No. 22-274

IN THE

Supreme Court of the United States

STEVEN DONZIGER,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF

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REPLY BRIEF

After maintaining their distance throughout the trial and appeal, the Department of Justice and the court-appointed special prosecutors have joined forces in opposing certiorari. Far from *solving* the doctrinal conflict on which the petition based its main argument for certiorari, though, the brief in opposition shows that only this Court can untangle the separation-of-powers conundrum created by *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

Indeed, the BIO makes clear that there is no coherent middle ground. *Young* was based on the view that, for institutional self-protection, federal courts must have the power not only to *initiate* a criminal contempt proceeding, but also to override executive branch declinations by appointing and supervising their *own* prosecutors. This rationale of judicial self-protection is incompatible with interbranch appointments of executive branch prosecutors. And the BIO's professed satisfaction with the outcome in this case does not make up for the absence of executive branch supervision *during* the prosecution—especially when its belated assessment disregards the "least possible power" restraint on criminal contempt that drove the holding in *Young*.

Even if the BIO's interbranch chimaera was normatively defensible, it's still unconstitutional. Echoing Justice Scalia in *Young*, Judge Menashi's dissent demolished the panel's Appointments Clause rationale—that such interbranch appointments may be authorized by Fed. R. Crim. P. 42(a). Rather than take on Judge Menashi, the BIO pivots to a new claim: that Article III *itself* silently authorizes interbranch appointments of private prosecutors in criminal

contempt cases—and is thus an exception to the Appointments Clause. But the only support the BIO offers for its atextual reading is *Young*, which blessed only *intra*branch appointments. It should go without saying that Article III does not create a silent exception to the Appointments Clause just so that courts can appoint and pay for private prosecutors controlled and directed by the executive. And the argument that such Article III appointees are subject to the Attorney General's supervision under 28 U.S.C. § 516 collides with this Court's conclusion that prosecutors appointed by courts under *Young* are "excepted" from that provision. *United States* v. *Providence J. Co.*, 485 U.S. 693, 704–05 & n.9 (1988).

In all events, even this theory is predicated on a fiction of executive branch supervision. In the district court, both the private special prosecutors and DOJ disclaimed a supervisory relationship. And DOJ filed an *amicus* brief in the Second Circuit "to express the *distinct* views of the Executive Branch." If what the BIO now claims about supervision was correct, those views could and should have been expressed by the private prosecutors at DOJ's direction. Supervision of a joint BIO in this Court is too little, too late. The BIO tries to sidestep the supervision issue by arguing that private prosecutors aren't "officers of the United States." But meaningful supervision is even *more* important, not less so, when it comes to non-officers wielding executive power.

That is because, as the Chief Justice noted in 2010, "[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government." *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J.,

dissenting). Whether "the government" can include a private attorney appointed without any statutory authorization by a federal judge, and who is subject to no meaningful supervision by the Executive Branch, poses a separation-of-powers question of the highest order. Ultimately, the BIO offers no reason why this Court can't answer that question in this case—and no good reason why it shouldn't.

I

The BIO does not actually defend the linchpin of the Second Circuit's analysis—that, in light of *Young*, it wasn't plain error for the district court to hold that, through Fed. R. Crim. P. 42(a), "Congress" authorized interbranch appointments in satisfaction of the Appointments Clause. Instead, the BIO argues a point that neither the private prosecutors nor DOJ raised below—that Article III authorizes interbranch appointments of private prosecutors.[1] The BIO claims to find support in *Young*, but its own argument contradicts *Young*—and undermines any claim of necessity for interbranch appointment power.

