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Attorneys for Amici Curiae
** Application for admission pro hac vice forthcoming*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

| | | |
|---------------------------|---|------------------------------------|
| United States of America, |) | CR-16-01012-001-PHX-SRB |
| |) | |
| Plaintiff, |) | BRIEF OF AMICI CURIAE THE |
| |) | ORTEGA MELENDRES PLAINTIFFS |
| v. |) | |
| |) | |
| Joseph M. Arpaio, |) | |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |
| |) | |

1 **I. Introduction**

2 The defendant in this criminal action, Joseph M. Arpaio (“Defendant” or
3 “Arpaio”), has moved for vacatur of this Court’s verdict of conviction for criminal
4 contempt of court, the Court’s findings of fact and conclusions of law, and “all
5 verdicts, orders and rulings,” following his acceptance of a presidential pardon. *See*
6 Proposed Order, Doc. 220-1. Arpaio seeks to erase the past record of his criminal
7 conduct in the litigation before this Court. This is an extraordinary request and the
8 Court should deny it.

9 Arpaio argues that this case is now moot and that all of the Court’s orders
10 should therefore be vacated. But to the extent this case is now moot, it is solely
11 because he accepted the President’s pardon—an action that, as set forth below,
12 acknowledges guilt. As Arpaio has been found guilty of criminal contempt by this
13 Court, based on the trial record, and has now admitted his guilt by acceptance of the
14 pardon, there is no reason to vacate the Court’s findings and other orders. Those
15 orders constitute the record of Arpaio’s criminal conduct, which violated the order of
16 the U.S. District Court in *Ortega Melendres v. Arpaio*,¹ Case No. 2:07-cv-02513-GMS
17 (D. Ariz.), Doc. 494, and the Fourth Amendment rights of *amici*, the Plaintiff class in
18 that civil case. Under these circumstances, Arpaio has set forth no valid grounds for
19 the extraordinary equitable remedy of vacatur, and such an order would fundamentally
20 impair the public’s interest in ensuring a full and accurate record in the instant case.

21 Arpaio’s requested vacatur would gravely harm the principle of rule of law
22 which the court in *Ortega Melendres* sought to protect when it recommended criminal
23 prosecution for Defendant’s contempt. *Ortega Melendres v. Arpaio*, Case No. 2:07-
24 cv-02513-GMS (D. Ariz.), Doc. 1792, September 19, 2016 Order re Criminal

25 _____
26 ¹ Since those orders issued, Sheriff Paul Penzone has been substituted as the defendant
27 in the civil case pursuant to Federal Rule of Civil Procedure 25(d).
28

1 Contempt. Criminal prosecution is an important safeguard against lawless
2 disobedience of court orders. This Court’s July 31, 2017 findings therefore should not
3 be vacated. Rather, this Court’s findings should remain in place and citable as the
4 plain record of the instant litigation, as a rebuke to Defendant’s contempt-of-court in
5 continuing an unconstitutional detention policy, and as a deterrent to others in the
6 future who might defy lawful court orders in pursuit of personal gain. As the *Ortega*
7 *Melendres* court noted, “The Sheriff’s defiance has been at the expense of the Plaintiff
8 class” in that case. *Id.* at 11:11-12. As victims of that defiance and Defendant’s
9 trampling on the Constitution, the *Ortega Melendres* Plaintiff class requests that this
10 Court deny Arpaio’s vacatur request.

11 II. Argument

12 A litigant seeking vacatur of a district court judgment based on mootness bears
13 the burden of showing “equitable entitlement to the extraordinary remedy of vacatur.”
14 *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994); *see also*
15 *Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (a court’s decision to
16 vacate a judgment “is not to be made mechanically, but should be based
17 on equitable considerations”); *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995)
18 (“*U.S. Bancorp* makes clear that the touchstone of vacatur is equity.”). Courts must
19 “take account of the public interest” in evaluating the equities. *U.S. Bancorp Mortg.*
20 *Co.*, 513 U.S. at 26. As the Ninth Circuit observed in *United States v. Tapia-Marquez*,
21 361 F.3d 535, 537-38 (9th Cir. 2004), the Supreme Court has never applied the vacatur
22 doctrine, which was developed in the context of civil appeals, in a criminal case like
23 this one. However, even assuming that vacatur is permissible in a criminal case, it is
24 not appropriate here.

