No. 17-10448

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

JOSEPH M. ARPAIO,

Defendant/Appellant.

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

BRIEF OF AMICI LAURENCE H. TRIBE; MARTIN H. REDISH; LAWRENCE FRIEDMAN; WILLIAM D. RICH; CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON; THE COALITION TO PRESERVE, PROTECT AND DEFEND; FREE SPEECH FOR PEOPLE; MOVEON; THE PROTECT DEMOCRACY PROJECT; REPUBLICANS FOR THE RULE OF LAW; AND THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF THE SPECIAL COUNSEL AND AFFIRMANCE

Jean-Jacques Cabou
Shane R. Swindle
Katherine E. May
PERKINS COIE LLP
2901 N. Central Ave., Ste. 2000
Phoenix, AZ 85012-2788
Telephone: (602) 351-8000

Steven A. Hirsch
Ian Bassin
Justin Florence
Aditi Juneja
Anne Tindall
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Ave. NW, #163
Washington, DC 20006
Telephone: (202) 831-2837

Noah A. Messing
Messing & Spector LLP
333 E. 43rd St., Lobby 1
New York, NY 10017
Telephone: (212) 960-3720

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No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

AMICI'S IDENTITY, INTERESTS, AND AUTHORITY TO FILE

Amici are legal scholars and nonprofit organizations with interests in (1) defending the rule of law and the judiciary's role in upholding it; (2) preserving the political viability of the pardon power for its intended purposes of mercy and justice; and (3) limiting corrupt pardons issued for self-interested reasons. *Amici* thus have an interest in ensuring that President Trump's pardon of Joseph M. Arpaio receives constitutional scrutiny.

Laurence H. Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard. He has written over 115 articles and books, including his treatise, *American Constitutional Law*, cited more than any other legal text since 1950.

Martin H. Redish is the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law, where he teaches and writes on the subjects of federal jurisdiction, civil procedure, freedom of expression and constitutional law.

Lawrence Friedman is Professor of Law at New England Law, where he teaches Constitutional Law, Information Privacy Law, National Security Law, and State Constitutional Law.

William D. Rich is Emeritus Professor of Law at the University of Akron School of Law. He has taught Constitutional Law, First Amendment Law, Election Law, and Criminal Law.

Citizens for Responsibility and Ethics in Washington ("CREW") is a nonprofit, nonpartisan corporation that seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials.

The Coalition to Preserve, Protect and Defend is a California nonpartisan, nonprofit organization comprised of some of California's most seasoned attorneys. It was formed to participate in litigation supporting government accountability, just laws, open government, and the public's right to an independent and impartial judiciary.

Free Speech For People ("FSFP") is a nonpartisan, nonprofit organization working to renew our democracy and our Constitution for "we, the people." FSFP has filed amicus briefs in constitutional cases across the country.

MoveOn is a nationwide nonprofit grassroots organization that supports candidates, advocates for legislation, and mobilizes to work for an inclusive and progressive future marked by equality, sustainability,

justice, and love.

The Protect Democracy Project, Inc. is a nonpartisan, nonprofit organization dedicated to preventing our democracy from declining into a more authoritarian form of government.

Republicans for the Rule of Law ("RFRL") is a group of life-long Republicans dedicated to defending the institutions of our republic and upholding the rule of law. RFRL believes in equal treatment under the law for everyone, fidelity to the Constitution, transparency, and the independence of prosecutors from politics.

The Roderick and Solange MacArthur Justice Center is a public-interest law firm that has led civil-rights battles in areas including police misconduct, indigent rights in the criminal-justice system, compensating the wrongfully convicted, and the treatment of incarcerated women and men.

Several amici were authorized to file this brief by order of this Court dated November 22, 2017 (Doc. 9). A motion confirming permission for other amici to join this brief was also filed April 29, 2019.

INTRODUCTION[1]

In this case, a federal district court tried to hold one of the nation's most notorious civil-rights violators to account by ordering him to halt his policy of arresting and detaining people without reason to believe that they had violated any state or federal law. In so doing, the court fulfilled its constitutional role as the guardian of individual rights. But the defendant publicly defied the injunction as well as a series of escalating civil-contempt orders. Finally, he was found guilty of criminal contempt—but the President rescued him by granting him a pardon.

The ultimate question presented here is whether that pardon not only releases appellant Joseph M. Arpaio from punishment and restores his civil rights, but also entitles him to rehabilitate his ruined reputation and avoid the collateral consequences of the guilt finding through vacatur—even though a pardon "does not erase a judgment of conviction, or its underlying legal and factual findings."[2]

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[1] Throughout this brief, unless otherwise indicated, emphases were added to, and internal punctuation, footnotes, and citations were omitted from, quotations. Citations to *The Federalist* refer to the 1961 Clinton Rossiter edition.

