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

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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,

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOSEPH M. ARPAIO, Sheriff, *Defendant-Appellant.*	No. 17-10448 D.C. No. 2:16-cr-01012-SRB-1 ORDER

Filed April 17, 2018

Before: A. Wallace Tashima, William A. Fletcher, and Richard C. Tallman, Circuit Judges.

Order;
Dissent by Judge Tallman

SUMMARY*

Criminal Law

In an appeal from the district court's denial of former Maricopa County Sheriff Joseph Arpaio's request—following a Presidential pardon—for vacatur of his criminal-contempt conviction, a motions panel issued an order appointing a special prosecutor to defend the district court's decision after the United States informed this Court that it does not intend to defend it.

The panel held that it has authority to appoint counsel under Fed. R. Crim. P. 42(a)(2); and that, independently, it has inherent authority to appoint a special counsel to represent a position abandoned by the United States on appeal.

Dissenting, Judge Tallman wrote that it is unwise for this Court to use its authority to appoint a private attorney at this late stage to "prosecute" the appeal of a case the Government already won, in the face of the Government's continued willingness to participate, and to countenance a surreptitious use of the vacatur appeal to pursue an untimely attack on the President's constitutional authority to pardon.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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John D. Keller, Deputy Chief; James I. Pearce, Trial Attorney; United States Department of Justice, Washington, D.C.; for Plaintiff-Appellee.

ORDER

This case is on appeal from the district court's denial of Defendant-Appellant's request for vacatur of his conviction for criminal contempt. The validity of the district court's denial will be addressed by the merits panel assigned to this case. We address only the question of whether to appoint a special prosecutor to defend the district court's decision in light of the United States' letter informing this Court that "[t]he government does not intend to defend the district court's order." For the reasons discussed below, we will appoint a special prosecutor to provide briefing and argument to the merits panel.

I. Background

Defendant-Appellant former Maricopa County Sheriff Joseph M. Arpaio ("Sheriff Arpaio") was referred for criminal contempt on August 19, 2016. The United States prosecuted Sheriff Arpaio and obtained a conviction on July 31, 2017. On August 25, 2017, President Donald J. Trump

pardoned Sheriff Arpaio, noting that Sheriff Arpaio's sentencing was "set for October 5, 2017."

On August 28, 2017, Sheriff Arpaio moved for two forms of relief. First, Sheriff Arpaio moved "to dismiss this matter with prejudice." Second, Sheriff Arpaio asked the district court "to vacate the verdict and all other orders in this matter, as well as the Sentencing on October 5th."

The district court granted Sheriff Arpaio's first request. On October 4, 2017, the district court dismissed with prejudice the action for criminal contempt. No timely notice of appeal from the dismissal order was filed. We denied a late-filed request for the appointment of counsel to "cross-appeal the District Court's Order dismissing the charges."

The district court denied Sheriff Arpaio's second request. On October 19, 2017, the district court denied vacatur and refused to grant "relief beyond dismissal with prejudice." That same day, Sheriff Arpaio filed a timely notice of appeal. In response to a request for the appointment of counsel to "defend the District Court's Order denying Arpaio's request for vacatur," we ordered the United States to "file a statement indicating whether it intends to enter an appearance and file an answering brief in this appeal."

The United States responded that it "does not intend to defend the district court's order from October 19, 2017 . . . ; instead, the government intends to argue, as it did in the district court, that the motion to vacate should have been granted." The United States took "no position on whether the Court should appoint counsel to make any additional arguments."

II. Discussion

Because the United States has abandoned any defense of the district court's decision with respect to vacatur, the merits panel of our court that will decide this appeal will not receive the benefit of full briefing and argument unless we appoint a special prosecutor to defend the decision of the district court. For the reasons that follow, we will appoint a special prosecutor.

First, we conclude that we have the authority to appoint counsel under Federal Rule of Criminal Procedure 42, which prescribes procedures for dealing with criminal contempt. Rule 42(a)(2) provides:

> *Appointing a Prosecutor*. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

In Rule 42(a)(2)'s most common application, the district court appoints a special prosecutor to investigate and try a criminal contempt when the government declines to perform that function. *See*, *e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 725 (2013) (Kennedy, J., dissenting) ("Federal Rule of Criminal Procedure 42(a)(2) allows a court to appoint a private attorney to investigate and prosecute potential instances of criminal contempt.").

But the operation of Rule 42(a)(2) is not confined to investigations and trials in the district court. A private

attorney appointed under the rule has the authority to act as a special prosecutor not only in the district court but also in the court of appeals. *See*, *e.g.*, *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808–09 (1987) (invalidating the appointment of special prosecutor because he was an interested party, not because he prosecuted an appeal); *United States v. Cutler*, 58 F.3d 825, 827, 831–32 (2d Cir. 1995) (accepting without comment a special prosecutor's briefing and argument in an appeal by a contemnor); *Matter of Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir. 1986) (same). Our attention has not been directed to, nor have we found, a case in which a special prosecutor was appointed by a court of appeals after the government declined to oppose the contemnor's arguments on appeal. However, we see no reason why such appointment should not take place under Rule 42(a)(2).

Second, independent of any authority under Rule 42(a)(2), we have inherent authority to appoint a special counsel to represent a position abandoned by the United States on appeal. "[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 793. "The fact that we have come to regard criminal contempt as a crime in the ordinary sense does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage." *Id.* at 799–800 (internal citations and quotation marks omitted).

The long-standing practice of the United States Supreme Court is to use its inherent authority to appoint disinterested

counsel to represent the position taken by the United States below when the United States refuses to defend its prior position. *See United States v. Brainer*, 691 F.2d 691, 693 (4th Cir. 1982) ("When the government confesses error in the Supreme Court, and thus abandons a position taken in a lower court, the Court commonly appoints an amicus to assert the abandoned cause.") (citing cases); Letter to Anton Metlitsky, Esq., *Lucia v. SEC*, No. 17-130 (U.S. Jan. 18, 2018) (inviting a private attorney "to brief and argue this case, as amicus curiae, in support of the judgment below"); Brief for the Respondent at 9–10, *Lucia v. SEC*, No. 17-130 (U.S. Nov. 29, 2017) (notifying the Court that the government would no longer defend the decision below and urging the Court to "appoint an amicus curiae" to do so).

