No. 23-1313

IN THE

Supreme Court of the United States

NATIN PAUL,

Petitioner,

v.

THE ROY F. AND JOANN COLE MITTE FOUNDATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent barely contests that the questions presented—which implicate important liberty interests—warrant this Court's review in an appropriate case. Respondent (at 10) admits that state courts "diverge[]" on whether criminal-contempt prosecutions by interested, private parties comport with due process—although it ignores equally on-point federal court-of-appeals cases and incorrectly argues that federalism permits the state-court split. And respondent (at 9) recognizes that this Court already granted certiorari once to decide a variant of the private-prosecutor question only to dismiss the writ as improvidently granted. *Robertson v. United States ex rel. Watson*, 560 U.S. 272 (2010). As amicus underscores, this Court's intervention is urgently needed to resolve whether an interested, private party may wield "the enormous power and discretion entrusted to a prosecutor in a criminal case." Cato Br. 4.

Respondent also does not dispute the well-acknowledged, entrenched split over whether criminal defendants have the right to allocute, *i.e.*, to address the court personally at sentencing. And respondent barely defends the trial court's extraordinary, in absentia email sentencing of petitioner Natin Paul, which denied him his due-process and Sixth Amendment rights to an in-person sentencing with counsel. On that issue, respondent (at 16-17) primarily just urges the Court not to engage in "error correction."

Instead, respondent offers a litany of spurious vehicle objections and attacks on the petition's veracity. Respondent claims that this case implicates neither

question presented, that the lower courts did not rule on these issues, and that Mr. Paul failed to preserve them. But Mr. Paul clearly and consistently objected on federal constitutional grounds at every level of the Texas courts, the Texas Court of Appeals rejected his claims on the merits, and the Texas Supreme Court denied mandamus over a strenuous four-Justice dissent. Tellingly, respondent's brief in the Texas Supreme Court grappled with both questions on the merits without ever suggesting any impediments to that Court's review. This Court should reject respondent's eleventh-hour vehicle objections for what they are: a cynical attempt to evade review on two clearly certiorari-worthy questions that have divided state and federal courts. The Court should grant the petition.

I. This Court Should Decide Whether Contempt Prosecutions by Interested Private Prosecutors Are Constitutional

1. This case squarely presents an entrenched, critically important split over whether interested, private parties may prosecute criminal contempt cases against civil-litigation opponents. The majority of courts—contrary to the Texas courts' holdings below—reject such proceedings as due-process violations. Pet. 8-10; Cato Br. 5-8.

Respondent (at 10) incorrectly claims that federal court-of-appeals cases rejecting private contempt prosecutions rest on this Court's supervisory-power decision in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), not the Due Process Clause. But in the Fourth Circuit, criminal-contempt defendants enjoy "the protections that *the Constitution* requires," including "the right . . . to be prosecuted by an independent

prosecutor." *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 379 (4th Cir. 2004) (citation omitted; emphasis added). In the Fifth Circuit, interested private prosecutors "violate[] the *due process rights* of the criminal contempt defendant." *United States ex rel. SEC v. Carter*, 907 F.2d 484, 486 n.1 (5th Cir. 1990) (emphasis added). And in the Ninth Circuit, independent prosecutors are a "required . . . *due process* protection[]" in criminal-contempt cases. *F.J. Hanshaw Enters. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1132 (9th Cir. 2001) (emphasis added). Respondent ignores these on-point constitutional holdings.

Respondent (at 10) admits "a shallow divergence among state courts" on private contempt prosecutions, but minimizes that split by attributing it to different "state-specific procedural protections." As respondent (at 10-11) notes, the few state decisions blessing private contempt prosecutions cite other procedural safeguards as sufficient to avoid due-process violations. But respondent identifies no comparable protections in Texas. And respondent ignores contrary decisions, which categorically reject interested private prosecutors. In West Virginia, for example, criminal-contempt defendants have a "due process" "right to be prosecuted by a state's attorney," so private prosecutions are "clearly" "reversible error." *Trecost v. Trecost*, 502 S.E.2d 445, 449 (W. Va. 1998). And in the District of Columbia, "the demands of due process" "prohibit[] the appointment of" interested private contempt prosecutors. *In re Taylor*, 73 A.3d 85, 97-98 (D.C. 2013). The federal decisions above likewise articulate a per se constitutional rule. In any of those jurisdictions, the Texas procedure here would be categorically unconstitutional. If Mr. Paul's civil trial occurred blocks away in federal court, as opposed to Texas state court, he would not be facing incarceration.

