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

BRIEF FOR APPELLANT

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INTRODUCTION

On October 27, 2021, Appellant Steven Donziger began serving a six-month criminal contempt sentence imposed by the District Court in a prosecution brought in the name of the United States—but conducted by a court-appointed Special Prosecutor who acted without executive branch supervision and without constitutional authority. As the District Court acknowledged, the executive branch "provides an important check on federal courts' contempt power, a potent weapon that can in certain circumstances be liable to abuse." SPA-150 (cleaned up). And, in general, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Those liberty-preserving protections were absent from Appellant's prosecution.

This appeal thus presents fundamental constitutional questions about private prosecutions for criminal contempt, including whether criminal contempt charges must be prosecuted by officers who, like all other executive officers, are accountable to the President through an identifiable chain of command; and whether judicial appointment of such prosecutors must be authorized by statute. *See United States v. Arthrex,*

Inc., 141 S. Ct. 1970 (2021); U.S. CONST., art. II, § 2, cl. 2. And even if the Special Prosecutor in this case *did* constitutionally exercise authority, this prosecution departed from the principle that courts must use only the "least possible power adequate to the end proposed." *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 801 (1987) (cleaned up). The order to show cause charged violations of the judgment and orders related to post-judgment discovery in a civil RICO case. All of the violations alleged had either already been cured by *civil* contempt sanctions or were committed to allow appellate review of discovery orders—appellate review that subsequently vindicated Appellant's foundational objection to the scope of discovery. In the absence of any other checks on the criminal contempt power in this case, the lack of restraint in its application independently requires the exercise of this Court's supervisory power.

Whether for that reason, or because the prosecutor lacked the constitutional authority to act on behalf and in the name of the United States, Appellant's conviction should be reversed forthwith.

STATEMENT OF JURSDICTION

The District Court (Preska, J.) entered final judgments of conviction and imposed a sentence of six months imprisonment and a $10 special assessment on October 1, 2021. SPA-327. Appellant filed a timely notice of appeal on October 4, 2021. A-166. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The District Court's subject matter jurisdiction was based on 18 U.S.C. §§ 401 and 3231.

ISSUES PRESENTED

1. May a judicially appointed Special Prosecutor prosecute a criminal offense on behalf and in the name of the United States if the Special Prosecutor is not supervised and directed by a principal officer in the Executive Branch?

2. May the District Court appoint an executive officer to prosecute a criminal offense on behalf and in the name of the United States in the absence of a statute authorizing such an interbranch appointment?

3. Do principles of restraint require reversal of Appellant's criminal contempt convictions under the Court's supervisory power?

STATEMENT

A. The Contempt Power

Before *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), held that "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both," the distinction between civil and criminal contempt was not sharply defined. Consistent with *Bloom*, the Supreme Court applied the Double Jeopardy Clause to criminal contempt in *United States v. Dixon*, 509 U.S. 688 (1993). And the Solicitor General had to acknowledge in *Robertson v. United States ex rel. Watson*, 560 U.S. 272 (2010) (per curiam), that a criminal contempt prosecution for the violation of a domestic violence order of protection is necessarily a sovereign act that must be brought in the name and by the authority of the United States, not that of a private party.[1] *See id.* at 280 (Roberts, C.J., dissenting)

[1] In light of the Solicitor General's position, the Court dismissed the petition as improvidently granted. However, Chief Justice Roberts's opinion for himself and Justices Scalia, Kennedy, and Sotomayor laid out the reasons why "[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government." 560 U.S. at 273 (Roberts, C.J., dissenting). Private prosecution under the local law in *Robertson* did not present an Appointments Clause issue because the clause "*does not* restrict the appointment of local officers that Congress

("The fact that the allegedly criminal conduct concerns the violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States." (quoting *United States v. Providence J. Co.*, 485 U.S. 693, 700 (1988))).

Because both civil and criminal contempt can involve the imposition of fines and imprisonment, post-*Bloom* cases have clarified when constitutional protections for criminal cases apply. *Hicks v. Feiock*, 485 U.S. 624 (1988), involved the constitutionality of a burden-shifting presumption in a case imposing a suspended prison sentence for failing to pay child support. The Supreme Court remanded for a determination whether the sentence allowed the defendant to avoid the sentence and purge the contempt by paying the child support arrears, which would have made the imprisonment a form of civil contempt and the burden-shifting presumption constitutional. In *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994), the Court reversed the imposition of fines for violating a labor injunction without a jury trial because the union

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vests with primarily local duties." *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020).

"had no opportunity to purge [the substantial fines] once imposed." *Id.* at 837.

Among other things, those cases establish that the adjudicative functions of enforcing compliance with a court order or compensating a party for violations of rights under a court order are carried out by *civil*, not criminal, contempt. *See, e.g.*, *id.* at 829 ("A contempt fine accordingly is considered civil and remedial if it either coerces the defendant into compliance with the court's order, or compensates the complainant for losses sustained. Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge." (cleaned up)).

A third form of contempt, sometimes referred to as "direct contempt," involves summary adjudication "to maintain order in the courtroom and the integrity of the trial process in the face of an actual obstruction of justice." *Id.* at 832 (cleaned up). Like civil contempt, direct contempt is closely tied to the power to adjudicate: "In light of the court's substantial interest in rapidly coercing compliance and restoring order, and because the contempt's occurrence before the court reduces the need for extensive factfinding and the likelihood of an erroneous deprivation, summary proceedings have been tolerated." *Id.*

Congress has statutorily authorized federal courts to punish criminal contempt since the First Judiciary Act, ch. 20, § 17, 1 Stat. 73, 83 (1789). Current 18 U.S.C. § 401 confers the power to "punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." No federal statute generally authorizes federal courts to impose fines or imprisonment to coerce compliance with their orders as civil contempt.[2] And no statute generally authorizes federal courts to appoint a prosecutor or to conduct the prosecution in a criminal contempt case.

Fed. R. Crim. P. 42, as amended in 2002 under the Rules Enabling Act, provides:

> (a) DISPOSITION AFTER NOTICE. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.
>
> > (1) *Notice.* The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:
> >
> > > (A) state the time and place of the trial;

[2] 18 U.S.C. § 1826 authorizes coercive imprisonment of recalcitrant witnesses. Fed. R. Civ. P. 70(e) authorizes courts to enforce a judgment by contempt.

> (B) allow the defendant a reasonable time to prepare a defense; and
>
> (C) state the essential facts constituting the charged criminal contempt and describe it as such.
>
> (2) *Appointing a Prosecutor*. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

The Rules Enabling Act authorizes "[t]he Supreme Court and all courts established by Act of Congress [to] from time to time prescribe rules for the conduct of their business." 28 U.S.C. § 2071(a). The Supreme Court transmits proposed rules to Congress, which has an opportunity to review them before they take effect. *Id*. § 2074(a). However, except for rules "creating, abolishing, or modifying an evidentiary privilege," § 2074(b), there is no requirement that Congress approve a rule. Proposed rules, including the 2002 amendment to Rule 42 that addressed the appointment of a special prosecutor, take effect unless Congress vetoes them by enacting contrary legislation.

B. The Order to Show Cause

Appellant's criminal contempt prosecution began with an Order to Show Cause ("OSC") issued by Judge Kaplan on July 31, 2019. Civ. Dkt.

2276; A-49. The OSC alleged violations of orders entered in a civil RICO case brought by Chevron against Appellant and others which arose from litigation in Ecuador against Chevron for environmental harm by its predecessor Texaco that resulted in a multi-billion-dollar judgment against Chevron.[3] *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). This Court affirmed the judgment in the civil RICO case. *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016). The Supreme Court denied certiorari. *Donziger v. Chevron Corp.*, 137 S. Ct. 2268 (2017) (mem.).

By the time the District Court issued the OSC, Appellant was no longer in violation of the orders listed in Counts I, IV, V, and VI, and he had appealed to this Court to challenge the basis for the discovery orders underlying Counts I-III. Putting the criminal contempt charges in

[3] The litigation proceeded in Ecuador after Texaco successfully dismissed a lawsuit filed in the Southern District of New York on forum non conveniens grounds, conditioned on not contesting jurisdiction in Ecuador. *See Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). It returned to the Southern District of New York on Chevron's application for discovery under 28 U.S.C. § 1782. *See In re Application of Chevron Corp.*, 709 F. Supp.2d 283 (S.D.N.Y. 2010). Before the civil RICO trial, this Court overturned the District Court's injunction against enforcement of the Ecuadorian judgment. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 247 (2d Cir. 2012).

context requires a fair amount of detail about the civil judgment and the disputes that led to the contempt citations.

