No. 17-71094

In The United States Court Of Appeals For The Ninth Circuit

IN RE: JOSEPH M. ARPAIO,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF MANDAMUS TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
NO. 2:16-CR-01012 (HON. SUSAN R. BOLTON, DISTRICT JUDGE)

ANSWER BY REAL PARTY IN INTEREST THE UNITED STATES

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JURISDICTIONAL STATEMENT

Petitioner Joseph M. Arpaio seeks mandamus relief from the district court's denial of a motion to dismiss, or in the alternative, for a jury trial. *See* DE 132.[1] The district court (Bolton, J.) had jurisdiction under 18 U.S.C. § 3231. Petitioner filed a mandamus petition in this Court on April 14, 2017. This Court has jurisdiction under 28 U.S.C. § 1651.

ISSUE PRESENTED

Petitioner, then a county sheriff, violated a preliminary injunction that prohibited him from enforcing federal civil immigration law. The district court initiated criminal contempt proceedings based on that violation. Petitioner moved to dismiss the criminal contempt proceeding as time-barred, or in the alternative, for a jury trial. Is Petitioner entitled to mandamus relief to challenge the district court's denial of that motion?

STATEMENT OF THE CASE

Petitioner used to be the Sheriff of the Maricopa County Sheriff's Office (MCSO). The district court imposed a preliminary injunction in a civil suit prohibiting Petitioner from enforcing federal civil immigration law. Despite the district court's clear order, Petitioner openly and notoriously continued his efforts to enforce federal immigration law because he disagreed with the court and sought political gain. When the district court referred Petitioner for criminal contempt prosecution, Petitioner for

[1] "DE" refers to a docket entry in this case. "ECF No." refers to a docket entry in *Melendres v. Arpaio*, No. 2:07-cv-02513 (D. Ariz. 2007).

the first time claimed that his disobedience of the court order also made him a civil rights violator entitled to a jury trial. The district court rejected that claim, and Petitioner now seeks mandamus relief in this Court.

1. Beginning in February 2007, certain MCSO officers obtained authority to enforce federal civil immigration law under 8 U.S.C. § 1357(g), which Petitioner and MCSO officers commonly referred to (based on the pertinent Immigration and Nationality Act provision) as "Section 287(g)" authority. *See Melendres v. Arpaio*, No. 2:07-cv-02513 (D. Ariz. 2007), ECF No. 579 at 10. In December 2007, a group of private plaintiffs ("plaintiffs") filed a class-action lawsuit alleging that Petitioner and MCSO were engaged in "illegal, discriminatory, and unauthorized enforcement of federal immigration laws against Hispanic persons in Maricopa County, Arizona." *Melendres*, ECF No. 1. In October 2009, MCSO's Section 287(g) authority to enforce federal civil immigration law was removed. *Melendres*, ECF 494 at 2.

On December 23, 2011, the district court (Snow, J.) entered a preliminary injunction enjoining "MCSO and all of its officers from detaining any person based on knowledge, without more, that the person is unlawfully present within the United States." *Id.* at 38. The injunction further directed that MCSO "may not enforce civil federal immigration law." *Id.* at 39. This Court upheld the preliminary injunction on appeal, describing it as appropriately "narrow" and "limited." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

In May 2016, following 21 days of evidentiary hearings, the district court issued an order holding Petitioner and others at MCSO in civil contempt for, among other things, "intentionally fail[ing] to implement the Court's preliminary injunction in this case." *See Melendres*, ECF No. 1677 at 1. The court found that Petitioner understood, but refused to abide by, the preliminary injunction, repeatedly claiming in the media that MCSO had authority to detain—and did detain—individuals who were in the country without legal authorization. *Id.* at 9. When officials at Immigration and Customs Enforcement (ICE) refused to accept persons that MCSO detained on suspicion of civil immigration violations, Petitioner developed a "back-up plan" to bring them to Customs and Border Patrol (CBP). *Id.* at 11-14. The court found that Petitioner violated the preliminary injunction because doing so increased his popularity during an election campaign. *Id.* at 14-16.

The court further found that MCSO's failure to comply with the preliminary injunction harmed members of the plaintiff class. *Id.* at 32. While the injunction was in place, MCSO officers, using "race as one factor among others," conducted "pre-textual traffic stops to examine a person's citizenship and enforce federal civil immigration law." *Id.* at 33. Officers also "detained persons for unreasonable periods of time to investigate their immigration status." *Id.*

2. a. On August 19, 2016, the district court entered an order referring Petitioner to another judge for a determination of whether Petitioner should be held in criminal contempt for violating the preliminary injunction and for failing to make required

disclosures related to an investigation of Dennis Montgomery, an MCSO confidential informant. *See* DE 1 at 1-2. The district court also recommended three other individuals—two MCSO officers and an attorney who advised MCSO—for criminal contempt prosecution in connection with the concealing of 1,459 identification documents.[2] *Id.* at 2.

b. Rule 42 of the Federal Rules of Criminal Procedure permits a district court to punish "any person who commits criminal contempt" as long as the court provides adequate notice. *See* Fed. R. Crim. P. 42(a)(1). The court must request that the government prosecute the criminal contempt allegation, but can appoint another attorney if the government declines. Fed. R. Crim. P. 42(a)(2).

Two federal statutes define criminal contempt. Under 18 U.S.C. § 401(3), a federal court can punish "contempt of its authority" that, as relevant here, constitutes "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Similarly, 18 U.S.C. § 402 empowers courts to punish the "willful disobe[dience]" of court orders, but only where the underlying misconduct itself constitutes a federal or state criminal offense. Section 402 defendants have a right to a jury trial, *see* 18 U.S.C. § 3691, and a Section 402 proceeding must begin "within one year from the date of the act complained of," 18 U.S.C. § 3285.

