No. 00-1107

In the Supreme Court of the United States

ROBERT E. GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the conduct that formed the basis of the criminal contempt charge against petitioner involved disrespect to or criticism of the judge, so as to require the judge's disqualification under Federal Rule of Criminal Procedure 42(b).

2. Whether a finding of obstruction of justice is required before an attorney may be held in non-summary criminal contempt under 18 U.S.C. 401(3) for in-court conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 222 F.3d 1123. The decisions of the district court (Pet. App. 15a-73a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2000. A petition for rehearing was denied on October 20, 2000. Pet. App. 13a. The petition for a writ of certiorari was filed on January 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a hearing in the United States District Court for the Central District of California, petitioner

was convicted on one count of criminal contempt, in violation of 18 U.S.C. 401(1) and (3). Petitioner was sentenced to three days' imprisonment. The court of appeals affirmed. Gov't C.A. Br. 2-3; Pet. App. 2a.

1. Petitioner, an attorney who practices primarily in New York, represented Miles Galin in a criminal trial before a jury in the United States District Court for the Central District of California. See *United States* v. *Galin*, No. CR-96-00885-SVW (June 29, 1998), aff'd, No. 99-50205, 2000 WL 554266 (9th Cir. May 5, 2000), 217 F.3d 847 (Table). District Judge Stephen V. Wilson presided at the trial.[1] The *Galin* trial commenced on June 16, 1998, and jury deliberations began eight days later, on June 24th. Pet. App. 2a; Gov't C.A. Br. 3.

At a pretrial conference on June 12, 1998, the district court, recognizing that petitioner was not accustomed to appearing in California federal courts, issued instructions to all counsel on proper courtroom procedures. The court explained to petitioner and the other attorneys that: (1) attorneys were required to argue from the lectern and to ask leave of court to depart from the lectern; (2) when making an objection, attorneys were allowed only to state the legal ground and were not allowed to argue the objection in front of the jury; and (3) attorneys were required to conduct themselves in a non-combative manner and were not allowed to address

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[1] Despite petitioner's contrary suggestion—and in a case petitioner himself relies upon, Pet. 3 n.1—the court of appeals has hailed Judge Wilson as "an exceptionally able, hard-working, and conscientious jurist." *Martel* v. *County of Los Angeles*, 34 F.3d 731, 732 (9th Cir. 1994) (reversing district court's discovery ruling), opinion withdrawn and superseded in part on rehearing en banc, 56 F.3d 993 (9th Cir.) (affirming district court's discovery ruling), cert. denied, 516 U.S. 994 (1995).

each other during court. 6/12/98 Pretrial Conf. Tr. 2-3.[2] Immediately before jury selection, the district court again reminded the attorneys that they must stand behind the lectern while arguing, and again explained that the attorneys were not allowed to intrude into the well of the courtroom—which is roughly the area between the judge's bench and counsel tables—without permission. 6/16/98 Trial Tr. 184; Pet. App. 29a.

Petitioner persistently disregarded those orders during trial, despite escalating warnings from the court. Petitioner repeatedly argued objections in front of the jury, rather than requesting a sidebar or waiting for a recess as the district court had ordered, despite no fewer than 19 admonitions from the court not to do so. See Pet. App. 3a-4a (cataloguing the numerous times the district court ordered petitioner not to argue objections); *id.* at 75a-82a (same). Petitioner repeatedly violated the court's orders that he remain behind the

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[2] The court stated:

> Lawyers, and I say this because I know you are out [of] the district and it's hard to know the practices of a Court when you are not regularly appearing in that Court, lawyers are expected to argue from the lectern. If you have need to depart from the lectern, you are to ask leave of Court.
>
> When you make an objection, make the objection, state the legal grounds and don't argue the objection. If it's important you can always ask permission to approach the side bar, although I frown upon that, I don't like side bar conferences, or we can argue it at a recess. I prefer to argue matters that were ruled upon that counsel think may need reargument at the recess.
>
> I don't want lawyers talking to each other certainly. I want the procedure to be dignified and not an exercise in combat.

6/12/98 Pretrial Conf. Tr. 2-3.

lectern and not walk into the well of the courtroom without permission, despite more than six admonitions from the district court. See *id.* at 4a (cataloguing the numerous times the district court ordered petitioner not to intrude into the well of the courtroom); *id.* at 83a-84a (same). In addition, petitioner violated other district court orders and instructions in numerous other instances, including incidents in which he "waived [*sic*] documents in the air, pointed at witnesses and the prosecutor, spoke in an inappropriately loud voice on a number of occasions, * * * interrupted the Court * * *, pursued lines of questioning to which the Court had sustained objections, and inappropriately commented on the Court's evidentiary rulings." *Id.* at 31a; see *id.* at 85a-90a (citing 17 instances). The court directly admonished petitioner, on numerous occasions during trial, not to engage in those specific behaviors. See *ibid.* (quoting the district court's repeated admonishments to petitioner); *id.* at 4a-5a. In addition, on three consecutive trial days (June 18, 19, and 23, 1998), the court warned petitioner about the severity of his misconduct and its consequences. Finally, the court declared: "I am now telling you as a last resort * * * that if you persist any longer in violating my instructions and directions, I am going to cite you for contempt." 6/23/98 Trial Tr. 187; see 6/18/98 Trial Tr. 50-51, 56 (additional warnings); 6/19/98 Trial Tr. 30-31 (same).