[2] *United States v. Arpaio*, 2017 WL 4839072, at *1 (D. Ariz. Oct. 19, 2017).

But that's not the only question confronting the Court. Arpaio's claim of entitlement to vacatur fails unless the pardon is valid, and Arpaio's own appellate brief places the pardon's validity in issue. In this case where claims of unprecedented breadth have been made for the President's pardon power, it is proper to consider whether the Constitution limits that power. *See* Part I, below.

Courts recognize that the pardon power is not unbounded; it is part of the constitutional scheme and must operate within constitutional limits. *See* Part II.A., below. The Arpaio pardon transgressed three such limits.

1. The separation of powers. The foundation of our constitutional scheme is the separation of powers, which prevents tyranny and preserves liberty, in part by investing the courts with *independent* authority to safeguard the rights of individuals. Critical to that independence is the judiciary's power to enforce its own orders through contempt proceedings without relying on the whims of the executive branch. The Arpaio pardon undermines that independence and thus the judicial power to remedy violations of individual rights. *See* Part II.B., below.

2. The due process right to an effective judicial remedy.

Due process requires effective remedies for injuries. The Arpaio pardon violates Supreme Court precedents establishing that a pardon is unconstitutional and invalid if it undermines the efficacy of a continuing judicial remedy. *See* Part II.C., below.

3. The Take Care Clause. Another constitutional limit on the pardon power is the President's duty to take care that the laws be faithfully executed—a responsibility that bars him from encouraging lawlessness by pardoning a figure renowned for his assaults on constitutional rights. *See* Part II.D., below.

No President may issue a pardon that interferes with the federal courts' power to vindicate individuals' constitutional rights through duly issued injunctions and contempt orders. And expanding the pardon power to enable total exoneration through vacatur is corrosive of the rule of law and outside the bounds of any recognized Presidential power.

The Court should affirm the district court's vacatur ruling because the pardon underlying the requested vacatur was unconstitutional and invalid.

ARGUMENT

I. THE ARPAIO PARDON'S VALIDITY IS PROPERLY BEFORE THIS COURT.

Arpaio may argue that the Court cannot consider the constitutionality of his pardon because the United States failed to timely appeal from the order dismissing the criminal-contempt action against him. But Arpaio's own merits brief injects his pardon's questionable constitutionality into this case. Arpaio argues, for example, that:

- The fact that "the President [of the United States] should have the power to issue a pardon in the midst of litigation, which has the effect of causing the district court's [contempt] decision to be vacated, is not some kind of phantom threat to the constitutional separation of powers, or otherwise improper in any way. The President clearly has the power to pardon someone before they are even charged, or even after they are charged and before they are ever convicted . . . ."[3]
- The pardon rendered moot Arpaio's intended appeal of his conviction, unfairly "depriv[ing him] of the opportunity to appeal[.]" Consequently, the pardon requires that the guilt

[3] AOB at 15–16.

> finding be vacated because it would "undermine[] the integrity of [the judicial] system to allow a district court judge to find that a defendant is at once guilty, but forever unable to appeal their decision."[4]

These assertions call for the Court's independent examination of the pardon's validity. By way of analogy: This Court has held in interlocutory appeals that it may exercise pendent appellate jurisdiction over an otherwise non-appealable ruling that is "necessary to ensure meaningful review of" the order properly before the court. *Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012). A pendent issue is "necessary to ensure meaningful review" if it has "much more than a tangential relationship" to the decision properly before the Court. *Id.* Arpaio's own brief demonstrates that the relationship between the pardon's validity and his arguments on appeal is much more than "tangential." Arpaio asserts that the pardon is at once within the President's plenary power to pardon, yet so unfair in its effects on his future life as to have required the district court to take the unprecedented step of vacating its prior rulings and finding of guilt in the case. Those arguments make it

[4] AOB at 1.

"much more than . . . tangential" for this Court to examine the limits of the President's pardon power and whether those limits were transgressed in this case.

Moreover, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993). For example, "a court properly asked to construe a law has the constitutional power to determine whether the law exists." *Id.*; *see also Aleman v. Glickman*, 217 F.3d 1191, 1196 n.3 (9th Cir. 2000) (examining statutory construction whose correctness appellant's counsel assumed for purposes of oral argument). Here, likewise, a court asked to construe a pardon's effect may also determine its validity.[5]

[5] Constitutional avoidance plays no role here, as that doctrine is merely "a tool for choosing between competing plausible interpretations of a statutory text" and thus "a means of giving effect to congressional intent." *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005).

