No. 22-274

IN THE
Supreme Court of the United States

STEVEN DONZIGER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

**BRIEF OF PROFESSOR JENNIFER L. MASCOTT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

JENNIFER L. MASCOTT
*Counsel of Record*
R. TRENT MCCOTTER
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR.
ARLINGTON, VA 22201
(703) 993-8168
jmascott@gmu.edu

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**CONSTITUTIONAL PROVISIONS AND STATUTES**



**OTHER AUTHORITIES**

## INTEREST OF THE *AMICUS CURIAE*[1]

Professor Mascott is an Assistant Professor of Law and Co-Executive Director of The C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School of the George Mason University. She has an interest in preservation of the U.S. Constitution's separation of powers constraints on the exercise of federal government power.

Her academic scholarship analyzes the impact of the separation of powers on democratic accountability, the use of originalism as a mode of constitutional interpretation, and the relationship between historical practice and meaning and the proper application of constitutional principles. *Amicus* has a unique background and perspective on the issues in this case. *Amicus*'s article *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018), regarding the original meaning of the Appointments Clause, was cited in separate opinions in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021); *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020); *Ortiz v. United States*, 138 S. Ct. 2165 (2018); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); and *NLRB v. SW General, Inc.*, 580 U.S. 288 (2017). Moreover, *amicus* has been counsel on numerous

---

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification and have consented to the filing of this brief.

briefs at the Supreme Court in cases implicating separation of powers.

This particular case is important to *amicus* because it addresses questions related to the Appointments Clause, a core constraint and mechanism for accountability in the exercise of federal power. *Amicus* has a strong interest in sharing her expertise and perspective with the Court on these important legal issues.

## SUMMARY OF THE ARGUMENT

The Court should grant the Petition to address and resolve several important separation of powers questions raised by the lower courts' approval of a blending of core executive and judicial powers in a single office of special prosecutor. *See* Part I, *infra*. Further, the Court should grant review to address Rule 42's method of appointment, which likewise blends both judicial and executive powers. *See* Part II, *infra*.

## ARGUMENT

### I. Petitioner's challenge to the appointment structure of special prosecutors identifies separation of powers questions in the blending of core executive and judicial power that merit this Court's review.

Petitioner raises several challenges to the statutory and supervisory structure of the judicially appointed special prosecutor at issue in this case that suggest the Second Circuit's decision merits this Court's review. In particular, there are significant

questions whether the contempt prosecutor position was "established by Law" as required by the Constitution when the specific position was created via the Federal Rules of Criminal Procedure. In addition, although this Court has countenanced interbranch appointments on occasion, the Court has not yet definitively resolved the standard for assessing the circumstances under which a court of law may appoint an executive officer consistent with the Appointments Clause. *See Morrison v. Olson*, 487 U.S. 654, 673-77 (1988) (raising the question of interbranch appointments). *Cf.* Intratextualism, Akhil Reed Amar, 112 Harv. L. Rev. 748, 805-12 (1999) (addressing the meaning of "inferior" officer and contending that courts should not appoint prosecutors under the Constitution).

The constitutional structure, the Article II supervisory hierarchy embedded within the executive Vesting Clause that this Court recently highlighted in *United States v. Arthrex*, 141 S. Ct. 1970 (2021), intratextual features of the Constitution, and early evidence all suggest that a prosecutor should be appointed by an actor overseeing the category of federal power that the prosecutor exercises. Here, both the head of an executive department and a court of law have power to appoint the contempt prosecutor under circumstances that are not necessarily tied to the executive or judicial character of the prosecutor's function. Although this Court concluded that courts have constitutional authority to appoint special prosecutors in *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), over strong disagreement from Justice Scalia, *see id.* at 816-22, the character of

the prosecutor's authority in that case was much more tightly tied to the judicial character of the underlying contempt prosecution than the wide-ranging prosecution authority at issue here.

Finally, whether the contempt prosecutor is a judicial officer exercising prosecutorial authority incidental to a court's authority to protect and enforce its own prerogatives and contempt authority, or instead is an executive officer engaged in more standard criminal prosecution, the blend of executive supervisory authority and judicial appointment authority permitted under Federal Rule of Criminal Procedure 42 transgresses and blurs the separation of powers framework forming the backbone of the federal constitutional order.

As both the majority and dissenting opinions from the Second Circuit agree, the special prosecutor in this case would seem to constitute an "officer[] of the United States" under any definition of Article II officer offered by this Court. Similar to the independent counsel position at issue in *Morrison*, the special prosecutor wielded significant authority. *See* Pet.App.4a (majority op.); Pet.App.52a (Menashi, J., dissenting). Therefore, Article II of the U.S. Constitution includes express specifications addressing both the manner of the creation of the office of special prosecutor and the permissible mode of the officer's appointment.