1. Counts IV-VI: Violations of the Civil RICO Judgment

Paragraph 1 of the civil RICO judgment imposed "a constructive trust for the benefit of Chevron on all property . . . traceable to the [Ecuadorian] Judgment," specifically including "all rights under any contingent fee under the Retainer Agreement." SPA-23 (cleaned up). It required Appellant to "transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain." *Id.* Count IV of the OSC charged a willful violation of Paragraph 1 "by refusing to assign to Chevron [Appellant's] contractual rights to a contingent fee under the 2011 Retainer." SPA-11. The District Court found that Chevron had raised the failure to assign those rights as a possible basis for civil contempt in a letter in May 2018. SPA-42–44. Appellant sent Chevron an executed assignment by email on August 22, 2018, but the assignment was not notarized as the District Court had ordered. SPA-47. He provided a notarized assignment on September 4, 2018. SPA-47–48.

Count V of the OSC alleged a willful violation of Paragraph 1 "by refusing to assign to Chevron [Appellant's] contractual rights under the

2017 Retainer" Agreement executed after a change in the organization of the client group. SPA-11. Chevron moved to hold Appellant in civil contempt with regard to the 2017 Retainer on October 1, 2018. SPA-52. Appellant took the position that he had already fully assigned his contingency interest and was willing to execute "additional documentation" if asked to do so. *Id.* After Appellant was ordered to but failed to execute an assignment, the District Court found Appellant in civil contempt. SPA-53–54. Appellant executed the assignment and delivered it to Chevron on "the day that coercive fines were due to begin accruing" under the civil contempt order. SPA-55.

Count VI alleged a violation of Paragraph 5 of the civil RICO judgment. SPA-11. That paragraph enjoined Appellant "from undertaking any acts to monetize or profit from the Judgment, . . . including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein." SPA-193. The District Court found that in December 2016, Appellant had agreed with an executive life coach named David Zelman to pledge "an interest in the Ecuador judgment from [Appellant's] fees should they be collected" in exchange for coaching services. SPA-57. Appellant confirmed an agreement to

cover additional services in March 2018. SPA-58–60. However, the following day Appellant clarified that "I am barred by court order in the U.S. from collecting fees in the matter." SPA-60. Although Appellant held out the possibility "that the situation in that respect could change in a settlement context," he warned the life coach that "you need to be aware of the risk to you which is high." SPA-60. Chevron subsequently moved to hold Appellant in civil contempt of Paragraph 5 of the civil RICO judgment. SPA-61. While Chevron's contempt motion was pending, the life coach cancelled the agreement. SPA-62.

2. Counts I-III: Discovery Violations

The remaining counts of the OSC arose from discovery orders the District Court issued in the civil case after awarding Chevron over $813,000 in costs and allowing Chevron to pursue a civil contempt theory that this Court ultimately rejected when Appellant was able to obtain appellate review. *Chevron Corp. v. Donziger*, 990 F.3d 191 (2d Cir. 2021).

Count I alleged that Appellant failed to provide "a sworn list" of his electronic devices and accounts, as the District Court had ordered him to do by March 8, 2019. SPA-10–11. The District Court had ordered production of the list as part of the "Forensic Inspection Protocol" that

would ultimately have given Chevron access to electronic information, after the District Court had rebuffed Appellant's objections to the scope of discovery on First Amendment privilege grounds and a "foundational" challenge to Chevron's civil contempt theory that he violated the civil RICO judgment by raising money to litigate enforcement of the Ecuadorian judgment by pledging interests belonging to third parties, not to Appellant.[4]

Appellant had protested against being forced to produce discovery that could expose the identities of and communications with supporters

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[4] Chevron had sought discovery on two grounds: the civil contempt theory this Court held invalid, *see* Civ. Dkt. 1966; Civ. Dkt. 1967, and to locate assets to satisfy the judgment for costs in the civil RICO case. The permissible scope of discovery for the latter was much more limited and would not have required disclosure of the communications that Appellant resisted. *See* Fed. R. Civ. P. 26(b)(1) (discovery must be "proportional to the needs of the case"). Discovery under Fed. R. Civ. P. 69(e) and N.Y. CPLR § 5223 "is constrained principally in that it must be calculated to assist in collecting on a judgment." *EM Ltd. v. Republic of Argentina,* 695 F.3d 201, 207 (2d Cir. 2012). New York law authorizes "investigation [of] any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts." DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 509 (6th ed. 2021).

The important point is that the subject of discovery is the debtor's "assets or their whereabouts." SIEGEL & CONNORS, *supra*, § 509. When courts describe such post-judgment discovery as broad or permissive, *e.g.*, *EM Ltd.*, 695 F.3d at 207, they mean that the scope of *asset* discovery is broad, geographically and otherwise, not that discovery can be leveraged to pursue other objectives such as evidence of a violation of an injunction.

of the Ecuadorian litigation to Chevron, without a "ruling on the scope of the RICO Judgment." And he "indicated that he would be willing to risk contempt sanctions to protect the First Amendment rights he was asserting." SPA-86. After rejecting the First Amendment claims on the merits and ruling that Appellant had waived the privilege by failing to produce a privilege log, the District Court denied Appellant's request for a stay of discovery pending appeal. SPA-89.[5] The District Court granted Chevron's motion to compel, notwithstanding Appellant's objection that the court was "refusing to address the key issue underlying Chevron's original contempt motion for over six months." SPA-93 (cleaned up).

[5] Appellant's objection to the scope of the discovery Chevron sought was not an assertion of a document-specific privilege, but was rather a categorical objection to discovery that would implicate associational rights. Appellant would also have been hard-pressed to provide a meaningful privilege log that did not provide Chevron the very information identifying supporters and donors he sought to protect. "In related contexts, [the Supreme Court has] explained that those resisting disclosure can prevail under the First Amendment if they can show a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties." *John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010) (cleaned up); *see also In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 491 (10th Cir. 2011). Contrary to the District Court, *see* SPA-82, Appellant had standing to raise those First Amendment interests. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

Arguing that the District Court had (as this Court later agreed) created an ambiguity in his obligations under the civil RICO judgment with regard to fundraising to support litigation by selling third party interests in the Ecuadorian judgment, Appellant urged: "If the Court really thinks that a prohibition on litigation finance was so clear after April 2014 that I can be held in contempt thereof, it should make such a finding directly, which would allow me to seek appellate review." SPA-94. If not, Appellant concluded that he "must take a contempt sanction in this second-layer discovery context." *Id.*

After Chevron proposed a protocol to examine Appellant's electronic records, Appellant reiterated his position that "[i]f the Court is unwilling to rule on the legal basis of Chevron's motion," he intended to refuse to comply with the discovery order and "take an immediate appeal of any resulting contempt finding." SPA-95. At a subsequent hearing, Appellant asked that the District Court "hold off at least until you can rule so we know what the precise scope of whatever the post-judgment RICO injunction is." SPA-97. The District Court noted that Appellant did not have a stay of the order. SPA-98–99. But of course, he also did

not have at that time an appealable order from which he could seek a stay.

The District Court issued the Forensic Inspection Protocol order on March 5, 2019, as a sanction for Appellant's non-compliance with Chevron's discovery requests. SPA-102. Appellant did not provide the list of devices and accounts the Protocol required and did not surrender his devices. SPA-104–105. On May 23, 2019, the District Court granted Chevron's motion to hold Appellant in civil contempt of the Protocol and imposed daily fines. SPA-109. Appellant noticed an appeal of the order on May 28, 2019. SPA-109. The District Court issued a further contempt order on May 29, 2019. SPA-110. Appellant provided a list of his devices and accounts on May 29, 2019, and an updated list on June 5, 2019. SPA-111–112.

Although Appellant had provided a list, the District Court admonished Appellant that he remained subject to accumulating fines because he had not surrendered his devices for imaging. SPA-113–114. Count II of the OSC alleged that Appellant had violated the Forensic Inspection Protocol by his refusal to do so. SPA-11.

On June 11, 2019, the District Court issued a further order to coerce compliance with the Protocol and Chevron's discovery requests, requiring Appellant to surrender his passport. SPA-115.[6] Count III of the OSC charged a violation of the passport surrender order. SPA-11.

The following day, Appellant moved to stay the civil contempt sanctions pending appeal. SPA-116. The District Court suspended accumulation of the civil contempt fines on June 28, 2019, and on July 2, 2019 partially and conditionally granted Appellant's request for stay. SPA-118. "Specifically, Judge Kaplan granted a stay pending appeal of the portions of the Protocol requiring or permitting disclosure of information to Chevron," but subject to the conditions that he file his appeal brief by July 31, 2019, and not oppose an expedited appeal. SPA-118–119.

