**No. 23-3258**

IN THE
# United States Court of Appeals for the Eighth Circuit

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

STEVEN DORNSBACH; KAMIDA, INC.,
*Defendants-Appellants*.

On Appeal from the
United States District Court for the District of Minnesota
No. 22-cr-00048 (Hon. Daniel M. Traynor)

## APPELLEE'S BRIEF FOR THE UNITED STATES


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## SUMMARY OF THE CASE

Defendants-appellants Steven Dornsbach and his company, Kamida, Inc. ("Kamida"), were charged with one count of conspiracy to restrain trade in violation of Section 1 of the Sherman Act. After a trial before the Honorable Daniel M. Traynor, the jury found them not guilty, and Judge Traynor entered judgments of acquittal. About two months later, Dornsbach and Kamida moved in the same case for a permanent injunction requiring the Department of Justice ("DOJ") to remove from its website a press release about their indictment, which DOJ had updated to reflect their acquittals. Judge Traynor denied the motion for lack of ancillary jurisdiction. Dornsbach and Kamida now challenge that ruling, but it was correct; adjudicating the motion would neither have permitted the court to resolve factually interdependent claims nor have effectuated the judgments of acquittal. Dornsbach and Kamida also purport to appeal two pretrial rulings, but this Court lacks jurisdiction to review those rulings given the acquittals.

The United States believes this Court can resolve the issues based on the record and the briefs. If this Court decides that oral argument is necessary, 10 minutes per side would be adequate.

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## JURISDICTIONAL STATEMENT

The district court had jurisdiction over this criminal case under 18 U.S.C. § 3231. The court entered judgments of acquittal on May 12, 2023. Add. 028-029; R. Docs. 351, 352.[1]

On October 5, 2023, the district court denied Dornsbach and Kamida's post-judgment motion for a permanent injunction requiring DOJ to remove from its website a press release describing their indictment. On October 6, 2023, they timely appealed that ruling. *See* R. Doc. 381. This Court has jurisdiction under 28 U.S.C. § 1291.

On October 18, 2023, Dornsbach and Kamida filed an amended notice of appeal, purporting to add challenges to the district court's (1) February 17, 2023 denial of their pretrial motion to dismiss the indictment (Add. 001-021; R. Doc. 195); and (2) May 9, 2023 rejection of their proposal to instruct the jury on the rule of reason rather than the *per se* rule (R. Doc. 360, at 1222:2-6; *see* R. Doc. 341, at 23, 31). R. Doc. 385. This Court lacks jurisdiction to review these rulings because Dornsbach and Kamida were acquitted. *See infra*, pp. 33-34.

[1] "Add." refers to Appellants' Addendum; "Gov't Add." refers to Appellee's Addendum; and "R. Doc." refers to a district-court docket entry.

## STATEMENT OF THE ISSUES

I. Whether the district court lacked ancillary jurisdiction over Dornsbach and Kamida's motion for a permanent injunction requiring DOJ to remove from its website a press release about their indictment, where adjudicating the motion neither would have permitted the court to resolve factually interdependent claims nor would have effectuated the judgments of acquittal.

*Peacock v. Thomas*, 516 U.S. 349 (1996)

*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)

*United States v. Afremov*, 611 F.3d 970 (8th Cir. 2010)

*United States v. Meyer*, 439 F.3d 855 (8th Cir. 2006)

II. Whether this Court lacks jurisdiction over Dornsbach and Kamida's challenges to two of the district court's interlocutory rulings, where Dornsbach and Kamida were acquitted.

*United States v. Wilson*, 420 U.S. 332 (1975)

*Parr v. United States*, 351 U.S. 513 (1956)

## STATEMENT OF THE CASE

### I. Procedural Background

#### A. Indictment and Press Release

On March 9, 2022, a federal grand jury charged Dornsbach and Kamida with conspiring to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. R. Doc. 1, at 1. The indictment alleged that, from September 2012 through July 2017, Dornsbach and Kamida conspired with competitors to rig bids for concrete repair and construction contracts let by Minnesota municipalities—a "*per se*" violation of Section 1. *Id.*

On March 10, 2022, the day after the indictment was filed, DOJ's Office of Public Affairs ("OPA") issued a press release titled "Minnesota Concrete Company and its CEO Indicted for Rigging Bids for Public Contracts." Add. 040-041; R. Doc. 371-1, at 2-3, https://www.justice.gov/opa/pr/minnesota-concrete-company-and-its-ceo-indicted-rigging-bids-public-contracts. A subtitle stated: "Second Charge Filed for Long-Running Conspiracy that Targeted Local Governments and Public Schools in Minnesota." Add. 040; R. Doc. 371-1, at 2. The press release disclosed that Dornsbach and Kamida had been indicted by a federal grand jury; described the nature of the charge

("According to court documents filed in the U.S. District Court in Minneapolis, Dornsbach and Kamida conspired to rig bids on concrete repair and construction contracts submitted to at least four municipalities in the state of Minnesota, including local governments and school districts in the Minneapolis-St. Paul area, from at least as early as September 2012 and continuing through at least July 2017."); and stated, "Last year, Minnesota concrete contractor Clarence Olson pleaded guilty for his involvement in the conspiracy." *Id.*

The press release also contained statements by the Antitrust Division's Assistant Attorney General[2] and an Assistant Director of the FBI's Criminal Investigative Division[3] about the policy significance of

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[2] "'Bid-rigging schemes that target local government contracts cheat taxpayers out of the benefits of competition,' said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. 'This indictment affirms the division's commitment to safeguarding the integrity of the government procurement process at all levels of government.'" Add. 040; R. Doc. 371-1, at 2.

