No. 22-___

IN THE

Supreme Court of the United States

STEVEN DONZIGER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), this Court endorsed the practice of appointing private lawyers to try criminal contempts. *Young* assumed that such private special prosecutors exercise *judicial*, not executive, power. In 2002, Fed. R. Crim. P. 42 was amended to reflect that understanding, authorizing courts to appoint private lawyers to try criminal contempts once an "attorney for the government" has declined to do so. When the U.S. Attorney declined to try petitioner for criminal contempt, the district court appointed private lawyers to prosecute him—relying on both Rule 42 and its "inherent" judicial power.

On appeal, the Second Circuit concluded that such private special prosecutors are inferior *executive* officers whose interbranch appointments must comport with the Appointments Clause—including the requirements that Congress authorize the appointments and that the officers be subject to principal-officer supervision. Over Judge Menashi's dissent, however, the panel majority deemed that Congress's failure to block the amendment to Rule 42 was sufficient to authorize such appointments, and that the Attorney General's facial authority to direct federal prosecutions under 28 U.S.C. § 516 provided sufficient supervision even of lawyers who were appointed to override the executive's declination.

The questions presented are:

1. Whether Fed. R. Crim. P. 42(a)(2) authorizes judicial appointments of inferior executive officers?

2. If so, whether such appointments violate the Appointments Clause?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption on the cover page of this petition.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

The criminal conviction and direct appeal in this case are related to *Chevron Corp.* v. *Donziger*, S.D.N.Y. Docket No. 11 Civ. 0691.

The merits judgment in the district court was entered on March 4, 2014. The Second Circuit affirmed in Docket Nos. 14-0826 and 14-0832 on August 8, 2016. This Court denied certiorari in Docket No. 16-1178 on June 29, 2017.

The district court entered a judgment of civil contempt on May 23, 2019. The Second Circuit affirmed in part, reversed in part, vacated in part, and remanded in Docket Nos. 18-855, 18-2191, and 19-1584 on March 4, 2021.

As part of the same proceeding (and under the same docket number), the district court entered an Order to Show Cause on July 31, 2019, charging petitioner with criminal contempt. On the same date, the district court entered an order appointing private special prosecutors to try the charged offenses.

Counsel is unaware of any other proceedings to which the instant appeal is directly related.

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

APPENDIX (BOUND SEPARATELY)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), this Court blessed the judicial practice of appointing private lawyers to try criminal contempts that the Department of Justice (DOJ) has declined to prosecute. Over Justice Scalia's objection, Justice Brennan's majority opinion assumed that such prosecutions were exercises of *judicial* power. *See id.* at 789–800. *But see id.* at 815–25 (Scalia, J., concurring in the judgment). In 2002, Rule 42 was amended to reflect that understanding. Thus, when petitioner challenged their authority under the Appointments Clause, the private special prosecutors appointed in this case took the position that, because of the executive branch's declination, they were exercising judicial—not executive—power.

That position directly conflicts with this Court's separation-of-powers jurisprudence. This Court has held that the enforcement of federal laws is exclusively an *executive* function. *E.g.*, *Seila Law* v. *CFPB*, 140 S. Ct. 2183, 2191 (2020). It has clarified that those exercising authority like that wielded by the private special prosecutors here are "officers of the United States" whose appointments must comport with the Appointments Clause. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2053–55 (2018). It has explained that the central criterion of inferior-officer status is adequate supervision by principal officers. *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1982–86 (2021). And although it has concluded that Congress *can* authorize interbranch appointments of inferior executive officers, this Court has emphasized that such appointments raise serious separation-of-powers concerns that warrant rigorous scrutiny. *See Morrison* v. *Olson*, 487 U.S. 654, 675–77 (1988).

Faced with the obvious conflict between *Young* and these later decisions, the panel majority "end[ed] up following neither." Pet. App. 54a (Menashi, J., dissenting). Contrary to *Young*, the panel held that anyone who tries criminal offenses on behalf of the United States must be part of the executive branch subject to supervision by a principal officer. But the panel then relied upon Rule 42—which enshrined *Young*'s view of *judicial* power—as authority for both the interbranch appointments and principal-officer supervision of the private special prosecutors here.

The Second Circuit's "split-the-baby approach to executive power," *id.*, doesn't *solve* the separation-of-powers problems posed by *Young*; it compounds them. It makes no sense for courts to be able to override the executive branch's refusal to prosecute a contempt offense if the subsequent prosecution must still be subject to executive control. That would allow private contempt prosecutions to proceed only when the government doesn't want to be financially—or politically—responsible for them. *But see Free Enter. Fund* v. *Pub. Co. Acc'tg Oversight Bd.*, 561 U.S. 477, 497 (2010) ("The diffusion of power carries with it a diffusion of accountability."). And given the serious constitutional concerns raised by *all* interbranch appointments, it makes even less sense to conclude that judicial appointments of executive branch prosecutors can be implicitly authorized by a rule promulgated by this Court and adopted under the Rules Enabling Act only through Congress's *in*action.

Bringing *Young* into line with this Court's later rulings would be—and is—reason enough to grant certiorari. But the logical and doctrinal mess that the panel majority created in trying to square that circle makes plenary review in this case truly imperative.

DECISIONS BELOW

The Second Circuit's decision is reported at 38 F.4th 290 (2d Cir. 2022). Pet. App. 1a. The district court's denial of petitioner's motion for a new trial is not reported. It is available at 2021 WL 3726913 (S.D.N.Y. Aug. 23, 2021). Pet. App. 354a. The district court's Findings of Fact and Conclusions of Law are not reported. They are available at 2021 WL 3141893 (S.D.N.Y. July 26, 2021). Pet. App. 101a.

JURISDICTION

The Second Circuit entered its judgment on June 22, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

Rule 42(a)(2) of the Federal Rules of Criminal Procedure provides that, in cases of criminal contempt, "[t]he court must request that the

contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt."