The Supreme Court has relied on its inherent judicial power to appoint appellate counsel specifically in the context of contempt. In *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), the Court held that a special prosecutor appointed under Rule 42 needs the permission of the Solicitor General to litigate a contempt case in the Supreme Court. *Id.* at 699 n.5. The Court noted that the independence of the judiciary "might appear to be threatened" by this holding, especially in cases in which the contemnor was convicted by the district court, the Court of Appeals affirmed, and the Solicitor General refused to either defend the judgment below or authorize the special prosecutor to do so. *Id.* at 703–04. However, the Supreme Court explained that "[t]his threat . . . is inconsequential" because of the Court's inherent authority to appoint an amicus to appear before the Court to defend the judgment below: "[I]t is well within this Court's authority to appoint an *amicus curiae* to file briefs and present oral argument in support of that judgment." *Id.* at 704.

Conclusion

We will appoint special counsel and address all other pending motions by separate order.

SO ORDERED.

TALLMAN, Circuit Judge, dissenting:

Amici ask us to appoint a private attorney under Federal Rule of Criminal Procedure ("Rule") 42(a)(2) to defend the district court's Order denying Defendant/Appellant Joseph Arpaio's request for vacatur of his criminal contempt conviction. Rule 42(a)(2) is not applicable here. Arpaio effectively conceded his guilt by accepting the pardon, and there is no need for more investigation, presentation of evidence, or further proceedings to determine if the equitable relief of vacatur is appropriate. The United States has told us it is not abdicating its responsibility to represent the Government's interest in this appeal. Nor do *amici* attempt to hide the true purpose of their request—to challenge the underlying pardon. But the constitutionality of the President's pardon is not at issue in Arpaio's current appeal; the denial of Arpaio's motion for vacatur of his conviction is. The request is inappropriate. My colleagues' decision to appoint separate counsel now is therefore ill-advised and unnecessary. I respectfully dissent.

I

Following his pardon on August 25, 2017, Arpaio moved to dismiss his criminal contempt conviction with prejudice

and for vacatur of the record. On October 4, 2017, an able United States district judge found that the pardon was valid, dismissed the action for criminal contempt, entered that order on the public docket, and closed the case. The order also denied *amici*'s motion to appoint a Rule 42 attorney, but reserved ruling on Arpaio's additional request for vacatur. After considering further briefing on whether to vacate, the district court denied the request for vacatur on October 19, 2017, and Arpaio timely appealed.

Amici initially wanted us to appoint a special prosecutor to both defend the October 19 vacatur order and file a notice of appeal from the district court's earlier October 4 dismissal order. We denied *amici*'s motion in part, however, because under Federal Rule of Appellate Procedure 4(b)(1)(B)(ii), the time for filing an appeal to challenge the constitutionality of the pardon had run. Nov. 22 Order, Dkt. 9; *see United States v. Wheeler*, 952 F.2d 326, 327 (9th Cir. 1991) ("[A] district court's order refusing to vacate an underlying contempt order is nonappealable when the ground on which vacatur is sought existed at the time the contempt order was entered and the contemnor failed to appeal timely from that order."). In short, the basis for our November 22 Order was that *amici* were too late because they missed the deadline to raise a constitutional challenge to the earlier order.

We also asked the United States to state its intentions regarding Arpaio's separate vacatur appeal. The Government responded that it had entered an appearance and "intends to represent the government's interests in this appeal." The Government explained that, instead of defending the district court's October 19 order, it "intends to argue . . . that the motion to vacate should have been granted." That ought to have been the end of the matter.

But because the United States has chosen not to defend the vacatur order, *amici* now assert that the Government is declining to prosecute Arpaio's criminal contempt conviction and that we are *required* to appoint special counsel. Regrettably, my colleagues in the majority agree. Sound judicial discretion instead counsels that we should deny the request and not appoint a special prosecutor at this late date in the case.

II

The request to appoint a private lawyer under Rule 42(a)(2), in place of the United States, is inappropriate now because it effectively gives interested parties an avenue to belatedly appeal the pardon's effect on successful conviction, despite the Government's continued participation.

A

The criminal contempt case was successfully prosecuted by the United States, which did not hesitate or decline to prosecute. No useful purpose would be served by appointing a new prosecutor now.

Rule 42(a)(2) was developed for a very different purpose than employed here. "Federal Rule of Criminal Procedure 42(a)(2) allows a court to appoint a private attorney to *investigate and prosecute* potential instances of criminal contempt."[1] *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2673

[1] Rule 42(a)(2) states in whole, "**Appointing a Prosecutor.** The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of

(2013) (Kennedy, J., dissenting) (emphasis added). In recognizing the power of the judiciary to appoint special prosecutors, the Court stated in *Young v. U.S. ex rel. Vuitton et Fils S.A.* that "[t]he prosecutor is appointed *solely* to pursue the public interest in vindication of the court's authority." 481 U.S. 787, 804 (1987) (emphasis added). Accordingly, "[a] private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution."[2] *Id.*

The need for special counsel is over. The United States secured a contempt conviction at trial and any affront to the court's authority was vindicated. We have observed that a prosecutor, as part of the prosecutorial power to punish a putative contemnor, "can gather evidence and investigate matters more thoroughly than a court can at an evidentiary hearing alone. He or she can also serve to shorten the length of trial by culling through evidence and witnesses beforehand to determine which are relevant and credible." *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1140 (9th Cir. 2001).

But these powers of prosecution do not—and should not—extend to tangential matters of end-of-case record-

another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt."

[2] *Amici* do not appear disinterested. Given that the law firm serving as the primary signor for *amici* represented President Trump's former political rival, Hillary Clinton, their possible opposing interests should at least preclude them from appointment as special counsel, as they requested. *Young*, 481 U.S. at 811 ("[A]ppointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.").

keeping or vacatur of the record of a successful conviction following a pardon. This is not why Rule 42(a)(2) exists. It exists to ensure the judiciary "has a means to vindicate its own authority without complete dependence on other Branches." *Young*, 481 U.S. at 796. It also applies when the government is ineligible or otherwise declines to prosecute. *See, e.g.*, *F.T.C. v. Am. Nat. Cellular*, 868 F.2d 315, 318–20 (9th Cir. 1989) (analyzing factors that contribute to a party's ineligibility to prosecute criminal contempt charges); *In re Special Proceedings*, 373 F.3d 37, 43 (1st Cir. 2004) (holding that the appointment of a special prosecutor was appropriate where the government attorneys were the possible source of the leak of information underlying the criminal contempt prosecution).

