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18 UNITED STATES DISTRICT COURT  
19 DISTRICT OF ARIZONA

21 United States of America,  
22 Plaintiff,  
23 v.  
24 Joseph M. Arpaio,  
25 Defendants.

Case No. CR-16-01012-001-PHX-SRB

**[PROPOSED] BRIEF OF AMICI CURIAE  
MARTIN REDISH, FREE SPEECH FOR  
PEOPLE AND COALITION TO  
PRESERVE, PROTECT AND DEFEND IN  
OPPOSITION TO MOTION OF  
DEFENDANT JOSEPH ARPAIO FOR  
VACATUR AND DISMISSAL WITH  
PREJUDICE**

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## I. INTRODUCTION

Amici Martin Redish, Free Speech for People, and Coalition to Preserve, Protect and Defend, respectfully oppose the Motion of Defendant Joseph Arpaio for Vacatur and Dismissal With Prejudice. [Doc. 220]. In the narrow and unprecedented circumstances of this case, the exercise of the pardon power has exceeded the limits that the Due Process Clause of the Fifth Amendment imposes on the President's authority. Accordingly, the Court should hold the pardon unconstitutional, deny Defendant's motion, and proceed to sentencing.<sup>1</sup>

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## II. ARGUMENT

### **The Exercise of the Pardon Power in the Narrow Circumstances of this Case Undermines Judicial Protection of Constitutional Rights and Exceeds Due Process Constraints on the President's Authority to Pardon**

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The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees individuals the right to a hearing before an independent judicial body before any branch of the federal government may deprive those individuals of life, liberty or property. *See e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 530-32 (2004); *Bartlett v. Bowen*, 816 F.2d 695, 703-07 (D.C. Cir. 1987); *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948). As these cases show, under due process principles, the judiciary serves as the counter-majoritarian guardian of constitutionally protected individual rights against encroachment by the political branches of government.<sup>2</sup>

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<sup>1</sup> In considering the Defendant's motion, the Court has full authority to resolve the issues Amici raise. Federal courts' inherent powers "to prevent abuse, oppression, and injustice" are "as extensive and efficient as may be required by the necessity for their exercise, and may be invoked by strangers to the litigation as incident to the jurisdiction already vested." *Gumbel v. Pitkin*, 124 U.S., 146 (1888); see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). Courts may invoke this inherent power *sua sponte*, *Chambers, supra*, 501 U.S. at 49, or at the request of amici, particularly where the parties' alignment precludes their raising an issue of importance to the administration of justice. *See U.S. v. Mercedes-Benz of North America, Inc.*, 547 F.Supp. 399, 400 (N.D. Cal. 1982); *Green v. Nevers*, No. 92-CV-76881-DT) 1993 WL 1620511, at \*12 (E.D. Mich., Apr. 13, 1993). That is the situation here.

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<sup>2</sup> Constitutionally protected liberty interests under the Fourth Amendment were among the

1 Critically, the power of contempt for violating injunctions requiring government  
 2 officers to cease their unconstitutional actions – or risk fine, imprisonment or both – is a  
 3 vital means by which the judiciary enforces constitutional rights. As stated in *Institute of*  
 4 *Cetacean Research v. Sea Shepherd Conservation Society*, 774 F.3d 935, 951–52 (9th Cir.  
 5 2014):

6 [T]he purpose of contempt proceedings is to uphold the power of  
 7 the court, *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 327 (1904),  
 8 and to ensure that the court's vindication of litigants' rights is not  
 9 merely symbolic. Our orders would have little practical force, and  
 10 would be rendered essentially meaningless, if we were unable to  
 prevent parties bound by them from flagrantly and materially  
 assisting others to do what they themselves are forbidden to do.

11 If the President may employ his pardon power to relieve government officers of  
 12 accountability and risk of penalty for defying injunctions imposed to enforce  
 13 constitutional rights, that action will permanently impair the courts' authority and ability  
 14 to protect those inalienable rights. The result would be an executive branch freed from the  
 15 judicial scrutiny required to assure compliance with the dictates of the Bill of Rights and  
 16 other constitutional safeguards. Such a result is constitutionally unacceptable.