[2] One of those individuals was also referred for prosecution for his involvement in the Montgomery investigation.

c. On October 11, 2016, the government informed the court that it would prosecute Petitioner under 18 U.S.C. § 401(3) for violating the preliminary injunction. *See* DE 36. By contrast, the government declined to prosecute the other individuals and matters. In the government's view, Section 402 applied in those other instances because the underlying misconduct also violated federal law (*i.e.*, the obstruction of justice statutes) but the one-year statute of limitations under 18 U.S.C. § 3285 had expired. *See* DE 27 at 5-8; DE 60 at 1-4.

On October 25, 2016, the district court (Bolton, J.) issued an Order to Show Cause "as to whether . . . [Petitioner] should be held in criminal contempt for willful disobedience of Judge Snow's" December 2011 preliminary injunction. *See* DE 36 at 1-4. The Show Cause Order explained that the government intended to prosecute Petitioner for criminal contempt under 18 U.S.C. § 401(3). *See id.* at 1.

The Order set out the "essential facts constituting the charged criminal contempt." *Id.* For example, the court explained that in *Melendres*, Judge Snow entered a preliminary injunction prohibiting Petitioner and MCSO "from enforcing federal civil immigration law or from detaining persons they believed to be in the country without authorization but against whom they had no state charges." *Id.* at 2. The court also "ordered that the mere fact that someone was in the country without authorization did not provide, without more facts, reasonable suspicion or probable cause to believe that such a person had violated state law." *Id.* Judge Snow subsequently amended and supplemented the injunction because Petitioner refused to comply with it in good faith.

Id. at 2–3. Finally, "[a]fter exhausting all of its other methods to obtain compliance, Judge Snow referred Petitioner's intentional and continuing non-compliance with the court's preliminary injunction to another Judge to determine whether he should be held in criminal contempt." *Id.* at 4 (internal quotation marks omitted). Judge Bolton, to whom the case had been randomly reassigned, set trial to begin on December 6, 2016, which was subsequently continued to April 4, 2017.[3] DE 55.

On December 15, 2016, the government moved for the court to conduct a bench trial of the criminal contempt charge. DE 61 at 1-2. In particular, the government argued that "for contempt prosecuted under 18 U.S.C. § 401, if a defendant is sentenced to six months' imprisonment or less and/or a fine of $500 or less, there is no right to a jury trial." *Id.* at 2; *see also id.* at 1-2 (citing *Muniz v. Hoffman*, 422 U.S. 454 (1975), and *United States v. Rylander*, 714 F.2d 996 (9th Cir. 1983)). The government also explained that, if Petitioner is convicted, a six-month sentence in this case "would serve the interests of justice." *Id.* at 2. Petitioner opposed the motion and cross-moved for a jury trial; he conceded that he had no constitutional right to a jury trial in this case, but he argued that he had a statutory right to a jury trial under Section 3691 and that, even if not, the court in its discretion should order a jury trial. DE 62, 66, 69.

The district court held a hearing and granted the government's motion for a bench trial. DE 83. The court concluded that, because it would limit Petitioner's

[3] Trial is now set for June 26, 2017. *See* DE 136.

potential prison term to no more than six months, he was not constitutionally entitled to a jury trial. *Id.* at 2. It rejected his statutory argument because Petitioner's "contumacious conduct arising out of his disobedience of Judge Snow's preliminary injunction does not constitute a separate criminal offense." *Id.* at 2 n.1. Thus, because Section 402 did not apply, the jury-trial right provided in Section 3691 did not either. *See id.* Finally, the court declined to exercise its discretion in favor of granting Petitioner a jury trial. *Id.* at 3.

On April 10, 2017, Petitioner moved to dismiss, or in the alternative, for a jury trial. DE 130. He principally contended that dismissal was required because the statute of limitations had run. *See id.* at 1-16. For the first time, Petitioner argued that his alleged contumacious conduct in violating the preliminary injunction also contravened several federal and state criminal offenses, including civil rights law. *See id.* at 12-14 (suggesting his conduct violated 18 U.S.C. § 242; 18 U.S.C. § 241; 18 U.S.C. § 1509; Ariz. Rev. Stat. § 13-2810; and Ariz. Rev. Stat. § 13-1303). Accordingly, Petitioner contended, the government could prosecute a criminal contempt proceeding only under 18 U.S.C. § 402, which (under 18 U.S.C. § 3285) has a one-year statute of limitations. *Id.* at 14. But in Petitioner's view, all of his alleged contumacious conduct concluded no later than the end of 2013, which was "well more than one year" before the criminal contempt proceedings began. *Id.* at 8-9. In four sentences at the end of his 17-page motion, Petitioner alternatively "re-urged" his jury-trial request. *Id.* at 16.

The district court denied the motion the following day, reasoning that Petitioner had filed it after the deadline set for pretrial motions and that the court had already decided the issue. *See* DE 132 (citing earlier decisions at DE 60 and 83). Three days later, Petitioner filed his mandamus petition in this Court.

ARGUMENT

PETITIONER IS NOT ENTITLED TO MANDAMUS RELIEF.

After years of publically claiming that he could enforce federal civil immigration law even in the face of a clear court order to the contrary, Petitioner on the eve of trial argues that he cannot face a criminal contempt prosecution because his disobedience of the court order also violated other federal and state statutes. Though Petitioner ostensibly asks this Court to decide whether his conduct in disobeying the preliminary injunction amounted to a violation of, among other things, federal civil rights law and therefore entitles him to a jury trial, Petitioner ultimately seeks to have the criminal contempt proceeding dismissed as time-barred. *See* DE 130. This Court should reject Petitioner's tactical attempt to invoke a jury-trial right in this manner, particularly given the demanding standard applicable in mandamus actions.

