No. 17-10448

In The United States Court Of Appeals For The Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH M. ARPAIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, NO. 2:16-CR-01012

BRIEF FOR THE UNITED STATES OPPOSING APPOINTMENT OF A SPECIAL PROSECUTOR

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INTRODUCTION

In April 2018, this Court issued an Order indicating that it will appoint a special prosecutor "to defend the decision of the district court." In June 2018, the Chief Judge directed the parties to submit briefing on whether the Court should rehear the Order *en banc* to decide whether the Court "has the authority, either pursuant to Fed. R. Crim. P. 42(a)(2) or under its inherent authority, to appoint a special prosecutor under the circumstances presented by this case."

The Court lacks the power, either under Rule 42 or its inherent authority, to appoint a special prosecutor at this stage of the litigation. The government already prosecuted defendant Joseph Arpaio for criminal contempt, the President pardoned him before he could challenge his contempt conviction, and the sole question at issue in this appeal is whether Arpaio's inability to challenge his conviction as a result of the President's pardon means that the conviction should be vacated. The government agrees with Arpaio on that issue. But proceedings on that question do not remotely implicate the district court's authority, either under Rule 42 or inherently, to appoint a special prosecutor when the government declines in the first instance to prosecute criminal contempt. Instead, as in other cases where the government agrees with the defendant on a legal question on appeal, the most that this Court could do here is to appoint an amicus to defend the district court's judgment—and the government takes no position on whether it should do that.

Panel rehearing or, if necessary, rehearing *en banc* is warranted to clarify that the Order does no more than authorize the appointment of amicus counsel to defend the judgment below and that it does not vest the appointed counsel with broader powers. The prosecution of crimes is a prerogative of the Executive Branch, subject to a narrow exception for appointment of a special prosecutor in contempt actions that is codified in Rule 42. But the appointment of a special prosecutor under the circumstances of this case does not fit within that narrow exception, and thus would intrude into an area that is constitutionally reserved for the Executive. And the separation-of-powers concern would be particularly severe if the special prosecutor were able to challenge the validity of the pardon itself.

STATEMENT OF THE CASE

Following a referral in the United States District Court for the District of Arizona, the district court adjudicated defendant Joseph Arpaio guilty of criminal contempt, in violation of 18 U.S.C. § 401(3). Before the court imposed a sentence, the President pardoned Arpaio.

1. In December 2011, the district court (Snow, J.) presiding over a civil lawsuit against Arpaio and the Maricopa County Sheriff's Office, entered a preliminary injunction prohibiting the defendants from "detaining any person based solely on knowledge, without more, that the person is in the country without lawful authority." *Melendres v. Arpaio*, 695 F.3d 990, 994, 1000 (9th Cir. 2012) (internal quotation marks omitted). In August 2016, the district court entered an order referring the matter to

another judge (randomly assigned to Bolton, J.) to determine whether Arpaio and others should be held in criminal contempt for willfully violating that injunction. DE 1, at 1; *see* 18 U.S.C. § 401; Fed. R. Crim. P. 42(a)(2).[1] The government responded by agreeing to prosecute Arpaio. DE 27, at 8-9. Following a bench trial, at which attorneys from the Department of Justice prosecuted the pending charge, the district court found Arpaio guilty of criminal contempt, in violation of § 401(3). DE 210.

2. Before sentencing, the President issued Arpaio a "Full and Unconditional Pardon." DE 221. The Pardon encompassed Arpaio's "conviction" under Section 401(3) and any other criminal contempt offenses arising out of the underlying civil litigation. *See id.*

Arpaio moved to dismiss the case with prejudice and "vacate the verdict and all other orders." DE 220, at 1-2. The government similarly argued that the pardon's issuance "after the guilty verdict but before judgment moots the case, prevents appellate review, and thus warrants vacatur." DE 236, at 3. Various individuals and organizations sought leave to file briefs as amicus curiae challenging the pardon's validity on constitutional grounds. *See, e.g.*, DE 223, 227, 228, 229. One supplemented its amicus brief to argue that the court should appoint a private prosecutor under Rule 42 to prosecute the criminal contempt case. DE 231.

[1] "DE" refers to docket entries in the district court. "ECF" refers to docket entries in this Court.

