21-2486

United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN R. DONZIGER,

Defendant-Appellant.

On Appeal from a Judgment of the
United States District Court for the Southern District of New York

REPLY BRIEF FOR APPELLANT

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

1. As Appellant's opening brief explained, the court-appointed Special Prosecutor in this case was neither supervised consistent with nor appointed pursuant to the requirements of the Appointments Clause. In response, the Special Prosecutor presents dueling theories for her constitutional authority to prosecute in the name and on behalf of the United States.

The new theory, adopted from the *amicus* brief filed by the Department of Justice (DOJ),[1] is that the Special Prosecutor can wield "significant authority under the laws of the United States," but act without any supervision or accountability to the President because the position is temporary. But the constitutional hallmark of an "office" is a function and duties distinct from the particular incumbent, not permanence. *Morrison v. Olson*, 487 U.S. 654, 671 n.12 (1988) (statutory independent counsel is an officer); *In re Grand Jury Investigation*, 916 F.3d 1047, 1052–53 (D.C. Cir. 2019) (special counsel under DOJ regulations is an officer).

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[1] To avoid confusion, Appellant refers to Appellee's brief as the "Special Prosecutor's brief" or "SP Br.," and the Justice Department's *amicus* brief as the "DOJ's brief" or "DOJ Br."

Wielding significant authority is enough, even if that authority is limited to a single matter. *See Ass'n of Am. R.R.s v. Dept. of Transp.* ("*AAR*"), 821 F.3d 19, 38 (D.C. Cir. 2016) (holding that an arbitrator appointed to resolve a single case was not just an officer, but, given the lack of supervision by another executive branch officer, a principal officer whose appointment was unconstitutional). And even for non-officers, supervision necessarily must extend throughout all layers of the executive branch; the difference between employees and contractors on the one hand and inferior officers on the other is not that the former are somehow *exempt* from supervision, but rather that they may be supervised by inferior officers *as well as* by principal officers. *See Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam).

There is no exception to executive branch supervision for criminal contempt prosecutions. The Constitution does not vest *almost* all of the executive power in the President; it vests "all of it." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). The Article II duty to execute the laws of the United States includes prosecuting all federal crimes—contempt of court no less than contempt of Congress.

In addition to incorporating by reference DOJ's argument that the Special Prosecutor's limited tenure somehow eliminates the need for supervision, SP Br. 37–38, the Special Prosecutor reiterates the argument that she really *was* subject to principal officer supervision, although neither she nor DOJ realized it, *id.* at 38–46. The Special Prosecutor cites 28 U.S.C. § 516 as proof that the "conduct of litigation" in this case, like any other in which the United States has an interest, "is reserved to officers of the Department of Justice, under the direction of the Attorney General." But that contradicts not only DOJ's express decision not to intervene but also its need to file its own brief rather than to direct the Special Prosecutor with respect to her filing. It also contradicts the Special Prosecutor's own understanding that she was not in the executive branch at all. Even if inchoate supervision suffices by indirectly influencing the way an executive official carries out her duties, to have that effect, both ends of the chain of command must recognize that the chain exists. Here, neither did.

2. With respect to Appellant's claim that Federal Rule of Criminal Procedure 42 could not authorize her interbranch appointment, the Special Prosecutor defends the District Court's ruling on the merits

of a claim while contending that it was not raised. SP Br. 37, 45–46. The District Court erred in concluding that the matter was settled by *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), because the defendants there did not challenge the power to appoint under the prior version of Rule 42. *See* DOJ Br. 7 (noting the absence of an Appointments Clause challenge); Opening Br. 55–59. Rather, this is a question of first impression, and one on which the Special Prosecutor offers no counterargument to the analysis in Appellant's opening brief.

3. Finally, it should also be clear that a Special Prosecutor with no executive branch supervision cannot possibly serve as a structural check on the criminal contempt power. *See* SPA-150. The District Court's failure to exercise due restraint, in the absence of a structural check, warrants invocation of this Court's supervisory power.

ARGUMENT

I. THE CONSTITUTIONAL REQUIREMENT OF SUPERVISION DOES NOT DEPEND ON OFFICER STATUS.

The District Court held that the Special Prosecutor was an inferior executive officer who was subject to supervision by the Attorney General (even though no one knew it at the time). SPA-144. But the reason DOJ has filed a brief as *amicus curiae* "to express the distinct views of the

Executive Branch," DOJ Br. 1, is that there was and is no supervision and direction of the Special Prosecutor's own views by the Attorney General. DOJ argues instead that the Special Prosecutor is exempt from supervision and direction by a principal officer because, contrary to the District Court, she is not an "officer of the United States." But DOJ's conclusion that the Special Prosecutor would not be subject to supervision (as well as the premise that she is not an officer) is wrong.

