No. 17-10448

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

JOSEPH M. ARPAIO,

Defendant-Appellant.

BRIEF OF AMICI CURIAE CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF A RULE 42 SPECIAL PROSECUTOR APPOINTMENT

Appeal from the United States District Court
District of Arizona
2:16-cr-010120-SRB-1

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STATEMENT OF COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and this Court's June 1, 2018 Order [Dkt. 26]. No counsel for a party authored this brief in whole or in part, and no person, other than *amici* or their counsel, made any monetary contribution to the preparation or submission of this brief.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are members of the House Judiciary Committee. They are Rep. Jerrold Nadler (NY-10), Ranking Member of the Committee; Rep. Sheila Jackson Lee (TX-18), Ranking Member of the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; Rep. Steve Cohen (TN-9), Ranking Member of the Subcommittee on the Constitution and Civil Justice; Rep. Hank Johnson (GA-4), Ranking Member of the Subcommittee on Courts, Intellectual Property and the Internet; Rep. David Cicilline (RI-1), Ranking Member of the Subcommittee on Commercial and Antitrust Law; Rep. Ted Deutch (FL-22); Rep. Luis Gutierrez (Il-4); Rep. Karen Bass (CA-37); Rep. Ted W. Lieu (CA-33); Rep. Jamie Raskin (MD-08); and Rep. Pramila Jayapal (WA-07) (collectively, the "Congressional *Amici*").

The Congressional *Amici* have an interest in protecting the division of powers among the executive, legislative, and judicial branches of government set forth in the Constitution, and in protecting the rights and remedies provided by legislation enacted by Congress, which includes the right under 42 U.S.C. § 1983 to prohibitory injunctive relief from the deprivation of the rights, privileges and immunities under color of State Law.

As to the merits of the appeal, the Congressional *Amici* regard the presidential pardon at issue as an encroachment by the Executive on the

independence of the Judiciary, and urge the Court to defend jealously against that encroachment. The power to impose sanctions for contempt of court is an inherent power that is essential to the independence of the judiciary. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates…." *Anderson v. Dunn*, 19 U.S. 204, 227 (1821).

As to the issue immediately before the Court, the appointment of a special prosecutor to defend the district court's decision, the Congressional *Amici* have an interest that is also grounded in concern for separation of powers. The Congressional *Amici* contend that it is "emphatically the province and duty of the judicial department to say what the law is," not of the Executive. *United States v. Windsor*, 570 U.S. 744, 762 (2013) (internal citations omitted). The Congressional *Amici* urge the Court to support the Motions Panel's appointment of a special prosecutor to assure that this Court perform that duty in a "real, earnest and vital controversy," not in a "friendly, non-adversary proceeding." *Id*. at 759.

ARGUMENT

THE MOTIONS PANEL'S DECISION TO APPOINT A SPECIAL PROSECUTOR ENSURES THAT THE JUDICIARY, NOT THE PRESIDENT, ACTS AS FINAL ARBITER OF THE PRESIDENT'S CONSTITUTIONAL POWERS AND TO ASSURE THAT THE IMPORTANT CONSTITUTIONAL ISSUES IN THIS LITIGATION ARE PRESENTED TO THE COURT WITH THE NECESSARY CONCRETE ADVERSENESS.

The conduct of the present Administration here is starkly different from the conduct of past administrations in similar circumstances. The court below concluded that the Prohibition-era decision in *Ex Parte Grossman*, 267 U.S. 87 (1925), is controlling on the constitutionality of the Arpaio pardon, a conclusion with which the Congressional *Amici* disagree. There, the defendant ran a speakeasy and was caught selling liquor. The trial court issued an injunction that the defendant not sell liquor again. Less than two months later, the defendant was caught again. The trial court found the defendant guilty of contempt of court, and sentenced the defendant to a $1000 fine and to imprisonment for one year. The President reduced the sentence to the fine. The trial court denied the President the power to pardon or commute contempt of court, a decision supported by the greater weight of legal authority at the time, and committed the defendant to imprisonment. On appeal, the Harding Administration appointed special counsel to argue to uphold the imprisonment, but argued as amicus that the pardon was valid.

In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the Reagan Administration agreed with Jagdish Rai Chadha, "an East Indian who was born in Kenya and holds a British passport," that the statute under which Chadha was ordered deported was unconstitutional, as did the Ninth Circuit, which ordered the government not to deport Chadha. *Id*. at 923. The Administration then petitioned the Supreme Court to review the decision with which it agreed, and the Court granted certiorari. Members of the United States House of Representatives appeared as *amici* to argue that the statute was constitutional.

In *United States v. Windsor*, the Obama Administration agreed with the plaintiff that the Defense of Marriage Act's exclusion of same-sex partners from the definition of "spouse" in federal statutes was unconstitutional, as did the Second Circuit. The Obama Administration then petitioned the Supreme Court to review the decision with which it agreed, and the Court granted certiorari. The Administration informed the Court that the government has "an interest in providing Congress a full and fair opportunity to participate in the litigation," and "recognize[ed] the judiciary as the final arbiter of the constitutional claims raised." 570 U.S. at 754.

The Court in *Windsor* said that the "Executive's unusual position" of "agreement with Windsor's legal argument raises the risk that instead of a 'real, earnest and vital controversy,' the Court faces a 'friendly, non-adversarial

proceeding." *Id*. at 759. "[P]rudential concerns," the Court said, "demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Id*. at 760 (citations omitted). The Court concluded that the appearance of the Bipartisan Legal Advisory Group of the United States House of Representatives[1] to defend the constitutionality of the Defense of Marriage Act provided the necessary concrete adverseness. *Id*. at 761 ("BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.").

"[I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review," the Court said, "then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial

[1] BLAG represented the United States House of Representatives at the direction of the majority then, but certainly did not represent all Members' views. The Congressional *Amici* who served in the House at the time all agreed with the Second Circuit's decision that DOMA was unconstitutional, and all sharply opposed the position taken by BLAG before the Supreme Court. Representative Nadler was then lead sponsor of proposed legislation to repeal DOMA.

department to say what the law is." *Id*. at 762 (citations, quotation marks and other punctuation omitted). It would also pose "grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination by the Court." *Id*.

Unlike past administrations, the present Administration does not accept the norm that the judiciary should be the final arbiter of constitutional claims without regard to the Administration's position on those claims. The Administration has sought to squelch any legal challenge to the President's pardon at issue and to claim for itself the role of final arbiter of the President's power.

The inherent judicial power to appoint special counsel to prosecute contempt of court protects the independence of the judiciary from just such encroachments by the Executive. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). Thus, the Congressional *Amici* believe that the Motions Panel appropriately exercised its inherent and express power—codified in Rule 42 of the Federal Rules of Criminal Procedure—to appoint a special prosecutor to defend the district court's order, and to defend jealously the power of the judiciary to be final arbiter of constitutional claims.

CONCLUSION

For the foregoing reasons, the Congressional *Amici* respectfully request that this Court proceed with the appointment of a special prosecutor to defend the district court's order.

Dated: June 22, 2018

Respectfully submitted,

s/ *R. Bradley Miller*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the Court's typeface requirements, because it is written in 14-pt Times New Roman font, and with the type-volume limitations of the Court's June 1, 2018 Order [Dkt. 26], because it contains 1,352 words, excluding the portions excluded under Rule 32(f). This count is based on the word-count feature of Microsoft Word.

Dated: June 22, 2018

s/*Spencer G. Scharff*

Spencer G. Scharff

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 22, 2018 for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

Dated: June 22, 2018

s/*Spencer G. Scharff*

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