The BIO's self-contradictory reliance on *Young* as authority for *judicial* appointments of *executive* officers only underscores the need for this Court's intervention. Criminal contempt prosecutions are an exercise of either executive power or judicial power—

1. The BIO implies that the criminal contempt statute, 18 U.S.C. § 401, also provides appointment authority. BIO 11. But that provision says nothing about prosecutors *or* appointments. The BIO's assertion that appointment of a private prosecutor is a "necessary component" of § 401 cannot be reconciled with the codification of contempt of Congress as a crime—which has never been understood to allow Congress to appoint prosecutors. *See Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821).

not both. And there is no constitutional necessity for judges to override executive branch declinations by appointing prosecutors who may then be directed, supervised, and fired by the *same* executive. BIO 12.

Nor is such a middle ground a plausible reading of *Young*. *Young* itself stressed that its rationale was predicated on "necessity," *i.e.*, "ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches." 481 U.S. at 796. That's why private special prosecutors appointed under *Young* are "excepted" from Attorney General supervision under 28 U.S.C. §§ 516 and 547 in the lower courts—and are only subject to control under a *different* statute once an appeal reaches this Court. *See Providence Journal*, 485 U.S. at 704–05.

Ultimately, *Young* contemplated prosecutors who, for reasons of necessity, would exercise judicial power to prosecute contempt of court *independent* of the executive—just as the private special prosecutors argued in the district court. But, like the district court and all three Second Circuit judges, the BIO runs headlong away from that understanding—insisting that *all* prosecutors are part of the executive branch. In doing so, it surrenders any claim to reliance upon *Young*. If there is no necessity for contempt prosecutions *independent* of the executive, then there is no conceivable basis for finding an implicit interbranch appointment power in Article III.

II

The BIO also argues that there is no Appointments Clause issue because private special prosecutors are not "officers of the United States." BIO 9–10. DOJ first raised this contention in its amicus brief in the Second Circuit setting forth a position it acknowledged as

"distinct" from the arguments the special prosecutors had made in the district court. 2d Cir. ECF 99, at 1.

The crux of the federal officer issue is whether private special prosecutors hold a "continuing position." *See Lucia* v. *SEC*, 138 S. Ct. 2044 (2018). In *Morrison* v. *Olson,* this Court held that the independent counsel under the Ethics in Government Act of 1978 was an "officer of the United States" even though she was appointed to conduct a single investigation. 487 U.S. 654, 664, 671 n.12 (1988); *see* Pet. App. 12a–14a; *see also Ass'n of Am. R.R.s* v. *U.S. Dep't of Transp.*, 821 F.3d 19, 37–38 (D.C. Cir. 2016) (arbitrator appointed to resolve a single dispute between Amtrak and the Federal Railway Administration was an officer).

In unanimously rejecting DOJ's argument, the Second Circuit relied heavily on *Morrison*. Here, as in that case, "[t]he duties of [private special prosecutors] extend beyond the person; although not permanent, the position is continuing and may last for years; and the purpose of the position is to exercise federal prosecutorial power." Pet. App. 17a.[2]

Nor is *Morrison* an outlier on this point. The Office of Legal Counsel has long concluded that whether a position is a "continuing" one has almost nothing to do with its duration or breadth, versus whether it would survive the departure of the incumbent. *See, e.g.*, *Participation of Members of Congress in the Ronald Reagan Centennial Commission*, 33 Op. O.L.C. 193,

2. The BIO claims that the "office of independent counsel was . . . a far more lasting position than the temporary posts held by the special prosecutors here." BIO 10. In fact, the prosecutors here have already served longer than 15 of the 20 investigations initiated under the independent counsel statute.

197 & n.6 (2009). *See generally* 1 Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 8, at 6–7 (1890) ("duties continue, though the person be changed").

To illustrate the point, had the lead prosecutor here been unable to continue, the result would not have been *dismissal* of the prosecution; it would have been the appointment of a successor. Tellingly, the BIO does not argue otherwise. Instead, the BIO claims that dicta in *Lucia* somehow equated continuity with permanence. *See* BIO 9. Like the newfound Article III argument, this claim is not a reason to *deny* certiorari; it underscores the importance of *granting* it.

