No. 17-10448

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

JOSEPH M. ARPAIO,
Defendant/Appellant.

Appeal from the United States District Court
for the District of Arizona, No. 2:16-CR-01012
The Honorable Susan R. Bolton

MOTION FOR LEAVE FOR THE PROTECT DEMOCRACY PROJECT, INC., FREE SPEECH FOR PEOPLE, COALITION TO PRESERVE, PROTECT AND DEFEND, AND RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER TO PARTICIPATE AS *AMICI CURIAE*

(EXPEDITED CONSIDERATION REQUESTED)

DEADLINE PENDING: NOVEMBER 20, 2017

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Pursuant to Federal Rules of Appellate Procedure 27 and 29(b), and Ninth Circuit Local Appellate Rule 29(a)(3), the proposed *amici curiae* described below respectfully move this Court for leave to file a brief urging the Court to appoint a private attorney to ensure an adversarial process for this appeal, including through the filing of a cross-appeal.

Barring an extension of time, the deadline for the Government, or a private attorney acting for the Government under Rule 42 of the Federal Rules of Criminal Procedure, to notice a cross-appeal, is November 20, 2017. Fed. R. App. P. 4(b)(1)(B)(ii). Thus, the proposed *amici curiae* respectfully request expedited consideration of this matter.

I. IDENTITY AND INTEREST OF PROPOSED *AMICI CURIAE*

The proposed *amici* are nonprofit organizations that share an interest in, among other things, defending the rule of law and the rule of an independent judiciary in upholding it. As further detailed below, proposed *amici* have a profound interest in ensuring that the constitutionality of President Trump's extraordinary pardon of Arpaio (the "Pardon") is reviewed by this Court.

Individually, the Protect Democracy Project, Inc. ("Protect Democracy") is a nonpartisan, nonprofit organization dedicated to preventing our democracy from declining into a more authoritarian form of government. It does this by holding the President and the Executive Branch accountable to the laws and longstanding

practices that have protected our democracy through both Democratic and Republican Administrations.

Free Speech for People ("FSFP") is a nonpartisan, nonprofit organization working to renew our democracy and our Constitution for we, the people. FSFP has filed *amicus* briefs in constitutional cases in federal district courts across the country.

The Coalition to Preserve, Protect and Defend (the "Coalition") is a California nonprofit corporation dedicated to upholding the rule of law. Comprised of some of California's most seasoned attorneys—most of whom have extensive experience working in government—the Coalition was formed to participate in litigation supporting government accountability, just laws, open government, and perhaps most critically, to protect the public's right to an independent and impartial judiciary.

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the

rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated women and men.

II. THE PROPOSED BRIEF EXPLAINS WHY THIS COURT SHOULD APPOINT A PRIVATE ATTORNEY TO PROSECUTE AN APPEAL IN THIS MATTER

Amici submitted briefs in the District Court explaining that the Pardon was unconstitutional under the Due Process Clause and separation of powers provisions of Article II and Article III. The District Court, after considering those arguments, concluded that it was bound by a 1925 Supreme Court opinion and so could not invalidate the Pardon, even while acknowledging key distinctions between the Pardon here and the one at issue in the older case.

With the Government having sided with Arpaio, the proposed *amici* seek leave to file this brief to ask this Court to appoint a private attorney—as mandated by Rule 42 of the Federal Rules of Criminal Procedure. The Rule 42 attorney could defend the District Court's Order denying Arpaio's request for vacatur, from which this appeal was taken, and cross-appeal the District Court's Order dismissing the charges, to ensure that this Court has the full set of issues in this matter before it in an adversarial proceeding. In the alternative, the proposed *amici* request that the Court exercise its supervisory jurisdiction to reverse the District Court's Order denying *amici*'s Rule 42 request and direct the District Court to appoint a private attorney in time for that attorney to notice the cross-appeal.

As the proposed brief explains, criminal contempt prosecutions play a critical role in protecting the administration of justice and the authority of the Judiciary, and contempt charges should not be pardoned and dismissed in an unprecedented matter without full consideration by this Court. And full consideration requires that a Rule 42 attorney be appointed to ensure that the Court has the benefit of adversarial testing.

III. CONCLUSION

For these and other reasons set forth at greater length in the accompanying brief, proposed *amici* respectfully request permission to file their *amici* brief in support of appointment of a Rule 42 attorney to prosecute this appeal.

Respectfully submitted on this 8th day of November, 2017.

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BRIEF OF *AMICI CURIAE* THE PROTECT DEMOCRACY PROJECT, INC., FREE SPEECH FOR PEOPLE, COALITION TO PRESERVE, PROTECT AND DEFEND, AND RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER

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CORPORATE DISCLOSURE STATEMENT

The Protect Democracy Project, Inc. ("Protect Democracy"), Free Speech for People ("FSFP"), Coalition to Preserve, Protect and Defend (the "Coalition"), and the Roderick and Solange MacArthur Justice Center ("RSMJC") (collectively, "*Amici*") state that they are nonprofit organizations with no parent corporations and in which no person or entity owns stock.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are nonprofit organizations that share an interest in, among other things, defending the rule of law and the role of an independent judiciary in upholding it. As further set forth in the Motion, *amici* have a profound interest in ensuring that the constitutionality of President Trump's extraordinary pardon of Arpaio is reviewed by this Court.

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STATEMENT OF COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, or their counsel, made a monetary contribution to fund this brief's preparation or submission.