STATEMENT OF THE CASE

A. Legal Background

In *Bloom* v. *Illinois*, 391 U.S. 194 (1968), this Court held that "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Id.* at 201. In that sense, it is distinct from both civil contempt and "direct contempt," which involves summary adjudications of misconduct in the presence of the court. *See Ex parte Grossman*, 267 U.S. 87, 117–18 (1925). Although this Court has treated criminal contempt as an ordinary criminal offense for more than 50 years, the line *between* criminal and civil contempt was still evolving when *Young* was decided. *See, e.g.*, *United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821 (1994); *Hicks* v. *Feiock*, 485 U.S. 624 (1988). *See generally Green* v. *United States*, 356 U.S. 165, 191 & n.2 (1958) (Frankfurter, J., concurring) (describing the lack of clarity).

Young "reaffirmed the inherent authority of a federal court to initiate a criminal contempt proceeding for disobedience of its order, and its ability to appoint a private attorney to prosecute the contempt action." *United States* v. *Providence Journal Co.*, 485 U.S. 693, 701 (1988); *see Morrison*, 487 U.S. at 681 n.20 (similar). *Young* rejected the argument that, after *Bloom*, "the District Court lacked authority to appoint *any* private attorney to prosecute the contempt action against them, and

that, as a result, only the United States Attorney's Office could have permissibly brought such a prosecution." 481 U.S. at 793. Instead, "[t]he 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." *Id.* at 799–800.

Young also deemed it essential that the judiciary be able to override an executive declination: "Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated." *Id.* at 796. "While contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself. As a result," Justice Brennan explained, "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises." *Id.* at 800–01.

In a footnote, *Young* traced judicial authority to appoint private attorneys to try criminal contempts to an Advisory Committee note to Rule 42(b), which had cited with approval Judge Learned Hand's pre-*Bloom* opinion in *McCann* v. *N.Y. Stock Exchange*, 80 F.2d 211 (2d Cir. 1935). *See* 481 U.S. at 794 n.6. But *Young* still departed from *McCann* in two respects: This Court held that private special prosecutors must be *dis*interested, and it held that the executive branch should be given the first opportunity to prosecute. Thus, even though the majority endorsed the broader practice, it invalidated the specific appointment at issue in *Young*. *See id.* at 802.

Young's judicial power analysis provoked a sharp objection from Justice Scalia. Concurring in the judgment, he argued that "[p]rosecution of individuals who disregard court orders (except orders necessary to protect the courts' ability to function) is not an exercise of '[t]he judicial power of the United States." *Id.* at 815 (Scalia, J., concurring in the judgment) (quoting U.S. CONST. art. III, §§ 1–2) (second alteration in original)); *see id.* ("Since that is the only grant of power that has been advanced as authorizing these appointments, they were void."). In a footnote, Justice Scalia also observed that Congress had not authorized courts to appoint executive officers to prosecute contempts. *Id.* at 816 n.1.

In 2002, this Court promulgated an amendment to Fed. R. Crim. P. 42 that implemented *Young*. *See* 207 F.R.D. 89, 512 (2002). After the district court initiates a criminal contempt prosecution by providing notice of the charges under Rule 42(a)(1), the court generally "must request that the contempt be prosecuted by an attorney for the government." Fed. R. Crim. P. 42(a)(2). However, if the executive branch declines, the court may override that declination by "appoint[ing] another attorney to prosecute the contempt." *Id.*

Even as Rule 42 was amended to reflect Justice Brennan's opinion in *Young*, Justice Scalia's analysis of executive power prevailed in this Court's jurisprudence. Starting with *Morrison*, an unbroken line of rulings has made clear that *all* prosecutions of federal criminal laws in the name of the United States are exercises of executive power. As Chief Justice Rehnquist wrote for the *Morrison* majority, "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'

in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." 487 U.S. at 691.

In recent years, this Court has gone further. *Seila Law* held that "[u]nder our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" 140 S. Ct. at 2191 (cleaned up); *see also id.* at 2200 ("[I]nitiat[ing] criminal investigations and prosecutions . . . [is a] core executive power." (cleaned up)). And *Arthrex* explained that "[t]he activities of executive officers may take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power,' for which the President is ultimately responsible." 141 S. Ct. at 1982; *see also United States* v. *Vlahos*, 33 F.3d 758, 764 (7th Cir. 1994) (Manion, J., concurring) ("[P]rosecution of contempt—even though it is a crime against the judiciary—is a responsibility which the Constitution gives to the executive branch.").

To be sure, *Morrison* touched off an ongoing debate as to whether (and when) Congress can *restrict* how that executive power is wielded—and by whom. *See, e.g.*, 487 U.S. at 697–734 (Scalia, J., dissenting). But that debate is not implicated here. Congress has not attempted to insulate private special prosecutors from removal by whoever supervises them; indeed, Congress has done nothing affirmative to govern the appointment or removal of private special prosecutors at all. The separation-of-powers issues raised by the prosecution of criminal contempt offenses by court-appointed private special prosecutors therefore have nothing to do with the degree of independence those prosecutors possess;

rather, they implicate the more basic question of which constitutional model governs the appointment and supervision of such attorneys: the judicial power model embraced in *Young*, or the executive power model reflected in this Court's subsequent decisions.

B. Proceedings in the District Court

This current case began when the district court charged petitioner with six counts of criminal contempt arising out of violations of various orders it had imposed—including orders to compel discovery to ascertain his compliance with both an injunction and a judgment for costs entered against him in a civil RICO case.[1] On July 31, 2019, the district court issued an Order to Show Cause (OSC). Pet. App. 371a. The court referred the OSC to the U.S. Attorney's Office for the Southern District of New York, which "respectfully decline[d] on the ground that the matter would require resources that we do not have readily available." *Id.* at 383a.

Invoking Fed. R. Crim. P. 42(a)(2) and its "inherent power," the district court then appointed private lawyers to prosecute the charges in the OSC with the "same power to investigate, gather evidence, and present it to the Court as could any other government prosecutor." *Id.* at 384a. The private lawyers entered notices of appearance on behalf of the United States, and the criminal docket identified the lead private special prosecutor as the "Assistant U.S. Attorney."