At a hearing on Arpaio's motion, the district court permitted the amicus briefs but concluded that the pardon was constitutional, denied the request to appoint a private prosecutor, dismissed the criminal contempt action against Arpaio with prejudice, and took under advisement whether to "enter any further orders." *See* DE 243. In a subsequent written order, the district court denied Arpaio's motion for vacatur "insofar as it seeks relief beyond dismissal with prejudice." DE 251, at 4.

3. a. Arpaio appealed. As relevant here, an amicus curiae in the district court sought appointment under Rule 42 principally to file a cross-appeal challenging the pardon's validity. ECF 5-2, at 8-9. The amicus also indicated it would defend the district court's order refusing vacatur. *Id.* at 8. This Court issued an order denying the request for a Rule 42 appointment to cross-appeal as untimely, and directing the government to file a statement addressing whether (1) the government would defend the district court's non-vacatur decision; (2) the government would "represent the government's interests on appeal"; and (3) the Court should "appoint counsel to represent the government's interests on appeal and defend the district court's order." ECF 9, at 1-2.

In response, the government filed a statement indicating that it did not intend to defend the district court's order denying vacatur; did intend to "represent the government's interests in this appeal"; and "t[ook] no position" on whether this Court should "appoint counsel to make any additional arguments." ECF 12, at 2. The government did not address whether this Court has the authority to appoint a special

prosecutor, because the Court's order only raised the possibility of appointment of counsel—and in the government's view the Court had the authority to appoint counsel as an amicus curiae (though the government did not take a position on whether such an appointment would be appropriate).

b. A motions panel of this Court issued an Order indicating that it will appoint not amicus counsel, but a special prosecutor. *See United States v. Arpaio*, 887 F.3d 979 (9th Cir. 2018). The panel majority drew support from Rule 42(a)(2)—though it acknowledged that by its terms the Rule only permits an appointment to prosecute contempt when the government declines to do so. *Id.* at 981. The panel also pointed to the longstanding Supreme Court practice of appointing counsel as an amicus curiae to defend a position that the government has abandoned. *Id.* at 981-82. The Order stated that the merits panel would not "receive the benefit of full briefing and argument" without the appointment of a special prosecutor "to defend the decision of the district court." *Id.* at 981; *see id.* at 980 (appointing a special prosecutor "to provide briefing and argument to the merits panel").

Judge Tallman dissented, pointing out that the government has already prosecuted Arpaio and had advised the Court that it "is not abdicating its responsibility to represent the Government's interest in this appeal." *Arpaio*, 887 F.3d at 983 (Tallman, J., dissenting). For this reason, Judge Tallman viewed the appointment of a special prosecutor as "ill-advised and unnecessary." *Id.* Moreover, the need for a special prosecutor is over, Judge Tallman explained. The "powers of prosecution do not—

and should not—extend to tangential matters of end-of-case record-keeping or vacatur of the record of a successful conviction following a pardon. This is not why Rule 42(a)(2) exists." *Id.* at 984. Likewise, the district court's authority, Judge Tallman stated, "was vindicated when Arpaio was convicted of criminal contempt. Its authority will not be usurped if that conviction is vacated in light of the pardon, or if the court of appeals ultimately affirms." *Id.* Judge Tallman expressed concern that appointment of a special prosecutor "prejudged" the case by showing that the Court disagrees with the government's position, *id.* at 985, and he speculated that the real motive for those seeking appointment as a special prosecutor was to attack the validity of the pardon. *Id.* at 985-86.

ARGUMENT

The Court lacks authority to appoint a special prosecutor in this case. As a general matter, prosecutorial power is vested only in the Executive Branch. There is a narrow exception under *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), codified in Rule 42(a)(2), for the appointment of a special prosecutor to pursue criminal contempt when the government declines to do so, in order to vindicate the authority of courts over their proceedings. But that narrow exception does not apply here because the government pursued contempt and is continuing to represent the government's interests on appeal.

The only potential basis for any appointment of counsel is the government's agreement with Arpaio that his contempt conviction should be vacated because the

President pardoned him before the conviction became final. That legal question about the effect of the President's pardon is distinct from this Court's authority to ensure that a contemnor faces prosecution. At most, as in other criminal cases where the government agrees with the defendant that the district court erred, this Court could appoint an amicus curiae to present arguments in defense of the district court's decision. The Order's appointment of a "special prosecutor," who might rely on that designation to assert broader powers—such as the power to challenge the validity of the pardon—gives rise to grave separation-of-powers concerns that warrant clarification or correction by the motions panel or the *en banc* Court.

