21-2486

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN ROBERT DONZIGER,

Defendant-Appellant.

On Appeal From the United States District Court for the Southern District of New York, No. 1:19-cr-561 (Preska, J.)

BRIEF FOR THE UNITED STATES DEPARTMENT OF JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE ON ISSUE I

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INTEREST OF THE *AMICUS CURIAE*[1]

Ordinarily, federal criminal prosecutions are conducted by the Department of Justice under the supervision of the Attorney General. *See, e.g.*, 28 U.S.C. §§ 515, 516, 518, 519, 547(1). In this contempt case, the Department declined the district court's referral of prosecution pursuant to Federal Rule of Criminal Procedure 42(a)(2), resulting in the appointment of private attorneys as special prosecutors under that provision. Notwithstanding the Department's decision not to prosecute this particular case, the appointment of private attorneys to pursue charges of criminal contempt in federal court implicates important interests of the Executive Branch, including whether those attorneys are "officers" of the United States for purposes of the Appointments Clause. The Department submits this brief as *amicus curiae* to express the distinct views of the Executive Branch on that question. *See, e.g.*, *United States v. Providence Journal Co.*, 485 U.S. 693, 694 (1988) (noting Department's brief for the United States as *amicus curiae* in contempt case where special prosecutor also appeared on behalf of the United States as a party); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 789 (1987) (same).

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Department of Justice has not sought the consent of the parties or leave of the Court before filing this brief. The special prosecutors, defendant, and defendant's counsel played no role in the authorship of this brief, nor did they or anyone else contribute money to prepare and file it.

Consistent with its earlier decisions not to prosecute this case directly or to intervene in the contempt proceedings, the Department of Justice takes no position on other issues related to the defendant's conviction and sentence.

STATEMENT OF THE CASE

A. The Chevron Litigation

This case is the latest to arise out of a long-running dispute between defendant Steven Donziger and the Chevron Corporation. *See, e.g.*, *Chevron Corp. v. Donziger*, 990 F.3d 191 (2d Cir. 2021); *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012). Donziger, an attorney, represented plaintiffs in Ecuador who claimed to have been harmed by a Chevron predecessor who allegedly polluted the Amazon rainforest. SPA 8. After Donziger obtained an $8.6 billion judgment against Chevron in Ecuadorian courts, Chevron sued Donziger in the United States District Court for the Southern District of New York, alleging that he had procured that judgment through bribery and fraud. SPA 8-9.

The district court (Kaplan, J.) found in favor of Chevron. *See* SPA 8-9. The court ordered equitable relief that included a "constructive trust for the benefit of Chevron" on all money and assets Donziger had received or would receive that were "traceable to the Ecuadorian Judgment or the enforcement of the Ecuadorian Judgment." *Chevron Corp.*, 833 F.3d at 117-19 (brackets and

quotation marks omitted). This Court affirmed, *id.* at 151, and the Supreme Court denied certiorari, *see* 137 S. Ct. 2268 (2017).

In the years that followed, the district court grew increasingly concerned that Donziger was attempting to evade his obligations under the court's judgment, including by trying to shield assets in order to avoid assigning them to Chevron. *See* SPA 21-64. In an effort to address that issue, the court ordered Donziger to (among other things) provide a list of any electronic devices, accounts, and document management services he had used since the date of the judgment; allow a neutral forensic expert to image Donziger's electronic devices and storage media; and surrender his passport. *See* SPA 10-11, 64-124. Donziger did not timely comply with those orders. *Ibid.*

B. Contempt Proceedings

1. *Appointment of Special Prosecutors*

On July 31, 2019, the district court issued an order to show cause why Donziger should not be held in criminal contempt pursuant to 18 U.S.C. § 401(3), based on his willful failures to comply with the court's judgment and its discovery and passport orders. JA 49-58. The court also issued an order stating that it had referred the matter to the United States Attorney; that the United States Attorney had "'respectfully decline[d]'" to prosecute the contempt due to resource constraints; and that the court had therefore

appointed Rita M. Glavin and two other attorneys from her law firm as special prosecutors pursuant to Federal Rule of Criminal Procedure 42. JA 59; *see* Fed. R. Crim. P. 42(a)(2) (providing that "the court must appoint another attorney to prosecute [a] contempt" if "the government declines"). The court stated that the special prosecutors would "have the same power to investigate, gather evidence and present it to the Court as could any other government prosecutor," including the power to issue subpoenas and obtain search warrants. JA 59. It assigned the matter to another district court judge (Preska, J.) for trial. JA 49.

