CASE NO. 17-10448

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

v.

JOSEPH M. ARPAIO, Sheriff,

Defendant-Appellant.

On appeal from the United States District Court,
for the District of Arizona
2:16-cr-01012-SRB

ANSWERING BRIEF OF PLAINTIFF AND APPELLEE

Christopher G. Caldwell. #106790
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524
Telephone: (213) 629-9040
Facsimile: (213) 629-9022
ccaldwell@bsfllp.com

Special Prosecutor for United States of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

COUNTERSTATEMENT OF ISSUES

1. Whether the district court abused its discretion by declining to vacate all of its orders in a criminal contempt prosecution where Arpaio accepted a presidential pardon following his guilty verdict but prior to entry of conviction and where no appeal of the verdict was pending.
2. Whether this Court has jurisdiction to reach Arpaio's alternative arguments about the non-final criminal contempt order.
3. Whether Arpaio waived his right to appeal his verdict by accepting a presidential pardon.
4. Whether the action giving rise to Arpaio's contempt prosecution was prosecuted on behalf of the United States as contemplated in 28 U.S.C. §§ 402 and 3691 where the United States intervened as a plaintiff to participate in the remedial stages of the action.
5. Whether, viewing the evidence in the light most favorable to the government, any rational factfinder could have found that the government presented sufficient evidence to prove that Arpaio willfully violated a clear and definite court order.

JURISDICTIONAL STATEMENT

As a preliminary matter, Appellee[1] notes that Arpaio fails to include a statement of jurisdiction as required by Circuit Rule 28-2.2 and Federal Rule of Appellate Procedure (4)(a). This alone may justify dismissal of Arpaio's appeal. *See In re O'Brien*, 312 F.3d 1135 (9th Cir. 2002) (dismissing an appeal where a brief failed to include, *inter alia*, a jurisdictional statement).

As to the Vacatur Order, this Court has jurisdiction over appeals from final orders of the district court under 28 U.S.C. § 1291.

As to the underlying Contempt Order, this Court does not have jurisdiction over an appeal of the verdict, because a criminal contempt decision is not final—and thus is not appealable under 28 U.S.C. § 1291—until the court imposes sanctions for it. *United States v. Vela*, 624 F.3d 1148, 1151 (9th Cir. 2010).

STATEMENT OF THE CASE

This case arises from a finding of criminal contempt after a five-day bench trial against Joseph Arpaio. [*United States of America v. Arpaio*, No. 2:16-CR-01012-001-PHX-SRB (D. Ariz. Aug. 19, 2016) ("Contempt Docket"), 1ER:Tab 6, at 242.] Arpaio was the Sheriff of Maricopa County from 1993 through 2016.

[1] The United States Court of Appeals for the Ninth Circuit appointed Christopher G. Caldwell as Special Prosecutor to provide briefing and argument to the merits panel of this Court, which will hear Petitioner's pending appeal from the district court's denial of his motion to vacate his conviction for criminal contempt of court. *See United States of America v. Joseph Arpaio*, Case No. 17-10448, 9th Cir. Oct. 26, 2017, ECF Nos. 25 & 37.

[*Id.*] The Maricopa County Sheriff's Office (the "MCSO") had authority to enforce federal civil immigration law violations, but that authority was revoked in 2009. [*Id.* at 242-43.]

A. Judge Snow Issues a Preliminary Injunction Order Preventing the MCSO from Stopping Persons Without Reasonable Suspicion of Criminal Activity

In December 2007, Latino motorists brought a class action under 42 U.S.C. § 1983 against the MCSO and Sheriff Joseph Arpaio, among others, alleging that they engaged in a custom, policy, and practice of racial profiling of Latinos, and a policy of unconstitutionally stopping persons without reasonable suspicion that criminal activity was afoot, in violation of Plaintiffs' Fourth and Fourteenth Amendment rights. [*Melendres v. Arpaio*, No. 07-cv-2513 (D. Ariz. March 17, 2015) ("Melendres Docket"), 1SER:Tab 1, 2SER:Tab 2.]

After pretrial discovery was closed, the parties filed competing motions for summary judgment, and Plaintiffs' motion included a request for entry of a preliminary injunction. [Melendres Docket, 1SER:Tab 4, 2ER:Tab 8.] United States District Judge G. Murray Snow granted Plaintiffs' motion in part and entered a preliminary injunction in December 2011 prohibiting Arpaio and the MCSO from enforcing federal civil immigration law or from detaining persons they believed to be in the country without authorization but against whom they had no state criminal charges (the "PIO"). [Melendres Docket, 1ER:Tab 1.] The PIO

also ordered that the mere fact that someone was in the country without authorization did not provide reasonable suspicion or probable cause to believe that such a person had committed a crime. *See id.*

B. Arpaio Receives Repeated Warnings and Advice from His Attorneys Regarding the PIO

Arpaio's attorney and members of his command staff repeatedly advised him on what was necessary to comply with the PIO. [Melendres Docket, 1ER:Tab 2 at 46, ¶ 15.] The evening the PIO was issued, Timothy Casey, the MCSO's attorney, spoke to Arpaio and advised him on the injunction. [Contempt Docket, 1ER:Tab 6, at 243.] A few days later, Casey spoke to Arpaio about whether to appeal the PIO. [*Id.*] During that conversation, Casey explained the effect of the ruling and advised that "if you just believe or you know that a person is in the country unlawfully, you cannot detain him based on that alone. You either are to have an arrest based on state charges or you release. Those are the options." [*Id.* (citing 2SER14, at 509:13-23; 510:4-7.] Casey also told Arpaio that he could not turn people over to federal authorities, and Arpaio responded that the MCSO was no longer doing that anymore because President Obama was not accepting immigration detainees. To ensure that Arpaio and his staff were fully informed of the PIO's requirements, during a January 2012 executive staff meeting, the injunction was read twice by John MacIntyre to Arpaio and the other attendees. [1ER:Tab 6, at 244.]

C. Arpaio Refuses to Follow the Court's PIO Despite Repeated Warnings And Advice From His Attorneys

Casey told the press that Arpaio disagreed with the PIO and would appeal it. Casey also claimed Arpaio would comply with the PIO in the meantime, but the MCSO, under Arpaio's orders, continued to arrest and deliver undocumented immigrants to Immigration and Customs Enforcement and U.S. Border Patrol solely because they were in the country illegally—the same unconstitutional practice that the PIO was designed to remedy. [Melendres Docket, 1ER:Tab 2, at 46, ¶ 14.]

In a March 1, 2012 Univision interview, Arpaio answered "yes" when asked if he was still detaining and arresting illegal immigrants. [Contempt Docket, 1ER:Tab 6, at 244.] He further stated that he would continue to enforce federal immigration laws and "if they don't like what I'm doing, get the laws changed in Washington." [*Id.* (internal citation omitted).]

On April 5, 2012, in an interview with CBS about the Department of Justice's investigation into the MCSO, Arpaio stated, "Why are they going after this Sheriff? Well we know why. Because they don't like me enforcing illegal immigration law." [*Id.* (internal citation omitted).] On April 13, 2012, stated in a television interview, "I have support across the nation as evidenced by the big bucks I'm raising for my next campaign. They don't give you money unless they believe in you . . . . I want everyone to know what I do." [*Id.* (internal citation

omitted).]

When asked in an April 24, 2012 PBS Newshour interview what the impact to his operations would be if the Supreme Court struck down an Arizona immigrant identification law, Arpaio replied, "[N]one. I'm still going to do what I'm doing. I'm still going to arrest illegal aliens coming into this country." [*Id.* (internal citation omitted).] Then, in a May 2012 Fox News interview, Arpaio stated, "I'm not going to give up. I'm going to continue to enforce state and federal laws." [*Id.* (internal citation omitted).]

D. Arpaio Continues to Violate the PIO after This Court Affirmed It and Judge Snow Entered a Permanent Injunction

Arpaio's failure to comply with the PIO continued even after his appeal of that order to the Ninth Circuit Court of Appeals was denied in September 2012. [1ER:Tab 6, at 246; 1ER:Tab 2 at 51-52, ¶¶ 42-43.] On October 9, 2012, the MSCO issued a news release wherein Arpaio stated, "I continue to enforce the laws but keep running into road blocks . . . . My back up [*sic*] plan is still in place and will [*sic*] continue to take these illegal aliens not accepted by ICE to border patrol." [1ER:Tab 6, at 246 (internal citation omitted).]

When Plaintiffs accused Arpaio of violating the PIO, he falsely told his lawyers that he had been directed by federal agencies to turn over persons for whom he had no state charges. [Melendres Docket, 1ER:Tab 2, at 53, ¶¶ 50-52.] Arpaio's lawyer advised him that this practice likely violated the PIO. [*Id.* at 53, ¶

53.] Still, he continued to direct his deputies to arrest and deliver unauthorized persons to ICE and Border Patrol. [*Id*. at 54, ¶¶ 55-57.] Arpaio himself later admitted to "three areas of contemptuous conduct," one of which is a "failure to abide by and apprise MCSO deputies of the terms of the [December 23, 2011] preliminary injunction." [Melendres 2SER:Tab12, at 490.] He also agreed to "adopt and stipulate to the facts as stated in the Court's Order to Show Cause." *Id.* at 491. The Order to Show Cause states that "Arpaio failed to take reasonable steps to implement the preliminary injunction's proscriptions," and that "Arpaio directed operations and promulgated policies that violated the terms of the preliminary injunction." [2SER:Tab11, at 473].