Despite those admonitions and warnings, on June 24, 1998, during closing statements, petitioner once again argued an objection in front of the jury and commented on the court's ruling, at which point the court informed petitioner, outside the presence of the jury, that it was going to him cite him for contempt. 6/24/98 Trial Tr. 107. On July 15, 1998, pursuant to Federal Rule of

Criminal Procedure 42(b), the district court issued an Order to Show Cause why it should not hold petitioner in contempt under 18 U.S.C. 401. Pet. App. 66a-90a. Section 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 401. The show-cause order listed 52 specifications of contemptuous conduct,[3] including 28 instances where petitioner improperly argued an objection in front of the jury, seven instances where petitioner failed to argue from the lectern or entered the well of the courtroom without permission, and 17 instances in which petitioner was disruptive or combative. Pet. App. 75a-90a.

In his response to the show-cause order, petitioner asked that Judge Wilson be disqualified from adjudicating the contempt charge under Federal Rule of Criminal Procedure 42(b), 28 U.S.C. 455, and the Due Process

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[3] Petitioner incorrectly asserts (Pet. 4) that there were 53 specifications of contempt. Petitioner erroneously includes an episode on June 19, 1998, involving an in-chambers discussion during which petitioner suggested Judge Wilson was showing bias. The district court, however, did not allege or consider that episode to be contemptuous. Pet. App. 72a n.9. See also p. 12, *infra*.

Clause. Judge Wilson found no reason to disqualify himself but, pursuant to local court rules, see C.D. Cal. Gen. Order No. 224 (Oct. 22, 1993), the motion to disqualify was also referred to District Judge George H. King for determination. Gov't C.A. Br. 5-6. Judge King also denied the recusal motion, concluding that there was no basis to disqualify Judge Wilson. The record, Judge King concluded, demonstrated no circumstances raising reasonable questions about Judge Wilson's impartiality. Pet. App. 61a-63a.

On October 29, 1998, the court held an evidentiary hearing on the contempt charge, at which petitioner testified and presented evidence.[4] After the hearing concluded, the district court found petitioner in criminal contempt and sentenced him to three days' incarceration, but stayed execution of sentence pending appeal. Gov't C.A. Br. 7. Later, while preparing a written order, the court observed that the show-cause order had "inadvertently only cited subsection one" of 18 U.S.C. 401 "for the Court's authority to hold [petitioner] in contempt," even though 18 U.S.C. 401(3) was applicable because the contempt involved violations of the court's orders. Pet. App. 16a-17a; see *id.* at 69a & n.8. Accordingly, the court allowed petitioner supplemental briefing on the applicability of Section 401(3). *Id.* at 58a-60a.[5]

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[4] The court conducted the contempt proceeding; the government did not participate. Gov't C.A. Br. 6 n.3.

[5] Although petitioner argued in the district court that he could not be convicted under Section 401(3) because he was deprived of adequate notice, the district court rejected that contention, Pet. App. 51a-57a, and petitioner did not renew it on appeal. Nor does he renew that contention in this Court.

On May 14, 1999, the district court entered its final order and judgment finding petitioner guilty on one count of criminal contempt of court, in violation of 18 U.S.C. 401(1) and (3). Pet. App. 15a-57a. The court found that petitioner willfully violated the court's clearly expressed orders by arguing objections in the presence of the jury and by walking in the well of the courtroom without permission. *Id.* at 38a. It also found that, in willful disregard of the court's rulings, petitioner commented on evidentiary rulings to the jury, "attempt[ed] to ask questions to which the Court had sustained objections; yelled in the courtroom; pointed his finger and gestured at the jury, a witness, and the prosecutor; and interrupted the Court." *Id.* at 31a-32a, 38a. Additionally, the court found that petitioner's conduct resulted in an obstruction of justice because his actions "wasted the time of the Court and the jury because it required the Court to continually admonish [petitioner], take unnecessary sidebars and recesses, interrupt the trial to explain protocol and even send the jury out of the courtroom." *Id.* at 38a. The court further found that "[petitioner's] conduct also caused general disruptions due to his shouting, walking around the courtroom, pointing, and addressing remarks to the prosecutor." *Ibid.*[6]

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[6] Petitioner suggests that the district court acted improperly in basing the contempt conviction on all 52 specifications of contemptuous conduct alleged in the show-cause order. Even if it were true that the evidence did not adequately support some of the specifications, reliance on improper incidents to support a contempt conviction is "harmless error where ample evidence supports the conviction after the improper evidence is disregarded and [the reviewing court is] convinced it did not affect the court's decision." *FTC* v. *American Nat'l Cellular*, 868 F.2d 315, 322 (9th Cir. 1989).

2. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-12a. The court rejected petitioner's argument that his conduct in arguing objections in front of the jury was justified to protect the record for appeal. Petitioner's argument, the court of appeals explained, was contradicted by Rule 103 of the Federal Rules of Evidence, which requires only a timely objection or offer of proof to preserve an issue for appeal, and which specifically provides that such matters should not be discussed in the presence of the jury "to the extent practicable." *Id.* at 8a (quoting Fed. R. Evid. 103(c)). The court also ruled that petitioner's proffered justifications for his conduct were irrelevant because, "even if the district court had adopted an impermissible practice, the attorney's remedy would have been to raise the issue on appeal, rather than repeatedly violating the court's instructions." *Ibid.*

The court rejected petitioner's argument that obstruction of justice is a necessary element of criminal contempt under 18 U.S.C. 401(3) where the charge is based on a criminal defense attorney's in-court conduct. Relying on its earlier decision in *United States* v. *Thoreen*, 653 F.2d 1332 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982), the court held that the text of Section 401(3) contains no such requirement. Pet. App. 9a-10a. Noting that "[t]he district court had to chastise [petitioner] on more than two dozen occasions for arguing objections, entering the well of the courtroom, raising his voice, interrupting the court, waving documents, and pointing," the court of appeals concluded that petitioner's "repeated disobedience" was a violation of the contempt statute. *Id.* at 10a.

The court also held that Judge Wilson did not err in presiding over the contempt hearing. The court explained that due process requires recusal of a judge

who, because he has become personally embroiled in a controversy, cannot adjudicate it impartially. Pet. App. 10a (citing *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465-466 (1971); *Offutt* v. *United States*, 348 U.S. 11, 17 (1954)). Applying that standard, the court stated that, while Judge Wilson "at times lost patience with" petitioner because petitioner was "fl[ou]ting the court's orders, the record does not support a contention that the judge was so 'personally embroiled' with [petitioner] that disqualification was necessary." Pet. App. 10a-11a. To the contrary, based on its review of the record, the court concluded that, "[a]lthough he repeatedly admonished [petitioner] for violating courtroom protocol, Judge Wilson exhibited restraint, patience, and respect toward [petitioner] throughout the trial." *Id.* at 11a.

ARGUMENT

1. Petitioner contends (Pet. 13-17) that Judge Wilson should have been disqualified from presiding at the contempt proceeding. That claim does not warrant further review.

a. Federal Rule of Criminal Procedure 42(b) requires that a judge be disqualified from presiding at the contempt hearing "[i]f the contempt charged involves disrespect to or criticism of a judge." According to petitioner, the decision below holds that Rule 42(b) requires disqualification only where "the judge is so 'personally embroiled' ([Pet.] App. 10a) as to violate Due Process." Pet. 14-15. Petitioner contends (Pet. 13-15) that the court of appeals' decision improperly conflates the disqualification provision of Rule 42(b) with the due process requirement of a fair and impartial adjudicator, see *Taylor* v. *Hayes*, 418 U.S. 488 (1974),

and conflicts with the decisions of other courts of appeals.

Petitioner's characterization of the court of appeals' opinion is incorrect. In its per curiam opinion, the court of appeals did not address petitioner's argument that Judge Wilson should have been disqualified under Rule 42(b). See Pet. App. 10a-12a. Rule 42(b) is not mentioned anywhere in the opinion. See *id.* at 1a-12a. Rather, the court of appeals limited its analysis to petitioner's claim that due process required Judge Wilson's disqualification. Significantly, in earlier rulings, the court of appeals has explicitly recognized that disqualification may be required under Rule 42(b) even where there has been no finding of a due process violation. See, *e.g.*, *United States* v. *Engstrom*, 16 F.3d 1006, 1011-1013 (9th Cir. 1994). Because the opinion here does not explicitly address Rule 42(b), it does not conflict with the decisions of any other court on the proper interpretation of that rule, and does not warrant this Court's review of any issue arising under that rule.[7]

Judges Wilson and King did not, in any event, abuse their discretion when they independently concluded that Judge Wilson should not be disqualified under Rule 42(b). See *Nilva* v. *United States*, 352 U.S. 385, 396 (1957) (decision whether to disqualify under Rule 42(b) reviewed for abuse of discretion); *United States* v. *Griffin*, 84 F.3d 820, 830 (7th Cir. 1996) (same). Petitioner was charged with contempt based on his repeated failure to follow the court's orders regarding, *inter alia*, not arguing objections in front of the jury, not intruding into the well of the courtroom without

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[7] Petitioner did raise his argument under Rule 42(b) in the court of appeals. The court of appeals, however, addressed only petitioner's due process claim.

permission, and not shouting or interrupting the court. Contrary to petitioner's contention (Pet. 14), repeated violations of a court's orders do not constitute "disrespect to or criticism of a judge" requiring the judge's disqualification. See, *e.g.*, *Nilva*, 352 U.S. at 395-396 (attorney's disobedience to subpoena not "disrespect[ful]" within the meaning of Rule 42(b)). Indeed, the very cases cited by petitioner (Pet. 15) disprove his assertions. For example, in *United States* v. *Griffin*, *supra*, the contemnor was a criminal defense attorney who, in order to put impermissible matters before the jury, repeatedly violated the court's orders limiting the scope of cross-examination. 84 F.3d at 833. Rejecting the contemnor's claim that the district judge was disqualified from presiding over the contempt proceeding under Rule 42(b), the Seventh Circuit ruled that "a theory that disrespect obtains in every violation of a district judge's order" is "untenable." *Id.* at 830. Likewise, in *In re Puerto Rico Newspaper Guild Local 225*, 476 F.2d 856 (1973), the First Circuit explained that "disobedience of a court order has been held not to fall within [the] category" of contempts requiring disqualification under Rule 42(b). *Id.* at 859.[8]

