No. _____

In The
Supreme Court of the United States

IN RE: JOSEPH M. ARPAIO,
Petitioner.

On Petition for a Writ of Mandamus
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF MANDAMUS

MARK GOLDMAN
GOLDMAN &
ZWILLINGER, PLLC
17851 North 85th St.,
Suite. 175
Scottsdale, AZ 85255
docket@gzlawoffice.com

DENNIS I. WILENCHIK
Counsel of Record
JOHN D. WILENCHIK
WILENCHIK &
BARTNESS, P.C.
2810 N. Third St.
Phoenix, AZ 85004
(602) 606-2810
diw@wb-law.com
jackw@wb-law.com
admin@wb-law.com
Counsel for Petitioner

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LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

Where the Department of Justice has appeared in a criminal appeal on behalf of the United States, and indicated that it intends to represent the United States' interests on appeal, can the Ninth Circuit appoint a "special prosecutor" to replace the Department of Justice as prosecutors for the United States, simply because the Department intends to argue that the lower court erred?

By appointing a special prosecutor to supplant the Department of Justice, on the sole grounds that the Department of Justice concedes error by the lower court, does the Court violate the separation of powers, as well as due process, by actively participating in the prosecution?

Do federal courts have any power to appoint prosecutors to a case that the Department of Justice can legally and ethically handle, whether or not the Department actually chooses to prosecute the case? (Should *Young v. United States ex rel. Vuitton et Fils S.A.* be clarified or overruled?)

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are as follows:

1. Petitioner/Defendant Joseph M. Arpaio.
2. Respondent/Plaintiff United States of America.

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PETITION FOR MANDAMUS

Petitioner Joseph M. Arpaio ("Petitioner," or "Defendant") respectfully petitions for an order reversing the lower court's published order appointing a "special prosecutor" to replace the Department of Justice in this criminal prosecution and appeal, even though the Department of Justice has appeared in the appeal and indicated that it "intends to represent the Government's interests in this appeal." As Judge Callahan wrote in her dissent (joined by four other judges of the Ninth Circuit), "the extraordinary act of appointing a special prosecutor not only violates the separation of powers, but is also sloppy, creates bad law, and invites reversal by the Supreme Court."[1]

The lower court has no power to replace the Department of Justice as prosecutors for the United States in a criminal case – including, if not particularly in, a prosecution for contempt of court. The Ninth Circuit's reason for replacing the Department of Justice was that the prosecutors disagreed with the lower court's order refusing to vacate Mr. Arpaio's conviction following the dismissal of the case, and indicated that they intend to argue in this appeal that the lower court erred. The court's decision to replace the Department of Justice merely because it has conceded error by the lower court violates the separation of powers, is clearly illegal

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[1] From the Order denying rehearing *en banc*, filed October 10, 2018, Appendix B hereto.

under federal law, and gives a constitutionally-intolerable appearance of bias by actively involving the court in the ongoing prosecution of a case.

OPINIONS BELOW

On April 17, 2018, the Ninth Circuit motions panel published an order authorizing the appointment of a special prosecutor to supplant the Department of Justice in the instant criminal appeal (Appendix "A" hereto), after requests by various non-parties to the case,[2] who were later joined by certain Democratic members of Congress. Judge Tallman published a dissent, and a judge of the court *sua sponte* called for a vote on whether to rehear the order *en banc*. On October 10, 2018, twelve judges participated in another published order that, while technically denying a rehearing *en banc,* was effectively a (more than[3]) *en banc* decision, with seven judges joining in the majority opinion and five joining the dissent. On October 15, 2018, the Circuit court appointed a special prosecutor by an order providing that "[t]he special prosecutor will be limited to the functions a government attorney would have performed in connection with Arpaio's appeal in

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[2] As Judge Tallman wrote in his dissent to the April 17, 2018 Order, the non-parties who requested the special prosecutor "do not appear disinterested…[T]he law firm serving as the primary signor for [them] represented Trump's political rival, Hillary Clinton…" *See* footnote 2 to Appendix "A" hereto.