Here, the district court's authority was vindicated when Arpaio was convicted of criminal contempt. Its authority will not be usurped if that conviction is vacated in light of the pardon, or if the court of appeals ultimately affirms the district court's refusal to annul it from the defendant's record.

B

The Government has also never declined to prosecute this case. *See* Fed. R. Crim. P. 42(a)(2) ("If the government *declines* the request [to prosecute a contempt charge], the court must appoint another attorney to prosecute the contempt."). It maintains that it continues to represent the public (and the Executive) interest in the vacatur proceedings. *Amici*, however, would have us believe that because the United States supports the vacatur, such action is tantamount to the Government declining to prosecute a criminal contempt conviction. But they cite no cases for the proposition that Rule 42 requires appointing a special prosecutor where, as

here, the Government has already successfully obtained a conviction, but the President has pardoned the contemnor.

Nor does "the interest of justice" mandate that the Government be precluded from continuing to act as a prosecutor so the record of Arpaio's conviction may be maintained. Fed. R. Crim. P. 42(a)(2). And because the pardon does not erase Arpaio's guilt or expunge the fact of the judgment, there is no underlying affront to the court's authority stemming from criminal contempt left to vindicate. *See In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) ("Because a pardon does not blot out guilt or expunge a judgment of conviction, one can conclude that a pardon does not blot out probable cause of guilt or expunge an indictment.").

Even if some future merits panel subsequently reversed the district court's vacatur order denying Arpaio's request, the special prosecutor would still need the Solicitor General's approval to file a petition for writ of certiorari to the United States Supreme Court. *United States v. Providence Journal Co.*, 485 U.S. 693, 706–07 (1988). This seems highly unlikely given the Government's current litigating position. Arpaio was convicted, pardoned, and all that remains is a matter of record-keeping as to the fact of his conviction.

Given the Government's continued participation in this case, our appointment now of a special prosecutor to advance a litigating position different from that pursued by the United States Department of Justice makes it *appear* as though we are appointing another prosecutor because we have prejudged the case and disagree with the Government's position. In light of this appearance of judicial bias, we should respect the Government's position and remain impartial on the matter.

See Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968) ("[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."); Code of Conduct for United States Judges, 175 F.R.D. 363, 364–66 (1998).

C

More worrisome still is that *amici* seemingly want a special prosecutor appointed just to take another stab at attacking the pardon on constitutional grounds after they failed to timely appeal. *See Amici Curiae*'s Reply to Statement of the United States, Dkt. 13, at 1 ("[T]he need for a Rule 42 attorney is particularly acute in this case given the unprecedented nature of the Pardon and the novel and important constitutional issues it raises."); Brief for *Amici Curiae*, Dkt. 5, at 1 ("[P]roposed *amici* have a profound interest in ensuring that the constitutionality of President Trump's extraordinary pardon of Arpaio is reviewed by this Court."); Motion for Leave for Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar to Participate as *Amici Curiae*, Dkt. 18, at 3–23 (proposed *amici* spend three pages addressing vacatur, and nineteen subsequent pages addressing the validity of the pardon).

The Supreme Court has already ruled that the President has the power to pardon criminal contempt convictions. *Ex parte Grossman*, 267 U.S. 87, 122 (1925). And we have already ruled that *amici* missed the deadline for arguing the merits of such an appeal. It's time *amici* let go of that issue.

III

It is an unwise use of our authority to appoint a private attorney at this late stage to (1) "prosecute" the appeal of a case the Government already won, (2) in the face of the Government's continued willingness to participate, and (3) to countenance a surreptitious use of the vacatur appeal to pursue an untimely attack on the President's constitutional authority to pardon. I fear the majority's decision will be viewed as judicial imprimatur of the special prosecutor to make inappropriate, unrelated, and undoubtedly political attacks on Presidential authority. We should not be wading into that thicket.

Accordingly, I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOSEPH M. ARPAIO, Sheriff, *Defendant-Appellant.*	No. 17-10448 D.C. No. 2:16-cr-01012-SRB-1 ORDER

Filed October 10, 2018

Before: A. Wallace Tashima, William A. Fletcher, and Richard C. Tallman, Circuit Judges.

Order;
Concurrence by Judge W. Fletcher;
Statement by Judge Tashima;
Dissent by Judge Callahan;
Statement by Judge Tallman

SUMMARY*

Appointment of Special Counsel

A motions panel filed an order on behalf of the court denying rehearing en banc of the motions panel's April 17, 2018 published order authorizing the appointment of a special prosecutor to provide briefing and argument to the merits panel that will hear former Sheriff Joe Arpaio's appeal from the district court's denial of his motion to vacate his conviction for criminal contempt of court.

Concurring in the denial of rehearing en banc, Judge W. Fletcher, joined by Judges Graber, Wardlaw, Gould, Paez, and Christen, wrote to emphasize the limited role of the special prosecutor and the legality of the order.

In a statement regarding the denial of rehearing en banc, Judge Tashima wrote that he agrees with and fully supports Judge W. Fletcher's concurrence in the denial of rehearing en banc.

Dissenting from the denial of reconsideration en banc, Judge Callahan, joined by Judges Bybee, Bea, and Ikuta, wrote that the panel should have stuck to the tried and true solution of simply appointing amicus curiae to defend the district court's vacatur ruling in this situation in which the Department of Justice agrees that the conviction should be vacated. She wrote that the appointment of the special prosecutor is ill-advised and unnecessary, constitutionally

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

infirm, and an unprecedented and unauthorized intrusion of executive power.

In a statement regarding the denial of rehearing en banc, Judge Tallman wrote that he agrees with the views expressed by Judge Callahan in her dissent from the denial of rehearing en banc.

ORDER

A judge of the court sua sponte called for a vote on whether to rehear en banc the published order in this case dated April 17, 2018. A vote was taken, and a majority of the non-recused active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f). Rehearing en banc is **DENIED**.

