

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

UNITED STATES OF AMERICA)	
)	
v.)	
)	No. 4:21-CR-5-O
THE BOEING COMPANY,)	
)	
<i>Defendant.</i>)	
)	

**THE BOEING COMPANY'S CONSOLIDATED REPLY TO OBJECTIONS TO THE
UNITED STATES' MOTION TO DISMISS THE CRIMINAL INFORMATION, DKTS.
318 AND 319, AND RESPONSE TO MOTION TO APPOINT A SPECIAL
PROSECUTOR, DKT. 321**

Following good faith negotiations considering all facts, circumstances, and views, the Department of Justice (the “government”) has filed a Motion to Dismiss the Criminal Information and has entered into a non-prosecution agreement (“NPA”) with The Boeing Company (“Boeing” or the “Company”). Representatives of more than 110 individuals who perished in the MAX accidents support, or otherwise do not oppose, this resolution. Dkt. 312 at 1-2; *see* Dkt. 328 at 1. Certain family members oppose the government’s Motion to Dismiss, *see* Dkts. 318 and 319, whereas others move for the immediate appointment of a special prosecutor, *see* Dkt. 321, (collectively, the “Objecting Representatives”).¹

As Boeing has expressed throughout these proceedings, Boeing respects the views and concerns of the Crash Victim Representatives, both those who support the resolution and those who oppose it. Boeing knows the Court will carefully evaluate their views, and all views, in considering the government’s Motion to Dismiss.²

The government has stated its basis for moving for dismissal, and Boeing does not oppose that motion. The Rule 48(a) dismissal inquiry is primarily to protect the defendant against potential gamesmanship and harassment by the government, and that has not occurred here. The government has explained that it is moving to dismiss because, in exercising its prosecutorial discretion, it believes dismissal is the appropriate course as also reflected in the NPA. Boeing is

¹ For ease of the Court, Boeing consolidates its reply to all filed objections and its response to the Motion for Appointment of a Special Prosecutor.

² Certain of the Objecting Representatives have not previously appeared in these proceedings and directly established Crime Victims’ Rights Act (“CVRA”) victim status. Because they appear to be similarly situated to other Crash Victim Representatives that have, Boeing assumes the Court will accord them similar treatment consistent with its prior ruling, while reserving its position on that issue. *See* Dkt. 116. Should the Court determine to conduct proceedings to assess CVRA victim status for any Objecting Representatives, Boeing is prepared to address its arguments for the Court.

not aware of any case in which the denial of a Rule 48(a) motion that was not opposed by the defendant was upheld on appeal, and the Objecting Representatives do not cite any.³ On this record, the Court should grant the Motion to Dismiss.

Furthermore, as set forth below, the Court should reject related motions filed by some Objecting Representatives to strike Paragraph 22 from the NPA and to appoint a special prosecutor—both of which are not supported by established law and ignore the fundamental role of the Executive Branch in enforcing the law.

I. The Government Has Satisfied the Standard for Rule 48(a) Dismissal

The government’s motion articulates the standard for a Rule 48(a) dismissal. Dkt. 312 at 9-12; *see also id.* at 10 (“A trial court may therefore, according to the Fifth Circuit, deny a Rule 48(a) motion to dismiss only if the court ‘finds that the prosecutor is clearly motivated by considerations other than his assessment of the public interest.’” (quoting *United States v. Hamm*, 659 F.2d 624, 630 (5th Cir. Unit A 1981))). The government’s motion also supplies detailed reasons for dismissal. *See* Dkt. 312 at 13-19. The Objecting Representatives would handle the case differently, but critically that is not the question that Rule 48(a) and Fifth Circuit precedent ask. The only question is whether *the prosecutor* is clearly motivated by considerations other than

³ The *Cockrell* case cited by the Objecting Representatives is a good example. *See* Dkt. 318 at 5, 9. There, a judge of this Court denied a Rule 48(a) motion, the government filed a petition for writ of mandamus, and the Fifth Circuit ordered the Court to dismiss the indictment on mandamus review. *See* Writ of Mandamus, *In re: United States*, No. 05-10023, ECF No. 20 (5th Cir. Jan. 14, 2005) (“You are hereby ordered to dismiss the indictment . . .”). Other Fifth Circuit cases have also reversed denials of Rule 48(a) motions. *See, e.g., United States v. Cowan*, 524 F.2d 504, 514 (5th Cir. 1975). The other limited district court authority cited by the Objecting Representatives is no more persuasive. *See, e.g., United States v. N. V. Nederlandsche Combinatie Voor Chemische Industrie*, 453 F. Supp. 462, 463 (S.D.N.Y. 1978) (after denying a Rule 48(a) motion, the district court ultimately dismissed the indictment because the government failed to proceed with prosecution within required time limits).

