No. 22-274

In the Supreme Court of the United States

STEVEN DONZIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed plain error when, in reliance on Federal Rule of Criminal Procedure 42 and this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), it appointed private attorneys to prosecute a criminal contempt of court.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Aguinda v. *Texaco, Inc.*, No. 93-cv-7527 (June 29, 2001)

In re Application of Chevron Corp., No. 10-mc-2 (Nov. 30, 2010)

Chevron Corp. v. *H5*, No. 14-mc-144 (Mar. 2, 2015)

In re Application of Chevron Corp., No. 14-mc-392 (Aug. 17, 2017)

United States v. *Donziger*, No. 19-cr-561 (Oct. 1, 2021)

United States Court of Appeals (2d Cir.):

Jota v. *Texaco, Inc.*, No. 97-9102 (Oct. 5, 1998)

In re Aguinda, No. 00-3066 (Feb. 23, 2001)

Lago Agrio Plaintiffs v. *Chevron Corp.*, No. 10-4341 (Dec. 15, 2010)

Chevron Corp. v. *Naranjo*, No. 11-1150 (Jan. 26, 2012)

Chevron Corp. v. *Donziger*, No. 19-4091 (May 13, 2020)

United States v. *Donziger*, No. 20-1529 (Sept. 22, 2020)

United States v. *Donziger*, No. 21-2486 (June 22, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 38 F.4th 290.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2022. The petition for a writ of certiorari was filed on September 20, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted on six counts of contempt of court, in violation of 18 U.S.C. 401(3). Judgment 1-2. The court sentenced petitioner to six months of imprisonment. Judgment 3. The court of appeals affirmed. Pet. App. 1a-34a.

1. In 1993, petitioner, an attorney, filed a class-action lawsuit in the Southern District of New York on

behalf of Ecuadorian plaintiffs against the Chevron Corporation. Pet. App. 110a. The claims alleged that one of Chevron's corporate predecessors had polluted the Amazon rainforest. *Ibid.* The litigation was later transferred to the Ecuadorian courts, which entered an $8.6 billion judgment against Chevron. *Ibid.*

In 2011, Chevron countersued petitioner in the Southern District of New York for procuring the Ecuadorian judgment though bribery and fraud. Pet. App. 111a. The district court resolved those counterclaims in favor of Chevron, finding that petitioner and others "had engaged in a veritable smorgasbord of corrupt and fraudulent acts in the Ecuadorian case," such as "submitting false evidence" and "bribing the judge." *Ibid.* The court imposed a constructive trust for Chevron's benefit on all money and assets that petitioner had received as a result of the Ecuadorian judgment. *Id.* at 125a-126a. The court of appeals affirmed. See *Chevron Corp.* v. *Donziger*, 833 F.3d 74 (2d Cir. 2016), cert. denied, 137 S. Ct. 2268 (2017).

In the years that followed, petitioner persistently evaded his obligations under the district court's judgment, including by disobeying several discovery orders intended to prevent him from shielding his assets from Chevron. See Pet. App. 6a, 123a-170a, 371a-377a. After repeatedly trying and failing to obtain petitioner's compliance with those orders through other means, the court ordered petitioner to provide a list of electronic devices, accounts, and document management services he had used since the judgment and to allow a neutral forensic expert to image his electronic devices and storage media. See *id.* at 6a, 170a-231a, 377a-381a. The court explained that those steps were necessary because of petitioner's "stonewalling of post-judgment

discovery" and his "obdurate refusal to make any serious, good faith effort to produce documents he ha[d] been ordered to produce." *Id.* at 198a, 345a n.805 (citations omitted). Petitioner did not comply with those orders either. *Id.* at 6a, 170a-213a, 377a-381a.

The court found petitioner in civil contempt of court, imposed monetary penalties, and ordered him to surrender his passport. Pet. App. 6a. Petitioner's contumacious conduct persisted, however. See, *e.g.*, *id.* at 6a, 159a, 169a-170a, 218a-231a.

