No. 17-10448

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

JOSEPH M. ARPAIO,

Defendant/Appellant.

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

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

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CORPORATE DISCLOSURE STATEMENT

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

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Pursuant to this Court's June 1, 2018 Order (Doc. 26), *Amici* submit this Brief in Opposition to Rehearing *En Banc*.[1] For the reasons below, this Court should decline to reconsider the panel's procedural order *en banc*.

INTRODUCTION

There are no grounds for rehearing this matter *en banc*. In a well-reasoned, fact-bound opinion, a majority of the panel concluded that it had inherent authority, as well as authority under FED. R. CRIM. P. 42(a)(2), to appoint a private attorney to ensure that this Court will have the benefit of full briefing and argument on the merits of this case. The panel also found that a private attorney was necessary and appropriate in this case, given the unusual circumstances presented by the Government's refusal to defend its contempt conviction on appeal. *U.S. v. Arpaio*, 887 F.3d 979, 981-82 (9th Cir. 2018).

Neither the Government nor Arpaio petitioned for rehearing of the panel's order, nor did they file a request for rehearing *en banc*—and for good reason. It has long been established that "*[e]n banc* courts are the exception, not the rule," *U.S. v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960), and that *en banc* rehearing "should be made only in the most compelling" or "rarest of circumstances," *Mitts v.*

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), *amici* state that no party's counsel has authored this brief in whole or in part. No party, no party's counsel, and no one else other than *amici curiae*, their members, and their counsel have contributed money intended to fund preparing or submitting this brief.

Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing *en banc* (citations omitted)); *see also, e.g.*, *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301, 1302 (10th Cir. 2016) (Briscoe, J., concurring in the denial of rehearing *en banc*) (circuit courts "should be extraordinarily cautious in exercising [their] inherent authority to *sua sponte* rehear a case when the parties themselves have chosen not to seek *en banc* review"). Indeed, FEDERAL RULE OF APPELLATE PROCEDURE 35 cautions that *en banc* review "is not favored" and is reserved for "a question of exceptional importance" or "to secure or maintain uniformity of the court's decisions." FED. R. APP. P. 35(a).

The panel's decision does not meet either standard, as it neither conflicts with Supreme Court or Ninth Circuit precedent, nor presents a precedent-setting error of exceptional public importance. While there is no denying the importance of the merits of this case, the panel's decision appointing a private attorney merely resolves the question of whether anyone will oppose Arpaio's arguments on appeal, while adhering to precedent from both the Supreme Court and this Court interpreting RULE 42 and the Court's inherent authority.

Because the panel's decision fails to meet the high standard for *en banc* review that FEDERAL RULE OF APPELLATE PROCEDURE 35 demands, the Court should decline to consider this matter *en banc*. *E.g.*, *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180 (9th Cir. 2013) (call to rehear panel order *en banc* failed to win a majority

vote, where order created no inter-circuit split and did not present an issue of exceptional importance).

FACTUAL AND PROCEDURAL BACKGROUND

On July 31, 2017, Arpaio was found guilty of criminal contempt for willfully violating a federal judge's order prohibiting him from detaining persons in violation of their constitutional rights. On August 25, 2017, President Trump declared that Arpaio was "convicted for doing his job" and issued the Pardon. Arpaio accepted the Pardon and subsequently moved for two forms of relief based on the Pardon: (1) dismissal of the case with prejudice; and (2) vacatur of the conviction and all other orders in the case.

The Department of Justice refused to oppose the extraordinary relief Arpaio sought. Instead, the Department of Justice agreed with Arpaio that vacatur and dismissal was proper. Multiple *amici*, including *amici* here, filed briefs in the district court arguing that the Pardon was unconstitutional, and that appointment of a Rule 42 attorney was necessary in light of the Government's apparent refusal to continue the prosecution.

On October 4, 2017, the district court denied *amici*'s request for a Rule 42 attorney and, believing itself bound by *Ex parte Grossman*, 267 U.S. 87 (1925), found the Pardon valid and that the Pardon required that the action be dismissed with prejudice. Concerned that no party with standing to do so would appeal from the

district court's order, *amici* filed a supplemental brief requesting that the court appoint a RULE 42 attorney that could appeal the order of dismissal.