In May 2013, Judge Snow issued a permanent injunction prohibiting the MSCO from detaining, holding, or arresting Latino occupants of vehicles based on a reasonable belief that such persons are in the country without authorization, among other things. [1ER:Tab 6, at 247-48.]

E. Judge Snow Refers Arpaio's Case for Criminal Contempt Proceedings

In light of the seriousness of Judge Snow's orders and the extensive evidence demonstrating that Arpaio was intentionally refusing to comply, Judge Snow referred the case to United States District Judge Susan R. Bolton to determine whether Arpaio should be held in criminal contempt for, among other things, violating the PIO.

Following a five-day bench trial, in July 2017, Judge Bolton found beyond a reasonable doubt that Arpaio willfully violated the clear and definite PIO and found him guilty of criminal contempt (the "Contempt Order"). [D.C.Contempt Docket, 1ER:Tab 6.]

Subsequently, Arpaio filed a motion for a new trial and motion for acquittal. [Melendres Docket, 3ER:Tabs 35 & 36.] On August 25, 2017, President Trump issued a pardon for Arpaio's criminal contempt, which Arpaio accepted.[2] Three days later Arpaio filed a motion to vacate all judgments and verdicts related to the criminal charge and dismiss the case with prejudice. [Melendres Docket, 3ER: Tab 37.] Judge Bolton dismissed the case and vacated the sentencing hearing but declined to vacate any previous rulings (the "Vacatur Order"). [Melendres Docket, 1ER:Tab 7.] Judge Bolton never ruled on Arpaio's motion for a new trial or motion for acquittal.

STANDARD OF REVIEW

On Arpaio's Vacatur Order, this Court "review[s] for abuse of discretion a

[2] Some Amici have suggested that this Court should affirm Judge Bolton's order on the ground that the president's pardon of Arpaio was constitutionally infirm. This Court has ample grounds to affirm the district court's order without reaching this constitutional issue, as discussed below. *See Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1093 (9th Cir. 2003) (internal citation and quotation omitted) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

district court's grant or denial of vacatur." *United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004) (internal citation omitted). "Given the fact-intensive nature of the inquiry required, it seems appropriate that a district court should enjoy greater equitable discretion when reviewing its own judgments than do appellate courts operating at a distance." *Am. Games, Inc. v. Trade Products, Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998). Moreover, "[t]he Supreme Court has termed vacatur an 'extraordinary remedy,' one only available to applicants who 'demonstrate equitable entitlement' to it." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1068-69 (9th Cir. 2007) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994)). Courts thus apply a presumption in favor of retaining judgments, which "should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp*, 513 U.S. at 26 (internal citation omitted).

If this Court proceeds past Arpaio's Motion to Vacate and reaches Arpaio's alternative arguments, (1) "[j]urisdictional issues are reviewed de novo," *United States v. Struckman*, 611 F.3d 560, 571 (9th Cir. 2010), and (2) this Court "review[s] the question whether a defendant has validly waived his statutory right to appeal de novo." *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016).

Even if Arpaio can establish jurisdiction and the right to appeal, "[t]he district court's findings of fact are reviewed for clear error." *United States v. Doe*,

136 F.3d 631, 636 (9th Cir. 1998). The Court must uphold these findings if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017) (internal quotations omitted) (emphasis in original). This standard applies to Arpaio's merits challenges here. *See, e.g.*, *United States v. Cutler*, 58 F.3d 825, 835 (2d Cir. 1995) (applying standard to whether an order supporting a contempt conviction was clear and definite); *United States v. Colasuonno*, 697 F.3d 164, 181 (2d Cir. 2012) (applying standard to advice-of-counsel defense).

SUMMARY OF ARGUMENT

This appeal is Arpaio's last move to avoid being held accountable—even just on paper—for repeatedly violating Maricopa County residents' civil rights and willfully (and publicly) defying judicial attempts to protect them. This Court should not indulge Arpaio's desire to operate above the law by vacating the order confirming that he broke it.

The district court acted within its discretion in denying Arpaio's motion to vacate, which is the only final order over which this Court has jurisdiction. Arpaio argues that his conviction must be vacated under the "automatic vacatur" rule—a manufactured rule no court has adopted but Arpaio claims is dispositive here. In the alternative, Arpaio challenges the underlying Contempt Order by arguing that

his conviction was wrong on the merits. Neither argument finds support in the law.

While Arpaio claims that *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), requires "automatic vacatur" of his conviction, that case does not announce any such rule, and Arpaio ignores the doctrine and policy behind vacatur in contending otherwise. This Court and the Supreme Court have made clear that vacatur is a matter of equity to be determined on a case-by-case basis. *Munsingwear* did not establish an "automatic vacatur" rule; it just determined that equities generally favor vacatur in mooted *civil* cases. Many—but not all—courts have followed suit in civil cases, but no court has held that mooted criminal cases must be vacated. Consistent with all applicable authority, the district court in its discretion determined that the equities here did not compel vacatur.

The sole criminal case cited by Arpaio for his "automatic vacatur" argument, *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001), is distinguishable and in no way undermines the district court's decision. The pardon in *Schaffer* occurred after the defendant had been granted a new trial by the district court and was awaiting a hearing in the D.C. Circuit, and the *Schaffer* court premised its decision on that procedural posture. Here, the pardon was given and accepted after Arpaio's verdict was already effective and no appeal was pending. No court has vacated a verdict in a parallel situation, and the equities counsel against doing so

here.

If his challenge to the Vacatur Order is rejected, Arpaio argues in the alternative that the underlying Criminal Contempt Order should be vacated for two main reasons: (1) section 402 should have applied because Arpaio's contumacious conduct was independently criminal, so the prosecution was time-barred and required a jury trial, and (2) the district court lacked sufficient evidence to find that he willfully violated a clear and definite court order. He is wrong on both counts.

As a threshold matter, this Court does not have jurisdiction over an appeal of the verdict, because a criminal contempt order is not final—and thus is not appealable—until the court imposes sanctions for it. Even if this Court had jurisdiction over a merits appeal, Arpaio waived his right to challenge the verdict when he accepted President Trump's pardon. And even if Arpaio still held a right to challenge his conviction by direct appeal, *and* this Court had jurisdiction to hear it, his attacks on the conviction fail on the merits.

First, Section 402 does not apply where the underlying action was prosecuted by or on behalf of the United States. Here, the United States intervened as a plaintiff to ensure "vigorous enforcement of the remedial orders" against Arpaio and the MCSO. Arpaio argues without authority or analysis that this does not fall within the federal public interest carveout in section 402. In fact, the carveout exists exactly for cases like this one, where the United States had

determined that the underlying action advances public interests.

Second, the United States introduced overwhelming evidence that the PIO was clear and definite and that Arpaio willfully violated it. Arpaio concedes he violated the PIO, but he claims it was not willful because the PIO did not—in his mind—clearly and definitely forbid arresting undocumented immigrants and turning them over to federal agencies. Arpaio claims that his lawyer told him the PIO allowed this practice, but this argument is both misguided and spurious.

Judge Snow issued the 40-page PIO—after four years of litigation—in granting the *Melendres* Plaintiffs' summary judgment motion on their Fourth Amendment claims alleging that the MCSO unconstitutionally arrested undocumented immigrants based solely on their undocumented status. In the PIO, the court repeatedly explained that the injunction was meant to stop this practice. Casey, far from approving his conduct, told Arpaio more than once that seizing undocumented immigrants and transferring them to the federal government violated the PIO. And if that were not enough, Arpaio came out and publicly declared on several occasions he would not change his practices to comply with the PIO. Given the unambiguous circumstances surrounding the issuance and defiance of the PIO—context which Arpaio concedes is relevant when evaluating the clarity of the PIO—the district court properly concluded that Arpaio should not be permitted to backtrack from his willful disobedience now.

ARGUMENT

I. THE DISTRICT COURT PROPERLY REFUSED TO GRANT THE "EXTRAORDINARY REMEDY OF VACATUR"

Vacatur is an equitable remedy, and the district court has discretion to grant or deny it. Arpaio argues that, where a case is mooted after a verdict, the "rule of automatic vacatur" compels the court to vacate its verdict and all previous orders. In fact, courts apply equitable principles, not a bright-line rule, to determine whether vacatur is appropriate. And in a criminal case like this one, the primary equitable factor is whether the defendant helped moot his own case. Arpaio effectively concedes this—calling such scenarios an "exception" to "automatic vacatur"—but argues that a pardon need not be accepted to be effective, so Arpaio did not have a hand in mooting his case. He is wrong. Supreme Court precedent is clear that pardons must be accepted to be effective. Arpaio mooted his own case by lobbying for and accepting a pardon—after conviction but before any appeal—so the equities favor retaining the judgment. The district court did not abuse its discretion in so deciding.

A. The Balance of Equities, Not the "Automatic Vacatur" Rule, Determines Whether Vacatur Is Appropriate

Arpaio contends that *Munsingwear*'s "automatic vacatur" rule required the district court to vacate its verdict as soon as a presidential pardon mooted his prosecution. This argument fails for two independent reasons. *First*, even if *Munsingwear* had established an automatic vacatur rule in the way Arpaio

contends, it would only concern civil cases so would not govern here. *Second*, subsequent jurisprudence has clarified that *Munsingwear* never established an "automatic vacatur" rule, but just recognized that equity usually demands that judgments in moot civil cases be vacated. Supreme Court and Ninth Circuit cases have since made clear that the balance of equities determines whether a judgment in a mooted case should be vacated, and that a district court's balancing of those equities should be disturbed only in the rare situation where an abuse of discretion is established. *See United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004).

