Case No. 17-10448

IN THE 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 Nevada
Case No. 2:16-cr-010120-SRB-1

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* BY CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF NEITHER PARTY AND MOTION FOR SANCTIONS

Oral Argument Requested

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INTRODUCTION

Congress cannot define or limit the effect of a presidential pardon because the power of the President is not subject to legislative control. Certain members of the Congress of the United States, Jerrold Nadler, Steve Cohen, Henry C. "Hank" Johnson, Jr., Theodore E. Deutch, David Cicilline, Eric Swalwell, Ted Lieu, Pramila Jayapal, Sylvia Garcia, Joe Neguse, Madeleine Dean, Veronica Escobar, Jim Costa, Adriano Espaillat, Dwight Evans, Ruben Gallego, Raul M. Grijalva, Barbara Lee, Grace F. Napolitano, Eleanor Holmes Norton, Frank Pallone, Jr., Jackie Speier, Juan Vargas, and Nydia M. Nydia M. Velazquez ("*Amici Curiae*"), more than half of whom are lawyers, filed a non-meritorious and indeed frivolous brief which seeks to not only limit the effect of a constitutionally-protected presidential pardon, but also to essentially rewrite the U.S. Constitution and U.S. Supreme Court precedent in an attempt to satisfy their deep-seated hatred of Mr. Arpaio and the President of the United States, fueled by their not-so-subtle prejudicial, political agenda. The *Amici Curiae* should be sanctioned and admonished pursuant to 28 U.S.C. § 1927 and the inherent authority of this honorable Court for filing and pursuing such frivolous and definitively precluded relief for grandstanding and political purposes.

ARGUMENT

I. BOTH THE U.S. CONSTITUTION AND U.S. SUPREME COURT PRECEDENT DECISIVELY PRECLUDE THE RELIEF SOUGHT

BY THE *AMICI CURIAE*.

The *Amici Curiae*'s motion is wholly without merit and must be denied as a matter of law. The relief they request is unconstitutional and in strict violation of Supreme Court precedent.

Sheriff Joseph Arpaio ("Mr. Arpaio") was found liable for the misdemeanor of criminal contempt in a federal court for allegedly violating a court order. "Criminal contempt is a crime in the ordinary sense." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968); *see also Int'l v. Bagwell*, 512 U.S. 821, 826 (1994). Article II, Section 2 of the U.S. Constitution authorizes the President of the United States "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment" (the "Pardon Clause"). U.S. CONST. art. II, § 2. It is well established and not in dispute after "centuries of jurisprudence" that the President has the power to pardon criminal contempt of court. *Ex Parte Grossman*, 267 U.S. 87 (1925).

In *Ex Parte Garland*, 71 U.S. 333 (1866), the Supreme Court also summarized and delineated the far reach of a presidential pardon as follows:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he never committed the offence. If granted before conviction, it prevents . . . the penalties and disabilities consequent upon conviction from attaching; **if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new**

> **man, and gives him a new credit and capacity.**

Ex Parte Garland, 71 U.S. at 380-81 (emphasis added). This ruling simply means that a pardon removes or prevents the attachment of all consequences that are based on guilt for the offense.

This broad interpretation of the effect of a pardon was affirmed in *Knote v. United States*, 95 U.S. 149 (1877), in which the U.S. Supreme Court held:

> A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.

Knote, 95 U.S. at 153.

A presidential pardon relieves the offender of all punishments, penalties, and disabilities that flow directly from the conviction, provided that no rights have vested in a third party as a consequence of the judgment. In *Boyd v. United States*, 142 U.S. 450 (1892), for example, the defense objected to the testimony of a witness who had been convicted of larceny. In response, the prosecution presented a full and unconditional pardon issued by President Harrison. The Court held that the pardon restored the competency of the witness to testify. "The disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect." *Boyd*, 142 U.S. at 453-

54.

As such, the Pardon Clause gives the President exclusive jurisdiction in the issuance of pardons and reprieves for offenses against the United States. *See Schick v. Reed*, 419 U.S. 256, 266-67 (1974). Accordingly, the U.S. Supreme Court has repeatedly held that Congress may not act in any manner that would limit the full legal effect of a presidential pardon. *See, e.g., United States v. Klein*, 80 U.S. 128, 148 (1871); *Ex Parte Garland*, 71 U.S. at 380 ("This power of the President [i.e., the pardon power] is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.").

