No. 18-962

In the Supreme Court of the United States

IN RE JOSEPH M. ARPAIO, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The federal government prosecuted petitioner for criminal contempt of court, in violation of 18 U.S.C. 401(3), and obtained a guilty verdict. Petitioner then obtained a Presidential pardon. The district court thereafter dismissed the prosecution with prejudice but declined to vacate the verdict, and the government indicated on appeal that it agreed with petitioner that the guilty verdict should have been vacated. The court of appeals then appointed a "special prosecutor" to provide briefing and argument before that court. The question presented is whether petitioner is entitled to a writ of mandamus on his claim that appointment of a "special prosecutor" was erroneous.

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OPINIONS BELOW

The order of the court of appeals determining that it would appoint a special prosecutor (Pet. App. 1a-15a) is reported at 887 F.3d 979. The order of the court of appeals denying en banc review (Pet. App. 16a-42a) is reported at 906 F.3d 800. The order of the court of appeals appointing the special prosecutor (Pet. App. 43a-44a) is unreported.

JURISDICTION

The order of the court of appeals finding authority to appoint a special prosecutor was entered on April 17, 2018. A petition for rehearing was denied on October 10, 2018 (Pet. App. 16a-18a). The petition for a writ of mandamus was filed on January 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

Following a bench trial in the United States District Court for the District of Arizona, the district court ad-

judicated petitioner guilty of criminal contempt, in violation of 18 U.S.C. 401(3). Before the court imposed sentence, the President pardoned petitioner. The court denied petitioner's motion to vacate the factual finding of guilt, and petitioner appealed. When the government, which had prosecuted petitioner at trial, informed the court of appeals that the government intended to defend the interests of the United States but not to defend the district court's vacatur decision, the court of appeals appointed a special prosecutor. Petitioner's appeal of the district court's vacatur decision remains pending in the court of appeals.

1. From 1993 until 2016, petitioner was the sheriff of Maricopa County, Arizona. In December 2011, the district court presiding over a civil lawsuit against petitioner 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 2016, the court entered an order referring the matter to another district court judge to determine whether petitioner and others should be held in criminal contempt of court for willfully violating that injunction. D. Ct. Doc. 1, at 1 (Aug. 19, 2016).

The primary federal statute governing criminal contempt is 18 U.S.C. 401. It provides, among other things, that a federal court may punish "contempt of its authority" that constitutes "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. 401(3). Under the Federal Rules of Criminal Procedure, the court "must request" that the govern-

ment prosecute the criminal contempt "unless the interest of justice requires the appointment of another attorney." Fed. R. Crim. P. 42(a)(2). "If the government declines the request, the court must appoint another attorney to prosecute the contempt." *Ibid.*

The government agreed to prosecute petitioner. D. Ct. Doc. 27, at 8-9 (Oct. 11, 2016). Following a bench trial at which attorneys from the Department of Justice prosecuted the pending charge, the district court found petitioner guilty of criminal contempt, in violation of Section 401(3). D. Ct. Doc. 210 (July 31, 2017).

2. Before sentencing, the President issued petitioner a "Full and Unconditional Pardon." D. Ct. Doc. 221, at 1 (Aug. 28, 2017). The pardon encompassed petitioner's "Conviction" under Section 401(3) and any other criminal contempt offenses arising out of the underlying civil litigation. *Ibid.*

Petitioner moved to dismiss the case with prejudice and "vacate the verdict and all other orders." D. Ct. Doc. 220, at 1-2 (Aug. 28, 2017). He argued that vacatur was appropriate because the pardon had mooted the case and thereby deprived petitioner of the opportunity to challenge the merits of the verdict on appeal. See *United States* v. *Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam) (vacating guilty verdict where pardon was issued before conclusion of appeals). The government filed a brief that similarly argued that the pardon's issuance "after the guilty verdict but before judgment moots the case, prevents appellate review, and thus warrants vacatur." D. Ct. Doc. 236, at 3 (Sept. 21, 2017); *id.* at 2 (arguing that *Schaffer* "strongly counsels for vacatur").

