

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

AMICI CURIAE'S REPLY TO STATEMENT OF THE UNITED STATES

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December 20, 2017

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The Statement of the United States filed by the Department of Justice (the “DOJ Statement”) confirms the need for appointment of a Rule 42 attorney for this appeal. The DOJ Statement indicates that the government won’t defend the District Court’s Order denying Defendant-Appellant Arpaio’s motion to vacate. Rather, the Department of Justice will argue, like it did in the District Court, that the motion to vacate should have been granted. Dkt. Entry 12 at 2. The government has made clear that it is neither prosecuting the contempt nor this appeal. *See* Fed. R. Crim. Pro. 42. Unless the Court appoints a Rule 42 attorney, no attorney for a party will oppose the relief sought by Defendant Arpaio and now supported, in these unusual circumstances, by his former prosecutors.

The DOJ Statement points to no reason, and indeed none exists, why the Court should decline to heed the mandatory language of Rule 42 and appoint a private attorney as that Rule contemplates. As set forth in *Amici’s* earlier filing, appointment of a private attorney is not only permitted but is in fact required by Rule 42 when, as here, the government declines to prosecute a contempt. *See* Dkt. Entry 5-2 at 15-18. Were there some legal or prudential barrier to appointment of a Rule 42 attorney, the Justice Department would have raised it in its filing. And the need for a Rule 42 attorney is particularly acute in this case given the unprecedented nature of the Pardon and the novel and important constitutional issues it raises.

To be sure, as long as the Court allows our participation, *Amici* intend to continue to participate in the briefing and argument in support of the District Court's Order.¹ But *amicus* practice presents “at best, a limited and ad hoc opportunity for the presentation of adversarial ideas, not the structured opportunity for give-and-take” available under Rule 42. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 60-61 (2011). Only a Rule 42 attorney can ensure that the Court has the benefit of a fully adversarial process. See Andrew Crespo, *Appoint a Special Prosecutor, Not an Amicus, to Challenge Arpaio's Pardon*, Take Care Blog (Sept. 12, 2017), available at <https://takecareblog.com/blog/appoint-a-special-prosecutor-not-an-amicus-to-challenge-arpaio-s-pardon>.

Respectfully submitted on this 20th day of December, 2017.

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¹ Should the Court deem it helpful and appropriate, undersigned counsel would accept appointment pursuant to Rule 42 *pro bono* or would be pleased to recommend other qualified practitioners similarly willing to serve as a Rule 42 private attorney.

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CERTIFICATE OF SERVICE

I, Jean-Jacques Cabou, attorney for *Amicus Curiae* The Protect Democracy Project, hereby certify that on December 20, 2017, an electronic copy of this reply was served by notice of electronic filing via this Court's ECF system upon opposing counsel.

s/ Jean-Jacques Cabou

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