2. In 2019, the district court ordered petitioner to show cause why he should not be held in criminal contempt of court, in violation of 18 U.S.C. 401(3), for his willful failures to comply with the court's judgment and subsequent orders. Pet. App. 371a-382a. The court referred the matter to the United States Attorney for the Southern District of New York, who "respectfully declined" to prosecute the case itself because of resource constraints. *Id.* at 383a (brackets omitted). The court then appointed three private attorneys as special prosecutors in accordance with Federal Rule of Criminal Procedure 42, which authorizes a court to "appoint another attorney to prosecute [a] contempt" if "the government declines" to do so. Fed. R. Crim. P. 42(a)(2); see Pet. App. 383a-384a. The court transferred the contempt proceedings to a different judge for trial. Pet. App. 371a.

On the first day of the bench trial, petitioner moved to dismiss the charges on the theory that the court's appointment of the special prosecutors violated the Appointments Clause. See D. Ct. Doc. 302, at 3 (May 10, 2021). That Clause empowers the President to appoint officers with the advice and consent of the Senate, but permits Congress to vest the appointment of "inferior

Officers" in the President alone, the courts of law, or the heads of departments. U.S. Const. Art. II, § 2, Cl. 2. Petitioner argued that the court-appointed special prosecutors were inferior officers improperly acting without the supervision of any principal officers. See D. Ct. Doc. 302, at 3. The district court denied the motion, finding that petitioner had not shown that the Executive Branch lacked the authority to supervise the special prosecutors. See Pet. App. 250a.

At the end of the trial (but before the verdict), petitioner renewed his contention that the special prosecutors were improperly acting without supervision by any principal officers. D. Ct. Doc. 330, at 1-4 (June 22, 2021). The district court found that his pretrial delay had in fact forfeited the claim, because Federal Rule of Criminal Procedure 12(b)(3) requires a claim alleging a defect in the prosecution to be raised in a pretrial motion, but petitioner had failed to raise his Appointments Clause claim until the first day of trial. Pet. App. 252a. The court also rejected the claim on the merits, explaining that the Attorney General retained the legal power to supervise the special prosecutors' work. *Id.* at 255a-257a. The court found it irrelevant whether the Attorney General had in fact exercised that supervisory authority, because "what matters is that a superior officer *have the discretion* to review" the inferior officer's decisions, not that the superior officer actually do so. *Id.* at 262a-263a (quoting *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021)) (brackets omitted).

The district court then found petitioner guilty on all six counts of criminal contempt. Pet. App. 352a-353a. Petitioner moved for a new trial under Federal Rule of Criminal Procedure 33, arguing once more that the prosecutors were operating without the supervision of

principal officers. D. Ct. Doc. 351, at 1-6 (Aug. 3, 2021). The court denied the motion because it was a procedurally improper request for reconsideration of the court's earlier rulings, Pet. App. 360a-362a; the Appointments Clause claim was untimely, *id.* at 362a-366a; and the claim lacked merit for the reasons that the court had already explained, *id.* at 366a-369a. The court sentenced petitioner to six months of imprisonment. Judgment 3.

3. The court of appeals affirmed. Pet. App. 1a-34a.

Although the government had submitted an amicus brief arguing otherwise, the court of appeals agreed with petitioner that the special prosecutors were officers within the meaning of the Appointments Clause. Pet. App. 9a-17a. But, like the district court, the court of appeals rejected petitioner's contention that the special prosecutors were acting without the supervision of any principal officer. *Id.* at 18a-25a. The court explained that the Attorney General retained "the authority to supervise" the special prosecutors and that it was "beside the point" whether the Attorney General "in fact" exercised that authority. *Id.* at 19a, 22a. And because petitioner's supervision claim failed on the merits, the court found it unnecessary to decide whether petitioner had forfeited it by failing to raise it before trial. *Id.* at 18a.

The court of appeals also rejected petitioners' contention, raised for the first time on appeal, that Rule 42 violated the portion of the Appointments Clause providing that "Congress may by Law vest the Appointment" of inferior officers in the courts of law. U.S. Const. Art. II, § 2, Cl. 2; see Pet. App. 25a-31a. The court found that petitioner had forfeited that claim by failing to raise it in district court, and it thus reviewed petitioner's

claim for plain error, a standard that it found petitioner could not meet. *Id.* at 25a-31a. The court stated that it was "not clear" whether the term "Law" in the Clause excluded procedural rules enacted under the Rules Enabling Act, 28 U.S.C. 2071 *et seq.* Pet. App. 27a-28a. The court also determined that, even if it "might ultimately conclude that the appointment of a special prosecutor under Rule 42 violates the Appointments Clause, any error by the district court would not be 'clear' or 'obvious,'" and thus would not satisfy the plain-error standard. *Id.* at 28a.