II. THE ARPAIO PARDON IS UNCONSTITUTIONAL AND THEREFORE INVALID.

A. Courts recognize that the President's pardon powers are subject to constitutional limitations.

"The clemency power is something of a living fossil, a relic from the days when an all-powerful monarch possessed the power to punish and to remit punishment as an act of mercy." Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991) [hereinafter *Mercy Strained*]. In this country, at the federal level, the power exists entirely by virtue of Article II, Section 2, Clause 1 of the United States Constitution, which states that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

Few, if any, provisions in the Constitution are absolute. History and precedent teach that the notion of an unconstrained pardon power does not sit easily with American courts. After all, "[t]he framers did not create the president to be an American king, and he should not use the clemency power as if he is one." Jeffrey Crouch, *The Law: Presidential Misuse of the Pardon Power*, 38 PRESIDENTIAL STUD. Q. 722, 732 (2008). To the contrary, "the pardoning power is an enumerated power of the Constitution" and its limitations therefore "must be found in the Consti-

tution itself." *Schick v. Reed*, 419 U.S. 256, 267 (1974). And while some early cases suggest an unconstrained pardon power,[6] others find limits to that power in the Constitution's other provisions and overall structure.[7]

Over a century ago, for example, the Supreme Court held that the President cannot wield the pardon power to strip a witness of his Fifth Amendment privilege against self-incrimination. Instead, the witness must remain free to decline the pardon and invoke the privilege. *Burdick v. United States*, 236 U.S. 79 (1915). The court observed that "the power of the President under the Constitution to grant pardons and the [Fifth Amendment] right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,—to leave to each its proper place." *Id.* at 93–94.[8]

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[6] *See, e.g.*, *Ex parte Garland*, 71 U.S. 333, 334 (1866).

[7] *See Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Holmes, J.) (viewing pardon power as "part of the Constitutional scheme" as opposed to "act of grace"); *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1226–31 (D.D.C. 1974) (observing that Presidential pardon power, unlike royal prerogative, is limited by our written Constitution); *Mercy Strained* at 585–89.

[8] *Cf. Biddle*, 274 U.S. at 487-88 (refusing to extend right to decline pardon to case where no constitutional right was transgressed).

Both before and after *Burdick*, courts have cited examples of pardons unlikely to pass constitutional muster, including some that (a) contain conditions that violate fundamental rights,[9] (b) violate the Spending Clause,[10] (c) concern offenses against the states, or (d) excuse a party's refusal to obey court orders that enforce a private litigant's rights.[11] Courts likewise have cast doubt on, and invalidated, pardons that violate the due-process or equal-protection rights of pardon applicants.[12] In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Supreme Court rejected a prisoner's claim that a state's clemency process violated his rights to due process and his right to remain silent. But five justices rejected the view that due process plays no

[9] *See Schick*, 419 U.S. at 264 (holding that pardon may be granted "on conditions which do not in themselves offend the Constitution"); *see also id*. at 266 (pardon may include "conditions which are in themselves constitutionally unobjectionable"); *Hoffa*, 378 F. Supp. at 1231 (observing that pardon power is "limited, as are all powers conferred by the Constitution, by the Bill of Rights"); *Mercy Strained* at 598–600 (discussing *Hoffa*).

[10] *See Hart v. United States*, 118 U.S. 62, 67 (1886); *Knote v. United States*, 95 U.S. 149, 154 (1877); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 594 (2001) [hereinafter *Normalizing Clemency*].

[11] *See Ex parte Grossman*, 267 U.S. 87, 111 (1925); Part II.C.2., below.

[12] *Cf*. *Knote*, 95 U.S. at 156 (holding that pardon cannot defeat vested third-party rights).

role in pardon proceedings. Three agreed with Justice O'Connor that "some minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 288 (O'Connor, J., concurring in judgment, joined by Souter, Ginsberg, and Breyer, JJ.) (emphasis omitted). And Justice Stevens added that due process cannot countenance pardon proceedings "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence." *Id.* at 290-91 (Stevens, J., concurring in part and dissenting in part). "[F]or example," he noted, "no one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 292.

These opinions led to holdings by other courts that (1) a state clemency process violated due process because it was infected by the

state's witness tampering,[13] (2) a state may have violated due process when it misled an applicant's lawyer about the issues considered in clemency proceedings,[14] and (3) a state scheme for restoring felons' voting rights violated the First Amendment by allowing decisions to be based on viewpoint discrimination.[15]

In sum: "while the judiciary probably cannot invalidate the President's grant or denial of clemency on *public policy* grounds, it can and should use judicial review to ensure that the executive is using the clemency power *constitutionally*." *Mercy Strained* at 620.

B. The Arpaio pardon violates the separation of powers by undermining the ability of federal courts to protect individual rights.