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[6] A few courts have ordered passport surrenders as means of coercing compliance with other orders. *See e.g.*, *Bank of Am., N.A. v. Veluchamy*, 643 F.3d 185, 188–90 (7th Cir. 2011); *Herbstein v. Bruetman*, 241 F.3d 586, 588–89 (7th Cir. 2001); *In re Van Vlee*t, No. 08-CV-01645-WYD, 2009 WL 3162212, at *16 (D. Colo. Sept. 30, 2009); *Merrill Lynch Bus. Fin. Servs., Inc. v. Kupperman*, Civ. No. 06-4802, 2007 WL 2300737, at *1 (D.N.J. Aug. 7, 2007). To our knowledge, courts in this circuit have not previously addressed the permissibility of such an order or the standards that should guide its imposition. *See* SPA-177 n.610 (approving of *Herbstein*).

Appellant did not meet the appellate briefing deadline, by which time he had been already charged with criminal contempt. His appellate brief presented the challenge to the original contempt theory on which Chevron based its broad discovery requests, but the brief failed to draw this Court's attention to the link between the invalid contempt theory and the validity of the discovery orders. SPA-123; *Donziger*, 990 F.3d at 206 (citing Appellant's Reply Br. at 7 n.6). This Court agreed that the civil contempt theory was invalid. 990 F.3d at 206 ("Because we find that the Stay Order created ambiguity as to what precisely Donziger could no longer do to assist his clients in raising funds to continue their litigation efforts, we agree that the contempt finding on that limited issue cannot stand."); *see also id.* at 209–10, 212. "Given the district court's own interpretation of the Injunction, it was not unreasonable for someone in Donziger's position to believe that he could continue monetizing his clients' interests in the Ecuadorian Judgment and pay himself with those proceeds because, as the district court itself noted, that is how the case always has been financed. But, five years after the district court issued the Stay Order, it found him in contempt for (among other things) doing exactly that." *Id.* at 211 (citation omitted).

While this Court's opinion was emphatic that it was not vindicating Appellant, the Court did sustain the objection to Chevron's contempt theory that Appellant had sought to appeal by refusing to comply with discovery orders when the District Court refused otherwise to issue an appealable ruling. But the District Court issued the OSC charging Appellant with criminal contempt long before this Court issued its decision. A-49.

C. The Criminal Contempt Prosecution

The District Court referred the OSC to the U.S. Attorney. That office "respectfully decline[d] on the ground that the matter would require resources that we do not have readily available." A-59. Invoking the authority in Fed. R. Crim. P. 42(a)(2) and its "inherent power," the District Court appointed Rita Glavin and two colleagues, all then employed by Seward & Kissel LLP, to prosecute Appellant with the "same power to investigate, gather evidence, and present it to the Court as could any other government prosecutor." *Id.* The three private lawyers entered notices of appearance for the United States, as they have also done on the docket of this appeal. Crim. Dkt. 5, 6, 7; A-6. The criminal docket designated Ms. Glavin as the "Assistant US Attorney." A-4.

The District Court also designated Judge Preska, who had handled a previous aspect of Chevron's litigation (involving mediation of Chevron's claims against Patton Boggs) to try the criminal charges. Despite having assigned the criminal case to Judge Preska rather than having it randomly assigned by the Clerk of the Court, Judge Kaplan pointedly declined to recuse himself. *See* Response to Petition for a Writ of Mandamus at 18–19 n.54, *In re Donziger*, No. 20-464 (2d Cir. Mar. 11, 2020), Dkt. 28. The District Court also entered an order in the criminal prosecution requiring all submissions to be filed on the civil RICO docket before Judge Kaplan as well. Crim. Dkt. 2; A-5.

1. Pretrial Proceedings

Before trial, Appellant challenged the fairness of the private criminal contempt prosecution, pointing to connections between the prosecutor and Chevron, the absence of structural checks, and the principle that criminal contempt must be limited to the "least possible power adequate to the end proposed." *Young*, 481 U.S. at 801 (citation omitted).

In a letter dated December 30, 2019, Appellant's counsel in the criminal case asked the District Court to "inquire to determine the full

extent of Seward's ties to Chevron" because the Special Prosecutor had declined to respond his own inquiry. Crim. Dkt. 49. The letter also asked the Court "to clarify whether and the extent to which Judge Kaplan has played or is playing a continuing role in this prosecution." *Id.* The Special Prosecutor disputed claims about links to Chevron. However, she did not disclose at the time that Seward had represented Chevron in an unrelated matter in 2018. The Special Prosecutor declined to make any representations about contacts with Judge Kaplan, but stated that "the prosecution does not work for Judge Kaplan and makes its own decisions in the case." Crim. Dkt. 50.

Appellant's counsel asked that the Special Prosecutor disclose "the full extent of Seward's relevant relationships." Crim. Dkt. 51 at 2. At a status hearing before the District Court on January 15, 2020, the Special Prosecutor represented that neither she nor her colleagues nor their firm "have existing client relationships that would result in the three appointed prosecutors having conflicting loyalties or having anything that would cause the independence of our decision making on behalf of our client, the United States in this case, to be anything but impartial and objective." A-65:5–12. Appellant's counsel persisted in seeking

disclosure from the Special Prosecutor of contacts between Seward and Chevron that could not be gleaned from public records. A-76:23–77:6. The District Court declined to order any additional disclosure. *Id.* at 77:13–23.

On February 27, 2020, the date set by the District Court for pretrial motions, Appellant moved, *inter alia*, to disqualify the Special Prosecutor based on Seward's ties to the oil and gas industry and to dismiss the contempt charges as inconsistent with the exercise of the "least possible power adequate to the end proposed." Crim. Dkt. 60. The motion extensively discussed the concerns expressed about abuse of the contempt power in Justice Scalia's concurring opinion in *Young*. *Id.* at 6–7. Appellant submitted a legal ethics expert's declaration that concluded Seward's extensive practice in the oil-and-gas industry and representation of Chevron-related entities precluded the Special Prosecutor from being appropriately disinterested. Crim. Dkt. 60-2.

The Special Prosecutor subsequently submitted a declaration from a Seward partner disclosing for the first time that Seward had actually represented Chevron in a corporate matter from late 2016 to early 2018. A-85. While that was consistent with the Special Prosecutor's careful

prior representation at the January 6, 2020 hearing that neither she nor the firm had any "existing" relationship, it also confirmed that Chevron was familiar with the firm and that Chevron was within Seward's area of practice. When Appellant's counsel asked if Seward had disclosed the prior representation of Chevron to Judge Kaplan before he appointed Ms. Glavin as Special Prosecutor and whether Seward had done other work for Chevron, the firm's General Counsel declined to respond. A-87–88.

The District Court denied the motion to disqualify the Special Prosecutor and to dismiss the charges, concluding that Seward's ties to Chevron through its work with related companies and its past representation of Chevron were too attenuated to require disqualification. SPA-313–321.

The District Court also denied the motion to dismiss the charges. *Id.* at 20–25. The Court specifically rejected Appellant's argument that prosecuting him for violations of court orders that he had already complied with was inconsistent with the "least possible power" principle of restraint.[7]

[7] This Court dismissed Mr. Donziger's appeal for lack of jurisdiction. Order, *United States v. Donziger*, No. 20-1529 (2d Cir. Sept. 22, 2020), Dkt. 69.

In a subsequent motion to dismiss Counts I, II and III, Appellant elaborated on the argument that he could not be held in criminal contempt for refusing to comply with discovery orders for the purpose of obtaining appellate review of a civil contempt judgment. Crim. Dkt. 225-1. The District Court denied the motion. SPA-291.[8] The District Court also denied Appellant's motion to dismiss for selective or vindictive prosecution, SPA-264, and his motion to reconsider dismissal of charges based on principles of restraint, A-90. The Court rejected Appellant's argument that it should apply closer scrutiny to the charges, "given the absence of executive branch control o[r] supervision of the private prosecutor." *See* Crim. Dkt. 259 at 3. The District Court also quashed subpoenas for records relevant to the bias and interest of the attorneys called as trial witnesses in producing an outcome favorable to their client Chevron, except for limited disclosure of aggregate billings related to the civil RICO case. Crim. Dkt. 301.[9]

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[8] The District Court's principal rationale was that it read cases permitting a party to obtain review of a disclosure issue on appeal of a contempt order as not limiting "what flavor of contempt to impose." SPA-300.

