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 NINTH CIRCUIT COURT OF APPEALS

REPLY IN SUPPORT OF 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
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 of Record
for Petitioner

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

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REPLY IN SUPPORT OF PETITION FOR MANDAMUS

The issue at bar is clearly exceptional and could not be adequately addressed through any vehicle other than a mandamus. This proposition is almost self-evident: the principal harm being complained of is that the Circuit court has decided to control who speaks on behalf of the United States, overruling the right of the People to democratically elect an executive branch which appoints prosecutors to speak for them. This is a core violation of the separation of powers that has little to do with the merits of the underlying criminal appeal and that is clearly incapable of being remedied in a later direct appeal, much less through any vehicle other than mandamus.

The issue on appeal is clearly "extraordinary"—courts do not decide to replace prosecutors every day. Both of the reported decisions below had a strong dissent and a heavy *sua sponte* participation by the Ninth Circuit; and the dissenting judges literally invited this Court to intervene.[1] All of which speaks directly to just how "extraordinary" of an issue this really is.

In fact, the issue at bar is exactly what the "extraordinary" writ of mandamus was traditionally

[1] *United States v. Arpaio*, 906 F.3d 800, 809 (9th Cir. 2018)(Callahan, J., dissenting).

used for. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004)(brackets omitted). "Although courts have not confined themselves to an arbitrary and technical definition of 'jurisdiction,' only exceptional circumstances **amounting to a judicial 'usurpation of power,'** or a 'clear abuse of discretion,' will justify the invocation of this extraordinary remedy." *Id.* (emphasis added, internal citations omitted). "[W]hen a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of [mandamus]." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945). The case at bar involves just that – a judicial usurpation of the executive power to prosecute and argue cases on behalf of the United States, and not "mere error" concerning the merits of the underlying appeal.

In *Cheney*, this Court stated a three-part test for granting petitions for mandamus: "First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.*, 542 U.S. at 381 (internal citations and brackets omitted). "Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* (brackets omitted). "Third, even if the first two prerequisites have been met, the issuing court, in the

exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* "These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions **would threaten the separation of powers**…" *Id.* (quotation marks and brackets omitted, emphasis added). All of the foregoing elements are met here, and this case presents a perfect vehicle for the Court's exercise of its mandamus powers, because there is truly no other process by which this kind of harm can be cured.

What the Government misses in its brief—or more accurately, what it erroneously relegates to a footnote (n.2 on page 15 of the BIO)—is that a "special prosecutor" does not just "provid[e] briefing and argument before the court of appeals." He provides briefing and argument *on behalf of the United States*. While the special prosecutor's actual powers and anticipated duties under the order are somewhat indeterminate, the lower court's directive that the special prosecutor will be "counsel of record for appellee United States of America" is anything but. The importance of the lower court controlling who speaks on behalf of the United States, especially in an appellate context, cannot be overstated. As the Government starts to point out in its footnote, there are serious and inevitable practical consequences to this. For example, it is already obvious that the "special prosecutor" and the Department of Justice are taking completely opposite positions on the merits of the underlying appeal (i.e., on whether a pardon before sentencing warrants vacatur of a criminal conviction). Which one of those two positions will be the position of the "United States"? This

is not just an academic question, as this Court knows—because the issues that a party chooses to raise or not to raise, and the positions that it chooses to take or not to take, are significant and binding not just in the instant appeal, but in future appeals of the same case, and indeed in future appeals in other cases. *See, e.g., Helvering v. Wood*, 309 U.S. 344, 349 (1940)(finding that the government could not present a wholly new issue on appeal to this Court, where the government's attorneys had chosen to rely on different arguments in the circuit court); *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014)(where the government lost the case "in large part because it won when it argued the opposite before this Court more than 70 years ago" in a separate case, and the government was seen as trying to backtrack on its prior position). And if it is the "special prosecutor's" position alone that is to be binding on the United States – then has the circuit court not already dictated what that position will be? If the special prosecutor chooses not to "defend" the district court's order, then clearly he will be supplanted, just like the Department of Justice. The Ninth Circuit is controlling not only who represents the United States, but also what the United States' position will be—making this "special prosecutor" hardly an attorney for the United States, but rather an attorney for the Ninth Circuit.

Since filing the Petition, it has come to undersigned counsel's attention that the appointed "special prosecutor" is a former clerk to one of the two Ninth Circuit judges who voted to appoint him (Judge Tashima). The fact that the judges have never publicly disclosed this information, and that there was

zero transparency to the process by which the two judges selected and appointed him to be their "special prosecutor," heightens what is already an intolerable appearance of bias to the court's decision. This lack of transparency stands in stark contrast to the constitutional process by which U.S. Attorneys are appointed by the President to speak on behalf of the United States, which involves a public hearing and confirmation by the United States Senate. Not only has the lower court usurped the executive branch's prerogative to appoint prosecutors, but it has chosen not to bind itself with any of the same checks and balances that bind the executive branch, when exercising the same power.

When an attorney speaks on behalf of a client, he does so under a cloak of agency—and this fundamentally requires that his client, the "principal," have manifested assent for the lawyer to act on his behalf and subject to his control. *See e.g.* "Agency Defined," Restatement (Third) Of Agency § 1.01 (2006). The Constitution is clear that it is the President's prerogative to choose prosecutors to speak on behalf of the United States in court proceedings, subject to the advice and consent of the Senate. U.S. Const. art. II, § 2.[2] In other words, the Constitution defines the manner by which the People of the United States "manifest their assent" to having prosecu-

[2] "The President…shall appoint…Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

tors speak on their behalf, and subject to their control—and that is through their democratically-elected President and Senate. The Ninth Circuit has no authority to "hire" a lawyer for them, using its own opaque selection process lacking in oversight, and for the intolerably-biased reason that the United States' actual attorneys happen to disagree with it.

While the Solicitor General takes a curious position that the circuit court clearly erred, but that its error is not "extraordinary" enough for mandamus, his position carries no more weight than that of any lawyer on whether or not he should be replaced as counsel—the critical question being instead whether his client, i.e. the United States, has "consented" to the substitution, as a matter of constitutional law and the separation of powers. It is important that a client actually agree that someone will be their lawyer, because the statements of a lawyer, like any agent, are treated as though made by the client, who may be bound by them. *See* Restatement (First) of Agency §§ 140, 286 (1933). It is for this essential reason that determining whether an attorney speaks on behalf of the "United States," or simply as a "friend of the court," matters. The Ninth Circuit is forcing the People of the United States to be represented by a lawyer whom they have never authorized, over whom they have no control, and with whom they do not agree. Clearly, the harm from compelling the United States to take a particular position in this litigation that does not belong to it, and that it continues to disagree with, is a fundamental and extraordinary harm that cannot be adequately remedied through any other vehicle but mandamus. For the foregoing reasons, and for those

reasons stated in the Petition, this Court should grant mandamus by summarily reversing the Ninth Circuit order by which the circuit court appointed its own "special prosecutor" to speak on behalf of the United States, instead of the United States' actual attorneys at the Department of Justice, simply because they disagreed with the court.

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

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

Counsel for Petitioner