forfeiture notice is included in an indictment, the civil forfeiture predicate is thereby converted into a "criminal forfeiture proceeding." Indeed, if that had been the intent of Congress, it could have simply stated: "The procedures in section 413 of the Controlled Substances Act (21 U.S.C. § 853) apply to all stages of such a ~~criminal~~ forfeiture proceeding." It did not.

Because the plain language of the statute provides no cross-reference to Section 853 for cases involving *civil* forfeiture statutes, neither Section 853(e)'s or Section 853(f)'s provisions for restraining orders or seizure warrants, nor Section 853(k)'s limited bar on intervention, is applicable. As a result, the Second Circuit's finding that the restraining order was issued pursuant to those statutes, with the result that it was not appealable, was in error and should be reversed.

**III. IT IS UNCONSTITUTIONAL TO DENY  
WEBUILDTHEWALL A TIMELY OPPORTUNITY  
TO BE HEARD**

If, as the Second Circuit reasoned, Section 853 permits the restraint of WeBuildtheWall’s funds—*ex parte* and without a hearing and with no opportunity for appeal—in a case against the defendants, and WeBuildtheWall must await the defendants’ sentencing before being heard, the Constitution would override Section 853 and demand that WeBuildtheWall be afforded due process. *Cf. Kaley*, 571 U.S. at 324 n.3 (stating that, at oral argument, the government conceded that a defendant whose property is restrained has a constitutional right to a hearing on traceability of the assets to the crime); *United States v. Monsanto*, 924 F.2d 1186, 1193-98 (2d Cir. 1991) (en banc) (analyzing due process requirements using *Mathews v. Eldridge*, 424 U.S. 319 (1976), factors and holding that a post-seizure, pre-trial hearing is required by the Fifth and Sixth Amendments); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415, 419 (D.C. Cir. 2008) (finding that *ex parte* initial seizure was permitted, given exigencies of the particular facts, but also that due process requires a hearing to determine, pre-trial, the propriety of the initial seizure).

Under the *Mathews* factors, WeBuildtheWall has a due process right to be heard because, as *Mathews* itself emphasized, “the fundamental requirement of due process is the opportunity to be heard ‘at a



meaningful time and in a meaningful manner.” *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

First, WeBuildtheWall’s interest in using its property in furtherance of its mission is strong—the restraint has essentially frozen WeBuildtheWall’s ability to pay its bills or pursue its mission at the same time that it is working to transfer a section of wall to the Department of Homeland Security.

Second, there exists a significant risk of an erroneous deprivation of property absent a hearing to test the government’s claimed probable cause establishing that the restrained funds are, in fact, “subject to forfeiture”—i.e. that they are owned or obtained by a defendant, and that they have the requisite nexus to the alleged fraud (since the funds were donated to WeBuildtheWall well after WeBuildtheWall made a specific disclosure that Mr. Kolfage would be compensated). Indeed, none of those funds was ever owned or obtained by a defendant, and if not restrained, would be used to pursue WeBuildtheWall’s mission, just as donors intended. In addition, nearly all of those funds were received well after, as the Indictment acknowledges, WeBuildtheWall updated its website and made a specific disclosure that Mr. Kolfage would be compensated. There can be no factual or legal connection between an alleged fraud that diverted funds to compensate Mr. Kolfage and donations made to WeBuildtheWall that were never obtained by any

defendant. Similarly, there can be no factual or legal connection between an alleged fraud involving false claims that Mr. Kolfage would not be compensated and donations made well after WeBuildtheWall specifically disclosed that Mr. Kolfage would be compensated.<sup>7</sup>

Moreover, WeBuildtheWall's interests are not adequately protected by the defendants' trial. Beyond the overarching fact that an acquittal would vitiate any basis for forfeiture by demonstrating no predicate criminal conduct, the defendants have no particular interest in focusing on WeBuildtheWall's accounts as part of their defense, including whether those accounts have ever belonged to a defendant or whether there is any nexus between the funds in those accounts and the alleged crime. *See Daugerdas*, 892 F.2d at 557 ("The defendant will not end up with the property either way, and he might actually get a windfall if the money he owes is paid off with someone else's property.").

Third, the government's interest, and any burden placed upon the government, does not justify bypassing all process respecting the restraining order. The challenge here is to the nexus between the restrained WeBuildtheWall funds and anything owned by a

---

<sup>7</sup> It is no answer for the prosecution to point to the continuation of the conspiracy to the date the Indictment was returned. Even if the conspiracy continued, that does not mean that it continued to generate "proceeds" subject to forfeiture.

defendant, as well as the nexus between WeBuildtheWall's accounts and the alleged fraud, which are "technical matter[s] far removed from the grand jury's core competence and traditional function." *Kaley*, 571 U.S., at 331 n.9. The finding of probable cause to believe the crime has been committed is not at issue in WeBuildtheWall's request for relief, and thus the risks to the prosecution from being forced to preview its case are not presented.

This Court has held that seizures of property in the forfeiture context must satisfy the requirements of the Constitution, including the requirements of the Fifth Amendment. *James Daniel Good Real Property*, 510 U.S. at 50-52 (analyzing both the Fourth and Fifth Amendment in the context of an *ex parte* seizure of the alleged proceeds of crime; "the proper question is not which Amendment controls *but whether either Amendment is violated.*" (emphasis added)). Because WeBuildtheWall is not a defendant, and because the defendants have never owned or obtained the restrained funds, the private interest in using property free of government interference is *greater*, not less, than it would be where a defendant's funds are restrained. Due process requires a hearing to continue the restraint. Accordingly, the Second Circuit's finding of no appellate jurisdiction and the District Court's Order denying any timely opportunity to be heard should be reversed.

**CONCLUSION**

For the reasons stated above, the Court should grant the petition and reverse the Second Circuit's summary order.

Dated: November 18, 2021

JUSTIN S. WEDDLE

*Counsel of Record*

JULIA I. CATANIA

WEDDLE LAW PLLC

250 West 55th Street

30th Floor

New York, NY 10019

212-997-5518

[jweddle@weddlelaw.com](mailto:jweddle@weddlelaw.com)

## **APPENDIX**

1a

***UNITED STATES V. WE BUILD THE WALL, INC.,  
NO. 20-4274-CR, 850 FED. APP'X 125 (MEM)  
(2D CIR. JUNE 21, 2021)***

United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

WE BUILD THE WALL, INC., Interested Party-  
Appellant.<sup>1</sup>

20-4274-cr

June 21, 2021

Appeal from the United States District Court for the  
Southern District of New York (Torres, *J.*).

**ON CONSIDERATION WHEREOF, IT IS  
HEREBY ORDERED, ADJUDGED, AND  
DECREED** that the appeal be and it hereby is  
**DISMISSED.**

**Attorneys and Law Firms**

Appearing for Appellant: Justin S. Weddle, Weddle  
Law PLLC (Julia I. Catania, on the brief), New York,  
N.Y.

---

<sup>1</sup> The Clerk of Court is directed to amend the caption as set forth  
above.

Appearing for Appellee: Robert B. Sobelman, Assistant United States Attorney (Alison Moe, Nicolas Roos, Anna M. Skotko, Assistant United States Attorneys, on the brief), for Audrey Strauss, United States Attorney for the Southern District of New York, New York, N.Y.

Present: ROSEMARY S. POOLER, RAYMOND J. LOHIER, JR., Circuit Judges. LEWIS A. KAPLAN, District Judge.<sup>2</sup>

### **SUMMARY ORDER**

Interested-Party-Appellant We Build the Wall, Inc. (“WBTW”) appeals from the December 14, 2020 order of the United States District Court for the Southern District of New York (Torres, *J.*) denying its motion to modify the government's restraining order against its bank accounts or for a hearing on the subject. On August 20, 2020, the government unsealed an indictment charging several individuals with a scheme to defraud through an online fundraising campaign for WBTW, allegedly a private organization dedicated to building a wall on the border between the United States and Mexico. On August 24, 2020, the district court found probable cause existed for forfeiture of the funds in certain WBTW bank accounts and issued a sealed order restraining the funds. WBTW seeks a vacatur of the restraint or, in

---

<sup>2</sup> Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

the alternative, an opportunity to contest the order in a pre-trial hearing below. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

WBTW states that we have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). The government argues that the appeal is neither from a final order nor from the denial of a request to modify an injunction, and, therefore, it is not reviewable under either statute. We agree with the government.