Various individuals and organizations sought leave to file briefs as amici curiae challenging the pardon's validity on constitutional grounds. See, *e.g.*, D. Ct. Docs. 223, 227, 228, 229 (Sept. 11, 2017). One further sought to argue that the court should appoint a private prosecutor under Rule 42 to prosecute the criminal contempt case. See D. Ct. Doc. 231, at 2 (Sept. 11, 2017).

At a hearing on petitioner'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 petitioner with prejudice, and took under advisement whether to "enter any further orders." D. Ct. Doc. 243, at 1-2 (Oct. 4, 2017). In a subsequent written order, the court denied petitioner's motion for vacatur "insofar as it seeks relief beyond dismissal with prejudice." D. Ct. Doc. 251, at 4 (Oct. 19, 2017).

3. a. Petitioner 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. C.A. Doc. 5-2, at 8-9 (Nov. 8, 2017). The amicus also indicated it would defend the court's order refusing vacatur. *Id.* at 8. The court of appeals denied the request for a Rule 42 appointment to cross-appeal as untimely and directed the government to file a statement addressing whether (1) the government would defend the district court's vacatur order; (2) the government would "represent the government's interests on appeal"; and (3) the court of appeals should "appoint counsel to represent the government's interests on appeal and defend the district court's order." C.A. Doc. 9, at 1-2 (Nov. 22, 2017).

In response, the government filed a statement indicating that it intended to "represent the government's

interests in this appeal"; that it did not intend to defend the district court's order denying vacatur; and that it took no position on whether the court of appeals should "appoint counsel to make any additional arguments." C.A. Doc. 12, at 2 (Dec. 13, 2017). The government did not address whether the court of appeals had 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 to defend the district court's vacatur decision (though the government took no position on whether such an appointment would be appropriate).

b. A motions panel of the court of appeals issued an order indicating that it would appoint a special prosecutor. Pet. App. 3a-8a. 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 5a. Acknowledging that no court had ever appointed a private prosecutor where the government had accepted a court's referral and prosecuted the criminal-contempt allegation to a guilty verdict, the majority nonetheless could "see no reason why such [an] appointment should not take place under Rule 42(a)(2)." *Id.* at 6a. The panel pointed to this Court's longstanding practice of appointing counsel as an amicus curiae to defend a position that the government had abandoned. *Id.* at 6a-7a. 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 5a; see *id.* at 3a (appointing a special prosecutor "to provide briefing and argument to the merits panel").

Judge Tallman dissented. Pet. App. 8a-15a. He pointed out that the government had already prosecuted petitioner and had advised the court of appeals that it continues "to represent the Government's interest in this appeal." *Id.* at 8a. Judge Tallman thus viewed the special-prosecutor appointment as "ill-advised and unnecessary." *Ibid.* Moreover, Judge Tallman explained, the "need for a special prosecutor is over" because 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." *Id.* at 11a-12a. Likewise, the district court's authority, Judge Tallman stated, "was vindicated when [petitioner] 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.* at 12a. Judge Tallman expressed concern that appointment of a special prosecutor "prejudged" the case by showing that the court disagreed with the government's position. *Id.* at 13a.

4. After a judge on the court of appeals sua sponte called for a vote on en banc rehearing, the court denied rehearing. Pet. App. 18a.

a. Judge Fletcher, joined by five other circuit judges, concurred in the denial of en banc rehearing. Pet. App. 18a-27a. Judge Fletcher emphasized two aspects of the appointment. First, Judge Fletcher noted that the special prosecutor's function was limited to presenting briefing and argument in support of the district court's vacatur decision. *Id.* at 20a. Second, Judge Fletcher addressed the court's power to appoint a special prosecutor. See *id.* at 20a-25a. Under Rule 42,

which implemented the judiciary's "pre-existing inherent authority," the district court could appoint a private attorney to prosecute a contempt case when the government declined. *Id.* at 21a-24a. In Judge Fletcher's view, the court of appeals possessed a similar power to appoint a special prosecutor to defend the finding of guilt on appeal following the pardon. *Id.* at 24a.