2. *Motions to Dismiss*

On April 2, 2021, Donziger sent a letter to the Acting Deputy Attorney General asking the Department of Justice to "review" the contempt proceedings in his case. JA 102-23. Donziger argued, among other things, that Department "oversight" of the special prosecutors was "constitutionally[ ] required." JA 122. In a second letter dated April 19, 2021, Donziger further argued that the Department should review his case because the special prosecutors had used investigative resources provided by the FBI. JA 164-65. On May 7, 2021, the Acting Deputy Attorney General informed Donziger that the Department had reviewed his letters and had decided not "to intervene in the federal-court initiated contempt proceedings." JA 156.

On May 10, 2021—the first day of Donziger's bench trial—Donziger filed a motion to dismiss the order to show cause in which he argued, for the first time, that the appointment of the special prosecutors violated the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, because "Ms. Glavin and her colleagues are inferior officers acting without any acknowledged Executive [B]ranch supervisory authority." Mot. to Dismiss at 3 (D. Ct. Doc. 302). The district court denied that motion, explaining that Donziger had failed to show that "'the special prosecutors are not subject to any control or supervision'" by the Attorney General. SPA 139 (quoting trial transcript).

After the close of evidence at trial, Donziger filed another motion to dismiss in which he argued that the Supreme Court's then-recent decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), established that the special prosecutors' appointment violated the Appointments Clause. Mot. to Dismiss at 1-4 (D. Ct. Doc. 330). Donziger asserted that *Arthrex* required "active supervision" of an inferior officer by a superior one, and that the absence of such supervision by the Department of Justice in this case meant that "every facet of [the special prosecutors'] participation in this case and the foundation of the case itself is void." *Id.* at 2, 4.

The district court again rejected Donziger's Appointments Clause challenge. SPA 140-53. As a threshold matter, the court determined that

Donziger had waived or forfeited his claim by not raising it before trial. SPA 142-43. Alternatively, the court determined that the claim lacked merit because federal judges' longstanding "'ability to appoint a private attorney to prosecute a contempt action'" does not divest the Department of Justice of its authority to supervise the private attorney's work. SPA 144-45 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987)).

Proceeding on the assumption that the special prosecutors were "inferior officers" for purposes of the Appointments Clause, the court determined that the special prosecutors could "be supervised, in the constitutional sense, by the Attorney General" pursuant to the Attorney General's statutory authority to "'direct[]'" the "'conduct of litigation in which the United States . . . is a party or is interested.'" SPA 143-47 (quoting 28 U.S.C. § 516); *see* SPA 147 ("Although the Special Prosecutors may have been appointed by Judge Kaplan, they are exercising Executive Power and are subject to the Attorney General's control and supervision."). The court reasoned that "a system of appointment by the Judiciary but oversight by the Executive Branch is hardly foreign to our system of constitutional governance," and cited interim United States Attorneys as an example of inferior officers who are appointed by federal courts but nonetheless remain subject to "control or influence by the Attorney General." SPA 147-48 (citing 28 U.S.C. § 546(d)). The court

determined that the Department of Justice's decision not to prosecute this case in the first instance or to intervene later was irrelevant: "[i]n the Appointments Clause context, the standard is 'cannot,' not 'did not.'" SPA 152-53.

The district court further determined that Donziger's reliance on *Arthrex* was misplaced. That case addressed whether, for purposes of the Appointments Clause, members of the Patent Trial and Appeal Board qualified as inferior officers or as principal ones who had to be appointed by the President with the advice and consent of the Senate. *Arthrex*, 141 S. Ct. at 1979-80. The district court observed that *Arthrex* did not address, or even mention, the longstanding authority of federal courts to appoint special prosecutors in criminal contempt cases, which the Supreme Court explicitly upheld in *Young* (albeit not in the context of an Appointments Clause challenge). SPA 145 & n.507. And in any event, the court explained, *Arthrex* held that the Board members were principal officers because they were statutorily insulated from review and removal by other officers. *Arthrex*, 141 S. Ct. at 1985-86; *see* SPA 151. The district court determined that no similar provision "limit[ed] the Attorney General's discretion to review the Special Prosecutors' decisions or remove them from their posts." SPA 151-52.

