No. 16-1422

In the Supreme Court of the United States

IN RE JOSEPH M. ARPAIO, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a writ of mandamus on his statutory jury-trial claim.

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OPINIONS BELOW

The order of the court of appeals denying a petition for a writ of mandamus (Pet. App. 1a-2a) is unreported. The orders of the district court denying petitioner's motion for a jury trial (Pet. App. 3a-7a, 8a) are unreported.

JURISDICTION

The judgment of the court of appeals denying a petition for a writ of mandamus was entered on May 18, 2017. A petition for rehearing was denied on May 26, 2017. The petition for a writ of mandamus was filed on May 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

Following a criminal contempt referral in the United States District Court for the District of Arizona, the district court initiated a criminal contempt proceeding against petitioner under 18 U.S.C. 401(3) for willfully violating the terms of a court order. The court scheduled a bench trial. Petitioner moved to dismiss the proceeding as time-barred, or, in the alternative, for a jury

trial. The court denied the motion. Petitioner filed a petition for a writ of mandamus in the court of appeals demanding a jury trial. The court of appeals denied the petition. Pet. App. 1a-2a.

1. From 1993 until 2016, petitioner was the sheriff of Maricopa County, Arizona. In December 2007, a group of private plaintiffs filed a class-action suit in the District of Arizona, alleging that petitioner and the Maricopa County Sheriff's Office (MCSO) were unlawfully enforcing the federal immigration laws. See *Melendres* v. *Arpaio*, 695 F.3d 990, 994-996 (9th Cir. 2012). On December 23, 2011, the *Melendres* district court entered a preliminary injunction prohibiting the MCSO and all of its officers, including petitioner, "from detaining any person based solely on knowledge, without more, that the person is in the country without lawful authority." *Id.* at 994, 1000. The court of appeals affirmed. *Id.* at 1002-1003. The United States then intervened as a plaintiff. *Melendres* D. Ct. Doc. 1277, at 2 (Aug. 31, 2015).

In 2016, following 21 days of evidentiary hearings, the *Melendres* 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." *Melendres* D. Ct. Doc. 1677, at 1 (May 13, 2016). The court concluded that petitioner understood, but nonetheless refused to comply with, the preliminary injunction. The court found that petitioner repeatedly claimed in the media that MCSO had authority to detain—and did detain—individuals who were in the country without legal authorization, notwithstanding the court's injunction to the contrary. *Id.* at 9. When officials at Immigration and Customs Enforcement in the Department of Homeland Security (DHS) refused to accept persons

that MCSO detained on suspicion of civil immigration violations, the court found, petitioner developed a "back-up plan" to bring them instead to Customs and Border Protection in DHS. *Id.* at 11-14. The court found that petitioner violated the preliminary injunction in order to increase his popularity during an election campaign. *Id.* at 14-16.

2. The primary federal statute governing criminal contempt of court is 18 U.S.C. 401. It provides, among other things, that a federal court may punish "contempt of its authority" that constitutes "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. 401(3). Section 401 does not provide for a jury trial, nor does it specify a statute of limitations. The general five-year limitations period in 18 U.S.C. 3282(a) therefore applies.

A more specific contempt statute (18 U.S.C. 402) applies to willful disobedience of a court order when "the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed" and certain exceptions do not apply. *Ibid.* Unlike Section 401, Section 402 provides a statutory right to a jury trial and is subject to a one-year statute of limitations. *Ibid.*; see 18 U.S.C. 3285, 3691.

3. On August 19, 2016, the *Melendres* district court entered an order pursuant to 18 U.S.C. 401 and Federal Rule of Criminal Procedure 42, referring petitioner to another judge for a determination of whether he should be held in criminal contempt of court. See D. Ct. Doc. 1, at 1. The court also recommended three other individuals for criminal contempt prosecution in connection with concealing documents from the court. *Id.* at 2.

a. The government responded by agreeing to prosecute petitioner for contempt under 18 U.S.C. 401(3). See Pet. App. 9a. The government concluded that petitioner's conduct was criminal solely because it was contumacious, and that his acts were not of such character as to constitute another federal or state crime. See D. Ct. Doc. 27, at 6, 8 (Oct. 11, 2016). The government further concluded, however, that Section 402 applied to the other individuals because their allegedly contumacious conduct—concealing documents and hard drives—was of such character as to constitute obstruction of justice under 18 U.S.C. 1503 and 1512. D. Ct. Doc. 27, at 6-8. The government therefore concluded that a prosecution of the other individuals would be time-barred. *Ibid.*