1. *Munsingwear does not compel vacatur in criminal cases*

Munsingwear's supposed "automatic vacatur" rule, to the extent it even exists, does not apply in criminal cases. In *Tapia-Marquez*, this Court made an observation that is still true today: "The Supreme Court has never applied *Munsingwear* in a criminal case. Neither have we." 361 F.3d 535, 538 (9th Cir. 2004). In affirming denial of a motion to vacate, the *Tapia-Marquez* court stated, "We disagree . . . that *Munsingwear* requires vacatur of a criminal judgment when an appeal of that judgment becomes moot." *Id.* at 537; *see also Lettsome v. Waggoner*, 672 F.Supp. 858, 861 n.4 (D.V.I 1987) (holding regarding vacatur of moot cases, "where the matter is a criminal action, the procedure is not mandated"). Vacating judgments in moot criminal cases is simply not the

"established practice" that Arpaio claims.

2. Munsingwear *did not establish an "automatic vacatur" rule*

It is telling that, even in civil cases, no law mandates that courts vacate judgments in mooted cases. "The *Munsingwear* rule is neither statutorily nor constitutionally required." *Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. Seafirst Corp.*, 891 F.2d 762, 766 (9th Cir. 1989). The Supreme Court recognized *Munsingwear*'s limitations in *U.S. Bancorp*, when it observed that the portion of *Munsingwear* "describing the 'established practice' for vacatur was dictum." 513 U.S. at 23. *U.S. Bancorp* continued, "as *Munsingwear* itself acknowledged, the 'established practice' (in addition to being unconsidered) was not entirely uniform, at least three cases having been dismissed for mootness without vacatur within the four Terms preceding *Munsingwear*. Nor has the post-*Munsingwear* practice been as uniform as petitioner claims." *Id.* (internal citations omitted). *U.S. Bancorp* thus "rejected the notion that automatic vacatur was the 'established practice' *whenever* mootness prevents appellate review of a lower court decision." *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) (internal citation omitted) (emphasis added by *Dilley*).

3. *The district court's consideration of the equities determines whether vacatur is appropriate*

With no constitutional or doctrinal requirement mandating a certain outcome, the district court's evaluation of the equities determines whether to

vacate a judgment for mootness. "*U.S. Bancorp* makes clear that the touchstone of vacatur is equity." *Id.* at 1370. And "[e]quity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *accord Humphreys v. Drug Enforcement Agency*, 105 F.3d 112, 113-14 (3d Cir. 1996) ("*Munsingwear* should not be applied blindly, but only after a consideration of the equities and the underlying reasons for mootness.").

Even the *Munsingwear* decision to vacate was premised on equity, not a bright-line rule. *Munsingwear* vacated a judgment to "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance." 340 U.S. at 40. *U.S. Bancorp* recognized that this "reference to 'happenstance' in *Munsingwear* must be understood as a reference to the equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." 513 U.S. at 25. So rather than follow any bright-line rule, courts since *Munsingwear* "have disposed of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (internal quotations and citations omitted).

B. The Equities Favor Retaining the Contempt Order Because Arpaio Voluntarily Mooted His Own Appeal

The equities in this case favor retaining the Contempt Order because Arpaio

helped moot his own case by lobbying for and accepting a pardon. In weighing whether vacatur is equitable, "[t]he principal condition to which [courts] have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24.[3] Courts thus grant vacatur when "[a] party who seeks review of the merits of an adverse ruling . . . is frustrated by the vagaries of circumstance," but deny vacatur when a party caused mootness himself and thus "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari." *Id.* at 25.

Arpaio claims he played no role in mooting his case because presidential pardons are effective with or without the defendant's acceptance. He argues that the Supreme Court in *Biddle v. Perovich*, 274 U.S. 480 (1927), overruled its earlier holding in *Burdick v. United States*, 236 U.S. 79 (1915), that pardons must be accepted to be effective. [AOB at pp. 5-6.] Arpaio is wrong. *Burdick* was never overruled, so defendants must still accept pardons to receive their benefits. Arpaio thus mooted his own appeals by voluntarily petitioning for and accepting a

[3] Arpaio tries to downplay this principle by calling it an "exception" to his "automatic vacatur" rule. [*See* AOB at p. 10 ("The Supreme Court, our Circuit, and the first Circuit have all acknowledged an exception [from automatic vacatur] for 'when the appellant as by his own act caused the dismissal of the appeal[.]'").] But this principle, first applied by this Court in *Ringsby Truck Lines, Inc. v. W. Conf. of Teamsters*, 686 F.2d 720 (9th Cir. 1982), "is no 'exception' to *Munsingwear* at all. Rather, *Ringsby* and *Munsingwear* exemplify two different applications of identical principles." *Dilley*, 64 F.3d at 1370.

presidential pardon. Appellate review of his case was not "frustrated by the vagaries of circumstance" but foreclosed by Arpaio's voluntary actions. Equity thus requires maintaining the guilty verdict.

1. *Arpaio had to accept his pardon to receive its benefit*

The Supreme Court held in *Burdick* that pardons must be accepted to be effective, and that holding remains good law. *Burdick* involved a reporter who rejected an unconditional presidential pardon, leaving the Supreme Court to decide "the effect of the unaccepted pardon." *Burdick*, 236 U.S. at 87. *Burdick* reaffirmed the holding in *United States v. Wilson*, 32 U.S. 150 (1833), that a pardon "may . . . be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." *Burdick*, 236 U.S. at 90 (quoting *Wilson*, 32 U.S. at 150). This holding is unequivocal and decided the dispute.

Twelve years later, the Supreme Court in *Biddle* decided an issue not raised in *Burdick*, and explicitly let *Burdick*'s holding stand. *Biddle* addressed one question: "Did the President have authority to commute the sentence of Perovich from death to life imprisonment?" 274 U.S. at 486. The Supreme Court held that the President did have such authority, regardless of Perovich's consent. But *Biddle* declined to modify *Burdick*. Rather, *Biddle* just held "that the reasoning of *Burdick v. United States* . . . is not to be extended to the present case." *Id.* at 487-

88.

Burdick's holding that pardons must be accepted thus remains good law, as several post-*Biddle* cases have recognized. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 493 (1972) (holding that the grant of parole is a deed in the way "that a 'pardon is a deed'") (quoting *Wilson*, 32 U.S. at 150); *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (observing that *Burdick* "recognized that the acceptance of a pardon implies a confession of guilt") (citing *Burdick*, 236 U.S. at 91, 94); *United States v. Noonan*, 906 F.2d 952, 958 (3d Cir. 1990) ("[t]here is a 'confession of guilt implied in the acceptance of a pardon'") (quoting *Burdick*, 236 U.S. at 91); *Marino v. Immigration and Naturalization Serv.,* 537 F.2d 686, 692 (2d Cir. 1976) ("An unsolicited pardon or amnesty issued by the executive does not become effective automatically. It must be accepted by the one to whom it is issued before it can operate as a waiver of his right to contest his guilt.") (internal citations omitted); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975) ("[T]he acceptance of a pardon may constitute a confession of guilt.") (citing *Burdick*, 236 U.S. at 91); *Hoffa v. Saxbe*, 378 F.Supp. 1221, 1241 (D.D.C. 1974) (holding that "the requirement of 'acceptance,' within the pardon context, has always been a concept whereby the offeree of a pardon or commutation has the option to accept or reject in toto the offered clemency" and calling *Biddle* "an exception to this general rule").

Even the one case Arpaio relies on as support for vacatur in a parallel scenario, *United States v. Schaffer*, 240 F.3d 38 (D.C. Cir. 2001) (en banc), adopts this view. Citing its earlier decision in *In re North*, the D.C. Circuit in *Schaffer* observed that "acceptance of a pardon may imply a confession of guilt." *Schaffer*, 240 F.3d at 35 (citing *In re North*, 62 F.3d at 1437). *In re North*, in turn, stated without qualification that "the acceptance of a pardon implies a confession of guilt," 62 F.3d at 1437, and cited *Burdick* for that assertion.

2. *The equities require retaining the judgment*

Arpaio claims that retaining the district court's judgment is unfair because, if not for the pardon, he would have contested the judgment on appeal. [AOB at p. 7.] This reasoning misunderstands the pardon power and conveniently omits the fact that Arpaio voluntarily mooted the case. Pardons mitigate punishment; they do not eliminate judgments. If Arpaio wanted to contest the district court's ruling, he was free to reject, or even delay acceptance of ,the pardon and take his chances on appeal. This may create a tough choice for a defendant: accept the pardon and avoid punishment, or decline the pardon and roll the dice on appeal. But the nature of a pardon—eliminating punishments but not judgments—imposes this choice. Arpaio is not actually seeking to avoid an unfair quandary, but to expand the pardon power to not just eliminate punishments by the executive, but vacate convictions by the judiciary.

"The granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that mitigates or sets aside *punishment* for a crime." *United States v. Buenrostro*, 895 F.3d 1160, 1166 (9th Cir. 2018), cert denied, 139 S. Ct. 438, 202 L. Ed. 2d 333 (2018) (emphasis in original). Arpaio admits this. [AOB at p. 6 ("the pardon operates only to mitigate punishment for the crime") (internal citations omitted).] Yet Arpaio contends that fairness requires vacatur every time a defendant accepts a pardon after being convicted. This not only expands the centuries-old meaning of a pardon, but directly contradicts the Supreme Court's holding in *Burdick*.