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INTRODUCTION AND BACKGROUND

Criminal contempt is no ordinary crime, and Arpaio is no ordinary criminal. Charged with enforcing the law, Arpaio instead disregarded the law, abused it, and sought to bend it to his will. The question of whether his extraordinary conviction can be washed away, in whole or in part, by Presidential pardon is one of constitutional magnitude that requires an adversarial hearing to preserve the integrity of the judicial system. But the Justice Department has already said and written that it will not provide for that full adversarial process.

The Federal Rules of Criminal Procedure provide that when the Justice Department declines to pursue a criminal contempt prosecution, the court (defined by the Rules to include a court of appeals) must appoint a private attorney to pursue the prosecution and ensure an adversarial process. The Government made abundantly clear in the District Court that it would not continue to prosecute Arpaio, would not appeal the District Court's Order terminating the prosecution, and would not defend the District Court's Order denying Arpaio's request for vacatur on appeal. Accordingly, *amici* ask this Court to appoint a private attorney, pursuant to the Federal Rules, to ensure that this Court has the full advantage of the adversarial process in considering this appeal.

Amici ask the Court to appoint the private attorney now to ensure that the attorney can (1) notice a cross-appeal of the District Court's Order upholding the

validity of the Pardon and terminating the contempt prosecution, and (2) defend the District Court's Order denying Arpaio's request for vacatur, from which this appeal was taken. In the alternative, *amici* ask that the Court exercise its supervisory jurisdiction to reverse the District Court's Order denying *amici*'s Rule 42 request and directing the District Court to appoint a private attorney in time for that attorney to notice the cross-appeal. *See, e.g., United States v. Sanchez-Gomez*, 859 F.3d 649, 655 (9th Cir. 2017) ("'We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system.'" (quoting *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957)).

By way of background, after a five-day bench trial, the District Court found Arpaio guilty of criminal contempt for willfully violating Judge Snow's order prohibiting him from detaining persons in violation of their constitutional rights and scheduled sentencing for October 5, 2017. [Doc.[1] 210] On August 25, 2017, the President declared that Arpaio was "convicted for doing his job,"[2] and issued a Presidential pardon (the "Pardon"). [Doc. 221] Arpaio accepted the Pardon and

[1] Citations to "Doc." numbers correspond to the underlying District Court docket, CR-16-01012-001-PHX0SRB. Citations to "DE" numbers are to this Court's docket.

[2] Fox News, *Trump Hints That Arpaio Pardon Will Happen* (Aug. 22, 2017), http://www.foxnews.com/politics/2017/08/22/trump-hints-that-arpaio-pardon-will-happen.html.

subsequently moved to vacate all orders and dismiss his case with prejudice. [Doc. 220]

Lawyers from the Department of Justice (the "Government") refused to contest the extraordinary relief Arpaio sought. Instead, they agreed with Arpaio that vacatur and dismissal with prejudice was proper in light of the Pardon. [Docs. 225, 236] Multiple *amici*, including *amici* here, filed briefs in the District Court arguing that the Pardon was unconstitutional, and requesting that the Court appoint a Rule 42 attorney if the Government refused to continue the prosecution. [Docs. 223, 227, 228, 230, 231, 233, 239]

The District Court heard oral argument on October 4, 2017, but declined to appoint a Rule 42 attorney. [*See* Doc. 243] The Court agreed with *amici* that "the criminal contempt pardoned here is for a willful violation of a preliminary injunction that affected constitutional rights, a more significant issue than the willful violation of the injunction against selling alcohol in *In re Grossman*." [Exh. A (Transcript of 10/4/17 Motion Hearing) at 6:11-15] But the Court concluded that it was nonetheless bound by *Grossman*, 267 U.S. 87 (1925). The Court therefore found the Pardon valid and that it required that the action be dismissed with prejudice, but reserved ruling on Arpaio's additional request for vacatur. [Exh. A at 6:19-20; *see also* Doc. 243 at 1-3]

In light of the Government's comments during oral argument, which made clear that it did not intend to appeal the District Court's Order terminating the prosecution, *amici* then asked the District Court for leave to file a short *amici* brief in support of the appointment of a Rule 42 attorney to appeal that Order. [Docs. 249-50] While that motion was pending, the District Court issued its Order denying Arpaio's request for vacatur–a request in which the Government concurred (Doc. 236) but which the District Court still denied. [Doc. 251] On October 19, 2017, Arpaio noticed an appeal of that Order. [Doc. 252]

On October 30, the Clerk of this Court issued an Order directing Arpaio to move to dismiss this appeal or show cause why it should not be dismissed for lack of jurisdiction. [DE 4] In the event that Arpaio elects to show cause, the Order provides that "a response may be filed within 10 days" of service thereof. [*Id.*] The Order does not indicate which party would file the "response" to Arpaio's filing.

On November 1, 2017, the District Court denied *amici*'s request to appoint a Rule 42 attorney to prosecute an appeal, reasoning that the Government's decision not to appeal the Court's dismissal did not amount to a failure to prosecute, and further, that *amici* failed to name an attorney willing to accept such appointment or provide a mechanism by which that attorney would be compensated if appointed. [Doc. 255 at 1-2]

ARGUMENT

I. Appointment of a Private Attorney to Prosecute the Contempt Appeal Is Required By Rule 42(a)(2)

Rule 42(a)(2) directs that in a prosecution for criminal contempt, "[t]he court must request that the contempt be prosecuted by an attorney for the government," and "[i]f the government declines the request, the court *must* appoint another attorney to prosecute the contempt." Fed. R. Crim. P. 42(a)(2) (emphasis added). That mandatory language applies to the courts of appeals, including this Court. Fed. R. Crim. P. 1(a)(1) (confirming that the Rules of Criminal Procedure "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" (emphasis added)); *see also id.* at 1(b)(2) (defining "Court" as "a federal judge performing functions authorized by law").