The separation of powers is the Constitution's animating structural principle.[16] But it is not an end in itself, for governmental "branches" do not have rights—only people do; and protecting their

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[13] *See Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000).

[14] *See Wilson v. U.S. Dist. Ct. for N. Dist. of Cal.*, 161 F.3d 1185, 1187 (9th Cir. 1998).

[15] *See Hand v. Scott*, 285 F. Supp. 3d 1289, 1303–04 (N.D. Fla. 2018).

[16] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("[The Framers] rested the structure of our central government on the system of checks and balances.").

rights is the purpose for which the Framers chose divided government. As Madison explained, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 298.

Therefore, while separation-of-powers principles do "protect each branch of government from incursion by the others," that "is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). Indeed, "[i]n the precedents of [the Supreme] Court, the claims of *individuals*—not of Government departments—have been the principal source of judicial decisions concerning the separation of powers and checks and balances." *Id.*[17] Thus, "when government action is challenged on separation-of-powers grounds," courts "should consider the potential effect of the arrangement on individual due-process interests," bearing in mind that separa-

[17] *See also Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1233 (2015) (same); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) ("[T]he separation of powers can serve to safeguard individual liberty[.]"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (it was "the central judgment of the Framers" that separation of powers is "essential to the preservation of liberty).

tion of powers generally "aim[s] at the interconnected goal of preventing tyranny and protecting liberty." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516, 1534 (1991). The key question in any separation-of-powers controversy, therefore, should be "whether the governmental action at issue poses a threat to the impartial, non-arbitrary administration of the law that principles of due process require." *Id.* at 1540.

From that perspective, the Arpaio pardon epitomizes the unconstitutional Executive usurpation, as it undermines the remedial powers of the branch charged with enforcing individual rights: the judiciary.[18]

1. The judiciary plays a unique constitutional role in protecting individual rights.

Throughout our history, the judiciary's role has expanded in tandem with the recognition of individual rights.[19] It is the federal courts'

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[18] Although the Supreme Court rejected a separation-of-powers argument when upholding the pardon of a criminal contempt in *Grossman*, 267 U.S. at 120–21, that case involved the contempt of an order forbidding the contemnor from selling alcohol at his place of business—not (as here) an order enforcing third-party rights. Indeed, *Grossman* recognized that a pardon cannot interfere with such orders. *Id.* at 121. *See* Part II.C.2., below.

[19] *See* Douglas Laycock, Individual Liberty and Constitutional Architecture: The Founders' Prompt Correction of Their Own Mistake, 16 HARV.

unique responsibility to protect those rights by standing as a bulwark against the depredations of the political branches and of tyrannical popular majorities as well. This was true even of the "original" Constitution proposed in 1787, before the Bill of Rights was appended. And it has become ever more evident in the intervening years.

In retrospect, there are at least three critical junctures when the constitutional structure was altered to simultaneously confer additional rights on individuals and additional rights-enforcement responsibilities on the courts.

The "original constitution." In 1787, the Constitutional Convention proposed a constitution that omitted any "Bill of Rights." Although the judiciary's textual powers under Article III were "comparatively lackluster,"[20] the text did not tell the whole story. As Hamilton pointed out, even in its original form, the Constitution already featured a Bill of Rights (of sorts), including limitations on the law of treason and

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J.L. & PUB. POL'Y 75, 76, 81–83 (1993) [hereinafter Prompt Correction]; Geoffrey P. Miller, Liberty and Constitutional Architecture: The Rights-Structure Paradigm, 16 HARV. J.L. & PUB. POL'Y 87, 91 (1993); Ozan O. Varol, Structural Rights, 105 GEO. L.J. 1001, 1003 n.7, 1019–25 (2017) [hereinafter Structural Rights].

[20] Structural Rights at 1019.

abuse of the impeachment power; habeas corpus; the ban on bills of attainder, *ex post facto* laws, and titles of nobility; and local jury trials in criminal cases.[21]

Enforcing these limitations, the Framers understood, would become the special province and structural role of the courts. "Limitations of this kind," Hamilton wrote, "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." THE FEDERALIST NO. 78, at 465.

The Suspension Clause—a feature of the original Constitution—epitomizes this connection between the separation of powers, individual rights, and the judiciary. "[B]y affirming the duty and authority of the Judiciary to call the jailer to account," the Clause "protects the rights of the detained by a means consistent with the essential design of the Constitution." *Boumediene v. Bush*, 553 U.S. 723, 745 (2008). Absent that clause, "the political branches [would] have the power to switch the Constitution on or off at will . . . , leading to a regime in which Congress

[21] THE FEDERALIST NO. 84, at 510–11; *see Prompt Correction* at 76.

and the President, not this Court, say 'what the law is.'" *Id.* at 765.