Respondent (at 10-11) calls different contempt procedures "a hallmark of federalism." The right to an independent prosecutor is not a minor procedural tittle akin to different rules of evidence. Regardless, respondent's federalism argument is at most a *merits* argument for why interested, private prosecutors should be permissible. Lower courts' "different procedural requirements" (BIO 12) based on different understandings of what due process requires is the definition of a conflict.

2. This case squarely implicates that conflict. Respondent (at 5-6) claims otherwise, insisting that its lawyer was not, in fact, a private prosecutor, but "solely represented the Foundation's interest." That claim would be a surprise to the trial court, which repeatedly described respondent as "prosecuting" "the motions for contempt and sanctions." App.41a, 48a, 56a, 66a. The Texas Supreme Court dissenters had the same understanding: "The trial court permitted a judgment creditor to prosecute its debtor for acts of criminal contempt." App.3a.

Those judges understood this case correctly. Respondent's private counsel requested that the trial court commence criminal-contempt proceedings against Mr. Paul to "answer these charges of perjury and improper transfer." TSC Br. Ex. E, at 68.[1] The subsequent criminal-contempt hearing transcript reads from start to finish like a criminal trial prosecuted by respondent's lawyer. TSC Br. Ex. H. The lawyer offered evidence, called

1. The trial-court record is largely attached to Mr. Paul's Texas Supreme Court petition (TSC Br.), available at https://search.txcourts.gov/Case.aspx?cn=23-0253&coa=cossup. *Accord* BIO 2 n.1. The Texas Supreme Court briefs are also available at this link.

and examined Mr. Paul, and pressured him to respond by reminding him that he was "accused of perjury." *Id.* at 5, 10, 17, 19-20. The lawyer then delivered a closing argument asking the court to hold Mr. Paul in criminal contempt. *Id.* at 69-76. And the same attorney drafted the court's contempt order. TSC Br. Ex. J, at 2-9.

The lawyer also had a financial stake in the outcome, since the court ordered Mr. Paul to pay double attorneys' fees for successfully "prosecuting" the contempt motion. App.66a-67a; Pet. 6. Four Justices of the Texas Supreme Court thus recognized that "[t]he prosecutors in this case are to be paid from the defendant's coffers for their service." App.6a. Respondent (at 5-6) remarkably accuses petitioner and those Justices of misrepresenting this point, yet ignores the attorneys'-fee award.

Whether or not the lawyer was called a "prosecutor," his actions have all the features of a private prosecution that would be unconstitutional elsewhere. West Virginia's highest court found a due-process violation where a private party's lawyers brought a criminal-contempt prosecution, although "not formally designate[d] . . . special prosecutors." *State ex rel. Koppers Co. v. Int'l Union of Oil, Chem. & Atomic Workers*, 298 S.E.2d 827, 828 (W. Va. 1982). And the Ninth Circuit held that a party's lawyer impermissibly acted as a private prosecutor where he "was responsible for presenting witnesses to prove the charge and for arguing that misconduct occurred." *F.J. Hanshaw*, 244 F.3d at 1141. Moreover, the lawyer "had a direct interest in the result of the proceedings"—his client sought a "surcharge"—which made the lawyer "not independent." *Id.* Here too, respondent's lawyer presented witnesses, argued that Mr. Paul committed contempt,

and sought additional recovery (sanctions and attorneys' fees). As the Texas Supreme Court dissenters recognized, this case directly implicates the split: "Most states and the federal courts would invalidate this interested prosecution." App.7a-8a.

3. Whether an interested private party may prosecute his civil-litigation opponent warrants this Court's review. Pet. 10-12. Respondent never argues otherwise. Reflecting the issue's importance, this Court already granted certiorari to review a variant of this question once, only to dismiss the writ as improvidently granted. *Robertson*, 560 U.S. 272. As the Chief Justice explained in dissent, "[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole," not by private individuals. *Id.* at 273 (Roberts, C.J., dissenting). This case provides the opportunity for this Court to resolve the question left open by *Robertson* once and for all.

II. This Court Should Decide Whether In Absentia Email Sentencing Is Constitutional

This case independently warrants certiorari to resolve whether in absentia sentencing, without any right to allocution or counsel, is constitutional.