3. *Verdict and Post-Verdict Proceedings*

After considering the evidence presented during the bench trial and the parties' arguments, the district court determined that Donziger was guilty beyond a reasonable doubt on each count of criminal contempt listed in the order to show cause. SPA 244-45.

Donziger filed a motion for a new trial under Federal Rule of Criminal Procedure 33 in which he again argued that the special prosecutors' appointments violated the Appointments Clause. Mot. for New Trial at 1-6 (D. Ct. Doc. 351). The district court denied that motion on the grounds that (i) it was a procedurally improper request for reconsideration of the court's earlier denials of Donziger's motions to dismiss, SPA 252-55; (ii) the Appointments Clause challenge was untimely, SPA 255-59; and (iii) assuming the special prosecutors were inferior officers, Donziger's claim lacked merit because he had not identified any legal reason why the Attorney General could not have supervised their work, SPA 259-62.

The district court sentenced Donziger to six months of imprisonment. SPA 329.[2] This appeal followed.

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[2] Before trial, the district court determined that the contempt counts would be treated as misdemeanors punishable by up to six months of imprisonment and that Donziger therefore had no right to a jury trial. Status Conf. Tr. 5-6 (D. Ct. Doc. 87); *see Cheff v. Schnackenberg*, 384 U.S. 373, 379-80 (1966) (plurality op.) (holding that criminal contempt punished by six months of

SUMMARY OF ARGUMENT

Private attorneys selected to prosecute a single contempt case under Rule 42 are not "officers" for purposes of the Appointments Clause. To qualify as an "officer," a person must (i) exercise sovereign power of the United States; and (ii) hold a continuing or permanent "office," rather than an occasional, temporary, or *ad hoc* position in a particular case. The special prosecutors here satisfy the first element but not the second. The district court engaged the special prosecutors for the limited purpose of investigating and prosecuting predetermined misdemeanor contempt charges against Donziger in this case only. They have no powers to investigate or charge other crimes, to pursue other individuals, or to represent the interests of the United States in any case other than this one. The special prosecutors are not, therefore, among the class of "officers" who are subject to the Appointments Clause.

Accordingly, Donziger's Appointments Clause challenge is wrong in its inception: the special prosecutors were not invalidly appointed as "inferior officers" because they are not "officers" to begin with. Donziger's first claim of error should therefore be rejected. The Department of Justice takes no position on Donziger's remaining claims.

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imprisonment or less is a "petty offense" to which the jury-trial right does not attach) (quotation marks omitted); *Musidor, B.V. v. Great Am. Screen*, 658 F.2d 60, 65-66 (2d Cir. 1981) (same).

ARGUMENT

THE SPECIAL PROSECUTORS ARE NOT "OFFICERS" SUBJECT TO THE APPOINTMENTS CLAUSE

The district court assumed that the special prosecutors are "inferior officers" subject to the Appointments Clause. Based on that premise, the court determined that the special prosecutors were subject to supervision by the Attorney General and that the Department of Justice's decision not to handle Donziger's contempt prosecution directly, or to intervene when Donziger asked it to do so, established no legal impediment to supervision that would render the special prosecutors' appointments constitutionally invalid.

The Department of Justice agrees with the district court's bottom-line determination that no violation of the Appointments Clause occurred, but for different reasons. A private attorney appointed under Rule 42 receives a temporary assignment to prosecute a specific charged offense in a single case. A temporary assignment of that sort is not an "office" within the meaning of the Appointments Clause. Accordingly, Donziger's constitutional challenge should be rejected, irrespective of the supervision or lack thereof by the Department, because he has not challenged the appointment of an "officer" in the first place. *Cf. United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (explaining that an appellate court may affirm a district court's judgment "on any ground which the law and the record permit that would not

expand the relief [the prevailing party] has been granted"); *Mitchell v. City of New York*, 841 F.3d 72, 77 (2d Cir. 2016) ("It is well-settled that this court may affirm on any grounds for which there is a record sufficient to permit conclusions of law, including grounds no[t] relied upon by the district court.") (brackets and quotation marks omitted).

A. Legal Principles

The Appointments Clause of the Constitution provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. That provision "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)). "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991) (quotation marks omitted). The Framers of the Constitution sought in the Appointments Clause "to curb

Executive abuses of the appointment power" while preserving "administrative convenience" and "prevent[ing] congressional encroachment upon the Executive and Judicial Branches." *Edmond*, 520 U.S. at 659-60.