Section 1292(a)(1) permits an appeal as of right from “[i]nterlocutory orders of the district courts ... granting, continuing, modifying, refusing or dissolving injunctions[.]” “Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we ... construe[ ] the statute narrowly[.]” *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981). In accordance with this instruction, we have held that this statute is limited to traditional orders in equity and those orders, issued pursuant to statutory authority, that have “the practical effect of a preliminary injunction ... [and that] the appealing party demonstrates [pose] serious, perhaps irreparable consequences.” *Korea Shipping Corp. v. New York Shipping Ass'n*, 811 F.2d 124, 126 (2d Cir. 1987) (internal quotation marks omitted). In this case, the funds were restrained pursuant to the statutory authority provided to the



district court by the interaction of 18 U.S.C. § 981(c), 21 U.S.C § 853(e), and 28 U.S.C. § 2461(c).

WBTW argues that its appeal falls within that category of injunction-like orders that are appealable under § 1292(a)(1) when the preliminary relief “effectively shuts down an ongoing business.” *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 901 (2d Cir.1992). However, WBTW acknowledges that it has continued to receive funds after the restraining order was issued, and the government does not contest its right to use these funds. Furthermore, WBTW remains able to transact certain business, as it has paid to lift a temporary administrative dissolution in Florida. WBTW cannot show that the restraining order has effectively shut down the business. Accordingly, the restraining order is not appealable as an injunction under 28 U.S.C. § 1292(a)(1).

Alternatively, WBTW argues that we have jurisdiction under Section 1291, as the restraint is an appealable collateral order. In the ordinary course of a criminal case, we do not review “decisions made before sentencing is complete and a judgment of conviction has been entered.” *United States v. Robinson*, 473 F.3d 487, 490 (2d Cir. 2007). In *United States v. Aliotta*, we set out a three-part test for appellate review of a collateral order: “an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from

the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.” 199 F.3d 78, 82 (2d Cir. 1999).

WBTW cannot satisfy the *Aliotta* test. First, the restraint does not conclusively determine anything about the disputed funds, as there will be post-conviction proceedings to assess legal claims to the funds. *See* 21 U.S.C. § 853(n). Second, although WBTW argues that its position is not relevant to the merits of the case, as the government notes, WBTW objects to the government's categorization of certain funds as crime proceeds and the government's definition of the criminal scheme. To prove its entitlement to restraint, the government would be required to litigate the underlying fraud allegations in the indictment to justify its position that the funds in the accounts are the proceeds of a crime. Finally, WBTW will have the opportunity to litigate the forfeiture at the conclusion of the case, when it may challenge both the forfeitability of the property, *see United States v. Daugerdas*, 892 F.3d 545, 558 (2d Cir. 2018), and the superiority of the government's claim to the property, *see* 21 U.S.C. § 853(n)(6). WBTW can then appeal from any final order.

We have considered WBTW's remaining arguments and conclude that they fail to establish jurisdiction over this appeal. Accordingly, WBTW's appeal is DISMISSED.

6a

***UNITED STATES v. KOLFAGE*, No. 20 Cr. 412 (AT),  
2020 WL 7342796 (S.D.N.Y. Dec. 14, 2020)**

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

UNITED STATES of America,

v.

Brian KOLFAGE, Stephen Bannon, Andrew  
Badolato, and Timothy Shea, Defendants.

20 Cr. 412 (AT)

Signed 12/14/2020

**ORDER**

ANALISA TORRES, United States District Judge

Defendant Timothy Shea moves for an order transferring his case to the District of Colorado. Non-parties, We Build the Wall, Inc. (“We Build the Wall”) and Kris Kobach, in his individual capacity and as general counsel for We Build the Wall, move for an order (1) modifying the sealed post-indictment restraining order issued on August 24, 2020, which prohibits the transfer of certain funds involved in Defendants’ charged offenses, and (2) unsealing certain documents. For the reasons stated below, both motions are DENIED.

**BACKGROUND**

On August 17, 2020, a grand jury returned a sealed indictment charging Defendants, Brian Kolfage, Stephen Bannon, Andrew Badolato, and Timothy Shea, with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Indictment, ECF No. 2. The indictment alleges that Defendants fraudulently induced donors to contribute millions of dollars to an online crowdfunding campaign known as We Build the Wall. The indictment further alleges that Kolfage, Badolato, and Bannon made repeated false statements—on the crowdfunding website, We Build the Wall's website, and in social media, press releases, and donor solicitations—that money from the fundraising campaign would not be taken for Defendants' personal use, and that all funds would go to the campaign's stated mission: building a wall along the southern border of the United States. *Id.* ¶¶ 1, 9, 11–14. Despite these representations, Defendants allegedly took hundreds of thousands of dollars for their own personal use. *Id.* ¶ 17. We Build the Wall raised approximately \$25,000,000. *Id.* ¶ 16.

As to Shea, the indictment alleges that he conspired to transfer to Defendants the funds raised by dint of the false statements. *Id.* ¶ 2. Shea, a Colorado resident, allegedly suggested via text message to Defendants that he create a shell corporation to send

money to himself and Kolfage. *Id.* ¶ 20; Def. Mem. at 4. Consistent with this alleged proposal, Shea incorporated a limited liability corporation, which We Build the Wall then paid for “social media” work that was not performed. Indictment ¶ 21. These funds were then funneled to Shea and Kolfage. *Id.*

The indictment further contemplates that if Defendants were convicted, they would have to forfeit certain property involved in the alleged crimes under 18 U.S.C. § 981(a)(1)(c) and 28 U.S.C. § 2461(c). Indictment ¶¶ 34–35. The indictment was unsealed on August 20, 2020. ECF No. 3.

On August 24, 2020, the Court granted the Government's *ex parte* application for a sealed restraining order pursuant to 18 U.S.C. §§ 981, 982, 21 U.S.C. § 853, and 28 U.S.C. § 2461. The order restrains the transfer of funds into or out of three We Build the Wall bank accounts (the “Restraining Order”). Restraining Order at 1–2. The Court found probable cause to grant the Restraining Order because the Government's application (the “Restraining Order Application”) and the supporting affidavit of United States Postal Inspector Troy Pittenger (the “Pittenger Affidavit”), both filed under seal, demonstrate that assets in the accounts “are subject to restraint and forfeiture as proceeds of a conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 1343, and/or property involved in money laundering, in violation of Title 18,

United States Code, § 1956.” *Id.* at 1. The Government then served the Restraining Order on the banks that maintain the accounts. Gov’t Opp’n to Modification at 2, ECF No. 42.

Though the Government had previously advised We Build the Wall and Kobach of its belief that the funds were subject to restraint and forfeiture, and though the Government had served document requests on Kobach individually,<sup>1</sup> the Government did not inform them that it had obtained the Restraining Order until a month after it was issued. We Build the Wall Mot. at 6–9.

On October 13, 2020, We Build the Wall and Kobach filed a motion under seal seeking (1) an order modifying the Restraining Order to permit their access to funds that they claim are not connected with the charged offenses, or, (2) in the alternative, a hearing on whether the Restraining Order should be modified. *Id.* at 1. We Build the Wall and Kobach also moved to unseal the portions of the Restraining Order Application and the Pittenger Affidavit relied on by the Court, to the extent that such access could be granted pursuant to an appropriate protective order. *Id.*; We Build the Wall Reply at 12 n.9, ECF No. 52. Separately, on November 5, 2020, Shea moved to

---

<sup>1</sup> The state of New Jersey has separately served document requests on We Build the Wall. We Build the Wall Mot. at 7.

transfer his case to the United States District Court for the District of Colorado. Def. Mot., ECF No. 44.

## DISCUSSION

### I. Motion to Transfer

Shea argues that because he is a resident of Colorado and has no connections to the Southern District of New York, his case should be transferred to the United States District Court for the District of Colorado in the interest of justice. Def. Mot.; Def. Mem. at 1, ECF No. 45.

#### A. Legal Standard

“As a general rule a criminal prosecution should be retained in the original district.” *United States v. Parrilla*, No. 13 Cr. 360, 2014 WL 1621487, at \*13 (S.D.N.Y. Apr. 22, 2014) (internal quotation marks and citation omitted), *aff'd sub nom. United States v. Kirk Tang Yuk*, 885 F.3d 57 (2d Cir. 2018). However, under Federal Rule of Criminal Procedure 21(b), “[u]pon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.”

To determine if transfer is proper, the Court considers the ten factors set forth in *Platt v. Minnesota Mining & Manufacturing Co.*:

(1) location of ... defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket conditions of each district; and (10) any other special elements which might affect the transfer.