In *Young*, this Court stated that "[i]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders,

authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt." *Young*, 481 U.S. at 794. The Court further referenced a "longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is part of the judicial function." *Id.* at 795. The Court has viewed such authority as "inherent in all courts" and thus part and parcel of the creation of a federal judiciary and its vesting with jurisdiction. *See Michaelson v. United States ex rel. Chicago, St. P., M., & O.R. Co.*, 266 U.S. 42, 65-66 (1924) ("[T]he power to punish for contempts is inherent in all courts . . . [,] may be regarded as settled law[, and] is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the power." (internal quotation omitted)).

But this inherent judicial authority to punish disobedience of judicial orders is grounded in separation of powers and the distinct delineation between the federal branches that enables both the judiciary and the executive and legislature to remain jealous for their own interests, thereby restraining federal action and securing individual liberty. *Young*, 481 U.S. at 796. ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches."); *id.* ("Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated"; otherwise, "courts would be mere boards of arbitration whose judgments and decrees

would be only advisory" (internal quotation omitted)); *see also* The Federalist No. 51.

The Court in *Young* evaluated the constitutionality of a private attorney's appointment to prosecute contempt under the Federal Rules of Criminal Procedure, without addressing or even identifying the question whether the private attorney was acting as an Article II officer as a prosecutor in judicial contempt proceedings. But this Court's description of the now-defunct independent counsel position as an inferior Article II office in *Morrison* would seem to comfortably cover the range of duties and terms of the special prosecutor position at issue here. *See* Pet.App.11a, 20a. In contrast to prior temporary contractual positions found to constitute private hiring for services, contempt prosecutors serve temporarily, but in a position created by government rule that transcends their particular service and remains available to be filled by other individuals in future prosecutions performing similar functions. *See Lucia v. SEC*, 138 S. Ct. 2044 (2018); *United States v. Germaine*, 99 U.S. 508 (1879). Further, whether or not the contempt prosecutor position was created with Article II principles and constraints in mind, as a matter of first principles there are certain governmental functions that are so significant or core to the notion of government sovereignty, such as prosecution, that they cannot be exercised by individuals serving in temporary contractual positions designed to circumvent core constitutional accountability constraints on the exercise of sovereign authority such as the Oaths and Appointments Clauses. *Cf., e.g.*, *Dep't of Transp. v. Ass'n of Am.*

*R.Rs.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("Private entities are not vested with 'legislative Powers.' Nor are they vested with the 'executive Power,' which belongs to the President."); Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 Harv. J. L. & Pub. Policy 837 (2022).

Article II officer status would subject the position of special prosecutor to the Article II requirement that Congress establish the office "by Law." *See* U.S. Const. art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, 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 . . . ."). Other constitutional provisions referencing congressional action "by Law" describe actions that take place via the Article I, section 7 bicameral and presentment process. *See id.* art. I, § 2 cl. 2 (providing the direction of the manner of the census "by Law"); *id.* art. I, § 4 cl. 1 (authorizing Congress "by Law" to "make or alter" regulations related to the "Times, Places and Manner of holding Elections"); *id.* art. I, § 4 cl. 2 (authorizing Congress to establish meeting times "by Law"); *id.* art. I, § 6 cl. 1 (addressing congressional compensation "to be ascertained by Law"); *id.* art. I, § 9 cl. 7 (requiring money drawn from the treasury to be "in Consequence of Appropriations made by Law"); *id.* art. II, § 2 cl. 2 (authorizing Congress to create offices and vest inferior officer appointment authority "by Law"); *id.* art. III, § 2 cl. 3 (authorizing Congress "by Law" to direct the place of trial for certain crimes). That

Article I process requires passage either by both chambers of Congress with presidential consent or a two chamber veto override. *See id.* § 7 cl. 2 (specifying the proper bicameralism and presentment requirements); *id.* § 7 cl. 3 (requiring any action such as approval of an order, resolution, or vote that must be approved by both chambers of Congress—other than adjournment—to comply with the Article I, section 7, clause 2 procedures).

Although Congress and the President enacted legislation authorizing the creation of the Federal Rules of Criminal Procedure, the particular process used to generate those specific rules does not conform to the requirements for actions "by Law." *See* 28 U.S.C. §§ 2071, 2072. Although the earliest Congress created offices "by Law" through provisions as general as the authorization for cabinet secretaries to appoint as many clerks "as they shall find necessary," § 2, 1 Stat. 67, 68 (1789 appropriations measure), neither the statutory provisions authorizing the creation of the federal rules of procedure nor the statutory provision assigning the Attorney General supervisory authority over all prosecutors approach even that degree of lax specificity.