Judge Menashi dissented. Pet. App. 35a-55a. In Judge Menashi's view, petitioner had preserved his claims, *id.* at 38a-41a, and could in any event show plain error, *id.* at 41a-43a. Judge Menashi expressed the view that Rule 42(a)(2) does not rank as a "Law" within the meaning of the Appointments Clause, see *id.* at 44a-46a, and that the courts lacked "inherent judicial authority" to appoint special prosecutors, *id.* at 46a.

ARGUMENT

Petitioner contends (Pet. 18-28) that the district court's appointment of private attorneys to prosecute him for criminal contempt violated the Appointments Clause. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. This case would also be a poor vehicle for considering the questions presented, both because petitioner forfeited his contentions in the district court and because he cannot obtain any practical benefit from a decision in his favor. The petition for a writ of certiorari should be denied.

1. In general, the "Executive Branch has exclusive authority and absolute discretion to decide whether to

prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), this Court recognized a narrow exception to that rule for prosecutions of criminal contempt. As the court of appeals acknowledged, however, even a court-appointed special prosecutor remains subject to the Attorney General's direction and control. See Pet. App. 18a-25a.

a. Congress has granted federal courts the "power to punish by fine or imprisonment" a "contempt of its authority" that consists of "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. 401(3). In *Young*, this Court held that the federal courts "possess inherent authority to initiate [criminal] contempt proceedings for disobedience to their orders," including the power "to appoint a private attorney to prosecute the contempt" when the government has declined to handle a prosecution itself. 481 U.S. at 793; *id.* at 801-802.

After *Young*, the Federal Rules of Criminal Procedure were amended to provide that a court generally "must request" the federal government to prosecute a criminal contempt, but that, "[i]f the government declines the request, the court must appoint another attorney to prosecute the contempt." Fed. R. Crim. P. 42(a)(2); see Fed. R. Crim. P. 42 advisory committee's note (2002 Amendments) (explaining that Rule 42(a)(2) "reflect[s] the holding in *Young*").

b. A court's inherent authority under *Young* and Rule 42 to "initiat[e]" criminal contempt proceedings extends no further than issuing an order to show cause, asking "the appropriate prosecuting authority" to prosecute the case itself, and then, if the prosecuting authority declines to do so, appointing a special prosecutor as "a

last resort." *Young*, 481 U.S. at 795, 801. *Young* makes clear, however, that once those steps are taken, the court's role reverts to that of adjudicator and the prosecutor proceeds "outside the supervision of the court," *id.* at 807, as would naturally be necessary for any judge of that court to impartially adjudicate the matter.

As a result, once a contempt prosecution is initiated, responsibility for supervising that prosecution rests where it does for other prosecutions: in the Executive Branch, pursuant to the President's constitutional authority to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and the Attorney General's statutory authority to oversee federal prosecutions, see 28 U.S.C. 515-519. If the Attorney General is dissatisfied with the special prosecutor's actions, he may displace the special prosecutor by assuming control of the case directly and, if necessary, terminating the prosecution. See Pet. App. 24a-25a & n.13.

2. Contrary to petitioner's contentions (Pet. 18-28), the appointment of the special prosecutors in this case complied with the Appointments Clause. That Clause provides:

> [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. As a threshold matter, although the court of appeals concluded otherwise, see

Pet. App. 9a-17a, special prosecutors are not "Officers" covered by the Appointments Clause. But even if they were, their appointment and supervision would be consistent with that Clause.

a. The Appointments Clause, by its terms, applies only to the appointment of "Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. The special prosecutors here were not officers.

To be an officer, a person must occupy an office—that is, "a 'continuing' position established by law." *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018) (citation omitted). A person does not rank as an officer if he performs only "occasional or temporary" duties, as opposed to "continuing and permanent" ones. *Ibid.* (citation omitted). And consistent with that understanding, this Court has long held that a person who acts for the government only in a "particular case" ordinarily is not an officer and thus need not be chosen in accordance with the Appointments Clause. *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890); see *id.* at 326-327 (holding that a "merchant appraiser" chosen to resolve a customs dispute was not an officer because his functions extended no further than the "case [in which] he [wa]s selected to act"); *United States* v. *Germaine*, 99 U.S. 508, 512 (1879) (holding that a medical examiner was not an officer because he performed duties only "when called on * * * in some special case").