[3] "'For years, the defendants allegedly cheated their own communities by conspiring to rig bids on concrete repair and construction contracts for local governments and school districts,' said Assistant Director Luis Quesada of the FBI's Criminal Investigative Division. 'Bid rigging is not a victimless crime; it reduces competition and charges taxpayers the difference. This indictment shows that the FBI and our partners are committed to investigating those who try to cheat the system for their own gain.'" Add. 041; R. Doc. 371-1, at 3.

the indictment; described the maximum penalties applicable to a Sherman Act violation, noting that "[a] federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors"; identified the particular FBI and Antitrust Division offices involved in investigating and prosecuting the case, respectively; mentioned the recent formation of DOJ's Procurement Collusion Strike Force; and asked that "[a]nyone with information in connection with this investigation" contact the Antitrust Division. Add. 040-041; R. Doc. 371-1, at 1-2. The press release included a hyperlink to the indictment. Add. 041; R. Doc. 371-1, at 3.

The press release appeared (and continues to appear, as annotated to reflect the jury verdicts), in its chronological order, on the "Press Releases" page of DOJ's website, https://www.justice.gov/news/press-releases (last visited January 26, 2024)—a historical database of 20,666 press releases DOJ issued between January 6, 2009, and the present.[4] (Press Releases dating

[4] *See Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016) (recognizing "the authority of a court to take judicial notice of government websites") (internal quotation marks and citation omitted).

back to 1994 appear under the "Archived News" link. *Id.*). The Press Releases page is searchable by keyword and date range. *Id.* The press release about Dornsbach and Kamida's indictment was one of 11 issued that day, https://www.justice.gov/news/press-releases?search_api_fulltext=+&start_date=03%2F10%2F2022&end_date=03%2F11%2F2022&sort_by=field_date, and one of 135 issued that month, https://www.justice.gov/news/press-releases?search_api_fulltext=+&start_date=03%2F01%2F2022&end_date=04%2F01%2F2022&sort_by=field_date.

### B. Trial, Acquittals, and DOJ's Annotation of Press Release

Before trial, Dornsbach and Kamida moved to dismiss the indictment, arguing (as relevant here) that (1) Section 1 of the Sherman Act is unconstitutionally vague; and (2) the *per se* rule violates the Fifth and Sixth Amendment jury-trial guarantee. R. Doc. 145, at 1-2. In a thorough written opinion, the district court denied the motion. Add. 001-019; R. Doc. 195, at 1-19. Dornsbach and Kamida renewed these arguments at trial, urging the district court to instruct the jury on the rule of reason rather than the *per se* rule. R. Doc. 269, at 63 n.5.

Consistent with its ruling on the motion to dismiss, the district court denied this request. R. Doc. 360, at 1222:2-6; *see* R. Doc. 341, at 23, 31.

After a seven-day trial, the jury found Dornsbach and Kamida not guilty. R. Docs. 343, 344. On Friday, May 12, 2023, the Court entered judgments of acquittal, Add. 028-029; R. Docs. 351, 352, which terminated the case, Criminal Docket for Case No. 0:22-cr-00048-DMT-CRH, *USA v. Dornsbach et al.* ("TERMINATED: 05/12/2023"). On Tuesday, May 16, 2023, OPA added a notation at the top of the press release: "***Note**: The defendants in this case, Steven Dornsbach and Kamida Inc., were acquitted by a jury of the charges alleged in the indictment described in the press release below*." Add. 040; R. Doc. 371-1, at 2. OPA added the same statement to the top of the hyperlinked indictment. Gov't Add. 003; R. Doc. 375, at 3. Similar notations have been applied to other press releases for acquitted defendants.[5]

[5] Gov't Add. 003 n.2; R. Doc. 375, at 3 n.2 (citing Press Release, U.S. Dep't of Justice, *Senior Executives at Major Chicken Producers Indicted on Antitrust Charges*, https://www.justice.gov/opa/pr/senior-executives-major-chicken-producers-indicted-antitrust-charges; Press Release, U.S. Dep't of Justice, *DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry*, https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care; Press Release, U.S. Dep't of Justice, *Four Individuals Indicted on Wage*

### C. Motion for Permanent Injunction

On July 10, 2023, Dornsbach and Kamida moved in the terminated criminal case for a permanent injunction requiring DOJ to remove from its website the annotated press release. R. Docs. 367, 369, 372.[6] They claimed that, by continuing to publish the press release after the acquittals, DOJ was falsely proclaiming their guilt and thereby irreparably harming Dornsbach's reputation and the business opportunities of his sons—who had bought Kamida's assets and were operating a company named Kamida Concrete Construction, LLC. R. Doc. 369, at 1-2, 11, 19. Dornsbach and Kamida asserted no statutory or Constitutional basis for jurisdiction, arguing instead that the district court should exercise ancillary jurisdiction to "'vindicate its authority[] and effectuate'" the judgments of acquittal. R. Doc. 376, at 8 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994)). Specifically, as they put it, the court's "judgments of acquittal are final

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*Fixing and Labor Market Allocation Charges*, https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges).