[9] Two attorneys who had represented Chevron in the civil RICO case presented the bulk of the prosecution narrative at trial. The District Court limited cross-examination on the basis of attorney-client and work-

2. Trial and Post-Trial Proceedings

On May 7, 2021, the Friday before Appellant's trial was to begin, his present appellate counsel received a response from Justice Department official John P. Carlin, to an April 2, 2021 letter sent to Mr. Carlin as the then-Acting Deputy Attorney General requesting that the Department review the prosecution, and, if need be, direct the Special Prosecutor to request an adjournment of the trial to allow time for the review. A-156; *see* SPA-247–248. The letter presented a legal argument that the Special Prosecutor was exercising the executive power of the United States and therefore had to be subject to the supervision and direction of a principal executive officer, and outlined some of the reasons why the prosecution merited scrutiny. A follow-up letter to Mr. Carlin

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product privilege. It was not "lost" on the District Court that their demeanor and responsiveness shifted from direct to cross examination. SPA-19. But Appellant was not permitted to explore the reasons for those shifts. *See* A-142:4–7 (sustaining objection to whether "putting Mr. Donziger in jail is something your client wants"). For example, the billing records the District Court did order Chevron's counsel to produce showed that the firm billed over $3 million for its post-judgment work. But the lawyer would not explain why Chevron would be willing to pay so much to collect $813,000. A-138:10–140:17. The District Court also did not permit Appellant to explore the potential bias that could have been inferred from Chevron's "L-T [long-term] strategy is to demonize Donziger." A-134 (describing a March 2009 email from a public affairs official).

on April 19, 2021 noted that FBI agents had been assisting the Special Prosecutor, reinforcing the conclusion that she was exercising Article II executive authority, not Article III judicial power. A-163–165; SPA-248. The Special Prosecutor was copied on and received both letters. Mr. Carlin's brief email in response stated, in relevant part: "The Department has received your letters in the Donziger matter. Having reviewed the letters, the Department declines to intervene in the federal-court initiated contempt proceedings." A-156; SPA-248.

Before the trial began, one of Appellant's counsel advised the Court that the defense had learned that the Justice Department was "declining to exercise any supervision over the prosecutor in the case." A-125:16–20. After Judge Preska indicated that she did not want to address the issue until it had been fully briefed, counsel unsuccessfully urged that the absence of supervision "invalidates this entire proceeding," so that it would be imprudent to proceed with the trial without first resolving it. A-129:6–23. Later that day, Appellant filed a written motion to dismiss based on the Special Prosecutor's lack of constitutionally required supervision and direction by a principal officer. SPA-135–136; Crim. Dkt. 302. At the Court's direction, Appellant filed a declaration attaching the

Carlin email. SPA-136 & n.479; A-155. The District Court took the position that the email was hearsay and insufficient "direct admissible evidence of a policy or decision by the DOJ." A-147:1–6; SPA-137 & n.482. However, the District Court declined to permit any discovery or even to pose the question to the Special Prosecutor whether she understood herself to be under a principal officer's supervision and direction. The District Court denied the motion to dismiss on the ground that Appellant's "moving papers had given the Court absolutely no basis on which to conclude that the special prosecutors are not subject to any control or supervision whatsoever by the Executive Branch." SPA-139 (cleaned up).

The day after the Supreme Court's decision in *Arthrex*, Appellant submitted a letter motion requesting dismissal based on that decision. SPA-139–140; Crim. Dkt. 330. The Special Prosecutor responded by arguing that *Arthrex* was inapplicable, not that she was under the supervision and direction of a principal officer: "The initiation of criminal contempt charges, and the appointment of the special prosecutors by the District Court in this matter, reflect a vindication and use of the judicial power of the United States. It therefore follows that the decision in

Arthrex, which dealt with the question of whether the authority of Administrative Patent Judges to issue decisions *on behalf of the Executive Branch* is consistent with the Appointments Clause of the Constitution, has no applicability to this matter." A-161.

Leaving no doubt that she was asserting independence from executive oversight as a judicial appointee, the Special Prosecutor went on to note that "[w]hen the prosecution of Donziger was referred to the Executive Branch," it declined, which the Special Prosecutor understood as triggering an inherent judicial power to prosecute *outside of the executive*. *Id.* "*Arthrex*," she wrote, "has nothing to do with the exercise of the judiciary's inherent power as long recognized by Supreme Court precedent." *Id.* The Special Prosecutor's response thereby confirmed that the Carlin email meant what Appellant's counsel had said: that the Special Prosecutor was under no executive branch chain of command.

After considering post-trial submissions from the parties, the District Court issued its Findings of Fact and Conclusions of Law, finding Appellant guilty of each of the six counts of criminal contempt alleged in the Order to Show Cause. SPA-1.

The District Court also denied Appellant's motion to dismiss in its post-trial Findings and Conclusions. Although the Court agreed with Appellant's position in his moving papers and in the letter to the Justice Department that the Special Prosecutor was exercising executive authority and therefore subject to supervision and direction according to *Arthrex*, SPA-145–152, it denied relief on two grounds—neither of which had been advanced by the Special Prosecutor.

Appellant filed a timely new trial motion to address the two new grounds raised by the District Court. First, the new trial motion explained that the absence of supervision and direction was distinct from the validity of the Special Prosecutor's appointment; and the challenge was not untimely either under Supreme Court decisions (including *Arthrex* itself) addressing the timeliness of a challenge to an executive branch officer's constitutional authority, or under Fed. R. Crim. P. 12. Second, the new trial motion pointed to the Special Prosecutor's own response to the motion to dismiss as refuting the proposition that she was subject to constitutionally required supervision and direction simply because Fed. R. Crim. P. 42 itself did not prohibit such supervision. Crim. Dkt. 351 (motion), 361 (reply). The Special Prosecutor's opposition

to the new trial motion alluded to the participation of FBI agents in witness interviews (as noted in the April 19, 2021 letter to Acting Deputy Attorney General Carlin) as evidence of Justice Department involvement, but made no claim of supervision or direction or accountability to any principal officer. Crim. Dkt. 355. The District Court denied Appellant's request for discovery concerning how FBI agents had been assigned to assist the Special Prosecutor. Crim. Dkt. 359. On August 23, 2021, the District Court denied the motion for new trial. SPA-246.

On October 1, 2021, the District Court imposed the maximum sentence of six months. SPA-329. Appellant noticed his appeal on October 4, 2021. A-166. Appellant began serving the sentence on October 27, 2021.

SUMMARY OF ARGUMENT

The prosecution of offenses against the criminal laws of the United States is an executive function that does not shift to the judicial branch when, as here, the U.S. Attorney declines to prosecute. Like any other inferior executive officer, a court-appointed prosecutor must be supervised and directed by a principal executive officer accountable to

the President. Here, however, the Special Prosecutor told the District Court that she was *not* subject to that requirement because she was in the judicial branch. That admission, which is consistent with the Carlin email, is dispositive proof of a constitutional violation under *Arthrex*.

Even if the Special Prosecutor *had* been subject to constitutionally adequate supervision, her appointment as Special Prosecutor was invalid. Only Congress can authorize an interbranch appointment of an official in one branch by an official in another, and no statute authorized the Special Prosecutor's appointment here. The Federal Rules of Criminal Procedure are not laws passed by Congress, and Congress both cannot and did not delegate to the judiciary its constitutional appointment power. For courts to claim the power through rulemaking to create executive offices and fill them would encroach on the prerogatives of the executive branch and violate bedrock separation-of-powers principles.

Although constitutional flaws in the Special Prosecutor's authority to act on behalf of the United States require reversal, the Court can avoid those questions by reversing based on its robust supervisory power over matters internal to the judiciary. The Supreme Court used that very

power in *Young* to restrain criminal contempt and to promote the appearance of fairness. This prosecution was not limited to the "least possible power adequate to the end proposed." *Young*, 481 U.S. at 801. Civil contempt was sufficient to put an end to four of the six violations alleged, and three of the violations (including the two that had continued) were permissibly committed to trigger appealable civil contempt orders. As in *Young*, this prosecution also implicates the appearance of unfairness because the judge who brought the contempt charges picked the presiding judge, did not recuse, and needlessly picked a prosecutor with ties to the adverse party in the underlying civil litigation.

ARGUMENT

I. THE SPECIAL PROSECUTOR HAD NO AUTHORITY TO PROSECUTE A CRIME IN THE NAME OF THE UNITED STATES.

A. A Special Prosecutor Appointed to Prosecute a Criminal Case in the Name of the United States Is an Inferior Executive Officer.

The District Court correctly ruled that the Special Prosecutor is an inferior executive officer. Under the Order of Appointment, the Special Prosecutor's duty was to "investigate, gather evidence and present it to the Court as could any other government prosecutor." A-59. That order gave the Special Prosecutor the final say about the positions taken by

"the United States" in the criminal case against Appellant. The Special Prosecutor entered her appearance in the District Court and this Court as the attorney for the United States. As the District Court recognized, the Special Prosecutor exercises "significant authority pursuant to the laws of the United States," *Arthrex*, 141 S. Ct. at 1980, meaning that she must be an officer. SPA-144; *see also Lucia v. SEC*, 138 S. Ct. 2044 (2018). The District Court also recognized that, because the Special Prosecutor was appointed by a court, not by the President with the advice and consent of the Senate, she must be an "inferior officer[]." SPA-144. But an inferior officer "must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" SPA-145–146 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

The Special Prosecutor took the position in her opposition to Appellant's motion to dismiss following *Arthrex* that the Supreme Court's decision was inapplicable because it "dealt with . . . the authority of Administrative Patent Judges to issue decisions *on behalf of the Executive Branch*," whereas she understood herself to be exercising "the

judiciary's inherent power" following a declination to prosecute by "the Executive Branch." A-161.