Here, the district court selected the special prosecutors to prosecute a single misdemeanor offense against a single defendant in a single case, based on charges already determined by the court. The special prosecutors had "no general functions" extending beyond the "particular case" in which they were "selected to act." *Auffmordt*, 137 U.S. at 327. They accordingly are not

officers of the United States. See, *e.g.*, *Freytag* v. *Commissioner*, 501 U.S. 868, 881 (1991) (indicating that "special masters, who are hired by Article III courts on a temporary, episodic basis," are not officers); *Contracts With Members of Congress*, 2 Op. Att'y Gen. 38, 40 (1826) (explaining that "an engagement with a gentleman of the bar, whereby, for a valuable consideration, he is to render his professional services in a given case, is a contract, a bargain, an agreement," rather than an appointment to an office) (emphasis omitted).

The court of appeals nonetheless treated special prosecutors as officers based on an analogy to the independent counsel viewed as an officer in *Morrison* v. *Olson*, 487 U.S. 654 (1988). See Pet. App. 14a-17a. But the independent counsel exercised the "full power" of the Department of Justice to investigate, charge, and prosecute a range of defendants for a wide variety of crimes in courts throughout the United States. *Morrison*, 487 U.S. at 662 (citation omitted). The independent counsel could also continue performing those functions for as long as she deemed necessary. *Id.* at 664. The office of independent counsel was thus a far more lasting position than the temporary posts held by the special prosecutors here.

b. Even assuming that the special prosecutors were officers, petitioner errs in arguing (Pet. 18-23) that their appointments violated the Appointments Clause on the theory that "Congress" has not, "by Law," vested the power of appointment in the courts of law. U.S. Const. Art. II, § 2, Cl. 2. The Clause applies only to officers "whose Appointments are not herein otherwise provided for." *Ibid.* But Article III, as interpreted in *Young*, "otherwise provide[s] for" the appointment of special prosecutors. *Ibid.*

"Article III's grant of 'the judicial Power' imbues each federal court with the inherent authority to regulate its own proceedings." *United States* v. *Tsarnaev*, 142 S. Ct. 1024, 1041 (2022) (Barrett, J., concurring) (brackets, citation, and emphasis omitted). And in *Young*—which was decided before the adoption of the relevant amendment to Rule 42—this Court concluded that a federal court's "inherent authority" "encompasses the ability to appoint a private attorney to prosecute [a] contempt." 481 U.S. at 793; see *United States* v. *Providence Journal Co.*, 485 U.S. 693, 701 (1988) (explaining that a court's authority to initiate criminal contempt proceedings and to appoint a prosecutor is "part of the judicial function").

In any event, and even apart from Rule 42, "Congress" has "by Law" empowered the federal courts to appoint special prosecutors to prosecute contempt charges. U.S. Const. Art. II, § 2, Cl. 2. Congress has expressly granted federal courts the "power to punish * * * contempt." 18 U.S.C. 401; see *Ex parte Robinson*, 86 U.S. 505, 511-512 (1874) (tracing the federal courts' power to punish contempt to the Judiciary Act of 1789, ch. 20, 1 Stat. 73). And in *Young*, this Court concluded that a court's "power to initiate a contempt proceeding * * * of necessity encompasse[s] the authority to appoint an attorney to prosecute such a matter." 481 U.S. at 795 n.7. Petitioner, however, would construe Congress's own endorsement of courts' authority to punish contempts to *sub silentio* deny courts a necessary component of that authority—the authority to appoint private attorneys to prosecute contempt charges when the U.S. Attorney declines a request to do so itself.

As the court of appeals observed, petitioner's contrary argument would all but nullify *Young*. See Pet.

App. 28a. In *Young*, this Court squarely determined that courts "have long had, and must continue to have, the authority to appoint private attorneys to initiate [contempt] proceedings when the need arises." 481 U.S. at 800-801. Yet on petitioner's view, courts lack that authority after all.

c. Petitioner also errs in arguing (Pet. 24-28) that, because the special prosecutors allegedly were exempt from supervision by any principal officers, they are not inferior officers whose appointments can be vested in the courts of law. See *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021). But as the court of appeals correctly determined, court-appointed special prosecutors are subject to the direction and supervision of the Attorney General.