[6] That same day, the Minnesota Lawyer ran an article entitled, "Federal court jury acquits concrete contractor in bid-rigging case." Add. 023; Gov't Add. 012-014; Doc. No. 375-2.

orders, . . . and are entitled to be respected," yet "the government [is] acting as if the acquittals never happened." *Id.*; *see also id.* n.4 (arguing a direct "connection" between the motion and the underlying criminal case, in that "the acquittal[s] mean[] Defendants are not guilty of federal crimes and the Press Release states the opposite").

The United States opposed on the merits, arguing that the press release "is accurate on its face," and that Dornsbach and Kamida had not shown that DOJ's maintaining the press release on its website violated any legal duty or otherwise supported a cognizable cause of action. Gov't Add. 004-005; R. Doc. 375, at 4-5; *see also id.* at 6 (noting that the motion "does not identify anything in the press release that is factually inaccurate"). The United States argued in the alternative that Dornsbach and Kamida had failed to show that an injunction would be in the public interest given "the public interest in receiving accurate information"—including the fact of the acquittals—"about the Division's enforcement activities." Gov't Add. 005-009; R. Doc. 375, at 5-9. Specifically, press releases announcing charges provide the public "insight into how prosecutors are using public resources," including "which statutes prosecutors are employing, the facts that underlie

charges, and the enforcement priorities of prosecuting offices." *Id.* at 6. And annotating those press releases to reflect any acquittals, rather than removing the press releases from the "historical" record, both "efficiently communicate[s] the outcome of the trial to interested citizens" and avoids "creating a perception that the Department hides adverse results." *Id.*

The district court denied the motion for lack of jurisdiction. Add. 022; R. Doc. 379, at 1. At the outset, the court rejected the premise that the press release asserted Dornsbach and Kamida's guilt. Add. 024; R. Doc. 379, at 3. As the court explained, the title stated that a Minnesota concrete company and its CEO had been "indicted"; the text described the nature of the charges "'[a]ccording to court documents"; the quote from the Antitrust Division official described "bid-rigging schemes generally and his appreciation for the Indictment"; the quote from the FBI official qualified his description of the facts with "'allegedly'"; and, "most importantly," a note at the top of the press release explained that Dornsbach and Kamida had been "'acquitted by a jury of the charges alleged in the indictment described in the press release below.'" Add. 024-025; R. Doc. 379, at 3-4. Thus, according to the court, the press

release "accurately states what occurred": The defendants were accused of violating the Sherman Act and then acquitted by a jury. Add. 025; R. Doc. 379, at 4. And far from contradicting the acquittals, the press release—with the note at the top—"inform[]s the reader of the outcome." Add. 026; R. Doc. 379, at 26.[7]

Observing that Dornsbach and Kamida had not cited a single case approving ancillary jurisdiction "to enjoin the publication of what appears to be a legally and factually accurate news report," the district court concluded that they had "failed to meet their burden" of establishing that the court should exercise such jurisdiction. Add. 026-027; R. Doc. 379, at 5-6. The court noted, however, that Defendants "are free to file a separate civil cause of action" if they "believe their rights have been violated by the continued publication of the Press Release." Add. 027 n.1; R. Doc. 379, at 6 n.1.

This appeal ensued.

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[7] The court also considered, *sua sponte*, whether the acquittals rendered inaccurate any implicit statement that the indictment was supported by probable cause. But the court concluded that the acquittals did not do so because a petit jury's failure to find guilt beyond a reasonable doubt "does not negate proof of the conduct by some lower standard," such as probable cause. Add. 025-026; R. Doc. 379, at 4-5.

## II. Rulings Under Review

Dornsbach and Kamida appeal the district court's denial of their motion for a permanent injunction. Brief of Appellants ("Br.") 18-26. They also purport to appeal the district court's denial of their motion to dismiss the indictment and the court's rejection of their proposed jury instructions on the rule of reason. Br. 26-42.

## SUMMARY OF ARGUMENT

**I.** The district court correctly concluded that it lacked ancillary jurisdiction over Dornsbach and Kamida's permanent-injunction motion. Under *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), federal courts may exercise ancillary jurisdiction "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent"; and "(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80. The district court correctly concluded that Dornsbach and Kamida failed to show that their motion implicated either purpose.