[3] The Ninth Circuit assigns eleven (11) judges to an actual *en banc* panel. Ninth Circuit Rule 35-3.

this Court had the government been willing to perform those functions." At no time has the Department of Justice stated that it is unwilling or unable to perform its functions in connection with this appeal. In fact, the Department of Justice appeared in the appeal on behalf of the United States on December 13, 2017, and stated to the Circuit court, in response to its specific request (prompted by the non-parties' filings), that the Department "intends to represent the Government's interests in this appeal." What the Circuit court mischaracterizes as being "[un]willing to perform its functions," or as "abandoning" the appeal, was the Department of Justice's mere statement that it "does not intend to defend the district court's order from October 29, 2017, in which the court denied Defendant-Appellant Joseph M. Arpaio's motion to vacate [his conviction]; instead, the government intends to argue, as it did in the district court, that the motion to vacate should have been granted." In other words, the Ninth Circuit replaced the prosecutors because they concede error by the district court, and because they happen to take a position that favors the Defendant; and not because the prosecutors have "abandoned" or are "unwilling" to represent the United States' interests in this matter, which are to pursue justice.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this Petition by virtue of 28 U.S.C.A. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 516 provides that "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

28 U.S.C.A. § 547 provides that "[e]xcept as otherwise provided by law, each United States attorney, within his district, shall (1) prosecute for all offenses against the United States…"

28 U.S.C.A. § 518(b) provides that "[w]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

28 U.S.C.A. § 1651 provides that: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

STATEMENT OF THE CASE

The Court must summarily reverse the lower court's order appointing a "special prosecutor" to supplant the Department of Justice. The lower court's dissenting five judges, the Department of Justice, and even the Defendant agree that the Circuit court may appoint an *amicus curiae* to help brief and research issues for the lower court – which is the "tried and true" approach to situations in which the Government concedes error on appeal – in lieu of a special prosecutor. As the dissent wrote, "[t]he majority's conflation of the routine appointment of amici with the extraordinary act of appointing a special prosecutor not only violates the separation of powers, but is also sloppy, creates bad law, and invites reversal by the Supreme Court."

The crucial difference between an *amicus curaie* and a "special prosecutor" is that an *amicus curiae* is not entitled to speak on behalf the United States and does not have the broad powers of a prosecutor. These powers include the power to "conduct[] proceedings before grand juries and other investigations"; "mak[e] applications to any Federal court…for warrants, subpoenas, or other court orders"; and "initiat[e] and conduct[] prosecutions in any court of competing jurisdiction, fram[e] and sign[] indictments, fil[e] informations, and handl[e] all aspects of any cases, in the name of the United States."[4] While the power to seek subpoenas and so

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[4] See footnote seven to the October 10, 2018 dissent, Appendix B hereto, quoting 28 U.S.C. § 594(a).

forth is admittedly of lesser importance during a criminal appeal, the prosecutor's "other" power—the right to speak on behalf of the United States—actually takes on a heightened importance in the appellate context. Because the position(s) of the United States in any given appeal are binding, not just in the appeal itself but in later appeals of other cases, the "United States should speak with one voice before this Court," and in a voice that reflects the "common interests of the Government and therefore all of the people." *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988). While the Attorney General is appointed by a democratically-elected President to speak on behalf of the United States, there is no transparency whatsoever to the appointment of a "special counsel" by the Ninth Circuit to purportedly speak on behalf of the United States (and in fact, it is complete mystery how or why the Ninth Circuit selected the gentleman whom they appointed to be "special prosecutor" in October). In addition, reserving the power to speak on behalf of the United States to the Attorney General and the Department of Justice encourages prosecutors to take positions shaped by "longer term interests in the development of the law," as opposed to "a variety of inconsistent positions shaped by the immediate demands of the case sub judice"—or worse, shaped by the apparent interest of the judges who appointed them. *Id.*

Because the most troubling part about all of this is why the lower court removed the Department of Justice from this case, and the effect that that this must have on their "replacement." The lower court removed the Department of Justice because it be-

lieves that the Department's prosecutors are not "willing to perform [their] functions" in connection with this appeal, based only on the prosecutors' statement that they do "not intend to defend the district court's order from October 29, 2017…instead, the government intends to argue, as it did in the district court, that the motion to vacate should have been granted" (October 15, 2018 Order). The lower court shows a fundamental misunderstanding of what a prosecutor's function is. It is not to "defend" court orders, or to disagree with the defendant, or even to obtain and uphold a conviction at all costs. The function of a prosecutor is to represent the interest of the United States; and the interest of the United States is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). If prosecutors believe that a position is just, then they must take it, even if it is in the defendant's favor. The court may not remove prosecutors because it does not like their position, especially where their position is that the court made a mistake. To remove prosecutors from the case because they intend to argue that the court was wrong smacks of the worst kind of "tyrannical licentiousness." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). The lower court's order effectively sends the signal that if prosecutors act in the furtherance of justice, and concede error by the court, then they will be replaced. The new "special" prosecutor will be inherently biased in favor of defending the court's orders—because he knows that if he does not, he will be replaced as well. And so in reality, the Ninth Circuit has not appointed a "special prosecutor" to act in furtherance of the interests of the United States—

but rather a "special prosecutor" to act in the perceived interest of the judiciary.