b. Judge Callahan, joined by three other circuit judges, dissented from the en banc denial. Pet. App. 27a-42a. She argued that the "tried and true solution" to ensure that the court of appeals would receive full adversarial briefing on the vacatur issue was not the "unprecedented step of appointing a 'special prosecutor,'" but instead appointing an amicus curiae to provide briefing and argument. *Id.* at 27a. The special prosecutor appointment, moreover, was "constitutionally infirm" because it intruded upon executive power. *Id.* at 28a. A court's power to appoint a prosecutor applies only when necessary to "vindicate [the court's] own authority," she explained. *Id.* at 32a (quoting *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 793-796, 800-801 (1987)). Because that "quasi-executive" power ceases upon initiation of contempt proceedings, the court had no cause to appoint a special prosecutor here once the government initiated a contempt prosecution of petitioner. See *ibid.*; *Young*, 481 U.S. at 796 n.8. In short, the appointment "not only violates the separation of powers, but is also sloppy, creates bad law, and invites reversal" by this Court. Pet. App. 37a.

5. After the en banc denial, the court of appeals entered an order appointing private attorney Christopher G. Caldwell as the special prosecutor. Pet. App. 43a-44a. The order limited the appointed special prosecutor's role to "the functions a government attorney would

have performed in connection with [petitioner]'s appeal in this Court had the government been willing to perform those functions." *Ibid.* The order also directed the Ninth Circuit's Clerk of Court to add the special prosecutor as an "additional counsel of record for appellee United States of America." *Id.* at 44a.

ARGUMENT

The court of appeals erred because it lacked authority to appoint a special prosecutor in this case. Instead, as in other cases where the government agrees with a defendant on a legal question on appeal, the most that the court should have done was to appoint an amicus curiae to defend the district court's decision. The appointment of a special prosecutor, moreover, could potentially create significant constitutional problems. Nonetheless, mandamus relief is not warranted at this time because the appointed special prosecutor, who is limited under the appointment order to providing briefing and argument before the court of appeals, serves functionally as an amicus. If the appointed special prosecutor seeks to expand that role, this Court's review likely would be warranted.

1. The court of appeals' decision to appoint a special prosecutor was incorrect.

a. The court of appeals lacked authority to appoint a special prosecutor in this case. The Constitution vests prosecutorial power 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). A narrow exception exists for the prosecution of criminal contempt of court. See Fed. R. Crim. P. 42(a)(2); *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 801-802 (1987).

Specifically, a court may appoint a special prosecutor to pursue criminal 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).[1]

A court-appointed special prosecutor's sole purpose is to "pursue the public interest in vindication of the court's authority." *Young*, 481 U.S. at 804. The exception thus enables a court to "compel obedience to its orders." *In re Debs*, 158 U.S. 564, 595 (1895). But this 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 (quoting *United States* v. *Wilson*, 421 U.S. 309, 319 (1975)) (brackets omitted). The Court determined that courts must "first request the appropriate prosecuting authority 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."

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[1] Rule 42(a)(2) also permits the appointment of a private prosecutor without such a request where the "interest of justice requires." Fed. R. Crim. P. 42(a)(2). The court of appeals 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).

Ibid. Rule 42(a)(2) was then revised to "reflect the holding in *Young*." *In re Special Proceedings*, 373 F.3d 37, 41 (1st Cir. 2004) (citation omitted); Fed. R. Crim. P. 42, advisory committee notes (2002 Amendments). Thus, "the prosecutor should be given the right of first refusal to prosecute contempt, because prosecution of contempt —even though it is a 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).

b. The narrow exception that authorizes judicial appointment of a special prosecutor does not apply here for two reasons.

i. First, the government did not "decline[] the request" to prosecute petitioner for contempt. Fed. R. Crim. P. 42(a)(2). To the contrary, when the district court requested that the government prosecute petitioner for contempt, the government accepted the referral, prosecuted him, and obtained a guilty verdict at trial. There is no legal authority supporting "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." Pet. App. 12a-13a (Tallman, J., dissenting).

Following the Presidential pardon, the government informed the court of appeals that it intended to represent the interests of the United States in petitioner's case. Of course, in light of the 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 petitioner's guilty verdict as well, and the government agrees with petitioner that the district court erred in concluding otherwise. In particular, the

government agrees with petitioner that the pardon had the effect of mooting petitioner's case and thus deprived him of the opportunity to challenge the validity of the verdict on appeal. In *United States* v. *Schaffer*, 240 F.3d 35 (2001) (en banc) (per curiam), the D.C. Circuit vacated "all opinions, judgments, and verdicts" of the district court in a case where a pardon was issued while appellate review was ongoing. *Id.* at 38. The same course was warranted here as well.