W. FLETCHER, Circuit Judge, joined by GRABER, WARDLAW, GOULD, PAEZ, and CHRISTEN, Circuit Judges, concurring in the denial of rehearing en banc:

Former Sheriff Joe Arpaio has appealed to our court from the district court's denial of a motion to vacate his conviction for criminal contempt of court. On April 17, 2018, a motions panel of our court issued an order authorizing the appointment of a "special prosecutor to provide briefing and argument to the merits panel" that will hear Arpaio's appeal. *United States v. Arpaio*, 887 F.3d 979, 980 (9th Cir. 2018). The role of the "special prosecutor" under the order will be limited to providing briefing and argument to the merits panel.

A member of our court unsuccessfully sought en banc rehearing and reversal of the order of the motions panel. Several judges now dissent from the decision of our full court not to rehear the matter en banc. I concur in the denial of en banc rehearing. I write to emphasize two things—the limited role of the special prosecutor, and the legality of the order.

I. Limited Role of the Special Prosecutor

Arpaio violated an order of the district court. The United States prosecuted Arpaio for criminal contempt of court and obtained a conviction on July 31, 2017. President Trump pardoned Arpaio on August 25, prior to sentencing by the district court. Arpaio then moved to dismiss the prosecution and to vacate the conviction. On October 19, 2017, the district court granted Arpaio's motion to dismiss the prosecution but denied his motion to vacate the conviction. Arpaio appealed the denial.

On December 13, 2017, in response to an inquiry from our court, the government wrote that it "does not intend to defend the district court's order from October 19, 2017 . . . ; instead, the government intends to argue, as it did in the district court, that the motion to vacate should have been granted." United States Statement at 2. The government took "no position on whether the Court should appoint counsel to make any additional arguments." *Id.* The motions panel then issued the order now at issue on April 17, 2018.

After the motions panel issued its order, the government objected to the appointment of a private attorney as a special prosecutor, reversing the position it had taken on December 13. The government wrote on June 22, 2018: "The prosecution of crimes is a prerogative of the Executive

Branch, subject to a narrow exception for appointment of a special prosecutor in contempt actions that is codified in [Federal] Rule [of Criminal Procedure] 42. But the appointment of a special prosecutor under the circumstances of this case does not fit within that narrow exception, and thus would intrude into an area that is constitutionally reserved for the Executive." United States Brief at 2.

The role of a private attorney appointed as a special prosecutor, either under Rule 42 or under the court's inherent authority, is the same as the role of a federal prosecutor. The role of a federal prosecutor, and the corresponding role of a special prosecutor, is not limited to actions in the district court. The role of a federal prosecutor is to initiate a prosecution for contempt of court, to prosecute the case in the district court, and, if a conviction is obtained, to defend the conviction in the district court and the court of appeals.

In the case before us, the government was successful in obtaining a conviction for criminal contempt of court. The part of the prosecutor's role that remains is defending on appeal that successful result. The motions panel authorized the appointment of a special prosecutor to perform that function—to present in briefing, and by oral argument if necessary, arguments in support of the district court's denial of Arpaio's motion to vacate his conviction.

II. Legality of the Order

The dissenters characterize the order of the motions panel as "constitutionally infirm" and as an "unprecedented—and unauthorized—intrusion of executive power." Diss. Op. at 13. This is incorrect.

The order of the motions panel was an exercise of judicial rather than executive power. The order authorizes the appointment of private counsel to assist the court in evaluating the merits of an appeal, in a criminal contempt-of-court case, after the government has declined to perform that function.

A. Rule 42

Federal Rule of Criminal Procedure 42 applies equally to all federal courts in which a government or special prosecutor would act—whether seeking and obtaining in district court a conviction for criminal contempt, or defending in an appellate court a conviction obtained in the district court. Federal Rule of Criminal Procedure 1, provides:

> These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.

FED. R. CRIM. P. 1(a)(1).

Federal Rule of Criminal Procedure 42(a)(2) authorizes the appointment of a private attorney to prosecute criminal contempt of court when the government declines that role. It provides:

> *Appointing a Prosecutor:* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines

> the request, the court *must* appoint another attorney to prosecute the contempt.

FED. R. CRIM. P. 42(a)(2) (second emphasis added).

Rule 42(a)(2) is not itself the source of a federal court's authority to appoint a private attorney as a special prosecutor to perform the role of a government attorney in prosecuting a criminal contempt of court. Rather, it is an implementation of a court's pre-existing inherent authority to appoint a special prosecutor when the government declines to prosecute.

An earlier version of Rule 42 did not explicitly authorize the appointment of a private attorney as a special prosecutor to prosecute criminal contempt of court. The earlier Rule provided only that notice be given to an alleged contemnor that a government or private attorney had been appointed to prosecute the contempt. In *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 793 (1987), the Second Circuit had upheld a district court order appointing two private attorneys as "special prosecutors" to prosecute a criminal contempt of court. The Supreme Court struck down the appointment on the ground that the two special prosecutors were not disinterested, given that they represented one of the parties in the underlying civil case. But the Court wrote at length to uphold the right of the court to appoint a disinterested private attorney as a special prosecutor.

The Court acknowledged that Rule 42, as then written, did not explicitly authorize a court to appoint private attorneys as special prosecutors. But it held that courts have pre-existing inherent authority to make such appointments.

> While it is true that Federal Rule of Criminal Procedure 42(b) does not provide authorization for the appointment of a private attorney, it 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.*

Id. (emphases added).

Rule 42 was amended in 2002 to add what is now Rule 42(a)(2). The Committee Notes cite *Young* and explain the rationale for the amendment:

> Revised Rule 42(a)(2) now explicitly addresses the appointment of a "prosecutor" and adopts language to reflect the holding in *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987). In that case the Supreme Court indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The rule envisions that a disinterested counsel should be appointed to prosecute the contempt.

FED. R. CRIM. P. 42 Advisory Committee Notes to 2002 amendment.

B. Inherent Power

Rule 42 is rooted in the longstanding inherent power of the judiciary to appoint disinterested private attorneys as special prosecutors to pursue criminal contempt proceedings in federal court when government prosecutors are unwilling or unable to perform that function. The Court in *Young* made clear that Rule 42 is rooted in an inherent judicial power that exists independently of the Rule. Ordinary criminal prosecutions are, of course, exercises of the executive power. Prosecutions for criminal contempt of court are different. Such prosecutions are vindications of the judicial power, and the use of private attorneys as special prosecutors is part of the judicial function. The Court wrote in *Young*:

> The Rule's assumption that private attorneys may be used to prosecute contempt actions reflects the longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders *is a part of the judicial function*.