The application of the Appointments Clause to an individual's selection to perform a governmental function requires two main inquiries: (i) whether the individual is an officer or a non-officer; and (ii) if she is an officer, whether she is a principal or inferior one.

1. *Officers and Non-Officers*

The threshold inquiry under the Appointments Clause is whether the appointed individuals qualify as "officers." *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018). If the individuals are officers, their appointments must be made in conformity with the Appointments Clause. *Ibid.* If they are not officers, "the Appointments Clause cares not a whit about who named them." *Ibid.*

The distinction between officers and non-officers for purposes of the Appointments Clause depends on two requirements. First, an officer must "'exercis[e] significant authority pursuant to the laws of the United States.'" *Lucia*, 138 S. Ct. at 2051 (quoting *Buckley*, 424 U.S. at 126); *see Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77 (2007) ("[A] federal office involves a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government."). Such

authority includes the power to "bind[] the government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws." *Ibid.*; *see id.* at 87-93 (citing cases).

Second, and most importantly for purposes of this case, "an individual must occupy a '*continuing*' position established by law to qualify as an officer." *Lucia*, 138 S. Ct. at 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1878)) (emphasis added). An "office," in the constitutional sense, is a "'continuing and permanent'" position that is "created by statute" and that exists independently of any particular officeholder. *Lucia*, 138 S. Ct. at 2051-53 (quoting *Germaine*, 99 U.S. at 511-12); *see Officers of the United States*, 31 Op. O.L.C. at 102 ("By the time of the Founding, an 'office' was understood in the common law 'as an *institution* distinct from the person holding it and capable of persisting beyond his incumbency,' to which 'certain frequently recurrent and naturally coherent duties were assigned more or less permanently.'") (quoting Edward S. Corwin, *The President: Office and Powers 1789-1948*, at 85 (5th ed. 1984)) (brackets omitted).

In contrast, a person vested with sovereign authority on an "'occasional or temporary'" basis does not hold an "office," and therefore is not an "officer" within the meaning of the Appointments Clause. *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 512); *see Freytag*, 501 U.S. at 881 (position that

exists "on a temporary, episodic basis" is not an "office"); *Officers of the United States*, 31 Op. O.L.C. at 111 (explaining that "an office exists where a position that possesses delegated sovereign authority is permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very fact of performance") (quotation marks omitted).[3]

The category of non-officers, therefore, includes more than ordinary government employees—"special diplomatic agents, short-term contractors, *qui tam* relators, and many others in positions that have authority on an ad hoc or temporary basis do not hold offices." *Officers of the United States*, 31 Op. O.L.C. at 77. That principle has deep roots in our history. In 1796, Alexander Hamilton defended the constitutionality of a provision of the Jay Treaty that authorized President Washington alone to appoint commissioners to tribunals set up to resolve specific disputes between the United States and Great Britain, arguing that the commissioners were "'not in a strict sense OFFICERS,'" but rather "'special Agents for special purposes'" who were not subject to the

[3] Certain time-limited positions created by law may qualify as "offices" if they (i) continue from officeholder to officeholder; (ii) endure long enough to become a "continuing seat of power" rather than a "'transient'" one; and (iii) embrace duties that are "more than 'incidental' to the regular operations of government." *Officers of the United States*, 31 Op. O.L.C. at 112 (citing cases); *see* pp. 24-26, *infra*. As explained below, however, temporary positions that exist only in relation to "specified claims" or a "specific, single, or particular controversy or case" do not satisfy that standard. *Officers of the United States*, 31 Op. O.L.C. at 112.

Appointments Clause. *Id.* at 103 (quoting Alexander Hamilton, *The Defence* No. 37 (Jan. 6, 1796)) (emphasis omitted). In 1823, Chief Justice Marshall similarly determined that a person "employed under a contract . . . to do an act, or perform a service" on behalf of the government is not an "officer of the United States" because his position is not "a continuing one" defined by law. *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823). And in 1826, Attorney General Wirt opined "that an engagement with a gentleman of the bar, whereby, for a valuable consideration, he is to render his professional services *in a given case*, is a contract, a bargain, an agreement," and not an appointment to an office. *Contracts With Members of Congress*, 2 Op. Att'y Gen. 38, 40 (1826) (emphasis altered); *see Officers of the United States*, 31 Op. O.L.C. at 101-13 (collecting other examples).