A. Mandamus relief is available only in extraordinary circumstances.

"Mandamus is a drastic and extraordinary remedy reserved for really extraordinary cases." *In re Bundy*, 840 F.3d 1034, 1040 (9th Cir. 2016) (internal quotation marks omitted) (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)); *see also United States v. McCandless*, 841 F.3d 819, 822 (9th Cir. 2016) (per curiam) ("A writ of

mandamus may issue in cases involving exceptional circumstances amounting to a judicial usurpation of power." (internal quotation marks omitted)). This Court weighs five factors, often referred to as the *Bauman* factors following *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1980), to determine whether to grant mandamus relief: (i) the petitioner "has no other adequate means, such as a direct appeal," to obtain relief; (ii) the petitioner "will be damaged or prejudiced in a way not correctable on appeal"; (iii) the district court's "order is clearly erroneous as a matter of law"; (iv) the district court's order "is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and (v) the district court's order "raises new and important questions, or issues of law of first impression." *Bundy*, 840 F.3d at 1041 (citing *Bauman*, internal quotation marks omitted).[4]

Although these factors are "not exhaustive" and "should not be mechanically applied," it remains that "the absence of factor three—clear error as a matter of law—will always defeat a petition for mandamus." *Bundy*, 840 F.3d at 1041 (internal quotation marks and citations omitted). This "clear error" standard "means something like 'plain

[4] In *Cheney*, the Supreme Court explained that "three conditions must be satisfied" before mandamus relief can issue: (i) the petitioner "must have no other adequate means to attain the relief he desires"; (ii) the petitioner can establish a "clear and indisputable" right to relief; and (iii) the court decides in its discretion "that the writ is appropriate under the circumstances." 542 U.S. at 380-81 (internal quotation marks and punctuation omitted). In *Bundy*, this Court noted that it continues to apply the five *Bauman* factors "without separately considering the three conditions described" in *Cheney*. *Bundy*, 840 F.3d at 1041 n.5. Accordingly, we apply the *Bauman* factors, but we note that, in any event, there appears to be no practical difference between the Supreme Court's and this Court's articulation of the relevant standard.

error,'" *id.* at 1041 n.6, for which a defendant is required to show legal error that is "clear or obvious, rather than subject to reasonable dispute," *Puckett v. United States*, 556 U.S. 129, 135 (2009); *see also DeGeorge v. U.S. Dist. Court*, 219 F.3d 930, 936 (9th Cir. 2000) (mandamus relief unavailable if the legal question is a "close one"). This standard is "significantly deferential and is not met unless the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Bundy*, 840 F.3d at 1041 (internal quotation marks omitted).

Petitioner's claim (Pet. 2-3) that a different mandamus standard applies because he seeks to vindicate his right to a jury trial is incorrect. First, Petitioner ultimately seeks dismissal on statute of limitations grounds, not a jury trial. Although Petitioner alternatively requested a jury trial in the final four sentences of the 17-page motion for which he now seeks mandamus relief, that motion principally argued that, if 18 U.S.C. § 402 applies, any criminal contempt prosecution is time-barred because his contumacious conduct ended well before August 19, 2015, the earliest possible date that any Section 402 prosecution could reach.[5] *See* DE 130 at 7-14. But a mandamus petition challenging the denial of a motion to dismiss an indictment as time-barred triggers review under the *Bauman* factors, not under the distinct jury-trial standard

[5] Petitioner is likely correct as to the end point of his contumacious conduct. The latest date on which evidence of Petitioner's contumacious conduct arose was May 2013. *See Melendres*, ECF No. 1051 at 388 (MCSO officer discussing Plaintiffs' Exhibit 209, which showed that MCSO turned individuals over to ICE in violation of the preliminary injunction in May 2013).

Petitioner proposes. *See DeGeorge*, 219 F.3d at 934; *see also id.* at 935 (reasoning that because denial of a dismissal motion arguing that an indictment is time-barred "may be reviewed on direct appeal," it is therefore inappropriate for mandamus consideration). Indeed, this Court has often considered—and denied—mandamus relief under the *Bauman* factors for criminal defendants seeking review of a district court's denial of a dismissal motion. *See, e.g.*, *United States v. Romera-Ochoa*, 554 F.3d 833, 838-39 (9th Cir. 2009) (mandamus relief inappropriate under the *Bauman* factors for denial of motion to dismiss or revise indictment charging defendant with unlawful re-entry into the country after conviction for an aggravated felony); *United States v. Bird*, 359 F.3d 1185, 1189 (9th Cir. 2004) (mandamus relief inappropriate under the *Bauman* factors for denial of motion to dismiss the indictment for failure to state an element).

Second, any less demanding mandamus standard applies only to a *constitutional* right to a jury trial, which petitioner has already conceded (*see* DE 66 at 2) does not apply in his case. *See Owens-Illinois v. U.S. Dist. Court*, 698 F.2d 967, 969 (9th Cir. 1983) ("Where the *constitutional right* to a jury trial is drawn in question, mandamus is an appropriate remedy.") (emphasis added). Petitioner relies on this Court's decision in *In Re County of Orange*, but that case also made clear that it was applying the less rigorous mandamus standard in order to "protect the constitutional right to trial by jury." *See* 784 F.3d 520, 526 (9th Cir. 2015) (citing *Tushner v. U.S. Dist. Court*, 829 F.2d 853, 855 (9th Cir. 1987) (Kennedy, J.)). When, as here, this Court considers a nonconstitutional mandamus request for a jury trial, it applies the familiar *Bauman* factors. *See United States*

v. U.S. Dist. Court, 464 F.3d 1065, 1068-69 (9th Cir. 2006) (applying *Bauman* factors to consider whether jury trial required under Rule 23(a) of the Federal Rules of Criminal Procedure). Those factors apply here.