376 U.S. 240, 243–44 (1964). In addition, courts should consider the convenience of “any victim.” *United States v. Calk*, No. 19 Cr. 366, 2020 WL 703391, at \*2 (S.D.N.Y. Feb. 12, 2020). Courts “should not give any one factor preeminent weight nor should it assume that the quantity of factors favoring one party outweighs the quality of factors in opposition.” *United States v. Spy Factory, Inc.*, 951 F. Supp. 450, 455 (S.D.N.Y. 1997). Rather, how the factors are weighed is committed to the sound discretion of the district court. *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990). Ultimately, the defendant carries the burden of showing that “the interests of justice require transfer.” *United States v. Estrada*, 880 F. Supp. 2d 478, 482 (S.D.N.Y. 2012); see also *United States v. Posner*, 549 F. Supp. 475, 477 (S.D.N.Y. 1982) (“To warrant a transfer from the district where an indictment was properly returned it should appear that a trial there would be so unduly



burdensome that fairness requires the transfer to another district of proper venue where a trial would be less burdensome.” (internal citation omitted)).

## B. Application of the *Platt* Factors

### 1. Location of Defendant

The first factor weighs somewhat in favor of transfer. Shea resides in Colorado, and his family and business are located there. Def. Mem. at 8. However, a defendant's residence “is [neither] dispositive [n]or has independent significance in determining whether transfer is warranted,” though it may be considered in reference to the other factors. *United States v. Riley*, 296 F.R.D. 272, 276 (S.D.N.Y. 2014) (citing *Platt*, 376 U.S. at 245); *Maldando-Rivera*, 922 F.2d at 965. Nevertheless, absent countervailing concerns, the fact that Shea resides in Colorado weighs in favor of transfer. *See Spy Factory*, 951 F. Supp. at 456.

### 2. Location of Possible Witnesses

The second factor does not weigh in favor of transfer. To demonstrate that the location of possible witnesses favors transfer, the defendant cannot use “naked allegation[s] that witnesses will be inconvenienced by trial in a distant forum.” *Riley*, 296 F.R.D. at 276. Instead, the defendant must “offer specific examples of witnesses’ testimony and their inability to testify because of the location of the trial” including “concrete demonstrations” of the proposed testimony. *Id.*

Shea states that he intends to call in his case-in-chief a number of character witnesses from Colorado, and claims that “[t]raveling to the Southern District of New York will result in the inconvenience of a number of people throughout the trial, particularly in light of the difficulty of travel during the COVID-19 pandemic.” Def. Mem. at 9; Def. Reply at 3, ECF No. 54. Shea does not, however, identify the witnesses or their testimony, nor does he offer any details as to why they cannot travel to New York other than that “their travel expenditures will be costly and burdensome.” *Id.* This is insufficiently specific to demonstrate that this factor weighs in favor of transfer, even at this early stage of the case. *See United States v. Blakstad*, No. 19 Cr. 486, 2020 WL 5992347, at \*4 (S.D.N.Y. Oct. 9, 2020) (finding this factor did not weigh in favor of defendant where he “merely assert[ed] that his ‘witnesses are located in Southern California,’ and that bringing them to Manhattan ‘can make their use impractical’ ”); *United States v. Avenatti*, No. 19 Cr. 374, 2019 WL 4640232, at \*3 (S.D.N.Y. Sept. 24, 2019) (“[T]ransfer is unwarranted based on the mere possibility that unnamed, purported character witnesses will be unable to testify because of the location of the trial.”). Moreover, government funds are available to assist Shea with witness fees, allaying concerns regarding witnesses’ travel expenses. *See* 28 U.S.C. § 1825.

The Government has not finalized its trial witness list, but states that it will be calling witnesses from

across the country, including New York, but none from Colorado. Gov't Opp'n to Transfer at 7, ECF No. 45. The New York-based witnesses will include victims, whose convenience the Court must consider as well. *Id.* at 7–8; Fed. R. Crim. P. 21(b) advisory committee's note. The Government offers little information about its witnesses, which counterbalances Shea's similarly vague statements regarding his.

Although Shea does suggest that COVID-19 would make travel more difficult, this fact weighs “against holding any trial at all, rather than *where* to hold the trial.” *Blakstad*, 2020 WL 5992347, at \*6 (emphasis in original). Witnesses will have to travel whether the trial is held in Colorado or New York. Therefore, the pandemic does not alter the balance of this factor, and the Court concludes that the location-of-witnesses factor is neutral.

### 3. Location of Events

The factor of the location of the events is also neutral. The scheme, as alleged in the indictment, was national in scale: the fraud was carried out throughout the country over the internet, Defendants are residents of multiple states, and Defendants made communications to and from different states in organizing the conspiracy. Gov't Opp'n to Transfer at 9; *see generally* Indictment. Shea first argues that because he did not travel to the Southern District of New York, “his alleged involvement must logically be

exclusively limited to activity that occurred outside of the Southern District.” Def. Mem. at 9. However, in the age of digital communication, this argument does not hold: even if Shea never physically entered New York, it does not mean he cannot be connected to activity that took place here. *Blakstad*, 2020 WL 5992347, at \*4 (finding the third factor neutral where the defendant did not work in New York, but his co-conspirators had acted in Manhattan and “several calls, emails, and wire transfer moved through Manhattan”).

Shea next argues that the alleged conduct is unconnected to the Southern District of New York, and the Government's mere allegation of a “possibility of connection” to the Southern District is insufficient to link the events to this District.<sup>2</sup> Def. Reply at 1–2 (emphasis omitted). It is true that where a conspiracy has a “nerve center” located in the transferee district, this factor can favor transfer to that center. *United*

---

<sup>2</sup> Shea appears skeptical that venue is proper in the Southern District of New York. *See, e.g.*, Def. Mem. at 9. However, the motion is not a challenge to venue, Def. Mot., and Shea first raises a more explicit argument against venue in this District in his reply brief, Def. Reply at 1–3. Therefore, despite Shea's skepticism, the Court is not at this time considering the venue issue. *United States v. Martinez*, 862 F.3d 223, 234 (2d Cir. 2017) (“[N]ew arguments may not be made in a reply brief.”), *cert. granted, judgment vacated on other grounds sub nom. Rodriguez v. United States*, 139 S. Ct. 2772 (2019).

*States v. Alter*, 81 F.R.D. 524, 526 (S.D.N.Y. 1979) (finding that the location of events favored transfer to an alternate forum where “[i]t is beyond dispute that most, if not all, of the acts and conduct in furtherance of the alleged scheme to defraud occurred in [the alternate venue] and that it was the ‘nerve center’ of the alleged illicit operations in carrying on the scheme ...”). Shea, however, does not claim that Colorado is the “nerve center” of the conspiracy, nor do the facts alleged in the indictment suggest that most of the conspiratorial acts took place there. *See generally* Indictment.

Rather, in cases of nationwide criminal activity without a nerve center, such as this one, the location of the events does not favor either side. *Spy Factory*, 951 F. Supp. at 457. Though aspects of the conspiracy took place outside of the Southern District of New York, the Government states that there are victims of the conspiracy who are located in New York. Gov't Opp'n to Transfer at 7. This indicates that Defendants “intentionally projected their fraud nationwide, including into this [d]istrict,” thus making this factor “not particularly persuasive” for transfer. *Estrada*, 880 F. Supp. 2d at 483. Because of the country-wide scope, this factor favors neither side.

#### 4. Location of Documents

The location of documents likely to be involved is also neutral. Shea states that any documentary evidence

must be located outside of New York, as he has never resided in New York. Def. Mem. at 10. He also alleges that evidence he will produce is located in Colorado, though he does not identify any such evidence. *Id.* The Government, however, explains that as a result of search warrants issued at the time of arrest, the “relevant physical evidence” is located in this District, as is other evidence relied on in charging the case. Gov't Opp'n to Transfer at 10. Where the evidence is located mainly in New York, but this was “voluntarily accomplished” by the Government, this factor is neutral. *Spy Factory*, 951 F. Supp. at 458. Regardless, “[i]t is well settled that given the conveniences of modern transportation and communication, the location of the documents is a minor concern.” *Estrada*, 880 F. Supp. 2d at 484 (internal quotation marks omitted).

#### 5. Disruption to Defendant's Business

The factor concerning disruption to the defendant's business does not weigh in favor transfer. Shea states that as his business is “developing and growing in the local sector,” he must “remain engaged and hands-on with all elements of his business,” and that “[a] start-up company in its infancy will undoubtedly be disrupted if a trial were to take place in New York.” Def. Mem. at 10. Shea does not explain, however, why the trial would cause more disruption if he were in New York rather than in Colorado. “In either location a trial will disrupt [Shea's] ability to run his business”

due to a trial's all-consuming nature. *Parrilla*, 2014 WL 1621487, at \*15. Moreover, Shea has not demonstrated why remote technology, which is now all the more common under pandemic circumstances, would not permit him to manage his business from afar. *See Spy Factory*, 951 F. Supp. at 458 (finding the impact on defendants' businesses was minimized because "no defendant has shown why telephone and fax machine communication is insufficient to maintain the minimal contact that would be available to any of them over a lunch hour or after-hours if the trial were moved"). Shea, therefore, has not met his burden to demonstrate that this factor weighs in favor of transfer.