The Bill of Rights. Ratification of the Bill of Rights in 1791 transformed the judiciary's constitutional role by vastly expanding the expressly guaranteed individual rights that the judiciary was charged with protecting. Thomas Jefferson argued that provisions enshrining individual rights would put a "legal check . . . into the hands of the judiciary."[22] And Madison, repudiating his own initial skepticism, argued that if the Constitution incorporated individual rights, "independent tribunals of justice [would] consider themselves in a peculiar manner the guardians of those rights; they [would] be an impenetrable bulwark against every assumption of power in the Legislative or Executive; [and] they [would] be naturally led to resist every encroachment upon rights expressly stipulated in the Constitution by the declaration of rights."[23]

The Civil War Amendments. The judiciary's powers and responsibilities again were enlarged by the passage of the Civil War Amendments—most notably the Fourteenth and its due-process guar-

[22] Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl76.php.

[23] 1 ANNALS OF CONG. 423, 439 (1789) (Joseph Gales ed. 1834); *see also Structural Rights* at 1024 & n.153.

antee. In the years following its ratification, the Supreme Court "has deployed the weapon of due process" to strike down laws on diverse subjects ranging from maximum working hours to contraceptive use by married persons. *Structural Rights* at 1021. The Amendment stemmed from the drafters' desire "to be certain that the rights would be enforced by the judiciary." William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, 55 (1998). Accordingly, it guarantees "a neutral federal forum in which to enforce these new rights against state malfeasance." Maggie McKinley, *Plenary No Longer: How the Fourteenth Amendment "Amended" Congressional Jurisdiction-Stripping Power*, 63 STAN. L. REV. 1213, 1229 (2011).

2. The Arpaio pardon thwarted the court's power to vindicate the individual rights of the *Melendres* plaintiffs.

By undermining the contempt power, pardons like the one at issue here deal a crippling blow to the judiciary's ability to protect the constitutional rights of individuals. A pardon having that effect—a rarity in American history—violates the separation of powers.

In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the Supreme Court held that the judiciary's role in our constitu-

tional system hinges on the ability of courts to prosecute contempts independently—that is, without relying on the whims of the executive branch. Specifically, the court upheld the power of federal courts to appoint private attorneys to prosecute contempts, observing that "[c]ourts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated." *Id.* at 796.[24] "The ability to punish disobedience to judicial orders," the court reasoned, "is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. 'If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery.'" *Id.*

The court emphasized that "the rationale for the appointment authority is necessity. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution." *Id.* at

[24] The court also exercised its supervisory powers to hold that courts cannot appoint a prosecuting counsel who is also the lawyer for the party benefited by the violated court order. *See Vuitton*, 481 U.S. at 790.

801. Thus, "[t]he ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be 'mere boards of arbitration whose judgments and decrees would be only advisory.'" *Id.* at 796.

As *Vuitton* demonstrates, an attack on the federal courts' power to enforce their own orders and thus vindicate constitutional rights is an attack on the very notion of an independent judiciary. The Arpaio pardon represents such an attack in two interrelated ways.

First, the purpose of the contempt prosecution was to enforce an injunction protecting the constitutional rights of the *Melendres* litigants. The district court held Arpaio in criminal contempt as part of an escalating series of orders aimed at ensuring compliance with the constitutional-rights-protecting injunction. By effectively nullifying those contempt orders, the Arpaio pardon undermines the judiciary's ability to enforce constitutional rights.

Second, the Arpaio pardon purports to grant Arpaio a full and unconditional pardon not only for his past contempts but also for "any other" criminal contempts "that *might arise*, ***or*** *be charged*, in connection with" the *Melendres* matter. That phrasing not only covers contempts

that haven't yet been charged, but also contempts that *haven't yet been committed*. So the Arpaio pardon—both by its terms and as an intentional precedent—encourages Arpaio and his successors to violate court orders into the indefinite future, directly impinging on the judicial power.[25]

Because the Arpaio pardon violates the separation of powers, it is unconstitutional and should be invalidated.

C. The Arpaio pardon violates due process by depriving plaintiffs of an effective judicial remedy for their injuries.

In addition to being limited by the separation of powers, the pardon power is also constrained by due process. For example, in *Hamdi*, 542 U.S. at 530–32, the Court rejected the government's claim that the Executive's plenary powers in times of military conflict negated a citizen's right to due process in challenging his classification as an enemy combatant.[26]

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[25] "A pardon can only be granted for a contempt fully completed." *Grossman*, 267 U.S. at 121; *see Normalizing Clemency* at 570 n.37 (explaining rule against "dispensations").