B. Petitioner cannot satisfy the demanding mandamus standard.

Petitioner cannot establish that he is entitled to the "drastic and extraordinary" relief that the mandamus remedy provides. Focusing principally on the third *Bauman* factor, namely, whether the district court's order is "clearly erroneous as a matter of law," *see Bundy*, 840 F.3d at 1041, Petitioner contends (Pet. 12-24) that he is entitled to a jury trial because his actions in violating the preliminary injunction amounted to other federal and state criminal offenses. That contention is incorrect. Moreover, the other *Bauman* factors also weigh against Petitioner. This Court should therefore deny the mandamus petition.

1. Overview of criminal contempt law

As described above, federal law includes two criminal contempt statutes. The district court's Show Cause Order rested on an alleged violation of 18 U.S.C. § 401. To establish a violation of Section 401(3), the government must prove that: (1) Judge Snow issued a clear and definite order; (2) Petitioner knew of the order; and (3) Petitioner willfully disobeyed the order. *See, e.g.*, *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980); *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 (9th Cir. 1979). Section 401 provides for no maximum penalty, but the district court here agreed to limit Petitioner's sentencing exposure to no more than six months of imprisonment. *See* DE 83.

Accordingly, Petitioner is not constitutionally entitled to a jury trial. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989) ("It has long been settled that 'there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)); *Taylor v. Hayes*, 418 U.S. 488, 495 (1974) (noting that "petty contempt" may be tried without a jury and that "contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been authorized statute"); *see also Codispoti v. Pennsylvania*, 418 U.S. 506, 511 (1974) ("[W]here no legislative penalty is specified and sentence is left to the discretion of the trial judge, as is often true in the case of criminal contempt, the pettiness or seriousness of the contempt will be judged by the penalty actually imposed."). Finally, Section 401 does not include a specified statute of limitations, so the five-year period in 18 U.S.C. § 3282(a) applies.

In contrast, the other federal criminal contempt statute, 18 U.S.C. § 402, makes it unlawful for a person to do "any act or thing" that "willfully disobey[s] any . . . order" of a federal district court, where that "act or thing" is "of such a character as to constitute also a criminal offense" under federal or state law. Under Section 402, a defendant is entitled to a jury trial. *See* 18 U.S.C. § 402 (cross-referencing 18 U.S.C. § 3691). As discussed above (*see supra* at 10-11 and note 5), Petitioner argues (though does not inform the Court in his mandamus petition) that if Section 402 applies, the one-year statute of limitations precludes the government from prosecuting him for criminal contempt. *See* DE 130.

2. Petitioner cannot establish a clear and indisputable right to a jury trial.

Petitioner contends that he is entitled to a jury trial because his conduct that violated the preliminary injunction also constituted a criminal offense under various federal and state statutes. To succeed on the third *Bauman* factor, Petitioner must show that the district court's contrary conclusion (*see* DE 83 at 2 n.1) was a clear and obvious error. *See Bundy*, 840 F.3d at 1041 n.6. Petitioner cannot make that showing as a general matter for two reasons. First, at bottom, Petitioner is being prosecuted for nothing more and nothing less than disobeying a court order. Federal defendants have a variety of means to challenge a court order with which they disagree, but deliberately disobeying the order is not one of them. Second, Petitioner's claim depends entirely on the actions he took and the intent animating those actions. The appropriate place to establish the relevant facts is not in what amounts to an interlocutory appeal to this Court, but instead at a bench trial before the district court.

Petitioner's argument that, in violating the preliminary injunction, he necessarily violated various federal and state criminal offenses, also fails for the more specific reasons laid out below. Thus, far from clear and obvious error, the district court's conclusion was correct.

a. Petitioner's contumacious conduct did not violate civil rights law.

Throughout the nearly decade-long civil litigation in *Melendres*, Petitioner claimed that he did not violate the constitutional or statutory rights of the plaintiffs. Now,

however, Petitioner's central claim (Pet. 13-20) is that by violating the preliminary injunction, he also willfully deprived individuals of their constitutional rights, in violation of 18 U.S.C. § 242. Section 242 provides that:

> Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights . . . secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 242. Section 242 requires the government to prove, as separate elements, that a defendant, acting under color of law, (1) violated a federally protected right, and (2) acted willfully, *i.e.*, with the specific intent to violate that right. *See United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993).

At most, Petitioner can establish that he violated a federally protected right. To determine liability at this first step, the federal right at issue must "have been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Screws v. United States*, 325 U.S. 91, 104 (1945); *accord United States v. Classic*, 313 U.S. 299, 310-11 (1941). The *Screws* standard therefore "eliminates the possibility that persons may be prosecuted for willful violations of 'emerging' Constitutional rights." *United States v. O'Dell*, 462 F.2d 224, 230 n.7 (6th Cir. 1972). Petitioner's claim (Pet. 19) that he violated the plaintiffs' Fourth Amendment rights by detaining them without criminal charges does not sufficiently specify the right in question. The preliminary injunction prohibited Petitioner and MCSO "from

enforcing federal civil immigration law or from detaining persons they believed to be in the country without authorization but against whom they had no state charges." DE 36 at 2. Thus, the question is whether, at the time Petitioner and MSCO violated the preliminary injunction, a nonfederal officer's detention of an individual solely on the basis that that individual is known or reasonably suspected to be in the United States without authority violated that individual's Fourth Amendment rights.