1. Respondent does not dispute that the circuits and state courts are deeply and openly split over whether the Due Process Clause affords criminal defendants the right to allocute, *i.e.*, to personally address the court before sentencing. Pet. 13-15. And respondent does not dispute that this fundamentally important question warrants review.

Instead, respondent (at 13-15) bizarrely suggests that the question presented is not outcome-determinative because Texas' allocution statute prevents entry of a sentence only when the defendant has been pardoned, is incompetent, or is not the person convicted. Tex. Code Crim. Proc. art. 42.07. But Mr. Paul is not asking this Court to decide whether he was denied his allocution right under Texas' statute (although the trial court denied him that right too) or whether Texas' statute is unconstitutional. The question presented is whether, as a matter of *federal* constitutional law, criminal defendants have the right to allocute before sentencing. Mr. Paul raised separate federal- and state-law objections below, TSC Br. Exs. S, T, and obviously presses only his federal-law claim here.

The federal allocution right is not limited to identifying reasons, like a pardon or mistaken identity, that prevent entry of a sentence. Instead, in the jurisdictions that recognize this right, defendants may personally address the court to "bring mitigating circumstances to the attention of the court." *Boardman v. Estelle*, 957 F.2d 1523, 1526 (9th Cir. 1992) (citation omitted). Here, for example, Mr. Paul could have sought to make amends for any misunderstanding of the reporting obligations. Whatever Texas law requires, the trial court's email sentencing denied Mr. Paul that federal right.

2. Mr. Paul's in absentia sentencing further violated his right to be physically present at sentencing with the assistance of counsel. Pet. 16. Respondent (at 16) counters that some criminal-procedure rights, like grand juries and arraignments, do not apply to criminal-contempt proceedings. But in general, "constitutional protections

for criminal defendants . . . apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions." *United States v. Dixon*, 509 U.S. 688, 696 (1993); *see* Cato Br. 12-14. And respondent conspicuously ignores this Court's controlling decision in *Taylor v. Hayes*, which held that "fundamental due process protections" are "essential" in criminal-contempt proceedings, including the right at sentencing to "present matters in mitigation or otherwise attempt to make amends with the court." 418 U.S. 488, 499-500 (1974).

Whatever the applicability of *other* rights to criminal-contempt proceedings, the trial court's denial of the basic due-process and Sixth Amendment right to an in-person sentencing with counsel at which Mr. Paul and/or his counsel could "present matters in mitigation" flouted Mr. Paul's federal rights. Respondent (at 16-17) asserts that correcting this egregious constitutional violation would be mere "error correction" unworthy of this Court's attention. But coupled with two independently certiorari-worthy conflicts, the trial court's refusal to comply with this Court's precedent should enhance, not detract from, the need for certiorari.

3. Respondent (at 6, 16) also asserts that this case does not implicate the in-person sentencing question because the March 3 email order was not, in fact, the sentencing. In the Texas Supreme Court, however, respondent described the "Trial Court's Ruling" as occurring "[o]n March 3, 2023" when "the trial court sent an email announcing that it was finding Paul in both civil[] and criminal contempt." Found. TSC Br. 22. The email, from the court's staff attorney on his official account, stated: "[T]he Court finds Nate Paul in criminal contempt and orders him confined

in the Travis County jail for a period of 10 days beginning on March 15, 2023." TSC Br. Ex. I, at 1. On its face, the email adjudicated Mr. Paul guilty and ordered him to jail.

Regardless, whether Mr. Paul's sentencing occurred via email on March 3 or court order on March 10 is immaterial. The court's March 10 order, App.50a-57a, also occurred in absentia, without any opportunity for allocution or an in-person hearing with counsel. While Mr. Paul appeared at earlier hearings with counsel, BIO 16, the Due Process Clause and the Sixth Amendment demand more: the right to an in-person *sentencing*. The Texas courts denied Mr. Paul that right, whichever document constitutes the sentence.

III. This Case Is the Ideal Vehicle to Resolve Both Questions Presented

Respondent contends that this case is a poor vehicle because the questions presented were neither pressed nor passed upon below. Both contentions are demonstrably wrong.

