

# No. 14-60

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## United States Court of Appeals for the Second Circuit

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**UNITED STATES OF AMERICA,**

*Appellee-Respondent,*

v.

**APPLE INC.,**

*Appellant-Movant.*

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On Appeal from the United States District Court  
for the Southern District of New York  
Nos. 12-02862 & 12-03394 (DLC)

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**BRIEF OF AMICUS CURIAE DAVID M. DORSEN**  
**In Support of Apple Inc. and Reversal**

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**BRIEF OF AMICUS CURIAE**

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## Statement of Amicus Curiae

The parties to this action have consented to the filing of this brief for amicus curiae David M. Dorsen, Esq. Dorsen is a member of the Bars of the state of New York and the District of Columbia, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court, among others. This amicus brief supports the position of Apple Inc. with respect to separation of powers. Dorsen's interest in the case is twofold:

1. Dorsen is the author of *Henry Friendly, Greatest Judge of His Era* (Harvard University Press 2012), and is currently writing a book on the jurisprudence of Justice Antonin Scalia. Justice Scalia plays an important role in separation of powers jurisprudence. Dorsen seeks proper adherence to the doctrine of separation of powers (as well as of other constitutional doctrines).
2. Dorsen represents clients who are currently litigating separation of powers issues in other courts. He believes that his clients will benefit from the correct application of the principles of separation of powers.<sup>1</sup>

Dorsen hereby certifies that the word total for purposes of Rule 32(a)(7) is 1,568 words.

Dorsen does not seek permission to participate in oral argument.

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<sup>1</sup> With respect to Rule 29(c)(5), Federal Rules of Appellate Procedure, the answers to all inquiries are in the negative. No one other than Dorsen wrote any portion of this brief and no one other than Dorsen, including his clients, contributed money to or were billed for its preparation.

## ARGUMENT

The roles of the three branches of the federal government differ and they must be kept separate. Separation of Powers was a principal issue at the Constitutional Convention. *The Federalist, passim*. *Federalist* No. 78 teaches that a neutral and independent judiciary is a cornerstone of constitutional separation of powers and essential to protect the citizenry:

[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”<sup>2</sup>

Justice Scalia quoted this language in his opinion for the Court in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222-23 (1995). Any significant commingling of the branches of the federal government is unconstitutional. *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654, 677 (1988); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986). In *Young v. United States*, 481 U.S. 787 (1987), the Supreme Court reversed a conviction when a district court, after defendants allegedly violated an injunction it had issued following their infringement of plaintiff’s trademark, appointed plaintiff’s

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<sup>2</sup> The Anti-Federalists favored Separation of Powers at least as much as the Federalists. Herbert J. Storing, *What the Anti-Federalists Were For* 54-55, 59-63 (U. Chi. Press 1981); *The Anti-Federalist Papers* 169, 171-72, 240, 251, 335 (Ralph Ketcham, ed.) (Mentor 1986). The Anti-Federalist position has played a significant role. *E.g.*, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1994).

attorneys as special prosecutors to prosecute the defendants for contempt.

Concurring in the reversal, Justice Scalia wrote (481 U.S. at 816):

Prosecution of individuals who disregard court orders (except orders necessary to protect the courts' ability to function) is not an exercise of "[t]he judicial power of the United States, U.S. Const., Art. III, §§ 1, 2. . . . The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. . . . It is accordingly well established that the judicial power does not generally include the power to prosecute crimes."

Courts of appeals have condemned such improper arrangements in a variety of contexts. In *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (2d Cir. 1993), *cert. dismiss'd*, 513 U.S. 88 (1994), an enforcement action, the Court struck down a statutory arrangement whereby Congress put two *ex officio* nonvoting members on the Federal Election Commission. The Second Circuit held that the action should be dismissed as violating separation of powers, even though the *ex officio* members from the Legislative Branch had no official powers. *Accord, In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163-64 (2d Cir. 2001) ("The doctrine of separation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch or the Legislative Branch."); *National Roofing Contractors Ass'n v. U.S. Dept. of Labor*, 639 F.3d 339, 343 (7<sup>th</sup> Cir. 2011) ("The judiciary is not authorized to tell agencies how they must use prosecutorial discretion when implementing valid rules. . . . Functional as well as formal (separation-of-powers) concerns support leaving