Young, 481 U.S. at 795 (emphasis added).

In the case before us, a government prosecutor sought and obtained a conviction for criminal contempt in the district court. The government then declined to defend the conviction when Arpaio appealed the district court's denial of his motion for vacatur. The Court in *Young* instructs us what to do in that circumstance:

> If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to

> protect itself if that Branch declined prosecution. The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort.

Id. at 801.

Our court followed the procedure prescribed in *Young*. We inquired whether the government would defend Arpaio's conviction on appeal. When the government responded that it did not intend to do so, the motions panel issued an order authorizing the appointment of a special prosecutor to perform the prosecutorial functions that the government had declined to perform. Such an appointment, as the Court's opinion in *Young* makes clear, is "part of the judicial function," enabling the judiciary "to protect itself if [the Executive] Branch decline[s] prosecution." *Id.* at 795, 801.

III. Our Dissenting Colleagues' View

Our dissenting colleagues have a much narrower view of Rule 42 and the judiciary's inherent power. They concede, as they must, that the judicial branch has the authority under Rule 42 and its inherent power to "protect itself" if the executive branch declines to provide that protection. They also concede, as they must, that a court's authority under Rule 42 and its inherent power extends to the appointment of private attorneys as special prosecutors to initiate proceedings for criminal contempt of court.

However, our colleagues contend that a court's authority ends as soon as criminal contempt-of-court proceedings are "initiated." Diss. Op. at 17–18. They write, "Once a contempt proceeding begins, the court's authority is vindicated and the court has no further stake in the matter." *Id.* This cannot be right. Mere "initiation" of a criminal contempt proceeding is hardly sufficient to protect the integrity of the court. Actual prosecution of that contempt, once initiated, is necessary. Defense of a conviction on appeal is also necessary. That is, all of the normal functions of a prosecutor are necessary if the judiciary is fully to "protect itself" when the executive branch declines to provide that protection.

* * *

The order of the motions panel authorized the appointment of a special prosecutor under Rule 42 and its inherent power. During the pendency of Arpaio's appeal to our court, the special prosecutor will continue the prosecution for criminal contempt of court that the government has abandoned.

Once the government declined to continue the prosecution by defending Arpaio's conviction on appeal, the motions panel had no choice. Rule 42 specifies that if the government declines to prosecute, "the court *must* appoint another attorney to prosecute the contempt." FED. R. CRIM. P. 42(a)(2) (emphasis added). As the Supreme Court wrote in *Young*:

> If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to

> protect itself if that Branch declined prosecution.

481 U.S. at 801.

TASHIMA, Senior Circuit Judge, statement regarding denial of rehearing en banc:

I agree with and fully support Judge Fletcher's concurrence in the denial of rehearing en banc.

CALLAHAN, Circuit Judge, with whom BYBEE, BEA, and IKUTA, Circuit Judges, join, dissenting from denial of reconsideration en banc:

The question before the motions panel was a simple one: Given that the Unites States Department of Justice agrees with the appellant, Sheriff Arpaio, on the legal point that Arpaio's contempt conviction should be vacated, what should the court do to ensure the merits panel receives briefing and argument on both sides of the issue? The tried and true solution is to appoint amicus curiae to provide such briefing. The panel majority, unsatisfied with having already appointed amici curiae who have ably briefed the merits, took the unprecedented step of appointing a "special prosecutor" to supplant the Department of Justice.

We should have reconsidered the majority's decision en banc. As Judge Tallman states in his dissent, the appointment of a special prosecutor is "ill-advised and unnecessary."

The appointment is also constitutionally infirm. The majority's we-see-no-reason-why-not approach does not justify its admittedly unprecedented—and unauthorized—intrusion of executive power.

I

Judge G. Murray Snow (D. Ariz.) issued an order of charges for criminal contempt against former Maricopa County Sheriff Joseph M. Arpaio (and others), and requested that the United States Attorney's office prosecute Sheriff Arpaio. The government accepted the request, and the Public Integrity Section of the United States Department of Justice successfully prosecuted Sheriff Arpaio in a bench trial conducted by Judge Susan R. Bolton, obtaining a conviction of criminal contempt on July 31, 2017. Before sentencing, however, President Donald Trump pardoned Arpaio. Rather than challenge the conviction, the sheriff accepted the pardon. He then moved to dismiss the action and to vacate the conviction and all other orders in the case. The district court granted the first request but denied the second. Arpaio appeals from the denial of the motion to vacate.[1]

Non-parties who served as amici curiae in the district court proceedings filed a motion requesting permission to

[1] Sheriff Arpaio's appeal is limited to the question of whether, in light of the pardon, the district court should have vacated the conviction. No one appealed the order dismissing the action. Our court denied a late-filed request for the appointment of counsel to cross-appeal the dismissal on behalf of the government because the time to appeal had expired.

participate as amici curiae in the appeal.[2] The motion also asked the court "to appoint a private attorney" under Federal Rule of Criminal Procedure 42 to defend the denial of the request for vacatur "to ensure that this Court has the full set of issues in this matter before it in an adversarial proceeding." The court granted the motion in part, directed that the Clerk file amici curiae's proposed merits brief, which defends the district court's decision, and allowed amici to file a supplemental merits brief.[3]

The motions panel also ordered the government to "file a statement indicating whether it intends to enter an appearance and file an answering brief in this appeal." The order further stated that if the government intended not to defend the district court's order denying the motion to vacate, the government "shall also provide its position on whether this court should appoint counsel to represent the government's interests on appeal and defend the district court's order." The order did *not* indicate that the panel was considering replacing the government with a "special prosecutor."

The government responded that it "intends to represent the government's interests in this appeal." The government further stated that it "does not intend to defend the district

[2] These amici include The Protect Democracy Project, Inc. (which is represented by Perkins Coie LLP and Messing & Spector LLP), Free Speech for People, The Coalition to Preserve, Protect and Defend, and the Roderick and Solange MacArthur Justice Center (Northwestern Pritzker School of Law).