A. The Court lacks authority here to appoint a special prosecutor.

1. The prosecutorial powers are vested in the Executive Branch.

The Constitution vests prosecutorial power solely in the Executive Branch. *See* U.S. Const. art. II, §§ 1, 3. Accordingly, the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citations omitted). A narrow exception to that exclusive authority exists, however, for the prosecution of criminal contempt of court. *See* Fed. R. Crim. P. 42(a)(2); *Young*, 481 U.S. at 795, 801-02. Specifically, a district court may appoint a special prosecutor to pursue criminal charges for contempt of court committed outside the presence of the judge, but only if the court first "request[s] that

the contempt be prosecuted by an attorney for the government" and the government "declines th[at] request." Fed. R. Crim. P. 42(a)(2).[2]

That exception enables a court to "compel obedience to its orders," *In re Debs*, 158 U.S. 564, 595 (1895), but the Supreme Court has repeatedly emphasized that it is a narrow exception, due to the "unwisdom of vesting the judiciary with completely untrammeled power to punish contempt," *Bloom v. Illinois*, 391 U.S. 194, 207 (1968) (abrogating *Debs* in part). In particular, in *Young*, the Court reasoned that judicial initiation of criminal contempt proceedings "must be restrained by the principle that only the least possible power adequate to the end proposed should be used." 481 U.S. at 801 (citations, internal quotation marks, and brackets omitted). Courts must "first request the appropriate prosecuting authorities to prosecute contempt actions," and appoint a private prosecutor only where the government declines to prosecute, "ensur[ing] that the court will exercise its inherent power of self-protection only as a last resort." *Id.* Rule 42(a)(2) was then revised to "adopt[ ] the holding in *Young*." *In re Special Proceedings*, 373 F.3d 37, 42 (1st Cir. 2004); Fed. R. Crim. P. 42, Committee Notes on Rules—2002 Amendment. Thus, "the prosecutor should be given the right of first refusal to prosecute contempt, because prosecution of contempt—even though it is a

[2] Rule 42(a)(2) also permits the appointment of a private prosecutor without such a request where the "interest of justice requires." The motions panel did not rely on that rationale, which is inapplicable here and has been applied principally where prosecutors are potentially implicated in the contempt. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 42-43 (1st Cir. 2004).

crime against the judiciary—is a responsibility which the Constitution gives to the executive branch." *United States v. Vlahos*, 33 F.3d 758, 764 (7th Cir. 1994) (Manion, J., concurring).

2. The narrow exception for judicial appointment of a special prosecutor does not apply here.

This Court lacks authority to appoint a special prosecutor here, because the government did not "decline[] the request" to prosecute Arpaio for contempt. Fed. R. Crim. P. 42(a)(2). To the contrary, the government affirmatively accepted the referral, prosecuted Arpaio, and obtained "a contempt conviction at trial," such that "any affront to the court's authority was vindicated." *Arpaio*, 887 F.3d at 984 (Tallman, J., dissenting). Of course, following the prosecution, verdict, pardon, and dismissal of the contempt action with prejudice, the government determined as a legal matter that the pardon should result in the vacatur of Arpaio's conviction, and the government agrees with Arpaio that the district court erred in concluding otherwise. But the government's disagreement with the district court's decision—after obtaining a conviction that was followed by the pardon—does not mean that the government "decline[d]" the court's "request" that it "prosecute the contempt." Fed. R. Crim. P. 42(a)(2); *see Arpaio*, 887 F.3d at 985 (Tallman, J., dissenting) ("The Government has . . . never declined to prosecute this case."); *id.* (noting the lack of any legal authority "for the proposition that Rule 42 requires appointing a special prosecutor where, as here, the Government has already successfully obtained a conviction, but the President has pardoned the

contemnor."). The government continues to serve as the prosecutor in this case and to represent the interests of the Executive, even if it disagrees with the district court over the correct application of the law. *See* ECF 12, at 2.[3]

Nor is the appointment of a special prosecutor necessary to safeguard the district court's authority over the underlying civil case. "[E]nsuring that an alleged contemnor will have to account for his or her behavior" vindicates judicial authority "regardless of whether the party is ultimately convicted or acquitted." *Young*, 481 U.S. at 796 n.8. Here, Arpaio was made to account for his behavior—and the district court's authority was vindicated—when he was prosecuted for (and convicted of) criminal contempt. The subsequent question of whether that conviction should be vacated following an intervening Presidential pardon and the dismissal of the contempt case with prejudice is far afield from what Rule 42 and courts' inherent authority concern: "the initiation of contempt proceedings to punish disobedience to court orders." *Young*, 481 U.S. at 795. The distinct question here is "a matter of record-keeping as to the fact of his