Petitioner relies on two statements that he made to the court during trial that were arguably critical of the court, as Judge Wilson acknowledged in the show-cause order. Pet. App. 72a n.9. First, during an in-chambers conference on the fourth day of trial, petitioner stated

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[8] See also *In re Grand Jury Proceedings*, 875 F.2d 927, 932 & n.5 (1st Cir. 1989) (contemnor's alleged violation of court order not grounds for disqualification of judge who issued the order); *United States* v. *Marx*, 553 F.2d 874, 877 (4th Cir. 1977) (attorney's failure to appear for trial not a personal affront to judge requiring disqualification under Rule 42(b)).

that "the Court's approach to never permitting me to finish a thought before engaging in its own momentum only demonstrates a bias which I think at this point, Your Honor, is beginning to show the manner in which it is not a fair trial." 6/19/98 Trial Tr. 31. Judge Wilson responded:

> Let me say, Mr. Goldman, the record speaks for itself and at the end, for whatever it is worth, it will reflect whether or not I exhibited a bias or not. I don't feel that I have biased you in any way. My views don't control. It is what the record reflects. Now let's get back to the issues at hand.

Ibid. Second, during closing argument, petitioner argued an objection in front of the jury, despite repeatedly having been ordered not to do so, and the court once again admonished him. In response, petitioner stated: "Your Honor, may we have the criticism once directed in [the prosecutor's] direction." 6/24/98 Trial Tr. 107.

Contrary to petitioner's claim, neither of those comments required Judge Wilson's disqualification. The first comment was not charged as contemptuous conduct by the district court. Pet. App. 72a n.9 (remark was "wholly irrelevant" to court's decision to cite petitioner for contempt); see *id.* at 75a-90a (list of district court's specifications of contemptuous conduct). As a result, it has no bearing on Rule 42(b) disqualification; that rule, by its terms, requires disqualification only "[i]f the contempt *charged* involves disrespect to or criticism of" the judge. Fed. R. Crim. P. 42(b) (emphasis added). Nor did the second comment necessitate Judge Wilson's disqualification. The second comment "did in part form the basis for the contempt citation, but only insofar as it constituted another violation of

the Court's explicit and repeated order not to argue objections and comment on the Court's rulings in the jury's presence." Pet. App. 73a n.9; see *Griffin*, 84 F.3d at 830 (mere violation of a judge's orders does not constitute disrespect under Rule 42(b)). In other words, the alleged criticism was not the basis for "the contempt charged"; rather, the contempt was based on petitioner's violation of the court's orders by arguing objections and commenting on rulings in front of the jury. Accordingly, the citation's reference to that comment did not subject Judge Wilson to disqualification.

Petitioner cites no case in which the mere presence of a brief comment like the one at issue here—"[m]ay we have the criticism once directed in [the prosecutor's] direction," 6/24/98 Trial Tr. 107—has required recusal under Rule 42(b). Nor does petitioner identify a case in which the contempt rested not on the allegedly critical nature of the comment but on the fact that the comment violated the judge's earlier and repeated orders not to argue objections or comment on the court's rulings in front of the jury.[9] *In re Pilsbury*, 866 F.2d 22 (2d Cir. 1989), the only case cited by petitioner in which recusal

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[9] Rule 42(b)'s disqualification provision is derived from *Cooke* v. *United States*, 267 U.S. 517 (1925). See Fed. R. Crim. P. 42 advisory committee's note. In *Cooke*, this Court concluded that the judge should have disqualified himself where a litigant had written a letter to the judge accusing the judge of prejudice in "severe language, personally derogatory to the judge" and "calculated to stir the judge's resentment and anger," 267 U.S. at 533-534, and the relationship "between the judge and the parties had come to involve marked personal feeling," as demonstrated by the judge's use of "unfair and oppressive" procedures in conducting the contempt hearing, *id.* at 538, 539. *Cooke* does not stand for the proposition that any comment that criticizes a ruling made by a judge automatically prohibits the judge from adjudicating the contempt.

was required under Rule 42(b), is easily distinguishable.[10] There, the contemnor was a lawyer who, according to the district judge himself, had treated the judge with "disdain," had "mock[ed]" the judge, had made "rude and disrespectful remarks," and had displayed "insolent behavior." *Id.* at 25, 28. Relying on the district judge's own statements, the Second Circuit observed that the district judge "clearly regarded [the attorney's] conduct as a personal affront to the court," and concluded that the judge was disqualified from conducting the contempt proceedings. *Id.* at 28. In contrast, the record in this case reveals that petitioner was not disrespectful to Judge Wilson, and that Judge Wilson did not regard petitioner as disrespectful. See, *e.g.*, Pet. App. 72a-73a n.9.