First, the defamation claim brought in the motion was not factually interdependent with the Section 1 charge adjudicated in the

criminal case. Resolving the defamation claim could not have affected the resolution of the criminal case, which had already been disposed of. And the material facts underlying the defamation claim did not overlap with those implicated in the criminal case: At issue in the criminal case was Dornsbach and Kamida's bidding conduct during the period from September 2012 through July 2017, whereas the defamation claim asked whether—after the acquittals—DOJ maintained on its website a press release falsely asserting that Dornsbach and Kamida nonetheless were guilty of the Section 1 charge, and if so, whether any such false assertion was causing irreparable injury to Dornsbach's reputation and the company run by Dornsbach's sons. In short, other than the fact of the acquittals themselves, the defamation claim had little connection to the criminal case.

Second, asserting jurisdiction over the motion would not have permitted the district court to manage its proceedings, vindicate its authority, or effectuate its decrees. The criminal proceeding was over, and the court's decrees—the judgments of acquittal—established that the government had failed to prove the charge beyond a reasonable doubt and barred retrial.

The district court's conclusion finds additional support in this Court's treatment of motions for expungement. In *United States v. Meyer*, 439 F.3d 855 (8th Cir. 2006), this Court concluded, in light of *Kokkoken*, that federal courts lack ancillary jurisdiction over motions to expunge a criminal record that are based solely on equitable grounds. *Id.* at 859-60. Dornsbach and Kamida's motion was quite similar. It sought removal of a law-enforcement record concerning an indictment, and it did so solely on equitable grounds. *Meyer* thus counsels the same result here.

**II.** This Court lacks jurisdiction to review Dornsbach and Kamida's purported challenges to the district court's rulings in the criminal case. Because Dornsbach and Kamida were acquitted, they are not aggrieved parties entitled to review under 28 U.S.C. § 1291. *See United States v. Wilson*, 420 U.S. 332 (1975); *Parr v. United States*, 351 U.S. 513, 516-17 (1956).

## ARGUMENT

### I. The District Court Correctly Denied the Permanent-Injunction Motion for Lack of Ancillary Jurisdiction.

Dornsbach and Kamida failed to establish that the district court had ancillary jurisdiction over the permanent-injunction motion. The court thus correctly denied the motion.

#### A. Standard of Review

This Court reviews *de novo* "the question whether the district court had subject matter jurisdiction." *United States v. Afremov*, 611 F.3d 970, 975 (8th Cir. 2010). "When reviewing a district court's conclusion that it lacks subject-matter jurisdiction," this Court "review[s] the district court's legal determinations *de novo* and its resolution of disputed factual issues for clear error." *Certon Sofware, Inc. v. EaglePicher Techs.*, LLC, 4 F.4th 615, 618 (8th Cir. 2021). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous[,]" and "[t]his is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer*

*City, N.C.*, 470 U.S. 564, 574 (1985) (citations omitted); *Schaub v. VonWald*, 638 F.3d 905, 915 (8th Cir. 2011) (same).

### B. Legal Principles

Federal courts are courts of limited jurisdiction, and they "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen*, 511 U.S. at 377. It is presumed "that a cause lies outside this limited jurisdiction," and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Because parties, too, may not enlarge this limited jurisdiction by waiver or consent, "challenges to federal subject matter jurisdiction may be raised at any time, even for the first time on appeal." *Afremov*, 611 F.3d at 975.

The doctrine of ancillary jurisdiction "recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Kokkonen*, 511 U.S. at 378. In *Kokkonen*, the Supreme Court explained that its cases had sanctioned ancillary jurisdiction only in two contexts: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court

to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-380 (citations omitted); *see also Peacock v. Thomas*, 516 U.S. 349, 354 (1996) (applying *Kokkonen* and rejecting ancillary jurisdiction where case did not fall into either of the two categories *Kokkonen* described); *Afremov*, 611 F.3d at 975 ("[T]he Supreme Court has identified two purposes for which a federal court may exercise ancillary jurisdiction . . . .").[8]

Adhering to those limits, the Supreme Court concluded in *Kokkonen* that a district court lacked authority to consider a particular type of claim—a motion to enforce a settlement agreement that had been reached in a lawsuit before the same district court—because the claim was outside those traditional categories of ancillary jurisdiction. 511 U.S. at 377, 380. The district court did not have ancillary jurisdiction on the theory that the lawsuit and breach-of-

[8] "Congress codified much of the common-law doctrine of ancillary jurisdiction as part of 'supplemental jurisdiction' in 28 U.S.C. § 1367." *Peacock*, 516 U.S. at 354 n.5. Supplemental jurisdiction applies only in civil actions. 28 U.S.C. § 1367(a) ("in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ."); *see Myers v. Richland Cnty.*, 429 F.3d 740, 746 (8th Cir. 2005).

settlement motion were factually interdependent, the Court explained, because the facts underlying the lawsuit and the breach-of-settlement motion were distinct. *Id*. at 380. And the district court did not have ancillary jurisdiction on the theory that such jurisdiction was necessary to effectuate the court's decree in the parties' lawsuit, the Court continued, because that decree simply ordered "that the suit be dismissed." *Id*. That disposition, the Court wrote, was "in no way flouted or imperiled by the alleged breach of the settlement agreement." *Id*. at 380-381.