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1. The district court's opinion adjudicating the RICO claims after a bench trial is published at 974 F. Supp. 2d 362 (S.D.N.Y. 2014). The Second Circuit affirmed. 833 F.3d 74 (2d Cir. 2016). This Court denied certiorari. 137 S. Ct. 2268 (2017) (mem.).

On February 27, 2020 (the deadline for pretrial motions under Fed. R. Crim. P. 12(c)), petitioner moved to disqualify the special prosecutors and to dismiss the charges. In contesting the authority of courts to override executive branch declinations, the motion invoked Justice Scalia's *Young* concurrence. It also argued that the principle of using the "least possible power" required dismissal of all counts of the OSC. ECF 60, at 6; *see Young*, 481 U.S. at 801 (Scalia, J., concurring in the judgment).[2]

The district court denied the motions. It also denied several subsequent pretrial motions to dismiss. *See* Pet. App. 67a. In one ruling, the district court refused to apply closer scrutiny to petitioner's selective and vindictive prosecution claims, which were based upon the alleged "absence of executive branch control of the prosecutorial function," without disputing petitioner's claim that there *was* no control or supervision. *See id.* at 80a & n.5. The special prosecutors never argued in the district court, and the district court did not hold, that any claims in those motions had been forfeited.

On April 2, 2021, over a month before petitioner's scheduled trial, one of petitioner's counsel sent a letter (copying the special prosecutors) to then-Acting Deputy Attorney General John P. Carlin, asking

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2. Petitioner argued below that the "least possible power" principle barred his prosecution for orders that had already been enforced through civil contempt, and that his refusal to comply with the orders forming the basis for three of the six contempt counts could not provide a basis for criminal contempt because the defiance had been for the purpose of obtaining appellate review of an issue the Second Circuit later resolved in his favor. Petitioner does not press those arguments as an independent basis for granting certiorari here.

DOJ to review the conduct of the prosecution and, if necessary, direct the special prosecutors to seek an adjournment of the trial date to complete that review. The letter argued that the special prosecutors were exercising executive power and must therefore be subject to the supervision of a principal officer.[3] On May 7 (the Friday before petitioner's scheduled May 10 trial), Mr. Carlin finally responded to the letters in a terse email: "The Department has reviewed your letters in the Donziger matter. Having reviewed the letters, the Department declines to intervene in the federal court-initiated contempt proceedings." *Id.* at 356a.

At the outset of trial, petitioner moved to dismiss the prosecution because the special prosecutors lacked the supervision by a principal officer required by the Appointments Clause. The district court took the position that the Carlin email was "hearsay" and insufficient "direct admissible evidence of a policy or decision by the DOJ." *Id.* at 248a & n.482. The district court thus denied the motion on the ground that it "had given the Court absolutely no basis on which to conclude that the special prosecutors are not subject to any control or supervision whatsoever by the Executive Branch." *Id.* at 250a. The district court declined to ask the special prosecutors if they understood themselves to be under executive supervision or to allow any discovery on that issue.

However, in response to a letter motion filed the day after this Court's decision in *Arthrex*, the special prosecutors argued that "[t]he initiation of criminal contempt charges, and the appointment of the special

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3. A follow-up letter noted the unexplained participation of FBI agents in the special prosecutors' witness interviews.

prosecutors by the District Court in this matter, reflect a vindication and use of the judicial power of the United States." ECF 338, at 5. They reasoned that *Arthrex* "has no applicability" because that case was about "decisions *on behalf of the Executive Branch*." The response went on to explain that "[w]hen the prosecution of [petitioner] was referred to the Executive Branch," it had declined, triggering an inherent judicial power. "*Arthrex*," the special prosecutors wrote, "has nothing to do with the judiciary's inherent power as long recognized by Supreme Court precedent." *Id.* The special prosecutors did not contend, even in the alternative, that they were subject to oversight or even removal by a principal executive officer; their argument was solely that they did not need to be.

In its Findings of Fact and Conclusions of Law, the district court rejected petitioner's Appointments Clause claim. The court disagreed with the special prosecutors' contention that they were not subject to executive branch principal officer supervision and direction, but denied relief on two grounds that the special prosecutors had not raised. First, the district court ruled that petitioner's Appointments Clause motion was untimely and should have been filed by the February 27, 2020 pretrial motions deadline. Second, the court ruled that, even if the special prosecutors did not believe they were subject to supervision, the supervision was adequate because Rule 42 did not *forbid* supervision consistent with 28 U.S.C. § 516. Pet. App. 251a–263a.

The district court held that judicial appointment of inferior executive officers to prosecute contempts "was constitutionally permissible," relying on *Young* and Rule 42. *Id.* at 256a & n.509. It considered itself

bound by *Young* (notwithstanding *Arthrex*) because it is up to this Court to overrule its own decisions. *Id.* at 256a. In a footnote, the district court observed that "[t]he appointment was expressly compelled by Rule 42(a)(2)," which this Court promulgated. Thus, "[t]o the extent that Mr. Donziger views his challenge to be directed to the face of that Rule, and to the extent that he has not waived it already, he should direct his argument to that Court." *Id.* at 256a n.509.

Petitioner moved for a new trial, arguing (among other things) that, given the court's holding that the special prosecutors were inferior officers, their appointments were not authorized by (and their lack of supervision violated) the Appointments Clause. Petitioner disputed that "appointment by the Court pursuant to Fed. R. Crim. P. 42 was a valid exercise of *Congress*'s power to authorize the appointment of inferior officers by a court, because the Federal Rules are not statutes enacted by Congress." ECF 351, at 1 n.1. The district court denied the motion on the merits. Pet. App. 354a–370a.

The district court then sentenced petitioner to the maximum penalty for a non-jury contempt conviction—six months' imprisonment. Petitioner appealed the judgment to the Second Circuit. The judge presiding over the underlying civil RICO case issued an order purporting to extend the special prosecutors' appointments to encompass the appeal.