the public interest. None of the oppositions allege such ulterior motives. As a result, the government's Motion to Dismiss should be granted under controlling Fifth Circuit precedent.⁴

The Objecting Representatives, respectfully, do not frame their arguments around whether the government's motion to dismiss should be granted under the standards of Rule 48(a). They primarily argue that the government has effectively circumvented the Rule 48(a) decision by agreeing not to prosecute. That is not the case, *see infra* 5-7, and the government has supplied its reasons for dismissal as required. *See United States v. Salinas*, 693 F.2d 348, 352 (5th Cir. 1982) (“Although the burden of proof is not on the prosecutor to prove that dismissal is in the public interest, the prosecutor is under an obligation to supply sufficient reasons—reasons that constitute more than a mere conclusory interest.”). While the Objecting Representatives may disagree with the government's reasons, they cannot argue that those reasons are “merely conclusory,” and they do not argue that the reasons are motivated by bad faith or something other than the public interest.

Precedent teaches that Rule 48(a)'s “leave of court” requirement exists primarily to protect the rights of the *defendant*, which in this case is Boeing. *See Salinas*, 693 F.2d at 351 (“the courts have agreed that the primary purpose of the rule is protection of a defendant's rights”). Should the government seek to dismiss shortly before trial for tactical reasons, and the defendant objects, the court may deny the motion. *Cf. Salinas*, 693 F.2d at 353 (reversing conviction subsequent to Rule 48(a) dismissal without prejudice because the government sought to dismiss for tactical reasons, and holding that government violated Rule 48(a)). Similarly, should the government seek to harass a defendant by charging, dismissing, and recharging, the court can deny a motion to dismiss when the defendant objects. *See United States v. Welborn*, 849 F.2d 980, 983 (5th Cir. 1988) (“The

⁴ The government has conferred with the Crash Victim Representatives, and those objecting to the Motion to Dismiss have had full opportunity to be heard by the Court.

primary purpose of this requirement is ‘to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy.’” (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965))). Here, Boeing does not object and so protection of the defendant’s rights is not an issue. While case law dicta has suggested that there may be certain extremely limited circumstances where a court could deny an unopposed motion to dismiss, Boeing has not identified any cases where appellate courts have upheld a denial of a motion to dismiss, where the defendant consents, based on a finding of action contrary to the public interest. Even the dicta in those decisions does not counsel against granting the motion here as the government has articulated its reasons, which are neither conclusory nor contrary to the public interest. The government is not requesting dismissal for any reason other than the prosecutor’s own measured assessment of the unique facts and circumstances of this case, which is its fundamental responsibility in protecting the public interest. Disputing the government’s considered assessment of litigation risk,⁵ the calculation of the maximum fine, or the appropriate mechanism for compliance oversight, do not demonstrate—even remotely—that the government was clearly motivated by considerations contrary to the public interest.⁶

⁵ Objecting Representatives allege that the government does not have litigation risk, in part, because the doctrine of laches prevents Boeing from litigating the issue of breach. Dkt. 318 at 44. Putting aside the relevance of the Objecting Representatives’ views on the *government’s* litigation risk, they are incorrect. Boeing has throughout preserved its arguments that it did not breach its Deferred Prosecution Agreement (“DPA”) and its ability to assert those arguments. Had the parties not reached an agreed resolution of this matter, Boeing would have filed a motion to dismiss the Criminal Information on the basis that it had not breached the DPA. Pursuant to the Court’s Scheduling Order, Boeing was required to file any pretrial motions—including a motion to dismiss—by June 2, 2025. Dkt. 294 at 1. The parties entered an NPA on May 29, 2025, the government filed the Motion to Dismiss the same day, and on June 2, 2025, the Court terminated all pretrial deadlines. Dkt. 317. There has been no inexcusable delay and laches does not apply.