25 III. The Court Should Not Vacate Its Orders in Light of Defendant’s 26 Pardon.

27 Arpaio has failed to show that the equities support vacatur of the Court’s orders.
28 To the contrary, granting his request would harm the public interest in ensuring that

1 federal court orders are obeyed and that willful contemnors—particularly those who
2 have violated others’ constitutional rights while holding a position of public trust—are
3 held to account.

4 **A. Any Mootness Is the Result of Defendant’s Voluntary Action.**

5 Arpaio argues that the Court’s orders should be vacated because he accepted a
6 pardon “during the pendency of the appeals process, which has the effect of rendering
7 moot all the ongoing appeals.” Def.’s Mot. at 2. But any mootness of Defendant’s
8 appeal from his conviction would be due to his own voluntary actions—not to the kind
9 of intervening “vagaries of circumstance” that could support vacatur to prevent
10 unfairness. *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quotation marks omitted).
11 Equitable vacatur is designed to protect a litigant who is stymied in his effort to
12 overturn an adverse ruling when his appeal from the judgment becomes moot through
13 the result of “external happenstance” beyond his control. *See United States v. Payton*,
14 593 F.3d 881, 885 (9th Cir. 2010) (quotation marks omitted) (declining to vacate due
15 to happenstance where the reason for mootness “c[ould] hardly be deemed external to
16 the case”). But that is not the situation here; Arpaio has voluntarily accepted a pardon,
17 thus acknowledging his guilt. Indeed, the Defendant actively petitioned for the
18 pardon.²

19 By accepting that pardon, Defendant “voluntarily forfeited his legal remedy by
20 the ordinary processes of appeal or certiorari, thereby surrendering his claim to the
21 equitable remedy of vacatur.” *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25; *see also*
22 *Marino v. Immigration & Naturalization Serv., U. S. Dep’t of Justice*, 537 F.2d 686,
23 692 (2d Cir. 1976) (“An unsolicited pardon or amnesty issued by the executive does
24 not become effective automatically. It must be accepted by the one to whom it is

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26 ² A letter from Joseph Arpaio’s lawyer to White House Counsel Donald F. McGahn II,
27 The Washington Post, <https://apps.washingtonpost.com/g/documents/politics/a-letter-from-joseph-arpaios-lawyer-to-white-house-counsel-donald-f-mcgahn-ii/2540/>.

1 issued before it can operate as a waiver of his right to contest his guilt.”) (citing *United*
2 *States v. Burdick*, 236 U.S. 79, 91 (1915); *United States v. Wilson*, 32 U.S. 150, 161
3 (1833) (a pardon “may . . . be rejected by the person to whom it is tendered; and if it be
4 rejected, we have discovered no power in a court to force it on him.”)). In sum,
5 Defendant was not unfairly prevented from seeking review of his conviction; it is
6 “simply unreviewed by his own choice.” *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25.

7 Defendant cites only one out-of-circuit case,³ *United States v. Schaffer*, 240
8 F.3d 35, 38 (D.C. Cir. 2001) (en banc), in which the court granted vacatur when a
9 presidential pardon mooted a case with an appeal pending. This decision is
10 unpersuasive, however, as its analysis is conclusory and it fails to evaluate the equities
11 as required by Supreme Court precedent. First, *Schaffer*’s conclusion rests on the
12 unexamined assumption that a presidential pardon is an act of “unpredictable grace”
13 over which a recipient has no control. *Id.* As explained above, however, a defendant
14 may choose not to accept a pardon and thereby maintain his right to contest guilt. And
15 in this case, Arpaio actively sought a pardon and affirmed in response to a White
16 House inquiry that he would accept a pardon if offered one.⁴ Second, the *Schaffer*
17 court entirely failed to consider the interests of the public. As explained below, the
18 public interest strongly disfavors vacating the Court’s findings here.