On October 25, 2016, the newly assigned district court judge issued an Order to Show Cause under 18 U.S.C. 401(3) as to whether petitioner should be held in criminal contempt for willfully disobeying the *Melendres* preliminary injunction. See Pet. App. 9a-12a.

b. The government moved for a bench trial. D. Ct. Doc. 61, at 1-2 (Dec. 15, 2016). The government argued that a bench trial was appropriate where a conviction would result in a sentence of no more than six months in prison or a $500 fine and that a six-month sentence in petitioner's case would "serve the interests of justice." *Id.* at 2. Section 401 provides for no maximum penalty, but if the district court agreed to impose a sentence of no more than six months, the government argued, petitioner was not constitutionally entitled to a jury trial. *Ibid.*; see *Frank* v. *United States*, 395 U.S. 147, 150 (1969) ("[T]his Court has held that sentences for criminal contempt of up to six months may constitutionally be imposed without a jury trial."); see also *Bloom* v. *Illinois*, 391 U.S. 194, 201-202 (1968).

Petitioner opposed the government's motion and cross-moved for a jury trial. Petitioner acknowledged that he had no constitutional right to a jury trial, but urged the district court to grant a jury trial as a matter of its discretion. D. Ct. Doc. 62, at 1-2 (Dec. 27, 2016); see D. Ct. Doc. 66, at 2 (Jan. 9, 2017) (petitioner "agree[ing]" that he lacks a constitutional right to a jury trial) (capitalization omitted).

On the morning of a scheduled hearing on the motion, petitioner filed a supplement to his reply brief, arguing for the first time that Section 402 applied to him. See D. Ct. Doc. 69, at 1-2 (Jan. 25, 2017). Petitioner did not identify any particular state or federal law offense that he claimed his contumacious conduct violated. *Ibid.* In the hearing, however, petitioner asserted that his conduct constituted perjury and obstruction of justice during an evidentiary hearing in *Melendres*. D. Ct. Doc. 74, at 14 (Jan. 27, 2017); see *id* at 15, 18.

The district court disagreed and granted the government's motion for a bench trial. D. Ct. Doc. 83, at 1-3 (Mar. 1, 2017). The court concluded that petitioner's "conduct arising out of his disobedience of [the *Melendres*] preliminary injunction does not constitute a separate criminal offense." *Id.* at 2 n.1. The court also declined to order a jury trial as a matter of its discretion. *Id.* at 3.

c. Petitioner then moved to dismiss or, in the alternative, for a jury trial. See D. Ct. Doc. 130, at 2 (Apr. 10, 2017). Petitioner primarily argued that Section 402 applied and that its one-year statute of limitations barred the prosecution. See *id.* at 2-16. In the alternative, he renewed his argument that he should be granted a jury trial. *Id.* at 16-17. To support his contention that Section 402 applied, petitioner asserted

without elaboration or support that his conduct also constituted criminal obstruction of justice, 18 U.S.C. 1509, federal civil-rights crimes, 18 U.S.C. 241 and 242, state unlawful imprisonment, Ariz. Rev. Stat. Ann. § 13-1303 (2010), and state criminal contempt, *id.* § 13-2810. See D. Ct. Doc. 130, at 13-14.

The district court denied the motion for two reasons: (1) it was untimely; and (2) it raised issues the court had already decided. Pet. App. 8a.

4. Petitioner filed a petition for a writ of mandamus in the court of appeals, demanding a jury trial under Section 402. In an unpublished order, the court of appeals denied the petition. Pet. App. 1a-2a. The court held that petitioner "has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." *Id.* at 2a.

ARGUMENT

Petitioner has not made the showing necessary for the issuance of a writ of mandamus by this Court under the All Writs Act, 28 U.S.C. 1651(a). The "remedy of mandamus is a drastic one," *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 402 (1976), and "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy," *Will* v. *United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)). Writs of mandamus are granted by this Court as a matter of "discretion sparingly exercised" and only upon a showing that "the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form." Sup. Ct. R. 20.1. "[T]he party seeking issuance of the writ must show

that there is 'no other adequate means to attain the relief he desires' and satisfy the burden of demonstrating that the right to issuance of the writ is 'clear and indisputable.'" Stephen M. Shapiro et al., *Supreme Court Practice* 663 (10th ed. 2013) (quoting *Kerr*, 426 U.S. at 403). Petitioner cannot satisfy this exacting standard.