This Court's decision in *U.S. v. Providence* was clear that a special prosecutor cannot be appointed to represent just the interests of the "Judicial Branch," without violating the Attorney General's right to represent the entire United States. *Providence*, 485 U.S. at 701. Court has also referred to the proposition that "there is more than one 'United States' that may appear before this Court" as "somewhat startling," and it has expressly found that the plaintiff in a criminal contempt case is not fundamentally different from any other criminal case: "proceedings at law for criminal contempt are between the public and the defendant," and even "[p]rivate attorneys appointed to prosecute a criminal contempt action *represent the United States*...." *Id.*, 485 U.S. at 700-701 (emphasis original).

In *Providence*, this Court correctly decided that only the Solicitor General may appeal cases to this Court on behalf of the United States, and that the Solicitor General could not be supplanted by a "special prosecutor" who had been appointed by the lower court (at the commencement of the case, under Rule 42). This Court found that neither Rule 42 nor any other federal authority allowed the "special prosecutor" to take over the Solicitor General's role; and the Court cited 28 U.S.C.A.§ 518(a) in support of its conclusion. Section 518(a) provides that the Solicitor General shall conduct and argue cases to this Court on behalf of the United States, without exception. The Court noted that Congress could have

included "exception" language in the statute (like the "except as otherwise provided" language contained in some related statutes, §§516 and 547), in order to allow for a court-appointed special prosecutor to argue to this Court, but Congress chose not to do so. Therefore, a court-appointed special prosecutor could not replace the Solicitor General. The very next subsection of the same statute, 28 U.S.C.A. § 518(b), resolves the issue at bar in like fashion. Section 518(b) provides that the Attorney General or his officers (i.e. the Department of Justice) may choose to conduct and argue "any case in a court of the United States" when they consider it "in the interest of the United States" to do so, without exception. Following the same logic that this Court applied in *Providence*, the Department of Justice is therefore entitled to represent the United States in any case where it has chosen to do so, without exception, and the lower court cannot appoint a "special prosecutor" to supplant that role. The bright-line distinction—as made clear by the five dissenting judges, the Department of Justice, and the Defendant in this case—is that once the Department of Justice has appeared in a criminal case with the intent to represent the United States' interests, then it cannot be removed. If the Department of Justice declines to represent the United States, then Rule 42 provides that the court "shall" appoint a special prosecutor. To allow the court to replace the prosecutors is to countenance a serious violation of the separation of powers, as the dissenting opinion in this case powerfully articulates. (*See* dissent at Appendix B hereto, incorporated as if set forth herein.)

The lower court's decision to replace the prosecutors also shows a constitutionally intolerable level of actual or apparent bias. As a matter of law, the court has no interest in perpetuating or managing a prosecution, once it has been commenced. And by its own admission, the Circuit court entered the order at issue here because the prosecutors made the apparently inexcusable error of agreeing with the Defendant about something. Allowing the judiciary to replace prosecutors makes them beholden to the court and renders them as *de facto* employees. This in turn destroys the entire premise of neutrality on which our adversarial criminal justice system depends, and creates an intolerable risk of bias. "[T]o perform its high function in the best way justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955). "Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Id.* To this, it should be added that anything that tips the scales in between the *court* and the State and the defendant must also be resisted—because the court, as a matter of law, has no interest in the ongoing prosecution, and it should not even be on the "scale." To create a mechanism by which the court can legally remove and replace the prosecutors in an ongoing case—especially in a contempt case, and especially when the only reason is that the prosecutors happened to agree with the Defendant—is clearly to tip the balance against the Defendant, and to indulge in an unconstitutional level of actual or apparent bias.

This Court should be equally troubled by what the lower court points to as its unique justification for doing this – namely, that this is a contempt case. Rather than supply the court with a justification to act in what it perceives as "self defense," the fact that this is a contempt case simply heightens the need for clear due process and a clean separation of the judiciary from the prosecution—because those lines are, *ab initio*, inherently blurred. The "victim" in a criminal contempt case is effectively the court, and so the less that the court actively participates in the prosecution of a case after its commencement, so much the better, to avoid the obvious questions and problems surrounding its neutrality. If the prosecutors choose not to defend a court order, then it is not a sign that the court must take over the prosecution to "defend itself," but rather it is a sign that the separation of powers is functioning correctly, and that it is not in the interests of justice to defend it. Because "justice" is not something that exists only in the eyes of judges. It is also made by lawmakers, by law enforcement, by prosecutors, by defense counsel and by juries, all working together, and ultimately in service of the people of the United States. If the executive branch chooses not to defend a judge's action, then the judiciary should not have the right to unilaterally "defend itself" by in effect ordering that the prosecution defend the judge's action, or be replaced. This Court has articulated several times that in a criminal contempt case, the risk of judicial bias is at its greatest, and the reasons why: contempt "often strikes at the most vulnerable and human qualities of a judge's temperament," and "its fusion of legislative, executive, and judicial powers summons forth ... the prospect of the most tyrannical licen-