#### 6. Expense to the Parties

The sixth factor, expense to the parties, weighs in favor of transfer. Shea has proven that he qualifies for assistance under the Criminal Justice Act ("CJA"), because his "net financial resources and income are insufficient to obtain qualified counsel." Judicial Conference of the United States, 7 Guide to Judiciary Policy § 210.40.30(a); Gov't Opp'n to Transfer at 13. Although CJA funds are financing his defense, thus mitigating his costs, this does not completely offset expenses related to, for instance, travel and lodging. In addition, Shea's assets have been frozen by the Government. Def. Reply at 2. In these situations, courts have suggested that the cost to the defendant

weighs in favor of transfer. *See Spy Factory*, 951 F. Supp. at 459.

The Government has stated that were the case to be transferred, the New York-based lawyers, witnesses, and experts, including three Assistant United States Attorneys, two paralegals, several federal law enforcement agents, and computer forensic experts, would have to relocate to Colorado for weeks. Gov't Opp'n to Transfer at 13–14. Where the effect of a motion to transfer is “merely to shift the economic burden to the government,” this factor generally weighs against transfer. *United States v. Canale*, No. 14 Cr. 713, 2015 WL 3767147, at \*4 (S.D.N.Y. June 17, 2015) (quoting *United States v. Carey*, 152 F. Supp. 2d 415, 422 (S.D.N.Y. 2001)). However, given Shea's CJA status, and mindful that though the Government wishes to minimize cost to the taxpayers, “the Government is in a better position than the Defendant[] to bear such expenses,” this factor weighs in favor of transfer. *Riley*, 296 F.R.D. at 277.

#### 7. Location of Counsel

The location of counsel weighs against transfer. Both Shea's lawyer and the Government attorneys are in New York. *See Parrilla*, 2014 WL 1621487, at \*15. Shea alleges that the distance between him and his attorney has undermined his ability to mount an effective defense. Def. Mem. at 11. However, it is common for Defendants to have lawyers in other



states, and the geographic distance here does not weigh in favor of transfer. *See Spy Factory*, 951 F. Supp. at 460 (finding the location of counsel factor did not weigh in favor of transfer from New York to Texas despite two out of three Texas-based defendants retaining New York attorneys). The location of counsel factor, therefore, weighs against transfer.

#### 8. Accessibility of Trial Location

Shea does not dispute that New York is an accessible location. Def. Mem. at 11. However, he argues that because of the location of his witnesses, Colorado would be more accessible. *Id.* This simply rehashes the argument on factor two, and for the same reasons, this factor does not weigh in favor of transfer.

#### 9. Relative Docket Conditions

The relative docket conditions weigh against transfer. Shea states that he “cannot opine to the docket conditions of the Court.” *Id.* at 11. The Government, however, has noted that based on the United States Court's Federal Court Management Statistics for the year ending June 30, 2020, the District of Colorado had more civil and criminal felony filings per judge than the Southern District of New York, and had completed slightly more trials per judge. Gov't Opp'n to Transfer at 14; Judicial Caseload Profile, Federal Judicial Center (June 30, 2020), <https://www.uscourts.gov/statistics/table/na/federal->

court-management-statistics/2020/06/30-1. Therefore, disparities in docket conditions do not weigh in favor of transfer.

Shea also argues that due to COVID-19, it is unclear when or how a trial would be held. Def. Mem. at 11. However, this Court has already “made itself available, familiarized itself with this case, and scheduled a trial date that is convenient for both parties.” *Canale*, 2015 WL 3767147, at \*4. To be sure, the COVID-19 pandemic renders the trial date uncertain, but Shea offers no evidence that he would get an earlier trial in Colorado, that COVID-19 conditions in Colorado would not render any trial date there equally uncertain, or that transferring would not result in “delays and duplication of judicial resources.” *Id.* This factor, therefore, weighs against transfer.

#### 10. Special Considerations

Finally, the consideration of avoiding duplicative trials weighs strongly against transfer. Shea is one of four defendants charged in the indictment, and the others have not joined his motion to transfer. Transferring Shea's case would, therefore, require severing the case against him and conducting two trials on the same conspiracy, thus imposing a “double burden on the judiciary.” *Parrilla*, 2014 WL 2200403, at \*2. “There is a preference in the federal system for joint trials of defendants who are indicted together.”

*Zafiro v. United States*, 506 U.S. 534, 537 (1993). Severing and transferring a defendant “requires serious consideration of the Government's interest in avoiding duplicate trials” and, if done “without good reason,” is “contrary to the interest of justice.” *Parrilla*, 2014 WL 2200403, at \*2 (quoting *United States v. Valdes*, No. 05 Cr. 156, 2006 WL 738403, at \*10 (S.D.N.Y. Mar. 21, 2006) and *United States v. Thomas*, No. 06 Cr. 365, 2006 WL 2283772, at \*2 (S.D.N.Y. Aug. 6, 2006) (internal quotation marks omitted)). Shea has not provided “good reason” for severance, which the Court concludes is contrary to the interest of justice. *See id.* (finding severance as weighing against transfer given that “the Court has already devoted significant resources to this case and set a trial date, and an additional trial ... would be required.” (internal citations omitted)). This factor, therefore, weighs heavily against severance and transfer of Shea's case to Colorado.

In sum, the location of the defendant and the expenses of the parties weigh in favor of transfer, but the other factors are neutral or weigh against transfer, and the interest of avoiding additional trials weighs heavily against transfer. Balancing these factors, the Court finds that Shea has not carried his burden to show that transfer is warranted under Rule 21(b). Accordingly, Shea's motion to transfer is DENIED.

## II. Motion to Modify the Restraining Order

The Court construes the motion by We Build the Wall and Kobach as in effect requesting to intervene in this case to object to the Restraining Order, on the ground that it encompasses funds not subject to forfeiture. Because third parties are statutorily barred from intervention in a criminal case to challenge a forfeiture order, the motion is DENIED.

### A. Legal Standard

The criminal forfeiture proceedings in this case are governed by Federal Rule of Criminal Procedure 32.2 and 21 U.S.C. § 853.<sup>3</sup> *See* 28 U.S.C. § 2461(c). Though on its face § 853 applies only to controlled substances, the framework set forth in the section is applied to any offense for which civil or criminal forfeiture of property is authorized, such as the crimes charged in this case, by 28 U.S.C. § 2461(c).

This Court issued the Restraining Order pursuant to 21 U.S.C. § 853. Restraining Order at 1. Section 853(e) provides that:

Upon application of the United States, the court may enter a restraining order or injunction ... or take any other action to preserve the availability of property

---

<sup>3</sup> Section 853(d), which applies only in cases in which the defendant is convicted of a violation of the Controlled Substances Act, does not apply here. 21 U.S.C. § 853(d); 28 U.S.C. § 2461(c).

described in subsection (a) for forfeiture under this section—(A) upon the filing of an indictment or information .... alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section.

21 U.S.C. § 853(e).

In sum, the foregoing statutory framework for criminal forfeiture provides that if, upon the return of an indictment, the court finds probable cause that certain property would be subject to forfeiture upon conviction, the court may enter a restraining order to preserve the availability of that property. *See* 21 U.S.C. § 853(e)(1); *Kaley v. United States*, 571 U.S. 320, 323 (2014).

Because such orders may impinge on the rights of third parties, the forfeiture framework includes procedures for an ancillary, post-conviction proceeding where third parties can make claims against forfeited property. 21 U.S.C. § 853(n). This § 853(n) ancillary proceeding takes place with full notice to all interested parties, and includes the presentation of evidence and witnesses. *Id.* However, outside of this ancillary proceeding, a claimant is not permitted to intervene in a criminal case involving the forfeiture, or to initiate a lawsuit against the

government concerning the forfeiture, after an indictment has been returned. 21 U.S.C. § 853(k).<sup>4</sup>

It is “well settled” that § 853(k) means that an § 853(n) ancillary proceeding is the “exclusive avenue” for a third party to lay claim to forfeited assets. *DSI Assocs. LLC v. United States*, 496 F.3d 175, 183 n.12 (2d Cir. 2007); *see also United States v. Kozeny*, No. 05 Cr. 518, 2011 WL 1672473, at \*3 (S.D.N.Y. Apr. 29, 2011) (applying § 853(k)’s bar on intervention to a third party seeking to challenge a post-indictment restraining order).