DOJ does not dispute that the Special Prosecutor acts as the final decisionmaker for the United States under Judge Kaplan's order of appointment—and thus wields "significant authority pursuant to the laws of the United States." *Id.* at 12–13 ("[S]uch authority includes the power to 'bind[] the government or third parties for the benefit of the public, such as by administering, executing or authoritatively interpreting the laws.'" (citation omitted)); *id.* at 19. And, as noted below, DOJ is wrong that the Special Prosecutor's duties are too temporary to qualify as an "office." *See id.* at 9, 28. But even if DOJ were right about "officer" status, the Special Prosecutor must still be subject to supervision and direction through a chain of command leading to the President. The only difference is that non-officer employees and contractors may be

supervised in the first instance by inferior officers. But there is no precedent for leaving anyone who makes final decisions on behalf of the executive branch outside a chain of command.

The foundation of the supervision-and-direction requirement is the well-settled principle that the entire executive branch acts for and must therefore be accountable to the President. *See Seila Law*, 140 S. Ct. at 2191. As the Supreme Court has repeatedly explained, "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). Not only does it "prevent[] congressional encroachment upon the Executive and Judicial Branches," *id.*, it focuses accountability by ensuring that there is "a single President responsible for the actions of the Executive Branch." *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment); *see also Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) ("[T]he Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will

depend, as they ought, on the President, and the President on the community.'" (quoting 1 ANNALS OF CONG. 499 (1789))). *See generally Freytag v. C.I.R.*, 501 U.S. 868, 878 (1991) ("The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political.").

Simply put, the Appointments Clause "is a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995). And DOJ's appearance as *amicus* on the Special Prosecutor's side in this appeal does not eliminate the need for such a bulwark. *New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."). These precedents and principles would be meaningless if there were a category of judicial appointees who were allowed to make final decisions on behalf of the executive branch while subject to no supervision—whether they are "officers" or not.

In *Buckley*, the Court defined executive branch "employees" as "lesser functionaries *subordinate* to officers of the United States." 424

U.S. at 126 n.162 (emphasis added). Because "[t]he President is responsible for the actions of the Executive Branch and cannot delegate that ultimate responsibility or the active obligation to supervise that goes with it," *United States v. Arthrex, Inc.* 141 S. Ct. 1970, 1978–79 (2021) (cleaned up), having non-officers who exercise executive power outside of any chain of command would likewise run afoul of Article II.

Thus, whether or not the Special Prosecutor is an "officer of the United States," the Constitution is violated if *any* unsupervised personnel are able to make final decisions on behalf of the United States. *See id.* at 1976 ("The Appointments Clause provides that [the President] may be assisted in carrying out that responsibility by officers nominated by him and confirmed by the Senate, as well as by other officers not appointed in that manner but whose work, we have held, *must be directed and supervised* by an officer who has been." (emphasis added) (citation omitted)).[2] No one would suggest that assigning the duties of the

[2] The Special Prosecutor, but not DOJ, suggests that the supervision requirement only applies to executive branch officials who perform adjudicatory functions. SP Br. 40–41. But the language from *Arthrex* on which the brief relies is about what would constitute *adequate* supervision in contexts other than adjudication, not about whether supervision is required at all. *See* 141 S. Ct. at 1985–86.

Administrative Patent Judges in *Arthrex* to itinerant contractors under no supervision at all would solve the constitutional problem. If "the unchecked exercise of executive power by an officer buried many layers beneath the President poses more, not less, of a constitutional problem," *id.* at 1983, then burying the same unchecked power even lower down is no solution. *See Free Enterprise Fund*, 561 U.S. at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

DOJ's premise—that the Special Prosecutor can exercise significant authority under the laws of the United States without being an officer—is also plainly incorrect. Officer status is a requirement for such authority.[3] Just as the Appointments Clause prevents Congress

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More broadly, the Special Prosecutor is wrong that the Supreme Court's recent Appointments Clause cases are limited to the accountability of adjudicators. Not only did *Free Enterprise Fund*, *Seila Law*, and *Collins v. Yellen*, 141 S. Ct. 1761 (2021), each concern presidential control over policymakers, but any distinction between adjudicators and prosecutors cuts the other way. Prosecutorial decisions include discretionary policy judgments for which the President alone is accountable. That is why, unlike administrative adjudications, prosecutorial decisions are generally unreviewable. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Wayte v. United States*, 470 U.S. 598, 607–08 (1985).