Consistent with that understanding, the Supreme Court has held that individuals selected to act for the government in a "particular case" are not officers within the meaning of the Appointments Clause. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *see id.* at 326-27 (holding that a "merchant appraiser" selected to reappraise goods following a customs dispute was not an officer because "he acts only occasionally and temporarily" and "has no general functions, nor any employment which has any duration as to time, or which extends over any case further than [that in which] he is selected to act");

Germaine, 99 U.S. at 512 (same for civil surgeon whose duties were "occasional and intermittent," arising only "when called on by the Commissioner of Pensions in some special case"). Among other things, such temporary posts lack the "tenure, duration, emolument, and duties" established by law that are the hallmarks of an "office." *United States v. Hartwell*, 73 U.S. 385, 393 (1867); *see Officers of the United States*, 31 Op. O.L.C. at 107-09.[4]

2. *Principal and Inferior Officers*

Only if a person qualifies as an "officer" does the Appointments Clause's distinction between "principal" and "inferior" officers come into play. *Lucia*, 138 S. Ct. at 2051 & n.3. Although courts have, in the past, looked to various factors in attempting to draw the line between principal and inferior officers,

[4] For several years following the Supreme Court's decision in *Buckley*, the Department of Justice took the position that the "exercise[] of significant governmental power" alone distinguished an officer from a non-officer, based mostly on the fact that *Buckley* had not cited any other factor. *See, e.g.*, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 221 (1989). There was, however, no dispute in *Buckley* that the Federal Election Commissioners in that case were "officers" or that they held continuing positions established by law, and the Court cited its decisions in *Auffmordt* and *Germaine* when discussing non-officers. *See* 424 U.S. at 126 n.162. The Department has since disavowed its earlier position, *see Officers of the United States*, 31 Op. O.L.C. at 114; *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 142-43 & n.52 (1996); *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 221-23 (1995), and the Supreme Court has reaffirmed that continuity and permanence are central to the concept of an "officer" under the Appointments Clause, *see, e.g.*, *Lucia*, 138 S. Ct. at 2051-53.

see, e.g., *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988), more recent cases have focused the inquiry on a single factor: whether the officer "'has a superior' other than the President." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (quoting *Edmond*, 520 U.S. at 662).

In general, a principal officer is one who is not subject to direction or supervision by any other officer, except (potentially) the President himself. *See, e.g.*, *Edmond*, 520 U.S. at 663 (noting that cabinet secretaries are principal officers); *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 985 (2d Cir. 1991) (same for Tax Court judges); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 150 (1996) (explaining that "the most important issues" in determining whether an officer is principal or inferior are "the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer," and that "an officer responsible only to the President for the exercise of significant discretion in decision making is probably a principal officer"). Consistent with the Appointments Clause, a principal officer must be appointed by the President with the advice and consent of the Senate. *Arthrex*, 141 S. Ct. at 1979.

An inferior officer, in contrast, is one who is "'directed and supervised at some level by others who were appointed by Presidential nomination with the

advice and consent of the Senate.'" *Arthrex*, 141 S. Ct. at 1980 (quoting *Edmond*, 520 U.S. at 663); *see Edmond*, 520 U.S. at 662 ("Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President."). An inferior officer need not *actually* be directed or supervised when exercising his authority; it is enough that a principal officer "*have the capacity* to review" his decisions. *Arthrex*, 141 S. Ct. at 1984 (emphasis added); *see id.* at 1988 (plurality op.) (inferior officer must be "*subject to* the direction and supervision of an officer nominated by the President and confirmed by the Senate") (emphasis added). Although the "default manner of appointment for inferior officers is also nomination by the President and confirmation by the Senate," the Appointments Clause permits Congress "to dispense with joint appointment" for such officers and to instead vest their appointments in the President alone, the federal courts, or the heads of departments. *Id.* at 1979 (quotation marks omitted).

B. A Private Attorney Selected to Prosecute a Contempt Charge Under Rule 42 Does Not Hold an "Office"

1. *Special Contempt Prosecutors Exercise Sovereign Powers*

It is well established that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States," *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987), and that prosecuting such a crime is an exercise of "the sovereign power of the United States," *United States*

v. Providence Journal Co., 485 U.S. 693, 700 (1988); *cf. Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state."). Accordingly, the special prosecutors satisfy the first requirement of officer status: they exercise "'significant authority,'" *Lucia*, 138 S. Ct. at 2051, and "sovereign powers of the federal government," *Officers of the United States*, 31 Op. O.L.C. at 77.