The decision of the U.S. Supreme Court in *Ex Parte Garland* illustrates that Congress, and thus the courts, have no voice when it comes to presidential pardons. In *Ex Parte Garland*, at issue was an act of Congress that attempted to exclude from the practice of law all persons who had participated in the Confederate states' rebellion against the United States government. The Court determined that this exclusion was a punishment for the offense of treason. In other words, the Court concluded that, despite Congress's attempt to present the Act of 1862 as setting qualifications for a profession, it was actually an attempt to exact additional punishment for an offense. The Court held that the Act could not be

applied to Garland because the President's pardon prohibited the plaintiff from being punished for the offense of treason. To hold that he could be punished under this new law would subvert the President's clemency power. As the Court stated, "[i]f such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. *It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency*." *Ex Parte Garland*, 71 U.S. at 381 (emphasis added). Therefore, any punishment Congress attempted to prescribe the guilt for the offense was not applicable to plaintiff.

The Constitution, buttressed by U.S. Supreme Court case law, are crystal clear on the effects of a presidential pardon and the powerlessness of Congress much less the courts in seeking to vitiate a presidential pardon. Congress has no power to remove or punish a person who received a presidential pardon just as Congress nor the courts have the power to reverse or circumvent a presidential pardon.

II. THE *AMICI CURIAE* AND THEIR COUNSEL SHOULD BE SANCTIONED PURSUANT TO 28 U.S.C. § 1927 AND THIS HONORABLE COURT'S INHERENT AUTHORITY AND MR. ARPAIO SHOULD BE ENTITLED TO REASONABLE ATTORNEYS' FEES AND COSTS FOR HAVING TO RESPOND TO *AMICI CURIAE*'S FRIVOLOUS BRIEF. THE PUTATIVE AMICI *CURIAE* SHOULD ALSO BE REPRIMANDED AND DISCIPLINED FOR FILING A FRIVOLOUS MOTION AND *AMICUS CURIAE*

BRIEF WHICH, AS LAWYERS, THEY HAD REASON TO KNOW WAS A SHAM!

The *Amici Curiae*, the majority of whom hold juris doctorate degrees and practiced law before serving in the U.S. House of Representatives, filed a non-meritorious and frivolous motion and proposed brief seeking relief that has been precluded in the United States for generations. They knew or had reason to know that their motion and proposed *amici curiae* brief was not only frivolous but also pursued in bad faith, as they were filed only for political purpose and to try to further damage Mr. Arpaio, a honorably discharged military veteran and six-time elected Sheriff of Maricopa County who sought to protect America's borders and Arizona citizens from harms committed by illegal aliens and other lawbreakers. These principles do not mesh with the *Amici Curiae*'s political agenda and therefore, they simply want him, and the President who supports him, severely harmed.

As such, Mr. Arpaio seeks sanctions pursuant to 28 U.S.C. § 1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Indeed, any attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy

personally the excess of costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *Id*. The purpose of 28 U.S.C. § 1927 is to allow the Court "to access attorney's fees against an attorney who frustrates the progress of judicial proceedings." *United States v. Wallace*, 964 F.2d 1214, 1218 (D.C. Cir. 1992).

Amici Curiae and their counsel's bad faith and frivolous filing of their motion is precisely the kind of vexatious misconduct 28 U.S.C. § 1927 seeks to protect against. Here, all the elements are met. The *Amici Curiae* and their counsel acted unreasonably and vexatiously when they filed their motion which they knew or had reason to know is contrary to law, particularly since the majority of the *Amici Curiae* are law school graduates who practiced as attorneys. Undoubtedly, the filing "multiple[d] the proceedings[.]" 28 U.S.C. § 1927. Finally, the dollar amount that this Court awards will bear a nexus to the amount of unnecessary work that was performed.

In addition to the powers deriving from 28 U.S.C. § 1927, it is well established in the U.S. Court of Appeals for the Ninth Circuit that when rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, courts have an inherent power to impose sanctions for abusive litigation practices. "Article III courts have an 'inherent authority' to sanction 'bad faith' or 'willful misconduct,' even in the absence of express

statutory authority to do so." *Knupfer v. Lindblade* (*In re Dyer*), 322 F.3d 1178, 1197 (9th Cir. 2002) (citation omitted). Courts also have inherent authority to sanction litigation misconduct when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). Such power is government "by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc*., 501 U.S. 32, 42 (1991). A court's inherent authority is most commonly invoked when there is no court order in place regarding the conduct at issue. *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 106-07 (2d Cir. 2002) ("[e]ven in the absence of a discovery order, a court may impose sanctions on a party for misconduct under its inherent power to manage its own affairs").