[26] *See also Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (Executive's broad discretion over immigration "may not transgress constitutional limitations."), *aff'd*, 484 U.S. 1 (1987); *cf. Battaglia v.*

Here, the pardon power is constrained by the settled principle that due process requires effective remedies for the violation of constitutional rights. Due process "protect[s] fundamental rights against arbitrary abridgement. The right to a remedy is one of these fundamental rights historically recognized in our legal system as central to the concept of ordered liberty." Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636–37 (2004). In Hamilton's words: "It is essential to the idea of a law that it be attended with a sanction"; otherwise, "the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation." THE FEDERALIST NO. 15, at 105. Chief Justice John Marshall made the same point in *Marbury v. Madison*: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) 137, 163 (1803). Courts and legal scholars therefore "routinely assume that there is a due process

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Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (Congress cannot wield its broad power over federal-court jurisdiction so as to deprive any person of due process.).

right to have the scope of constitutional rights determined by some independent judicial body." *Bartlett v. Bowen*, 816 F.2d 695, 706 (D.C. Cir. 1987).

Although statutes and judicial doctrines do restrict remedies by various means and for various reasons, where Congress has created a remedy for a constitutional violation, and a court has awarded that remedy to an injured plaintiff, executive action that thwarts that remedy violates due process.

The Arpaio pardon does just that. It thwarts an injunctive remedy by which a court sought to vindicate the constitutional rights of innocent parties who came to court seeking protection for their fundamental individual liberties. And that result runs afoul of two Supreme Court precedents concerning the limits of the pardon power.

1. The *Knote* rule: A pardon cannot interfere with the due-process rights of third parties.

Long before our Constitution, pardons like Arpaio's that interfered with the vested rights of third persons were deemed off-limits, even to the monarch. *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 486 (1977) [hereinafter *Power to Pardon*]. Similar restrictions on the pardon power were

carried forward into American law. Specifically, two Supreme Court precedents combine to demonstrate that the President cannot issue pardons that interfere with a continuing remedy designed to safeguard the due-process rights of third parties.

The first of these cases, *Knote v. United States*, 95 U.S. 149 (1877), arose after President Andrew Johnson pardoned all persons who had sided with the South in the Civil War. *Id.* at 152. Unfortunately for Knote, before the pardon issued, the United States already had designated him a traitor and had seized his personal property, sold it, and paid the proceeds into the Treasury. *Id.*

The Supreme Court rejected Knote's claim that the pardon required the United States to refund the sale proceeds to him. The court ruled as it did partly because the Constitution bars the withdrawal of funds from the Treasury except by a Congressional appropriation, which Congress hadn't seen fit to make. *Id.* at 155.

But *Knote*'s holding also rested upon the broader rationale that the sums *could* have been refunded had "the right[s] of third parties . . . not [already] attached." *Id.* Although the third party in Knote's case was the government, other protected third parties might include, for

example, informers entitled to receive the proceeds of property confiscated from the traitors they had turned in. *See id.* at 156. Likewise, where an offender's property was "acquired by a third party" during the offender's period of civil incapacity, "[t]he pardon [would] not restore the property." *Id.* at 155. And—as an example involving rights "other than of property"—the court noted that where a felony conviction "operates to dissolve a marriage" and the innocent former spouse remarries, "[t]he subsequent pardon does not dissolve the new [marital] bonds." *Id.* In other words, where "the rights of other parties ha[ve] vested," the pardon's "power of restoration [is] thus gone." *Id.* at 156.

Knote thus established that the President's pardon power, however great, cannot interfere with the vested rights of private third parties. And although *Knote* spoke in terms of "vested rights," scholars explain that the vested-rights doctrine was the precursor to modern substantive due process.[27]

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[27] *See* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 375 (1911); Laura Inglis, *Substantive Due Process: Continuation of Vested Rights?*, 52 AM. J. LEGAL HIST. 459 (2012).

2. The *Grossman* rule: A pardon cannot interfere with a coercive judicial order necessary to furnish a plaintiff with an effective remedy.

The Supreme Court reinforced *Knote*'s teaching in *Ex parte Grossman*, 267 U.S. 87 (1925), where it held that a pardon cannot interfere with a coercive judicial order necessary to furnish a plaintiff with an effective remedy.

In 1921, during Prohibition, Grossman was found guilty of contempt and sentenced to a fine and imprisonment for violating an injunction requiring him to stop selling liquor at his place of business. *Id.* at 107. President Coolidge later issued a pardon commuting Grossman's sentence to the fine alone, on condition that the fine be paid. *Id.* It was, and Grossman was released; but a few months later, despite the pardon, the district court sent Grossman to prison to serve his sentence. *Id.* Grossman petitioned for a writ of habeas corpus in the Supreme Court, where "[t]he only question raised" was whether the President had the power to grant the pardon. *Id.* at 107–08.