1. The Texas courts ruled on both questions. *Contra* BIO 1, 8-9. Mr. Paul seeks certiorari from the Texas Supreme Court's denial of mandamus or habeas corpus—an original proceeding. In his petition for mandamus or habeas corpus, Mr. Paul objected that "[respondent] serving as criminal contempt prosecutor . . . violated due process." TSC Br. ii. And Mr. Paul contended that the imposition of "jail sentences without conducting a sentencing hearing . . . den[ied] [Mr. Paul] his constitutional rights to the assistance of counsel, to be present in court, and to allocution." TSC Br. iii. Respondent addressed both

arguments on the merits without even hinting that these issues were not adequately preserved. *See* Found. TSC Br. 26-37, 54-57.

The Texas Court of Appeals adjudicated Mr. Paul's claims too. The court listed Mr. Paul's arguments including that "opposing counsel improperly served as 'prosecutor'" and that "the district court failed to conduct a separate sentencing hearing before imposing punishment, which Paul claims denied him 'the right to the assistance of counsel, the right to presence, and the right of allocution.'" App.30a-31a. The court then determined that "these contentions do not entitle Paul to any relief"—again, rejecting his claim on the merits, without any mention of forfeiture. App.31a.

To be sure, the Texas courts did not explain their reasoning. But as long as the decision below rests on a federal ground, even if "unelaborated," this Court may grant review. *See Foster v. Chatman*, 578 U.S. 488, 497 (2016); Stephen M. Shapiro et al., *Supreme Court Practice* § 3.23, at 3-80 (2019). This Court routinely grants certiorari when state supreme courts decline to issue reasoned decisions.[2] Here, the Texas Supreme Court's decision is unambiguously based on federal law since Mr. Paul raised federal constitutional claims, and respondent exclusively answered with federal-law merits arguments, never mentioning the state-law forfeiture claim that is now a centerpiece of respondent's opposition.

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2. *E.g.*, *Smith v. Arizona*, 144 S. Ct. 1785 (2024); *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024); *Hemphill v. New York*, 595 U.S. 140 (2022).

Instead, respondent urged that the prosecutorial procedure used here applies "in virtually every Texas case in which a civil litigant is found to be in contempt of court," and no independent prosecutor was "required." Found. TSC Br. 28, 32; *see* Cato Br. 4-5 n.3. And respondent contended that "Texas courts 'have determined that the right to allocution ***is not a constitutional right***.'" Found. TSC Br. 56 (collecting cases). In other words, respondent told the Texas courts that Texas precedent was clear on both issues, making further elaboration unnecessary. Having prevailed, respondent cannot now complain that the Texas courts needed to say more. As amicus explains, that the Texas courts thought their practice so permissible as not to warrant explanation "makes the need for this Court's review more, not less, necessary." Cato Br. 4.

2. This Court will grant certiorari to state courts to resolve federal questions that were "pressed *or* passed upon below." *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (emphasis added). As just discussed, the decisions below passed on the questions presented. But respondent's forfeiture allegations (at 17-18) also are baseless.

As four Justices of the Texas Supreme Court recognized, "Paul challenged the Foundation's role as prosecutor of the criminal charges" and "raised this issue in the trial court and in the court of appeals," preserving his challenge to the interested, private prosecutor. App.3a, 5a. On March 9, 2023—before the entry of final judgment that respondent (at 6-7) characterizes as Mr. Paul's adjudication of guilt and sentencing—Mr. Paul filed objections to the trial court's procedures. Mr. Paul argued that "[c]ounsel for [the Foundation's] impermissible

role as prosecutor requires that the criminal-contempt proceedings be vacated." TSC Br. Ex. S, at 2. And Mr. Paul objected that "[t]he Sixth Amendment and Due Process Clause entitled Mr. Paul to an in-person sentencing hearing." *Id.* at 1.

Respondent (at 17) claims that Mr. Paul should have objected sooner. But Texas law simply requires a timely objection in the trial court to preserve issues for appellate review. *Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013). Respondent cites no Texas-law authority suggesting that Mr. Paul's objections were untimely. And, again, it made no such argument in the Texas Supreme Court. Respondent should not be heard to complain now in this Court that, after litigating this issue across every level of the Texas judiciary, Mr. Paul should have objected sooner.

Respondent's forfeiture claim is especially baffling as to the in absentia sentencing. Until the trial court's March 3 email, Mr. Paul had no reason to know that the trial court planned an extraordinary, in absentia email sentencing. Mr. Paul promptly filed written objections six days later, before entry of judgment. Respondent's choice to focus on baseless vehicle objections should confirm the obvious: these two critically important questions warrant review now, and this is the case to resolve them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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