[3] Other non-parties, Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar (who are represented by Riordan & Horgan), have also sought leave to file a brief as amici curiae and submitted a proposed brief defending the district court's denial of the request for vacatur.

court's order from October 19, 2017 . . . ; instead, the government intends to argue, as it did in the district court, that the motion to vacate should have been granted. We take no position on whether the Court should appoint counsel to make any additional arguments."

On April 17, 2018, over a dissent by Judge Tallman, the motions panel issued its published order stating it "will appoint a special prosecutor." *United States v. Arpaio*, 887 F.3d 979, 980 (9th Cir. 2018). The panel acknowledged the lack of any precedent for the court appointing a special prosecutor in a proceeding with a similar posture. *Id.* at 981–82. The panel justified its unprecedented action by stating, "[w]e see no reason why such appointment should not take place under Rule 42(a)(2)." *Id.* at 982.

The parties were then ordered to file supplemental briefs on "whether the Court has the authority, either pursuant to Fed. R. Crim. P. 42(a)(2) or under its inherent authority, to appoint a special prosecutor under the circumstances presented by this case." *United States v. Arpaio*, 891 F.3d 1130, 1130–31 (9th Cir. 2018). The parties and amici filed supplemental briefs. The Department of Justice made clear in its brief that it has no intent to cede its role as the prosecutor who brought this action to a replacement special prosecutor. The government argued that the court lacks the power to appoint a special prosecutor, as opposed to amicus counsel, at this stage of the proceedings.

II

A

A court's authority to appoint a "special prosecutor" is extremely limited. Such an exercise of executive-like power is authorized only when necessary to vindicate the court's own authority. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793–96, 800–01 (1987).

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). "Each branch 'exercise[s] . . . the powers appropriate to its own department,' and no branch can 'encroach upon the powers confided to the others.'" *Patchak v. Zinke*, 138 S. Ct. 897, 904–05 (2018) (alterations in original). The Supreme Court has cautioned that each branch—including the judiciary—must "resist[]" the inherent pressure "to exceed the outer limits of its power, even to accomplish desirable objectives." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

The judicial branch cannot take, or be given by another branch, "executive . . . duties of a nonjudicial nature" where such duties are not provided for in the Constitution. *See Buckley*, 424 U.S. at 123. "The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches." *Morrison v. Olson*, 487 U.S. 654, 677–78 (1988). The Supreme Court commands "vigilance" against the "danger[]" of the judicial branch being "allowed 'tasks that are more properly accomplished by [other]

branches.'" *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Morrison*, 487 U.S. at 680–81).

Although the Constitution squarely endows the executive branch with the prosecutorial power, the Supreme Court has recognized a limited judicial power to appoint a special prosecutor to initiate criminal contempt proceedings. *See Young*, 481 U.S. at 800–01. This inherent power is justified by the judiciary's need "to vindicate its own authority without complete dependence on other Branches." *Id.* at 796. But that doesn't give courts carte blanche to exercise control over this executive function whenever they "see no reason why" not. *See Arpaio*, 887 F.3d at 982. Rather, "[t]he need to vindicate a court's authority is . . . satisfied by ensuring that an alleged contemner will have to account for his or her behavior in a legal proceeding, regardless of whether the party is ultimately convicted or acquitted." *Young*, 481 U.S. at 796 n.8.

In other words, the need for the judiciary's limited quasi-executive power—and thus the power itself—is extinguished once criminal contempt proceedings are *initiated*. The Supreme Court repeated several times in *Young* that the power of appointment is limited to the "initiation" of contempt proceedings. *See, e.g.*, *Young*, 481 U.S. at 793 ("[C]ourts possess inherent authority to *initiate* contempt proceedings for disobedience to their orders." (emphasis added)); *id.* at 795 ("[T]he *initiation* of contempt proceedings to punish disobedience to court orders is a part of the judicial function." (emphasis added)); *id.* at 796 ("Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be *initiated*." (emphasis added)); *id.* at 800–01 ("[C]ourts have long had . . . the authority to appoint private attorneys to *initiate* such proceedings." (emphasis

added)); *id.* at 801 ("[A] court has the authority to *initiate* a prosecution for criminal contempt." (emphasis added)). Once a contempt proceeding begins, the court's authority is vindicated and the court has no further stake in the matter. *See id.* at 796 n.8 ("A court's ability to institute a contempt proceeding is therefore essential to the vindication of its authority in a way that the ability to determine guilt or innocence is not.").[4]

Additionally, although "a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that 'only "[t]he least possible power adequate to the end proposed" should be used in contempt cases.'" *Id.* at 801 (quoting *United States v. Wilson*, 421 U.S. 309, 319 (1975)) (alteration in original). "This principle of restraint in contempt counsels caution in the exercise of the power to appoint a private prosecutor." *Id.* Such power exists "only as a last resort," which means only if the court first asks the appropriate prosecuting authority to initiate contempt proceedings and that request is declined. *Id.*

B

The majority reaches two conclusions in support of its decision to "appoint a special prosecutor." First, while acknowledging there is no precedent for expansion of the

[4] Even if a court's power to appoint a prosecutor is not extinguished upon the initiation of criminal proceedings, such power certainly does not survive past an unappealed conviction. In this regard, the posture of this case is significant. Rather than challenge his conviction, Arpaio chose to accept the Presidential pardon. The district court then properly dismissed the case in light of the pardon. Arpaio does not appeal his conviction; he appeals only the district court's refusal to vacate its determination of guilt.

power to appoint a special prosecutor to the situation here, the majority nonetheless concludes that it "ha[s] the authority to appoint counsel under Federal Rule of Criminal Procedure 42." *Arpaio*, 887 F.3d at 981. Second, the panel concludes it "ha[s] inherent authority to appoint special counsel." *Id.* at 982. Neither conclusion withstands scrutiny.

The majority's assertion that Rule 42 empowers federal judges to appoint a special prosecutor is simply wrong. The Supreme Court stated in *Young* that Rule 42 "does not provide authorization for the appointment of a private attorney." *Young*, 481 U.S. at 793; *see id.* at 794 (observing that Rule 42 "does not itself purport to serve as authorization for" the practice of appointing a special prosecutor). Rather, such limited authority is inherent in the constitutional grant of power to the judiciary, and Rule 42 merely refers to that authority and "speaks only to the procedure for providing notice of criminal contempt." *Id.* at 793 (emphasis omitted). The Federal Rules of Criminal Procedure, as promulgated by the Supreme Court under the Rules Enabling Act, could no more *grant* Article III judges the power to appoint a prosecutor to initiate criminal proceedings than the judicial branch or legislative branch could unilaterally usurp some purely executive function.