We Build the Wall and Kobach argue that the § 853(k) bar on intervention does not apply for four reasons: (1) § 853 does not apply to pre-conviction forfeiture; (2) they only seek modification regarding untainted (and thus, non-forfeitable) assets, to which § 853 does not apply; (3) notwithstanding § 853(k), Federal Rule of Criminal Procedure 41(g) permits them to challenge the forfeiture; and (4) notwithstanding § 853(k), due process requires a hearing before such forfeiture. For

---

<sup>4</sup> Section 853(k), entitled “[b]ar on intervention,” states: Except as provided in subsection (n) [*i.e.*, through ancillary proceedings], no party claiming an interest in property subject to forfeiture under this section may—(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this action. 21 U.S.C. § 853(k).

the reasons stated below, these arguments are unavailing.

B. Application of 21 U.S.C. § 853 to Pre-Conviction  
Forfeiture Proceedings

Section 853 applies “to all stages of a criminal forfeiture proceeding.” 28 U.S.C. § 2461(c). Courts regularly interpret the § 853 framework to apply pre-conviction. *See, e.g., United States v. Dupree*, 781 F. Supp. 2d 115, 129 (E.D.N.Y. 2011).

Congressional action after *United States v. Razmilovic*, 419 F.3d 134 (2d Cir. 2005), drives home this point. In *Razmilovic*, the Second Circuit held that an earlier version of 28 U.S.C. § 2641(c) applied the § 853 framework only to post-conviction forfeiture. *Id.* at 136–37. The Second Circuit based this holding on the language of § 2461(c), which at that time stated that “*upon conviction*, the court shall order the forfeiture of the property in accordance with the procedures set forth in 21 U.S.C. § 853.” *Id.* (emphasis added and alterations adopted). In 2006, Congress, at least in part in response to *Razmilovic*, amended § 2461(c) to strike the words “upon conviction,” and to specify that “[t]he procedures in [§ 853] apply to *all stages of a criminal forfeiture proceeding*.” 28 U.S.C. § 2461(c) (emphasis added); *see United States v. Mann*, 140 F. Supp. 3d 513, 527, 530 (E.D.N.C. 2015). This amendment makes clear that Congress rejected the holding of *Razmilovic*. *See United States v.*

*Schlotzhauer*, No. 06 Cr. 00091-0103, 2008 WL 320717, at \*9 (W.D. Mo. Feb. 4, 2008) (“It appears that Congress has clarified its intent that section 2461(c) authorizes the pretrial restraint of assets.”).

Courts have, therefore, interpreted the amended § 2461(c) for the “unremarkable proposition” that § 2461(c) permits pretrial restraints on property through § 853. *Mann*, 140 F. Supp. 3d at 528; *see also United States v. Capoccia*, No. 03 Cr. 35, 2011 WL 1930677, at \*5 (D. Vt. May 19, 2011).

This Court too interprets the plain language of amended § 2461(c) to apply § 853’s framework to all stages of a criminal forfeiture proceeding, including the post-indictment, pre-conviction phase. Therefore, the § 853(k) bar on intervention applies here.<sup>5</sup>

### C. Challenge to the Forfeitability of Assets

We Build the Wall and Kobach argue that they merely assert their rights over assets that fall outside the

---

<sup>5</sup> We Build the Wall and Kobach argue that they do not seek to intervene in the trial, and only seek to modify the Restraining Order. We Build the Wall Reply at 11–12. However, like other courts, this Court construes this challenge to the Restraining Order, an order issued under § 853, as a request for intervention under § 853(k). *See Kozeny*, 2011 WL 1672473, at \*3 (finding § 853(k) bars pretrial intervention in a criminal case to challenge a post-indictment restraining order); *United States v. Rogers*, No. 09 Cr. 441, 2010 WL 1872855, at \*5 (N.D. Ga. Apr. 12, 2010), *report and recommendation adopted*, No. 09 Cr. 441, 2010 WL 1872858 (N.D. Ga. May 7, 2010) (collecting cases).



scope of Defendants' alleged offenses, to which § 853 does not apply, and not over properly forfeitable assets. We Build the Wall Reply at 11. In other words, they seek to challenge the forfeitability of certain assets covered by the Restraining Order.

Second Circuit precedent forecloses such arguments. See *United States v. Watts*, 786 F.3d 152, 175 (2d Cir. 2015); *DSI Associates LLC*, 496 F.3d at 181–185. In *Watts*, the Second Circuit considered a third party's argument about the forfeitability of certain assets under § 853. 786 F.3d at 175. The court reasoned first that, “[w]e have consistently interpreted § 853(k) to mean that an ancillary proceeding under § 853(n) is ‘the *only* avenue for a post-indictment third-party claim to forfeited property’ under the criminal forfeiture statute.” *Id.* (emphasis in original) (citing *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006)). The court then held that § 853(n) does not authorize challenges to a forfeiture based on “the forfeitability of a defendant's property by interested third parties,” and affirmed the district court's rejection of that argument. *Id.* at 175–76; see also *United States v. Egan*, 654 F. App'x 520, 522 n.2 (2d Cir. 2016); Fed. R. Crim. P. 32.2 Advisory Committee Note (“Th[e ancillary] proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property.”).

Here, We Build the Wall and Kobach effectively claim ownership over the funds, and argue that such funds are untouched by Defendants' alleged conspiracy. But, as *Watts* and *DSI Associates LLC* make clear, a third party can only intervene to challenge a finding of probable cause that assets are subject to forfeiture in a § 853(n) proceeding. We Build the Wall and Kobach are, therefore, barred by § 853(k) from intervening on the ground that there was no probable cause to restrain certain assets.

#### D. Federal Rule of Criminal Procedure 41(g)

We Build the Wall and Kobach also argue that their motion can be interpreted as a motion under Federal Rule of Criminal Procedure 41(g), and is, therefore, permissible despite § 853(k)'s bar on intervention. "Rule 41(g) permits a person aggrieved by the government's unlawful seizure or deprivation of property to move for specific relief: the property's return." *Adeleke v. United States*, 355 F.3d 144, 149 (2d Cir. 2004). "[W]here no criminal proceedings against the movant are pending or have transpired, a motion for the return of property is treated as a civil equitable proceeding." *Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992) (internal quotation marks, citation, and alterations omitted). Rule 41(g) is an equitable remedy "available only when there is no adequate remedy at law and the equities favor the exercise of jurisdiction," and, therefore, "[j]urisdiction under Rule 41 is to be exercised with great restraint

and caution.” *De Almeida*, 459 F.3d at 382 (internal quotation marks and citation omitted).

However, a Rule 41(g) motion brought after an indictment is clearly barred by § 853(k). *Chaim v. United States*, 692 F. Supp. 2d 461, 470 (D.N.J. 2010) (“[O]nce there is an indictment with a forfeiture allegation, an innocent third party ... cannot then commence a Rule 41(g) proceeding.” (emphasis in original)). A Rule 41(g) motion brought post-indictment can be read either as a bid to intervene in a criminal case or as an action “concerning the validity of [a third party's] interest in property” brought “subsequent to the filing of an indictment ... alleging that the property is subject to forfeiture under [§ 853]”—both of which are barred by § 853(k). 21 U.S.C. § 853(k); *Rogers*, 2010 WL 1872855, at \*4; see also *United States v. White*, No. 13 Cr. 0436, 2014 WL 3898378, at \*4 (D. Md. Aug. 7, 2014); *United States v. Huggins*, No. 13 Cr. 155, 2013 WL 1728269, at \*2 (S.D.N.Y. Mar. 22, 2013), *report and recommendation adopted*, No. 13 Cr. 155, 2013 WL 1736466 (S.D.N.Y. Apr. 11, 2013) (finding that because the third party filed their Rule 41(g) motion slightly before the indictment, the third party “is not necessarily limited to a section 853(n) proceeding—as it plainly would be had its motion been filed slightly later.”). Although the Second Circuit left open the possibility that a Rule 41(g) motion filed *pre-indictment* would be permissible, it has not spoken to a Rule 41(g) motion filed post-indictment. *De Almeida*, 459 F.3d at 383

(affirming a district court's denial of a Rule 41(g) motion filed pre-indictment because § 853(n) afforded an adequate remedy at law).

The indictment in this case was returned on August 17, 2020, approximately two months before We Build the Wall and Kobach brought their motion. Therefore, even if We Build the Wall and Kobach's motion were styled as a Rule 41(g) motion, Section 853(k) bars that motion.