tiousness." *Bagwell*, 512 U.S. at 831–32 (internal quotation marks omitted). Accordingly, "in [criminal] contempt cases an even more compelling argument can be made" than in ordinary criminal cases for providing "protection against the arbitrary exercise of official power." *Id.* In other words, the fact that this case involves contempt of court counsels for more judicial restraint, not less.

This Court has also repeatedly said that "[c]riminal contempt is a crime in the ordinary sense." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968); *Bagwell*, 512 U.S. at 826. Therefore, the prosecution in a criminal contempt case should be treated no differently than the prosecution in any other case. And if anything, the need for the separation of powers in such cases is greater and not less. "The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied?" *Ex parte Grossman*, 267 U.S. 87, 122 (1925). In *Ex parte Grossman*, this Court upheld the power of the President to pardon criminal contempt, in part because of the risk that the process will not be fair if judges control it entirely.

Finally: Petitioner also raises (like the dissent below) the broader question of whether Rule 42 itself—i.e., the very notion that the court can appoint its own prosecutors in a criminal contempt case, even if the Department of Justice is available to prosecute—is constitutional. First, there is clearly a distinction in between cases where the Department of Justice declines to prosecute, or it is conflicted out of doing so, and the case at bar. The Department of Justice has actively participated in this case; it intended to continue doing so; and nothing genuinely precludes it from doing so (other than the Circuit court's own fiat, which is here on appeal). The constitutionality of Rule 42 and of the Court's power to appoint prosecutors at all was compellingly raised by Justice Scalia in his concurrence to *Young v. United States*: "I would therefore hold that the federal courts have no power to prosecute contemners for disobedience of court judgments, and no derivative power to appoint an attorney to conduct contempt prosecutions." *Young v. U.S. ex rel. Vuitton et fils S.A.,* 481 U.S. 787, 825 (1987). After all, the power of a prosecutor to decline prosecution of a defendant is as powerful and as absolute as the power of a jury to acquit one; and so reserving prosecutorial discretion to the executive branch is about as much of an existential "threat" to the courts as reserving the power to acquit to a jury. Rather than being an existential "threat" against which the court must "defend itself," allowing prosecutors to decline to prosecute a case of criminal contempt is just another check on potential abuse of power by the judiciary. For the judicial branch to claim a broad power to initiate prosecutions for criminal contempt out of "self-defense," and for no reason other than

that the executive branch has declined to do so (and where its prosecutors would be ethically and legally competent to do so), seems to be as constitutionally infirm as the legislative branch invoking "self-defense" to decide a lawsuit challenging its own laws, simply because the court declined to hear the suit; or the executive branch invoking "self defense" to enforce a bill broadening its powers, simply because Congress declined to pass it into law. Courts cannot unilaterally decide to expand their own powers in "self-defense" or to "vindicate their authority," just like any other branch cannot unilaterally do so. Courts are, by design, totally reliant on the executive branch to defend them and to vindicate their authority; just like the executive branch is totally dependent on the judicial branch to uphold and "vindicate" its executive actions; and both rely on the legislative branch to give them any authority to "vindicate" or "defend" in the first place.

CONCLUSION

For all the foregoing reasons, the Court should summarily reverse the lower court's decision to replace the Department of Justice with a "special prosecutor," and/or grant merits briefing and argument on the issue(s). If the Department of Justice chooses to conduct and argue any case on behalf of the United States, then it may do so; and neither Rule 42 nor the court's inherent powers may change this result. The lower Court may not "replace" the prosecutors—and especially not for the reason given here, namely that the prosecutors have conceded error by the court and chosen to agree with the

defendant on an issue; and especially not in a criminal contempt case, where the Court must be at pains to demonstrate greater independence and neutrality, not less.

Respectfully submitted,

/S/ JOHN WILENCHIK
DENNIS I. WILENCHIK
JOHN D. WILENCHIK
WILENCHIK & BARTNESS, P.C.
2810 N. Third St.
Phoenix, AZ 85004
diw@wb-law.com
jackw@wb-law.com
admin@wb-law.com
Counsel for Petitioner

MARK GOLDMAN
GOLDMAN & ZWILLINGER, PLLC
17851 North 85th St.,
Suite. 175
Scottsdale, AZ 85255
docket@gzlawoffice.com