Bad faith "may be found, not only in the actions that led to the lawsuit, but in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 4 (1973); *see also Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219-20 (D.C. Cir. 1991) (bad faith includes "the filing of a frivolous complaint or meritless motion, or discovery-related misconduct"). Indeed, courts have found bad faith in a variety of conduct stemming from "a full range of litigation abuses." *Chambers*, 501 U.S. at 46. For example, "a party 'shows bad faith by delaying or disrupting the litigation . . .'" *Primus Auto. Fin. Servs., Inc. v. Batarse,* 115 F.3d 644, 648 (9th Cir. 1997)

(quoting *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978)).

In *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091 (9th Cir. 2001), this Court found "counsel's reckless and knowing conduct" to be "tantamount to bad faith and therefore sanctionable under the court's inherent power." *Id*. at 1108. There, defense counsel introduced testimony in violation of Federal Rule of Evidence 412.4 after the two Rule 412 pre-trial motions had been denied and after counsel assured the district judge that the anticipated testimony would not violate Rule 412. *Id*. at 1107. This Court found that "defense counsel's introduction of [the] testimony was a knowing and intentional violation of Rule 412 . . ." *Id*. at 1108.

Indeed, "sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose. Therefore . . . an attorney's reckless misstatements of law and fact, when coupled with an improper purpose . . . are sanctionable under the court's inherent power." *Fink v. Gomez*, 239 F.3d 989, 0994 (9th Cir. 2001).

Fink's holding is directly on point here. When the *Amici Curiae* and their counsel vexatiously multiplied the pleadings with a motion that was unnecessary – and contrary to the law – requiring Mr. Arpaio and his counsel to spend a considerable amount of time and financial resources preparing a response, the *Amici Curiae* and their counsel acted in bad faith, as they filed their motion only

for strategic, political purposes, just like this Court in *Fink* warned against. Moreover, the *Amici Curiae* undoubtedly "delayed" and "disrupted" the litigation by filing a motion that has no basis in fact or law. *Chambers*, 501 U.S. at 46. They knew that their motion had no basis in fact or law just like the attorneys in *B.K.B.*, where this Court sanctioned counsel for "reckless and knowing conduct." *B.K.B.*, 276 F.3d at 1108. Importantly, the *Amici Curiae* "[are] deemed bound by the acts of [their lawyers] and [are] considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1880)); *see also Lockary v. Kayfetz*, 974 F.2d 1166, 1169-70 (9th Cir. 1992).

In short, the *Amici Curiae* filed their motion only to run up unnecessary time, legal fees and costs and to pursue their political agendas. This also wastes the valuable resources of this Court. This misconduct is sanctionable and the *Amici Curiae*, the congressmen and congresswomen of the United States who were elected by the American people to uphold the Constitution, must not sabotage it and try to tear it down, and should have their motion stricken from the record and an order entered against them.

This honorable Court should not just reprimand the *Amici Curiae* and their counsel, it should also report those *Amici Curiae* who are licensed members of state bars to their respective bar disciplinary counsels and recommend that they be

reprimanded for acting in bad faith for political purposes contrary to the administration of justice, as well as other pertinent and relevant ethical violations which the disciplinary counsels may discern.

CONCLUSION

By pursuing their lawless motion seeking relief that is contrary to not only U.S. Supreme Court precedent but also the U.S. Constitution, the *Amici Curiae* put forth bogus, if not fraudulent, recitations of the law to be considered and needlessly wasted the resources of all parties involved, including this Court – all to pursue their political agendas. For the foregoing reasons, the motion and proposed brief submitted by *Amici Curiae* should be stricken from the record, Mr. Arpaio should be awarded attorneys' fees and costs for having to expend the time and resources in filing this otherwise unnecessary opposition to *Amici Curiae*'s frivolous motion and this honorable Court should impose such other sanctions, including but not limited to reprimands and referrals to bar disciplinary counsels, and such other relief as may be adjudged just and proper under these serious circumstances.

Dated: May 14, 2019

Respectfully submitted,

/s/ *Larry Klayman*

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2019, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the Ninth Circuit's CM/ECF system, causing it to be served upon any counsel of record in the case through CM/ECF.

/s/ *Larry Klayman*

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 2,678 words or 11 pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ *Larry Klayman*