Burdick observed that a pardon "carries an imputation of guilt; acceptance a confession of it." 236 U.S. at 95. A pardon might thus "involv[e] consequences of even greater disgrace than those from which it purports to relieve." *Id.* at 90. *Burdick* also recognized that a defendant could vindicate himself on appeal—"Circumstances may be made to bring innocence under the penalties of the law"—but that this required risking the punishment that the pardon would have mitigated. *Id.* at 90-91 ("If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, preferring to be the victim of the law rather than its acknowledged transgressor[.]"). As discussed in the previous section, *Burdick* thereby acknowledged and accepted the tradeoff that Arpaio says is untenable: accept the pardon and the judgment, or reject the pardon and appeal the judgment.

Arpaio asks this Court to ignore the fact that he forewent any appeal when he accepted a pardon. In so doing, Arpaio asks this Court to expand the compass of pardons so that they not only eliminate punishment but vacate the judgment giving rise to the punishment in the first place. The district court acted well within its discretion in rejecting these requests and retaining its verdict.

C. Public Policy Counsels against Vacating the Judgment Below

"[W]hen federal courts contemplate equitable relief, [their] holding[s] must also take account of the public interest." *U.S. Bancorp*, 513 U.S. at 26. When considering vacatur, courts must consider that "[j]uidical precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 26 (internal citation omitted). Here, the public interest would be served by retaining the district court's verdict against Arpaio, who unabashedly and repeatedly defied a court order.

D. Arpaio Draws a False Analogy between His Case and Abatement

Arpaio draws an inapposite comparison between pardon and abatement, which fails because it ignores the equitable basis for vacatur. Arpaio observes correctly, "Death pending appeal of a criminal conviction abates not only the appeal but all proceedings in the prosecution from its inception." [AOB at p. 13-

14 (citing *United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983)); *see also Durham v. United States*, 401 U.S. 481, 483 (1971) ("[D]eath pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.").][4] Arpaio then asserts in conclusory fashion that, "[f]rom a legal perspective, there is little difference between the mootness caused by death and the mootness caused by a pardon—in either case, any meaningful prospect of punishing the defendant disappears." *Id.* Of course, this reasoning would mean that all judgments in every mooted case must be vacated, which is plainly not the law. *See* Part I.B. *supra*; *see also, e.g., United States v. Tapia-Marquez*, 361 F.3d 535 (9th Cir. 2004) (declining to order vacatur where defendant mooted his appeal by completing his sentence); *United States v. Gomez-Gonzalez*, 295 F.3d 990 (9th Cir. 2002) (same).

In fact, abatement operates as an application of the equitable vacatur doctrine discussed above. This Court and the Supreme Court are clear that when a case is mooted by external happenstance, vacatur is appropriate, and when a party

[4] It is notable that, while abatement *ab initio* continues to apply in the Ninth Circuit, several other jurisdictions have either abandoned or curtailed the doctrine, which "is not grounded in the constitution or in statute, but is instead a court-created common law doctrine." *People v. Griffin*, 328 P.3d 91, 92 (Colo. 2014) (internal citation omitted). As the Massachusetts Supreme Court recently observed, only "eighteen States and the District of Columbia apply the doctrine of abatement ab initio[.]" *Commonwealth v. Hernandez*, 481 Mass. 582, 589 (Mar. 13, 2019 Mass. Supreme Ct.)

moots his own appeal through voluntary action, vacatur is not appropriate. A dead defendant has been eternally "frustrated by the vagaries of circumstance," *U.S. Bancorp*, 513 U.S. at 25, so courts abate the orders in such cases.[5] The same is not true for a defendant like Arpaio, who petitioned for and accepted the pardon that mooted his case.

E. *Schaffer* Does Not Compel Vacatur

To argue that vacatur is appropriate here, Arpaio relies on a single case: *United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001). That distinguishable decision, a per curiam opinion from another Circuit, provides no reason to find vacatur here. *First*, its sparse analysis ignores the Supreme Court precedent discussed in Part I.C. defining the nature of pardons, and instead just assumes that pardons result solely from external happenstance. *Second*, *Schaffer*'s facts do not parallel those here, as its defendant's conviction had been vacated when he was pardoned.

1. Schaffer *bases its holding on the incorrect assumption that defendants cannot reject pardons*

Schaffer offered one sentence and one citation to support the assertion that

[5] Notably, in an opinion known for its brevity, the Supreme Court overruled in part its decision in *Durham* establishing the abatement rule. *See Dove v. United States*, 423 U.S. 325 (1976) (dismissing petition for writ of certiorari without ordering vacatur when defendant-petitioner died, and adding without explanation, "[t]o the extent that *Durham v. United States* may be inconsistent with this ruling, *Durham* is overruled").

vacatur was appropriate: "Because the present mootness results not from any voluntary acts of settlement or withdrawal by Schaffer, but from the unpredictable grace of a presidential pardon, vacatur is here just and appropriate." *Id.* at 38 (citing *U.S. Bancorp*, 513 U.S. at 24-25). In place of any analysis, the court just cited to *U.S. Bancorp*'s finding that vacatur is appropriate when mootness is caused by the vagaries of circumstance, but not when mootness is caused by the defendant's voluntary action. *See U.S. Bancorp*, 513 U.S. at 24 ("The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action."); *id.* at 25 ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.") (internal citation omitted).

But this principle supports retaining the judgment below, not vacating it, because Arpaio voluntarily petitioned for and accepted a pardon. *See* Part I.B., *supra*. *Schaffer* concluded otherwise only by assuming that the defendant had no power to accept a pardon, a contention contradicted by *Schaffer*'s acknowledgment that "acceptance of a pardon may imply a confession of guilt." *Schaffer*, 240 F.3d at 38.[6]

[6] Aptly, the portion of *U.S. Bancorp* to which *Schaffer* cites reiterates the Supreme Court's "customary skepticism toward per curiam dispositions that lack the

2. Schaffer*'s facts are distinguishable from Arpaio's*

Even if *Schaffer*'s reasoning were correct, its holding would not apply here. Arpaio claims that "*Schaffer* is directly on-point," but Schaffer faced an importantly different procedural posture when he was pardoned. [AOB at p. 7.]

In *Schaffer*, the defendant was convicted of violating the Meat Inspection Act. 240 F.3d at 36. The district court then granted Schaffer's motion for acquittal, but the D.C. Circuit reversed that decision and reinstated the jury verdict. *Id.* at 37. The district court then granted Schaffer's motion for a new trial, but the D.C. Circuit again reversed the trial court's ruling. *Id.* This time, though, the D.C. Circuit granted Schaffer's motion for rehearing *en banc* and vacated its own decision reversing the district court's grant of a new trial. *Id.* at 38. "It was at that uncertain juncture that then President Clinton pardoned Schaffer[.]" *Id.*

The district court's order granting a new trial—leaving no conviction in place—was thus still in effect when Schaffer was pardoned. Notably, this Court has been clear that an "order granting a new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place." *United States v. Recio*, 371 F.3d 1093, 1105 n.11 (9th Cir. 2004) (quoting *United States v. Ayres*, 76 U.S. 608, 610 (1869)). The *Schaffer* court concluded, "[g]iven the posture of this case, the

---

reasoned consideration of a full opinion." *U.S. Bancorp*, 513 U.S. at 24 (citing *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974)).

efficacy of the jury verdict remains only an unanswered question lost to mootness . . . ." 240 F.3d at 38. That "posture" was an "uncertain juncture" where the circuit court was waiting to hear an appeal on a new trial order that remained in effect.

The posture of this case when Arpaio was pardoned was different. Crucially, the verdict against Arpaio was still in place—it had not been vacated by the grant of a new trial order like in *Schaffer*. Since *Schaffer* was decided based on that case's unique procedural posture, it offers little guidance on what to do here. The district court acted well within its discretion in finding that a case from another circuit addressing a different factual scenario did not compel vacatur for Arpaio.[7]

II. ARPAIO HAS NO RIGHT TO CHALLENGE HIS CONVICTION AND, EVEN IF HE RETAINED THAT RIGHT, THE CONVICTION SHOULD BE AFFIRMED

If Arpaio's challenge to the Vacatur Order fails, Arpaio pivots to challenge his Contempt Order arguing that his conviction should be overturned on the merits. Specifically, he argues that he was entitled to a jury trial under 28 U.S.C. §§ 402 and 3691, that the evidence at trial did not show he willfully violated a clear and

[7] Rather than challenge Judge Bolton's reasoning, Arpaio attacks her order for stating that the *Schaffer* district court "was already poised to try Schaffer anew when the pardon issued." [AOB at p. 11 (quoting Contempt Docket, ER7, p. 258, lines 20-23).] Arpaio argues that the trial court was not "poised" to retry Schaffer because the court of appeals could still have reversed the district court's grant of a new trial. *Id.* But whether or not the trial court was "poised" to retry Schaffer is beside the point; the new trial order—an order vacating the verdict against Schaffer—was still in effect. That is what matters.

definite court order, and that his due process rights were violated when the verdict was issued electronically. But Arpaio fails to establish the right to raise such on appeal let alone that they are correct.

First, Arpaio has no right to appeal the Contempt Order, and this Court has no jurisdiction to entertain such an appeal. *Second*, even if Arpaio had a right to appeal, he waived it when he accepted President Trump's pardon. *Finally*, even if Arpaio had a right to appeal *and* had not waived it by accepting a pardon, none of the district court's rulings on Arpaio's merits arguments were an abuse of discretion.