This Court, and every other court that has considered the issue, has held that Rule 42(a)(2)'s requirement that a private attorney be appointed if the government fails to pursue a contempt prosecution is "mandatory." *United States v. Struckman*, 611 F.3d 560, 580 n.1 (9th Cir. 2010) (Berzon, J., concurring) ("If criminal contempt is pursued, a prosecutor, either for the government or appointed specially by the court, would be *mandatory* as to conduct occurring outside the court's presence." (emphasis added) (citing Rule 42(a)(2)); *In re Troutt*, 460 F.3d 887, 894 (7th Cir. 2006) ("The requirement in Rule 42(a)(2) to appoint a prosecutor is

spelled out in mandatory language[.]"); *e.g.*, *United States v. Peoples*, 698 F.3d 185, 193 (4th Cir. 2012) (reversing contempt conviction because district court violated Rule 42(a)(2) in failing to appoint a prosecutor for second contempt trial).

In this case, although the Government obtained a guilty verdict, it has since declined to prosecute the contempt to completion. Contrary to the District Court's suggestion (Doc. 255 at 1-2), the Government did not just decline to prosecute an appeal; it abandoned the prosecution based on the Pardon *while the prosecution was pending in the District Court*. Indeed, the Government not only declined to oppose Arpaio's request for vacatur and dismissal, it *agreed* with Arpaio that vacatur and dismissal with prejudice was appropriate, arguing in its briefing and in oral argument below that in light of the Pardon, "this prosecution is over," that "[t]here will be no sentencing," "[t]here will be no judgment," and there will be no appeals. [Exh. A at 14:10-19; *see also* Docs. 225, 236] Under these circumstances, where the Government has abandoned the prosecution, Rule 42(a)(2) requires that the Court "appoint another attorney to prosecute the contempt."[3]

[3] In denying *amici*'s Rule 42 request to appoint private counsel for an appeal, the District Court noted that *amici* had not identified an attorney who would serve in that role or a mechanism for compensating that attorney. [Doc. 255 at 2 n.2] *Amici* stand ready to recommend a qualified practitioner to serve this role pro bono if that would assist this Court.

The fact that this case is now on appeal does not change the analysis. On the contrary, private attorneys have repeatedly represented the United States on appeal in criminal contempt cases where the government has declined to prosecute. *E.g.*, *In re Special Proceedings*, 373 F.3d 37, 39-40 (1st Cir. 2004) (Rule 42 prosecutor representing United States on appeal); *United States v. Cutler*, 58 F.3d 825, 828 (2d Cir. 1995) (same).[4] This practice predates Rule 42(a)(2) and traces at least back to *In re Grossman*, where "[s]pecial counsel, employed by the Department of Justice, appear[ed] . . . to uphold the legality of the detention" while "[t]he Attorney General of the United States, as amicus curiae, maintain[ed] the validity and effectiveness of the President's [pardon]." 267 U.S. at 108. This is consistent with the Supreme Court's pronouncements that criminal appeals are an "integral part of (our) system for finally adjudicating [a defendant's] guilt or innocence," *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), and that "concrete adverseness . . .

[4] Although these cases involved an appeal of an adjudication of contempt, it is well settled that an order dismissing a criminal contempt charge is an appealable order within meaning of 18 U.S.C. § 3731. *E.g.*, *United States v. Goldman*, 277 U.S. 229, 236 (1928) (dismissal of information charging criminal contempt is an appealable order under 18 U.S.C. § 3731); *United States v. Sanders*, 196 F.2d 895, 897 (10th Cir. 1952) ("An order dismissing a criminal contempt proceeding is appealable under the Criminal Appeals Act."); *United States v. Kelsey–Hayes Co.*, 476 F.2d 265, 266-67 (6th Cir. 1973) (same).

sharpens the presentation of issues upon which the court so largely depends for illumination," *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).[5]

With the Justice Department having stated its refusal to further advocate against Arpaio, a private attorney is not only mandatory, but also needed to perform two key roles, both of which are time sensitive.

First, the private attorney can defend the District Court's Order refusing to vacate the prior rulings of that Court from the appeal by Arpaio that seeks, essentially, to erase history. The Clerk's October 30 Order contemplates an adversarial process for the appeal—it directs "a response" be filed within 10 days of Arpaio's filing. [DE 4 at 1] Yet with the Government having failed to pursue the prosecution, until the appointment of a Rule 42 private attorney there is no party positioned to file such a response.

Second, and more urgently, a private attorney appointed pursuant to Rule 42 can notice a cross-appeal, challenging the District Court's October 4 Order

[5] In cases where Rule 42(a)(2) is not available, the Supreme Court has historically appointed counsel "to support an undefended judgment below, or to take a specific position as an amicus." Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 909-10 (2011) (noting that this has happened forty-three times since 1954). But amicus practice presents "at best, a limited and ad hoc opportunity for the presentation of adversarial ideas, not the structured opportunity for give-and-take" available under Rule 42(a)(2). Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 60-61 (2011).

upholding the validity of the Pardon. As to this latter task, barring an extension of time, the deadline to notice such an appeal is *November 20, 2017*. *See* Fed. R. App. P. 4(b)(1)(B)(ii).