The government's disagreement with the district court's decision on this legal question—whether vacatur is appropriate when a pardon is issued after a guilty verdict but before an opportunity for appellate review—does not mean that the government "decline[d]" the court's "request" that it "prosecute the contempt." Fed. R. Crim. P. 42(a)(2). The government does not abdicate the prosecutorial function when it agrees with a defendant on a legal question. Rather, 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 this Court illustrates. See Stephen M. Shapiro et al., *Supreme Court Practice* 345-346 (10th ed. 2013). A decision to confess error here is thus not tantamount to "abandon[ing] the case." Pet. App. 40a (Callahan, J., dissenting). The government continues to serve as the prosecutor and to represent the interests of the United States, even if it disagrees with the district court over the correct application of the law. Cf. Pet. 7 (function of a prosecutor is to represent the interests of the United States, which is "not that it shall win a case, but that justice shall be done") (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)).

ii. Second, the government has already vindicated any affront to the court's authority. See *Young*, 481 U.S.

at 795; see also Pet. App. 37a (Callahan J., dissenting) ("The district court's authority was vindicated when the government initiated contempt proceedings."). "[E]nsuring that an alleged contemner 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 797 n.8. Here, petitioner in fact was prosecuted to a verdict for criminal contempt, and indeed was ultimately found guilty. See Pet. App. 11a (Tallman, J., dissenting).

The sole issue now pending before the court of appeals is whether the district court's factual adjudication of petitioner's guilt and other orders should be vacated following an intervening pardon and the dismissal of the contempt case with prejudice. That "tangential * * * end-of-case record-keeping" question about the propriety of vacatur is far afield from any concern with vindication of the court's authority. Pet. App. 11a-12a (Tallman, J., dissenting). There is accordingly "no underlying affront to the court's authority stemming from criminal contempt left to vindicate." *Id.* at 13a.

Judge Fletcher's conclusion that the government "declined to defend [petitioner's] conviction when [petitioner] appealed the district court's denial of his motion for vacatur," Pet. App. 24a, is thus mistaken in two respects. First, even assuming petitioner stands "convicted" where a Presidential pardon issues after a guilty verdict but before sentencing, the vacatur question on appeal is separate from defending that "conviction," and not akin to a declination to prosecute. Second, the court's interest in vindication was satisfied once the government initiated and pursued the prosecution through to

a verdict, and thus does not depend on whether petitioner was ultimately convicted and sentenced for contempt.

c. To accomplish the court of appeals' stated purpose to hear adversarial briefing on the vacatur question before it, the court could have appointed an amicus counsel. 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 Prods. Co.* v. *Root Ref. Co.*, 328 U.S. 575, 581 (1946)). The government did not take a position below on whether the court of appeals should have appointed an amicus. The government left that decision to the court of appeals, as it typically does before this Court. But any such appointment was only proper as an exercise of the court of appeals' inherent judicial 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 roles performed by an amicus counsel and a court-appointed special prosecutor are distinct. See Pet. App. 35a-37a (Callahan, J., dissenting). While an amicus is limited to providing briefing and argument, a court-appointed special prosecutor ordinarily possesses powers similar to those held by Executive Branch prosecutors. See *id.* at 35a-36a & n.7; accord *id.* at 20a (Fletcher, J., concurring) (noting that a court-appointed prosecutor under Rule 42 has the same role as a federal prosecutor). For example, a court-appointed special prosecutor is empowered to investigate; to appear before a grand jury, including to seek an indictment in a particular case; and to issue or apply for legal process

such as subpoenas, search warrants, and other court orders. See *id.* at 35a-36a & n.7 (Callahan, J., dissenting).