A. Arpaio Has No Right to Appeal the Verdict Because It Was Not a Final Order

Arpaio's Opening Brief omitted the requisite Statement of Jurisdiction. *See In re O'Brien*, 312 F.3d 1135 (9th Cir. 2002) (dismissing an appeal where a brief failed to include, *inter alia*, a jurisdictional statement). Particular as to his alternative challenge to the Contempt Order, this omission should not be surprising. "In a criminal case, the [final judgment] rule prohibits appellate review until conviction and imposition of sentence." *Flanagan v. United States*, 465 U.S. 259, 263 (1984) (internal quotation and citation omitted); *see United States v. Vela*, 624 F.3d 1148, 1151 (9th Cir. 2010) ("When a criminal defendant is found guilty, . . . there is no final judgment until the defendant is sentenced[.]"). This rule applies equally in criminal contempt cases: "In the absence of a sentence on the criminal

contempt finding, the decision lacks the finality which would allow this court to review it." *Massengale v. United States*, 278 F.2d 344, 345 (6th Cir. 1960).

Arpaio was never sentenced. *See* Contempt Docket, 1ER:Tab 6, at 255 (setting Sentencing for October 5, 2017); *id.*, 2SER:Tab17, at p. 574:20:15-16 (dismissing the criminal contempt action with prejudice before sentencing). The contempt verdict is thus not a final order from which Arpaio can appeal. This Court should not countenance Arpaio's attempt to slyly piggyback an improper appeal of the merits onto his appeal of the order denying vacatur.

B. Arpaio Waived His Right to Appeal the Verdict When He Accepted a Pardon

Even if the Contempt Order were final and appealable, Arpaio waived his right to challenge the underlying verdict when he accepted President Trump's pardon. "As a general rule, one who accepts a pardon pending an appeal from conviction thereby waives all rights upon the appeal." 59 Am. Jur. 2d *Pardon and Parole* § 53 (2019); *see* 67A C.J.S. *Pardon & Parole* § 34 (2019) ("The acceptance of a pardon may imply a confession of guilt so that such acceptance constitutes a waiver of an accused's rights on appeal from a conviction.").

Waiving the right to appeal is a necessary consequence of the fact that pardons must be accepted to be effective. Accepting a pardon implies a confession of guilt. *See Burdick*, 236 U.S. at 91 (recognizing the "confession of guilt implied in the acceptance of a pardon"); *In re North*, 62 F.3d at 1437 (observing that

Burdick "recognized that the acceptance of a pardon implies a confession of guilt") (citing *Burdick*, 236 U.S. at 91, 94); *Noonan*, 906 F.2d at 958 ("[t]here is a 'confession of guilt implied in the acceptance of a pardon'") (quoting *Burdick*, 236 U.S. at 91); *Bjerkan*, 529 F.2d at 128 n.2 ("[T]he acceptance of a pardon may constitute a confession of guilt.") (citing *Burdick*, 236 U.S. at 91). By accepting a pardon and impliedly admitting guilt, the defendant waives his right to contest that guilt and to appeal. *See Marino v. Immigration and Naturalization Serv., U.S. Dep't of Justice*, 537 F.2d 686, 692 (2d Cir. 1976) (holding that acceptance of an unsolicited pardon "operate[s] as a waiver of [defendant's] right to contest his guilt") (citing *Burdick*, 236 U.S. at 91; *United States v. Wilson*, 32 U.S. 150, 161 (1833); *Hoffa*, 378 F.Supp. at 1241-43; *see also Fletcher v. Graham*, 192 S.W.3d 350, 381 (Ky. 2006) (observing that acceptance of an unsolicited pardon "operate[s] as a waiver of [defendant's] right to contest his guilt") (quoting *Marino*, 537 F.2d at 692); *Bogue v. State*, 185 Ind. 243 (1916) (dismissing defendant's appeal of his conviction where "appellant has accepted a parole by the Governor"); *Goss v. State*, 107 Tex. Crim. 659, 661 (1927) ("The appellant ha[s], by the acceptance of the executive clemency, waived his right of appeal[.]"); *Odom v. State*, 8 Okla. Crim. 540 (1912) ("A plaintiff in error, by accepting a parole, abandons his appeal and waives the right to have it determined.").

As explained in Part I.B.2 above, the Supreme Court's holding in *Burdick* recognized that defendants who ask for and receive pardons create a real choice for the themselves: accept the implied guilt that comes with a pardon but avoid punishment, or decline the pardon and roll the dice on appeal. But *Burdick* explicitly addressed and accepted this consequence of its holding, and several circuit courts have affirmed the decision since. *See, e.g.*, *In re North*, 62 F.3d at 1437; *Noonan*, 906 F.2d at 958; *Bjerkan*, 529 F.2d at 128 n.2. Arpaio cannot have his cake and eat it too. He had the choice to accept the pardon or challenge the merits of his conviction: he chose the former.[8]

Arpaio tries to circumvent this waiver by invoking the collateral consequences doctrine, which holds that a conviction is not moot if it may have collateral consequences for the defendant in the future. [AOB at pp.16-18.] He argues that, though he was pardoned, his conviction may have future consequences (*e.g.*, in future sentencing), so it is not moot. But this improperly conflates two

[8] One state supreme court found that accepting a pardon waives an appeal unless it is granted because the executive believes the defendant innocent. *State v. Jacobson*, 348 Mo. 258, 262 (1941). Even under this lenient standard—which no federal court has adopted—Arpaio has no right to appeal, as nothing in the record, President Trump's pardon, or the White House's pardon statement suggests President Trump believed Arpaio to be innocent of contempt. *See* President Trump Pardons Sheriff Joe Arpaio (2017), *https://www.whitehouse.gov/briefings-statements/president-trump-pardons-sheriff-joe-arpaio* ("Sheriff Joe Arpaio is now eighty-five years old, and after more than fifty years of admirable service to our Nation, he is worthy candidate [*sic*] for a Presidential pardon.").

issues: (1) whether Arpaio's conviction is moot, and (2) whether he waived his right to appeal it. Arpaio tries to sidestep the dispositive waiver issue by only addressing mootness.

It is no wonder, then, that Arpaio does not cite a single case holding that the collateral consequences doctrine—or any other—guarantees a pardoned defendant the right to appeal his conviction. Even the primary case, on which Arpaio relies, *Schaffer*, held that a pardoned defendant's appeals were moot. 240 F.3d at 36 ("The parties agree that the pardon rendered moot the ongoing appeals. They are quite right on this point."). It ultimately does not matter whether Arpaio's conviction is technically moot, however, because he waived the right to appeal it when he accepted President Trump's pardon. The Court thus should not consider Arpaio's challenge of his Contempt Order, and need not proceed to his alternative attacks on the merits of his conviction. But to the extent this Court reaches the merits of Arpaio's conviction, there are still ample reasons to affirm the district court's decision.

C. Arpaio's Alternative Attacks on the Merits of the Contempt Order Fail.

1. *Arpaio Was Properly Charged under 18 U.S.C. § 401 Because the Melendres Case Was a Prosecution in the Federal Public Interest*

Arpaio claims that his contempt charge fell under 18 U.S.C. §§ 402 and 3691, which together impose a one-year statute of limitations and a jury trial

requirement on certain types of contempt actions. But sections 402 and 3691 only apply when the defied order was not "entered in a[] suit or action brought or prosecuted in the name of, or on behalf of, the United States[.]" And this federal public interest carve-out applies to the *Melendres* action, because the United States intervened as a plaintiff and was enforcing important federal interests in the face of local disobedience.

To circumvent this federal public interest carve-out, Arpaio relies on the fact that private parties initiated the *Melendres* litigation, so "[i]t is clear that the Government did not 'bring or prosecute' the action." [AOB at p. 33.] But "the dispensing language of [sections 402 and 3691] does not, in *haec verba*, require that the United States (or a federal agency) be a party plaintiff." *United States v. Wright*, 516 F.Supp. 1113, 1116 (E.D. Pa. 1981) (internal citation omitted). The provisions only require that "the United States should *at some point in the litigation* assume a procedural posture functionally equivalent to that of a complaining party." *Id.* (emphasis added).

Arpaio offers no authority to support his argument beyond a single unexplained cite to *United States v. Pyle*, a nearly four-decades-old case from the Eastern District of Pennsylvania that reaffirmed the federal public interest carve-out but concluded that it did not apply to the specific facts there. 518 F.Supp. 139 (E.D. Pa. 1981). Not only are the facts in *Pyle* distinguishable, *Pyle*'s underlying

reasoning and legislative analysis actually confirm why no jury trial was required here. Moreover, a joint opinion from two judges in the same district addressing the same issue arising from the same underlying litigation disagreed with the judge in *Pyle* and held that the federal public interest carve-out *did* apply to that situation. *Wright*, 516 F.Supp. at 1118. Other relevant case law and section 402's legislative purpose similarly reveal that the federal public interest carve-out applies where, as here, the federal government sought to vindicate public interests, especially against local officials violating constitutional rights.

i. *Pyle* Actually Confirmed the Federal Public Interest Carveout, But Found That It Did Not Apply to the Specific Facts There

The narrow holding in *Pyle* has no bearing here. *First*, *Pyle* is a thirty-eight-year-old case from the Eastern District of Pennsylvania that has never been cited in this circuit. *Second*, two judges writing jointly in *Wright*—five days before *Pyle* and facing the same facts and issues—reached the opposite conclusion. At most, the 1981 opinions of these three judges favor affirming Arpaio's conviction two to one.