The Attorney General has the statutory power to "direct[]" the "conduct of litigation in which the United States * * * is interested," 28 U.S.C. 516; to dispatch "any officer of the Department of Justice" to any court "to attend to the interests of the United States," 28 U.S.C. 517; to "direct * * * any officer of the Department of Justice" to "conduct and argue any case in a court of the United States in which the United States is interested," 28 U.S.C. 518; and to "supervise all litigation to which the United States * * * is a party," 28 U.S.C. 519. Those provisions apply in contempt cases no less than in other cases. "Criminal contempt is a crime in the ordinary sense," *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968), and "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States," *Young*, 481 U.S. at 804.

Petitioner's contrary arguments lack merit. He errs in focusing (Pet. 27) on whether the Attorney General engaged in "actual supervision in this case." In order

for an officer to be "inferior" under the Appointments Clause (enabling the vesting of his appointment in a court of law), it is not necessary that a principal officer actually direct and supervise him; it is enough that the principal officer "have the capacity" to do so. *Arthrex*, 141 S. Ct. at 1984; see *id.* at 1988 (explaining that the principal officer must "have the discretion to review" the inferior officer's decisions, but "need not [actually] review" them). And for the reasons described above, the Attorney General had the statutory capacity to review the special prosecutors' conduct of this prosecution.

Nor can petitioner look past the Attorney General's statutory power to supervise the special prosecutors by arguing (Pet. 27) that "neither the supervisor nor the supervisees believe[d]" that such authority existed. The validity of an inferior officer's appointment turns on the principal officer's legal authority to supervise that officer, not on either officer's subjective beliefs. In any event, the court of appeals rejected petitioner's factual contention (Pet. 24) that the special prosecutors had denied, in any dispositive way, that they were subject to supervision by the Attorney General. See Pet. App. 23a n.12. Similarly, a letter from the Department of Justice "declin[ing] to intervene" in the matter, *e.g.*, Pet. 9 (citation omitted), does not suggest any lack of authority to do so if and when the government deems such direct involvement to be warranted.

Contrary to petitioner's suggestion (Pet. 26), it also makes no difference that the Department of Justice filed a brief as amicus curiae in the court of appeals. The Department's practice of appearing as an amicus curiae in contempt cases, rather than directing special prosecutors to make particular arguments in their own

briefs, is longstanding and reflects no acknowledgment by the government that it lacks the authority to issue such directives. See, *e.g.*, *Young*, 481 U.S. at 789 (noting the government's brief as amicus curiae in a contempt prosecution). Regardless, the government's filing of this brief in opposition on behalf of the United States should dispel any doubts about who ultimately controls the conduct of contempt prosecutions of this sort.

d. At all events, petitioner's contentions do not warrant this Court's review. Petitioner identifies no court of appeals that has accepted those contentions. Indeed, the decision below appears to be the first and only time a court of appeals has addressed those contentions on the merits. See Pet. 20 n.4 (stating that this case "appears to be one of the only post-*Young* cases to produce an appealable judgment"). And petitioner acknowledges (Pet. 32) that "the judicial appointment of private special prosecutors * * * may be a rarity." No sound reason exists for this Court to review petitioner's novel challenge to the appointment here.

3. This case would also be a poor vehicle for considering the questions presented because, as the lower courts recognized, they are procedurally defective.

a. As the district court correctly determined, petitioner relinquished his contention that the special prosecutors lacked adequate supervision by failing to raise it pretrial. See Pet. App. 252a-254a, 362a-366a. Under the Federal Rules of Criminal Procedure, any "defect in instituting the prosecution" "must be raised by pretrial motion." Fed. R. Crim. P. 12(b)(3). A party's failure to "meet the deadline for making a [pretrial] motion" renders the motion "untimely" unless the party can show "good cause" for the failure. Fed. R. Crim. P. 12(c)(3). Petitioner did not meet that requirement here.

In this case, petitioner's "supervision argument was apparent as soon as the special prosecutors were appointed in July 2019." Pet. App. 18a n.8. Yet petitioner failed to raise the claim "before the February 27, 2020 deadline for filing pre-trial motions." *Ibid.* He instead waited "until the first day of trial" to do so. *Ibid.*; see *id.* at 365a-366a ("[Petitioner] actively litigated this case for nearly two years * * * without raising *any* Appointments Clause challenge. He only raised the issue on the record on the first day of trial[.] * * * To say that [petitioner] waited until the last possible minute would be a monumental understatement.").