[3] The Constitution's use of "officer" to refer to a person who could make final decisions binding the government was consistent with standards for

from enacting a law that gives the powers of a principal officer to someone who has been appointed as an inferior officer, it forbids conferring the power of an officer on an employee or contractor.

In *Buckley*, the Supreme Court explained that the difference between officers and employees turns on whether the individual "exercise[s] significant authority pursuant to the laws of the United States." 424 U.S. at 126. It was that precise understanding (and that specific passage from *Buckley*) that led the Supreme Court in *Morrison* to conclude that an independent counsel appointed under the Ethics in Government Act of 1978 was an "officer of the United States." 487 U.S. at 671 n.12 (citing *Buckley*, 424 U.S. at 126 & n.162); *see* DOJ Br. 16 n.4 (describing DOJ's reading of *Buckley*). Similarly, the issue in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and in *Freytag* before it, was whether administrative judges were effectively the final decisionmakers for the executive branch. If so, they had to be officers, not employees, as the SEC had ruled in rejecting *Lucia*'s challenge. *Id.* at 2050.

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corporate officers. *See Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 167 (1804) ("An instrument then to bind the company, must be signed by the president or some other officer, according to the ordinances, bye-laws and regulations of the company, or board of directors.").

All of this is why the D.C. Circuit recently concluded—at DOJ's urging—that the Special Counsel authorized by DOJ regulations adopted after the independent counsel statute expired is *also* an "inferior officer." *See In re Grand Jury Investigation*, 916 F.3d at 1052–53; *see also* Brief for the United States at 10, *In re Grand Jury Investigation*, 916 F.3d 1047 ("It is undisputed that the Special Counsel is an officer and the Appointments Clause applies."), 2018 WL 4680139.

What these cases all make clear is that *only an officer* can exercise significant authority on behalf of the sovereign. DOJ's brief cites no case for the proposition that it would be constitutional to delegate significant authority to a non-officer employee or contractor, and no example in which that is true in practice.[4] And for good reason. As DOJ's own Office

[4] The examples DOJ invokes in its *amicus* brief prove the point: The "merchant appraiser" in *Auffmordt v. Hedden*, 137 U.S. 310 (1890), worked in conjunction with the general appraiser and was subject to review by the Secretary of the Treasury. *See* 137 U.S. at 311, 313–14. The surgeon in *United States v. Germaine*, 99 U.S. 508 (1879), performed medical examinations under the direction of the Commissioner of Pensions—and made no decisions on the government's behalf. *Id.* at 511–12. A private *qui tam* relator is subject to overruling and displacement by the government at any time. *E.g.*, 31 U.S.C. § 3730(b),(c). And the decisions of a special master are subject to review by the district court under Fed. R. Civ. P. 53, under the supervision of the *judicial* branch. None of these individuals make significant final decisions on behalf of the United States—let alone without any supervision by federal officers.

of Legal Counsel (OLC) explained 25 years ago, "Congress and the President may not avoid the strictures of the [Appointments] Clause by vesting federal employees with the independent or discretionary responsibility to perform any 'significant governmental duty.'" *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 145 (1996).

The District Court was therefore correct to conclude that the Special Prosecutor is an inferior executive officer. SPA-144. The Special Prosecutor's role is like that of the independent counsel in *Morrison*, and bears striking similarities to the Special Counsel under current DOJ regulations. Judge Kaplan's order appointing the Special Prosecutor specifically provided that she "shall have the same power to investigate, gather evidence, and present it to the Court as could *any other government prosecutor* including, without limitation, the power to issue or procure issuance of subpoenas and apply for and execute or cause the execution of search warrants." A-59 (emphasis added). Not only does this appointment give the Special Prosecutor the power to make significant final decisions on behalf of the executive branch, but it also provides the authority to take legal positions on behalf of the United States—as

reflected, *inter alia*, in the divergence between her position and that of the Justice Department as *amicus curiae* here.

Thus, declaring the Special Prosecutor to be an employee or a contractor would not actually cure the lack of supervision. Employees or contractors are not *exempt* from the requirement of supervision. Nor would the infringement on Congress's exclusive power to authorize interbranch appointments be any less if one branch could appoint an employee or contractor, rather than an officer, as a final decisionmaker for another branch. *See* Opening Br. 49–51. Even if DOJ's argument about whether the Special Prosecutor is an officer were correct, it would not change the fact that the Constitution required that the Special Prosecutor be supervised in this case—and she wasn't.