C. Proceedings in the Second Circuit

In the court of appeals, petitioner's opening brief argued that a special prosecutor is an inferior executive officer who must be appointed and supervised in a manner consistent with the Appointments Clause. Petitioner argued that the

appointments in this case failed to satisfy the Appointments Clause, both because Congress had not provided for them and because, even if it had, the proceedings in the district court had demonstrated the extent to which the appointed officers were not actually subject to any executive branch supervision. 2d Cir. ECF 90.

DOJ filed an unsolicited brief as *amicus curiae* "to express the distinct views of the Executive Branch" on the question whether the special prosecutors are officers of the United States for purposes of the Appointments Clause. 2d Cir. ECF 99, at 1. DOJ took "no position on other issues related to [petitioner's] conviction and sentence." *Id.* at 2. The DOJ brief principally argued that, although special prosecutors exercise what DOJ referred to as "sovereign powers," their duties are too temporary to qualify them as "officers of the United States." *See id.* at 10–28.

DOJ embraced *Young* as allaying the separation-of-powers concerns that petitioner had flagged, quoting Justice Brennan's conclusion that "[t]he 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." *Id.* at 23. DOJ argued that, if petitioner were correct, the judiciary would be dependent on the executive branch, contrary to DOJ's reading of *Young*. *Id.* at 28. At no point in its brief did DOJ contend that the special prosecutors were subject to any oversight by a principal officer in the executive branch. Indeed, the existence of such supervision would, quite obviously, be inconsistent with the filing of a *separate* brief "to express the distinct views of the Executive Branch." *Id.* at 1.

The special prosecutors also filed a brief in the name of the United States, adopting the argument in the DOJ *amicus* brief (which they had not made below). In addition, the special prosecutors argued that they are "subject to the Attorney General's supervision by statute," citing 28 U.S.C. § 516. 2d Cir. ECF 121, at 38–46. The special prosecutors never claimed to have been under the *actual* supervision of a principal officer—only that § 516 was applicable given the district court's holding that they were wielding executive power. Nor did the special prosecutors acknowledge their prior position that, by dint of the executive branch's declination, they were exercising judicial—not executive—power.

At oral argument, both DOJ and the special prosecutors modified their positions. DOJ contended that the Attorney General had the power to remove the special prosecutors—and suggested in response to a question that the court could infer the Attorney General's approval of the special prosecutors' conduct from the fact that he had *not* removed them. The lead special prosecutor likewise portrayed herself (for the first time) as a part of DOJ, although she repeatedly equivocated when asked whether she could be removed by the Attorney General. Neither DOJ nor the lead prosecutor explained why, if their newfound positions about supervision were correct, it was necessary for DOJ to file an *amicus* brief to express the "distinct views" of the principal officer to whom the special prosecutors purportedly answered.

Nevertheless, the court of appeals affirmed. The panel unanimously rejected DOJ's argument that special prosecutors are not officers subject to the Appointments Clause, and it endorsed petitioner's view that the special prosecutors are necessarily

inferior *executive* officers. *See* Pet. App. 9a–17a. But the panel majority also accepted DOJ's and the special prosecutors' new positions that the Attorney General "could replace the special prosecutors." *Id.* at 20a. In light of 28 U.S.C. § 516 (reserving litigation to which the United States is a party "to officers of the Department of Justice under the direction of the Attorney General"), the majority deemed it irrelevant whether either the Attorney General or the special prosecutors were aware of a chain of command when the special prosecutors were making decisions in the name of the United States. *Id.* at 22a.

As for whether Rule 42(a)(2) could and did authorize an interbranch appointment, the majority applied plain error review. *Id.* at 25a–31a. The majority concluded that, even if a rule was not an exercise by "Congress . . . by Law" of the power to select an alternative to the constitutional default method of appointment, the error could not be considered "clear" or "obvious" in light of *Young*. *Id.* at 27a–28a; *see id.* at 30a ("[W]hat is clear from that case is that the Supreme Court explicitly rejected the dissent's position."). The majority concluded that "[t]he district court reasonably relied on *Young*." *Id.*

Judge Menashi agreed that the special prosecutors are inferior executive officers. *Id.* at 37a (Menashi, J., dissenting). But his dissent explained that "plain error review does not apply because [petitioner] raised his challenge to the appointments of the special prosecutors repeatedly before the district court." *Id.* at 38a. He noted that petitioner had no reason to address Rule 42 until after the district court had rejected his argument that the special prosecutors were unsupervised; after all, the lack of supervision would have *precluded* inferior-

officer status (and, thus, even the possibility of an interbranch appointment) under *Edmond* v. *United States*, 520 U.S. 651 (1996), and *Arthrex*. *See* Pet. App. 38a–40a & n.3 (Menashi, J., dissenting). The majority, Judge Menashi wrote, "refuses to consider [petitioner's] challenge . . . because [he] failed to make a specific argument against that holding before the holding was ever issued." *Id.* at 40a–41a.

In any event, Judge Menashi pointed out that the error, viewed "at the time of appellate consideration" was plain. *Id.* at 42a (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). "The [Rules Enabling Act] notification provision—under which Congress normally does nothing at all—cannot transform the courts' adoption of Rule 42 into an instance of 'Congress . . . by Law' vesting the appointment power in the courts." *Id.* at 45a.

The dissent went on to flag the inconsistency between the majority's attempt to harmonize *Young* with 28 U.S.C. § 516 and *Young*'s rationale of judicial self-protection. The dissent also noted that, in *Providence Journal*, 485 U.S. at 704, this Court treated *Young* as having carved private contempt prosecutors out of the Attorney General's statutory oversight. Pet. App. 50a (Menashi, J., dissenting). Judge Menashi faulted the majority's "attempts to reconcile *Young* with the constitutional separation of powers," and he concluded that "[t]he court's half-hearted adherence to *Young* on plain error review undermines that precedent by rendering ineffective the judicial power *Young* described as necessary." *Id.* at 54a. Judge Menashi's "straightforward conclusion" was "that the appointments of the special prosecutors were void," requiring reversal of petitioner's conviction. *Id.* at 55a.