### C. Discussion

#### 1. The district court lacked authority to consider the permanent-injunction motion under either head of ancillary jurisdiction.

The correctness of the district court's ruling follows directly from *Kokkoken*. Dornsbach and Kamida's permanent-injunction motion was not "factually interdependent" with the underlying criminal case because it depended on events that occurred *after* the criminal case had ended. The motion alleged that, after Dornsbach and Kamida had been acquitted, DOJ maintained on its website a press release that defamed them—by falsely asserting that they nonetheless were guilty of the

Section 1 charge—and irreparably harmed them—by damaging Dornsbach's reputation and injuring the company run by Dornsbach's sons. *See, e.g.*, R. Doc. 369, at 2, 11, 23. Those post-acquittal allegations had little to do with the facts underlying the criminal case: Dornsbach's bidding conduct during the period from September 2012 through July 2017. R. Doc. 341, at 23-24. Thus, as in *Kokkonen*, it would have been "neither . . . necessary nor even particularly efficient that they be adjudicated together." *Kokkonen*, 511 U.S. at 380; *cf. Doe v. United States*, 833 F.3d 192, 198 (2d Cir. 2016) (explaining that a motion to expunge was not factually interdependent under *Kokkonen* where it "may have depended in part on facts developed in [the defendant's] prior criminal proceeding" but was also "premised on events that . . . transpire[d] long after the conviction itself").

*Kokkonen* so held even though both the original claim and the ancillary claim involved the same legal theory: breach of contract. 511 U.S. at 380. Here, the lack of relation between the claims is more pronounced: The ancillary claim invoked a legal theory—defamation—quite distinct from that animating the criminal prosecution—Section 1 of the Sherman Act. As the Supreme Court observed in *Peacock*, "we

have cautioned against the exercise of [ancillary] jurisdiction over proceedings . . . where the relief [sought is] of a different kind or on a different principle than that of the prior decree." 516 U.S. at 358 (internal citations and quotation marks omitted); *see also id.* (holding ancillary jurisdiction could not properly be exercised because "[t]his action is founded not only upon different facts than the [original] suit, but also upon entirely new theories of liability"); *United States v. Maize*, 785 F. App'x 432, 433 (9th Cir. 2019) (holding district court lacked ancillary jurisdiction over motion to compel DOJ to remove public access to electronically stored press releases about his plea agreement and conviction because, in part, "[t]he issue in the criminal case was whether Maize was guilty of the charged crimes," whereas "the issue in the motion to compel is whether the effects of DOJ's actions constituted punishment").

Similarly, in *Afremov*, this Court held that the first head of ancillary jurisdiction did not allow a district court to adjudicate, in a terminated criminal case, an expert's motion to compel payment of consulting fees he charged for responding to subpoenas duces tecum. 611 F.3d 971-75. This Court reasoned that, although the motion and

the criminal case had "certain things" in common ("*i.e.*, the subpoenas, the subpoenaed documents, and so on"), the expert could not show that "the *claim*" he asserted—which "sounds in contract"—"is factually or logically interdependent with any of the criminal charges." *Id.* at 975-76. Specifically, resolving the claim "will not affect the final judgment entered in the criminal case," and "the material facts underlying the criminal charges—for instance, the who, what, where, and when of the alleged kickback scheme—do not overlap with the material facts underlying the contract claim." *Id.* at 976. In short, as here, the claim asserted in the expert's motion lacked any "meaningful connection" to the charges resolved in the criminal case. *Id.*

Nor would the resolution of Dornsbach and Kamida's motion have enabled the district court to "manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 379-80. The judgments of acquittal resolved the criminal case and discharged Dornsbach and Kamida, Add. 028-029; R. Docs. 351, 352, and the criminal case had been terminated for approximately two months before Dornsbach and Kamida filed their motion. *See Maize*, 785 F. App'x at 433 ("Before Maize filed the motion [to compel re the DOJ press

releases], there were no proceedings to manage, no court authority to vindicate, and no decrees to effectuate."); *cf. Afremov*, 611 F.3d at 977 (although expert styled contract claim as motion to quash subpoenas under Fed. R. Crim. P. 17, any Rule 17 claim was mooted at latest when final judgment was entered in the criminal case; district court's decision to adjudicate contract claim thereafter "was not a matter of managing its proceedings, vindicating its authority, or otherwise preserving its ability to function successfully"). And like the dismissal in *Kokkonen* itself, *see* 511 U.S. at 380-381, the judgments here were not conditioned on any further activity; they remain effective irrespective of future extrajudicial developments.