There is also no basis for carving out a special exception for criminal contempt prosecutions. Tellingly (and correctly), DOJ does not deny that when a U.S. Attorney's Office prosecutes a criminal contempt, it is exercising executive power, and it does not dispute that a U.S. Attorney's

declination could not shift constitutional authority over the same function to the judiciary.[5]

To be sure, courts have contempt powers inherent in Article III to enforce their orders by civil contempt and to quell courtroom disruption by direct contempt. Opening Br. 35–37.[6] DOJ does not dispute that *Young*'s endorsement of *some* judicial authority to prosecute contempts, DOJ Br. 23 (quoting *Young*, 481 U.S. at 799–800), can be reconciled with *Morrison* only by drawing a line—between summary direct contempt and an ordinary criminal prosecution like this one. The function of

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[5] To the extent that DOJ's brief could be read to imply—*see* DOJ Br. 19—that a prosecutor in a contempt case needs no supervision because the prosecutor does not make any decisions on behalf of the United States, the submission of the DOJ's brief along with the numerous other positions taken by the Special Prosecutor in this case without any DOJ involvement proves that implication incorrect. Every criminal prosecution involves the exercise of significant judgment and discretion on behalf and in the name of the United States. And supervision of such decisions cannot come from the court which is presiding over the contempt prosecution.

[6] The Special Prosecutor's brief refers to inherent judicial power to *punish* contempt, which is not at issue here. *See* SP Br. 39. During the Founding Era, contempt was punished by summary adjudication, not by the appointment of a prosecutor to present evidence at a trial. *See Ex parte Grossman*, 267 U.S. 87, 117–18 (1925) ("[F]or years before the American Constitution, courts had been held to be inherently empowered to protect themselves and the function they perform by summary proceeding."); 4 WILLIAM BLACKSTONE, COMMENTARIES, 283–288 (1807).

prosecuting criminal contempt is no different from the function of prosecuting any other crime—including contempt of Congress—and resides in the executive branch alone. *See* Opening Br. 32–38.

Since the Supreme Court has clarified the line between the use of fines and imprisonment to enforce judicial orders and its use to punish, the argument for treating criminal contempt as a *sui generis* exception to constitutional requirements—from jury trial to double jeopardy to the burden of proof—has collapsed. If that is true for individual rights, it is no less true for structural protections that are, after all, designed to vindicate those rights.

Ultimately, the separation of powers issues implicated by a criminal contempt prosecution are no different from criminal prosecution for contempt of Congress or any other crime, including crimes that relate directly to the interests of the judiciary (such as obstruction or threats to judges). Like any other prosecutor executing the criminal laws of the United States, the Special Prosecutor had to be in an executive branch chain of command.

II. THE SPECIAL PROSECUTOR HOLDS A "CONTINUING POSITION."

DOJ is wrong that the Special Prosecutor is not an "officer of the United States." At common law, the concept of a "continuous" office simply meant "an institution . . . capable of persisting beyond [an individual's] incumbency." EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 70 (4d ed. 1957) (emphasis omitted); *see also* James A. Heilpern, *Temporary Officers*, 26 GEO. MASON L. REV. 753, 756 (2019) ("[F]rom the earliest days of the Washington administration, presidents consistently sought Senate confirmation even for officials sent on temporary missions, including many of the very officials the OLC . . . claims were unilaterally appointed by presidents." (footnote omitted)).

The central inquiry at the time of the Founding thus did not go to the *duration* of the position (which would often be unpredictable, especially at inception); it was whether the position was distinct from the individual holding it. In *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747), for instance, Chief Justice Marshall, on circuit, defined the idea of an office's continuity entirely by reference to whether the position's "duties continue, though the person be changed." *Id.* at

1214; *see also* 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 8, at 6–7 (1890) (endorsing Chief Justice Marshall's formulation in *Maurice*).[7]

Permanence in the sense of perpetuity is not—and never has been—a requirement. DOJ plays up the longevity and breadth of certain independent counsel investigations in arguing that, in contrast to the Special Prosecutor, the independent counsel was "effectively a continuing office," not a temporary one. DOJ Br. 25. But neither the independent counsel statute nor 28 C.F.R. part 600 nor Rule 42 impose any specific tenure or time limit on the prosecutorial positions they create. And DOJ offers no cogent explanation for why what was sometimes true in practice under the independent counsel statute distinguishes it from what remains possible under Rule 42.

DOJ nevertheless attempts to distinguish *Morrison* (while not even citing the D.C. Circuit's post-*Lucia* ruling in *In re Grand Jury Investigation*) on the ground that a handful of independent counsel investigations roamed broadly and lasted a long time. DOJ Br. 24–25.