Importantly, *Pyle* addressed a factual scenario completely different from the one here. In *Pyle*'s underlying litigation, a plaintiff class sued various defendants, including the city of Philadelphia, several city officials, *and the United States itself* (by naming the Department of Housing and Urban Development ("HUD")) to

compel construction of low-income housing. 518 F.Supp. at 141. The district court found for the plaintiffs and issued a corresponding injunction. Later, in response to a motion by plaintiffs that HUD joined, the district court issued a preliminary injunction limiting certain protest activities that were disrupting the housing development's construction. *Id.* at 142. Certain third parties violated the preliminary injunction and were prosecuted under section 401 for contempt of court. *Id.*

For purposes of section 402's carve-out, *Pyle* thus involved the federal government as *a defendant*, undermining any claim that it was prosecuting the federal public interest in the underlying civil rights action. But here, the federal government intervened as *a plaintiff* in the underlying civil rights action against Arpaio, thereby establishing that *Melendres* was "brought or prosecuted" on behalf of the United States. And crucially, the two judges in *Wright* found that "the United States, through HUD, . . . played so substantial and so formal a role" in the litigation underlying *Pyle* that it did fall under the federal public interest carve-out. *Wright*, 516 F. Supp. at 1117. If the applicability of section 402's carve-out in the *Pyle* litigation was a close call, its applicability here is a slam dunk.

ii. Case Law Suggests Section 402's Carveout Applies Where the Underlying Case Reflects the Federal Government's Attempt to Further Public Interests

The *Pyle* court found a single case addressing the applicability of section 402's carve-out in an action the United States did not initiate, *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963) ("*Barnett I*"). Both the *Barnett I* opinion and *Pyle*'s analysis of it confirm that the carve-out can apply even when the government is not the first to initiate suit.

Barnett arose from civil rights pioneer James Meredith's lawsuit seeking to desegregate the University of Mississippi and compel it to admit him. After the district court ruled against Meredith, the Fifth Circuit Court of Appeals reversed and granted the injunction prayed for, and then granted the application of the United States to appear and participate as amicus curiae to ensure Mississippi complied with the injunction. *See United States v. Barnett*, 376 U.S. 681, 683-84 (1964) ("*Barnett II*").

The Mississippi Legislature responded by adopting measures to prevent Meredith from attending the University, and the Court of Appeals then enjoined the Mississippi governor and various other state officials from continuing to prevent Meredith's admission. *Id.* at 684-85. When Mississippi's governor and lieutenant governor violated this order, they were prosecuted and convicted of criminal contempt without a jury, which they appealed.

In response to the contemnors' arguments that they were improperly denied a jury trial, an evenly divided Fifth Circuit sitting en banc found that section 402's carve-out applied because the United states acted "as something more than a mere amicus curiae." *Barnett I*, 330 F.2d at 388. The Supreme Court in *Barnett II* decided on other grounds that a jury trial was not required, so *Barnett I* was the last word on the federal public interest carve-out .

In contrasting *Barnett I*, the *Pyle* court—far from supporting Arpaio—articulated reasoning why the section 402 carve-out applies here. *First*, *Pyle* observed that the court of appeals in *Barnett* "assigned the United States . . . status as a de facto party plaintiff," while "HUD simply did not play a comparable role" in the underlying litigation where it was a defendant. *Pyle*, 518 F.Supp. at 150. In *Melendres*, the United States was not simply "something more than a mere amicus curiae" or "a de facto party plaintiff": it was an *actual* party plaintiff, which intervened to actively participate in the underlying civil rights enforcement.

Second, unlike the United States in *Barnett*, "HUD did not seek to enter [*Pyle's* underlying action] to defend important federal and public interests." *Id.* In *Melendres*, the United States joined the litigation to protect federal civil rights from threats by local officials, which is the same reason the government joined Meredith's cause in *Barnett*. As the United States stated in its motion to intervene in *Melendres*:

> The United States' active participation in the remedial phase of this action as plaintiff-intervenor is necessary to protect the United States' interests in the effective nationwide enforcement of civil rights laws relating to police misconduct and in ensuring that the defendants' equal protection violations are remedied through vigorous enforcement of the remedial orders in this case.

[2ER:Tab 14, at 320.] And as the *Melendres* court recognized in granting this motion, the United States' intervention "promot[ed] the strong public interest in obtaining compliance with the equal protection clause of the Constitution." [2ER:Tab 14, at 400 (internal citation and alterations omitted).]

So under *Pyle*'s own reasoning, the points favoring application of the federal public interest carve-out apply even more strongly here than in *Barnett I*.

iii. The Legislative Purpose of section 402 Favors Applying the Federal Public Interest Carve-out Here

Finally, the legislative purpose behind section 402—to prevent corporations from exploiting injunctions to further purely private interests rather than federal public interests—supports applying the federal public interest carve-out here. As *Pyle* observed, Congress enacted sections 402 and 3691 "to curb the abuse of the criminal contempt power in labor disputes." 518 F.Supp. at 151. In the early nineteenth century, powerful corporations made a practice of obtaining injunctions and then pushing criminal contempt prosecutions against protesting laborers, which would deny the laborers a jury trial that they could have received if prosecuted for independent criminal offenses. *Id*. Such "abuse of the criminal

contempt power" between private parties is what Congress sought to curb. *See* 48 Cong. Rec. 8779-8880 (remarks of Rep. Floyd) ("The purpose of this bill is to prevent injustice in certain classes of cases which chiefly grow out of labor disputes, where great and powerful corporations, on the one hand, go into the federal courts and seek to enforce their decrees and judgments against laboring people."); *see also United States v. Sweeney*, 226 F.3d 43, 45 (1st Cir. 2000) (observing that Congress inserted a jury trial provision in Section 402 in order to prevent abuse by "private litigants" seeking to use the judicial contempt power as an "instrument of private law enforcement") (quoting *Wright*, 516 F. Supp. at 1116).

But where the United States—not a private corporation—prosecutes the underlying action, the concern animating sections 402's and 3691's jury trial requirement is eliminated. Private parties are motivated by private interests, but the United States "has but one purpose: to advance and protect the common good as declared by federal law." *Pyle*, 518 F.Supp. at 156. So if the United States joins an action and thus determines that it furthers "the public interests embodied in federal law," *id*., the concern about private corporate abuse animating sections 402's and 3691's requirements are absent.

Moreover, where the federal government is seeking to endure federal rights, Congress in sections 402 and 3691 not only determined that a jury is unnecessary,

but a potential hindrance to the fair administration of justice. As *Wright* observed, section 402's "legislative purpose as it emerges from the legislative history was to permit non-jury trials where the concern of the United States in seeking, through contempt proceedings, to redress disobedience of any lawful order, was enforcement of the judicially determined public interest as distinguished from enforcement of judicially determined private entitlements." 516 F.Supp. at 1116 (internal quotation and alterations omitted).

The federal public interest carve-out to section 402 is especially important when local officials like Arpaio violate federally protected rights and defiantly flaunt federal court protections for those rights. *Pyle* recognized that section 402's carve-out should apply where the United States seeks "to defend important *federal* and public interests," or put differently, "the public interests embodied in federal law." 518 F.Supp. at 150, 156 (emphasis added). *Barnett* exemplified this point, as the federal government there sought to enforce federal rights against the refusal to desegregate by a state's government. In such scenarios, local juries may only serve to further frustrate attempts to vindicate federal public interests. *See generally* Judge Billy G. Bridges & Wendy E. Walker, *The Forty Year Fight to Desegregate Public Education in the Fifth Circuit and in Particular, Mississippi*, 16 Miss. C. L. Rev. 289 (1996) (describing how federal courts in the mid-19th

Century led desegregation efforts). Congress created a carve-out to section 402 to prevent this.

2. *The Evidence Presented at Trial Was Sufficient to Sustain Arpaio's Conviction*

"Criminal contempt is established when it is shown that the defendant is aware of a clear and definite court order and willfully disobeys the order." *United States v. Rylander*, 714 F.2d 996, 1001-02 (9th Cir. 1983). Arpaio violated the PIO. He admitted below that he "violated the Court's orders and that there are consequences for these violations." [*See* Contempt Docket, 2SER:Tab15, 507:15-16; Expedited Motion to Vacate Hearing and Request for Entry of Judgment, *Melendres*, Docket, 2SER:Tab12.] Arpaio admitted in *Melendres* that he "directed operations and promulgated policies that violated the terms of the [December 23, 2011] preliminary injunction." Order to Show Cause, *Melendres* Docket, 2SER:Tab11, 1t 473.[9] But Arpaio claims that, while he may be liable for civil contempt, he is not guilty of criminal contempt for three reasons: (1) the PIO was not "clear and definite" in enjoining the MCSO's practice of detaining immigrants based solely on their undocumented status and transferring them to federal authorities; (2) Arpaio reasonably relied on the advice of counsel in continuing his contumacious conduct; and (3) Arpaio reasonably relied on orders from federal

[9] Arpaio stipulated to the facts as stated in the *Melendres* court's order to show cause. *Melendres* Docket, 1SER:13, p. 492.

authorities who had the power to permit his contumacious conduct. None of these arguments comes close to carrying the burden necessary to overturn the district court's findings.

i. The Evidence Was Sufficient to Find the PIO "Clear and Definite"

"[T]he clarity of [the PIO] must be evaluated by a reasonableness standard, considering both the context in which it was entered and the audience to which it was addressed." *United States v. Cutler*, 58 F.3d 825, 835 (2d Cir. 1995). Here, there is no reasonable dispute that Arpaio publicly declared that he would not change his conduct in response to the PIO, effectively conceding that his conduct violated it. [Contempt Docket, 1ER:Tab 6, at 244.] But to distract from his well-publicized campaign of defiance, Arpaio points to three categories of evidence to suggest that the PIO was too ambiguous to support a criminal contempt verdict: (1) the text of the PIO itself, (2) the testimony of MCSO officers and primarily Arpaio's attorney, and (3) Arpaio's interpretation of comments from Ninth Circuit judges hearing an appeal of the PIO. [AOB at pp. 37-46.] In fact, the evidence from each category—especially when drawing the required inferences in the government's favor—supports the district court's finding that the PIO clearly and definitively proscribed Arpaio's contumacious conduct. *See United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017) (holding that a district court's findings of fact must be upheld on appeal if, "viewing the evidence in the light most favorable to

the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (emphasis in original).