Rule 42 reflects the judgment of the Supreme Court and Congress that, when, as here, the Government fails to pursue a contempt prosecution, the integrity of the Judicial Branch requires appointment of another attorney to serve that function. As the Supreme Court has explained, "[i]f the Judiciary were completely dependent on [prosecutors from] the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution," and the appointment of a private attorney when the Government declines to prosecute a criminal contempt is a "necessity." *Young v. U.S. ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987).[6] This case is no exception to that Rule.

II. There Is an Acute Need for Adversarial Presentation on the Unprecedented Constitutional Questions Raised in this Matter

As the District Court's assessment reflects, the constitutional questions presented by the Pardon transcend those at issue in *In re Grossman*. The contempt in this case violated a court order designed to protect private constitutional rights–

[6] *See* Fed. R. Crim. P. 42 advisory committee's note to 2002 amendments (noting that Rule 42 was amended in 2002 "to reflect the holding in *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987)").

which was not at issue in *Grossman*. The District Court explicitly acknowledged "that the criminal contempt pardoned here is for a willful violation of a preliminary injunction that affected constitutional rights, a more significant issue than the willful violation of the injunction against selling alcohol in *In re Grossman*." [Exh. A at 6:11-15] But it nonetheless upheld the Pardon because it believed itself bound by that appellate precedent.

This Court should have the opportunity through an adversarial process to consider whether *Grossman* reaches the very different Pardon at issue here. Appointment of a private attorney will ensure these issues are briefed in full on the merits, so *amici* will not develop those arguments here. But in short, the pardon at issue in *Grossman* involved a judicial order to secure compliance with a federal regulatory statute, the National Prohibition Act. *Grossman*, 267 U.S. at 107. The Pardon here, in contrast, arises in a private suit seeking to vindicate private litigants' constitutional rights.[7] The Pardon here thus runs afoul of the Bill of Rights, including the Due Process Clause, which ensures that the Judiciary is empowered to protect private constitutional rights. The pardon in *Grossman* did not implicate these issues involving the Bill of Rights and the power of the courts

[7] After Arpaio violated court orders to redress the constitutional rights of those litigants, the courts entered an escalating series of contempts to ensure the protection of their constitutional rights. *See Melendres v. Arpaio*, 2:07-cv-02513-GMS (D. Ariz. May 13, 2016), ECF No. 1677 (finding Arpaio in civil contempt on three counts). [Doc. 210]

to protect private constitutional rights, and so the Court in *Grossman* did not have before it the question of whether the pardon power reaches a contempt order used to enforce constitutional rights.

The novel and important constitutional issues raised by the Pardon magnify the need for an adversarial appeal, as it is well settled that "truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citation omitted).[8]

Ensuring the presentation of adversarial ideas in this appeal is likewise necessary because the core power and independent functioning of the Judiciary is at stake. The "fundamental purpose [of criminal contempt proceedings] is to preserve respect for the judicial system itself." *Young*, 481 U.S. at 800. For this reason, the Supreme Court has instructed that the appellate courts play an important role in criminal contempt matters: "The exercise of supervisory authority

[8] *See also, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1261 (2006) ("Our readiness to trust a court's rulings of law depends on the assumption that the adverse parties will each vigorously assert the best defense of its positions [and that t]he court reaches its decision only after confronting conflicting arguments powerfully advanced by both sides."); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 552 (1988) ("[C]ourts are limited in their ability to investigate issues on the periphery of those brought to them by the litigants, or even to explore the issues before them in any more detail than the parties wish to provide."); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) (only when a court "has had the benefit of intelligent and vigorous advocacy on both sides can [it] feel fully confident of [its] decision").

[by the appellate courts] is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the Judiciary." *Id.* at 809.

That the Government has sided with Arpaio in the wake of the President's pardon does not end the inquiry into the validity and effect of that pardon. Whether the Pardon trumps the independence and authority of the courts to protect constitutional rights should not be left to the Executive Branch alone. Stated differently, because the Judiciary's interest in defending its ability to enforce its orders stands on its own, the Government's capitulation should not deny this Court the opportunity for adversarial testing and meaningful appellate review. By appointing a private attorney to fill the role abdicated by the Government, this Court can avoid being left "searching anxiously for the principles on which a contrary opinion [to Arpaio's] may be supported," and dependent on whatever "the imagination of the court could suggest." *Marbury v. Madison*, 5 U.S. 137, 159 (1803).

CONCLUSION

The President's pardon of his political ally for willfully disobeying a federal court order that directed him to stop his long-standing constitutional violations is unprecedented in our nation's history. For a matter of this significance, the Court should appoint a private attorney to ensure that it has the full benefit of the

adversarial process that Rule 42 was promulgated to preserve. In the alternative, the Court should exercise its supervisory jurisdiction to reverse the District Court's Order denying *amici*'s Rule 42 request and should direct the District Court to appoint a private attorney in time for that attorney to notice the cross-appeal.

Respectfully submitted on this 8th day of November, 2017.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Rs. App. P. 32(a)(7) and 29(d). The brief contains 3,042 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word processing program used to prepare it.