Confusingly, however, the court of appeals appointed a "special prosecutor" but endowed him only with the powers of an amicus counsel. Pet. App. 3a ("[W]e will appoint a special prosecutor to provide briefing and argument to the merits panel."); see *id.* at 36a-37a (Callahan, J., dissenting) (noting that panel majority "uses these distinct labels * * * as if they were interchangeable"). The initial order (see *id.* at 3a, 7a) and Judge Fletcher's opinion concurring in the en banc denial (see *id.* at 18a) cabin the special prosecutor's authority to briefing and argument before the court of appeals. Similarly, the order appointing private attorney Christopher G. Caldwell as the special prosecutor expressly limits his role to "functions [that] a government attorney would have performed in connection with [petitioner]'s appeal" if the government had elected to defend the district court's decision. *Id.* at 43a-44a. Moreover, obligating the special prosecutor to take a specific legal position is consistent with the task of an appointed amicus, but at odds with a prosecutor's duty to assess the merits of a question independently and determine which position best serves the interests of justice.

d. If the court of appeals intended to vest the appointed counsel with the broader powers typically possessed by a special prosecutor under Rule 42, that would significantly overstep 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 "un-

dermine 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 Court's decision in *Young* and Rule 42. 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 threatens to encroach on the "quintessentially executive function[s]" of investigating and prosecuting crime. See *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (collecting cases).[2]

2. a. Despite these problems, mandamus relief is not warranted at this time because the special-prosecutor appointment can and should be narrowly construed as tantamount to the appointment of an amicus curiae. Writs of mandamus are granted by this Court as a matter of "discretion sparingly exercised" and only upon a showing that "the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any

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[2] The appointment of a special prosecutor also may give rise to practical problems. By having the special prosecutor added to the docket as counsel for the United States, the court of appeals provides no guidance on "who will resolve" any "conflicts" between the government and the special prosecutor. Pet. App. 36a n.7 (Callahan, J., dissenting); cf. *Providence Journal Co.*, 485 U.S. at 701 (finding "somewhat startling" the proposition that there could be "more than one 'United States' that may appear before this Court") (citation omitted).

other form." Sup. Ct. R. 20.1. Petitioner does not satisfy that standard at this time.

The order appointing the special prosecutor can be read to authorize the appointment of counsel with a role and authorities that are functionally equivalent to those of a court-appointed amicus curiae. Although the panel majority and Judge Fletcher label the appointed attorney a "special prosecutor," the nature of the appointment should be understood as limited to filing briefs and presenting arguments in defense of the district court's vacatur decision. That reading, moreover, draws support from the language of the panel majority, Judge Fletcher's opinion, and the subsequent order appointing the private attorney. See, *e.g.*, Pet. App. 3a, 7a (panel majority); *id.* at 20a (Fletcher, J., concurring); *id.* at 43a-44a (appointment order). So construed, the order would avoid the serious constitutional concerns posed by a more broadly empowered special prosecutor, see pp. 14-15, *supra*, which itself weighs strongly in favor of interpreting the order to appoint counsel solely to defend non-vacatur. Cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); cf. Pet. 13 (arguing that a broad interpretation of a special prosecutor's powers under Rule 42 implicates constitutional concerns). And even if the special prosecutor potentially could exercise broader powers under the order appointing him, the possibility that he would not actually exercise such powers counsels against review at this time.

b. If the special prosecutor in the future expands his role beyond that of a functional amicus curiae in the court of appeals, this Court's review likely would be warranted. A special prosecutor operating 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 view himself as empowered to challenge the validity of the pardon itself—notwithstanding that both the district court and the court of appeals denied motions to appoint a special prosecutor for that purpose. See Pet. App. 8a, 14a (Tallman, J., dissenting). The counsel who sought the special-prosecutor appointment envisioned the special prosecutor launching just such a challenge, see C.A. Doc. 5-2, at 9-12, which would be particularly inappropriate because the Constitution exclusively grants the President the "Power to grant Reprieves and Pardons for Offences against the United States." U.S. Const. Art. II, § 2, Cl. 1. And this Court has already 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).

To the extent a special prosecutor sought 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 non-appealing party." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008). The government did not appeal the district court's dismissal of the case here in light of the pardon. Moreover, the court of appeals 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.'" C.A. Doc. 9, at 1. An interpretation of the order that permits the special prosecutor "to take another stab at attacking the pardon on constitutional grounds,"

Pet. App. 14a (Tallman, J., dissenting), would thus impermissibly expand the relief requested in the absence of a cross-appeal and seek to place before the merits panel an issue that no party has appealed.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

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