The District Court correctly rejected the idea that the United States Attorney's declination transformed an exercise of executive power into an exercise of judicial power. SPA-146–147. Indeed, as the Supreme Court noted in *Arthrex*, even when an officer is called a "judge" and conducts a form of administrative adjudication, their "activities . . . are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power,'" for which the President is ultimately responsible." 141 S. Ct. at 1982 (citation omitted). The District Court recognized that judicial appointment of a prosecutor is different from prosecution by the judicial branch, citing the example of judicial appointment of an interim United States Attorney to fill a vacancy under 28 U.S.C. § 546(d). SPA-147–148. "Although that appointment would be made by the federal judiciary, no one would reasonably suggest that the interim U.S. Attorney would operate free from control or influence by the Attorney General." SPA-148. More fundamentally, as Justice Scalia explained in *Young*,

> The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. See Art. III,

> § 2. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them—which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes.

481 U.S. at 816 (Scalia, J., concurring in the judgment).

It is also incompatible with judicial impartiality to deem a prosecutor representing "the government" in a criminal case to be exercising judicial power and operating as a subordinate within the judicial branch as the Special Prosecutor contended. *See* SPA-151. The District Court considered and rejected the possibility that Judge Kaplan was the Special Prosecutor's "supervisory authority." SPA-146.

That criminal enforcement of federal law is the exclusive province of the executive branch does not mean that courts are powerless to enforce their orders. Courts can imprison or fine to coerce compliance without the involvement of prosecutors and the executive branch. The civil contempt power also includes compensating a party injured by the violation of a judicial order. All of that is inherent in adjudication of cases or controversies under Article III without stretching Article III to reach judicial prosecution of crimes or judicial supervision of prosecutors. The Supreme Court's reliance in *Young*, 481 U.S. at 796, on a statement in

Gompers v. Bucks Stove & Range, 221 U.S. 418, 450 (1911), that lack of judicial power to punish contempts would make court orders a "mere mockery," was based on the understanding at the time of *Gompers* that "[c]ontempts are neither wholly civil nor altogether criminal." 221 U.S. at 441.

Bloom and subsequent Supreme Court decisions differentiating sharply between civil and criminal contempt assign the enforcement of court orders through coercion to civil contempt. Under those decisions, civil contempt (and direct contempt) fall within the courts' sole adjudicative power of Article III, while leaving *all* criminal prosecutions, including prosecutions for criminal contempt, to the President's constitutional authority and responsibility "to take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

That the power to prosecute criminal contempt is exclusively an executive power does not mean that courts cannot *initiate* a criminal contempt proceeding—as Judge Kaplan did here by filing an order to show cause. But the authority to file charges does not carry with it the authority to supervise and direct prosecution of those charges. As Justice Scalia wrote in his *Young* concurrence, there is nothing unusual in our

constitutional system of checks and balances about "the theoretical possibility that the actions of one Branch may be brought to nought by the actions or inactions of another." 481 U.S. at 817 (Scalia, J., concurring in the judgment). That is why the Supreme Court long ago upheld Congress's inherent power to quell an immediate disturbance, similar to the power of a court to issue a direct contempt. *See Anderson v. Dunn*, 19 U.S. (5 Wheat.) 204 (1821). But no one thought then or since that Congress could therefore appoint its *own* prosecutors to bring criminal contempt charges against recalcitrant witnesses in the federal courts. The judiciary, no less than Congress, must depend on the politically accountable executive branch to decide whether and how a criminal contempt case, once initiated, is ultimately carried out in the name of the United States. As the District Court noted, language in *Young* and *Providence Journal* "suggests that what the Supreme Court thought critical was federal courts' authority *to initiate criminal contempt proceedings*, not to prosecute them." SPA-149.[10]

[10] Courts have reversed contempt convictions when the judge has acted as a prosecutor outside the "direct" contempt context. *See, e.g., Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1248 (11th Cir. 2007); *Cromer v. Kraft Foods N.A., Inc.*, 390 F.3d 812, 820–21 (4th Cir. 2004); *Am. Airlines*

Indeed, like Justice Scalia in his *Young* concurrence, the District Court acknowledged the role of an executive branch prosecutor as "an important check on federal courts' contempt power, a potent weapon that can in certain circumstances be liable to abuse." SPA-150 (cleaned up). The question here is whether a prosecutor who does not *know* that she is exercising executive power and is not subject to a chain of command leading to the President can properly serve as an inferior executive officer. After *Arthrex*, that question answers itself.

B. The Special Prosecutor Was Not Under the Required Supervision and Direction of a Principal Officer.

In her opposition to Appellant's motion to dismiss, the Special Prosecutor flatly denied that she was an executive officer acting under the supervision and direction of a principal officer. Indeed, unlike the Independent Counsel in *Morrison v. Olson*, 487 U.S. 654 (1988), no statute creates the office or an executive branch chain of command; the Special Prosecutor is not even statutorily bound to follow Justice Department policies. *Id.* at 672. And the Special Prosecutor's denial that she was subject to supervision came after she had been copied on

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v. Allied Pilots Ass'n, 968 F.2d 523, 531 (5th Cir. 1992); *In re Davidson*, 908 F.2d 1249, 1251 (5th Cir. 1990).

correspondence urging the Department of Justice to impose supervision and direction—correspondence addressed to the then-Acting Deputy Attorney General, one of the officials who presumably would have been in the chain of command if the Special Prosecutor had been supervised. In an email sent the Friday before trial, the Justice Department, "declined to intervene in the federal-court initiated contempt proceedings." A-156.

Simply put, the Special Prosecutor has never, to this day, claimed to have been subject to any chain of command under a principal officer in the executive branch. Her argument that she did not *have to be* subject to such supervision contradicts any effort to argue now that she was.

The District Court correctly recognized that, as an inferior executive officer, the Special Prosecutor must be supervised and directed by a principal executive officer. SPA-145–146. After *Arthrex*, that constitutional mandate can no longer be disputed. "An inferior officer must be directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Arthrex* 141 S. Ct. at 1980 (cleaned up). Like the Administrative Patent Judges ("APJs") in *Arthrex*, the Special Prosecutor has "the power

to render a final decision on behalf of the United States without any such review by [her] nominal superior or any other principal officer in the Executive Branch." *Id.* at 1981 (cleaned up). Indeed, the Special Prosecutor did not have a "nominal superior" in the Executive Branch. Thus, the Special Prosecutor was not even subject to the kinds of *indirect* influence by a principal officer that *Arthrex* held to be constitutionally *insufficient*. *Id.* at 1981–82. The point is not that each of the Special Prosecutor's decisions needed to be approved by a principal officer, but that a specific principal officer had to have the acknowledged *authority* to review them. Neither the Special Prosecutor's response to the motion to dismiss nor the Justice Department's email acknowledged such an authority. Under *Arthrex*, that should be the end of the matter.

Nor is judicial review a cure:

> Review outside Article II—here, an appeal to the Federal Circuit—cannot provide the necessary supervision. While the duties of APJs partake of a Judiciary quality as well as Executive, APJs are still exercising executive power and must remain dependent upon the President. The activities of executive officers may take legislative and judicial forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power,' for which the President is ultimately responsible.

Id. at 1982 (cleaned up). As was true of the APJs in *Arthrex*, "[g]iven the insulation of [Special Prosecutor] decisions from any executive review, the President can neither oversee the [Special Prosecutor] [her]self nor attribute the [Special Prosecutor's] failings to those whom he *can* oversee. *Id.* (cleaned up). The unsupervised exercise of executive power "conflicts with the design of the Appointments Clause to preserve political accountability." *Id.* If that is true of "judges" in the executive branch, surely it must be true of an officer who carries out the core executive function of criminal prosecution. The bottom line is that the Special Prosecutor's "unreviewable executive power" is "incompatible with [her] status as [an] inferior officer[]." *Id.* at 1983.

Although the District Court agreed with Appellant (and disagreed with the Special Prosecutor) that the prosecutor was an officer in the executive branch, it denied relief on two grounds the Special Prosecutor had not raised: the absence of a prohibition of supervision in Rule 42 and the putative untimeliness of Appellant's *Arthrex* claim.