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Dated: November 8, 2017

Jean-Jacques Cabou
Jean-Jacques Cabou

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: November 8, 2017

Jean-Jacques Cabou
Jean-Jacques Cabou

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EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

_____

United States of America,	)	
	)	
Plaintiff,	)	
	)	**CR16-01012-01-PHX-SRB(BSB)**
vs.	)	Phoenix, Arizona
	)	October 4, 2017
Joseph M. Arpaio,	)	10:01 a.m.
	)	
Defendant.	)	
_____	)	

BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Official Court Reporter:
Elizabeth A. Lemke, RDR, CRR, CPE
Sandra Day O'Connor U.S. Courthouse, Suite 312
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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P R O C E E D I N G S

(Called to the order of court at 10:01 a.m.)

THE COURT: Good morning. Please sit down.

THE CLERK: Criminal case 16-1020, *United States of America v. Joseph M Arpaio*. Time set for hearing regarding Defendant's Motion for Vacatur and Dismissal With Prejudice.

Counsel, please announce your presence for the record.

MR. KELLER: John Keller on behalf of the government, along with my colleagues Victor Salgado, Simon Cataldo and James Pearce.

MR. JOHN WILENCHIK: Thank you. John Wilenchik on behalf of the Defendant, along with Mark Goldman, Jeff Surdakowski and Vince Mayr.

THE COURT: Since the time this hearing has been set, I have received several motions for leave to file briefs as Amici Curiae. They are:

Erwin Chemerinski, Michael Tigar and Jane Tigar's Motion for Leave to File Brief of Amici Curiae;

Motion For Leave To File Brief Of Amici Curiae Martin Redish, Free Speech For People and Coalition To Preserve, Protect and Defend In Opposition To Motion of Defendant Joseph Arpaio For Vacatur And Dismissal With Prejudice;

Motion of Roderick and Solange MacArthur Justice

Center For Leave To File Amicus Curiae Brief Regarding Arpaio Pardon;

Certain Members Of The Congress Of The United States Motion For Leave to Participate as Amici Curiae;

The Protect Democracy Project, Inc.'s Motion For Leave to Participate As Amicus Curiae;

Motion For Leave To File Brief Of Amici Curiae The Ortega Melendres Plaintiffs;

And a Motion For Leave To File Supplemental Brief Of Amici Curiae In Support Of Appointment Of A Private Attorney To Prosecute Defendant's Criminal Contempt.

Responses have been filed to these motions.

In the exercise of the Court's discretion, the motions to file briefs as amici curiae are granted.

The motion in support of a private attorney to prosecute Defendant's criminal contempt is denied.

All of these amici briefs, with the exception of the one filed by the ***Melendres*** plaintiffs, argue that the Presidential pardon of Defendant Arpaio is void and unconstitutional.

All of the briefs attempt to distinguish the pardon of criminal contempt upheld by the United States Supreme Court in ***In Re: Grossman*** from the pardon in this case.

Additionally, one of the briefs argues that the pardon is invalid because it purports to pardon Defendant

Arpaio for acts that have not yet taken place, that is, future potential violations by him of the ***Melendres*** injunction.

I have concluded that the pardon is valid and pardons Defendant Arpaio for his criminal contempt of the preliminary injunction issued in the ***Melendres*** civil rights case.

I have concluded that I am bound by the Supreme Court's decision in ***Grossman*** that a criminal contempt of a court order is an offense against the United States.

I will comment briefly on some of the arguments made in the amici briefs, specifically concerning the argument that the pardon is invalid because it purports to pardon future conduct.

It is evident to me that one cannot be pardoned for a criminal act not yet committed. Whether the pardon's language can be interpreted to attempt to do this is an issue not yet ripe for consideration.

My concern here is only with the pardon of the criminal contempt already committed. It is highly speculative to suggest that there is a realistic possibility that Defendant Arpaio will violate an injunction in the ***Melendres*** case in the future.

Were that to occur, the court considering that violation will be the one to decide whether the pardon attempted to pardon future acts and the invalidity of such a pardon.

The Court also rejects the arguments that this pardon eviscerates the rights of the private litigants in *Melendres*. The private litigants in *Melendres* have obtained a permanent injunction and other relief in their civil case which remains fully enforceable by the court. This pardon does not interfere with the rights of those private litigants.

This pardon in this criminal contempt case has the effect of allowing Defendant Arpaio to escape punishment for his willful violation of the preliminary injunction in *Melendres*.

I agree that the criminal contempt pardoned here is for a willful violation of a preliminary injunction that affected constitutional rights, a more significant issue than the willful violation of the injunction against selling alcohol in *In Re: Grossman*.

But this difference in the significance of the conduct enjoined is not a basis for me to refuse to follow the Supreme Court's holding.

The Court finds the pardon valid and that it requires this action for criminal contempt be dismissed with prejudice.

The question I will hear argument on today is whether the pardon requires this Court to enter any other orders than the order of dismissal.

Who wishes to address that issue on behalf of the Defendant?

MR. JOHN WILENCHIK: Thank you, Your Honor. I will.

THE COURT: All right. You may proceed.

MR. JOHN WILENCHIK: Your Honor, this issue has been thoroughly briefed and we appreciate the questions that the Court has already had on this.

I think the best answer to those questions are all found in the *Schaffer* case that we've cited. What's at issue here is the legal question of the Defendant's guilt. And the significance of that is for future legal questions in other cases, in particular, for the issue of collateral estoppel. Because this case is moot, because there will never be an appeal, as a matter of law the mootness results in a vacatur of the Court's verdict.

This is on basic principles of fairness, because otherwise, we would never have the opportunity to appeal that verdict. We will never have the opportunity to litigate it.

In recognition of that, the Court should vacate it.

THE COURT: Let me interrupt you for just a second.

MR. JOHN WILENCHIK: Please.