The court of appeals declined to decide whether petitioner had thereby relinquished his supervision claim, noting that the special prosecutors may themselves have forfeited a timeliness objection by failing to raise it in response to petitioner's untimely motion to dismiss. Pet. App. 18a n.8. But a district court may reject a party's claim as untimely even if the opposing party fails to raise a timeliness defense. See *Wood* v. *Milyard*, 566 U.S. 463, 472-473 (2012). The district court permissibly followed that course here. See Pet. App. 252a-254a, 362a-366a.

b. It would follow *a fortiori* that the other claim that petitioner advances in this Court—that Rule 42 is not a "Law" that empowers courts to appoint special prosecutors consistent with the Appointments Clause—was likewise relinquished under Rule 12(b)(3) by petitioner's failure to raise any challenge to the appointment of the special prosecutors before the trial began. Petitioner "failed to raise his challenge to Rule 42" in district court, *id.* at 5a, and instead raised that claim "[f]or the first time on appeal," *id.* at 25a, as he acknowledged at oral argument, *id.* at 26a n.14. In any event,

as the court of appeals recognized, any review here would necessarily be for plain error. *Id.* at 25a-27a; see Fed. R. Crim. P. 52(b).

To prevail on plain-error review, petitioner must show (1) an "error" (2) that is "plain," (3) that affected his "'substantial rights,'" and (4) that "had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Greer* v. *United States*, 141 S. Ct. 2090, 2096-2097 (2021) (citations omitted). For the reasons discussed above, petitioner cannot show that the appointment of the special prosecutors was error. See pp. 8-14, *supra*. And at a minimum, he cannot show that any error was plain—that is, so "clear or obvious" under governing law, *Puckett* v. *United States*, 556 U.S. 129, 135 (2009), that a court would be "derelict in countenancing it, even absent the defendant's timely assistance in detecting it," *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

Petitioner errs in suggesting (Pet. 29) that, if his claims are reviewed for plain error, this Court could nonetheless announce in this case that its earlier decision in *Young* is "wrong" and then apply that holding in assessing the existence and plainness of any errors. Although a court of appeals may grant plain-error relief based on intervening legal developments in other cases, see *Henderson* v. *United States*, 568 U.S. 266, 279 (2013), a court may not grant such relief by resolving an unsettled legal question or overruling precedent in the defendant's own case. A contrary approach would effectively negate the limitation of Rule 52(b) relief to cases in which an "error" is "plain." *Greer*, 141 S. Ct. at 2096.

Nor can petitioner show an effect on his substantial rights or on the fairness, integrity, or public reputation

of the proceeding. Petitioner asserts (Pet. 28) that he satisfies those requirements because, "but for the appointments" of the special prosecutors, he "would never have been *tried* for criminal contempt—let alone convicted and sentenced to confinement." But that assertion depends on the assumption that the government would have declined to prosecute him for contempt even if the district court had no other option for initiating a contempt proceeding. That assumption is unwarranted. When the government declined the initial invitation to expend its prosecutorial resources on this case, it did so with the understanding that the court could still appoint attorneys to proceed with the case subject to Executive Branch supervision. Petitioner fails to show that the government would have weighed its interests and resource needs the same way if the option of appointing special prosecutors had been unavailable, leaving the court without any effective remedy against an unyielding contemnor.

Regardless, "the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing" at which a "properly appointed official" is substituted for the improperly appointed one. *Lucia*, 138 S. Ct. at 2055 (citation and internal quotation marks omitted). Accordingly, even if petitioner were correct that the appointment of the special prosecutors was invalid, the result would be, at most, a remand for a new trial conducted by a properly appointed prosecutor. Particularly given the overwhelming evidence of his guilt, see Pet. App. 101a-353a, petitioner can show no likelihood that a prosecution handled by the Department of Justice directly would turn out any differently than the trial he already had.