REASONS FOR GRANTING THE PETITION

Between them, *Young* and this Court's later cases present a separation-of-powers paradox. A court-appointed private special prosecutor exercises *either* executive power or judicial power; not both. *Young* concluded that such private special prosecutors exercise judicial power. But every relevant subsequent decision by this Court, from *Morrison* to *Arthrex*, is consistent with the unanimous holding of the court of appeals here—that private special prosecutors trying criminal contempt offenses in the name of the United States exercise executive power. Appointing special prosecutors by rule is consistent with *Young*, but not with this Court's later decisions.

Resolving this conflict would be reason enough to grant certiorari. But rather than follow either line of precedent, the Second Circuit tried to have it both ways. Its ill-conceived effort creates brand-new (and even more pressing) separation-of-powers problems—both by suggesting that Congress can delegate to other branches its constitutional power to provide for inferior-officer appointments, and by watering down the test for inferior-officer supervision. Whatever the right answer is to the constitutional conundrum posed by *Young*, the panel majority's analysis isn't it.

Instead, this Court's review is imperative both because the question of *which* framework governs the use of private special prosecutors to try criminal contempts is "an important question of federal law that has not been, but should be, settled by this Court"; and because the Second Circuit's attempt at a hybrid answer, which "conflicts with relevant decisions of this Court," S. CT. R. 10(c), raises grave constitutional questions of its own.

I. WHETHER RULE 42 AUTHORIZES JUDICIAL APPOINTMENTS OF INFERIOR EXECUTIVE OFFICERS MERITS THIS COURT'S REVIEW

Once the Second Circuit unanimously concluded that, notwithstanding *Young*, the special prosecutors in this case were inferior executive officers exercising executive power, the invalidity of their appointments should have followed. Under that analysis, the special prosecutors' appointments had to comport with the Appointments Clause—and it is undisputed that Congress has enacted no statute authorizing these interbranch appointments.

Thus, even if Rule 42 *could* comport with the Appointments Clause, *but see post* at 22–23, whether it actually authorizes interbranch appointments of inferior executive officers is itself an important question worthy of this Court's review—both on its own and because, if the answer is no, holding as much would obviate the need for courts to ask the graver separation-of-powers questions that the decision below provokes.

1. "Revised Rule 42(a)(2) now explicitly addresses the appointment of a 'prosecutor' and adopts language to reflect the holding in *Young* v. *United States ex rel. Vuitton*, 481 U.S. 787 (1987)." 207 F.R.D. at 512. As amended in 2002, current Rule 42(a)(2) memorializes this Court's analysis in *Young*. Private special prosecutors can be appointed by courts to try criminal contempts, but only if (1) the "attorney for the government" declines; and (2) the private attorneys are disinterested.

Rule 42 says nothing about the scope (or limits) of private special prosecutors' powers. It says nothing about how special prosecutors are to be supervised,

or by whom. And it says nothing about when special prosecutors can be removed from office—or, again, by whom. That is why the district court could not resolve from the face of Rule 42 whether the special prosecutors were supervised by the Attorney General or by the judge who appointed them. *See* Pet. App. 256a ("Rule 42 does not provide the answer, and the Supreme Court has never definitively resolved the question either.").

In contrast, *Hollingsworth* v. *Perry*, 570 U.S. 693 (2013), assumed that "special prosecutors appointed by federal courts to pursue contempt charges" are "subject to the ultimate authority of the *court* that appointed them." *Id.* at 711 (emphasis added); Pet. App. 50a n.9 (Menashi, J., dissenting) (same). That understanding reflects the "traditional default rule," that "removal is incident to the power of appointment." *Free Enter. Fund*, 561 U.S. at 511; *see also Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839). Whether or not a measure adopted under the Rules Enabling Act *could* override that default rule, nothing on the face of Rule 42 purports to do so here.

2. Unlike the statute before the *Morrison* Court, Rule 42 does not provide for (or even address) the scope of executive branch supervision. There was no question in *Morrison* that the appointment power was *intended* to operate across branches; not only did the Ethics in Government Act of 1978 expressly vest the power to appoint an independent counsel in the Special Division of the D.C. Circuit (and only after a referral by the Attorney General), but it made the independent counsel expressly subject to supervision by the Attorney General, and to removal by the Special Division. *See* 487 U.S. at 660–65 (describing the independent counsel statute).

Morrison also reiterated the serious separation-of-powers concerns that interbranch appointments would raise if, as in this case, they "had the potential to impair the constitutional functions assigned to one of the branches." *Id.* at 675–76. Because Rule 42 squarely implicates those separation-of-powers concerns to the extent that it *does* authorize an interbranch appointment, *see post* at 22–23, it is incumbent upon this Court to resolve in the first instance whether it provides such authority.

3. The importance of this question is only amplified by the fact that the Second Circuit got the answer wrong. This Court has regularly required a clear statement from Congress before assuming that a statute was intended to provoke serious constitutional questions. That principle should apply with at least as much force to procedural rules adopted under the Rules Enabling Act—entirely through Congress's *in*action. *Cf. Clark* v. *Martinez*, 543 U.S. 371, 381–85 (2005) (discussing the constitutional avoidance canon). Indeed, a rule of procedure that authorizes a criminal prosecution that the executive branch has declined to pursue may even be invalid on its face. *See* 28 U.S.C. § 2072(b). Either way, whether Rule 42 authorizes interbranch appointments of inferior *executive* officers—rather than of *judicial* officers as *Young* contemplated—is unquestionably "an important question of federal law that has not been, but should be, settled by this Court." S. CT. R. 10(c).[4]

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4. As *Young* foresaw, "[i]n practice, courts can reasonably expect that the public prosecutor will accept the responsibility for prosecution." 481 U.S. at 801; *see Vlahos*, 33 F.3d at 762–63 (overturning appointment of a private prosecutor because the U.S. Attorney had not declined). Courts have appointed private

II. WHETHER RULE 42 SATISFIES THE APPOINTMENTS CLAUSE ALSO WARRANTS THIS COURT'S REVIEW

The second question presented—whether Rule 42 satisfies the Appointments Clause—likewise merits review. In *Young*, Justice Scalia was emphatic that no rule adopted under the Rules Enabling Act *could* validly authorize an interbranch appointment of an inferior officer—for the simple reason that, in such a case, the appointment power had not been vested *by* "Congress." 481 U.S. at 815 & n.1 (Scalia, J., concurring in the judgment). Judge Menashi echoed this objection in his dissent in the court of appeals. *See* Pet. App. 44a–45a (Menashi, J., dissenting).

