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20 UNITED STATES DISTRICT COURT

21 DISTRICT OF ARIZONA

22
23 United States of America,
24 Plaintiff,

25 v.

26 Joseph M. Arpaio,
27 Defendant.

No. CR-16-01012-001-PHX-SRB

**[PROPOSED] BRIEF OF AMICI
CURIAE IN SUPPORT OF
APPOINTMENT OF RULE 42
ATTORNEY TO PROSECUTE
APPEAL**

28

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1 **I. INTRODUCTION AND BACKGROUND**

2 During the October 4, 2017, hearing on Defendant’s Vacatur Motion, this Court
3 concluded that it was “bound by the Supreme Court’s decision in *Grossman* that a
4 criminal contempt of a court order is an offense against the United States.” [Transcript of
5 10/4/17 Motion Hearing (“Hrg. Tr.”), at 5:6-8] The Court agreed with *Amici* that “the
6 criminal contempt pardoned here is for a willful violation of a preliminary injunction that
7 affected constitutional rights, a more significant issue than the willful violation of the
8 injunction against selling alcohol in *In re Grossman*.” [*Id.* at 6:11-15] While the Court
9 recognized this potential basis for distinguishing *Grossman*, the Court concluded that it
10 was nonetheless bound by that decision. The Court therefore found the Pardon valid, and
11 held that the Pardon required this action for criminal contempt be dismissed with
12 prejudice. [*Id.* at 6:19-20; *see also* Doc. 243 at 1]

13 While *Amici* respectfully disagree with the Court’s conclusions, they do not ask the
14 Court to revisit its decisions. *Amici* understand that the Court had before it the benefit of
15 briefing on the issue, and that the Court determined that it was bound by appellate
16 precedent—albeit precedent that it agreed can be distinguished from this case. *Amici*
17 submit this short supplemental brief to ask that the Court take a modest action to provide
18 for appellate consideration of this issue, by appointing a private attorney—as the Federal
19 Rules of Criminal Procedure command—who can then prosecute an appeal.

20 **II. ARGUMENT**

21 To begin, as this Court’s assessment reflects, the question of the Pardon’s validity
22 implicates considerations beyond those at issue in *Grossman*, for this case involves
23 private constitutional rights—a more significant issue than did *Grossman*. Under these
24 circumstances, this Court’s ruling should not be insulated from appellate review by the
25 Ninth Circuit, which could reasonably deem *Grossman* distinguishable, or ultimately by
26 the Supreme Court, which is free to reconsider *Grossman* itself.

27 Providing for appellate review in this case is all the more necessary because the
28 core power of the judiciary is at stake. The “fundamental purpose [of criminal contempt

1 proceedings] is to preserve respect for the judicial system itself.” *Young v. U.S. ex rel.*
2 *Vuitton et Fils S.A.*, 481 U.S. 787, 800 (1987). For this reason, the Supreme Court has
3 instructed that the appellate courts play an important role in criminal contempt matters:
4 “The exercise of supervisory authority [by the appellate courts] is especially appropriate
5 in the determination of the procedures to be employed by courts to enforce their orders, a
6 subject that directly concerns the functioning of the Judiciary.” *Id.* at 809. This Court
7 should not limit the appellate courts’ opportunity to consider the important question raised
8 here concerning the judiciary’s authority to enforce constitutional rights.

9 Appointing a private attorney who can prosecute an appeal is not only important to
10 the Judicial Branch as a whole—it is also mandated by the Federal Rules of Criminal
11 Procedure. Rule 42(a)(2) directs that in a prosecution for criminal contempt, “[t]he court
12 *must* request that the contempt be prosecuted by an attorney for the government,” and “[i]f
13 the government declines the request, the court *must* appoint another attorney to prosecute
14 the contempt.” Fed. R. Crim. P. 42(a)(2) (emphasis added). Every court that has
15 considered the issue has held that Rule 42(a)(2)’s requirement that a private attorney be
16 appointed if the government declines to prosecute the contempt is “mandatory.” *See*
17 *United States v. Struckman*, 611 F.3d 560, 580 n.1 (9th Cir. 2010) (Benzon, J. concurring)
18 (“If criminal contempt is pursued, a prosecutor, either for the government or appointed
19 specially by the court, would be *mandatory* as to conduct occurring outside the court’s
20 presence.” (citing Rule 42(a)(2)) (emphasis added)); *In re Troutt*, 460 F.3d 887, 894 (7th
21 Cir. 2006) (“The requirement in Rule 42(a)(2) to appoint a prosecutor is spelled out in
22 mandatory language[.]”); *e.g.*, *United States v. Peoples*, 698 F.3d 185, 193 (4th Cir. 2012)
23 (reversing contempt conviction because district court violated Rule 42(a)(2) in failing to
24 appoint a prosecutor for second contempt trial).

25 In this case, although the Government obtained a conviction, it then abandoned any
26 efforts to prosecute the contempt. The Government has argued in its briefing and in oral
27 argument that “this prosecution is over,” that “[t]here will be no sentencing,” “[t]here will
28 be no judgment,” and there will be no appeals. [Hrg. Tr. at 14:10-23; *see also* Doc. 225 at

1 3] Under these circumstances, where the government has abandoned the prosecution, Rule
2 42(a)(2) requires that the Court “appoint another attorney to prosecute the contempt.”¹

3 A criminal case is not final until it is resolved by direct appeal. The Supreme Court
4 has explicitly held that criminal appeals are an “integral part of (our) system for finally
5 adjudicating [a criminal defendant’s] guilt or innocence.” *Griffin v. Illinois*, 351 U.S. 12,
6 18 (1956); see *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983). Nothing in
7 Rule 42 even suggests that a private attorney could only prosecute a contempt in district
8 court and not on appeal. *E.g.*, *In re Special Proceedings*, 373 F.3d 37, 39-40 (1st Cir. 2004)
9 (Rule 42 prosecutor representing United States on appeal); *United States v. Cutler*, 58
10 F.3d 825, 828 (2d Cir. 1995) (same). Thus, the duty to prosecute set forth in Rule 42
11 includes the duty to prosecute an appeal where, as here, valid grounds for appeal exist.

12 Rule 42 reflects the judgment of the Supreme Court and Congress that, when the
13 Justice Department fails to pursue a contempt prosecution, the integrity of the Judicial
14 Branch requires appointment of another attorney to serve that function. Because this Court
15 believed itself bound by appellate precedent (and had before it *amici* briefs presenting
16 arguments that a private attorney might have made), it may have concluded it did not need
17 a private attorney for its own consideration of the issue. But, now that this Court has
18 dismissed the contempt charge, failure to appoint a private attorney could allow the
19 President and his Justice Department to effectively block appellate consideration of a
20 constitutional issue of critical importance to the Judicial Branch as a whole.

21 **III. CONCLUSION**

22 For the foregoing reasons, *Amici* respectfully request that the Court appoint a
23 private attorney to prosecute an appeal of this case.

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26 _____
27 ¹ Rule 42(a)(2) is not limited to situations where the government declines to
28 prosecute before charges are brought. See, e.g., *In re Grogan*, 972 F. Supp. 992, 1008 n.22
(E.D. Va. 1997) (denying government’s motion to dismiss criminal contempt charge and
appointing a private attorney to continue the prosecution).

1 Dated: October 16, 2017

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*Application for Admission *Pro Hac Vice* Forthcoming

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants for this matter.

s/ Stephanie J. Lawson