The only explanations offered for the majority's asserted power to appoint a special prosecutor is that the majority "see[s] no reason why such an appointment should not take place under Rule 42" and that the "operation" of Rule 42 "is not confined to investigations and trials in the district court."

Id. at 981–82.[5] In seeing no reason to doubt its authority to appoint a special prosecutor, the majority overlooks constitutional constraints on the court's power.

Curiously, the majority seeks to justify the appointment of a special prosecutor by relying on the "longstanding practice" of appointing a disinterested party to serve as amicus curiae to defend a lower court's decision when the United States declines to defend the decision.[6] *Arpaio*, 887 F.3d at 982. To state the obvious: appointment of a special prosecutor as contemplated by Rule 42 is not the same thing as appointment of appellate counsel or amicus curiae simply to brief and argue a case on appeal. A "special prosecutor" is "[a] lawyer appointed to investigate and, if justified, seek indictments in a particular case." Prosecutor, Black's Law Dictionary (10th ed. 2014). In contrast, "amicus curiae" is "[s]omeone who is not a party to a lawsuit but who

[5] In asserting that the "operation" of Rule 42 is not confined to activities in the district court, the panel fails to recognize the distinction between a *special prosecutor's* powers once appointed (which can continue into an appeal) and the *court's* power to appoint a special prosecutor in the first instance on appeal. The majority cites no authority stating that the judiciary's power to appoint a special prosecutor is coterminous with the hypothetical duration of the special prosecutor's power once appointed. Indeed, such a view is contrary to the *Young* Court's narrow construction of the judiciary's power.

[6] Amici's attempt to defend the majority's decision suffers from the same defect. Tellingly, in their brief on the en banc question, amici painstakingly avoid using the term "special prosecutor" other than when quoting the panel's order and reciting *Young*'s holding that "courts possess inherent authority to initiate contempt proceedings." Instead, like the panel, they seek to justify the order by asserting the undisputed proposition that courts have the power to appoint amicus or appellate counsel to defend a lower court's judgment.

petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." Amicus Curiae, Black's Law Dictionary (10th ed. 2014). As the Department of Justice notes, "[t]he distinction is important because, by its nature, counsel appointed as amicus would be limited to defending the judgment and could not claim any of the powers associated with a special prosecutor."[7]

Despite the clear distinction between a "special prosecutor" on the one hand and "appellate counsel," "counsel," or "amicus curiae" on the other hand, the majority uses these distinct labels throughout its order as if they were

[7] A special prosecutor's powers are broad. A special prosecutor appointed by the Attorney General under the former Ethics in Government Act, and the regulations that replaced that Act when it expired in 1999, is bestowed with "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney." 28 C.F.R. § 600.6; *see also* 28 U.S.C. § 594(a) (providing that a special prosecutor's powers include "conducting proceedings before grand juries and other investigations," "making applications to any Federal court . . . for warrants, subpoenas, or other court orders," and "initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any cases, in the name of the United States"). A special prosecutor appointed under Rule 42 to prosecute contempt necessarily has the same, or at least similar, prosecutorial powers. And just as we have no ability to expand or to restrict the United States Attorney's prosecutorial powers, we are powerless to exercise control over the prosecutorial function of a special prosecutor appointed to represent the government. Here, of course, the movants wish the special prosecutor to take a position in litigation that the district court properly denied Arpaio's motion to vacate the fact of his conviction. That is directly opposite to the position taken by the United States. The panel does not tell us who will resolve such conflicts between the special prosecutor and the United States Department of Justice.

interchangeable.[8] The majority's citation to *Lucia v. SEC*, 138 S. Ct. 923 (2018), is ironic. *See Arpaio*, 887 F.3d at 982. In that case, the Supreme Court invited a particular attorney "to brief and argue this case, as *amicus curiae*, in support of the judgment below." *Lucia*, 138 S. Ct. 923. Like in *Lucia*, the panel's prior appointment of amici is all that is needed here. Yet the majority eschews the Supreme Court's approach, instead somehow finding in *Lucia*'s single-sentence appointment of amicus curiae support for the appointment of a special prosecutor to displace the Department of Justice.

The 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.

C

The appointment of a special prosecutor is completely unnecessary.

First, the United States did not decline the district court's request to prosecute Sheriff Arpaio for contempt. The district court's authority was vindicated when the government initiated contempt proceedings. Although the district court

[8] *See Arpaio*, 887 F.3d at 981 ("we will appoint a special prosecutor"); *id.* ("unless we appoint a special prosecutor"); *id.* ("we have the authority to appoint counsel under [Rule 42"]); *id.* at 982 ("we have inherent authority to appoint a special counsel"); *id.* ("inherent authority to appoint disinterested counsel"); *id.* ("inherent judicial power to appoint appellate counsel"); *id.* ("inherent authority to appoint an amicus").

had no stake in the outcome of those proceedings, the result was in fact a conviction.

Second, the majority's sole stated purpose in the appointment—to allow the merits panel the benefit of full briefing and argument—does not require or justify the appointment of a special prosecutor. The court's only interest in this litigation is to have the issues raised on appeal fully briefed and argued, and that purpose is achieved by the court exercising its undisputed authority to appoint amicus curiae. Accordingly, even if the government's position that the district court is in error would otherwise result in uneven briefing, the easy solution is the non-controversial appointment of amici to brief the issues.[9]

Indeed, the majority's assertion that the merits panel "will not receive the benefit of full briefing and argument" absent appointment of a special prosecutor is perplexing in light of the panel's prior order granting various groups leave to serve as amici and directing that the Clerk file amici's proposed brief. Given the obvious option of appointing amicus curiae, perhaps even more perplexing is our concurring colleagues'

[9] Confession of error by the government does not relieve the court "of the performance of the judicial function." *Sibron v. New York*, 392 U.S. 40, 58 (1968); *Young v. United States*, 315 U.S. 257, 258–59 (1942) ("[O]ur judicial obligations compel us to examine independently the errors confessed."). As stated in the Fourth Circuit case cited by the majority, "the Court commonly appoints an amicus"—not a special prosecutor—when the government confesses error in the lower court's judgment. *See Arpaio*, 887 F.3d at 982 (quoting *United States v. Brainer*, 691 F.3d 691, 693 (4th Cir. 1982)).

suggestion that the motions panel had "no choice" but to appoint a special prosecutor. Conc. Op. at 11.[10]

A cursory review of amici's merits brief (prepared by highly esteemed counsel) confirms that amici vigorously defend the district court's decision. Amici will also be able to respond to the appellant's opening brief because the panel expressly authorized them to "file a supplemental brief addressing the merits of this appeal." Additional proposed amici have filed a separate proposed merits brief that likewise heartily defends the district court.