prosecutorial decisions to prosecutors.”); *United States v. Jennings*, 960 F.2d 1488, 1491 (9<sup>th</sup> Cir. 1992) (The judiciary does not “have a license to intrude into the authority, powers and function of the [executive] branch . . . .”); *In re Grand Jury Subpoena Duces Tecum*, 782 F. Supp. 1518, 1521 (N.D. Ala. 1992) (“Our constitution charges to the executive branch of government the responsibility for investigation and prosecution of crime. Judicial deference to the prosecutorial function and its attendant discretion in who, when, where, and how to prosecute is founded upon the constitutional separation of powers. *Smith v. Meese*, 821 F.2d 1484, 1491 (11<sup>th</sup> Cir. 1987).”); *see National Ass’n of Pharm. Mfrs. v. FDA*, 637 F.2d 877, 889 (2d Cir. 1981) (Friendly, J.) (insufficient connection between authority conferred by Legislative Branch and regulations issued by Executive Branch “would do violence to established principles of separation of powers”).

The actions of the monitor that Apple Inc. describes in its emergency motion appear more suitable to the inquisitorial system of continental Europe and other systems that differ in crucial respects from the adversary system of the United States. Judges, or alter egos of judges, are not responsible in this country’s judicial system for gathering the facts. Indeed, appellate courts reverse trial courts that usurp the functions of the parties. The adversary system naturally follows from a Constitution that separates the judicial function from the prosecutorial function. In a nutshell, what the court-appointed and court-

supervised monitor has been described as doing is antagonistic both to the Constitution's fundamental doctrine of separation of powers and to the adversary system.

Because of its central position in the structure of the federal government, violation of separation of powers cannot be waived. In this respect it resembles lack of subject-matter jurisdiction. *See Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1528 (2013) (dismissal of moot case for lack of case or controversy and subject-matter jurisdiction); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (judge required to raise lack of subject-matter jurisdiction *sua sponte*). Thus, two Chinese nationals cannot agree to have the federal courts decide their dispute involving an automobile accident in Shanghai.

Violation of separation of powers is even a clearer case for the inability to waive. Like an advisory opinion or lack of standing (which is closely related to separation of powers), violation of the doctrine of separation of powers impinges on the constitutional powers of other branches of government. When a federal court entertains a lawsuit that is not an Article III case or controversy, it detracts from powers that the Constitution assigned to other branches of the federal government. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) (“the Constitution’s central mechanism of separation of powers depends largely on what activities are appropriate to legislatures, to executives, and to

courts”); *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986) (“Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as ‘an inseparable elements of the constitutional system of checks and balances.’ . . . [T]he parties cannot by consent cure the constitutional difficulty for the same reason that parties cannot confer on federal courts subject-matter jurisdiction beyond the limits imposed by Article III, § 2.”); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1947) (“the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. . . . The Constitution allots the nation’s judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches.”). Thus, not only is there the unconstitutional usurpation of power, but also the unconstitutional diminution of power of coordinate branches of the federal government.

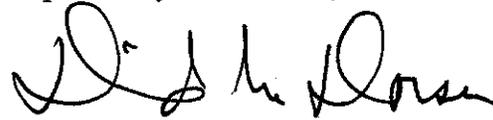
Finally, there is no requirement that an individual show injury by the violation of separation of powers. “‘The structural principles secured by the separation of powers protect the individual . . . .’” *Stern v. Marshall*, 131 S.Ct. 2594, 2605 (2011), quoting *Bond v. United States*, 131 S.Ct. 2355, 2365 (2011), which also stated that “‘individuals ‘are protected by the operation of separation

of powers and checks and balances and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.” See *Young v. United States, supra*; *FEC v. NRA, supra*. As noted at the start of the Argument, the doctrine of separation of powers was not incorporated into the Constitution for aesthetic reasons but instead to protect persons subjected to federal power. The doctrine should be allowed to play its essential role.

### CONCLUSION

The Court should sustain the position of Apple Inc. on the issue of separation of powers.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28<sup>th</sup> day of January, 2014, a true and correct copy of the foregoing has been sent by first-class mail to:

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and

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A handwritten signature in black ink, appearing to read "David M. Dorsen", written over a horizontal line.

David M. Dorsen  
Amicus Curiae