THE COURT: Your motion did not ask that I just vacate the guilty verdict that was contained within my findings and conclusions.

MR. JOHN WILENCHIK: Correct.

THE COURT: The motion asked that I vacate all orders and rulings in the case of which there are potentially dozens.

MR. JOHN WILENCHIK: Correct. The issue there is that that is strong language in *Schaffer* and the remedy that the DC Circuit issued in *Schaffer*, which was to vacate, quote, all opinions, judgments, and verdicts.

And there's even language earlier in this same opinion that talks about vacating all decisions of the court.

So we're, again, drawing on the remedy that was issued in *Schaffer*. We're not even going beyond that case. There has been a question raised whether we're asking for expungement here. We're not asking for expungement. We're just asking for the same remedy in the *Schaffer* case.

The *Schaffer* case said that the remedy was to vacate the disputed panel decision and all underlying judgments, verdicts, and decisions -- and decisions of the district court.

That's the reason why we have asked for that broader remedy as the Court has characterized it.

THE COURT: You may continue.

MR. JOHN WILENCHIK: There's been a lot of other arguments raised by amici as to why this vacation ought to be granted. I'm not inclined to address those unless the Court is inclined to listen to them.

THE COURT: Well, I believe that the only party that made significant argument in that respect was the brief filed by the *Melendres* plaintiffs.

I think that it was discussed briefly and as an alternative argument in the other briefs, but not as fully discussed as the *Melendres* plaintiffs.

MR. JOHN WILENCHIK: I agree with that, Your Honor, and we've filed a very thorough brief in response to the *Ortega* and *Melendres* amicus brief.

THE COURT: And may I note that specifically for the record, because there was a response filed by you to the motions to file amici briefs that did not address the substance of the arguments that I just rejected.

You did file, while entitled, an objection to the motion to file the brief, you did, in fact, file your substantive response to the *Melendres* plaintiffs' amici brief which the Court has just accepted.

MR. JOHN WILENCHIK: Again, the posture of this case, I'll answer the Court's question like this.

We made an attempt to address some of the substance, but given the uncertainty about whether the Court would even allow those amicus briefs be filed, I can't say we addressed it in the complete and thorough manner that we would like to, you know, knowing that the Court is considering those kind of arguments.

But here today, talking about this, we did file a good response, those issues, in the *Ortega* and *Melendres* brief. And the argument raised there essentially is that the

Ninth Circuit has recognized that this principle of vacatur has one exception, which is, if the defendant knowingly and voluntarily forfeits his right to appeal.

That's clearly not the case here. In fact, *Schaffer*, again, addresses that. It says this is not a case when a President issues a pardon where the defendant knowingly forfeits some right.

This is about the unpredictable grace, to use the words of the *Schaffer* court, of the Presidential pardon. In fact, in *Schaffer*, concerning Archibald Schaffer, Archie Schaffer had actually applied for the clemency. He had actually formally applied for a pardon.

Defendant Arpaio did not. In fact, if anything, his comments before the pardon was issued indicated he was not going to ask for one. So there could be a clear example even more so than in the *Schaffer* case of the, quote, unpredictable grace of a Presidential pardon.

This is not the kind of thing that where the defendant, even when a pardon was issued, the defendant is not voluntarily forfeiting some right. He has no control of the process. This is entirely distinguishable from that one line of cases that are considered an exception to vacatur where a defendant voluntarily forfeits the right, i.e. by settlement or by plea agreement.

So that was the one issue I spotted in replying to

the *Melendres* brief that I thought was worth addressing. Then you have the argument that somehow by accepting the pardon, that's his voluntary forfeiture. We pointed to the -- I believe it's the latest United States Supreme Court case about the effect of pardons which said that when a pardon is full and unconditional, you don't have to accept it. It's immediately effective.

Again, commenting more on the nature of something that's the President's unpredictable grace, it's not something we've caused. It's not like we're settling the case when the President pardons us -- pardons the Defendant.

Therefore, this principle of vacatur fully applies. I think it applies more so here in a criminal case. The *Ortega* and *Melendres* defendants -- not defendants -- amicus filers did raise an issue there of -- they said that while the -- that this is not going to apply to the United States Supreme Court to a criminal case.

What they neglected to mention is that there is a Ninth Circuit case that said in the footnote -- well, it said in the body of the opinion -- and we've cited in our briefs, I believe it was the *Tapia* case -- it said in the opinion that this principle -- we could perceive circumstances where the principle of vacatur would apply in a criminal case. And then they footnoted to *Schaffer* which is a very clear indication that the Ninth Circuit believes that vacatur can and should

apply when a Presidential pardon is issued before the end of the appeals.

THE COURT: But vacatur, typically, is as to the judgment of conviction which has not happened in this case.

MR. JOHN WILENCHIK: The reason -- I wouldn't say "typically." The government did a good job in its brief of pointing out that this whole principle is very, very similar to the rule of abatement. The rule of abatement is just the term when the defendant dies before the end of the case as opposed to the pardon.

And the rule of abatement is equal, if not more so applied, before a judgment is entered. And, again, we have that language in *Schaffer* talking about making all decisions, not just judgments, not just verdicts, all decisions of the district court.

And the reason this is done, I think, applies even more so where there is no final judgment yet. The reason is because the appeals have not ended. In fact, in *Schaffer* the court even made a comment about how, you know, if you're -- even if the Court of Appeals had decided, even if we are in the petition for hearing stage, it says, and regardless of whether this is the initial review process of the court, it's the initial hearing stage. There should still be this vacatur because the process has not ended.