2. *Special Contempt Prosecutors Do Not Occupy a Continuing and Permanent Office Established by Law*

Special contempt prosecutors do not, however, satisfy the second requirement of officer status, because they do not "occupy a 'continuing' position established by law." *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 511). The special prosecutors here were selected to prosecute a single misdemeanor offense under 18 U.S.C. § 401(3), against a single defendant in a single case, based on charges that had been predetermined by the district court. *See* JA 59. Although the court authorized the special prosecutors to "investigate" the contempt and "gather evidence"—including through subpoenas or warrants—those powers existed for the sole purpose of "present[ing] [evidence] to the Court" in this case. *Ibid.* The special prosecutors therefore have "no general functions, nor any employment which has any duration as to time, or which extends over any case" other than the

one in which they were "selected to act." *Auffmordt*, 137 U.S. at 327; *see Germaine*, 99 U.S. at 512. And their duties will "terminate by the very fact of performance" when Donziger's conviction becomes final. *Officers of the United States*, 31 Op. O.L.C. at 111 (quotation marks omitted).

Accordingly, like the merchant appraiser in *Auffmordt* and the civil surgeon in *Germaine*, the special prosecutors in this case are not "officers": they have been vested with governmental authority on a "temporar[y]" basis in the context of a "particular case," *Auffmordt*, 137 U.S. at 327, rather than being appointed to a "'continuing and permanent'" office, *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 511-12). The Appointments Clause does not apply in that circumstance.

The fact that Rule 42 authorizes courts to "appoint another attorney to prosecute [a] contempt" if "the government declines," Fed. R. Crim. P. 42(a)(2), does not necessarily make that attorney an "officer." The question of whether a procedural rule can serve as a vehicle through which Congress confers appointment authority under the Appointments Clause, *see Young*, 481 U.S. at 815 n.1 (Scalia, J., concurring in judgment); *cf. Beller & Keller v. Tyler*, 120 F.3d 21, 25 (2d Cir. 1997) (explaining that federal rules of procedure "are not statutes" because they "are proposed by an advisory committee and adopted by the United States Supreme Court"), is beside the point. Rule 42 merely

empowers courts to temporarily enlist the services of an attorney to handle a particular type of case involving a specific person if the need arises. That sort of *ad hoc* position does not qualify as a continuing and permanent "office," whether or not Congress authorizes it. *See, e.g.*, *Auffmordt*, 137 U.S. at 312, 326-27 (merchant appraiser not an "officer" even though statute provided for appointment, listed required qualifications, and prescribed duties); *Germaine*, 99 U.S. at 508-09, 511-12 (same for civil surgeon, whose position, duties, and pay were described in statute); *cf. Lucia*, 138 S. Ct. at 2053 (determining that SEC administrative law judges "hold a continuing office established by law" because, *inter alia*, they "receive a career appointment . . . to a position created by statute, down to its duties, salary, and means of appointment") (brackets and quotation marks omitted).

In these respects, special prosecutors in contempt cases are analogous to many other private individuals who represent governmental interests in the course of litigation without becoming "officers" subject to the Appointments Clause. Special masters, for example, generally do not qualify as officers because they are hired by courts to assist with the adjudication of particular cases "on a temporary, episodic basis." *Freytag*, 501 U.S. at 881. *Qui tam* relators represent the interests of the United States in False Claims Act suits—and do so pursuant to express statutory authority—but are not officers because

their role is limited to a single case. *See, e.g.*, *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 804-05 (10th Cir. 2002) (citing cases); *Officers of the United States*, 31 Op. O.L.C. at 114. And courts have long had authority "to appoint an *amicus curiae* to file briefs and present oral argument" in support of a criminal judgment that the government has decided not to defend in a particular case, *Providence Journal*, 485 U.S. at 704, without any suggestion that they are subject to the Appointments Clause.

As Attorney General Wirt concluded almost two centuries ago, "an engagement with a gentleman of the bar . . . to render his professional services in a given case" does not make him an officer of the United States. 2 Op. Att'y Gen. at 40. That is equally true of the special prosecutors here.