#### E. Due Process

Finally, We Build the Wall and Kobach argue that their Fifth Amendment due process rights were violated by the seizure of their property without a proper hearing, either before or after seizure. We Build the Wall Mot. at 12–13; We Build the Wall Reply at 9.<sup>6</sup>

---

<sup>6</sup> Contrary to We Build the Wall and Kobach's argument, the relevant portion of § 853 does not require a hearing before issuing a post-indictment restraining order. Unlike § 853(e)(1)(B), which governs the issuance of restraining orders *pre*-indictment, § 853(e)(1)(A), which governs restraining orders issued *post*-indictment, does not include a requirement for notice and hearing. 21 U.S.C. § 853(e)(1); *Kaley*, 571 U.S. at 324 n.2 (noting that, as opposed to § 853(e)(1)(A), “[t]he forfeiture statute itself requires a hearing when the Government seeks to restrain the assets of someone who has not yet been indicted.”). “[B]ecause of the exigent circumstances presented, notice and a hearing need not occur before an *ex parte* restraining order is entered pursuant to section 853(e)(1)(A).” *United States v. Monsanto*, 924 F.2d

Although the Supreme Court has made clear that pretrial hearings on forfeiture may be required when the forfeiture order is challenged by a criminal defendant, particularly where their Sixth Amendment right to counsel is implicated, the law concerning the rights of third parties is less clear. *See Kaley*, 571 U.S. at 324; *Monsanto*, 924 F.2d at 1193–98. However, courts have generally determined that § 853(n) proceedings provide sufficient due process to third parties. For instance, the Fourth Circuit in *United States v. McHan*, 345 F.3d 262, 269 (4th Cir. 2003), considered the third parties’ argument that they should be afforded a hearing before, or soon after, a preliminary order of forfeiture. The court noted that this argument was “a challenge to the statutory scheme,” which effectively contended that “due process required that they, as third parties, be given an opportunity to interject themselves into the sentencing phase of the criminal case.” *Id.* The Fourth Circuit rejected this argument, holding that “it was Congress’s clear intention in passing § 853(n) that third parties have an opportunity to be heard and to be awarded relief if they were to show a cognizable interest in the property preliminarily ordered forfeited” and so “§ 853(n) provides all of the process due.” *Id.* at 270; *see also Libretti v. United States*, 516 U.S. 29, 44 (1995) (denying the argument that a

---

1186, 1193 (2d Cir. 1991), *abrogated on other grounds by Kaley*, 571 U.S. 320.

§ 853(n) proceeding “is inadequate to safeguard third-party rights” because “Congress has determined that § 853(n) ... provides the means by which third-party rights must be vindicated”); *Kozeny*, 2011 WL 1672473, at \*5 (finding due process did not require an early hearing on a post-indictment restraining order); *cf. United States v. Dagerdas*, 892 F.3d 545, 557 (2d Cir. 2018) (finding that the due process violation was cured where the third party had a right to replead a § 853(n) petition to assert her interest in the forfeited funds); *DSI Assocs. LLC*, 496 F.3d at 186–187 (holding that a third party did not have standing for a § 853(n) proceeding after conducting a due process analysis).

Moreover, even if the Court were to apply the test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine the amount of process due, it would not grant We Build the Wall or Kobach a hearing before the § 853(n) proceeding. *Mathews* requires courts to weigh:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

substitute procedural requirement would entail.

424 U.S. at 335. Because We Build the Wall and Kobach will be afforded a hearing under § 853(n) after trial, their true contention is that due process requires they have a hearing sooner rather than later. Not so.

First, regarding the private interest, the Second Circuit has concluded that criminal defendants have a strong private interest in pretrial hearings on forfeiture orders when the order impedes their Sixth Amendment right to counsel. *See United States v. Cosme*, 796 F.3d 226, 232 (2d Cir. 2015). However, it has not held that other constitutional rights give rise to other similarly strong private interests for criminal defendants, let alone the interests of third-party claimants. *Id.* at 233 n.2 (noting that “several sister circuits have indicated that a pretrial, post-deprivation adversarial hearing is not required absent Sixth Amendment concerns”). We Build the Wall and Kobach allege interests in their ability to use their money in furtherance of their mission and to pay Kris Kobach's legal fees with respect to the Government's document requests, We Build the Wall Reply at 9, but those interests are less weighty—and less time sensitive—than a criminal defendant's Sixth Amendment right to counsel. *Cosme*, 796 F.3d at 233; *see also United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (“Due process does not automatically require a [post-restraint, pretrial] hearing and a

defendant may not simply ask for one. As a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family.”). Moreover, the Restraining Order does not prevent We Build the Wall from utilizing funds obtained after the Restraining Order issued. Gov't Resp. at 3. This additional source of funding lessens the immediate interest of We Build the Wall.

Second, there is little value to an additional hearing. In issuing the Restraining Order, this Court has already concluded that the Government demonstrated probable cause. Restraining Order at 1. This determination will be tested at trial, and in the § 853(n) proceeding. We Build the Wall and Kobach offer no explanation as to how a hearing conducted now would better guard against an erroneous deprivation of property, as opposed to a hearing conducted with the benefit of completed discovery and jury-made findings of fact. *See Sunrise Acad. v. United States*, 791 F. Supp. 2d 200, 206 (D.D.C. 2011) (“The only added benefit of a pretrial hearing would be an earlier, but preliminary, determination.”).

Third, the Government's interest in avoiding additional third-party, pretrial proceedings is strong. Allowing such litigation would endanger Defendants' rights to a speedy trial, as it could prevent the Government from turning its focus to trial. *Id.* In



drafting § 853, Congress observed that a pretrial hearing

would require the government to prove the merits of the underlying criminal case and forfeiture counts and put on its witnesses well in advance of trial ... such requirements can make obtaining a restraining order—the sole means available to the government to assure the availability of assets after conviction—quite difficult ... [Such] requirements m[ight] make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy...

*Id.* at 207 (quoting S. Rep. No. 98-225 (1984)).

The interests of the Government may be outweighed by a criminal defendant's right to counsel. *See Monsanto*, 924 F.2d at 1193–98. But where, as here, a third party requests access to funds before a statutorily mandated hearing, “the interests of the government, the public, and the criminal defendant in a fair and orderly trial on the merits of the criminal indictment must take precedence over the petitioners’ desire for earlier adjudication of their claims.” *Sunrise Acad.*, 791 F. Supp. 2d at 207. The Court concludes, therefore, that § 853(n) provides We Build the Wall and Kobach with due process.

Therefore, We Build the Wall and Kobach's motion to modify the Restraining Order, or for a hearing, is DENIED.

### III. Motion to Unseal

We Build the Wall and Kobach also request that the Restraining Order Application and the Pittenger Affidavit supporting the Restraining Order be unsealed, to the extent that they be “given access (subject to an appropriate protective order) to those portions of the sealed *ex parte* submissions that purport to support probable cause that all donations to We Build the Wall are the proceeds of crime.” We Build the Wall Reply at 11–12, 12 n.9.

It is well-established that motions to intervene to “assert the public's First Amendment right of access to criminal proceedings” are appropriate. *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008). However, We Build the Wall and Kobach are not asserting the public's right of access; they state that their request is not for “the equivalent of blanket unsealing and public filing of the entirety of the *ex parte* documents.” We Build the Wall Reply at 12. We Build the Wall and Kobach instead rely on the principle that the court should “safeguard *party* access to the evidence tendered in support of a requested court judgment.” We Build the Wall Mot. at 23–24 (emphasis added) (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987)). But neither We Build the Wall nor Kobach is a party to this case.

The Restraining Order Application and the Pittenger Affidavit will be provided to Defendants, the proper parties. Gov't Opp'n to Modification at 14. And, in connection with the § 853(n) proceeding, discovery will be conducted so that We Build the Wall and Kobach may obtain the requisite information, if such information has not already been disclosed at trial. We Build the Wall and Kobach's argument in favor of access is, therefore, unavailing.

The Government has consented to unsealing the Restraining Order. Gov't Opp'n to Modification at 15. It was issued under seal to prevent dissipation of the funds before service on the relevant financial institutions was effected. Restraining Order at 9. That concern is no longer present. Therefore, the Restraining Order shall be unsealed and filed on the public docket. In addition, as We Build the Wall and Kobach's motion was filed under seal because of its reference to the then-sealed Restraining Order, *see* Oct. 13, 2020 Order, We Build the Wall and Kobach's motion and its accompanying documents, ECF No. 38, shall also be unsealed.

However, the Government requests that the Restraining Order Application and the Pittenger Affidavit remain under seal. Gov't Opp'n to Modification at 15. The Court concludes that continued sealing is warranted.

When deciding whether judicial documents should remain under seal, the Court must weigh the

presumption of public access afforded judicial documents against the other interests implicated by disclosing the documents. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). One is the potential adverse effect on law enforcement interests. *Id.* The Restraining Order Application and the Pittenger Affidavit provide more details regarding the Government's investigation than is contained in the indictment or is publicly known, including the full scope and nature of the investigation, the identities of individuals and entities who may be implicated, and further details about the evidence collected thus far. Gov't Opp'n to Modification at 15. This information, if disclosed, could hamper the investigation. Where an investigation is "ongoing," and the sealed document identifies subjects and the extent of the investigation, "[c]ompelling reasons exist to maintain the secrecy of the Government's investigation." *United States v. Park*, 619 F. Supp. 2d 89, 94 (S.D.N.Y. 2009).