Courts did not uniformly agree on the answer to this question until the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012). *Compare, e.g.*, *United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008) ("To justify [the defendant's] extended detention . . . the government must point to specific facts demonstrating that [the Sheriff's] Deputy . . . had a reasonable suspicion that [the defendant] was engaged in some nonimmigration-related illegal activity."), *with United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) ("[T]his court has held that state law-enforcement officers have the general authority to make arrests for violations of federal immigration laws.").[6] For one thing, state and local law enforcement officers may assist in federal immigration enforcement under 8 U.S.C. § 1357(g), just as some MCSO officers were authorized to do from 2007 until October 2009. *See Melendres*, ECF No. 494 at 2. In *Arizona*, however, the Supreme Court cautioned that "[d]etaining individuals solely to

[6] The Fourth Amendment question arose in *Urrieta* and *Vasquez-Alvarez* in the context of suppression challenges by the defendant, not civil rights prosecutions. But as this Court has observed, "[t]he protections of the Constitution do not change according to the procedural context in which they are enforced." *Reese*, 2 F.3d at 884.

verify their immigration status would raise constitutional concerns." 132 S. Ct. at 2509 (citations omitted). Courts have since concluded that, in the absence of express federal direction or authorization, a nonfederal officer's prolonged detention of an individual solely to enforce federal civil immigration law violates the Fourth Amendment. *See, e.g.*, *Santos v. Frederick Cnty Bd. Of Com'rs*, 725 F.3d 451, 465-70 (4th Cir. 2013) (finding a constitutional violation for purposes of 42 U.S.C. § 1983, but concluding that the violation was not clearly established as applied to conduct in 2008). Even so, at least some amount of Petitioner's conduct in violating the preliminary injunction (imposed in December 2011) predated the Supreme Court's June 2012 decision in *Arizona*.

But even assuming Petitioner's post-June 2012 conduct satisfied the first element of a Section 242 violation, no allegations or currently available facts establish the second element—that Petitioner acted willfully, *i.e.*, "voluntarily and intentionally and with a specific intent to . . . violate a specific protected right." *Reese*, 2 F.3d at 885. To act willfully for purposes of Section 242 is to "act in open defiance or reckless disregard of a constitutional requirement that has been made specific and definite." *Screws*, 325 U.S. at 105. That heightened specific intent requirement both avoids potential vagueness concerns and "prevents the statute from 'becoming a trap for law enforcement agencies acting in good faith.'" *Reese*, 870 F.3d at 881 (quoting *Screws*, 325 U.S. at 104).

Petitioner identifies *no* evidence that would establish the willfulness element in Section 242. Indeed, the government is not aware of, and Petitioner does not cite, any case finding a violation of Section 242 where the conduct at issue involved enforcement

of an otherwise valid federal policy—*see* 8 U.S.C. § 1357(a)(1) (allowing federal immigration officers to "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States")—by a local law enforcement officer unauthorized to enforce it. *Cf. Arizona*, 132 S. Ct. at 2508 ("The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter."). Petitioner does not explain how his enforcement of civil immigration law evinced "reckless disregard" of constitutional rights when the same enforcement undertaken by ICE or CBP officials would have been entirely lawful.

Moreover, during the course of the civil litigation in *Melendres*, Petitioner pointed to a number of reasons for his decision to violate the preliminary injunction that have nothing to do with depriving the plaintiffs of their constitutional rights. First, Petitioner appeared to believe that he was operating within the scope of his lawful authority. After MCSO lost the federal authority to enforce civil immigration law in October 2009, Petitioner announced in a press release that he had consulted with Kris Kobach, "former chief advisor to the former U.S. Attorney General on immigration law," who had advised him that MCSO "possesse[d] the inherent authority of a local law enforcement agency to arrest aliens who have violated federal immigration laws and are deportable regardless of whether or not a formal '287(g)' agreement with the federal government is in place." *See* MCSO News Release, *Sheriff Arpaio Dedicates More Resources*

To Illegal Immigration Fight (Feb. 8, 2010).[7] Second, Petitioner openly and publically voiced his opposition to what he viewed was bad federal immigration policy. *See, e.g.*, *Melendres*, ECF 1027 at 541-43. Third, the district court concluded after days of evidentiary hearings that Petitioner's motivation for violating the preliminary injunction was not to deprive the plaintiffs of their Fourth Amendment rights, but was instead to "benefit his upcoming re-election campaign." *Melendres*, ECF No. 1677 at 14. These facts do not evince the bad purpose and reckless disregard of constitutional rights required to prove specific intent under Section 242.

None of the cases Petitioner cites (Pet. 14, 18) aid his argument. In *Clark v. Boynton*, 362 F.2d 992 (5th Cir. 1966), a sheriff disobeyed an injunction prohibiting him from interfering with the free-speech and assembly rights of civil rights protestors in Selma, Alabama. *Id.* at 993-94. The defendant-sheriff then oversaw the forced march of an assembled group of protestors while some were "struck with a cattle prod." *Id.* at 995. That the government there suggested, and the Fifth Circuit agreed, that those facts established "at least arguably" a violation of Section 242 offers no insight into whether Petitioner willfully intended to violate the plaintiffs' Fourth Amendment rights when he directed MCSO officers to enforce federal civil immigration law. The same is true of *Brown v. United States*, 204 F.2d 247 (6th Cir. 1953), where a defendant-sheriff

[7] The government has filed this press release, which it may use an exhibit at Petitioner's trial, along with its filing of this response to the mandamus petition. *See* Exhibit A, *infra* at 32.

was the "prime mover" in a system of extortion that targeted a minority community, *id.* at 249-50, and *United States v. Trierweiler*, 52 F. Supp. 4 (E.D. Ill. 1943), where the defendant-sheriff "call[ed] a posse" and directed it to undertake an "unjustified shooting" of a "negro citizen of Tennessee . . . lawfully traveling within . . . Indiana," *id.* at 5-6.