III

The BIO's pivot to putative vehicle problems fares no better. Taking plain error first, even if petitioner had forfeited whether an interbranch appointment under Fed. R. Crim. P. 42(a) could satisfy the Appointments Clause (he didn't), the plain error standard is no obstacle to review here for two independent reasons. First, the BIO does not actually *defend* the Second Circuit's Rule 42 analysis. Second, the lower courts' error would be plain even if it did.

As noted above, the BIO justifies the interbranch appointment of private special prosecutors principally on the ground that Article III silently authorizes them. Whatever the merits of that claim, it is *not* the argument on which a majority of the court of appeals relied—or to which it applied plain error review.

This tactical shift by the government has two implications. First, it undermines any argument that plain error insulates the decision below from this Court's review. After all, the BIO's defense of that decision rests on grounds wholly unrelated to it. Thus,

even if the new arguments advanced in the BIO were properly before this Court, there is no argument that *petitioner* would have to show that the lower courts plainly erred in rejecting them.

Second, this shift suggests that the government lacks a good response to Judge Menashi's dissent—which concluded that, even if plain error applied, the Rule 42 error *was* plain. Instead, the BIO responds with misbegotten arguments about the other prongs of the plain error standard.

For instance, the BIO asserts, without any authority, that "a court may not grant [plain error] relief by resolving an unsettled legal question or overruling precedent in the defendant's own case." BIO 16. But the BIO acknowledges that *Young* does not include an Appointments Clause holding. *Id*. at 7. And even if the Second Circuit felt constrained by *Young*, this Court isn't. In any event, the district court's actual errors were its holdings that Rule 42 both does and could constitutionally authorize the interbranch appointment of inferior executive officers. Although the tension between *Young* and later cases is "unsettled," whether *Young* provides authority for *inter*branch appointments is not; it plainly doesn't. *See* Pet. App. 49a (Menashi, J., dissenting).

The BIO also contests an element of plain error that neither the special prosecutors nor DOJ disputed below, asserting that petitioner cannot "show an effect on his substantial rights or on the fairness, integrity, or public reputation of the proceeding" from the error, since DOJ *might* have prosecuted him had it known private special prosecutors couldn't—and it might still on remand. BIO 16–18.

Like the fact that petitioner has already served his sentence,[3] the fact that petitioner might be subject to a constitutionally *valid* prosecution if his conviction is reversed is not a reason for this Court to leave intact a constitutionally *invalid* conviction—or to leave unresolved the grave separation-of-powers questions properly presented in this case.[4]

IV

The BIO's plain error arguments also fail because, as Judge Menashi's dissent makes clear, there was no forfeiture in the first place.

First, contra the panel majority, petitioner *did* raise the Rule 42 argument in his motion for a new trial, *i.e.*, his first filing after the district court held that the prosecutors were *executive* officers. *Compare* Pet. App. 26a n.14 ("[A]fter the district court rejected Donziger's supervision argument, he could have—but didn't—raise this Rule 42(a) argument in his motion for a new trial."), *with* Pet. 12 ("Petitioner disputed

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3. The BIO suggests that petitioner faces no collateral consequences. BIO 17. But collateral consequences are presumed when criminal defendants appeal convictions. *United States* v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam). And there's no need to presume here; the special prosecutors have continued to argue that petitioner has not cured his violations of certain of the underlying orders—suggesting that further criminal contempt prosecutions may be in the offing.

4. Among other obstacles to the retrial hypothesized by the BIO, the government fails to note that at least three of the six contempt charges would likely now be unavailable—because the Second Circuit effectively invalidated the discovery orders on which they were based. And petitioner's prior compliance with the other orders in response to civil contempt sanctions means that criminal contempt was not an exercise of the "least possible power adequate to the end proposed." *See* DOJ Manual § 784.

that 'appointment by the Court pursuant to Fed. R. Crim. P. 42 was a valid exercise of Congress's power to authorize the appointment of inferior officers by a court, because the Federal Rules are not statutes enacted by Congress.'" (quoting 2d Cir. ECF 351, at 1 n.1)). And, as noted *ante* at 3–4, the BIO effectively concedes plain error since it abandons the district court's reliance on Rule 42.