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special prosecutors since *Young* in only a handful of cases—and petitioner's prosecution appears to be one of the only post-*Young* cases to produce an appealable judgment. *See United States* v. *Kilgallon*, 572 F. Supp. 3d 713 (D.S.D. 2021) (dismissing a contempt prosecution by private special prosecutors appointed to try courtroom U.S. Marshals who refused to disclose their COVID status to the presiding judge); *In re Special Proceedings*, 842 F. Supp. 2d 232 (D.D.C. 2012) (involving disclosure of report by private special prosecutor appointed to investigate DOJ misconduct in the prosecution of Sen. Ted Stevens); *United States* v. *Scruggs*, No. 2:07-cr-00325 (N.D. Ala. Feb. 29, 2008) (mem.) (dismissing a contempt prosecution by private special prosecutors appointed to try an attorney for delivering documents to the state rather than a party in a civil case); *United States* v. *Bevilacqua*, 447 F.3d 124 (1st Cir. 2006) (appeal of cost award after guilty plea to contempt charge by private special prosecutor).

In 35 years, then, little reason has emerged to doubt that courts *can* rely upon the executive to prosecute contempts in appropriate cases—just as Congress must. *See Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821). In contrast, the effects of the Second Circuit's Appointments Clause analysis will hardly be limited to a handful of future private contempt prosecutions.

But the Appointments Clause does not just require that Congress authorize the interbranch *appointment* of inferior officers; it also requires, as a condition of inferior-officer status, that the officers be subject to supervision and direction by a principal officer. *Arthrex*, 141 S. Ct. at 1988 ("[T]he exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate."); *Edmond*, 520 U.S. at 662–66.

As this case shows, supervision by the Attorney General is at odds with the very idea of appointing a private prosecutor to try a case that the "attorney for the government" has turned down. Thus, even if Rule 42 can be construed to authorize interbranch appointments of inferior executive officers, whether it is consistent with the Appointments Clause as so construed is also a question that would warrant this Court's intervention. Only this Court can resolve whether a rule of procedure can satisfy the Appointments Clause in general, and also the more specific conflict between the Second Circuit's defense of the "supervision" in this case; this Court's rulings in *Edmond* and *Arthrex*; and the reason for having private special prosecutors in the first place.

1. Whether Congress Can Delegate Its Power to Authorize Inferior-Officer Appointments Is an Important—and Unanswered—Question

No statute authorizes the appointment of private special prosecutors. The district court, in its order appointing the special prosecutors in this case, rested its authority on "Fed. R. Crim. P. 42(a)(2) and the inherent power of the Court." Pet. App. 383a. In the

Second Circuit, the panel majority rested exclusively on Rule 42. *Id.* at 25a–31a. That holding reflects a serious error of constitutional interpretation that, by itself, warrants this Court's review.

It is axiomatic that valid rules of procedure adopted consistently with the Rules Enabling Act have the force of law. *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). But the issue here is not the legal force of a rule; it is which branch *wrote* it: The plain text of the Appointments Clause does not just require that interbranch appointments of inferior officers be provided for "by law"; it expressly requires that "Congress" act "by law . . . as *they* think proper." U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

Congress did nothing to authorize appointments of special prosecutors when it enacted the Rules Enabling Act in 1934. Congress *acted*, but not in any way related to appointments. And Congress's failure to disapprove the 2002 amendment to Rule 42—allowing the proposed rule to take effect under 28 U.S.C. § 2074(a)—was *in*action, not action. Congress thus did not act (or "think [it] proper") to authorize interbranch appointments of private special prosecutors in accord with the "single, finely wrought and exhaustively considered, procedure" that the Appointments Clause prescribes—that is, "by law." *See INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

Whether, notwithstanding a lack of affirmative action by Congress, Rule 42's putative authorization for courts to appoint inferior executive officers satisfies the Appointments Clause is thus a critically important constitutional question that this Court has not answered—all the more so if the answer is "yes."

2. The Second Circuit's Holding that the Absence of Supervision Here Was "Beside the Point" Directly Conflicts With *Edmond* and *Arthrex*

Even if Rule 42 could be understood to reflect a constitutionally sufficient decision by Congress to vest the power to appoint inferior executive officers in district courts, those officers must also be subject to meaningful supervision by a principal officer. Otherwise, they would be *principal* officers whose appointments could be vested only in the President. *See Arthrex*, 141 S. Ct. at 1988; *Edmond*, 520 U.S. at 662–66.

1. The panel majority held that the supervision requirement was satisfied here because the Attorney General has the statutory authority to supervise all prosecutions by the United States. *See* Pet. App. 20a & n.9 (citing 28 U.S.C. § 516). But the statutory tautology that those trying federal crimes must be subject to the Attorney General's direction only exposes the paradox inherent in the panel's reliance upon *Young*. It defies logic to treat an officer who was appointed for the specific purpose of *overriding* a declination by the "attorney for the government" as an "attorney for the government" who will—indeed, *must*—be subject to supervision by the same agency. Put another way, *Young* and Rule 42 are predicated on a private special prosecutor who is *distinct from*, and therefore *not* supervised by, the Department of Justice.[5] As Judge Menashi's dissent noted, the panel

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5. In *Providence Journal*, this Court suggested that 28 U.S.C. § 516 does *not* require Attorney General supervision of private special prosecutors appointed under *Young*. As the Court explained, § 516 requires Attorney General supervision "[e]xcept as otherwise authorized by law," and "[a] fair reading

majority never came to grips with that contradiction. *See* Pet. App. 50a (Menashi, J., dissenting).