Petitioner's suggestion (Pet. 18) that the Show Cause Order's reference to "willful" disobedience suffices to establish willfulness for purposes of Section 242 is misplaced. A defendant's decision to willfully flout a validly issued federal court order violates federal criminal contempt law regardless of whether the order is a correct application of law. *See Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect."). Moreover, although a criminal contempt violation and a Section 242 violation require a showing of willfulness, the standards are different. Not all circuits interpret "willfulness" for purposes of criminal contempt identically, *compare United States v. Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010) (knowledge is sufficient), *with United States v. Iqbal*, 684 F.3d 507, 512 (5th Cir. 2012) (recklessness required), *with Wright v. Nichols*, 80 F.3d 1248, 1251 (8th Cir. 1996) (willfulness established where a defendant "reasonably should have been aware" of the violation), but none requires the heightened specific intent necessary to prove a violation of Section 242. The facts developed at trial could well establish—as the government expects—that Petitioner knowingly, intentionally, or recklessly violated the

preliminary injunction by directing MCSO to continue to enforce federal civil immigration law after December 2011. But that showing says nothing about whether Petitioner's intent in so doing was to violate plaintiffs' constitutional rights as opposed to combatting what he viewed as bad federal policy and making political gains during campaign season.

Petitioner emphasizes (Pet. 17, 19-20) that the allegations in the Show Cause Order indicate that he and other MCSO officers detained plaintiffs on the basis of race and alienage, but those allegations do not change the willfulness analysis. Those allegations could be relevant to establish Section 242's requirement that a defendant deprive a person of a specific constitutional right "on account of such person being an alien" or "by reason of his . . . race." 18 U.S.C. § 242; *see also United States v. Otherson*, 637 F.2d 1276, 1285 (9th Cir. 1980) (Section 242 applies to all persons within the jurisdiction of the United States, regardless of whether an individual is in the country without legal authorization). But the government is unaware of facts that would support those allegations and neither intends nor needs to establish them for criminal contempt purposes.[8] More importantly, and as already discussed, those allegations (even if proved) do not address, let alone establish, Petitioner's intent in enforcing federal civil immigration law.

[8] In contrast, the government does intend to prove that Petitioner had individuals detained based on their suspected immigration status, which may overlap with, but is not the same as, alienage or race.

In short, it is not clear or obvious that Petitioner's violation of the preliminary injunction also constitutes a violation of Section 242.[9]

b. Petitioner's contumacious conduct did not violate any other federal or state laws.

Petitioner also contends (Pet. 21-24) that his violation of the preliminary injunction contravened other federal and state laws. With little analysis, Petitioner lists one additional federal criminal offense and two state criminal offenses. Petitioner's conduct in violating the preliminary injunction did not run afoul of those statutes.

First, Petitioner (Pet. 22-23) claims his conduct contravened 18 U.S.C. § 1509, which criminalizes "[w]hoever, by threats and force, willfully prevents, obstructs, impedes, or interferes with, or attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree" of a federal court. Congress enacted that now rarely charged provision to "reach interference with school desegregation orders by individuals who are not parties against whom the orders were issued, nor acting in concert with such parties, and who are thus not usually subject to contempt sanctions." *Clark*, 362 F.2d at 992 n.14 (citation omitted).

In claiming that Section 1509 could apply to his conduct, Petitioner tellingly omits the first qualifying phrase "by threats or force." *See* Pet. 22-23 (suggesting Section

[9] Because the willfulness requirement in Section 242 applies with equal measure to conspiracy to violate civil rights in 18 U.S.C. § 241, *see Reese*, 2 F.3d at 881, Petitioner is also unable to show that his conduct violated that federal criminal statute. *See* Pet. 22.

1509 applies because he willfully interfered with the rights of persons and willfully prevented or obstructed MCSO from complying with the preliminary injunction). In this Court's only (unpublished) decision citing Section 1509, it vacated a conviction because a letter sent by the defendant contained no language that reasonably could be construed as an "expressed or implied threat." *See United States v. Pangelinan*, 250 F. App'x 826, 826 (9th Cir. 2007). The same problem would plague any potential Section 1509 prosecution of Petitioner. No allegations or available record evidence suggest that Petitioner acted "by threats or force" when he violated the preliminary injunction.

Petitioner next claims (Pet. 23) that his conduct constituted unlawful imprisonment, in violation of Ariz. Rev. Stat. § 13-1303. Section 13-3103 criminalizes "knowingly restraining another person." Ariz. Rev. Stat. § 13-1303(A). As an initial matter, it is not clear that the prosecution could establish the "knowingly" requirement under the alleged facts. Furthermore, the statute identifies as a defense any "restraint . . . accomplished by a peace officer or detention officer acting in good faith in the lawful performance of his duty." Ariz. Rev. Stat. § 13-1303(B)(1).

Petitioner argues (Pet. 23) that he could not successfully press the statutory defense if he has (as alleged) willfully violated the preliminary injunction. But the one does not follow the other. As discussed above (*see supra* at 18-19), Petitioner well could have believed that he and his MCSO officers could (and should) lawfully enforce federal civil immigration law as part of MCSO's duty, even if doing so violated the preliminary injunction. Further, even a superficial survey of recent case law shows that the state

does not use Section 13-1303 to prosecute conduct such as Petitioner's in this case. *See, e.g.*, *State v. Henderson*, 115 P.3d 601, 604 (Ariz. 2005) (jury convicted defendant under Section 13-1303 for assaulting his 73-year-old mother); *State v. Williams*, No. 2 CA-CR 2014-0260, 2015 WL 474312, at *1 (Ariz. Ct. App. Aug. 10, 2015) (defendant trapped victim in car and, at knife point, forced her to engage in oral and anal sex); *State v. Villalobos*, No. 1 CR2012-165742-002, 2015 WL 71569, at *1-*3 (Ariz. Ct. App. Jan. 6, 2015) (defendant held family hostage with shotgun while participating in a home-invasion robbery).