19 **B. Vacatur Would Fundamentally Impair the Public Interest.**

20 Vacatur of the Court’s findings would be unjust to the members of the Plaintiff
21 class in *Ortega Melendres v. Arpaio*—the direct victims of Defendant’s unlawful
22 conduct—and detrimental to the public interest. The public interest in preserving the
23 Court’s July 31, 2017 findings arises out of Defendant’s history of violating the

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25 ³ In contrast, as noted above, the Ninth Circuit has noted that the Supreme Court has
26 never applied this vacatur doctrine in a criminal case. *Tapia-Marquez*, 361 F.3d at
538.

27 ⁴ See note 2, *supra*.

1 constitutional rights of the plaintiff class and “of obfuscation and subversion of th[e]
2 *Ortega Melendres*] Court’s orders that is as old as th[at] case and did not stop after
3 [Defendant himself] became the subject[] of civil contempt.” *Ortega Melendres v.*
4 *Arpaio*, Case No. 2:07-cv-02513-GMS (D. Ariz.), Doc. 1792 at 8:15-17. The *Ortega*
5 *Melendres* court found that the civil contempt remedies in that case were insufficient to
6 address Defendant’s willful disobedience: “The [civil] remedies are at the expense of
7 the citizens of Maricopa County. Little to no personal consequence results to the
8 Sheriff. . . . This lack of personal consequence only encourages his continued non-
9 compliance.” *Id.* at 11:11-20. The *Ortega Melendres* court therefore concluded that a
10 criminal referral was needed to ensure future compliance with its orders: “If this Court
11 had the luxury of merely entering what orders were necessary to cure a one-time
12 obstruction, or if the Sheriff had evidenced a genuine desire to comply with the orders
13 of this Court, it would be a different matter. The Court has exhausted all of its other
14 methods to obtain compliance.” *Id.* at 12:2-5. This Court’s July 31, 2017 findings will
15 help ensure that similar defiance by others will not recur in the future.

16 In deciding that it was not in the public interest to vacate a court’s judgment
17 merely based on the parties’ settlement, the Supreme Court noted that “[j]udicial
18 precedents are presumptively correct and valuable to the legal community as a whole.
19 They are not merely property of private litigants and should stand unless a court
20 concludes that the public interest would be served by a vacatur.” *U.S. Bancorp Mortg.*
21 *Co.*, 513 U.S. at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips*
22 *Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)) (quotation marks omitted).
23 Leaving this Court’s July 31, 2017 findings in place would preserve for public citation
24 the work that this Court did in weighing the evidence presented in this case and
25 reaching the decision set forth in its July 31, 2017 order; the “public interest in
26 preserving the work product of the judicial system should always at least be weighed
27 in the balance.” *Izumi*, 510 U.S. at 41 (Stevens, J., dissenting). This Court’s findings
28 should stand as a warning to others who might in the future harm the constitutional

1 rights of the *Ortega Melendres* class, or anyone else, by willfully disregarding the
2 lawful orders of a court. As the Ninth Circuit reaffirmed in upholding the preliminary
3 injunction that Defendant willfully violated, “it is always in the public interest to
4 prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d
5 990, 1002 (9th Cir. 2012) (quotation marks omitted). The public also has a strong
6 interest in ensuring that court orders are followed, *see In re Mem’l Hosp. of Iowa Cty.,*
7 *Inc.*, 862 F.2d 1299, 1302-03 (7th Cir. 1988), especially by governmental actors, *see*
8 *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). Defendant’s voluntary decision to seek
9 and accept a pardon should not be allowed to erase the Court’s work or impair the
10 public benefit resulting from its decision.

11 On the other hand, Defendant’s acceptance of a pardon effectively constitutes
12 an acceptance of guilt, and so preservation of the Court’s findings reaching that
13 conclusion works no unfairness on Defendant. *See Burdick*, 236 U.S. at 94 (a pardon
14 “carries an imputation of guilt; acceptance a confession of it”).

15 IV. Conclusion

16 In sum, the Court should not vacate the Court’s orders based on Defendant’s
17 acceptance of a presidential pardon because it would be inequitable under these
18 circumstances.

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21 By: /s/ Kathleen E. Brody

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** Application for admission pro hac vice forthcoming*

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2017, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court’s electronic filing system or by mail as indicated on the Notice of Electronic Filing.

Dated this 13th day of September, 2017.

/s/ Kathleen E. Brody