[7] DOJ acknowledges that the duties created by the appointment order continue until the prosecution produces a final judgment, regardless of the resignation or disability of the incumbent. DOJ Br. 20.

But it would be sheer nonsense if a prosecutor's *ex ante* constitutional authority turned on predictions about the duration of an investigation that has not happened yet; the number of defendants ultimately charged; or the amount of resources consumed by the prosecutor and their staff.

Instead, it is enough for constitutional purposes that an individual (whether the Special Prosecutor or a special counsel or independent counsel) is selected to exercise general prosecutorial powers to bring a finite class of criminal prosecutions of indefinite duration arising from a finite set of events—all in the name of the United States. The office is "temporary" in the sense that it is not permanent, but its duties do not run only with the incumbent.

DOJ argues that "the Court has since backtracked from *Morrison*'s reliance on the Independent Counsel's supposed temporariness as a mark of inferior-officer status." *Id.* at 27. That is factually correct, but the change points in exactly the opposite legal direction. The Supreme Court's subsequent decisions in *Edmond* and *Arthrex* have minimized the duration of the office as a relevant ground for distinguishing *inferior* officers from *principal* officers, not for distinguishing between inferior

officers and *non*-officers. The point of these cases has been to *increase* the President's control, not diminish it.

DOJ's continuity argument effectively reduces to the claim that *Morrison*'s holding that the (temporary) independent counsel was an officer does not survive *Lucia*. *See, e.g.*, DOJ Br. 27 ("More recent cases have likewise reaffirmed that only a 'continuing and permanent' position established by law qualifies as an 'office,' and that an 'occasional or temporary' one does not." (citing *Lucia*, 138 S. Ct. at 2051)).

But DOJ reads too much into the phrasing of a sentence in an opinion that was about "significant authority," not continuity in office. That's because "everyone . . . agree[d]" that the SEC Administrative Law Judges in *Lucia* held a "continuing" position. 138 S. Ct. at 2053. DOJ reads *Lucia* as creating a new permanence requirement for officers by seemingly using "continuing" as the antonym of "temporary." But, especially when the opinion is about a different issue, "it is a mistake to parse terms in a judicial opinion with the kind of punctilious exactitude due statutory language." *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1968 (2021) (Gorsuch, J., concurring in part and

dissenting in part) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)).

The 2007 OLC opinion on which DOJ's brief heavily relies does not rule out temporary offices. *See* DOJ Br. 13–14 & n.3. Rather, it agrees that "a temporary position also *may* be continuing, if it is not personal, 'transient,' or 'incidental.'" *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 100 (2007) (emphasis added); *see id.* at 111 ("'[C]ontinuance' is not 'permanence'; no case of which we are aware before the Civil War indicates that permanence is required, and the post-Civil War authority just discussed is best read as simply confirming that some temporary, non-personal positions may amount to offices."). And a 2009 OLC opinion concluded that members of a commission to honor former President Reagan on the centennial of his birth were officers even though they received no pay, had no physical government offices, and could not serve for more than two years (a shorter tenure than the Special Prosecutor in this case). *Participation of Members of Congress in the Ronald Reagan Centennial Commission*, 33 Op. O.L.C. 193, 197 & n.6 (2009).

Nor is there an exception for "individuals selected to act for the government in a 'particular case.'" *See* DOJ Br. 15. In *AAR*, the D.C. Circuit squarely rejected the argument that an arbitrator appointed to resolve a single dispute between freight railroad operators and the Department of Transportation was not an officer. 821 F.3d at 38. Indeed, the government argued in that case that the "limited nature" of the arbitrator's duties made the arbitrator an inferior officer who could be appointed by the Surface Transportation Board rather than by a Head of Department—not that the arbitrator was not an officer. Reply Brief for Petitioners at 13 n.4, *AAR*, *Dep't of Transp. v. Assoc. of Am. R.R.s*, 575 U.S. 43 (2015), 2014 WL 5395799; Brief for Appellees at 46–47, *AAR*, 821 F.3d 19 (2016), 2015 WL 4776858. The D.C. Circuit went on to hold that the absence of principal officer supervision meant the arbitrator was a *principal* officer and the appointment was invalid. 821 F.3d at 39.

DOJ has failed to demonstrate that *Lucia* changed the test for a "continuing" position from what it was from the Founding era through *Morrison*. *See* Heilpern, *supra*, at 771 ("[A] position 'summoned into existence only for specific temporary purposes' is still considered to be

continuous—and therefore an office—as long as it is 'capable of persisting beyond [an individual's] incumbency.'" (footnote omitted)).