c. Petitioner's efforts to avoid plain-error review lack merit. He errs in suggesting (Pet. 29) that this Court has "exempted Appointments Clause challenges from forfeiture." To the contrary, "[t]his Court has held that 'one who makes a *timely* challenge to the constitutional validity of [an] appointment' * * * is entitled to relief." *Lucia*, 138 S. Ct. at 2055 (emphasis added; citation omitted); cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (explaining that an Appointments Clause claim does not raise "a jurisdictional issue"). The cases on which petitioner relies (Pet. 29-30) all involved agencies or other non-Article III tribunals; none involved the failure to raise an Appointments Clause challenge before an Article III court with clear authority to resolve the constitutional claim. See *Arthrex*, 141 S. Ct. at 1978 (administrative agency); *Lucia*, 138 S. Ct. at 2055 (administrative agency); *Freytag*, 501 U.S. at 872 (Tax Court). Even if a party's failure to raise an Appointments Clause challenge before non-Article III tribunals could in some circumstances be excused, no sound reason exists to excuse forfeitures of Appointments Clause claims in Article III courts. See *Sims* v. *Apfel*, 530 U.S. 103, 108-110 (2000) (distinguishing between preservation rules in courts and preservation rules in agencies).

In addition, none of the cases petitioner cites involved the plain-error rule applicable to criminal cases at issue here, see Fed. R. Crim. P. 52(b), which specifically "limit[s]" the "power" of reviewing courts to correct forfeited errors. *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Even if courts could overlook the forfeiture of Appointments Clause challenges in civil cases, they have "no authority" to recognize "exception[s]" to the plain-error rule in criminal cases. *Johnson* v.

United States, 520 U.S. 461, 466 (1997). Petitioner's reliance (Pet. 30) on *Ryder* v. *United States*, 515 U.S. 177 (1995)—a criminal case involving an Appointments Clause challenge to the composition of an intermediate military appellate court—is misplaced. The defendant in *Ryder* preserved his claim by raising it before that court in the first instance, even though it was foreclosed by the court's precedent. *Id.* at 179; see *United States* v. *Ryder*, 34 M.J. 1259 (C.G.C.M.R. 1992) (per curiam). And in any event, Rule 52(b) does not apply to military cases. See *United States* v. *Tunstall*, 72 M.J. 191, 196 & n.7 (C.A.A.F. 2013) (explaining that military courts apply a less stringent plain-error rule).

Finally, petitioner errs in asserting (Pet. 30-31) that, by arguing that the special prosecutors lacked adequate supervision by principal officers, he preserved all other potential challenges under the Appointments Clause. Although the petition incorporates a lack-of-supervision argument into its discussion of the question presented, petitioner's supervision claim (which challenged whether special prosecutors are properly supervised by principal officers) was distinct from his Rule 42 claim (which challenged whether Congress has conferred authority on courts to make such appointments in the first place). Furthermore, as discussed above, petitioner's supervision claim was itself untimely, so it could not have preserved other claims. See pp. 14-15, *supra*. And in any event, in order to preserve an issue for appellate review, a party in a criminal case must specifically inform the court of "the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). The court of appeals determined that petitioner's belated challenge to the constitutionality of Rule 42(a)(2) was sufficiently "distinct" from his claim

concerning supervision that plain-error review was appropriate. Pet. App. 26a n.14. That case-specific determination does not warrant further review.

4. In any event, petitioner's inability to obtain meaningful appellate relief provides a further reason not to grant review.

Petitioner was convicted of misdemeanor contempt offenses and was sentenced to six months of imprisonment, with no term of supervised release. Judgment 1-3. He was released from Bureau of Prisons custody on April 25, 2022, see Federal Bureau of Prisons, U.S. Dep't of Justice, *Find an Inmate*, https://www.bop.gov/inmateloc (Register No. 87103-054), and is no longer subject to any restraint as a result of his convictions. Nor has petitioner identified any lingering collateral consequences that may result from those misdemeanor convictions. See *Blackledge* v. *Perry*, 417 U.S. 21, 28 n.6 (1974) ("[C]onviction of a 'felony' often entails more serious collateral consequences than those incurred through a misdemeanor conviction."); cf. Pet. App. 6a, 111a & n.15, 159a, 169a-170a, 218a-231a (observing that various consequences of petitioner's misconduct, including monetary penalties and disbarment, arose from the civil judgment and civil contempt findings entered against him, not his criminal prosecution). Indeed, petitioner himself has previously acknowledged that the termination of his sentence would effectively preclude "meaningful appellate relief." Pet. C.A. Bail Mot. 39.

This Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties. *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882); see *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it

decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial."). It should not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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