Section 543 of Title 28 of the United States Code generally authorizes the Attorney General ("AG") to appoint attorneys to assist federal prosecutors "when the public interest so requires," but the provision lacks any statutory reference to appointment of special prosecutors by judges—the appointment mechanism at issue here. *Compare* 28 U.S.C. § 543(a) (authorizing appointment of attorneys to assist U.S.

attorneys only by the Attorney General), *with* Fed. R. Crim. P. 42(a)(2) (requiring a court to request contempt prosecution "by an attorney for the government" but then requiring the court to "appoint another attorney" if the government has declined the initial contempt prosecution request). And the provisions on which the Second Circuit relies to establish AG supervisory authority over judicial contempt special prosecutors authorize delegation of authority from the AG to other officers or employees without specifically creating any new office. *See, e.g.*, 28 U.S.C. § 519 (requiring the AG to "supervise all litigation to which the United States . . . is a party" and to direct all attorneys specially appointed under 28 U.S.C. § 543 in their duties). *Cf. id.* § 516 (reserving the conduct of litigation to which the U.S. is a party to "officers of the Department of Justice, under the direction of the Attorney General"); *id.* § 510 (authorizing the AG to delegate functions to other officers and employees without specifying the creation of new offices).

Founding-era documents such as the Declaration of Independence indicate that limits on federal office creation were important safeguards to prevent certain abuses of British officeholders leading to the Revolution. *See* Decl. of Independence ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries. He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance."); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018). The origination of judicial,

or executive, prosecutorial positions by non-legislative rule or vague statute merits this Court's attention and review.

## II. The separation of powers questions raised by the appointment structure of the Fed. R. Crim. P 42(a) special prosecutors touch on core constitutional constraints in the exercise of federal authority.

The separation of powers is a key structural constraint on federal governmental authority. One of its core features is a limitation on the improper blending of governmental power among the three distinct federal branches through means other than those expressly permitted by the constitutional text.

This Court in *Young* delineated the contempt prosecutor position as judicial despite the prosecutor's role in enforcing contempt proceedings through discipline external to the judicial proceeding itself. *See* 481 U.S. at 796. Whether the power that Rule 42(a) prosecutors exercise is executive or judicial, however, neither this Court's precedent in *Young* nor the decision below reconcile the constitutional tension inherent in a system that subjects a criminal prosecutor to the potential supervision or direction of actors from two distinct federal branches.

In *Morrison*, the executive branch had a role in both the initiation of independent counsel positions and the ultimate supervision and potential removal of such officers. *See* 487 U.S. at 662-63. Members of this Court have expressed doubts about the continued

relevance of *Morrison* itself in contemporary separation of powers cases. *See, e.g., Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 494-95 (2010). The structure here is even more problematic and uneasy in light of the constitutional separation of powers.

Judicial authority to appoint Rule 42 prosecutors vests only after the executive branch has declined to prosecute a contempt violation. Yet such prosecutors remain subject to executive branch influence and potential Attorney General supervision. *See* 28 U.S.C. § 516; *id.* § 519; *id.* § 543. Under this Court's jurisprudence, Rule 42(a) prosecutors might exercise authority to preserve the integrity of judicial power inherent in Article III jurisdiction, or they might exercise executive prosecutorial power under this Court's precedents. *Compare Young*, 481 U.S. at 793-95 (judicial), *with Morrison*, 487 U.S. at 695-96 (executive). But they cannot simultaneously do both.

"The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). As Chief Justice Marshall explicated centuries ago, one of the "object[s] of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329 (1816). Among these three

branches, "it is the duty of each to abstain from, and to oppose, encroachments on either." These branches are "distinct and independent," *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792), but for explicit constitutional instructions to the contrary, such as the allocation of veto authority to the President as part of the business of lawmaking and the Chief Justice's duty to preside over impeachment trials. The Constitution even prescribes finely grained limitations on the terms under which an officer from one branch can engage in service in another. *See* U.S. Const. art. I, § 6, cl. 2 (Incompatibility and Ineligibility Clauses).

As this Court has long recognized, the "purpose of separating and dividing the powers of government" is to "diffuse power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). These considerations are at their apex when the exercise of federal criminal prosecutorial authority and individual liberty is at stake.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JENNIFER L. MASCOTT
*Counsel of Record*
R. TRENT MCCOTTER
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR.
ARLINGTON, VA 22201
(703) 993-8168
jmascott@gmu.edu

November 16, 2022