DOJ's position would also produce absurd results. Not only could individuals who are subject to no supervision exercise all of the executive power of the United States so long as their position is temporary; but those individuals could be appointed without any involvement *by* the executive branch (or the other branches, for that matter)—since, if the individual at issue is not an "officer of the United States," "the Appointments Clause cares not a whit about who named them." *Lucia*, 138 S. Ct. at 2051.

The President, for instance, could bypass the constitutional requirement that principal officers be confirmed by the Senate by creating temporary positions wielding authority comparable to contemporary Cabinet Secretaries. It is not hard to imagine how Congress, or the courts, or even the executive branch could capitalize upon such an understanding to aggrandize power properly belonging to the other branches. Even before the recent spate of Supreme Court Appointments Clause decisions, this result would have been indefensible. It is only that much more so now. The Special Prosecutor is an "officer of

the United States," such that she must be subject to supervision by a principal executive officer, and her interbranch appointment must be authorized "by law."

III. THE SPECIAL PROSECUTOR WAS NOT SUPERVISED AND DIRECTED BY AN EXECUTIVE OFFICER.

In addition to incorporating by reference DOJ's argument that she did not need to be supervised, the Special Prosecutor stands by the District Court's inconsistent theory that she *was* supervised by the Attorney General as a matter of law—although the Special Prosecutor now relies on a different authority in support of that claim (28 U.S.C. § 516) than the District Court did (the absence of restrictions in Rule 42). But the mere fact that DOJ filed a brief as *amicus curiae* rather than directing the Special Prosecutor to take the same position proves that there is and has been no supervision and direction of the Special Prosecutor—that DOJ perceives a categorical limitation on its authority to supervise court-appointed prosecutors in contempt cases. That confirms what was already apparent from the Special Prosecutor's original insistence that she was not subject to supervision and direction because she was not part of the executive branch at all, A-161, and DOJ's

rejection of Appellant's pretrial request that it review the prosecution, A-156.

Appellant agrees that 28 U.S.C. § 516 imposes a statutory requirement of Attorney General direction over this case. No law exempting a court-appointed prosecutor in a criminal contempt case from direction by the Attorney General would be constitutional if it had the effect of allowing a court to appoint an official with executive powers but without executive branch oversight—as the Special Prosecutor had maintained in response to Appellant's post-*Arthrex* motion.

IV. ONLY CONGRESS BY STATUTE CAN AUTHORIZE A COURT TO CREATE A POSITION IN THE EXECUTIVE BRANCH.

DOJ's brief argues that the Special Prosecutor is not an officer and therefore is not subject to the Appointments Clause. But its brief does not address the separation-of-powers implications of allowing the judicial branch, without authority to make an interbranch appointment from Congress, to choose the person exercising the executive power to enforce criminal law, even if that appointee were not considered an "officer."

For her part, the Special Prosecutor principally argues that Appellant's challenge to the interbranch appointment of a prosecutor

without statutory authority was forfeited. *See* SP Br. 37. But that claim can't be squared with the Special Prosecutor's acknowledgment, eight pages later, that the District Court *decided* this issue in its Findings of Fact and Conclusions of Law without asserting a *sua sponte* procedural forfeiture. *See id.* at 45 (quoting SPA-145 & n.509). The Special Prosecutor's only substantive response is that the District Court's analysis is supported by "applicable Supreme Court and Circuit precedent," for which she cites inapposite cases in which statutes *expressly authorized* the interbranch appointments at issue—including the independent counsel statute, the statute authorizing the appointment of Tax Court judges, and 28 U.S.C. § 546(d), which authorizes district courts in certain circumstances to appoint U.S. Attorneys. SP Br. 45–46. All that the Special Prosecutor's citations prove is the novelty of the claim that a Rule of Criminal Procedure can satisfy the Appointments Clause's requirement that interbranch appointments of inferior officers be provided for "by law." *See* Opening Br. at 49–55.

That Congress has not authorized the interbranch appointment of a Special Prosecutor does not mean that *it* could not do so. *See Morrison*, 487 U.S. 654 (upholding the independent counsel statute); *United States*

v. Hilario, 218 F.3d 19 (1st Cir. 2000) (upholding 28 U.S.C. § 546(d)). Nothing in the Constitution forbids the legislature from, for example, authorizing the judiciary to appoint a duly-supervised inferior executive officer to bring contempt prosecutions that otherwise implicate DOJ's ethical or conflict-of-interest rules. *See* DOJ Br. 28 n.6. But a future statute cannot save this prosecution, and a rule is not a substitute.