Even though the court has received merits briefs on both sides of the only issue in this appeal, the panel majority maintains that it is compelled to appoint a special prosecutor to supplant the DOJ. Will the merits panel's consideration of the issue somehow be limited because amici do not have prosecutorial powers in presenting the case for affirmance? No. Will the merits panel's decision regarding vacatur somehow be devoid of effect if rendered without the presence of a "special prosecutor" in the case? No. On top of our unflagging duty to follow the law in deciding the appeal on its merits (as in all cases), do we have some additional interest in arriving at a particular result or seeing to the punishment of Arpaio? Of course not.

[10] The concurrence makes this assertion without even attempting to explain why the appointment of amicus curiae is inadequate to serve the majority's sole purpose of "provid[ing] briefing and argument to the merits panel." *Arpaio*, 887 F.3d at 980. We appoint amici all the time to "assist the court in evaluating the merits of an appeal." *See* Conc. Op. at 6.

Nothing about our court resolving this case based on the briefing of the parties and amici either threatens to render the district court that issued the injunction against Arpaio impotent or undermines that court's power in any way. The merits panel's ultimate resolution of the sole issue in this case simply does not implicate the judiciary's interest in ensuring that disobedience of contempt orders is punished.

D

If simply appointing amici to present a brief and argument would have done the trick, why encroach (or even risk encroaching) on the executive branch's prerogative by appointing a special prosecutor?

It is now the law of this circuit—which covers nearly 20% of the nation's population—that a judge may, in the name of getting "full briefing," appoint a special prosecutor to replace the United States Department of Justice provided the judge "see[s] no reason why" not. *Arpaio*, 887 F.3d at 982. And the judge may do this even though the federal prosecutor initiates the criminal action, obtains a conviction, and fully intends to represent the government's interests throughout the proceedings. Under the majority's rationale, a judge could appoint a special prosecutor when he or she simply disagrees with the prosecution strategy or litigation position and thus declares that the United States has abandoned the case.

The combination of the majority's holding being unprecedented and so obviously unnecessary to the panel's stated purpose (i.e., to brief the merits of the appeal) will serve only to undermine public confidence in the merits panel's ultimate decision—whatever it decides. And it isn't difficult to anticipate the mischief that is sure to result from

such an unreasoned application of the judiciary's power to appoint a special prosecutor. Justice Scalia offered a prophetic warning in his concurring opinion in *Young*:

> In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges' in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth much more vividly than [the Supreme Court in *Anderson v. Dunn*, 6 Wheat. 204 (1821)] could ever have imagined the prospect of "the most tyrannical licentiousness."

Young, 481 U.S. at 822 (Scalia, J., concurring) (quoting *Anderson*, 6 Wheat. at 228). Perhaps Justice Scalia was right all along that "federal courts have no power to prosecute contemners for disobedience of court judgments, and no derivate power to appoint an attorney to conduct contempt prosecutions." *Id.* at 825 (Scalia, J., concurring).

While Sheriff Arpaio and the Chief Executive who pardoned him have evoked strong feelings from those with opposing political views, we abandon our role as impartial jurists by "wading into that [political] thicket," effectively firing the United States' attorneys, and appointing a special prosecutor in their stead. *See Arpaio*, 887 F.3d at 986 (Tallman, J., dissenting).

III

The executive branch's role is to prosecute. Our role is to adjudicate. When we close our eyes to the constitutional

limits of our power, we are bound to veer out of our lane, and there's no telling what else we might do simply because "we see no reason why" not. The prosecutors here intend to do their job—we should let them and worry about doing our own job.

The panel should have stuck to the tried and true solution of simply appointing amicus curiae to defend the district court's vacatur ruling. The prior appointment of amici is more than adequate to achieve the panel's sole stated purpose of getting briefing and argument for the merits panel. And, unlike the appointment of a special prosecutor, such an appointment doesn't run afoul of the Constitution's separation of powers.

I respectfully dissent from the denial of reconsideration en banc.

TALLMAN, Senior Circuit Judge, statement regarding denial of rehearing en banc:

I agree with the views expressed by Judge Callahan in her dissent from the denial of rehearing en banc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed October 15, 2018

No. 17-10448
D.C. No. 2:16-cr-01012-SRB-1
District of Arizona, Phoenix

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH M. ARPAIO, Sheriff,
Defendant-Appellant.

ORDER

Before: TASHIMA, W. FLETCHER, and TALLMAN, Circuit Judges.

On April 17, 2018, our Court issued an order authorizing the appointment of a "special prosecutor to provide briefing and argument to the merits panel" that will hear the appeal of former sheriff Joe Arpaio from the district court's denial of his motion to vacate his conviction for contempt of court. *United States v. Arpaio*, 887 F.3d 979, 980 (9th Cir. 2018). On October 10, 2018, our Court denied en banc rehearing of that order. *United States v. Arpaio*, No. 17-10448, 2018 WL 4904770 (9th Cir. Oct. 10, 2018). Pursuant to our April 17, 2018 order, we hereby appoint Christopher G. Caldwell as special prosecutor for purposes of this appeal. The special prosecutor will be limited to the functions a government attorney would have performed in

connection with Arpaio's appeal in this Court had the government been willing to perform those functions.

The Clerk shall amend the docket to reflect that

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Boies, Schiller and Flexner
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is added as additional counsel of record for appellee United States of America.

Within 14 days after the date of this order, special prosecutor Caldwell shall register on the Court's website for electronic filing/noticing with the Case Management Electronic Case Files (CM/ECF) system if he is not already registered.

A briefing schedule will be established by separate order.