⁶ Certain Objecting Representatives include a declaration from Paul Cassell in which Mr. Cassell, among other things, offers his opinion that Boeing would be easily convicted at trial. The government, which would actually bear the burden of proof and responsibility of conducting that

Again, the Objecting Representatives may in good faith disagree with the government's assessment and whether it is consistent with the public interest, but neither Rule 48(a) nor any cases applying it have concluded that disagreement with the prosecutor's assessment is alone a basis for denying an unopposed motion to dismiss.⁷

II. Objections to Paragraph 22 of the NPA and Requests for Appointment of a Special Prosecutor

The oppositions focus primarily on Paragraph 22 of the NPA and the government's agreement therein not to prosecute Boeing. One group of Objecting Representatives has moved the Court to immediately appoint a special prosecutor in light of Paragraph 22, *see* Dkt. 321, whereas another has asked the Court to declare that single paragraph void in contravention of public policy and to appoint a special prosecutor if the Court denies the Motion to Dismiss and the government subsequently declines to prosecute, *see* Dkt. 318 at 16-19. Boeing first addresses why Paragraph 22 of the NPA cannot be declared void as against public policy. Boeing next addresses why appointing a special prosecutor would be contrary to the Constitution and law.

A. Paragraph 22 of the NPA

Certain of the Objecting Representatives argue that Paragraph 22 of the NPA should be declared void as against public policy. Others concede that the government has full discretion to

trial, is free under the law to take a different view from Mr. Cassell. Regardless, to be clear, Boeing does not agree to any facts proffered by Mr. Cassell or the Objecting Representatives in their briefing.

⁷ It bears note that, consistent with this Court's and the Fifth Circuit's direction, the government has conferred with the Crash Victim Representatives regarding the NPA. The government reported their views to this Court in its Motion to Dismiss, and those who wish to be heard have now had the opportunity to express their views directly to the Court. Having exercised the right to confer and be heard, the only issue is whether the government's Motion to Dismiss meets the standards set by the Fifth Circuit. It does, and the Objecting Representatives do not dispute that the government has presented its reasoned views as to why dismissal is appropriate and in the public interest.

determine whether to prosecute, but they nevertheless argue that Paragraph 22 violates public policy because it somehow usurps the Court’s authority to decide the Motion to Dismiss. *See* Dkt. 318 at 12-16. This argument conflates the government’s authority to decide whether to prosecute with the Court’s authority to rule on a motion to dismiss. The government moved to dismiss and articulated its reasons for dismissal. The government did not, however, argue that its Motion to Dismiss was moot due to its agreement with Boeing not to prosecute, and the Court retains the authority under Rule 48(a) to rule on the government’s motion.

The government’s non-prosecution commitment is set forth in the opening paragraph of the NPA, where the government agrees that it will “not further criminally prosecute the Company for any crimes relating to any of the conduct described in the Statement of Facts” Dkt. 312-1 at 1. Paragraph 22 of the NPA simply and transparently makes the fundamental and indisputable point that the government (and only the government) can determine whether to bring and pursue a criminal charge (like the one set forth in the Information), and that the government has concluded—in its discretion—not to do so. *See United States v. Adams*, 24-CR-556, 2025 WL 978572, at *38 (S.D.N.Y. Apr. 2, 2025) (noting that “delving deeper” into the reasons behind the DOJ’s motion to dismiss “would not change the ultimate outcome here, because the Court—even if it were so inclined—could not force the Government to prosecute this case by denying the Motion”).

Because it is entirely within the government’s discretion whether to pursue a criminal prosecution, an agreement not-to-prosecute (an NPA) does not require Court approval. And there is no basis under the law or the Federal Rules of Criminal Procedure on which to review the NPA

and declare any part of it void as against public policy.⁸ While the Objecting Representatives argue extensively that this NPA is unprecedented, in fact it is at the core of every NPA—whether written or verbal—that the government agrees not to prosecute.

The Objecting Representatives concede—as they must—that the Executive Branch retains the authority to decide whether to prosecute. *See* Dkt. 318 at 14 (“To be clear, voiding the no-further-prosecution provision does not mean that the U.S. Department of Justice is automatically required to move forward with Boeing’s prosecution. . . . To be sure, the Department might ultimately reach the same conclusion about whether to further prosecute Boeing it reached in the NPA.”). Their position is apparently that the government may make the decision not to prosecute unilaterally, but if it elects to do so as part of an agreement that secures benefits to the public and to their own clients then somehow that becomes an impermissible exercise of that same unilateral discretion. They notably cite no legal support for this argument. Every day in this country prosecutors decide not to prosecute and dismiss cases unilaterally, and every day prosecutors make that same decision not to prosecute and to dismiss if the defendant pays a fine or engages in some other remedial act before its court date. Both are exercises of prosecutorial discretion that the law fully allows.