Equally unavailing is Petitioner's argument (Pet. 23-24) that his conduct in violating the preliminary injunction violated Arizona's criminal prohibition on interfering with judicial proceedings, in violation of Ariz. Rev. Stat. § 13-2810. As relevant here, Section 2810 prohibits interference with judicial proceedings by knowingly "[d]isobey[ing] or resist[ing] the lawful order, process or other mandate of a court." Ariz. Rev. Stat. § 13-2810(A)(2). Again, Petitioner identifies no case suggesting that his conduct would fall within the scope of this provision, which appears to have been applied principally to violations of protective orders issued by Arizona courts in domestic situations. *See, e.g.*, *United States v. Youssef*, 547 F.3d 1090, 1092 n.2 (9th Cir. 2005) (defendant prosecuted under Ariz. Rev. Stat. § 13-2810(A)(2) for violating a protective order issued in Phoenix Municipal Court by threatening his brother-in-law); *State v. Merrill*, No. 1 CA-CR 13-0583, 2015 WL 1275443, at *1-*3 (Ariz. Ct. App. Mar. 19, 2015) (defendant convicted under Ariz. Rev. Stat. § 13-2810(A)(2) for violating

protective order while sexually assaulting his former wife); *State v. Woolbright*, No. 1 CA-CR 12-0680, 2014 WL 465655, at *1-*3 (Ariz. Ct. App. Feb. 4, 2014) (defendant convicted under Ariz. Rev. Stat. § 13-2810(A)(2) for violating protective order to not be "at or near" his ex-wife's house). Nor does Petitioner identify any authority that would bring a federal district court order within the jurisdiction of a state criminal contempt proceeding.

Moreover, if Petitioner's argument on Ariz. Rev. Stat. § 13-2810(A)(2) is correct, it would render the distinction between 18 U.S.C. § 401 and 18 U.S.C. § 402 meaningless. Congress created a jury-trial right for criminal contempt proceedings in Section 402 for conduct also amounting to a separate criminal offense in order to rein in abuses in labor disputes where business organizations were using courts to have union members tried and convicted without a jury when the union members' acts amounted to other crimes such as disorderly conduct. *See* 48 Cong. Rec. 8779-80 (1912); *see also id.* at 8780 (noting as an "injustice" the fact that a bench trial must occur even where a "powerful corporation, with a force of detectives vigilant and active on behalf of their masters, and none too scrupulous in their methods, make a charge against an individual in some remote part of the country . . . alleging . . . contempt, and the alleged facts upon which such charge is based would constitute a crime either under the statut[ory] laws of the United States or under the common laws of England") (statement of Sen. Floyd). Petitioner's view, by contrast, elevates form over substance by arguing that if alleged contumacious conduct violating Section 401 also would violate

some state contempt statute (such as Ariz. Rev. Stat. § 13-2810(A)(2)), the contempt defendant is entitled to a jury trial under Section 402. That absurd interpretation would render Section 401 entirely nugatory. *See United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013) ("Statutory interpretations which would produce absurd results are to be avoided.") (bracket omitted) (quoting *Arizona St. Bd. For Charter Schs. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006)).

c. Section 402's exception would apply.

Because Petitioner's violation of the preliminary injunction does not also violate another, distinct federal or state criminal statute, 18 U.S.C. § 401 governs his prosecution and he is not statutorily entitled to a jury trial. But even if 18 U.S.C. § 402 applied at the threshold, it is a "close" question whether the exception in Section 402 for "any suit or action brought or prosecuted in the name of, or on behalf of, the United States" also applies. Because Petitioner seeks extraordinary relief through a mandamus action, however, he cannot prevail when this Court is "not firmly convinced, either way, as to what the correct result should be." *DeGeorge*, 219 F.3d at 936 (citation omitted).

Petitioner relies (Pet. 24-27) heavily—and solely—on *United States v. Pyle*, 518 F. Supp. 139 (E.D. Pa. 1981), to argue that the Section 402 exception does not apply. *Pyle* concerned litigation initiated by class-action plaintiffs to force Philadelphia to construct low-cost public housing. *Id.* at 141. Following initial pretrial litigation, plaintiffs added the Department of Housing and Urban Development ("HUD") as a defendant. *Id.* After the court found HUD had violated its duties to promote public housing, HUD

turned around and supported a preliminary injunction issued by the court prohibiting other defendants from interfering with construction of the housing project. *Id.* at 142. When the court initiated contempt proceedings against some of the other defendants for violating that injunction, the court rejected application of the Section 402 exception because, notwithstanding HUD's change of position, its initial involvement in the case was as a defendant. *Id.* at 150.

Pyle is in tension with both another decision within the same district and, more importantly, a binding decision from the Third Circuit. In *United States v. Wright*, 516 F. Supp. 1113, 1117-18 (E.D. Pa. 1981), another district court, assessing another aspect of the same core set of facts, concluded that HUD's close alignment with the plaintiffs rendered the materially identical exception in 18 U.S.C. § 3691 applicable. And in *United States v. Gedraitis*, 690 F.2d 351, 354 (3d Cir. 1982), the Third Circuit concluded that the Section 402 exception applied and the defendants were not entitled to a jury trial because HUD, even though initially joined as a defendant, had ultimately supported the plaintiffs' request for an injunction.

The decision in *Gedraitis* supports application of the Section 402 exception here. After filing a separate civil suit against Petitioner in May 2012, *see United States v. Maricopa County, et al.*, No.2:12-cv-981 (May 10, 2012), the Justice Department filed a statement of interest in the underlying civil case in June 2013 in which it identified potential forms of relief following the district court's civil contempt findings, *see Melendres*, ECF No.

580. As Petitioner notes (Pet. 25), the government formally intervened in July 2015. That level of involvement renders the Section 402 exception applicable.

3. The other *Bauman* factors counsel denial.

Because Petitioner fails to establish that the district court committed "clear error as a matter of law" when it decided that his contempt proceeding fell within Section 401, not Section 402, denial of his mandamus petition is appropriate without reference to the other *Bauman* factors. *See Bundy*, 840 F.3d at 1041 ("Because our conclusion that the district court did not commit 'clear error as a matter of law' precludes issuance of the writ, we address only that *Bauman* factor."). Nonetheless, the other *Bauman* factors also counsel denying Petitioner relief.