1. Rule 42's Silence Does Not Establish that the Special Prosecutor Was Subject to Executive Branch Supervision.

The District Court's substantive ground for denying relief was that the absence of supervision and direction did not matter as long as Rule 42 did not *forbid* supervision on its face. The Court reasoned that, unlike the statutes governing APJs in *Arthrex*, Fed. R. Crim. P. 42 did not expressly *limit* supervision of the Special Prosecutor, and so there was no separation of powers problem akin to the one identified in *Arthrex*. SPA-151.

This argument badly misreads *Arthrex* as being confined to circumstances in which Congress has expressly insulated an inferior executive branch officer from proper supervision by a principal executive officer. *Arthrex* itself makes clear that the defining characteristic of an inferior executive officer is that they *are* properly subject to supervision by a principal executive officer. *See, e.g.*, 141 S. Ct. at 1980 ("In contrast to the scheme approved by *Edmond*, no principal officer at any level within the Executive Branch 'direct[s] and supervise[s]' the work of APJs [in issuing decisions on patentability]." (quoting *Edmond*, 520 U.S. at 663)). After all, "[i]t is not enough that other officers may be identified

who formally maintain a higher rank, or possess responsibilities of a greater magnitude." *Id.* at 1982–83 (quoting *Edmond*, 520 U.S. at 662–63). Because "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, the question is not whether Rule 42 expressly *prohibited* a principal executive officer from supervising the Special Prosecutor; but whether there was an actual and legally binding supervisory chain of command for the office. Here, again, the fact that neither the Special Prosecutor nor the Justice Department were of the view that she *was* subject to such supervision at the time of Appellant's trial ought to settle the matter.

Indeed, although Appellant entirely agrees with the District Court's conclusion that the Special Prosecutor, just like an interim United States Attorney appointed under 28 U.S.C. § 546(d) or an independent counsel appointed under the former Ethics in Government Act, must be part of the executive branch and subject to oversight by the Attorney General, the Justice Department turned away his request for oversight. The terse email declining Appellant's request for supervision reflects the Department's understanding—in accord with the Special

Prosecutor's—that it does not oversee prosecutors appointed by the court. Appellant moved to dismiss immediately after that.

2. The Challenge to the Special Prosecutor's Authority Was Not Untimely.

The District Court also denied Appellant's motion to dismiss based on the Special Prosecutor's lack of supervision on the ground that it was that it was untimely. Ruling *sua sponte*, the court held that "any defect in the Special Prosecutors' appointment would have (or at the very least should have) been apparent from the outset of the case, *i.e.*, from the moment the Special Prosecutors were appointed by Judge Kaplan on July 31, 2019." SPA-142. The District Court reasoned that, to be timely, Appellant had to have raised the issue by the deadline for filing pretrial motions. *Id.*

But Appellant's challenge was clearly timely under Supreme Court precedent. He raised the issue as soon as the Department of Justice declined his request before trial to exercise supervision and direction (when the defect might have been curable) and moved to dismiss in light of that response before the trial started. That timing is far *earlier* in the litigation than the challenges the Supreme Court held to be timely in *Lucia*, 138 S. Ct. at 2055 (after the administrative hearing on appeal to

the SEC); *United States v. Ryder*, 515 U.S. 177, 182–83 (1995) (on rehearing); and *Arthrex*, 141 S. Ct. at 1978 (on appeal to the Federal Circuit). And nothing in Fed. R. Crim. P. 12 or the Supreme Court's jurisprudence even remotely suggests that civilian criminal defendants are required to file challenges even *earlier* than all other litigants (including military defendants).

In any event, there was no basis for denying relief under Rule 12 on its own terms. To begin with, the Special Prosecutor's opposition did not invoke a default under Rule 12(c)(3) by arguing that the motion was untimely. That was a procedural forfeiture by the prosecution. This Court has recognized that prosecutors forfeit procedural arguments when they fail to raise them. *United States v. Quiroz*, 22 F.3d 489, 490–91 (2d Cir. 1994). And in *Eberhart v. United States*, 546 U.S. 12, 16–17 (2005) (per curiam), the Supreme Court held that the prosecution forfeited an objection to the timeliness of a new trial motion, even though the Rule 33 deadline, unlike Rule 12, is a "rigid" standard that implicates finality interests. As this Court noted in a civil case:

> *Eberhart* thus conveys two significant messages concerning a time limit for taking action, such as moving for a new trial, imposed on litigants by procedural rules. First, the time limit is not jurisdictional. As a result, a party entitled to defeat a

> request for relief as untimely will forfeit the protection of the time limit by not invoking it, a ruling that implies that a court has no obligation to raise the untimeliness issue on its own motion.

In re Johns-Manville Corp., 476 F.3d 118, 123 (2d Cir. 2007).[11]

And even if there are instances where a judicial interest could justify imposing a procedural forfeiture on one party *sua sponte* despite a forfeiture by the other, this is not one of them.[12] The District Court decided other motions to dismiss filed after the initial deadline without holding them untimely. SPA-291; SPA-264. And it did not rule that Appellant's motion to dismiss on the first morning of trial based on the Special Prosecutor's lack of principal officer supervision was untimely. SPA-250 (describing initial ruling). The District Court also reached the

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[11] The Court has applied this reasoning to the timeliness of criminal appeals. *See United States v. Waite*, 12 F.4th 204, 211 (2d Cir. 2021); *United States v. Kantor*, 853 F. App'x 723, 725 (2d Cir. 2021).

[12] *United States v. Mitchell*, 518 F.3d 740, 749 (10th Cir. 2008), noted that "[o]urs is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses. A narrow exception may exist, however, when the issue implicates the court's power to protect its own important institutional interests." In *United States v. Oliver*, 878 F.3d 120, 127 (4th Cir. 2017), the Fourth Circuit noted the risk that "[w]hen the court raises a forfeited issue sua sponte, it undermines the principle of party presentation and risks becoming a third advocate." That risk is especially serious in a criminal contempt case in which the court might already be perceived to be aligned with the prosecution the court initiated—and the prosecutor it appointed.

merits of the issue in its Findings and Conclusions, so imposing a default did not conserve any resources, nor would it have any impact on this Court's ability to review a question of law.

Rule 12 did not bar Appellant's motion because, even under the District Court's analysis of the merits, the motion did not raise a "defect in instituting the prosecution" like those listed in Rule 12(b)(3). The appointment order on its face said nothing about whether the Special Prosecutor was supervised or by whom. *See* SPA-146 (noting that supervision under the order could "logically" rest with either Judge Kaplan or the Attorney General). The District Court acknowledged in its order denying Appellant's new trial motion that "appointment and supervision may be distinct concepts under the Appointments Clause," SPA-258.[13]

[13] *Arthrex* shows that even an otherwise validly *appointed* inferior officer's decisions must be set aside in the absence of supervision and direction. The Court reformed the statute to make the APJs' decisions subject to review by a principal officer. 141 S. Ct. at 1986 (plurality); *id.* at 1997 (Breyer, J. concurring in the judgment in part and dissenting in part). In so acting, *Arthrex* joined two lines of the Supreme Court authority promoting accountability of the executive branch to the President. One line concerns the requirement that every inferior officer be accountable to a principal officer (who is accountable, in turn, to the President). *See Edmond*, 520 U.S. at 662. The other line promotes political accountability by severing statutory provisions restricting

The District Court's forfeiture rationale therefore depends not on a strict application of Rule 12, but on its erroneous view that the challenge should have been brought earlier because the lack of supervision should have been apparent from the face of the Order of Appointment. This view is necessarily dependent on the substantive error discussed in subsection 1, *supra*: that the absence of a textual prohibition on supervision is not the same as the existence of supervision. The motion to dismiss also was not "reasonably available" for purposes of Rule 12(b)(3) until the Justice Department turned down Appellant's request, a decision it did not communicate to Appellant's counsel until the Friday (May 7, 2021) before the Monday (May 10, 2021) trial. And Appellant also brought the intervening decision in *Arthrex* to the District Court's attention immediately after it was decided, renewing his request for dismissal. At the very least, even if Rule 12 applied, the District Court was required under the circumstances to find "good cause" to consider the motion to dismiss under Rule 12. Fed. R. Crim. P. 12(c)(3) ("[A] court

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removal of principal officers. *See, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

may consider the defense, objection, or request if the party shows good cause.").

C. Congress Did Not Authorize the Interbranch Appointment of Special Prosecutors.

Even if the Special Prosecutor were properly supervised as an inferior executive officer, her appointment by Judge Kaplan was itself unconstitutional for two separate but related reasons: First, it was not authorized "by law" as required by the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2. And second, it runs afoul of the separation-of-powers limits on interbranch appointments of inferior executive officers articulated by the Supreme Court in *Morrison*, 487 U.S. 654.