3. *Authority to Prosecute Contempts Need Not be Vested in an Officer*

The fact that private attorneys engaged under Rule 42 are temporarily vested with *prosecutorial* power, as opposed to other types of power, does not affect their status under the Appointments Clause. As an initial matter, it bears repeating that no general separation of powers concern arises when a private attorney prosecutes a contempt. "A contempt proceeding is *sui generis*," involving not only the usual governmental interest in prosecuting crime but also the need "to uphold the power of the court" and to "protect[] [it] from insults and oppressions." *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 326-27, 333 (1904)

(quotation marks omitted). Accordingly, "it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders," including "the ability to appoint a private attorney to prosecute the contempt" if the government declines. *Young*, 481 U.S. at 793; *see id.* at 799-800 ("The fact that we have come to regard criminal contempt as a crime in the ordinary sense does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage.") (citation and quotation marks omitted).

In any event, although the nature of the power exercised may be relevant to the first criterion for an "office" under the Appointments Clause, it has little to do with the second, which concerns instead whether Congress has made the position a continuing and permanent fixture of government. Other individuals in temporary positions (*e.g.*, the special masters discussed in *Freytag*, the commissioners under the Jay Treaty) may exercise at least as much power as special contempt prosecutors, in matters of far broader public import than the misdemeanor conviction of a single person, without becoming officers. *Cf. Young*, 481 U.S. at 815-16 & n.1 (Scalia, J., concurring in judgment) (concluding that Appointments Clause is "irrelevant" to selection of special prosecutors in contempt cases). No reason exists to treat the temporary exercise of sovereign

power by private attorneys in contempt cases differently from the temporary exercise of sovereign power in other contexts.

Indeed, special contempt prosecutors like the ones in this case are, in many respects, quite different from prosecutors who hold "offices" under the Appointments Clause. United States Attorneys, for example, are "inferior officers," *see Myers v. United States*, 272 U.S. 52, 159 (1926), because they occupy a statutorily defined "office" that has continuous duties, passed from officeholder to officeholder, including authority to represent the United States in all civil and criminal cases arising in the district over which the United States Attorney has jurisdiction. *See* 28 U.S.C. §§ 541-549 (defining appointment, position, duties, staff, and salary of United States Attorneys); *cf. United States Attorneys—Suggested Appointment Power of the Attorney General*, 2 Op. O.L.C. 58, 59 (1978) (determining that United States Attorneys are inferior officers subject to supervision by Attorney General). No similar continuous power over a broad range of cases is vested in a private attorney selected to prosecute a single contempt case.

The Office of the Independent Counsel addressed in *Morrison v. Olson*, 487 U.S. 654 (1988), is similarly distinguishable from the special prosecutors here. In determining that the Independent Counsel was an "inferior officer" under the Appointments Clause, the Supreme Court explained that Congress

had vested that office with ongoing authority to displace the Department of Justice and to exercise the "'full power'" of the Attorney General over all matters within its jurisdiction. *Id.* at 662-63. That included the power to investigate and prosecute a variety of crimes committed by different people in courts throughout the United States; to convene grand juries; to pursue civil litigation on behalf of the United States; to take appeals; to grant immunity to witnesses; and to appoint a staff of attorneys and investigators "as large as [the Counsel] 'deems necessary.'" *Id.* at 662; *see id.* at 717 n.3 (Scalia, J., dissenting). The Independent Counsel also continued in office for as long as necessary to "complete[] or substantially complete[] any investigations or prosecutions undertaken pursuant to the Act." *Id.* at 663-64.

Accordingly, although the Independent Counsel was not designed to exist in perpetuity, it was effectively a continuing office because, *inter alia*, it was "indefinite and expected to last for multiple years, with ongoing duties, the hiring of a staff, and termination only by an affirmative determination that all matters within the counsel's jurisdiction were at least substantially complete," and it possessed wide-ranging powers that could be brought to bear in cases well beyond "the specific matter that had prompted [the Counsel's] appointment." *Officers of the United States*, 31 Op. O.L.C. at 114-15. The Independent Counsel investigation in *In re Madison Guaranty Savings & Loan*

Association, for example, lasted 11 years, with three successive appointees to that office (Kenneth Starr, Robert Ray, and Julie Thomas)[5] assembling a staff larger than many U.S. Attorneys' Offices and carrying out at least seven distinct criminal investigations that resulted in charges or convictions against numerous people for a variety of offenses in Arkansas and the District of Columbia, as well as the impeachment of a sitting President. *See* U.S. Congressional Research Service, *Independent Counsels Appointed Under the Ethics in Government Act of 1978*, at 10-13, 19 (June 8, 2006); *Final Report of the Independent Counsel, In Re Madison Guaranty Savings & Loan Ass'n*, Appx. E, at 135-42 (2002). The use of a private attorney to prosecute contempt charges in a single case is not comparable.