Second, the lower courts found no forfeiture of petitioner's argument that the special prosecutors were not supervised by principal officers—which would defeat any claim that they were validly acting as executive officers—even if they *could* have been appointed under Article III. Both the district court and the court of appeals addressed and resolved that argument de novo. Pet. App. 256a & n.509; *id.* at 18a–25a (majority); *id.* at 41a (Menashi, J., dissenting) ("In this case, Donziger repeatedly raised the issue of the Appointments Clause before the district court, and the district court addressed it.").[5]

Contrary to the impression left by the BIO, this is thus not a case in which a criminal defendant belatedly identified grounds on which to challenge his prosecution and conviction; it is a case in which the defendant was diligently pursuing a moving target. Petitioner's first motion to dismiss relied heavily on

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5. The BIO claims that the absence of supervision should have been apparent as soon as the special prosecutors were appointed despite *its* dismissal of the special prosecutors' denial of supervision. BIO 13, 15. Given that the relationship between the special prosecutors and DOJ was unclear to *them* even after petitioner's letter to DOJ (as it was to the district court, Pet. App. 256a), it is hard to see how it could have been clear to petitioner—at least until he received DOJ's response. Once he did, he raised the absence of supervision the very next day.

Justice Scalia's *Young* concurrence. He immediately moved to dismiss based upon a lack of supervision when DOJ cryptically declined to take any responsibility for the prosecution—without providing any clarity as to who was in charge. Pet. 9–10. Once the district court rejected the special prosecutors' claim that they were exercising judicial, *not* executive, power, *see id.* at 10–11, he challenged reliance on Rule 42 as authority for *inter*branch appointments in his very next filing.

The government also offers no sound reason why the Appointments Clause challenges in *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970 (2021), *Lucia*, *Ryder* v. *United States*, 515 U.S. 177 (1995), and *Freytag* v. *Comm'r*, 501 U.S. 868 (1991), were timely if petitioner's challenge was not. Pet. 29–30. In deeming each of those challenges to be timely, it was irrelevant to this Court whether the parties had complied with forum procedural rules. Given petitioner's tenacious efforts to challenge the appointments in this case, the BIO offers no persuasive basis for treating petitioner's Appointments Clause arguments more harshly than the later-raised arguments in those cases.[6]

On the substance of the supervision issue, just like the panel majority, the BIO takes the extreme position that a statutory chain of command is sufficient to satisfy the Appointments Clause even if both ends of the chain deny that it exists, BIO 13, and even though this Court in *Providence Journal* held

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6. The BIO also errs in suggesting that Fed. R. Crim. P. 52(b) distinguishes when Appointments Clause challenges are timely in criminal versus civil cases. BIO 18–19. Rule 52(b) goes to the *consequences* of failing to timely raise an argument, not to *whether* the argument was timely.

that prosecutors appointed under *Young* are "excepted" from the Attorney General's supervision under 28 U.S.C. § 516. 485 U.S. at 704–05. As the petition explained, Pet. 27–28, this "double-secret supervision" theory, to the extent it has any merit, is a reason to *grant* certiorari, not to deny it.

CONCLUSION

This Court may ultimately stand by *Young*—and reaffirm the prosecution of criminal contempt by court-appointed and court-supervised private lawyers as a *sui generis* exception to the principle that all prosecutions are exercises of executive power. Or it may decide that Justice Scalia had it right all along. But the clumsy half-measures embraced by the Second Circuit majority and the BIO make neither practical nor constitutional sense.

Allowing courts to appoint and fund private special prosecutors who answer only to the executive branch fails to serve the judicial self-protection purpose that *Young* articulated. The only purpose it *does* serve is to allow the executive branch to avoid responsibility for dubious criminal contempt prosecutions—as it has in this case.

The petition should be granted.

Respectfully submitted,

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