Neither of the first two, closely related factors—the party seeking the writ has no other adequate means (including direct appeal) to attain the desired relief and the party will be prejudiced in a manner not redressable on appeal, *see id.*—favors Petitioner. First, Petitioner can pursue his claim on appeal. As discussed above, Petitioner's invocation of a jury-trial right ultimately seeks dismissal on a statute-of-limitations theory, which he can pursue on appeal. *DeGeorge*, 219 F.3d at 935. Relatedly, "[b]eing forced to stand trial despite the running of the statute of limitations is not inherently prejudicial" because a statute of limitations safeguards against unfair convictions, but does not create a right to be free from trial. *Id.* at 936. Moreover, being tried at a bench trial will not damage or prejudice Petitioner in a way not correctable on appeal. If Petitioner is convicted at a bench trial but ultimately correct that he is entitled to a jury

trial—yet wrong on his time-barred claim—this Court can vacate the conviction and remand for a retrial before a jury. Mandamus relief is unnecessary because remand for a retrial following reversible trial error is a familiar and well-established mechanism for relief.

Nor do the fourth or fifth factor support granting the writ. The fourth factor asks whether the district court's order represents an "oft-repeated error" or reflects a "persistent disregard of the federal rules." *Bundy*, 840 F.3d at 1041. Petitioner suggests (Pet. 4-5) that the court has twice disregarded Rules 23 and 42 of the Federal Rules of Criminal Procedure, but does not explain in what manner. Finally, Petitioner passingly suggests that the final factor—whether the district court's order "raises new and important problems, or issues of law of first impression," *Bundy*, 840 F.3d at 1041—is satisfied because this Court must decide whether the district court was entitled to deny his jury-trial claim solely on timeliness grounds. *See* Pet. 5; *see also* Pet. 8-11 (raising timeliness arguments). But a decision on the merits of Petitioner's claim does not require any decision on the timeliness issue, which in any event is in no way an issue of unique importance or first impression. Thus, taken as a whole, the *Bauman* factors support denial of the petition.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James I. Pearce, Attorney in the Appellate Section of the Criminal Division at the U.S. Department of Justice, hereby certify that on May 2, 2017, an electronic copy of this brief was served by notice of electronic filing via this Court's ECF system upon opposing counsel.

s/ James I. Pearce

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1) and Ninth Circuit Rule 21 because it contains 7,763 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Garamond font, 14-point.

s/ James I. Pearce

Date: May 2, 2017

No. 17-71094

In The United States Court Of Appeals For The Ninth Circuit

IN RE: JOSEPH M. ARPAIO,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF MANDAMUS TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
NO. 2:16-CR-01012 (HON. SUSAN R. BOLTON, DISTRICT JUDGE)

EXHIBIT A: MCSO NEWS RELEASE (Feb. 8, 2010)

News Release

Maricopa County Sheriff's Office
Joe Arpaio, Sheriff

Date: February 8, 2010

SHERIFF ARPAIO DEDICATES MORE RESOURCES TO ILLEGAL IMMIGRATION FIGHT

NEARLY 900 SWORN DEPUTIES WILL TRAIN TO ENFORCE FEDERAL/STATE IMMIGRATION LAWS

(Phoenix, AZ.) Maricopa County Sheriff Joe Arpaio today announces a new illegal immigration policy where all 881 sworn deputies will now begin enforcing all state and federal immigration laws after undergoing a new training program administered by Sheriff's training staff.

According to Sheriff Arpaio, initial training begins today and will be ongoing under the watchful eyes of expert advisor Kris Kobach, former chief advisor to the former U.S. Attorney General on immigration law and border security.

Arpaio says the 881 trained deputies will replace and expand the work done by the 100 deputies whose federal authority granted by the 287(g) program was revoked in October 2009 by the U.S. Department of Homeland Security.

"Washington obviously did not like my deputies enforcing all immigration laws, "Arpaio says, "particularly during crime suppression operations. But I refused to roll over and play dead. Now, just as I knew all along, a nationally recognized immigration expert opines that local law enforcement can, in fact, enforce federal immigration laws." Arpaio adds that his office has arrested over 270 illegal aliens even after losing some of the authority granted him by the 287(g) agreement.

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Kris Kobach, who is a nationally distinguished immigration attorney hired by the Maricopa County Attorney's Office as an expert advisor to the Sheriff's Office, examined the law and has informed the Sheriff that, "The Maricopa County Sheriff's Office possesses the inherent authority of a….local law enforcement agency to arrest aliens who have violated federal immigration laws and are deportable…..regardless of whether or not a formal '287(g)' agreement with the federal government is in place."

Arpaio says he recognizes that having nearly 900 sworn deputies on the streets enforcing federal and state immigration laws will prove to be controversial in certain circles. The Sheriff stresses that racial profiling is, always has been and always will be strictly prohibited by deputies enforcing these laws.

Not only will the sworn deputies enforce the federal and state immigration laws, Arpaio says, they will also be cooperating with the Sheriff's specialized units in the areas of human smuggling, employer sanctions and crime suppression operations.

Since March 2006, the Maricopa County Sheriff's Office has been actively engaged in the battle to reduce the number of illegal immigrants in the county and has arrested, detained and investigated over 37,000 illegal aliens.

Thirty-eight (38) investigations under the state employer sanction laws have resulted in the arrests of 332 illegals including 214 for felony ID theft and forgery charges.

Over 1800 illegal aliens have been arrested by Sheriff's deputies on state felony human smuggling laws.

The Sheriff's Office is the only law enforcement agency in Arizona enforcing all aspects of these two state laws.
In addition, 13 crime suppression operations by the Sheriff's Office have netted 728 arrests of which 358 were illegal aliens.

The Sheriff's illegal immigration hotline has received over 6900 tips/calls. ###

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