The Supreme Court held that he did and accordingly upheld the pardon. En route to that result, however, the court discussed the historical distinction between the types of contempt that the king could and

could not pardon. *Id.* at 111. The king could pardon completed (as opposed to continuing) contempts "to punish the contemnor for violating the dignity of the court and the king, in the public interest." *Id.* In such cases, "the sentence is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions." *Id.* But the king could *not* "interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor." *Id.* In such cases, where a continuing contempt undermines the efficacy of an ongoing proceeding, "the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it." *Id.*

Grossman's ban on pardons that interfere with judicial remedies would seem to invalidate the Arpaio pardon. After all, Arpaio repeatedly flouted an injunction barring further violations of the *Melendres* plaintiffs' rights to liberty, due process, and equal protection under law—the quintessential example of a "coercive measur[e] to enforce a suitor's right." *Grossman*, 267 U.S. at 121.

But that conclusion is muddied by *Grossman*'s perpetuation of the historical distinction between continuing and completed contempts, a framework that prevented the court from considering the following

question: What about a situation where the contemnor's misconduct arguably is "complete," but the remedial order that he violated was intended to exert a "continuing" effect on the defendant's conduct—as in the case of the *Melendres* civil-rights injunction? In that situation, the pardon becomes akin to one that undermines the efficacy of an ongoing proceeding—the kind of pardon that, historically, the President (and before him, the king) could never grant. *See Grossman*, 267 U.S. at 111; *Power to Pardon* at 486. The question then is not whether the pardon would interfere with the court's ability to retroactively vindicate its own "dignity" and "authority" in some abstract sense, but whether the pardon would, in effect, undermine the efficacy of an ongoing proceeding by sending the message that an injunctive remedy has no teeth and may be flouted with impunity.[28]

Answering that question requires harmonizing *Grossman* with

[28] Whether the contempt proceedings are denominated "criminal" or "civil" is irrelevant to that question. *Cf. Grossman*, 267 U.S. at 111 (calling historically pardonable completed contempts "criminal" and unpardonable continuing contempts "civil"). Today, the criminal/civil distinction merely reflects a pragmatic conclusion as to how much process is due in a contempt proceeding. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 837–38 (1994). The distinction therefore has no bearing on the scope of the pardon power.

Knote, as explained below.

3. The *Knote/Grossman* synthesis: The President cannot pardon even a "completed" contempt if doing so would undermine the efficacy of a continuing constitutional remedy.

Knote extends the "no-pardon zone" to pardons that purport to undermine the due-process rights of third parties, *regardless* of any distinction between completed and continuing contempts. Of course, the *Knote* court had no occasion to consider the completed-versus-continuing-contempt distinction discussed in *Grossman*, because *Knote* didn't involve a contempt pardon. Conversely, the *Grossman* court had no occasion to consider *Knote*'s vested-third-party-rights rule, because Grossman's contempt didn't affect any vested third-party rights. (Grossman merely disobeyed a regulatory injunction prohibiting alcohol sales on his business premises. Under Prohibition, his patrons had no vested right to consume alcohol.)

But this case implicates both precedents because it involves a pardon that (1) effectively undermined a third party's due-process rights by (2) excusing a contemnor's violation of a continuing constitutional remedy. The Court is therefore obliged to apply and harmonize the two decisions, if reasonably possible.

Doing so establishes that the President cannot pardon any contempt—whether completed *or* continuing—that undermines the efficacy of a continuing constitutional remedy. And that is especially so where, as here, the remedy vindicates "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Hamdi*, 542 U.S. at 531. Of course, the President still may pardon completed contempts—like Grossman's—that *didn't* interfere with such remedies. But that's not this case.

Under *Knote*, *Grossman*, and the other authorities establishing constitutional limits on the pardon power[29] the Arpaio pardon cannot stand. Arpaio repeatedly flouted a continuing injunction enforcing the *Melendres* plaintiffs' fundamental rights. By pardoning Arpaio, the President signaled to both Arpaio and his successors that the *Melendres* injunction—the same coercive order that Arpaio flouted and one specially crafted to provide continuing protection to the plaintiffs and others similarly situated—may be violated with impunity. The Arpaio pardon therefore fell entirely outside the President's power to pardon.

[29] *See* Part II.A., above.

D. The Arpaio pardon violates the President's duty to take care that the laws be faithfully executed.

By rewarding the trampling of fundamental liberties and inviting more of the same, the Arpaio pardon also violates the President's constitutional duty to take care that the laws be faithfully executed.[30]

Our Constitution entrusts the President with the responsibility to faithfully execute that office and our laws. No one may assume the presidency until he has sworn an oath to "faithfully execute the Office of President of the United States." U.S. CONST. art. II, § 1, cl. 8. By that oath, the President accepts the Constitution's command that he "shall take Care that the Laws be faithfully executed." *Id.* art. II, § 3.

