No. 16-1422

In The
Supreme Court of the United States

IN RE: JOSEPH M. ARPAIO,
Petitioner,

On Petition for Writ of Mandamus
to the Arizona District Court

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

MARK GOLDMAN
GOLDMAN &
ZWILLINGER, PLLC
17851 North 85th St.,
Suite. 175
Scottsdale, AZ 85255
docket@gzlawoffice.com

DENNIS I. WILENCHIK
JOHN D. WILENCHIK
WILENCHIK &
BARTNESS, P.C.
2810 N. Third St.
Phoenix, AZ 85004
(602) 606-2810
diw@wb-law.com
jackw@wb-law.com
admin@wb-law.com
Counsel for Petitioner

August 16, 2017

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner hereby files his supplemental brief calling attention to an intervening matter not available at the time of his last filing.

On July 31, 2017, the district court entered a verdict finding the Defendant guilty of criminal contempt of court following a bench trial. It set sentencing for October 5, 2017 at 10:00 a.m. The verdict concludes:

> The evidence at trial proves beyond a reasonable doubt and the Court finds that Judge Snow issued a clear and definite order enjoining Defendant **from detaining persons for further investigation without reasonable suspicion that a crime has been or is being committed**; that Defendant knew of the order; and that Defendant **willfully** violated the order by failing to do anything to ensure his subordinates' compliance and by **directing them to continue to detain persons for whom no criminal charges could be filed**. Because the Court finds that Defendant willfully violated an order of the court, it finds Defendant guilty of criminal contempt.

Even in its verdict, the Court is clearly describing conduct that also constitutes a crime under 18 U.S.C.A. § 242, which provides that it is a crime to willfully deprive any person, under color of state law, of a constitutional right: in this case, the Fourth Amendment right to be free from unreasonable seizure (in other words, the right to be free from

being detained "for further investigation without reasonable suspicion that a crime has been or is being committed"). Because the conduct with which the district court charged Defendant, and now the conduct that it has found he committed, constituted a criminal offense under 18 U.S.C.A. § 242,[1] the Defendant was and is clearly entitled to a trial by jury in this case, by authority of 18 U.S.C.A. § 3691.[2]

This issue clearly is not moot, nor will it be moot when this Court meets in September, especially since the Defendant's sentencing is not set to occur until October. An "actual or live controversy" clearly still exists as to whether the Defendant was and is entitled to a trial by jury. "[A] case does not become moot as long as the parties have a concrete

---

[1] *Inter alia.*

[2] It has also come to the attention of Defendant's counsel that even the judge in the civil matter (out of which this criminal contempt proceeding arose) stated on the record (at a hearing for which undersigned counsel was not present) that he believed that 18 U.S.C.A. § 402 would apply to this criminal contempt proceeding: "[I]f I initiate a criminal contempt proceeding, that's actually a separate matter tried by the United States Attorney….I thought I would raise to you another statute…It's 18, United States Code, Section 402 as opposed to 401, and it basically says that **if a crime has been committed against victims of behavior that results from a contempt**, individual assessments of $1,000 can be made to be paid by the contemnor as well as the jail fine, and because you [the plaintiff's attorneys] are representing people **who may have been the victims of that crime**, I guess I want your input as to whether or not it's worth pursuing such a contempt **under that statute** if civil contempt doesn't meet it." Doc. 817 (Evidentiary Hearing Transcript) in *Melendres v. Arpaio*, Case 2:07-cv-02513-GMS, page 21, lines 13-23 (emphasis added).

interest, however small, in the litigation's outcome." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 665 (2016), *as revised* (Feb. 9, 2016)(internal quotation marks omitted). "A case becomes moot only when it is impossible for a court to grant *any effectual relief whatever* to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165 (2013)(emphasis added, internal quotation marks omitted). The Government argues that this issue is moot because the district court went ahead and conducted a bench trial anyway, which smacks of injustice and would render the right to a trial by jury moot in every case. Just because the district court went ahead with a bench trial while this Court was in recess is not a good excuse to disregard this issue, which is now fully briefed and before the Court, and whose merit is clear. Further, the Government's argument that a jury is of lesser importance when the right to a jury is "statutory" as opposed to "constitutional" is directly contradicted by one of this Court's best-known pronouncements on the importance of jury trials: "[a] right so fundamental and sacred to the citizen, **whether guaranteed by the Constitution or provided by statute**, should be jealously guarded by the courts." *Jacob v. City of New York*, 315 U.S. 752, 752–53 (1942)(emphasis added).