[3] Although the Order states that the government has "declined to oppose the contemnor's arguments on appeal," 887 F.3d at 981-82, the government has only declined to defend the district court's decision on vacatur; it has not expressed any position on the sufficiency and trial-related claims that Arpaio presses in his appellate brief. *See* ECF 22, at 19-72. In any event, the government does not abdicate the prosecutorial function when it agrees with a defendant on a legal question. The government has an independent obligation to assess the merits of any given legal argument, as the Solicitor General's practice of confessing error in the Supreme Court illustrates. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(a), at 345-46 (10th ed. 2013).

conviction." *Arpaio*, 887 F.3d at 985 (Tallman, J., dissenting). There is accordingly "no underlying affront to the court's authority stemming from criminal contempt left to vindicate."[4] *Id.*

To the extent the court wishes to hear from counsel defending the district court's non-vacatur decision, it has the authority to appoint such counsel as an amicus curiae. *See* Fed. R. App. P. 29(a)(2); *see also United States v. Barnett*, 376 U.S. 681, 738 (1964) (Goldberg, J., dissenting) (recognizing "power of federal courts to appoint 'amici to represent the public interest in the administration of justice'" (quoting *Universal Oil Products Co. v. Root Rfg. Co.*, 328 U.S. 575, 581 (1946))). The United States takes no position on whether the Court should appoint an amicus—only that, under the circumstances of this case, any appointment of counsel must be pursuant to the Court's inherent authority to provide for an amicus "to file briefs and present oral argument" in defense of the district court's decision. *See United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988). The distinction is important because, by its nature, counsel appointed as amicus would be limited to defending the judgment and could not claim any of the powers associated with a special prosecutor.

[4] The Order correctly observes that the "operation of Rule 42(a)(2) is not confined to investigations and trials in the district court" and that a properly appointed special prosecutor is authorized to handle litigation in the courts of appeals. *Arpaio*, 887 F.3d at 981. But that says nothing about whether the motions panel here properly appointed a special prosecutor in the first place.

B. *En banc* rehearing is warranted if the Order is not limited to appointment of amicus counsel to defend the district court's decision.

The relevant standard for *en banc* consideration is whether (1) the panel decision conflicts with a Supreme Court or Ninth Circuit decision or (2) the case presents one or more "questions of exceptional importance." Fed. R. App. P. 35(b)(1). Unless the panel clarifies that the counsel appointed by the Order is an amicus, the serious separation-of-powers concerns raised by the designation of a special prosecutor would warrant the intervention of the *en banc* Court.

1. The Order should be clarified to confirm that it does nothing more than appoint amicus counsel.

Although unclear, the Order can be read to do nothing more than authorize the appointment of amicus counsel. The Order addresses "only the question of whether to appoint a special prosecutor *to defend the district court's decision*." *Arpaio*, 887 F.3d at 980 (emphasis added). Accordingly, the Order cabins the special prosecutor's responsibilities to "provid[ing] briefing and argument to the merits panel." *Ibid.* That briefing and argument must "defend the decision of the district court." *Id.* at 981; *see United States v. Arpaio*, --- F.3d ---, 2018 WL 2473495, at *1 (9th Cir. June 1, 2018) (describing Order as "appointing a special prosecutor to defend the district court's denial of defendant Arpaio's request for vacatur of his criminal contempt conviction"). Moreover, the motions panel found support for its decision in the Supreme Court's

practice of appointing counsel as amicus curiae when the prevailing party declines to defend a lower-court decision. 887 F.3d at 981-82.

For those reasons, although the panel majority referred to appointed counsel as "a special prosecutor," the nature of the appointment can and should be understood as limited to filing briefs and presenting arguments in defense of the district court's non-vacatur decision. So construed, the Order would avoid the serious constitutional concerns posed by a more broadly empowered special prosecutor, *see* pp. 13-16, *infra*, which itself weighs in favor of interpreting the Order to appoint counsel solely to defend non-vacatur. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The motions panel, and, if necessary, the *en banc* Court, therefore should grant rehearing and, if it adheres to its decision to appoint counsel, redesignate that counsel as an amicus.