1. Rule 42 Is Not an Exercise of Congress's Constitutional Power to Authorize Appointments of Inferior Officers.

The text of the Appointments Clause is clear: Unlike principal executive officers, who must be nominated by the President, confirmed by the Senate, and serve at the President's pleasure, *see Myers v. United States*, 272 U.S. 52 (1926), "Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

In *Morrison*, the Supreme Court reaffirmed that the Clause allows *Congress* to authorize *inter*branch appointments—including the judicial appointment of an "Independent Counsel" under the Ethics in Government Act of 1978. *See* 487 U.S. at 673–77. As Chief Justice Rehnquist explained for the Court, "the inclusion of 'as they think proper' seems clearly to give Congress significant discretion to determine whether it is proper to vest the appointment of, for example, executive officials in the courts of Law." *Id*. at 673 (cleaned up); *see also Ex parte Siebold*, 100 U.S. 371, 397–98 (1879) ("[A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress."). Congress has not enacted a statute authorizing judicial appointment of special prosecutors.

The order appointing the Special Prosecutor cites Fed. R. Crim. P. 42(a)(2), and, to be sure, court rules have the force of law in many circumstances.[14] But when the Constitution refers to *Congress* acting "by

[14] In the order appointing the Special Prosecutor, Judge Kaplan also referred to the "inherent power of the Court." A-59. The "inherent power of the Court" is not a "law" by which *Congress* has authorized interbranch appointments. *See, e.g.*, *Young*, 481 U.S. at 815–17 (Scalia, J., concurring in the judgment). And whatever inherent power courts may have over judicial offices, they have no inherent power to make interbranch appointments of executive officers.

law," it means by legislation. "Adoption" of a rule under the Rules Enabling Act (really, Congress's failure to veto a rule) is not an exercise of Congress's Article I legislative power—which requires bicameral action and presentment to the president. *INS v. Chadha*, 462 U.S. 919, 952 (1983). Indeed, the Supreme Court recently made it clear that there are no exceptions to such constitutional requirements under the Appointments Clause. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656-57 (2020) (rejecting exception for officers of the United States under Article IV).

2. Congress Cannot Delegate its Power to Authorize Interbranch Appointments.

It would violate fundamental principles of separation of powers—especially for interbranch appointments—if Congress could delegate its Appointments Clause power to the judiciary (by rule) or the executive (by regulation), because the function of the Appointments Clause is to regulate appointments by those branches as *Congress* thinks proper. As the Court explained in *Freytag v. C.I.R.*, 501 U.S. 868 (1991),

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. The Appointments Clause not only guards

> against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.

Id. at 878 (citation omitted); *see also Free Enter. Fund v. Pub. Co. Acc'tg Oversight Bd.*, 561 U.S. 477, 497 (2010) ("The diffusion of power carries with it a diffusion of accountability.").

If Congress could "diffuse appointment power," *see Freytag*, 501 U.S. at 887, by delegating authority to make interbranch appointments, that would allow the delegated branch to choose the offices and officers exercising the authority of, and thereby exert control over the functions of, a coordinate branch. That is the reason, in explaining why the Ethics in Government Act did not unduly aggrandize the constitutional functions assigned to the Executive Branch, why *Morrison* went out of its way to stress that "the Special Division has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment." 487 U.S. at 695. In other words, the separation-of-powers concerns that might have arisen from the otherwise valid interbranch appointment in

Morrison were assuaged by the fact that no one branch was arrogating power to itself.

Here, in contrast, Rule 42(a)(2) leaves the decision to appoint a special prosecutor in criminal contempt cases to the very judge initiating the prosecution after the Justice Department has declined to prosecute. Thus, the non-statutory judicial appointment of special prosecutors under Rule 42(a)(2) constitutes the very "*judicial* usurpation of properly executive functions," *Morrison*, 487 U.S. at 695, from which the *Morrison* Court distinguished the independent counsel. If the Special Division in *Morrison* had not only appointed the independent counsel against (or at least without) the Attorney General's authorization, but also hand-picked the presiding district judge (as happened in this case), it is hard to imagine the Supreme Court reaching the same result. *See id.* at 677.

The Supreme Court's recent emphasis on formal requirements in its Appointments Clause jurisprudence makes the separations of powers violation even clearer here than it was when the Supreme Court decided *Morrison*. *See United States v. Arpaio*, 906 F.3d 800, 808 (9th Cir. 2018) (Callahan, J., dissenting from the denial of reconsideration en banc) ("The Federal Rules of Criminal Procedure, as promulgated by the

Supreme Court under the Rules Enabling Act, could no more *grant* Article III judges the power to appoint a prosecutor to initiate criminal proceedings than the judicial branch or legislative branch could unilaterally usurp some purely executive function.").

In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), for instance, a majority of the Court adopted the central argument from Justice Scalia's *Morrison* dissent—that "[u]nder our Constitution, the 'executive Power'—*all of it*—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Id*. at 2191 (quoting U.S. CONST. art II, § 1, cl. 1) (emphasis added); *see also id*. at 2197 ("The entire 'executive Power' belongs to the President alone."); *see generally Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). To that end, *Seila Law* repeatedly described *Morrison*'s endorsement of the independent counsel regime as a narrow "exception" to the constitutional default. *See, e.g.*, 140 S. Ct. at 2198–200; *see also Arthrex*, 141 S. Ct. at 1970 (Gorsuch, J., concurring in part) ("This admittedly formal rule serves a vital function. If the executive power is exercised poorly, the Constitution's design at least ensures '[t]he people know whom to blame'—and hold accountable." (quoting *Morrison*, 487 U.S. at 729 (Scalia, J., dissenting))).

But even if Congress could constitutionally delegate its Appointments Clause authority to the courts to be exercised through rulemaking, it did not do so in the Rules Enabling Act. A rule must not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As the Supreme Court has long understood it, whether a rule runs afoul of this constraint turns on "whether a rule really regulates procedure,—the *judicial* process for enforcing rights and duties recognized by substantive law." *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941) (emphasis added). Rule 42(a)(2) does not "regulate[] procedure" as *Sibbach* understood the phrase. 312 U.S. at 14. The procedures governing prosecution of a criminal contempt are the same regardless whether the prosecutor is the United States Attorney or a private lawyer. What Rule 42(a)(2) does is create an executive office and authorize a judge to fill it. And insofar as it maintains a criminal prosecution that the United States Attorney has declined to bring, the rule is substantive in effect, not procedural.

3. Young *Did Not Decide the Issue.*

The District Court based its conclusion that the Special Prosecutor had been validly appointed largely on *Young*. *See* SPA-144–145; *id.*at

149 & n.508. In the District Court's view, because the Supreme Court upheld the validity of court-appointed special prosecutors in *Young*, the appointment in this case must likewise be valid.

There are at least three problems with the District Court's reliance on *Young*. First, *Young* simply did not consider any of the specific challenges Appellant has raised to the Special Prosecutor's appointment and involvement in this case. The Petitioners in *Young* focused their challenge on whether the appointment of an *interested* special prosecutor raised due process concerns. *See* Brief for Petitioners at 15–34, *Young*, 481 U.S. 787 (Nos. 85-1329, 85-6207), 1986 WL 727440. Their only challenge to the appointment itself was to whether it was authorized by the then-extant version of Fed. R. Crim. P. 42(b). *See id*. at 40–41. No party in *Young* argued that Rule 42 was invalid under the Rules Enabling Act to the extent that it did authorize the appointment of a special prosecutor, or that the Appointments Clause required specific statutory authorization for such an appointment. And the only Justice in *Young* to consider those issues would have held that such an appointment was unconstitutional. *See* 481 U.S. at 815 n.1 (Scalia, J., concurring in the

judgment). The District Court therefore wrongly read *Young* to decide questions it did not even consider.

Second, *Young*'s discussion of the historical tradition of judicial punishment of contempt at least outwardly rested on the wrong distinction—between in-court and out-of-court contempt, not between civil and criminal contempt. *See, e.g.*, *id.* at 798–99; *see also Bagwell*, 512 U.S. at 827 ("Although the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempts are somewhat less clear.").

The reason why this distinction matters is because of the Supreme Court's subsequent decision in *Morrison*. As the Court would explain just one year after *Young*, criminal prosecutions are "'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Morrison*, 487 U.S. at 691. *Young*, in contrast, described contempt prosecutions as "part of the *judicial* function," 481 U.S. at 795 (emphasis added), and rejected the argument that "*any* prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage." *Id.* at 799–800 (emphasis added). Those statements can be

reconciled by distinguishing between the punishment of direct contempt to quell courtroom disruption in the presence of the judge and a criminal contempt prosecution like the one in this case—which is functionally indistinguishable from any other criminal case. *See id.* at 815 (Scalia, J., concurring in the judgment) (quoting U.S. CONST. art. III, §§ 1, 2)). Read together, *Young* and *Morrison* hold that stopping direct contempt in the courtroom is a judicial function (just as stopping disruption of Congress is within the legislative power), but that prosecuting crimes, including the prescribed offense of criminal contempt, is an executive function.