So when the process hasn't even begun yet, which is

where we are here, where there's not a judgment even, those principles apply even more forcefully to say because the defendant would never have the right to appeals and it has to be vacated, therefore, because the legal question was guilt or innocence will never be determined.

THE COURT: Okay. Anything else?

MR. JOHN WILENCHIK: Your Honor, we may have rebuttal, if necessary, but I just would add to that that this really is a matter of basic fairness and it's a matter of the legal question of his guilt.

A pardon -- the *Schaffer* court says a pardon does not decide guilty or innocence. And by vacating the conviction, you're not deciding guilt or innocence. You are just recognizing that the legal question of his guilty for collateral estoppel purposes or any other purpose has never been decided and never will be.

Thank you.

THE COURT: Thank you. Mr. Keller, will you be addressing this on behalf of the government?

MR. KELLER: Yes, Your Honor.

THE COURT: You may proceed.

MR. KELLER: The Presidential pardon removes the legal consequences of the finding of guilt here. The authorities are unanimous on that point. The circuits to have addressed it, the Seventh Circuit in *Birkin*, the Third Circuit

in *Noonan*, the DC Circuit in *Schaffer*, and Corpus Juris Secundum, the section of that that the court and the parties have cited to, are all unanimous that the effect of the pardon is to negate the consequences, the legal consequences of the court's finding of guilt.

And so the next question is: What procedural steps are appropriate in light of that fact, in light of the pardon?

And as the Court has already indicated today and indicated in its order directing supplemental briefing, dismissal of the order to show cause is appropriate in light of the pardon. Dismissal of the charging document in this case clearly reflects the fact that this prosecution is over, that the Defendant will never be held accountable for his criminal contempt of Judge Snow's preliminary injunction.

Similarly, an order of vacatur is appropriate as to the Court's finding of guilt to clearly reflect that there are no legal consequences going forward of that finding.

There will be no sentencing. There will be no judgment. And that finding should not be relied upon by future litigants or future courts for any legal significance.

And, really, I would say because of the operation of the pardon -- because the pardon negates the legal consequences of the finding of guilt, this is less about equity and more about administration and good housekeeping.

So an order of vacatur establishes on the court's

docket as a judicial directive, not -- not just putting the pardon on the docket, because obviously, the pardon doesn't come from the judiciary.

An order of vacatur establishes clearly for the record that this legal finding made by the court has no legal significance going forward, but it doesn't change the evidence that was presented in this case and it doesn't limit future parties, historians, litigants' ability to rely on that same evidence to establish the conduct that occurred.

THE COURT: When you refer to the "order of vacatur," you are asking the Court only to vacate its guilty verdict and not any other orders or rulings in the case; is that accurate?

MR. KELLER: I think that is the most important order for the Court to vacate.

I will say that this line of logic, this reasoning, would apply to any other legal rulings that the Court made that the Defendant is not going to be able to challenge that could potentially be raised in some future litigation.

For example, the Court's ruling that the Defendant in his personal capacity had no attorney-client privilege with Tim Casey. That is a ruling that could have some legal significance in another hearing or in another case and that will never be challenged on appeal.

And so, although the government is primarily concerned with the findings of fact finding the Defendant

guilty, I think the same reasoning would apply to the Court's other legal findings, legal conclusions, rulings in this case.

Again, on the --

THE COURT: How about the ones that favored the Defendant?

MR. KELLER: Again, Your Honor, I believe it wouldn't matter which way the ruling came out. I think just the fact that there is a legal determination out there in the record that could be relevant to some collateral litigation means that those rulings should be vacated so that it's clear that they have no legal effect going forward.

THE COURT: Why shouldn't I just allow if someone ever attempts to use one of these rulings and claimed that it was final and law of the case to make that argument then?

MR. KELLER: You certainly -- you certainly could, Your Honor.

Obviously, there are a variety of options well within the Court's discretion. But I think the judicial interests of finality and predictability are served by a simple order of vacatur here which just establishes for the record that these rulings that will never be reviewed on appeal do not have legal force going forward.

THE COURT: Anything else?

MR. KELLER: No, Your Honor.

THE COURT: Thank you.

Mr. Wilenchik, anything else?

MR. JOHN WILENCHIK: Yes, Your Honor.

The answer to Your Honor's last question, which is, why not -- I'll use a colloquial phrase here -- why not, you know, pass the ball, why not allow a future court to make that determination, the answer is because we've asked for it here. We've specifically asked for a vacatur.

And, again, the rule is very established that the Court is obligated to do that. This issue, "Why not leave it to a future court," I mean, that's something that can be brought up on any issue in any case and we don't believe that's appropriate. We believe there is firm, well-established practice, as the Ninth Circuit has referred to it, a vacatur when mootness occurs.

And if we do not, again, we have asked for that. If that's not granted by the Court --

THE COURT: But the orders I've seen, for example, in the case of the death of an individual while a criminal conviction was on appeal, the orders order that the verdict -- or, I'm sorry -- that the judgment of conviction be vacated and that the indictment be dismissed with prejudice and doesn't go beyond that.

It doesn't -- it doesn't tell me to do anything with the jury's verdict or with any other rulings in the case and why would this be different?

MR. JOHN WILENCHIK: The question is why isn't it the same? Again, *Schaffer* is saying it's the same. It specifically in the second paragraph of *Schaffer*, all decisions of the district court, where it's a verdict, where it's an evidentiary decision, the issue is the same.