Courts have recognized the benefits of having the judge who witnessed the contempt preside at the contempt hearing; accordingly, disqualification should not be undertaken lightly. See *Nakell* v. *Attorney Gen. of N.C.*, 15 F.3d 319, 325 (4th Cir.) ("Because the acts in question are within the personal knowledge of the judge, that judge should preside whenever possible."),

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[10] Two of the cases cited by petitioner involved a summary contempt proceeding under Federal Rule of Criminal Procedure 42(a), and therefore Rule 42(b)'s disqualification provision was not at issue. See *In re Levine*, 27 F.3d 594, 597-598 (D.C. Cir. 1994), cert. denied, 514 U.S. 1015 (1995); *In re Chaplain*, 621 F.2d 1272, 1278 (4th Cir.) (Phillips, J., concurring in part and dissenting in part), cert. denied, 449 U.S. 834 (1980). In the remaining cases cited by petitioner, the court rejected the argument that violation of a court's orders constitutes the type of disrespect requiring a judge's disqualification under Rule 42(b). See *Griffin*, 84 F.3d at 830; *In re Grand Jury Proceedings*, 875 F.2d at 932 & n.5; *Marx*, 553 F.2d at 877; *In re Puerto Rico Newspaper Guild Local 225*, 476 F.2d at 859.

cert. denied, 513 U.S. 866 (1994). Under all the circumstances of this case, disqualification under Rule 42(b) was not required.

b. The Due Process Clause of the Fifth Amendment requires recusal where the trial judge is biased or might appear to be biased. *Taylor*, 418 U.S. at 501. In contempt cases, this Court has required recusal where the judge has become "personally embroiled" in the controversy with the alleged contemnor. *Offutt* v. *United States*, 348 U.S. 11, 17 (1954). It has also required recusal in non-summary contempt proceedings where the judge has been personally "vilified" by the contemnor. See *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971).

Primarily relying on *Offutt*, *supra*, petitioner contends (Pet. 15-17) that Judge Wilson should have been disqualified from presiding over the contempt proceedings because he exhibited a strong personal distaste for petitioner. The court of appeals correctly rejected that fact-bound contention. Pet. App. 10a-12a. Petitioner violated the court's orders not to argue objections more than 20 times, while also disobeying the trial court's orders on a variety of other matters. When viewed in context, the statements petitioner highlights as evidence of Judge Wilson's allegedly unfair hostility to petitioner at most "illustrate Judge [Wilson's] frustration" with petitioner's "continued" violations of the court's orders. *Griffin*, 84 F.3d at 831. Such "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display," do not warrant recusal. *Liteky* v. *United States*, 510 U.S. 540, 555-556 (1994); see *Offutt*, 348 U.S. at 17 (recusal required because the "[t]he record discloses not a rare flare-up,

not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges"—but "an intermittently continuous wrangle on an unedifying level between the [judge and the contemnor]").

For example, despite petitioner's suggestion (Pet. 17 & n.3) that he was unfairly rebuked for attempting to learn what page of a transcript corresponded to a particular tape recording, the record reveals that Judge Wilson simply ordered petitioner to comply with three prior orders of the court—namely, that counsel should not address each other, that they not walk in the well of the courtroom without permission, and that they speak in moderate tones. 6/23/98 Trial Tr. 183-184. Likewise, while petitioner claims (Pet. 17) that he was subjected to an "unwarranted torrent of criticism" for stating three simple words—namely, "Your Honor, may"—the record shows that petitioner's statement constituted his *tenth* attempt to argue an objection in front of the jury after the court had already ruled on the matter, despite numerous prior admonishments from the court not to do so. Pet. App. 75a-77a; 6/18/98 Trial Tr. 72-74. The resulting rebuke by the trial judge is not evidence of improper judicial behavior; it was nothing more than an effort to bring a recalcitrant lawyer into compliance with the court's orders.[11] "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration"—are not a basis for recusal. *Liteky*, 510 U.S. at 556; see *In re Union Leader Corp.*, 292 F.2d 381, 390 (1st Cir.) ("even a very considerable showing of irritation" by the judge does not demonstrate personal bias),

[11] Indeed, the rebuke took place outside the jury's presence, and Judge Wilson gave petitioner the opportunity to argue the objection in full before bringing the jury back. See 6/18/98 Trial Tr. 74.

cert. denied, 368 U.S. 927 (1961); see also *United States* v. *Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997); *United States* v. *Nunez*, 801 F.2d 1260, 1266 (11th Cir. 1986).[12]

Furthermore, the facts of this case are not similar to either *Offutt* or *Taylor*, *supra*, in which recusal was required based on the personal animosity displayed by the judge. In *Offutt*, the entire course of the trial was "colored" by clashes of "increasing personal overtones" between the judge and the alleged contemnor-attorney. 348 U.S. at 12. To cite just a few examples, the judge in *Offutt* threatened to gag the attorney and stated to the jury that the attorney was "disgraceful," "disreputable," and "unworthy of being a member of the profession." *Id.* at 17 n.3. The judge further stated to the jury that he "blush[ed] that we should have such a specimen in our midst." *Ibid.* Those comments demonstrate a personal animosity not present here. *Ibid.* Similarly, in *Taylor*, the judge characterized the lawyer's behavior as "'the worst display' he had seen in many years at the bar," commented that, "[a]s far as a lawyer is concerned, you're not," threatened to gag the

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[12] Petitioner also takes out of context Judge Wilson's comments to petitioner at the post-trial proceeding regarding a trial exhibit. The record (see 6/29/98 Trial Tr. 6-14) reveals that petitioner was allowed a full opportunity to make his point, that Judge Wilson then sought certain information from the prosecutor, and that petitioner repeatedly interrupted Judge Wilson's inquiry despite Judge Wilson's having instructed petitioner that he would give petitioner the opportunity to respond "in a little bit" (*id.* at 9), or in "[j]ust one moment" (*id.* at 11; see also *id.* at 12). Finally, after petitioner persisted in interrupting the court, Judge Wilson warned petitioner that there would be consequences to petitioner's refusal to follow the court's directions. *Id.* at 13. Judge Wilson then, once again, patiently advised petitioner that he would "have an opportunity to address the Court." *Ibid.*

lawyer, and denied the lawyer the opportunity to speak in his own defense. 418 U.S. at 502.