⁸ The Objecting Representatives allege they were not given sufficient notice in conferral with the government of Paragraph 22’s commitment not to prosecute. They claim that alleged lack of conferral violates their rights under the CVRA. Boeing largely defers to the government in this regard, as Boeing did not participate in the conferral sessions, but based on the transcripts attached in opposition, it is evident they were advised in conferral that the government was considering entering into an NPA. *See, e.g.*, Dkt. 318-1 at 103-104. As Mr. Cassell identifies in his declaration, he is an experienced criminal prosecutor and former DOJ official. *See* Dkt. 318-1 at 2-5. He would certainly know that all NPAs involve a commitment not to prosecute as that is the essential nature of a non-prosecution agreement and the core consideration that the counter-party to the government receives.

To do as the Objecting Representatives ask—eliminate the agreement not to prosecute—would not only exceed what the Rules of Criminal Procedure allow, it would violate the law of contract. Not being prosecuted was *the* principal consideration received by Boeing in entering the NPA, and to declare that portion of the agreement void would deprive Boeing of its full consideration.⁹

An NPA is contractual in nature—a *voluntary* agreement between the DOJ and an investigated party, for which each side gives consideration. *See United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998) (interpreting an NPA in accordance with general contract principles); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 738 (D.C. Cir. 2016) (finding that DPAs and NPAs both require adherence to the agreement’s conditions). The Objecting Representatives seek to strike the core consideration that the government offered in negotiating the NPA and on which Boeing relied when it entered that agreement. But Boeing is a private party that cannot be forced to enter into a new agreement or to accede to an NPA that has been amended to remove key elements on which Boeing relied. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) (“When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”). Doing so would be contrary to black letter principles of contract law and would violate due process.

Due process prevents the government from changing the terms or failing to perform its side of the agreement after extracting performance from the counterparty. *Castaneda*, 162 F.3d at 835–36 (under the “general principles of contract law” applicable to non-prosecution agreements, “if a

⁹ Certain Objecting Representatives previously urged the Court to declare a similar provision of the DPA void as against public policy. This Court rejected that argument. Dkt. 185 at 10-12 (denying representatives’ request to “excise from the DPA’ the immunity provisions that block Boeing from prosecution”).

defendant lives up to his end of the bargain, the government is bound to perform its promises.”); *United States v. Garcia*, 519 F.2d 1343, 1345 (9th Cir. 1975) (same for deferred prosecution agreements); *United States v. Hoffman*, Criminal Action No. 14-022, 2014 WL 5040721, at *3 (E.D. La. Oct. 8, 2014) (“Like contracts between private parties, agreements executed during a criminal investigation or prosecution between the government and a witness, target, or accused are interpreted in accordance with general principles of contract law.”); *see also United States v. Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974) (“[W]hen the prosecution makes a ‘deal’ within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance.”); *United States v. Diaz-Garcia*, 26 F. App’x 615, 617 (9th Cir. 2001) (same for pre-trial stipulation between government and defendant). Here, Boeing has already commenced performance by, among other things, paying the required monetary sums into escrow and agreeing to the Statement of Facts. The same due process considerations that bind the government would also prevent this Court from granting any relief urged by the Objecting Representatives that would prevent the government from honoring its contractual undertakings.

B. Appointment of a Special Prosecutor

Certain Objecting Representatives move for immediate appointment of a special prosecutor. *See* Dkt. 321. Others assert that no such appointment should be made at this time but that the Court could appoint one later if the government declines to prosecute. *See* Dkt. 318 at 16-19. And yet others make no such request, *see* Dkt. 319, or otherwise support the proposed resolution and have not filed any objection. Appointment of a special prosecutor, whether now or later, would violate Boeing’s rights and be inconsistent with the Constitution and law. Boeing therefore objects to the appointment of any special prosecutor.