The right to a trial by jury is of such fundamental importance, that it is difficult to conform it neatly into the mold of a typical mootness inquiry, or to frame the continuing harm that arises out of its deprivation; but a defendant should not have to do so anyway, in order to have the right. "[T]he right to trial by jury, like the right to have the assistance of counsel, is too fundamental and absolute to allow

courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 284 (1942)(Douglas, J.). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)(quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).[3] "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power." *Bloom v. State of Ill.*, 391 U.S. 194, 202 (1968). Further, "[a]lleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts," such as is the case here, "are especially suited for trial by jury." *Green v. United States*, 356 U.S. 165, 217, n. 33 (1958)(Black, J., dissenting). In contempts "involving out-of-court disobedience to

[3] "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy'; and, as Justice Story said 'the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases." *Dimick*, 293 U.S. at 486. "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 Writings of Thomas Jefferson (Washington ed.) 71.

complex injunctions," which is also the case here,[4] "the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial," and criminal procedural protections such as the right to a trial by jury "are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 833–34 (1994)(Scalia, J.). "Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed," contempt proceedings "leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Id.* at 831. "Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament, and its fusion of legislative, executive, and judicial powers summons forth the prospect of the most tyrannical licentiousness." *Id.* (internal citations and

---

[4] The injunction at issue was complex and confusing to a person of ordinary intelligence, and hedged about by vague qualifications. It reads: "[The Maricopa County Sheriff's Office, or 'MCSO'] and all of its officers are hereby enjoined from detaining any person based **only on** knowledge or reasonable belief, **without more**, that the person is unlawfully present within the United States, because as a matter of law such knowledge does not amount to a reasonable belief that the person either violated or conspired to violate the Arizona human smuggling statute, or any other state or federal criminal law." (Emphasis added.) The order did not clearly enjoin the MCSO from contacting federal immigration authorities after the end of a lawful detainment in order to turn an illegal alien over to them, and then immediately turning the illegal alien over to federal authorities at their direction, which the district court's verdict found to be a "willful" violation of the Order.

quotation marks omitted). Accordingly, the right to a jury trial in a case of criminal contempt deserves especially strict protection. *Id.*

Finally, this case—especially in its present posture—presents the perfect vehicle for this Court to finally resolve the longstanding Circuit split identified in *Kamen v. Nordberg*, 485 U.S. 939 (1988) concerning when, and how diligently, appellate courts must protect the right to a trial by jury. In order for the promise of a trial by jury to be anything but illusory, and in order to encourage trial courts to err on the side of granting them (rather than denying them), appellate courts must be available to police that right diligently, before the case is ever submitted to trial; and they should address the merits of a claimed right to a jury soundly and promptly, according to the respect that any "sacred" right deserves. *Jacob*, 315 U.S. at 752. The public interest in this case gives the Court an opportunity to send a powerful and clear message that the right to a jury trial remains alive and respected in the United States of America; and that when the sacred right to a jury has been overlooked and disregarded, then the occasion will come even for this Court "merely to correct errors." *In re Peterson (State Report Title: Ex Parte Peterson)*, 253 U.S. 300, 305 (1920)(finding that mandamus should issue to correct deprivation of trial by jury, even though party in opposition claimed that this Court should not issue mandamus "merely to correct errors").

Finally, this case has been fully briefed and is appropriate for a summary ruling. The Defendant's right is clear, and it has been denied. Defendant respectfully requests that the Court grant the Peti-

tion for mandamus, vacate the lower court's order denying a trial by jury, and direct that this matter be tried to a jury of his peers.

Respectfully submitted,

MARK GOLDMAN
Goldman & Zwillinger, PLLC
17851 North 85th St.,
Suite. 175
Scottsdale, AZ 85255
docket@gzlawoffice.com

DENNIS I. WILENCHIK
JOHN D. WILENCHIK
WILENCHIK & BARTNESS, P.C.
2810 N. Third St.
Phoenix, AZ 85004
diw@wb-law.com
jackw@wb-law.com
Counsel for Petitioner