Finally, insofar as the District Court understood *Young* to allow prosecutions as an exercise of judicial power, that understanding does not survive *Seila Law*—in which a majority of Justices adopted Justice Scalia's position that "[t]he entire 'executive Power' belongs to the President alone." 140 S. Ct. at 2197. *Seila Law* confirms that the prosecutorial function cannot shift from the executive to the judicial branch just because the U.S. Attorney declines a referral. The point is not, contra the district court, that *Seila Law* (or *Arthrex*) overruled *Young* (or *Morrison*, for that matter). *See* SPA-145, SPA-149–50. Rather, it is

that, after *Seila Law* (which read *Morrison* narrowly), there is every reason to read *Young* narrowly, as well.

4. The Supreme Court's Promulgation of Rule 42 Does Not Settle Its Validity.

The District Court rejected Appellant's constitutional challenge to the appointment of the Special Prosecutor as foreclosed by Rule 42(a)(2), because Rule 42 "was promulgated by the Supreme Court and adopted by Congress pursuant to The Rules Enabling Act"—not because of any *sua sponte* procedural forfeiture. SPA-145 n.509. The District Court concluded that any challenge to the face of Rule 42(a)(2) should be directed to the Supreme Court. *Id.*

That holding was incorrect. The Supreme Court's promulgation of a rule of procedure under the Rules Enabling Act is not a dispositive adjudication of the Rule's validity, either on its face or as applied. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946) ("The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency."); *see Burlington N.R. Co. v. Woods*, 480 U.S. 1, 6 (1987) (explaining that rules have only "*presumptive* validity under both the constitutional and statutory constraints" (emphasis

added)). In the absence of action by Congress specifically authorizing interbranch appointment of a prosecutor, the Special Prosecutor lacked constitutional authority to enforce federal criminal laws in the name of the United States.

II. THE PROSECUTION VIOLATED THE PRINCIPLE OF RESTRAINT WARRANTING REVERSAL UNDER THIS COURT'S SUPERVISORY POWER.

The Court can decide this case without reaching either of the constitutional issues in Part I, because the absence of structural checks on the exercise of criminal contempt power produced the appearance and reality of unfairness.

Checks on governmental power are central to our constitutional scheme. Yet the record of this case is an example of governmental power in its most elemental form—punishment by imprisonment—without any restraints save appellate intervention by this Court. No grand jury of Appellant's fellow citizens reviewed the charges, even when they carried felony penalties; no petit jury of Appellant's peers weighed the evidence of guilt at trial.[15] The judge who issued the OSC picked the judge who

[15] Appellant had a *statutory* right to a jury trial on Counts I and II pursuant to 18 U.S.C. § 3691, regardless of the petty offense maximum penalty, because the allegations supporting those charges arguably

presided over the criminal case without recusing himself. He chose a private prosecutor who, among the many distinguished former federal prosecutors who would have been available, had ties to Chevron. In doing so, the judge overrode the U.S. Attorney's decision to decline the prosecution and chose an unsupervised prosecutor who could not serve as an independent executive branch check on the contempt power.

It is unusual for Nobel laureates, members of Congress, and the United Nations Working Group on Arbitrary Detention to speak out in in condemnation of a federal criminal prosecution. Even if this Court discounts those protests, they are evidence, at a minimum, of serious questions as to the perceived legitimacy of federal judicial proceedings—questions that weaken rather than vindicate judicial authority. That is why this Court has a special responsibility to rein in criminal contempt through its supervisory power. As the Supreme Court explained in *Young*, "[w]hile a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by

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"constitute[]" obstruction of justice in violation of the catchall clause of 18 U.S.C. § 1503 as construed by this Court in *United States v. Cohn*, 452 F.2d 881 (2d Cir. 1971). The District Court denied Appellant's motion for a jury trial on that basis. Crim. Dkt. 163 at 3–6.

the principle that only the least possible power adequate to the end proposed should be used in contempt cases." 481 U.S. at 801 (cleaned up).

Indeed:

> supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness. The exercise of supervisory authority 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 808–09 (citations omitted). This Court's supervisory authority to oversee criminal contempt prosecutions within the Circuit is not limited to enforcing the *Young* per se rule against the appointment of interested prosecutors. *See Shillitani v. United States*, 384 U.S. 364, 371 n.9 (1966) ("The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate."). This Court's intervention is warranted both to protect "basic notions of fairness," *Young*, 481 U.S. at 808, and to ensure that the contempt power is exercised in a way that enhances respect for the judiciary and vindicates its authority. It would be counterproductive to prosecute a person for criminal contempt in the name of protecting judicial authority,

yet to do so in such a way that the prosecution itself undermines respect for the courts.

The principle of restraint instructs against charging criminal contempt for permissibly taking civil contempt of the same orders to obtain appellate review of his "foundational objection" to discovery premised on an invalid civil contempt theory, as Appellant did in this case. The principle of restraint also precludes charging criminal contempt after civil contempt sanctions have already produced compliance with an order.

The scant two pages of the District Court's Findings and Conclusions addressing whether the criminal contempt charges were an exercise of "the least possible power adequate to the end proposed" fail to engage seriously with the legal principle. *See* SPA-242–244. For example, for the "hornbook" proposition "that the same contemptuous act can subject a contemnor to both civil and criminal sanctions," the District Court cites dicta in a series of pre-*Young* decisions, none of which actually involves imposing both criminal and civil contempt for the same act, much less—as Judge Kaplan did here—filing criminal contempt charges even after achieving compliance through civil contempt. SPA-243 &

n.830.[16] The District Court made no mention of the Supreme Court's illustration of the principle of restraint in *Young*: "[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." 481 U.S. at 801 (citation omitted). That is not consistent with heaping criminal punishment on someone who has already yielded to civil contempt sanctions, as Judge Kaplan did in this case.

The District Court also failed to explain how the principle of restraint advanced in *Young* was consistent with criminally prosecuting Appellant for violating discovery orders when Appellant's explicit reason for doing so was to challenge the civil contempt theory on which the scope of discovery was based. Unfortunately, through his own ineptitude as a pro se litigant, Appellant failed to call this Court's attention to how the discovery orders depended on the contempt theory this Court ultimately rejected. But that does not change the fact that Appellant had a proper

[16] The language quoted from *In re Grand Jury Witness*, 835 F.2d 437, 440 (2d Cir. 1987), traces back to a discussion of whether civil and criminal contempt for the same act is barred by double jeopardy, not by the principle of restraint. *See Yates v. United States*, 355 U.S. 66, 74 (1957).

purpose to obtain appellate review. Chevron could not have justified sweeping discovery of Appellant's electronic devices if discovery had been limited to finding assets to satisfy the cost judgment, which is all New York law allows. The only possible basis for the intrusive discovery the District Court ordered in the civil case was therefore Chevron's invalid theory that Appellant could be held in contempt for selling the interests of third parties in the judgment to finance the litigation. Appellant's appeal-minded noncompliance to raise this "foundational objection" did not warrant prosecution for criminal contempt.

If, as explained above, a special prosecutor must be subject to supervision and direction by a principal officer accountable to the President, then even a court-appointed prosecutor can be a check of sorts on criminal contempt power. As the District Court recognized in its Findings and Conclusions after trial, it is not reasonable to interpret Rule 42 as shifting the prosecution function from the executive branch to the judiciary if the United States Attorney declines to prosecute. SPA-146, SPA-149–150. The United States Attorney's Office's declination to prosecute for lack of resources must be understood to mean that resources necessary were disproportionate to the public interest that

would be served by such a prosecution, not that the Office could not possibly staff the case. The former is the kind of determination that falls within the province of the Article II executive branch.[17] In the absence of checks—like independent review by a prosecutor accountable to the executive branch—this Court should exercise its supervisory power to reverse Appellant's conviction.

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[17] According to section 752 of the Department of Justice *Criminal Resource Manual*:

> In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the United States Attorney of the court's request to prosecute a mere formality; however, there may be sound reasons in a given case for the United States Attorney to decline participation in the proceedings and for the prosecution to be conducted on behalf of the court by private counsel appointed by the court for this purpose. On a case-by-case basis, the United States Attorney should evaluate not only the propriety of his participation in 18 U.S.C. § 401 proceedings, but also the interest of the government as a litigant vis-a-vis the clear duty of the United States Attorney to preserve respect for the authority of the federal court upon which successful law enforcement relies.

https://www.justice.gov/archives/jm/criminal-resource-manual-768-indirect-criminal-contempt-role-prosecutor.

CONCLUSION

Appellant's convictions for criminal contempt should be reversed.

DATED: November 5, 2021

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)(A), because, as measured by the word processing system used to prepare this document, there are 13,839 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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