To start, the Objecting Representatives do not possess standing to move for appointment of a special prosecutor. They point to the CVRA as the basis for their standing to make this request, *see* Dkt. 321 at 10, but the CVRA provides no such support. The CVRA grants crime victims enumerated rights and gives them standing to seek relief for violations of those rights. 18 U.S.C. § 3771(a), (d)(1), (d)(3). But appointment of a special prosecutor is not one of the rights provided by the CVRA. *See id.* § 3771(a) (listing CVRA rights). Likewise, the Objecting Representatives are wrong to suggest that the CVRA could provide a statutory basis to appoint a special prosecutor given that the CVRA expressly forbids any reading of the statute that would “impair the prosecutorial discretion of the Attorney General or any officer under his direction.” *Id.* § 3771(d)(6). The CVRA thus cannot provide the remedy certain Objecting Representatives seek—which would not just impair, but override, the Executive’s prosecutorial discretion. *See* Dkt. 334 at 19-22 (government’s arguments as to lack of basis for a motion to appoint a special prosecutor).

Even assuming a basis to so move, the motion seeks unconstitutional relief. The Constitution vests the Executive, and not the Judiciary, with the authority to prosecute. As certain Objecting Representatives allow, that separation of powers is a core pillar of our constitutional form of government. *See* Dkt. 321 at 1-3. “In our system of separation of powers, the role of the judiciary is to ‘say what the law is,’ not to ‘take Care that the Laws be faithfully executed.’” *Adams*, 2025 WL 978572, at *19 (quoting first *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), and then U.S. Const. art. II, § 3). This makes sense because precedent teaches that “courts are ‘particularly ill-suited’ to weigh the factors typically relevant in determining whether to pursue prosecution, such as ‘as [sic] the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan.” *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). Federal courts

thus generally agree that a “court cannot appoint its own prosecutor.” *Id.* at 20; *accord In re U.S.*, 345 F.3d 450, 454 (7th Cir. 2003) (vacating appointment of special prosecutor).

The Objecting Representatives moving for (or open to) the appointment of a special prosecutor provide no reason to think otherwise. *First*, they misread *United States v. Cowan*, 396 F. Supp. 803 (N.D. Tex. 1974), and the Fifth Circuit’s subsequent decision in *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975). To be sure, a judge of this Court initially appointed a special prosecutor in *Cowan*. But, contrary to the position taken by certain Objecting Representatives, the Fifth Circuit’s subsequent reversal of that decision in no way supports appointment of a special prosecutor here. To begin with, the Fifth Circuit vacated that order on appeal based on the trial court’s failure to adhere to the extremely deferential standard that applies to a Rule 48(a) motion to dismiss. 524 F.2d at 514. While that ruling obviated the need for the Fifth Circuit to issue a holding concerning the appointment of a special prosecutor, *id.* at 515, the Fifth Circuit’s ruling is nevertheless affirmatively unhelpful to the Objecting Representatives’ suggestion that this Court should direct this case to proceed notwithstanding the government’s motion. In particular, the Fifth Circuit observed that courts are “*constitutionally powerless to compel the government to proceed*,” even if they deny a motion to dismiss. *Id.* at 511 (emphasis added). The Objecting Representatives thus misread the *Cowan* case to the extent they assert it *supports* the appointment of a special prosecutor. Indeed, the Objecting Representatives fail to cite any case where the Fifth Circuit has approved the appointment of a special prosecutor outside the narrow context of contempt of court—and Boeing is aware of none.

Second, while courts generally cannot appoint their own prosecutors, Boeing acknowledges there is a limited exception to that rule for the appointment of special prosecutors to prosecute contempt proceedings. *See United States v. Donziger*, 38 F.4th 290, 304 (2d Cir. 2022)

(upholding appointment of a special prosecutor in contempt proceeding);¹⁰ Fed. R. Crim. P. 42(a)(2) (“The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.”); Br. of Court-Appointed *Amicus Curiae* Paul D. Clement, *United States v. Adams*, No. 24-CR-556, Dkt. 158 (S.D.N.Y. Mar. 7, 2025) at 15 (“There is one narrow context in which the Supreme Court has recognized that a court has authority to exercise what would otherwise be a core executive function”). But contempt proceedings “present[] markedly different considerations” than the appointment of a special prosecutor to prosecute crimes. *Adams*, 2025 WL 978572, at *19. “[C]ourts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt.” *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987). But courts do not possess an inherent authority to prosecute crimes. *Adams*, 2025 WL 978572, at *19 & n.31. This is why, in another recent case where there were arguments for a special prosecutor, the court remarked that it was aware of “no authority for, or examples of, a district court appointing a private prosecutor in a criminal case outside the contempt context.” *Adams*, 2025 WL 978572, at *19. The Objecting Representatives are seeking an unprecedented