Moreover, disclosure would implicate the privacy interests of uncharged individuals and entities, who were not named in the indictment but are named in the Restraining Order Application and the Pittenger Affidavit. *Amodeo*, 71 F.3d at 1050. This interest may be of particular concern in a case such as this, which is the subject of pretrial publicity. In addition, there is no prejudice to Defendants if the Restraining Order Application and the Pittenger Affidavit remain under seal, as Defendants have access to the documents.

Accordingly, We Build the Wall and Kobach's request to unseal the Restraining Order Application and the Pittenger Affidavit is DENIED.

### **CONCLUSION**

For the reasons stated above, Shea's motion to transfer is DENIED. We Build the Wall and Kobach's motion to intervene and to unseal the Restraining Order Application and the Pittenger Affidavit is DENIED. The Restraining Order shall be UNSEALED.

The Clerk of Court is directed to unseal: (1) the Restraining Order and (2) We Build the Wall's motion, ECF No. 38. The Clerk of Court is further directed to terminate the motions at ECF Nos. 38 and 44.

SO ORDERED.

**U.S. CONSTITUTION AMEND. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**18 U.S.C. § 981**

§ 981. Civil forfeiture

**(a)(1)** The following property is subject to forfeiture to the United States:

**(A)** Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

**(B)** Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

**(i)** involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

**(ii)** would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

**(iii)** would be punishable under the laws of the United States by imprisonment for a term

exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

**(C)** Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting “specified unlawful activity” (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

**(D)** Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of--

**(i)** section 666(a)(1) (relating to Federal program fraud);

**(ii)** section 1001 (relating to fraud and false statements);

**(iii)** section 1031 (relating to major fraud against the United States);

**(iv)** section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

**(v)** section 1341 (relating to mail fraud); or



**(vi)** section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the the<sup>1</sup> Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

**(E)** With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

**(F)** Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of--

**(i)** section 511 (altering or removing motor vehicle identification numbers);

**(ii)** section 553 (importing or exporting stolen motor vehicles);

**(iii)** section 2119 (armed robbery of automobiles);

45a

**(iv)** section 2312 (transporting stolen motor vehicles in interstate commerce); or

**(v)** section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

**(G)** All assets, foreign or domestic--

**(i)** of any individual, entity, or organization engaged in planning or perpetrating any any<sup>1</sup> Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

**(ii)** acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as defined in section 2332b(g)(5)<sup>2</sup> against the United States, citizens or residents of the United States, or their property;

**(iii)** derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property; or

**(iv)** of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government.<sup>3</sup> Where the property sought for forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States.

**(H)** Any property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title.

**(I)** Any property, real or personal, that is involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a prohibition imposed pursuant to section 104(a) of the North Korea Sanctions and Policy Enhancement Act of 2016.

**(2)** For purposes of paragraph (1), the term “proceeds” is defined as follows:

**(A)** In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly,

as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

**(B)** In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term “proceeds” means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

**(C)** In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

**(b)(1)** Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be

seized by the Secretary of the Treasury or the Postal Service, respectively.

**(2)** Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if--

**(A)** a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

**(B)** there is probable cause to believe that the property is subject to forfeiture and--

**(i)** the seizure is made pursuant to a lawful arrest or search; or

**(ii)** another exception to the Fourth Amendment warrant requirement would apply; or

**(C)** the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

**(3)** Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district

in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

**(4)(A)** If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

**(B)** The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign

50a

country or elsewhere in support of probable cause for the seizure of the property under this subsection.

**(c)** Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may--

- (1)** place the property under seal;
- (2)** remove the property to a place designated by him; or
- (3)** require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

**(d)** For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property under this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall

51a

apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

**(e)** Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine--

**(1)** to any other Federal agency;

**(2)** to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

**(3)** in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency--



52a

**(A)** to reimburse the agency for payments to claimants or creditors of the institution; and

**(B)** to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

**(4)** in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

**(5)** in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

**(6)** as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; or

**(7)** In<sup>3</sup> the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other

Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local

official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

**(f)** All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

**(g)(1)** Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

**(2)** Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that--

**(A)** the claimant is the subject of a related criminal investigation or case;

**(B)** the claimant has standing to assert a claim in the civil forfeiture proceeding; and

**(C)** continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

**(3)** With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

**(4)** In this subsection, the terms “related criminal case” and “related criminal investigation” mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In determining whether a criminal case or investigation is “related” to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

**(5)** In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit

evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

**(6)** Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property while the stay is in effect.

**(7)** A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.

**(h)** In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

**(i)(1)** Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may

57a

transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

**(A)** has been agreed to by the Secretary of State;

**(B)** is authorized in an international agreement between the United States and the foreign country; and

**(C)** is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

**(2)** The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to

a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

**(3)** A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

**(4)** A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when

admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

**(5)** The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

**(j)** For purposes of this section--

**(1)** the term “Attorney General” means the Attorney General or his delegate; and

**(2)** the term “Secretary of the Treasury” means the Secretary of the Treasury or his delegate.

**(k) Interbank accounts.--**

**(1) In general.--**

**(A) In general.--**For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign financial institution (as defined in section 984(c)(2)(A) of this title), and that foreign financial institution (as defined in section 984(c)(2)(A) of this title) has an interbank account in the United States with a covered financial institution (as defined in section 5318(j)(1) of title 31), the funds shall be deemed to



have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title), may be restrained, seized, or arrested.

**(B) Authority to suspend.**--The Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate a forfeiture under this section if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign financial institution (as defined in section 984(c)(2)(A) of this title) is located and the laws of the United States with respect to liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination would be in the interest of justice and would not harm the national interests of the United States.

**(2) No requirement for government to trace funds.**--If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign financial institution (as defined in section

984(c)(2)(A) of this title), nor shall it be necessary for the Government to rely on the application of section 984.

**(3) Claims brought by owner of the funds.**--If a forfeiture action is instituted against funds restrained, seized, or arrested under paragraph (1), the owner of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title) may contest the forfeiture by filing a claim under section 983.

**(4) Definitions.**--For purposes of this subsection, the following definitions shall apply:

**(A) Interbank account.**--The term “interbank account” has the same meaning as in section 984(c)(2)(B).

**(B) Owner.**--

**(i) In general.**--Except as provided in clause (ii), the term “owner”--

**(I)** means the person who was the owner, as that term is defined in section 983(d)(6), of the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title) at the time such funds were deposited; and

**(II)** does not include either the foreign financial institution (as defined in section

984(c)(2)(A) of this title) or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

**(ii) Exception.**--The foreign financial institution (as defined in section 984(c)(2)(A) of this title) may be considered the “owner” of the funds (and no other person shall qualify as the owner of such funds) only if--

**(I)** the basis for the forfeiture action is wrongdoing committed by the foreign financial institution (as defined in section 984(c)(2)(A) of this title); or

**(II)** the foreign financial institution (as defined in section 984(c)(2)(A) of this title) establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign financial institution (as defined in section 984(c)(2)(A) of this title) had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign financial institution (as defined in section 984(c)(2)(A) of this title) shall be deemed the owner of the funds to the extent of such discharged obligation.

**18 U.S.C. § 982**

§ 982. Criminal forfeiture

**(a)(1)** The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

**(2)** The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate--

**(A)** section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

**(B)** section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 555, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

**(3)** The court, in imposing a sentence on a person convicted of an offense under--

**(A)** section 666(a)(1) (relating to Federal program fraud);

**(B)** section 1001 (relating to fraud and false statements);

**(C)** section 1031 (relating to major fraud against the United States);

**(D)** section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);

**(E)** section 1341 (relating to mail fraud); or

**(F)** section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the the<sup>1</sup> Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

**(4)** With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of

65a

such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

**(5)** The court, in imposing sentence on a person convicted of a violation or conspiracy to violate--

**(A)** section 511 (altering or removing motor vehicle identification numbers);

**(B)** section 553 (importing or exporting stolen motor vehicles);

**(C)** section 2119 (armed robbery of automobiles);

**(D)** section 2312 (transporting stolen motor vehicles in interstate commerce); or

**(E)** section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

**(6)(A)** The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act or section 555, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section

66a

1028 of this title if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law--

**(i)** any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and

**(ii)** any property real or personal--

**(I)** that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or

**(II)** that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.

**(B)** The court, in imposing sentence on a person described in subparagraph (A), shall order that the person forfeit to the United States all property described in that subparagraph.