In contrast, the court of appeals in this case correctly concluded that, "[a]lthough he repeatedly admonished [petitioner] for violating courtroom protocol, Judge Wilson exhibited restraint, patience, and respect toward [petitioner] throughout the trial." Pet. App. 11a; see *Paul* v. *Pleasants*, 551 F.2d 575, 585 (4th Cir.) (judge's compliments of contemnor's efforts at trial showed lack of bias), cert. denied, 434 U.S. 908 (1977). Indeed, the record is replete with instances of Judge Wilson's respectful and complimentary attitude towards petitioner. See, *e.g.*, 6/18/98 Trial Tr. 99 (stating that it is "admirable" that petitioner "is a zealous advocate"); *id.* at 19 (telling petitioner that it is "good" that he can get excited about a case, and that the court does not mind a "spirited debate"); *id.* at 51 ("I certainly admire the zeal in which you have represented your client."); 6/19/98 Trial Tr. 57-58 (telling petitioner that his cross-examination of a witness was "quite appropriate" and that he had "developed some good points").

Moreover, nothing in the adjudication of the contempt demonstrates personal antagonism on Judge Wilson's part. The numerous specifications of contemptuous conduct simply reflect petitioner's remarkable persistence in engaging in contumacious conduct, rather than demonstrating personal animosity on Judge Wilson's part. Furthermore, Judge Wilson gave petitioner a full and fair hearing. Petitioner was given notice, was represented by counsel, and allowed to present witnesses and evidence in his defense. See *Ungar* v. *Sarafite*, 376 U.S. 575, 588 (1964) (that contemnor was accorded hearing, rather than summarily judged, was evidence that judge had not become personally embroiled with contemnor); cf. *Weiss* v. *Burr*,

484 F.2d 973, 982 n.15 (9th Cir. 1973) (delay in adjudicating contempt diminishes likelihood that judge "imposed sentence 'while smarting under the irritation of the contemptuous act[s]'") (quoting *Sacher* v. *United States*, 343 U.S. 1, 11 (1952)), cert. denied, 414 U.S. 1161 (1974). Then, after deciding that petitioner was properly charged under Section 401(3) in addition to Section 401(1), Judge Wilson gave petitioner the opportunity for supplemental briefing on the matter. Accordingly, in light of all those circumstances, the record does not demonstrate that Judge Wilson was "personally embroiled" with petitioner such that he had the appearance or the actuality of bias in presiding over petitioner's contempt proceeding. *Taylor*, 418 U.S. at 501-502.

Relying primarily on *Mayberry* v. *Pennsylvania*, *supra*, petitioner contends that recusal was required because "brief comments impugning a judge's impartiality are, without more, sufficient to require the judge's disqualification." Pet. 16. That is not correct. In *Mayberry*, the record revealed that the alleged contemnor had engaged in "brazen efforts to denounce, insult, and slander the court." 400 U.S. at 462. As this Court recounted, "[m]any of the words leveled at the judge in [that] case were highly personal aspersions, even 'fighting words'—'dirty sonofabitch,' 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool.'" *Id.* at 466. The judge had ordered the alleged contemnor gagged. *Id.* at 462. Given the highly charged circumstances, the Court ruled that the contemnor should be granted a trial "before a judge other than the one reviled by the contemnor." *Id.* at 466. At the same time, however, the Court specifically acknowledged that "[i]t is, of course, not every attack on a judge that disqualifies him from sitting." *Id.* at 465. Thus, in *Ungar*, 376 U.S. at 584,

this Court held that the defendant's statement that he was being "badgered" and "coerced" by the judge was "disruptive, recalcitrant and disagreeable commentary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." This Court further observed that "[w]e cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." *Ibid.* Likewise, petitioner's comments to the court during the trial were moderately worded disagreements with the court's rulings, rather than the type of "insulting attack" that requires disqualification of the judge. *Ibid.*

The court of appeals cases relied on by petitioner (Pet. 16-17) similarly fail to support his claim that "brief comments impugning a judge's impartiality" require disqualification. In *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972), recusal was required where the defendant not only stated that "[t]he door in this courtroom seems to swing in one direction [against the defendants]," but also called the judge "inhumane" and his actions "disgraceful," and the judge characterized counsel's remarks throughout the trial as insulting and sarcastic. *Id.* at 396. Likewise, in *United States* v. *Meyer*, 462 F.2d 827 (D.C. Cir. 1972), the court explicitly rested its recusal decision not merely on the fact that, in one of the charged acts, the contemnor accused the judge of bias, but also on the trial judge's characterization of the contemnor's conduct as "insulting, derogatory, and disrespectful." *Id.* at 844-845. Indeed, refuting petitioner's argument, the court in *Meyer* explicitly stated that "some comments about the trial judge, viewed in

context, are not sufficiently personal" to require disqualification for bias. *Id.* at 841.[13]