¹⁰ Certain Objecting Representatives cite *Donziger* as support for the proposition that an appointment of a special prosecutor here would not violate the Appointments Clause. *See* Dkt. 321 at 18. *Donziger* held only that the appointment of a special prosecutor *in the contempt context* would not violate the Appointments Clause. *Donziger*, 38 F.4th at 294. It arrived at that conclusion because the special prosecutors at issue in that case were “subject to supervision by the Attorney General,” who can “supervis[e]” and “remov[e]” them. *See id.* at 299-300. But that case is not controlling—and there thus *would be* an Appointments Clause issue here—because the appointment of a special prosecutor in this case would only occur after the Executive decided not to prosecute.

deviation from recognized separation of powers principles with their analogy to contempt prosecutions.

Third, Morrison v. Olson, 487 U.S. 654 (1988) does not support the Objecting Representatives' request. The Court there recognized that *Congress* can vest power to appoint an independent counsel in a specially created federal court. *Id.* at 676. But Congress has provided no similar authorization that would be relevant here. *See* Br. of Court-Appointed *Amicus Curiae* Paul D. Clement, *United States v. Adams*, No. 1:24-cr-56, Dkt. 158 (S.D.N.Y. March 7, 2025) at 15 (“There is no express authorization for the courts to take over a prosecution or to appoint a special prosecutor to maintain a prosecution that the executive wishes to abandon.”). Examples cited by the Objecting Representatives concerning statutorily appointed interim U.S. Attorneys, *see* 28 U.S.C. § 546(d), and statutorily authorized civil relator suits under the False Claims Act are similarly distinct.¹¹

The Objecting Representatives fall back on the All Writs Act as a purported basis of statutory authority. But the All Writs Act's grant of authority to “issue all writs necessary or appropriate in aid of [courts'] respective jurisdictions and agreeable to the usages and principles of law” offers no textual grant of authority whatsoever to appoint a special prosecutor. 28 U.S.C. § 1651(a). Nor—as far as Boeing can tell—has any court ever interpreted it to grant that power. Even assuming the All Writs Act could be construed to grant such authority, which it does not, traditional principles of constitutional avoidance direct courts to avoid reading the All Writs Act to intrude on the separation of powers. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The*

¹¹ At least one judge on the Fifth Circuit has indicated that even the statutorily approved scheme in the False Claims Act is constitutionally suspect. *See United States ex rel Montcrief v. Peripheral Vascular Assocs., P.A.*, 133 F.4th 395, 412 (5th Cir. 2025) (Duncan, J. concurring) (“A Constitution like ours—one that vests *all* federal executive power in a President—does not allow this outsourcing of prosecutorial power to a private person.”).

Interpretation of Legal Texts 247-48 (2012) (explaining that the constitutional doubt canon “militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality”).

At bottom, the Objecting Representatives invite the Court to take steps wholly at odds with our constitutional structure. As the Fifth Circuit recognized in the primary authority the Objecting Representatives attempt to rely upon, “[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, *or whether to dismiss a proceeding once brought.*” *Cowan*, 524 F.2d at 512 (emphasis added) (quoting *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.)). The Executive considers not only those factors from *Wayte*, discussed *supra* at 10, but also “the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). The Objecting Representatives invite the Court to look past these concerns and appoint a special prosecutor that “would not be an executive officer *but a judicial officer.*” Dkt. 321 at 18 (emphasis added). This is an invitation to replace the Executive’s prosecutorial discretion with the Judiciary’s. That is not only novel—it is unconstitutional.

CONCLUSION

Boeing respectfully requests that the Court grant the Motion to Dismiss and deny the Motion to Appoint a Special Prosecutor.

Dated: July 2, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2025, the foregoing was filed with the Clerk of the United States District Court for the Northern District of Texas using the CM/ECF system. The system will serve counsel of record.

/s/ Benjamin L. Hatch
Benjamin L. Hatch