Dornsbach and Kamida's argument to the contrary focuses on the second head of ancillary jurisdiction.[9] They assert that adjudicating the permanent-injunction motion was necessary to "vindicate the district court's authority" and "effectuate—for all practical purposes—the district court's decrees." Br. 22. Specifically, the judgments of acquittal

[9] Dornsbach and Kamida contend that the motion was "interrelated with facts and not-guilty verdicts in the underlying criminal proceeding," Br. 16; *see also* Br. 22, but they provide neither "reasons [n]or arguments" to explain the contention; they thus have abandoned it. *United States v. Zavala*, 427 F.3d 562, 564 n.1 (8th Cir. 2005).

ostensibly "have been rendered meaningless" "[i]n the public eye, and with respect to Dornsbach's reputation," because the press release allegedly asserts that Dornsbach and Kamida are guilty of the bid-rigging charge. Br. 22-25. This argument fails.

The argument depends on a factual claim that the district court rejected. Add. 024; R. Doc. 379, at 3 (stating, as to claim that "the Press Release . . . says the Defendants are guilty of the crimes charged," "[t]he Court disagrees"). In making its ruling, the court "reviewed the Press Release" and found that "[n]owhere in the Press Release does it claim the Defendants are guilty of the crime charged." Add. 024-025; R. Doc. 379, at 3-4. As the court explained, the title states that a Minnesota concrete company and its CEO had been "indicted"; the press release "goes on to indicate the nature of the charges '[a]ccording to court documents'"; the Antitrust official "is quoted describing bid-rigging schemes generally and his appreciation for the Indictment"; the FBI official "qualifie[s] his description of the facts as 'allegedly' occurring"; and "most importantly," the press release "include[s] a note at the top that '[t]he Defendants in this case, Steven Dornsbach and Kamida Inc., were acquitted by a jury of the charges alleged in the indictment

described in the press release below.'" *Id.* Far from asserting Dornsbach and Kamida's guilt, the court concluded, the press release "accurately states what occurred": "The Defendants were accused of violations of the Sherman Act for acts they allegedly did[,]" and they were then "acquitted by the jury." Add. 025; R. Doc. 379, at 4; *see also id.* ("The Press Release simply reiterate[s] the charges in the Indictment."); Add. 026; R. Doc. 379, at 5 ("The Press Release with the outcome at the top does not contradict the acquittals, it inform[]s the reader of the outcome.").

Dornsbach and Kamida do not even acknowledge that the clear-error standard applies to this factual finding, *see* Br. 18 (asserting that "de novo" review applies because "'the material facts are not in dispute'" (quoting *Thompson v. Covington*, 47 F.3d 974, 975 (8th Cir. 1995) (per curiam)),[10] much less contend that the district court clearly erred, *see*

[10] Dornsbach and Kamida claim (Br. 18) that the "material" facts were not in dispute because, at the start of the "Background" section of its opinion, the district court stated: "The relevant facts are not in dispute." Add. 022; R. Doc. 379 at 1. But the "relevant" facts were those in the Background section: the date and nature of the charge, the date and title of the press release, the dates and outcome of the criminal trial, the date and language of the note at the top of the press release, and the date and title of the Minnesota Lawyer article. Add. 022-023; R. Doc. 379 at 1-2. And in the "Discussion" section of the opinion, the court

Br. 22 ("In reviewing the district court's decision *de novo*, Dornsbach and Kamida respectfully submit that the district court erred . . . .") (emphasis added); they thus have abandoned any such contention, *Zavala*, 427 F.3d at 564 n.1.[11] And the court's correct finding—that the press release was "accurate"—destroys the premise of their argument. *Cf. United States v. Lucido*, 612 F.3d 871, 875 (6th Cir. 2010) (rejecting argument that FBI's maintenance of records of acquitted defendant's indictments implicates a district court's ability to manage, vindicate its power over, or effectuate its orders in the terminated criminal cases; "So long as the records of what happened in the proceedings—that he was twice indicted and twice acquitted—are accurate, it is difficult to see what business the courts have as a matter of inherent power in removing any trace of the proceedings."); *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) ("The existence and availability of Coloian's

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explicitly resolved the parties' factual dispute over whether the press release "says the Defendants are guilty of the crimes charged" or is otherwise "inaccurate." Add. 024-026; R. Doc. 379 at 3-5.

[11] In any event, for the reasons the district court described, Dornsbach and Kamida could not show that the press release asserted their guilt, rather than simply describing the allegations in the indictment and noting the subsequent acquittals. Indeed, Dornsbach and Kamida's description of the ostensible inaccuracies in the press release, Br. 23-25, fails even to mention the annotation.

criminal records do not frustrate or defeat his acquittal. In fact, the records are entirely consistent with and respectful of the jury's ultimate judgment in Coloian's case, as they accurately document his arrest, trial and acquittal.").

### 2. *Meyer* lends further support to the district court's holding.

This Court has not specifically considered whether ancillary jurisdiction extends to equitable motions, like Dornsbach and Kamida's, to compel the removal from a government website of a press release announcing a defendant's indictment. But this Court has considered the jurisdictional question in a closely analogous context: equitable motions to expunge criminal records. In that context, this Court has rejected the exercise of ancillary jurisdiction. The same logic supports the district court's holding here.