2. If the Order vests the special prosecutor with broader powers, *en banc* rehearing is warranted.

If the Order is intended to vest the appointed counsel with the broader powers typically possessed by a special prosecutor under Rule 42, including potentially the power to attack the validity of the pardon, *see Arpaio*, 887 F.3d at 983 (Tallman, J., dissenting), that would significantly overstep the judicial authority and would violate "the constitutional principle of separation of powers." *Morrison v. Olson*, 487 U.S. 654, 685 (1988). The Court's appointment of a more wide-ranging special prosecutor would both "accrete" to the Judiciary power "more appropriately" vested in the Executive and

"undermine the authority and independence" of the Executive. *Mistretta v. United States*, 488 U.S. 361, 382 (1989). As noted above, prosecution of crimes is an Executive prerogative, and the narrow exception for appointment of a private attorney to prosecute contempt is cabined by the Supreme Court's decision in *Young* and Rule 42. But judicial appointment of a special prosecutor under the circumstances of this case—where the government already has prosecuted the contempt matter and thus vindicated the district court's interest in protecting its authority—contravenes *Young* and Rule 42, and thus would encroach on the "quintessentially executive functions" of investigating and prosecuting crime. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (citing cases).

Reflecting that separation-of-powers violation, vesting a special prosecutor with broader powers could impede core Executive functions in a variety of ways. In particular, such an appointment creates a risk that the special prosecutor could challenge the validity of the pardon itself—notwithstanding that both the district court and this Court denied motions to appoint a special prosecutor for that purpose. *See Arpaio*, 887 F.3d at 983, 985-86 (Tallman, J., dissenting). The counsel who sought the special-prosecutor appointment envision the special prosecutor launching just such a challenge, s*ee* ECF 5, which would be particularly inappropriate because the Constitution exclusively grants the President the "power to grant reprieves and pardons for offenses against the United States." U.S. Const. art. II, § 2, cl. 1 (capitalization altered). And the Supreme Court has previously rejected the argument that the President's pardon power does not encompass the power to pardon individuals prosecuted or convicted for

criminal contempt. *See Ex Parte Grossman*, 267 U.S. 87, 122 (1925). Appointment of a special prosecutor who could challenge the President's authority in prosecuting and pardoning contempt would thus be doubly intrusive on the Executive's prerogatives.

To the extent the Order permits a special prosecutor to attack the validity of the pardon on appeal, it would also conflict with the "party presentation principle" that "an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). Here, the government did not appeal the district court's decision dismissing the case with prejudice in light of the pardon. Moreover, this Court has already denied an "emergency request" under Rule 42 to appoint a special prosecutor to "'notice a cross-appeal'" from the district court's decision "'upholding [the] validity of the Pardon.'" ECF 9, at 1. An interpretation of the Order that permits the special prosecutor "to take another stab at attacking the pardon on constitutional grounds," *Arpaio*, 887 F.3d at 985 (Tallman, J., dissenting), would impermissibly invite arguments that would imply broadening of the judgment and seek to place before the merits panel an issue decided below that no party has appealed. See Stephen M. Shapiro et al., *Supreme Court Practice* ch. 6.35, p. 493 (10th ed. 2013) (citing cases in which the Supreme Court has required a cross-petition for a writ of certiorari even where "the party is not asking for more" than affirmance if "the *rationale* of an argument would give the satisfied party more than the judgment below").

CONCLUSION

The appointment of a "special counsel" was in error. The panel, and, if necessary, the *en banc* Court, should grant rehearing to clarify that the Order does no more than authorize the appointment of an amicus to defend the district court's refusal to vacate Arpaio's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James I. Pearce, Attorney in the Appellate Section of the Criminal Division at the U.S. Department of Justice, hereby certify that on June 22, 2018 an electronic copy of this brief was served by notice of electronic filing via this Court's ECF system upon opposing counsel.

s/ James I. Pearce

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations provided in the Court's Order on June 1, 2018 because it contains 3,943 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Garamond 14-point font in text and Garamond 14-point font in footnotes.
3. This brief complies with the privacy redaction requirement of Fed R. App. 25(a)(5) because it contains no personal data identifiers.
4. The digital version electronically filed with the Court on this day is an exact copy of the written document to be sent to the Clerk; and
5. This brief has been scanned for viruses with the most recent version of McAfee VirusScan Enterprise, version 8.7.0*i*, which is continuously updated, and according to that program is free of viruses.

DATED: JUNE 22, 2018

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