**(7)** The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

**(8)** The court, in sentencing a defendant convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or of a conspiracy to commit such an offense, if the offense involves telemarketing (as that term is defined in section 2325), shall order that the defendant forfeit to the United States any real or personal property--

**(A)** used or intended to be used to commit, to facilitate, or to promote the commission of such offense; and

**(B)** constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense.

**(b)(1)** The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

**(2)** The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the



68a

forfeiture, conducted three or more separate transactions involving a total of \$100,000 or more in any twelve month period.

**18 U.S.C. § 983**

§ 983. General rules for civil forfeiture proceedings

**(a) Notice; claim; complaint.--**

**(1)(A)(i)** Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

**(ii)** No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

**(iii)** If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either--

**(I)** send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

**(II)** terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to

70a

preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

**(iv)** In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

**(v)** If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

**(B)** A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

**(C)** Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court

71a

for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

**(D)** The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including--

- (i)** endangering the life or physical safety of an individual;
- (ii)** flight from prosecution;
- (iii)** destruction of or tampering with evidence;
- (iv)** intimidation of potential witnesses; or
- (v)** otherwise seriously jeopardizing an investigation or unduly delaying a trial.

**(E)** Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

**(F)** If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the

72a

property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

**(2)(A)** Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

**(B)** A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

**(C)** A claim shall--

**(i)** identify the specific property being claimed;

**(ii)** state the claimant's interest in such property;  
and

**(iii)** be made under oath, subject to penalty of perjury.

**(D)** A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

**(E)** Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

**(3)(A)** Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

**(B)** If the Government does not--

**(i)** file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

**(ii)** before the time for filing a complaint has expired--

**(I)** obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

**(II)** take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

**(C)** In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

**(D)** No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

**(4)(A)** In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the

Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

**(B)** A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

**(b) Representation.--**

**(1)(A)** If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

**(B)** In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as--

- (i)** the person's standing to contest the forfeiture;
- and



**(ii)** whether the claim appears to be made in good faith.

**(2)(A)** If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

**(B)(i)** At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

**(ii)** The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

**(3)** The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

**(c) Burden of proof.**--In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

**(d) Innocent owner defense.**--

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise

78a

to forfeiture took place, the term “innocent owner” means an owner who--

**(i)** did not know of the conduct giving rise to forfeiture; or

**(ii)** upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

**(B)(i)** For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law--

**(I)** gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

**(II)** in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

**(ii)** A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the

person whose conduct gave rise to the forfeiture) to physical danger.

**(3)(A)** With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term “innocent owner” means a person who, at the time that person acquired the interest in the property--

**(i)** was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

**(ii)** did not know and was reasonably without cause to believe that the property was subject to forfeiture.

**(B)** An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if--

**(i)** the property is the primary residence of the claimant;

**(ii)** depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

**(iii)** the property is not, and is not traceable to, the proceeds of any criminal offense; and

**(iv)** the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

**(4)** Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

**(5)** If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order-

**(A)** severing the property;

**(B)** transferring the property to the Government with a provision that the Government compensate

81a

the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

**(C)** permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.

**(6)** In this subsection, the term “owner”--

**(A)** means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

**(B)** does not include--

**(i)** a person with only a general unsecured interest in, or claim against, the property or estate of another;

**(ii)** a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

**(iii)** a nominee who exercises no dominion or control over the property.

**(e) Motion to set aside forfeiture.--**

82a

**(1)** Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if--

**(A)** the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

**(B)** the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

**(2)(A)** Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

**(B)** Any proceeding described in subparagraph (A) shall be commenced--

**(i)** if nonjudicial, within 60 days of the entry of the order granting the motion; or

(ii) if judicial, within 6 months of the entry of the order granting the motion.

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

**(f) Release of seized property.--**

(1) A claimant under subsection (a) is entitled to immediate release of seized property if--

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;



**(C)** the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

**(D)** the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

**(E)** none of the conditions set forth in paragraph (8) applies.

**(2)** A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

**(3)(A)** If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the

district court for the district in which the property was seized.

**(B)** The petition described in subparagraph (A) shall set forth--

**(i)** the basis on which the requirements of paragraph (1) are met; and

**(ii)** the steps the claimant has taken to secure release of the property from the appropriate official.

**(4)** If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

**(5)** The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

**(6)** If--

**(A)** a petition is filed under paragraph (3); and

**(B)** the claimant demonstrates that the requirements of paragraph (1) have been met, the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

**(7)** If the court grants a petition under paragraph (3)--

**(A)** the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including--

**(i)** permitting the inspection, photographing, and inventory of the property;

**(ii)** fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

**(iii)** requiring the claimant to obtain or maintain insurance on the subject property; and

**(B)** the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

**(8)** This subsection shall not apply if the seized property--

**(A)** is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

**(B)** is to be used as evidence of a violation of the law;

**(C)** by reason of design or other characteristic, is particularly suited for use in illegal activities; or

**(D)** is likely to be used to commit additional criminal acts if returned to the claimant.

**(g) Proportionality.--**

**(1)** The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

**(2)** In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

**(3)** The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

**(4)** If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a

violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

**(h) Civil fine.--**

**(1)** In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than \$250 or greater than \$5,000.

**(2)** Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

**(3)** In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

**(i) Civil forfeiture statute defined.**--In this section, the term “civil forfeiture statute”--

**(1)** means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

**(2)** does not include--

**(A)** the Tariff Act of 1930 or any other provision of law codified in title 19;

**(B)** the Internal Revenue Code of 1986;

**(C)** the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

**(D)** the Trading with the Enemy Act (50 U.S.C. 4301 et seq.), the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), or the North Korea Sanctions Enforcement Act of 2016; or

**(E)** section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

**(j) Restraining orders; protective orders.**--

**(1)** Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or

preserve the availability of property subject to civil forfeiture--

**(A)** upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

**(B)** prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

**(i)** there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

**(ii)** the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

**(2)** An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

**(3)** A temporary restraining order under this subsection may be entered upon application of the

United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 14 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

**(4)** The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.



**21 U.S.C. § 853**

§ 853. Criminal forfeitures

**(a) Property subject to criminal forfeiture**

Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

**(1)** any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

**(2)** any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

**(3)** in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives

profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

**(b) Meaning of term “property”**

Property subject to criminal forfeiture under this section includes--

- (1)** real property, including things growing on, affixed to, and found in land; and
- (2)** tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

**(c) Third party transfers**

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

**(d) Rebuttable presumption**

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II.

**(e) Protective orders**

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

**(B)** prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

**(i)** there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

**(ii)** the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

*Provided, however,* That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

**(2)** A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section

and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

**(3)** The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

**(4) Order to repatriate and deposit**

**(A) In general**

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

**(B) Failure to comply**

Failure to comply with an order under this subsection, or an order to repatriate property

under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

**(f) Warrant of seizure**

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

**(g) Execution**

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other

action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

**(h) Disposition of property**

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

**(i) Authority of the Attorney General**

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

**(j) Applicability of civil forfeiture provisions**

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section



100a

881(d) of this title shall apply to a criminal forfeiture under this section.

**(k) Bar on intervention**

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

**(l) Jurisdiction to enter orders**

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

**(m) Depositions**

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may,

upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

**(n) Third party interests**

**(1)** Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

**(2)** Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

**(3)** The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

**(4)** The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

**(5)** At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

**(6)** If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

**(A)** the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

**(B)** the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

**(7)** Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

**(o) Construction**

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

**(p) Forfeiture of substitute property**

**(1) In general**

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant--

**(A)** cannot be located upon the exercise of due diligence;

**(B)** has been transferred or sold to, or deposited with, a third party;

**(C)** has been placed beyond the jurisdiction of the court;

**(D)** has been substantially diminished in value; or

**(E)** has been commingled with other property which cannot be divided without difficulty.

**(2) Substitute property**

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

**(3) Return of property to jurisdiction**

In the case of property described in paragraph (1)(C), the court may, in addition to any other action

105a

authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

**(q) Restitution for cleanup of clandestine laboratory sites**

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall--

**(1)** order restitution as provided in sections 3612 and 3664 of Title 18;

**(2)** order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

**(3)** order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

**28 U.S.C. § 1291**

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**28 U.S.C. § 1292**

§ 1292. Interlocutory decisions

**(a)** Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

**(1)** Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

**(2)** Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

**(3)** Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

**(b)** When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is



substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

**(c)** The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

**(1)** of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

**(2)** of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

**(d)(1)** When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any

judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

**(2)** When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

**(3)** Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is

ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

**(4)(A)** The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

**(B)** When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

111a

**(e)** The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

**28 U.S.C. § 2461**

§ 2461. Mode of recovery

**(a)** Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

**(b)** Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

**(c)** If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and

113a

section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.