17 **1. The Due Process Clause Qualifies and Limits Otherwise Plenary**  
 18 **Powers in the Body of the Constitution**

19 To be sure, the Constitution expresses the President's pardon power in broad terms.  
 20 U.S. Const., art. II, § 2.<sup>3</sup> On its face, the provision appears virtually unlimited in the  
 21 discretion it vests in the President to pardon others for crimes. But the Constitution's  
 22 structure makes every provision in the body of the document, including provisions

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 24 rights whose violation by Defendant this Court enjoined in the matter giving rise to his  
 25 criminal contempt. *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS at 36, 40 (D. Ariz.  
 26 December 23, 2011); *United States of America v. Joseph M. Arpaio*, No. CR-16-01012-  
 001-PHX-SRB, 11-14 (D. Ariz. July 31, 2017); see *Hamdi*, *supra*, 542 U.S. at 529;  
*Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

27 <sup>3</sup> "The President shall . . . have power to grant reprieves and pardons for offenses against  
 28 the United States, except in cases of impeachment."

1 conferring broad power, subject to limitation by amendments that impose restrictions on  
2 government. As the Supreme Court stated in *Williams v. Rhodes*, 393 U.S. 23, 29 (1968):

3 [T]he Constitution is filled with provisions that grant Congress or  
4 the States specific power to legislate in certain areas; these granted  
5 powers are always subject to the limitation that they may not be  
6 exercised in a way that violates other specific provisions of the  
7 Constitution. For example, Congress is granted broad power to 'lay  
8 and collect Taxes,' but the taxing power, broad as it is, may not be  
9 invoked in such a way as to violate the privilege against self-  
10 incrimination. Nor can it be thought that the power to select  
11 electors could be exercised in such a way as to violate express  
12 constitutional commands that specifically bar States from passing  
13 certain kinds of laws.

14 Similarly, no court could properly hold that Congress may use its plenary power over  
15 interstate commerce to restrict First Amendment rights of free speech or press.

16 Indeed, courts have long applied the Fifth Amendment's Due Process Clause to  
17 restrict plenary powers that the body of the Constitution explicitly confers on the political  
18 branches. *See Battaglia v. General Motors Corp.*, *supra*, 169 F.2d at 257. The power at  
19 issue in *Battaglia* was Congress' broad authority to grant or deny federal court  
20 jurisdiction. U.S. Const., art. III, §1.<sup>4</sup> The court held that that Congress' exercise of its  
21 broad constitutional authority must yield when in conflict with the Due Process Clause:

22 [W]hile Congress has the undoubted power to give, withhold, and  
23 restrict the jurisdiction of courts other than the Supreme Court, it  
24 must not so exercise that power as to deprive any person of life,  
25 liberty, or property without due process of law or to take private  
26 property without just compensation.

27 *Id.* at 257. *Accord*, *Bartlett v. Bowen*, *supra*, 816 F.2d at 706; *cf.* *Lockerty v. Phillips*, 319  
28 U.S. 182 (1943).

These same Constitutional restrictions apply to the Executive Branch when, as  
here, a protected liberty interest is at risk. In *Hamdi v. Rumsfeld*, 542 U.S. at 530-32, the

<sup>4</sup> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

1 Court rejected the government's claim that its plenary powers in times of military conflict  
2 negated a citizen's right to due process in challenging his classification as an enemy-  
3 combatant. *See also Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484  
4 U.S. 1 (1987) ("The Executive has broad discretion over the admission and exclusion of  
5 aliens, but . . . [i]t . . . may not transgress constitutional limitations."). The Due Process  
6 Clause limits plenary powers conferred on the President in the body of the Constitution,  
7 just as the clause limits the powers of the Congress.

8 **2. Courts Properly Constrain Application of the Pardon Power When its**  
9 **Exercise Conflicts with Due Process**

10 Applying the same principles, the Supreme Court has been careful not to allow use  
11 of the Presidential pardon power in a way that treads on constitutional rights. In the only  
12 other case that Amici have found where a Presidential pardon infringed upon the Bill of  
13 Rights, the Supreme Court circumscribed application of the Presidential pardon power.  
14 *See Burdick v. United States*, 236 U.S. 79, 93-94 (1915).

15 In *Burdick*, a newspaper editor refused a Presidential pardon designed to compel  
16 him to disclose confidential sources to a grand jury; if effective, the pardon would have  
17 eliminated his Fifth Amendment privilege against self-incrimination, previously invoked  
18 to resist disclosure. The Court protected the privilege, holding that the editor's refusing the  
19 pardon rendered it void. Thus, the Court gave effect to an individual's Constitutional right  
20 and limited the pardon power's application where the two conflicted.

21 *Biddle v. Perovich*, 274 U.S. 480 (1927), proves the point in reverse. There, as in  
22 *Burdick*, the intended recipient of Presidential clemency rejected it. But unlike *Burdick*,  
23 the Court held that Executive reduction of Biddle's sentence, based on a criminal  
24 conviction but presenting no infringement on the Bill of Rights, was *effective*; Justice  
25 Holmes refused to extend *Burdick* to a case where the President's action did *not* transgress  
26 a constitutional right. *Id.* at 287-88. Critically, in neither *Burdick* nor *Biddle* did the Court  
27 decline to exercise its role as final arbiter of the pardon power's scope on the ground that  
28 the power is absolute.