In *United States v. Meyer*, 439 F.3d 855 (8th Cir. 2006), a former defendant filed a motion to expunge his conviction under the docket number of his criminal case, citing employment difficulties arising from his criminal record. *Id.* at 856. The magistrate judge granted the motion, ordering that "all records of the misdemeanor conviction herein shall be expunged from the records of this Court and from any law

enforcement data[]bases . . . so that [Meyer] will cease suffering unwarranted consequences from this conviction." *Id.* This Court reversed. *Id.* at 863. As this Court explained, although it previously had recognized an inherent but narrow power to expunge federal criminal records in extreme cases, *Kokkonen*'s "narrowing [of] the scope of ancillary jurisdiction" convinced the Court that ancillary jurisdiction cannot extend to expungement motions based solely on equitable grounds. *Id.* at 859-60. Specifically, such motions do not "serve the goals of ancillary jurisdiction as articulated by *Kokkonen*." *Id.* at 861. Instead, with the possible exception of an extraordinary case involving an illegal or invalid criminal proceeding, the power of expungement is one that "the framers of the Constitution allocated to Congress, the Executive, and the states." *Id.* at 861-62 (quoting *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000)).

Dornsbach and Kamida are similarly situated to the defendant in *Meyer*. They urged that a "record" related to their criminal case—the press release concerning their indictment—be expunged. They did so solely on equitable grounds, citing injunction standards rather than any Constitutional provision or statute. *Meyer*, 439 F.3d at 861. And they

did not seek expungement on the ground that their criminal proceeding was "in any way invalid or illegal." *Id.* The logic of *Meyer*'s jurisdictional holding thus would appear to apply equally to them. Indeed, the Sixth Circuit, which has the same rule as *Meyer*, *see United States v. Field*, 756 F.3d 911 (6th Cir. 2014) ("[F]ederal courts lack ancillary jurisdiction over motions for expungement based on purely equitable considerations."), recently applied that rule to an expungement motion directed, in part, at press releases on the Department of Justice's website. *See United States v. Valueland Auto Sales, Inc.*, 847 F. App'x 344, 345 (6th Cir. 2021) (no ancillary jurisdiction over defendants' motion for expungement of records pertaining to their indictment, including DOJ press releases, where the criminal charges had been dropped).[12]

Also applicable here is *Meyer*'s separation-of-powers concern. Entertaining the permanent-injunction motion based on a defamation

[12] In *Valueland*, the defendants' motion asked that the court "issue an order expunging all records related to the Government's investigation, indictment, and prosecution of this case, including but not limited to, any news releases on the Department of Justice's website." Defendants Valueland Auto Sales, Inc.'s and Ron Benit's Motion to Expunge Their Records at 1, ECF No. 173, *United States v. Valueland Auto Sales, Inc.*, Case No. 2:13-cr-00143 (S.D. Ohio).

claim would have contravened the Federal Tort Claims Act (FTCA), which does not waive sovereign immunity for defamation claims against the federal government. *See* 28 U.S.C. § 2680(h); *McAdams v. Reno*, 64 F.3d 1137, 1144 (8th Cir. 1995); *see, e.g.*, *Moessmer v. United States*, 760 F.2d 236, 237-38 (8th Cir. 1985) (holding that FTCA barred claim that government "communicated defamatory material" from employment record, because claim "falls within the libel and slander exception to the FTCA"). And ordering DOJ to remove the press release arguably would have trespassed on the detailed scheme Congress established under the Privacy Act to ensure that the government maintains accurate records. *See* 5 U.S.C. § 552a; *McCready v. Nicholson*, 465 F.3d 1, 7-8, 10-12 (D.C. Cir. 2006) ("[T]he Act safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records . . . by allowing an individual to participate in ensuring that his records are accurate and properly used.") (internal quotation marks omitted). Although the district court did not explicitly rely on the separation-of-powers concern, *Meyer* shows that that concern strongly supports the district court's ruling.

### 3. Dornsbach and Kamida's authorities are inapposite.

Instead of addressing this Court's relevant precedents, including *Afremov* and *Meyer*, Dornsbach and Kamida rely on cases that they suggest—without elaboration—involve analogous circumstances. But none of these cases support the exercise of ancillary jurisdiction in the circumstances here; indeed, many of the cases do not involve ancillary jurisdiction. *Cf.* Add. 026; R. Doc. 379, at 5 (district court observing, "The cases the Defendants rely on do not provide the Court with sufficient conviction it should assert ancillary jurisdiction over the claim").

First, Dornsbach and Kamida point to cases in which courts have issued orders to control pretrial publicity (*i.e.*, gag orders). *See* Br. 20 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *United States v. Brown*, 218 F.3d 415, 423-24 (5th Cir. 2000)). But neither *Sheppard* nor *Brown* involved ancillary jurisdiction. Gag orders are "case management orders[]," *Brown*, 218 F.3d at 422 n.7, crafted "to protect the jury from outside influence" and ensure "a fair trial," *Sheppard*, 384 U.S. at 358, in *pending* cases over which the court has jurisdiction under 18 U.S.C. § 3231. *See United States v. Schiavo*, 504 F.2d 1, 6

n.10 (3d Cir. 1974) (pretrial publicity order authorized under "the jurisdiction granted to the district courts over 'all offenses against the laws of the United States' in 18 U.S.C. § 3231 and the requirements of the Sixth amendment" for a fair trial).