V. THE CHALLENGES TO THE SPECIAL PROSECUTOR'S CONSTITUTIONAL AUTHORITY WERE TIMELY AND, IN ANY EVENT, THE SPECIAL PROSECUTOR FORFEITED ANY OBJECTIONS BASED ON TIMING.

DOJ's brief does not argue that Appellant forfeited his constitutional challenges, and it seems improbable that DOJ would file a brief solely addressing the merits of those challenges if it thought they were not properly before the Court.

For her part, the Special Prosecutor does not dispute that she "never raised an untimeliness objection before the District Court." SP Br. 34.[8] Nor does the Special Prosecutor dispute that the District Court did

[8] The Special Prosecutor argues that a prosecutor cannot forfeit an objection to a filing after the Rule 12 deadline because Rule 12 expressly allows the court to permit a late filing for "good cause." SP Br. 34. But the good cause standard cuts the other way, because it allows a party to show good cause when a filing is challenged as untimely and there is a dispute about the applicability of Rule 12(b)(3), as there is here. The

not treat as untimely other motions to dismiss Appellant filed after the February 27, 2020 deadline, including Appellant's motion to dismiss on the basis of the Special Prosecutor's lack of supervision at the beginning of trial. *See* Opening Br. 46. Thus, the Special Prosecutor is left to defend the District Court's *sua sponte* invocation of a procedural forfeiture only with respect to Appellant's post-*Arthrex* supervision argument—and not the other two claims advanced in his opening brief.

As noted above, though, Appellant's supervision argument was raised the first business day after receiving DOJ's email declining Appellant's request to supervise the Special Prosecutor, and was renewed the day after *Arthrex*. The Special Prosecutor offers no good reason why the timeliness standard to raise a constitutional defect to an executive official's authority should be different in a civilian criminal case than it was in *Ryder*, *Lucia*, or *Arthrex*. SP Br. 33. And forfeiture under Rule 12 was not justified even if the claims had been reasonably available before DOJ's email and *Arthrex*, because the supervision argument was not a

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District Court never *considered* the question of "good cause" because the Special Prosecutor never challenged the motion's timeliness.

defect in "instituting" the prosecution subject to the Rule 12 deadline, but rather a defect in how it was carried out.

The Special Prosecutor strangely faults Appellant (who, she claims, was being "strategic," SP Br. 32) for waiting until DOJ responded to his request that it supervise the Special Prosecutor before moving to dismiss. *Id.* at 35–36. While Appellant would have preferred a response from DOJ before the eve of his trial, until Appellant received that email, he had insufficient grounds to assert that the Special Prosecutor *wasn't* being supervised.

VI. REVERSAL UNDER THE COURT'S SUPERVISORY POWER IS ALSO WARRANTED.

The short shrift the Special Prosecutor's brief gives to Appellant's constitutional arguments is in marked contrast to its lengthy recitation of what it describes as Appellant's "years of noncompliance." *Id.* at 50. But despite the Special Prosecutor's efforts to focus the Court's attention elsewhere,[9] there is no dispute about the facts relevant to Appellant's

[9] For instance, the Special Prosecutor plays up the fact that Appellant does not dispute the District Court's factual findings "on this appeal." SP Br. 2 n.2. Given that Appellant's claims are about constitutional and legal defects in his prosecution, there was no reason to do so—not because Appellant agrees with those findings, but because, contra the Special Prosecutor's brief, they are almost entirely irrelevant here.

supervisory power argument: the judge who filed the charges picked a Special Prosecutor who worked for a firm that had represented Chevron and had extensive ties to other firms in the oil industry with potential interest in demonizing a prominent critic; the judge picked another judge to preside over the trial but did not recuse himself; this Court rejected the civil contempt theory that was the basis for the scope of the original discovery orders that produced the Forensic Inspection Protocol and passport surrender orders underlying Counts I-III; and civil contempt was sufficient to cure the violations of the orders underlying Counts IV-VI as well as Count I. Assessment of whether the District Court acted with the "least possible power" must be based, not on some cumulative frustration with or hostility to Appellant arising from years of contentious litigation, but on the specific conduct alleged in Judge Kaplan's Order to Show Cause (OSC), and the absence of any structural checks on the contempt power in this case.

The Special Prosecutor quibbles about whether the District Court made a determination in the civil case that Appellant fully purged himself of civil contempt with regard to Count I (SP Br. 51–52), but that should be all the more reason why it was inexcusable to pile a criminal

contempt charge on top of civil contempt before and without making that determination. The District Court's Findings in the criminal case were not based on any perceived inadequacy in Appellant's list of his devices and accounts prior to the issuance of the OSC, but on his delay in complying with the discovery order. SPA-217 ("Although Mr. Donziger changed his mind at some point regarding his intent to resist Paragraph Four [of the Forensic Inspection Protocol], he still did not produce a sworn list of his devices until May 29, 2019, i.e., after Judge Kaplan had already found him to be in civil contempt and after coercive fines began to run." (footnote omitted)).