1 Together, these cases teach that courts limit the President's pardon power where,  
2 and only where, competing constitutional rights are at stake. As Justice O'Connor, joined  
3 by three other justices, wrote in *Ohio Adult Parole Authority v. Woodard*:

4 I do not, however, agree . . . that, because clemency is committed to  
5 the discretion of the executive, the Due Process Clause provides no  
6 constitutional safeguards . . . . Judicial intervention might, for  
7 example, be warranted in the face of a scheme whereby a state  
8 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.

9 523 U.S. 272, 288-89 (1998) (O'Connor, J., concurring).

10 The invocation of the pardon power in this case differs in critical ways from that  
11 power's traditional use. When the President pardons a private individual who has been  
12 convicted of a crime, there arises no risk that the President will circumvent judicial  
13 imposition, through injunction, of constitutional restraints on federal and state officials.

14 Here, by contrast, that is not only a danger, but it is precisely the result that the  
15 pardon would achieve. Defendant violated myriad individuals' constitutional rights, then  
16 ignored an injunction prohibiting him from continuing to do so. If the President is  
17 permitted to pardon Defendant's contempt conviction, the signal will be sent to all law  
18 enforcement officers that if their unconstitutional actions further presidential policies or  
19 preferences, they stand to benefit from the exercise of his pardon power, much as  
20 Defendant seeks to benefit here.

21 Just as Judge Snow issued his preliminary injunction to protect individuals in the  
22 future from the unconstitutional practices at issue in *Melendres v. Arpaio*, No. CV-07-  
23 2513-PHX-GMS, 36, 40 (D. Ariz. Dec. 23, 2011), this Court should protect the countless  
24 individuals whose constitutional rights will be placed at risk if this pardon is allowed to  
25 stand. The Court should recognize the serious constitutional pathology that would  
26 inescapably flow, and the peril to our constitutional system of checks and balances. A  
27 dangerous precedent would be set for any future presidential pardon that immunizes law  
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1 enforcement officers – or other government actors – from the penalties of contempt for  
2 violating judicial injunctions safeguarding constitutional rights.

3 *Ex parte Grossman*, 267 U.S. 87, 115, 120 (1925), involved no such danger. There,  
4 the Supreme Court recognized the President’s power to pardon an individual for a  
5 contempt conviction arising from his flouting an injunction to stop selling liquor in the  
6 Prohibition era. The decision, however, is readily distinguishable.

7 The present case involves a pardon issued (1) for criminal contempt (2) for  
8 violating an injunction (3) issued to a government official (4) to cease a systemic practice  
9 of violating (5) individuals’ constitutional rights. By contrast, *Grossman* involved only the  
10 first two elements. Absent the last three elements, the presidential pardon did not  
11 implicate the Due Process Clause. With them, the Court confronts a situation that  
12 threatens to empower the President, through use of his pardon power, to effectively  
13 eliminate the judiciary’s ability to protect and enforce constitutional rights.

14 In our history’s preeminent constitutional decision, *Marbury v. Madison*, 5 U.S.  
15 (1 Cranch) 137, 176-77 (1803), Chief Justice John Marshall wrote for a unanimous Court:

16 To what purpose are powers limited, and to what purpose is that  
17 limitation committed to writing, if these limits may, at any time, be  
18 passed by those intended to be restrained? The distinction, between  
19 a government with limited and unlimited powers, is abolished, if  
20 those limits do not confine the persons on whom they are imposed,  
21 and if acts prohibited and acts allowed, are of equal obligation.

22 Chief Justice Marshall may not have foreseen a President’s misuse of the pardon  
23 power to overcome constitutional limits on official actions antithetical to the Bill of  
24 Rights. Still, Marshall’s warning is directly applicable to this situation. The Constitution  
25 loses its meaning as a restraint on government, and as a guarantor of individual rights, if  
26 the pardon power may be employed in the manner exercised in this case.

### 27 **III. CONCLUSION**

28 This case centers on a law enforcement officer’s willful violation of court orders  
protecting constitutional rights. The power to pardon that contempt is the power to destroy

1 the protection of those rights. Amici respectfully urge this Court to find that this  
2 unprecedented exercise of the pardon power exceeds the limits of Presidential authority  
3 set by the Due Process Clause of the Fifth Amendment to the United States Constitution.  
4 The Court should hold that exercise invalid, deny Defendant's Motion and proceed to  
5 sentence him.

6 Dated: September 11, 2017

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