2. Petitioner renews his claim (Pet. 18-22) that lawyers may be held in contempt under 18 U.S.C. 401(3) for their courtroom conduct only where it actually obstructs justice. The text and structure of Section 401 refute that argument. Unlike Section 401(1), which requires that the "[m]isbehavior * * * obstruct the administration of justice," Section 401(3) does not include an obstruction requirement. 18 U.S.C. 401(3). Instead, contempt under Section 401(3) is premised on "[d]isobedience" to the district court's "lawful writ, process, order, rule, decree, or command," without regard to consequences or results. 18 U.S.C. 401(3). Perhaps for that reason, petitioner suggests that an obstruction element must, in effect, be read into Section 401(3) to protect zealous advocacy. That contention lacks merit, and does not otherwise warrant further review.

The contempt power is vested in courts to vindicate their authority. *International Union, UMWA* v. *Bagwell*, 512 U.S. 821, 831 (1994); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-796 (1987). As this Court has recognized, "[t]he underlying concern that gave rise to the contempt power was not * * * merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Id.* at 798. Thus, contrary to petitioner's contention, disobedience of a court's commands

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[13] *Bakalis* v. *Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994), cited by petitioner (Pet. 17), is completely inapposite. In that case, the court concluded that evidence that a college board of trustees had prejudged an employment decision precluded the board from receiving qualified immunity.

is punishable under the contempt power, whether or not it results in an obstruction of justice. See *Maness* v. *Meyers*, 419 U.S. 449, 458 (1975) ("all orders and judgments of courts must be complied with promptly"; those who disobey "generally risk criminal contempt even if the order is ultimately ruled incorrect"). Two courts of appeals now have explicitly so ruled. See Pet. App. 9a-10a; *Taberer* v. *Armstrong World Indus., Inc.*, 954 F.2d 888, 901 n.16 (3d Cir. 1992) (recognizing the need for courts to be able to exercise the contempt power against attorneys "to vindicate the court's authority, although there is no actual obstruction of the administration of justice").

Under petitioner's contrary rule, lawyers could willfully and flagrantly defy a court's direct orders in the name of zealous courtroom advocacy, as long as the defiance does not reach some threshold level that amounts to obstruction of justice.[14] Zealous advocacy, however, "can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge * * * with power to curb both adversaries." *Sacher*, 343 U.S. at 8. Accordingly, attorneys must obey the court's commands whether or not failure to do so will obstruct justice. To deprive courts of authority to enforce their rules absent an obstruction of justice would substantially erode the judicial power, and thereby subvert the orderly administration of justice. *Young*, 481 U.S. at 796 ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the

[14] Petitioner offers no reason for distinguishing a lawyer's in-court conduct from out-of-court conduct, as zealous advocacy involves both.

judicial power of the United States' would be a mere mockery.") (quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)); *In re Holloway*, 995 F.2d 1080, 1088 (D.C. Cir. 1993) (allowing counsel to disobey court's orders would lead to "a sprawling chaos that would render the adjudication close to random"), cert. denied, 511 U.S. 1030 (1994). Nothing in the Constitution (if that is the basis for petitioner's claim) requires such a result. If a court's orders unduly interfere with effective representation, the remedy is to appeal or seek relief through mandamus. *Maness*, 419 U.S. at 458-459; see also *Walker* v. *City of Birmingham*, 388 U.S. 307, 320 (1967) (a court's orders, even if constitutionally invalid, must be obeyed until reversed by a higher court); *United States* v. *Allocco*, 994 F.2d 82, 85 (2d Cir. 1993) ("Even if [the attorney-contemnor] felt that the order was unreasonable, it was nonetheless clear; any objection he had to the order simply should have been preserved on the record."); *In re Gustafson*, 650 F.2d 1017, 1020 (9th Cir. 1981) (remedy for error in court rulings was by mandamus or appeal, not disobedience). "Zealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting an attorney of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law." *In re Ellenbogen*, 72 F.3d 153, 158 (D.C. Cir. 1995).[15]

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[15] Thus, petitioner's disobedience of the court's orders to refrain from arguing objections in front of the jury was not immune from sanction merely because petitioner allegedly did not seek to put prejudicial information in front of the jury. Cf. *Pounders* v. *Watson*, 521 U.S. 982 (1997) (affirming contempt conviction of attorney who, in the course of violating court's orders, put prejudicial information in front of the jury). Nor is petitioner justified in relying (Pet. 21 n.5) on various authorities stating the unremarkable rule

Petitioner in any event errs in asserting (Pet. 18-20) that this Court and others require proof of an obstruction of justice in non-summary contempt proceedings under Section 401(3). The cases upon which petitioner relies all arose under Section 401(1), or involved *summary* contempt proceedings under Rule 42(a). Unlike non-summary contempt proceedings under Rule 42(b), summary contempt under Rule 42(a) may be imposed without procedural protections such as notice of the charges, a hearing, the assistance of counsel, and the right to call witnesses. See *Harris* v. *United States*, 382 U.S. 162, 165-167 (1965) (describing importance of Rule 42(b) procedures); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). Because all of those protections play an important role in ensuring that the contempt power is not abused, this Court has specifically predicated resort to the "drastic procedures of the summary contempt power" under Rule 42(a), *In re McConnell*, 370 U.S. 230, 234 (1962), on the "exceptional circumstances," *Harris*, 382 U.S. at 164, occasioned by contemptuous conduct that obstructs justice. Accord *Pounders* v. *Watson*, 521 U.S. 982, 989 (1997); *In re Oliver*, 333 U.S. 257, 274-275 (1948).