We have asked for that. We'll never have the chance to appeal it. And even beyond this, to become some kind of issue in a future court is, again, a burden on the Defendant to have to relitigate this when he's asked for it now and the case law clearly compels it, a vacatur of all decisions of the district court.

THE COURT: Isn't that as highly speculative a proposition as the one that I rejected about a future contempt of the *Melendres* injunction?

MR. JOHN WILENCHIK: It's not speculative at all, Your Honor, inasmuch as the significance of any decision of this Court is not speculative. We're not going to say it's speculative when the Court convicts somebody or issues a verdict or issues any ruling on anything in any case.

THE COURT: No. Speculative that there will be a future litigation where issues that the Court decided here would be attempted to be used to bind the Defendant -- bind Mr. Arpaio whether it be civil or criminal.

It just -- I'm having a hard time imagining the situation, just the same way I was having a hard time

imagining a future alleged contempt of the *Melendres* injunction.

MR. JOHN WILENCHIK: Well, let me put it this way.

The Sheriff has been named in numerous civil lawsuits and currently-pending civil lawsuits, including Section 1983 lawsuits. The Court mentioned earlier that it believes this was a decision about the Sheriff doing something that affected constitutional rights. That is exactly the basis for a 1983 lawsuit, which already, they're too numerous to count or to mention.

THE COURT: No. I said the preliminary injunction in the *Melendres* case was an injunction that affected constitutional rights. I didn't say anything I ruled here affected constitutional rights.

That's what the preliminary injunction was trying to do and the permanent injunction as well in that civil case.

MR. JOHN WILENCHIK: The answer to the Court's question is that it is for purposes of civil lawsuits, as well as in a future sentencing of a criminal lawsuit, which, given the Sheriff is 85, I can understand that being viewed as somewhat a speculative issue.

But there are many currently-pending, including in the district court here, civil lawsuits involving the Sheriff where any one of these issues related to Melendres there could be an attempt to bring that lawsuit on collateral estoppel

grounds to say that either he was found -- any number of things in this case, whether it's the privilege issue, you know, to attempt to use his communications with Tim Casey in this case for whatever purpose.

It's far from speculative, given that there are civil lawsuits out there and they're all seeking to show the same thing, whether even in a slightly different context or really different context or a very different context that the Sheriff's Office deprived constitutional rights.

It's for purposes of that kind of litigation which is, again, far from speculative that we seek what, according to the DC Circuit, we believe we're entitled to and have requested, which is a vacatur of all decisions of this Court.

THE COURT: Thank you very much.

It is ordered that this criminal contempt action is dismissed with prejudice.

It's further ordered taking under advisement whether the Court will enter any further orders beyond dismissal with prejudice.

Is there anything else that the Court needs to address today, Mr. Keller?

MR. KELLER: No, Your Honor.

THE COURT: Mr. Wilenchik? Mr. Wilenchik?

MR. JOHN WILENCHIK: Your Honor, I believe my co-counsel Mark Goldman may have something.

THE COURT: Well, I'm going to get to him after you answer my question. Do you have anything else?

MR. JOHN WILENCHIK: I have nothing further.

THE COURT: Mr. Goldman, do you have anything further.

MR. GOLDMAN: Good morning, Your Honor.

I have a couple of questions for the Court.

First question is: Under what legal principle or rule of criminal procedure or any other reasoning did the Court use in order to grant the motions from all of these parties or individuals filing amicus briefs with the court?

In other words, as a matter of law, why are 30 Congressmen, Democrat Congressmen, allowed to file a brief in a criminal action in federal court?

THE COURT: Because the filing -- the granting or refusal to grant a motion to file an amicus brief is committed to the sound discretion of the court.

I exercised my discretion and allowed the filing of the briefs and then rejected the arguments that they made therein to void the pardon.

MR. GOLDMAN: I understand that, but just to provide guidance for me in the future, because I have never seen anything like this before and probably people in the courtroom haven't either and notwithstanding that the Court has told me just now that it's within the sole discretion of the Court,

under what --

THE COURT: I said "sound."

MR. GOLDMAN: Pardon?

THE COURT: "Sound discretion" of the Court.

MR. GOLDMAN: "Sound discretion" of the Court.

Excuse me, Your Honor.

In connection with that discretion, what was the Court's reasoning to exercise its sound discretion to accept these amicus briefs? There were many of them and the defendant was required to review them, respond to them, consider them.

And under what circumstances are nonparties allowed to file briefs in connection with a criminal action which, to my understanding, was between a prosecutor and the defendant.

THE COURT: Is that your only other question, Mr. Goldman?

MR. GOLDMAN: No, Your Honor.

THE COURT: What other questions. Go ahead and tell me your other question as well.

MR. GOLDMAN: Yeah. Is the Court going to consider sanctions against the parties and the individuals filing those briefs with the Court?

And if so, I would like to argue as to why we're entitled to -- we should be entitled to attorneys' fees to have to respond to them and why those are sanctionable briefs

that were filed with the Court --

THE COURT: If you --

MR. GOLDMAN: -- without merit.

THE COURT: If you wish to file such a motion, I will consider it upon its filing and full briefing, but will not comment on it today, nor will I give any further explanation in response to your questions concerning the exercise of my discretion.

MR. GOLDMAN: Okay. Thank you, Your Honor.

THE COURT: You're welcome.

Court is adjourned.

(Proceedings adjourned at 10:31 a.m.)

* * *

C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 4th day of October, 2017.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE, RDR, CRR, CPE