(1) The text of the PIO—especially in the context of the *Melendres* litigation—clearly and definitively identifies the proscribed conduct

Arpaio argues that the text of the PIO "is not evidence" and is "of no probative value with regard to whether the [PIO] was clear and definite to" Arpaio. [AOB at p. 37.] Arpaio contends further that the PIO "contained confusing conditions and qualifications that you could drive a 'Mack truck' through." [*Id.* at p. 41.] He is wrong on all counts.

First, courts determining whether an order is "clear and definite" frequently evaluate the order's text. *See, e.g.*, *United States v. Forte*, 742 Fed.Appx. 207, 208 (9th Cir. 2018) (finding an order sufficiently "clear and definite" to support a criminal contempt conviction based only on the order's text); *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1244 (11th Cir. 2007) (analyzing an order's text in determining whether it was sufficiently clear and definite to support a criminal contempt conviction).

Second, the context in which the PIO was issued—a factor Arpaio emphasizes is essential to a proper judgment[10]—make clear that Arpaio was

[10] *See* AOB at p. 40 ("[T]he reasonableness of the specificity of the order is a *question of fact* and must be evaluated in the *context in which it is entered and the*

enjoined from overseeing the practice of detaining people based solely on their immigration status and transferring them to federal authorities. The PIO came after Arpaio had spent years litigating the plaintiffs' claims that he enforced "a policy stopping persons without reasonable suspicion that criminal activity is afoot" in violation of the Fourth Amendment (PIO at 2), *i.e.*, a policy of stopping people based solely on their immigration status. When plaintiffs moved for summary judgment on this and other claims, the district court in the PIO granted summary judgment "to the extent that it enjoins MCSO from detaining persons for further investigation without reasonable suspicion that a crime has been or is being committed." PIO at 23-26.

If this were not enough, the PIO repeatedly defines the illegal conduct it seeks to enjoin:

- "[A]ctual knowledge, let alone suspicion, that an alien is illegally present is not sufficient to form a reasonable belief he has violated federal criminal immigration law." *Id.* at 7.
- "MCSO officers . . . have no power to detain or investigate violations such as those regulating authorized entry, length of stay, residence status, and deportation. Seizing a civilian pursuant to such a violation,

---

audience to which it is addressed.") (quoting *United States v. Turner*, 812 F.2d 155, 1565 (11th Cir. 1987)) (emphasis added by Arpaio).

absent reasonable suspicion of criminal activity, violates the Fourth Amendment." *Id.* at 8 (internal citation and quotation omitted).

- "The fact that a law enforcement officer suspects, or even knows, that a vehicle passenger is not legally present in the country does not in and of itself provide reasonable suspicion that the passenger was or is being 'smuggled'" under Arizona's human smuggling law A.R.S. § 13-2319(A)-(F). *Id.* at 11.
- "Local law enforcement officers may therefore not detain vehicle passengers based upon probable cause, or even actual knowledge, without more, that those passengers are not lawfully in the United States, since such knowledge does not provide officers with reasonable suspicion that the passengers are violating any law that local law enforcement officers can enforce." *Id.* at 12-13 (citation omitted).
- "[B]elief without more that a person is not legally authorized to be in the country cannot constitute reasonable suspicion to believe that he or she has violated the state human smuggling law." *Id.* at 15.
- "To the extent that Defendants claim that the human smuggling statute, or any Arizona or federal criminal law, authorizes them to detain people based solely on the knowledge, let alone the reasonable

suspicion, that those people are not authorized to be in the country, they are incorrect as a matter of law." *Id.* at 17.

Based on this detailed description of the MCSO's unlawful conduct, the PIO enjoined the MCSO and its offers "from detaining any person based on knowledge, without more, that the person is unlawfully present within the United States." *Id.* at 38. The district court explained further: "It follows of course that the MCSO may not stop any person based on reasonable suspicion or probable cause, without more, that the person is unlawfully present within the United States." *Id*. And the PIO concluded by clarifying one last time: "MCSO does not have reasonable suspicion that a person violating or conspiring to violate the state human smuggling law or any other state or federal criminal law because it has knowledge, without more, that the person is in the country without legal authorization." *Id.*

Nothing could obscure this "clean and definite" directive to cease detaining undocumented immigrants who committed no crimes and turning them over to federal authorities.

(2) The trial record shows Arpaio understood that the PIO proscribed his contumacious conduct

The PIO's compass was not just clear on its face, but made clear to Arpaio through his counsel, Timothy Casey. Arpaio cherry-picks phrases from Casey's testimony but, the record shows that Casey understood and explained the PIO to Arpaio, and that Arpaio understood but chose to defy it.

Arpaio points to a scattered handful of Casey's remarks that seem to add qualifiers to the PIO as evidence that Casey and thus Arpaio did not understand the straightforward order to forbid arresting undocumented immigrants and transferring them to federal authorities. In fact, Casey made clear to Arpaio that:

1) Arpaio could not detain someone based on his immigration status, (*see, e.g.*, Trial Tr. Day 1-AM 89:4 (Casey testifying that he told Arpaio: "If you just believe or you know that [someone] is in the country unlawfully, you cannot detain him based on that alone. You either are to have an arrest based on state charges or you release. Those are the options. That's what I explained to him."); and
2) He could not turn illegal immigrants over to immigration authorities. [*See, e.g.*, *id.* at 90:13-22 (Casey testifying that he told Arpaio "you can't turn anyone over to the federal government"); Trial Tr. Day 1-PM 133:8-14 (Casey testifying that he told Arpaio "that the [sheriff's] office could not hold people for the federal authorities in the absence of state charges").]

Moroever, Casey testified that Arpaio "understood" these warnings. [*See* Trial Tr. Day 1-PM 154:12-19 (after Arpaio transferred undocumented immigrants to U.S. border patrol, "[t]he sheriff said it wasn't going to happen again. He understood. It was a one-time he characterized it as a mistake, and it would not happen again.

And that's my memory, is that the resolution was it was not going to happen again, that this was an exception, an aberration, and not the rule, that he remembered what we talked about particularly after the trial in July or August, and it was not going to happen again").]

Arpaio confirmed his understanding through his public statements about his defiance of the PIO. In a March 1, 2012 Univision interview, Arpaio stated that he was still detaining and arresting illegal immigrants and would continue to enforce federal immigration laws. [Contempt Docket, 1ER:Tab 6, at 244 (internal citation omitted.] A press release later that month stated that "Arpaio remains adamant about the fact that his office will continue to enforce both state and federal illegal immigration laws as long as the laws are on the books." [*Id.* (internal citation omitted)]. If that did not make his willfulness clear enough, Arpaio stated in an April 4, 2012 interview that he "will never give in to control by the federal government." [*Id.* (internal citation omitted)]. The idea that Arpaio attempted to abide by the PIO but just misunderstood it is ludicrous.

(3) Verbal Comments from Ninth Circuit judges hearing a challenge to the PIO support the court's finding that the order was clear and definite

Arpaio claims that the Ninth Circuit panel hearing his 2012[11] appeal of the PIO in *Melendres v. Arpaio*, No. 12-15098, interpreted the PIO differently from the district court, so the order must not be "clear and definite." [AOB at pp. 42-43.] The three judges—Arpaio concedes—agreed that the PIO clearly forbade him from stopping persons based solely on knowledge or suspicion they were in the country illegally. And the Ninth Circuit panel never suggested that the PIO *allowed* detaining and transferring undocumented immigrants to federal authorities. To circumvent the unambiguous scope of the PIO, both misinterprets the judges' verbal statements and gives their comments improper weight. *See In re McInnis*, No. BAP NC-17-1336-FBKU, 2018 WL 6565413, at *7 (B.A.P. 9th Cir. Dec. 10, 2018) ("Even if there was a conflict between the bankruptcy court's oral ruling and the Dismissal Order, the court's written order prevails over any oral statements in court.") (*citing Rawson v. Calmar S.S. Corp.*, 304 F.2d 202, 206 (9th Cir. 1962) (stating that the court's oral "comment is superseded by the findings of fact. The trial judge is not to be lashed to the mast on his off-hand remarks in

[11] Arpaio writes that these comments were made in 2013, but they were actually made during oral argument in September 2012. *See Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012).

announcing decision prior to the presumably more carefully considered deliberate findings of fact").

For example, Arpaio quotes Ninth Circuit Judge Susan Graber's statement that "all [Judge Snow has] enjoined is stopping someone for human trafficking on the sole ground that the person themselves, that people themselves are here unlawfully." [AOB at p. 42 (internal quotation omitted).] From this alone, Arpaio infers that Judge Graber believed the PIO permitted him to stop undocumented immigrants and turn them over to federal authorities.