Second, Dornsbach and Kamida point to cases involving post-trial orders forbidding defendants from contacting victims or witnesses. *See* Br. 20 (citing *United States v. Grigsby*, 737 F. App'x 375, 377 (10th Cir. 2018); *United States v. Morris*, 259 F.3d 894, 900-01 (7th Cir. 2001)). But neither of these cases involved a jurisdictional question, much less purported to apply *Kokkonen*. *Grigsby* merely stated without analysis that the no-contact order was issued pursuant to ancillary jurisdiction. 737 F. App'x at 377. *Morris* addressed whether the district court had overstepped its "sentencing authority" in imposing a no-contact order as a condition of the defendant's sentence. 259 F.3d at 900-01.

Finally, Dornsbach and Kamida advert to motions for the return of property seized in criminal cases, *see* Br. 25 (citing *Ball v. United States*, 193 F.3d 998, 999 (8th Cir. 1999); *Thompson*, 47 F.3d at 975; *United States v. Douglas*, 55 F.3d 584, 586 (11th Cir. 1995)), and to a third-party motion to enforce a criminal restitution order, *see* Br. 25

(citing *United States v. Chan*, 22 F. Supp. 2d 1123, 1127 (D. Haw. 1998)). But again, none of these cases purport to apply *Kokkonen*, and Dornsbach and Kamida offer no explanation of why those cases' holdings would govern here. Br. 25.

In any event, the seized-property cases, at least, accord with *Kokkoken*'s first category: Because the government's seizure and retention of disputed property is itself grounded in the judicial proceedings in the underlying criminal case, *see, e.g., Henderson v. United States*, 575 U.S. 622, 624 (2015) (seizure of firearm as condition of bail), a motion seeking the property's return is factually interdependent with that case. No such interdependence exists when the government merely issues a press release about an indictment.

As for *Chan*, a (non-precedential) district court case, it did not address a question of ancillary jurisdiction. The question in *Chan* was whether a third-party's motion to compel compliance with a criminal restitution order could be considered a civil action within the meaning of the Equal Access to Justice Act, whose prevailing-party attorney's fees provision applies only to civil actions. 22 F. Supp. 2d at 1125, 1127; *see also id.* at 1126 ("the United States does not argue that the Court

does not have jurisdiction"). To the extent the court *understood* itself to be exercising ancillary jurisdiction over the motion to compel, that unstated belief has no bearing here. In *Chan*, the third party sought to enforce the terms of a plea agreement that had been "incorporated into the Court's judgment." *Id.* at 1126. Here, by contrast, and as in *Kokkonen*, the judgments of acquittal were not conditioned on any further activity.

Dornsbach and Kamida, then, have failed to show that the district court erred in holding that they did not carry their burden of establishing ancillary jurisdiction.

## II. This Court Lacks Jurisdiction to Review the Other Asserted Grounds of Appeal.

Dornsbach and Kamida also purport to appeal the district court's denial of their motion to dismiss the indictment (Add. 001-021; R. Doc. 195) and its rejection of their proposal to instruct the jury on the rule of reason rather than the *per se* rule (R. Doc. 360, at 1222:2-6; R. Doc. 341, at 23, 31). R. Doc. 385; *see* Br. 26-42 (arguing that Section 1 of the Sherman Act is unconstitutionally vague and that the application of the *per se* rule violates the Fifth and Sixth Amendments). This Court lacks jurisdiction to review these purported challenges because Dornsbach

and Kamida were acquitted. *See Parr v. United States*, 351 U.S. 513, 516-17 (1956) (a criminal defendant who was acquitted of all charges cannot appeal the judgment because "[o]nly one injured by the judgment sought to be reviewed can appeal, and . . . petitioner has not been injured by [the prosecution's] termination in his favor."); *United States v. Wilson*, 420 U.S. 332, 348 (1975) ("[T]he verdict of acquittal foreclosed retrial and thus barred appellate review.").

To the extent that Dornsbach and Kamida ask this Court to address their constitutional arguments anyway because "[t]he permanent-injunction motion should be considered in light of the statute's unconstitutionality" on remand to the district court, Br. 42-43, "[t]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (internal quotation marks and citation omitted). As this Court reiterated in *Meyer*, "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." 439 F.3d at 859 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Dornsbach and Kamida's motion for a permanent injunction and dismiss for lack of jurisdiction the purported appeal of the district court's rulings on the motion to dismiss and jury instructions.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 6,976 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word 2016, using 14-point Century Schoolbook font, a proportionally spaced typeface.

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## CERTIFICATE OF VIRUS SCAN

Pursuant to Eighth Circuit Local Rule 28A(h)(2), I certify that Microsoft Defender has been run on the brief and addendum and that no virus was detected.

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## CERTIFICATE OF SERVICE

I certify that on January 26, 2024, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel of record for all parties.

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