While *amici*'s RULE 42 request was pending, on October 19, 2017, the district court issued its order denying vacatur, from which this appeal was taken. *Amici* subsequently filed a brief with this Court requesting appointment of a RULE 42 attorney. By order dated November 22, 2017, this Court directed the Government to "file a statement indicating whether it intends to enter an appearance and file an answering brief in this appeal." (Doc. 9, at 1-2). The Government responded that it "does not intend to defend the district court's order from October 19, 2017 . . . ; instead, the government intends to argue, as it did in the district court, that the motion to vacate should have been granted." (Doc. 12, at 2). The Government took "no position on whether the Court should appoint counsel [under Rule 42] to make any additional arguments." (*Id.*) Nor did Arpaio address *amici*'s request for appointment of a RULE 42 attorney.

On April 17, 2018, the panel issued its order declaring its intention to appoint counsel to defend the district court's denial of Arpaio's request for vacatur. (Doc. 25). Neither Arpaio nor the Government petitioned for rehearing of that order, nor did they file a request for rehearing *en banc*. On June 1, 2018, the *En Banc* Coordinator issued an order notifying the parties that a judge had made a *sua sponte* request for a vote on whether to rehear the panel's order *en banc*, and requesting that

the parties file briefs setting forth their positions with respect to whether the order should be reheard *en banc*. (Doc. 26). The order also stated that *amici* were permitted, but not required, to file a brief stating their positions on whether the order should be reheard *en banc*. (*Id.*)

ARGUMENT

I. *En Banc* Review Is Rare and Not Warranted Under the Standards of FED. R. APP. P. 35.

"An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless . . . *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a). Indeed, *en banc* review in the Ninth Circuit is markedly more limited than review allowed under RULE 35 because the Ninth Circuit Rules require that the panel decision "directly conflicts with an existing opinion by another court of appeals *and* substantially affects a rule of national application in which there is an overriding need for national uniformity." 9TH CIR. R. 35-1 (emphasis added). In other words, this Court will only exercise its discretion to rehear a case *en banc* if the decision both creates an intra- or inter-circuit split *and* raises a pressing national issue.

The fact that a judge disagrees, or even that a few judges disagree, with the result reached by the panel is insufficient to justify *en banc* review. *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir. 1981) (Robinson, J.,

dissenting). The function of *en banc* hearings "is not to review alleged errors for the benefit of losing litigants," but rather to "bring consistency within [the] law." *Thompson v. Calderon*, 120 F.3d 1045, 1070 (9th Cir. 1997) (Kozinski, J., dissenting), *rev'd on other grounds*, 523 U.S. 538 (1998). And especially where, as here, no party has even sought *en banc* review, this Court should not strain to exercise its inherent authority to do so *sua sponte*. *Herbert*, 839 F.3d at 1302.

A. *En Banc* Consideration Is Not Necessary to Secure or Maintain Uniformity

The panel's decision is entirely consistent with—not "contrary" to—existing precedent and therefore does not justify the extraordinary remedy of *en banc* review. There was nothing new in the panel's reaffirmance of the long-standing rule that this Court has inherent authority to appoint a private attorney to support an undefended judgment below, or to take a specific position as *amicus*. Nor was there anything novel in the panel's straightforward application of RULE 42, which by its terms governs criminal proceedings not only in the district court, but also "in the United States courts of appeals and the Supreme Court of the United States." FED. R. CRIM. P. 1. Notably, the dissenting judge cited no case (and *amici* are aware of none) that conflicts with the majority's opinion.

First, the panel's conclusion that it has inherent authority to appoint a private attorney is entirely consistent with the relevant precedents of the Supreme Court and this Court. *See* Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici*

Curiae to Defend Abandoned Lower Court Decisions?, 63 STAN. L. REV. 907, 909-10 (2011) (noting that the Supreme Court has appointed counsel to support an undefended judgment below, or to take a specific position as *amicus* forty-three times since 1954); *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (affirming district court's order appointing *amicus* to "investigate fully the facts alleged in the complaint, [and] participate in the case with the full rights of parties"), *overruled on other grounds by Bown v. Reinke*, No. 16-35573, 2018 WL 2011036, 722 Fed. App'x 681 (9th Cir. May 8, 2018); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) ("[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt."). The panel's conclusion is also consistent with that of other courts that have addressed the issue. *See, e.g.*, *U.S. v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 992 (2d Cir. 1984) (affirming district court's order granting proposed intervenors "elevated *amicus* status" that would have allowed them to call their own witnesses and cross-examine witnesses); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) (recognizing federal courts' "inherent authority to appoint 'friends of the court' to assist in their proceedings" (citation omitted)); *U.S. v. State of Mich.*, 116 F.R.D. 655, 657 (W.D. Mich. 1987) (granting civil liberties group *amicus* litigating status under its inherent authority).