In reality, Judge Graber's said the PIO forbade the MCSO from "stopping someone" for being in the country illegally. One cannot detain and deliver an undocumented immigrant to federal authorities without first "stopping them."

Arpaio similarly misconstrues Judge Clifford Wallace's statement that the PIO "says that the Sheriff cannot enforce federal civil cases. That's all it says. And it says the officers are hereby enjoined from detaining any person based upon knowledge or reasonable belief, without more . . . that the person is unlawfully present within the United States. And he explains that's a civil not a criminal case so you can't stop them." [*Id.* at p. 43 (internal quotation omitted).]

Arpaio does not explain how his interpretation of these comments conflicts with the district court's verdict. In Judge Wallace's reading, the PIO enjoins the MCSO from enforcing federal civil immigration law, including by stopping

someone solely based on his status as an illegal immigrant. This description easily covers Arpaio's contumacious conduct of detaining and delivering undocumented persons to the federal government based solely on their immigration status, and thus accords with the district court's verdict.

And even if the Ninth Circuit Judges had disagreed with the district court's unambiguous directive from the PIO, that discordance would not undermine the clear evidence that Arpaio understood the PIO to forbid turning people over to federal authorities. This is true for the reason Arpaio cites in his brief: "[t]he reasonableness of the specificity of an order is a *question of fact* and must be evaluated *in the context in which it is entered and the audience to which it is addressed*." [AOB at p. 40 (quoting *United States v. Turner*, 812 F.2d 1552, 1565 (11th Cir. 1987) (emphasis Arpaio's).] The PIO was directed toward Arpaio, and the evidence at trial—especially when drawing all required inferences in the prosecution's favor—showed that Arpaio understood it to forbid detaining undocumented immigrants just to turn them over to federal authorities.

ii. The PIO Did Not Violate the Fair Notice Requirement of the Due Process Clause of the Fifth Amendment

Arpaio argues that the Fifth Amendment's fair notice requirement holds that "in order to convict a defendant for criminal contempt of a court order, the order must give notice to a person of 'ordinary intelligence' that his conduct was 'plainly and unmistakably' criminal." [AOB at p. 47 (internal citations omitted).]; *see also*

Weyerhaeuser Co. v. Int'l Longshoremen's & Warehousemen's Union, Local 21, 733 F.2d 645 (9th Cir. 1984) (finding this Court does not have jurisdiction over an appeal of the verdict, because a criminal contempt order is not final—and thus is not appealable under 28 U.S.C. § 1291—until the court imposes sanctions for it.). This fair notice standard applies to criminal statutes, not preliminary injunctions. Arpaio does not cite a single case suggesting otherwise, because none exists. He cites instead three Supreme Court cases that address whether certain statutes are vague, one Eighth Circuit case that does not address appellant's claim that a court order was vague and overbroad, and one Fifth Circuit case that just re-states the "clear and definite" requirement discussed above. None of these authorities applies the fair notice doctrine in a way comparable to preliminary injunctions, certainly not in contexts where the enjoined party had ample notice as was the case here.

iii. The Evidence Refutes Arpaio's Advice-of-Counsel Defense

"Criminal contempt is established when it is shown that the defendant is aware of a clear and definite court order and willfully disobeys the order." *United States v. Rylander*, 714 F.2d 996, 1001-02 (9th Cir. 1983). "'Willfulness' is defined as 'a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.'" *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986) (citing *United v. Baker*, 641 F.2d 1311, 1317 (9th Cir. 1981)). A

defendant may negate the willfulness element by showing that he committed the contumacious act in good-faith reliance on the advice of counsel that the act did not violate the court order. *See Armstrong*, 781 F.2d at 706.

In order to assert an advice-of-counsel defense, a defendant must have made a full disclosure to his attorney, received advice as to the specific course of conduct that he followed, and relied on this advice in good faith. *United States v. Smith*, 7 F.App'x 772, at *1 (9th Cir. 2001) (citing *United States v. Ibarra–Alcarez,* 830 F.2d 968, 973 (9th Cir. 1987). Here, as cataloged in Part II.A.1.ii above, Arpaio did not fully disclose his activities to his counsel *and* Arpaio's counsel advised him more than once that his contumacious conduct violated the PIO. Thus, no prong of the advice-of-counsel defense is satisfied.[12]

iv. No Evidence Supports Arpaio's Public Authority Defense

Arpaio also asserts that he raised "the public authority defense, which was sustained by the undisputed evidence but entirely overlooked by the lower court." [Pet. Br. at 55 (internal quotation omitted).]

---

[12] Seemingly aware of this, Arpaio offers only that: "The uncontroverted evidence showed that even Defendant's former lawyer Mr. Casey . . . did not believe that the PIO was clear or definite at the time, and that he advised the Defendant of this and that the Defendant could make a good faith argument in support of cooperating with federal authorities." [AOB at p. 48.] As outlined in Part II.A.1.ii , Casey told Arpaio that the PIO proscribed his contumacious conduct, and that the supposed "good faith argument" to the contrary would lose in the relevant court and most other courts.

But a public authority defense is properly used only when "a government official makes some statement or performs some act and the defendant relies on it, possibly mistakenly, and commits an offense in so doing." *United States v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994). A defendant must show "that his reliance on governmental authority was reasonable as well as sincere" and that the law enforcement officers who allegedly authorized the illegal activity had the *actual* legal authority to permit it. *Id.* at 881-82.

Here, Arpaio points to no evidence submitted at trial showing that: (1) he relied on statements from federal law enforcement officers in directing the Maricopa County Sheriff's Office to detain individuals without probable cause that they committed any crime, and (2) such federal agents had the "*actual* legal authority to permit" those violations. Instead, Arpaio posits, without providing any citation to the trial court record, that the testimony from the border agents who testified at trial support the first prong of this test, namely that "Defendant and M[aricopa] C[ounty] S[heriff's] O[ffice] had a reasonable belief that they were acting as authorized government agents to assist in law enforcement activity at the time of the offense." [AOB at p. 55 (internal citation and quotations omitted).] Arpaio fails to address, much less satisfy, the second prong, that the officers who allegedly authorized the illegal activity had the actual legal authority to permit it.

3. *Issuing the Verdict in Arpaio's Absence Was Harmless*

Lastly, Arpaio argues that the district court violated his Fifth and Sixth Amendment rights by providing electronic notice of the bench trial verdict to counsel via email rather than scheduling a court proceeding to announce the verdict in the presence of Arpaio. [AOB at pp. 35-37.] Arpaio cites a Second Circuit case, *United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997), cert. denied, 522 U.S. 1134 (1998), for the proposition that this failure constitutes a fundamental structural error in violation of the Fifth and Sixth Amendments. However, the fact that the district court did not announce the verdict in the presence of Arpaio simply does not fall within the narrow category of structural errors "permeates the trial from beginning to end . . . ." *United States v. Kash*, 751 Fed.Appx. 1007, 1008 (9th Circ. Oct. 16, 2018) (citing *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir. 1996)). Trial errors, in contrast, are those "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Rice*, 77 F.3d at 1141. The Supreme Court has said very clearly that structural errors "are the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578 (1986). In addition, to merit a finding of structural error, a defendant must have been

excluded from a stage of the criminal proceedings at which he had an "active role to play." *Rice*, 77 F.3d at 1141.

"Our court, as well as the D.C. and Tenth Circuits, have applied harmless-error analysis to the defendant's absence at return of the verdict." Rice, 77 F.3d at 1142. In addition, since *Canady*, the Second Circuit has also applied the harmless-error analysis to a defendant's absence at return of a verdict. *See, e.g., United States v. Arrous*, 320 F.3d 355, 361-62 (2003) (finding any error in conducting resentencing proceeding in defendant's absence was harmless error because defendant's presence would not have changed the sentence). Here, the district court's failure to issue Arpaio's verdict to him personally was not a structural error because it did not permeate the entire trial from beginning to end. In addition, there is no basis to assume that Judge Bolton would have changed her verdict had she communicated it in Arpaio's presence. "In two centuries of state and federal case law, remarkably few opinions even mention the possibility that defendant's presence may cause jurors to have second thoughts when they return the verdict," much less judges. See *Rice*, 77 F.3d at 1143. Thus, any error with issuing the verdict in Arpaio's absence is harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the district court's decision.

Respectfully Submitted April 22, 2019

/s/ Christopher G. Caldwell

Christopher G. Caldwell #106790
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524
Telephone: (213) 629-9040
Facsimile: (213) 629-9022
E-mail: ccaldwell@bsfllp.com

Special Prosecutor for United States of America

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief contains 13,734 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 32.

Dated: April 22, 2019

/s/ Christopher G. Caldwell

Christopher G. Caldwell #106790
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524
Telephone: (213) 629-9040
Facsimile: (213) 629-9022
E-mail: ccaldwell@bsfllp.com

Special Prosecutor for United States of America

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Brief for the United States was this day served upon counsel for appellant by notice of electronic filing with the Ninth Circuit CM/ECF system.

Dated: April 22, 2019

/s/ Christopher G. Caldwell

Christopher G. Caldwell #106790
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street, 31st Floor
Los Angeles, California 90017-5524
Telephone: (213) 629-9040
Facsimile: (213) 629-9022
E-mail: ccaldwell@bsfllp.com

Special Prosecutor for United States of America