2. In any event, in at least three ways, the proceedings in this case illustrate how the private special prosecutors were neither supervised by, nor accountable to, any principal executive officer.

First, as noted above, the special prosecutors repeatedly took the position in the district court that, consistent with *Young*, they were exercising judicial, not executive, power—and that, as such, they were subject to neither the direction nor supervision of the Department of Justice. *See ante* at 9–11.

Nor did the special prosecutors take this position in a vacuum; by that point (which was also after this Court's decision in *Arthrex*), they had been copied on petitioner's correspondence with John Carlin (then the Acting Deputy Attorney General). Thus, they would have known if DOJ had told them that it *could* review the prosecution—and had simply chosen not to do so. Instead, there was no moment in the district court when the special prosecutors recognized that—or acted as if—they were subject to any direction or supervision by DOJ. Even in the court of appeals, when the special prosecutors agreed for the first time that they *were* subject to DOJ supervision, the lead prosecutor repeatedly equivocated when asked at oral argument if the special prosecutors could be removed by the Attorney General. *See ante* at 14.

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of *Young* indicates that a federal court's inherent authority to punish disobedience and vindicate its authority is an excepted provision or authorization within the meaning of §[] 516." 485 U.S. at 704.

Second, petitioner's counsel repeatedly asked DOJ to *exercise* some direction and supervision over this case—including in the letters to Mr. Carlin. On the eve of trial, Carlin finally responded—cryptically stating that "The Department has reviewed your letters in the Donziger matter. Having reviewed the letters, the Department declines to intervene in the federal court-initiated contempt proceedings." Thus, the entire trial was conducted against a backdrop in which *both* the special prosecutors *and* DOJ had disavowed any direction or supervision by the executive branch. Even the trial court could not tell whether the special prosecutors were being supervised by the Attorney General, the judge who referred the OSC, or neither. *See* Pet. App. 256a.

Third, and perhaps most telling, the Department of Justice participated as an unsolicited *amicus* in the court of appeals—participation that was necessary, in DOJ's own words, "to express the distinct views of the Executive Branch." The DOJ *amicus* brief argued that the Appointments Clause was not implicated at all by petitioner's appeal because the special prosecutors were not "officers of the United States." *See ante* at 13.

But the merits of that argument (which the court of appeals unanimously rejected) aside, DOJ's assumption of an *amicus curiae* role is revealing: If the special prosecutors were subject to the direction and supervision of the Attorney General, then there should have been no need for the Department of Justice to file its own brief offering "the *distinct* views of the Executive Branch"; DOJ could not act as its own *amicus*.

3. The panel majority made the very mistake that this Court decried in *Arthrex*—focusing on the literal applicability of 28 U.S.C. § 516 without confronting either the clear lack of actual supervision in this case or the supervision paradox that arises from the inconsistency with *Young*. *See* Pet. App. 22a ("Whether [the special prosecutors] were in fact supervised is beside the point.").

The objection is not, as the panel majority wrongly described it, that the Attorney General had to personally approve each strategic and tactical decision that the special prosecutors made, *see id.*; it's that the supervision requirement as *Arthrex* just reiterated it can't be satisfied if neither the supervisor nor the supervisees believe—or acts as if—such supervision is even theoretically required, let alone truly taking place. At the very least, whether such double-secret supervision *is* constitutionally sufficient notwithstanding *Arthrex* is itself a matter that this Court ought to resolve.

More fundamentally, the rampant confusion over the relationship between the special prosecutors and DOJ only underscores *why* it must be Congress that explicitly authorizes interbranch appointments of inferior officers when it "think[s] proper." After all, such confusion is far less likely to result when Congress has deliberately thought through the structure of an office—and has expressly delineated the office's powers and limits. In *Morrison*, those detailed procedures obviated the majority's concern that the interbranch appointments authorized by the independent counsel statute violated the separation of powers. *See* 487 U.S. at 675–77. Their absence

here has the opposite effect—weighing that much more strongly in favor of this Court's intervention.[6]

III. THIS CASE IS A COMPELLING VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

As the above analysis makes clear, both questions presented warrant this Court's plenary consideration. And this case is a compelling vehicle for that review. Although the panel majority held that petitioner forfeited his Rule 42 claim (which it then reviewed only for plain error), that analysis was both flatly incorrect and immaterial here. Indeed, Judge Menashi explained in detail why the majority was wrong—and why this Court's review would thus be de novo. Pet. App. 38a–41a (Menashi, J., dissenting). If this Court agrees that the questions presented merit review, then the majority's forfeiture analysis poses no obstacle to resolving them here.

1. The panel majority did not dispute that, if the interbranch appointment of the special prosecutors violated the Appointments Clause, the district court's rejection of that claim was "error" that "affected [petitioner's] substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732 (1993); *see* Fed. R. Crim. P. 52(b). After all, but for the appointments, petitioner would never have been *tried* for criminal contempt—let alone convicted and sentenced to confinement.

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6. The district court suggested that the constitutional validity of Rule 42 might follow from the fact that *this* Court proposed it. Pet. App. 256a n.509. But this Court has never so much as hinted that the validity (let alone the constitutionality) of a rule adopted under the Rules Enabling Act is conclusively established from the Court's role in its promulgation. That said, such reticence on the part of lower courts to invalidate a rule proposed by this Court only further adds to the reasons why this Court should intervene here.