Likewise, the panel's opinion with respect to RULE 42 is entirely consistent with existing precedent and the mandatory text of the rule. *See Arpaio*, 887 F.3d at 981-82. RULE 42 is directed to "the court," defined as "a federal judge performing functions authorized by law." FED. R. CRIM. P. 1(b)(2). And RULE 42 requires that in a prosecution for criminal contempt, if the Government declines to prosecute the matter, "the court *must* appoint another attorney to prosecute the contempt." FED. R. CRIM. P. 42(a)(2) (emphasis added); *see In re Troutt*, 460 F.3d 887, 894 (7th Cir. 2006) ("The requirement in Rule 42(a)(2) to appoint a prosecutor is spelled out in mandatory language.").

To be sure, as the majority recognized, "[i]n RULE 42(a)(2)'s most common application, the district court appoints a special prosecutor to investigate and try a criminal contempt when the government declines to perform that function." *Arpaio*, 887 F.3d at 981 (citations omitted). But the majority also properly concluded that "the operation of RULE 42(a)(2) is not confined to investigations and trials in the district court," and that "[a] private attorney appointed under the rule has the authority to act as a special prosecutor not only in the district court but also in the court of appeals." *Id.*; *see, e.g.*, *Ex parte Grossman*, 267 U.S. at 108 (where special counsel employed by the Department of Justice appeared to uphold the legality of the detention, while the Attorney General appeared as *amicus curiae* to defend the validity and effectiveness of the pardon); *Young*, 481 U.S. at 808-09 (invalidating

the appointment of special prosecutor because he was an interested party, not because he prosecuted an appeal); *In re Special Proceedings*, 373 F.3d 37, 39-40 (1st Cir. 2004) (accepting without comment private attorney's briefing and argument on behalf of United States in appeal by a contemnor); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 294 (4th Cir. 2000) (same); *U.S. v. Cutler*, 58 F.3d 825, 831-32 (2d Cir. 1995) (same); *Matter of Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir. 1986) (same).

The fact that no other appellate court decision has appointed a RULE 42 attorney in the rare circumstances presented here should come as no surprise. And the rarity of these circumstances is no reason to reconsider the panel's decision to follow the mandatory language of RULE 42.

B. The Panel's Decision Is Not of Exceptional Importance

The panel's decision appointing a private attorney also does not meet the strict requirements to meet the "exceptional importance" prong of *en banc* review. "There is now general agreement among the circuits that the 'truly extraordinary' cases meriting *en banc* treatment are those involving 'issue(s) likely to affect many other cases' in other words, those of real significance to the legal process as well as to the litigants." *Foley*, 640 F.2d at 1341 (Robinson, J., dissenting) (footnotes and citations omitted). The panel order does not meet that standard. The panel's decision to appoint a special prosecutor was based on the unusual circumstances presented by

the Government's refusal to continue to prosecute the contempt or to defend its contempt conviction on appeal. The appointment of a private attorney may have some impact on the parties in this case. But, the fact that another lawyer will now appear to argue a position the United States itself long espoused will have no appreciable effect on any other case or the legal process.

Nor does the fact that Judge Tallman dissented justify *en banc* review. *See, e.g.*, *Foley*, 640 F.2d at 1341 (Robinson, J., dissenting) (*en banc* review is not justified "merely because (a judge) disagrees with the result reached by the panel"). At best, Judge Tallman's dissent disagrees with the majority's application of the law to the record. Any purported error in the application of the law to the record would not affect a rule of national application as required to justify *en banc* review. *See* 9TH CIR. R. 35-1.

Tellingly, the Government took no position on whether the Court should appoint a RULE 42 attorney in its statement to the Court (Doc. 12). And, neither the Government nor Arpaio sought *en banc* review of the order appointing a private attorney. If there were some legal or prudential barrier to appointment of a private attorney in this case, the parties would have raised it in a filing. Their failure to do so confirms that *en banc* review is inappropriate here.

CONCLUSION

For the reasons set forth above, this Court should decline to reconsider the

panel order *en banc*.

Respectfully submitted on June 22, 2018.

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CERTIFICATE OF SERVICE

I, Jean-Jacques Cabou, attorney for *Amicus Curiae* The Protect Democracy Project, hereby certify that on June 22, 2018, an electronic copy of this document was served by notice of electronic filing via this Court's ECF system upon opposing counsel.

s/ Jean-Jacques Cabou

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations provided in the Court's Order on June 1, 2018 because it contains 2,524 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font in text.

3. This brief complies with the privacy redaction requirement of Fed. R. App. 25(a)(5) because it contains no personal data identifiers.

4. The digital version electronically filed with the Court on this day is an exact copy of the written document to be sent to the Clerk.

Dated: June 22, 2018

s/ Jean-Jacques Cabou