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that a party must state the grounds upon which evidence is admissible in order to preserve the issue for appeal. See Fed. R. Evid. 103(a)(2). Petitioner does not claim that any of those authorities state that counsel may or should make such statements in front of the jury, see Fed. R. Evid. 103(c) (offers of proof should not be made in the hearing of the jury), or that such statements should or must be made despite a court's contrary orders. That petitioner many times requested a side bar or recess instead of arguing an objection in front of the jury shows that he knew that the record could be adequately preserved in other ways. Pet. App. 26a (citing 29 instances).

While a finding of obstruction is required before an individual may be held in *summary* contempt, no court has held that a finding of obstruction of justice is required in a *non-summary* proceeding *under Section 401(3)*. For example, although petitioner relies (Pet. 18-19) on this Court's decision in *In re McConnell*, *supra*, that case involved a summary proceeding, and was brought under Section 401(1), which expressly requires obstruction. 370 U.S. at 233; p. 21, *supra*. Similarly, *In re Little*, 404 U.S. 553, 555 (1972) (cited Pet. 19), involved a summary proceeding, and was brought under a local statute requiring obstruction as an element of contempt. In each case, both the summary nature of the proceeding and the statutory provision at issue required obstruction of justice before the accused could be held in contempt. See, *e.g.*, *In re McConnell*, 370 U.S. at 236 (concluding that lawyer's conduct did not "amount to an obstruction of justice that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts").[16] Petitioner's reliance (Pet. 19) on *In re Dellinger*, 461 F.2d at 400, is unavailing for identical reasons; that case too was a summary contempt proceeding under Section 401(1), rather than a non-sum-

[16] Petitioner's reliance (Pet. 19-20) on *In re Michael*, 326 U.S. 224, 228 (1945), and *Clark* v. *United States*, 289 U.S. 1, 11 (1933), is likewise unavailing. In neither case did this Court hold that a finding of obstruction is required in all non-summary contempt proceedings. Rather, in both cases, this Court required a finding of obstruction simply "to bring about the exceptional conditions," *Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (quoted in both *In re Michael* and *Clark*), that would allow a witness or jury member, respectively, to be held in contempt for conduct that amounted to perjury. See *United States* v. *Dunnigan*, 507 U.S. 87, 93-94 (1993).

mary contempt case under Section 401(3). See 461 F.2d at 391.[17]

Nor can *United States* v. *Lumumba*, 794 F.2d 806 (2d Cir.), cert. denied, 479 U.S. 855 (1986), be read as holding that obstruction is required in a non-summary contempt case under Section 401(3). In *United States* v. *Martin*, 525 F.2d 703, cert. denied, 423 U.S. 1035 (1975), the Second Circuit carefully distinguished between the requirements of subsections (1) and (3) of Section 401, and explicitly held that a "contempt conviction under § 401(3) for disobedience of a lawful order of the court d[oes] *not* require a finding of obstruction of justice." *Id.* at 710 (emphasis added). In so holding, the court stated that its earlier decision in *In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975), a summary contempt case, should not be read as incorporating the obstruction of

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[17] For the same reasons, petitioner errs when he states (Pet. 21-22 n.6) that the Ninth Circuit had, until the decision below, held obstruction to be a "substantive element of the offense of contempt in cases involving attorneys." The earlier cases on which petitioner relies (Pet. 21 n.6)—*In re Greenberg*, 849 F.2d 1251, 1254-1255 (9th Cir. 1988), *Hawk* v. *Cardoza*, 575 F.2d 732, 735 (9th Cir. 1978), and *Weiss*, 484 F.2d at 979—all involved *summary* contempt. In *In re Greenberg*, the Ninth Circuit specifically stated that "a district court should not *summarily* convict an attorney of criminal contempt unless that attorney 'create[s] an obstruction which blocks the judge in the performance of his judicial duty.'" 849 F.2d at 1255 (emphasis added) (quoting *In re McConnell*, 370 U.S. at 236). Interpreting its own precedent, the court of appeals in this case concluded that *United States* v. *Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982), stood for the proposition that there was no obstruction element in Section 401(3). See Pet. App. 9a-10a. Accordingly, petitioner's challenge based on the Ex Post Facto Clause (Pet. 22 n.6) is entirely unsupported, and there is no reason to hold the case pending decision in *Rogers* v. *Tennessee*, cert. granted, 529 U.S. 1129 (2000).

justice requirement of Section 401(1) into Section 401(3). *Martin*, 525 F.2d at 709. *Lumumba*, without citing *Martin*, quoted *Williams* for the proposition that, "[n]ot long ago," the court had decided that criminal contempt requires obstruction. 794 F.2d at 808. That statement, however, was not necessary to the result; *Lumumba* did not reverse a contempt conviction under Section 401(3) based on the absence of obstruction. In light of *Martin*'s clear statement that obstruction is *not* an element of non-summary contempt under Section 401(3), *Lumumba*'s dictum cannot be read as establishing the contrary rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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