In concluding that any error was not sufficiently "clear or obvious," the panel majority fell back, once more, on *Young*—holding that, because only this Court can overrule its precedents, the district court "reasonably relied on *Young*" in rejecting petitioner's Appointments Clause claim. Pet. App. 30a. But plain error is assessed based on what is true "at the time of appellate consideration," including now. *Johnson*, 520 U.S. at 468; *see also Henderson* v. *United States*, 568 U.S. 266, 273–77 (2013). And in this Court, not only is *Young*'s judicial power rationale obviously wrong, but it would be plainly wrong under *Chadha* to conclude that Congress authorizes an interbranch appointment "by law" when it fails to pass a new law blocking a rule promulgated under the Rules Enabling Act from entering into force. *But see* Pet. App. 27a ("[I]t is not clear that the phrase "Congress . . . by Law" requires bicameral approval and presentment, and that it does not encompass Rule 42."). The Rules Enabling Act could no more turn congressional failure to pass a law disapproving a rule into Congress authorizing an interbranch appointment "by law" than the Immigration and Nationality Act could turn a one-house veto into legislation. *See* 28 U.S.C. § 2074(a); *Chadha*, 462 U.S. at 925.

2. This Court has also repeatedly exempted Appointments Clause challenges from forfeiture. Petitioner's Appointments Clause claim was raised far *earlier* in these proceedings than the challenges that this Court considered de novo in *Arthrex*, *Lucia*, *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995), and *Freytag* v. *Commissioner*, 501 U.S. 868 (1991). In *Arthrex*, the Appointments Clause was raised for the first time on appeal to the Federal Circuit. *See* 141 S.

Ct. at 1988. In *Lucia*, it was raised after the administrative hearing on appeal to the SEC. *See* 138 S. Ct. at 2055. In *Ryder*, it was raised only on rehearing. *See* 515 U.S. at 182–83. And in *Freytag*, it was raised only on appeal after the challengers specifically *consented* to the participation of the Special Trial Judge—which the Solicitor General had invoked as a reason for this Court to deny certiorari. *See* 501 U.S. at 878–80.

3. In any event, as Judge Menashi explained at length, there was no forfeiture in the first place. Pet. App. 38a–41a (Menashi, J., dissenting). Indeed, petitioner "was so persistent in raising his Appointments Clause challenge that he exasperated the district court." *Id.* at 39a. The majority responded in a footnote, citing a claimed concession at oral argument and suggesting that petitioner "could have—but didn't—raise this Rule 42(a) argument in his motion for new trial." *Id.* at 26a n.14.

In the full exchange the panel cited, petitioner's counsel drew the same distinction as Judge Menashi, arguing that, although the Rule 42 argument had not been offered in precisely the same form earlier, "Judge Preska certainly did seem to think it was fairly encompassed within our appointments clause claims. She reached the issue; she decided the issue; the Special Prosecutor did not object to her resolution of the issue." And in a footnote in his new trial motion (the next filing after the district court first held that the special prosecutors were inferior executive officers), petitioner *did* dispute that "appointment by the Court pursuant to Fed. R. Crim. P. 42" could be a valid exercise of Congress's Appointments Clause power, specifically citing Justice Scalia's opinion in *Young*. *See ante* at 12.

The panel majority apparently believed that petitioner hadn't done enough to preserve the specific *argument* that Rule 42 failed to constitutionally authorize the interbranch appointment of the private special prosecutors. Pet. App. 26a n.14. But arguing against a moving target, petitioner repeatedly adapted his Appointments Clause *claim* to the shifting baseline against which it was being litigated. *Id.* at 39a–40a & nn.2–3 (Menashi, J., dissenting).[7]

As this Court has repeatedly emphasized, "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag*, 501 U.S. at 880. Here, there is no good reason why this Court should be beholden to the Second Circuit's factually and legally flawed forfeiture analysis—and several good reasons why it isn't.[8]

4. The errors in both the Second Circuit's decision to apply plain error review and in its application thereof make clear that, if certiorari is granted, this Court could, and would, review the questions presented de novo. But to whatever extent even an incorrect plain error holding below might militate against certiorari in other cases, it doesn't do so here.

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7. As this Court made clear in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), claims can be forfeited; arguments cannot. *Id.* at 535. Here, both the supervision and Rule 42 arguments support the same *claim*—that the special prosecutors exercised authority in violation of the Appointments Clause.

8. If this Court is less convinced that the Second Circuit's plain error analysis was flawed, it can—and should—designate the plain error issue as a third question presented, rather than see it as a reason not to answer the first two.

First, the panel's holdings that the special prosecutors are inferior executive officers and that they were subject to constitutionally adequate supervision by the Attorney General were both reached de novo. Thus, Rule 42 aside, the panel majority's de novo conclusions necessarily provoke the conflict between *Young* and this Court's more recent decisions in *any* case in which a private special prosecutor is appointed to try criminal contempts.

Second, there is a real danger that courts will read the Second Circuit majority opinion to "suggest[] not merely that the district court did not *plainly err*" in holding that Rule 42 satisfies the Appointments Clause, but that the district court did not *err* at all." Pet. App. 42a. (Menashi, J., dissenting). Even though the judicial appointment of private special prosecutors to try criminal contempts may be a rarity, *see ante* at 20–21 n.4, the Second Circuit's Appointments Clause analyses will hardly be limited to these facts—or to this legal context.

Rather, the decision below stands for two propositions that will necessarily have broader relevance elsewhere—that Congress can (implicitly) delegate its power to authorize appointments of inferior officers to other branches; and that inferior executive officers need be subject to only theoretical—not actual—supervision by a principal officer to satisfy *Arthrex*. If all that weren't enough, the Second Circuit's clumsy attempt to mesh *Young* with this Court's later cases only preserves criminal contempt prosecutions as a constitutional no-man's-land between the branches—in which confusion (like the district court's in this case) will persist until and unless this Court intervenes.

CONCLUSION

This Court's "separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." *Freytag*, 501 U.S. at 878. Here, courts have claimed for themselves the power to make interbranch appointments of private special prosecutors to try criminal contempt cases that the executive branch has declined to prosecute—without any specific authority from Congress. At the very least, if such judicial aggrandizement of the appointments power *is* to be tolerated, it ought to be because this Court has expressly endorsed it.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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