These provisions—the Take Care Clause and the Oath Clause—make the President a fiduciary, binding him to exercise heightened duties of loyalty and care to the public and the common good. *See* Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Two Legal Conclusions*, 3–6 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177968 [hereinafter *Fiduciary Constitutionalism*]. "Article II's fiduciary duties provide a textual basis to limit the President's pow-

[30] The Take Care Clause's justiciability remains "an open question." *CREW v. Trump*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018).

er to pardon, which is not absolute. The pardon power is limited by the text of the Constitution and requires the President to exercise it loyally and carefully, only in the public interest and not in his self-interest. That is a constitutional minimum that flows from the fiduciary duties of his office." *Id.* at 13; *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (discussing President's reliance on executive officers in "discharging the duties of his trust"); *id.* at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

As Justice Holmes explained in *Biddle v. Perovich*, 274 U.S. 480 (1927), a pardon is "not a private act of grace" but "part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public will be better served . . . ." *Id.* at 486. Accordingly, if the President is using the pardon power to undermine the Constitution itself, he is not "faithful[ly] execut[ing]" his office. *Fiduciary Constitutionalism* at 11–12.

And he isn't. "By pardoning Arpaio, Trump signaled that thugs who brutalize minorities and break the law may be shielded from justice. He also undermined the judiciary as a guardian of the rule of law.

Using the pardon power this way thus involved a gross abuse of presidential authority." Laurence Tribe & Joshua Matz, To End a Presidency: The Power of Impeachment, 63 (2018).

That conclusion is reinforced by the fact the Arpaio pardon purports to grant Arpaio a full and unconditional pardon for contempts that haven't yet been committed. *See* Part II.B.2., above. The President has no power to grant individuals such "dispensations"; indeed, denying the President that power was the specific purpose behind the Take Care Clause. *See, e.g.*, Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS., 7, 16 (2000); *Normalizing Clemency* at 570 n.37. Recently, the President told the Commissioner of Customs and Border Protection that he would be pardoned if imprisoned for illegally blocking asylum seekers from entering the U.S. The President's invocation of that kingly prerogative makes a mockery of our Constitution.

CONCLUSION

The Court should affirm the district court's vacatur ruling on the ground, *inter alia*, that the pardon purportedly justifying the requested vacatur was unconstitutional and invalid.

Respectfully submitted on April 29, 2019.

THE PROTECT DEMOCRACY PROJECT, INC.

By: *s/ Steven A. Hirsch*
Ian Bassin
Justin Florence
Aditi Juneja
Anne Tindall
2020 Pennsylvania Avenue NW, #163
Washington, DC 20006

PERKINS COIE LLP

By: *s/ Jean-Jacques Cabou*
Jean-Jacques Cabou
Shane R. Swindle
Katherine E. May
2901 North Central Avenue
Suite 2000
Phoenix, Arizona 85012-2788

MESSING & SPECTOR LLP

By: *s/ Noah A. Messing*
Noah A. Messing
333 E. 43rd St., Lobby 1
New York, NY 10017

Attorneys for Amici Curiae Laurence H. Tribe, Martin H. Redish, Lawrence Friedman, William D. Rich, Citizens for Responsibility and Ethics in Washington, MoveOn, The Protect Democracy Project, and Republicans for the Rule of Law

COALITION TO PRESERVE, PROTECT, AND DEFEND

By: *s/ Dennis Aftergut*
Dennis Aftergut
Louise H. Renne
350 Sansome Street, Suite 00
San Francisco, California 94104
dal.cppd@gmail.com
lrenne@publiclawgroup.com

Attorneys for Amici Curiae Free Speech for People and Coalition to Preserve, Protect and Defend

FREE SPEECH FOR PEOPLE

By: *s/ Ronald A. Fein*
Ronald A. Fein
1340 Centre St. #209
Newton, Massachusetts 02459
rfein@freespeechforpeople.org

RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER

By: *s/ Locke E. Bowman*
Locke E. Bowman
David M. Shapiro
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
locke.bowman@law.northwestern.edu
david.shapiro@law.northwestern.edu

Attorneys for Amicus Curiae Roderick and Solange MacArthur Justice Center

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief uses a proportionally spaced Century Schoolbook typeface, 14-point, and that the text of the brief contains 6,976 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 32.

Dated: April 29, 2019

/s/ Jean-Jacques Cabou

CERTIFICATE OF SERVICE

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

Dated: April 29, 2019

/s/ Jean-Jacques Cabou

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