In determining that the Independent Counsel was an inferior officer rather than a principal one, the Supreme Court noted (among other factors) that the Counsel's position was "'temporary'" and that it lacked "ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the [court] to undertake." *Morrison*, 487 U.S. at 672. That aspect of the Court's opinion, however, does not suggest

[5] Robert Fiske discharged the duties of that office as a "regulatory Independent Counsel" before Kenneth Starr's appointment. *Final Report of the Independent Counsel, In Re Madison Guaranty Savings & Loan Ass'n*, Appx. E, at 137 (2002); *see* Pub. L. No. 103-270, § 7(h), 108 Stat. 732, 738 (1994).

that the special prosecutors in this case are officers. The Independent Counsel's status as an officer was not contested in *Morrison*, *see id.* at 719 (Scalia, J., dissenting)—and was, as described above, established by facts not present here. And the Court has since backtracked from *Morrison*'s reliance on the Independent Counsel's supposed temporariness as a mark of inferior-officer status, explaining that "*Morrison* did not purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause," *Edmond*, 520 U.S. at 661, and that "[m]ore recent[]" cases "have focused on whether the officer's work is 'directed and supervised' by a principal officer," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 n.3 (2020) (quoting *Edmond*, 520 U.S. at 663); *see Arthrex*, 141 S. Ct. at 1980 (relying on *Edmond*, not *Morrison*, as establishing the appropriate test for an inferior officer). More recent cases have likewise reaffirmed that only a "'continuing and permanent'" position established by law qualifies as an "office," and that an "'occasional or temporary'" one does not. *Lucia*, 138 S. Ct. at 2051 (quoting *Germaine*, 99 U.S. at 511-12); *see Freytag*, 501 U.S. at 881. That principle resolves this case.

* * * * *

At base, Donziger's Appointments Clause challenge depends on the implausible suggestion that the Supreme Court, the drafters of Rule 42, and all others who have relied on private attorneys to prosecute criminal contempts

were on a fool's errand. Under Donziger's theory, if the Department of Justice declines to prosecute a contempt case in the first instance or to otherwise intervene, the court is effectively unable to proceed due to the lack of a constitutional method for obtaining the services of another prosecutor short of Presidential nomination and Senate confirmation. Were that true, the Supreme Court's affirmation of judicial "authority to appoint private attorneys to initiate [contempt] proceedings when the need arises"—in part to prevent the Judiciary from becoming "completely dependent on the Executive Branch to redress direct affronts to its authority" or "powerless to protect itself if that Branch declined prosecution"—would be meaningless. *See Young*, 481 U.S. at 801. Even embracing the district court's view of the Attorney General's authority would not solve the problem in all cases.[6] There is no reason to go down that path. The special prosecutors do not have a continuing and permanent position established by law, and thus they are not "officers" under the Appointments Clause. The Court should resolve this case on that ground.

[6] For example, the Attorney General's ability to supervise and direct an "inferior officer" charged with prosecuting a contempt could be constrained by ethical or conflict-of-interest rules, such as where the alleged contemnor is a government employee to whom the Department of Justice is providing representation under 28 C.F.R. §§ 50.15 or 50.16. *Cf. Young*, 481 U.S. at 803-04 (noting conflict-of-interest principles that apply to federal prosecutors).

CONCLUSION

For the foregoing reasons, Donziger's Appointments Clause challenge should be rejected.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this brief contains 6,668 words (excluding the parts of the brief exempted by Rule 32(f)) and has been prepared in a proportionally spaced, 14-point typeface using Microsoft Word 365.

s/ Robert A. Parker
Robert A. Parker

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, I filed the foregoing Brief for the United States Department of Justice as *Amicus Curiae* in Support of Appellee on Issue I with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all registered counsel.

s/ Robert A. Parker
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