1. At the outset, this petition almost certainly will be moot before this Court considers it at conference. Petitioner seeks a writ of mandamus to obtain a jury trial rather than a bench trial. But as of the date of this filing, his bench trial had already commenced. Petitioner's trial began on June 26, 2017, and is scheduled to end by July 7, 2017. See D. Ct. Doc. 136 (Apr. 12, 2017). Even if the trial were to take significantly longer than the allotted time, it would still be very unlikely that the trial would remain ongoing at the time of the Court's next scheduled conference on September 25, 2017.

2. Even if this petition were not moot, mandamus relief would be unavailable because, if petitioner is convicted, he could obtain adequate relief through an appeal after a final judgment, with the benefit of a complete record of the basis for the judgment of contempt. Contrary to petitioner's contention in this Court (Pet. 6), if he were correct that Section 402 applied here, the appropriate remedy after a conviction at a bench trial would not be to vacate and remand for a jury trial. Rather, if Section 402 applied, a prosecution for contempt would be untimely because a one-year limitations period applies under that statute. See 18 U.S.C. 402, 3285. Accordingly, on appeal from a final judgment, petitioner could obtain a complete remedy: Dismissal of the charge against him.

As petitioner himself put it in the district court, "if the United States Supreme Court rules that [petitioner]

is entitled to a jury trial, it will have the effect of terminating the criminal contempt matter" because "the statute of limitations has run for Section 402." D. Ct. Doc. 166, at 4 (June 20, 2017). Because petitioner could obtain the same relief on direct appeal, mandamus is unavailable. See, *e.g.*, *DeGeorge* v. *United States Dist. Court*, 219 F.3d 930, 934-935 (9th Cir. 2000) (mandamus unavailable for claim that an indictment is time-barred); see also, *e.g.*, *United States* v. *Bokhari*, 757 F.3d 664, 671 (7th Cir. 2014) (mandamus unavailable to seek dismissal of indictment); *United States* v. *Bird*, 359 F.3d 1185, 1189-1190 (9th Cir. 2004) (same); *United States* v. *Davis*, 873 F.2d 900, 910 (6th Cir.) (same), cert. denied, 493 U.S. 923 (1989).

3. To the extent petitioner asks this Court to exercise its discretion to treat the petition for a writ of mandamus as a petition for a writ of certiorari, see, *e.g.*, *Calderon* v. *Thompson*, 523 U.S. 538, 549 (1998), this Court should deny review because the unpublished decision below is limited to the facts of this case and does not implicate any circuit conflict.

Petitioner invokes (Pet. 15-16) a longstanding circuit conflict over the appropriate mandamus standard when a petitioner seeks to protect his constitutional right to a jury trial. See *Kamen* v. *Nordberg*, 485 U.S. 939, 940 (1988) (White, J., dissenting from denial of certiorari) (discussing the conflict and this Court's mandamus practice in cases where "necessary to protect the constitutional right to trial by jury"). But this case does not implicate that conflict, because it is undisputed that petitioner lacks a constitutional right to a jury trial. He claims only a statutory right, and no conflict exists among the courts of appeals concerning the mandamus standard in the context of a statutory jury-trial right.

See *United States* v. *United States Dist. Court*, 464 F.3d 1065, 1068-1069 (9th Cir. 2006) (per curiam) (assessing nonconstitutional jury-trial claim under typical mandamus standard), cert. denied, 551 U.S. 1133 (2007).[*]

Moreover, this case would be a poor vehicle for deciding the appropriate articulation of the mandamus standard because, even if the standard petitioner favors were extended to statutory cases, he still would not be entitled to a writ of mandamus. As set forth above, the extraordinary remedy of mandamus is unavailable here because petitioner can obtain adequate relief via direct appeal after entry of a final judgment: If he were correct that Section 402 applies, his case would be dismissed on appeal as untimely; he would never have a jury trial. The articulation of the mandamus standard is accordingly irrelevant here.

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[*] In *In re Union Nacional de Trabajadores*, 502 F.2d 113 (1974), the First Circuit appears to have applied the less demanding mandamus standard to a statutory jury-trial claim. *Id.* at 121. But that decision is no longer binding precedent because it was vacated following this Court's decision in *Muniz* v. *Hoffman*, 422 U.S. 454 (1975). See *In re Union Nacional de Trabajadores*, 527 F.2d 602, 603-604 (1st Cir. 1975) (per curiam).

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

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JUNE 2017