As to Count VI, the Special Prosecutor argues that criminal contempt charges were proper despite the cancellation of the pledge of an interest in the judgment in exchange for services because Appellant failed to produce communications with the life coach, and because the coach had already rendered some services before cancelling the deal. SP Br. 51. But any injury from that was to the life coach, not to the District Court, or even to Chevron. And Count VI was not based on a discovery violation.

The Special Prosecutor, like the District Court in its cursory discussion of the principle of restraint, SPA-242–244, fails to square the filing of criminal contempt charges after civil contempt has already produced compliance with *Young* and *Shillitani v. United States*, 384 U.S. 364 (1966). The Supreme Court illustrated the principle that a court should use the "least possible power" by noting the suggestion in *Shillitani* that, "when confronted with a witness who refuses to testify, a trial judge should first consider the feasibility of prompting testimony through the imposition of civil contempt, utilizing criminal sanctions only if the civil remedy is deemed inadequate." *Young*, 481 U.S. at 801. By that standard, the District Court had no reason to invoke criminal contempt when civil contempt had proved to be adequate to achieve compliance with its orders.

The Special Prosecutor also fails to meet the argument that criminal contempt charges were not warranted for violations of discovery orders committed as a way of obtaining appellate review of Chevron's invalid civil contempt theory, after the District Court in the civil case refused to address Appellant's argument that its stay ruling had created an ambiguity about fundraising for the litigation by selling third-party

interests in the judgment—an argument this Court sustained. The scope of the discovery orders, and particularly discovery "that would tend to reveal the identity of any . . . material supporter of the Ecuador Litigation" *see* SP Br. 12, was not justified solely to find personal assets to satisfy the money judgment for court costs. *See* Opening Br. 13 n.4. As the Special Prosecutor acknowledges, SP Br. 12, the privilege issue arose in response to the order to produce "discovery relating to a solicitation of a particular investor"—after Chevron obtained information that Appellant had sought funding from a hedge fund in exchange for third-party interests in the judgment. Civ. Dkt. 1966, 1967. Invalidating Chevron's civil contempt theory should have invalidated the discovery orders that ultimately spiraled into the Forensic Inspection Protocol and the passport surrender order. It is impossible to square the Special Prosecutor's collateral bar arguments, which the District Court sustained, SPA-168–174, with the contention that the court could impose criminal contempt on top of civil contempt. Either Appellant was entitled to litigate the invalidity of the discovery orders as a defense to criminal contempt, contrary to the District Court's collateral bar ruling, or it must contradict the principle of restraint to convict someone of criminal

contempt for violating an order that rests on a legally invalid foundation that the defendant cannot contest. Either way, Appellant's conviction cannot stand.

The Special Prosecutor does not dispute that Appellant had legitimate reasons to be concerned that Chevron would use information it obtained about supporters to threaten and harass them, having done so in the past, thereby interfering with protected speech and association rights. Civ. Dkt. 2026. And the District Court was wrong about Appellant's standing to assert those rights. Opening Br. 14 n.5. The absence of compelling reasons to prosecute criminal contempt of orders that should never have been entered (the civil contempt-based discovery-related orders in Counts I-III), or that had already been enforced by civil contempt (Counts I and VI-VI), in combination with the unusually acrimonious history of the litigation and Judge Kaplan's failure—at the very least—to fully separate Chevron and that history from the prosecution, creates the appearance of unfairness. There is no vindication of judicial authority in such a judgment. While there is little doubt that Appellant could have better handled the post-judgment litigation in the civil RICO case, the principle of restraint should have prevented the

District Court from escalating the conflict to criminal contempt—and, once it did, it should have taken the U.S. Attorney's "no" for an answer.

* * *

This case illustrates the need for an independent executive as "an important check on the federal courts' contempt power, a potent weapon that can in certain circumstances be liable to abuse." SPA-150 (cleaned up).

CONCLUSION

Appellant's criminal contempt conviction should be reversed.

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Respectful submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Local Rule 32.1(a), the undersigned counsel certifies as follows:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7), as modified by Local Rule 32.1(a)(4)(B), because, as measured by the word processing system used to prepare this document, there are 6,987 words in it.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word software in Century Schoolbook 14-point font in the text and footnotes.

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