No.

In the Supreme Court of the United States

HORNBECK OFFSHORE SERVICES, LLC, ET AL.,
Petitioners,

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following the Deepwater Horizon oil spill, the government imposed a moratorium on drilling in the Gulf of Mexico. The district court enjoined enforcement of the moratorium, citing the lack of any rational relationship to the factual record. Federal officials nonetheless asserted that the moratorium continued in effect and soon thereafter issued a new, virtually identical moratorium.

The district court subsequently held the government in civil contempt, but the Fifth Circuit reversed. It acknowledged the government had effected an "end-run" around the district court's injunction, but concluded that the district court should have issued a "more broadly worded injunction that explicitly prohibited the end-run taken by Interior." App., *infra*, 16a. Five judges dissented from the denial of rehearing en banc.

The questions presented are:

1. Whether—as the Third, Seventh, and Eleventh Circuits hold—a district court possesses authority to prevent circumvention of its orders by imposing sanctions on conduct that violates the understood purpose of an injunction, but not its explicit terms, or whether—as the First, Second, Fifth, and Tenth Circuits hold—the four corners of an injunction's text limit a district court's civil contempt authority.

2. Whether—as the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits hold—a court of appeals should accord deference to a district court's construction of its own orders, or whether—as the Second, Fifth, District of Columbia, and Federal Circuits hold—an appellate court reviews that construction *de novo*.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners here were plaintiffs-appellees in the court below. They are Hornbeck Offshore Services, LLC; Martin Holdings, LLC; C-Port, LLC; C-Port 2, LLC; Offshore Support Services, LLC; Fourchon Heavy Lift, LLC; Clean Tank, LLC; Sea Fluids, LLC; C-Innovation, LLC; Alpha Marine Services, LLC; Nautical Solutions, LLC; Nautical Ventures, LLC; Reel Pipe, LLC; North American Fabricators, LLC; North American Shipbuilding, LLC; Gulf Ship, LLC; and Tampa Ship, LLC.

In addition, Bollinger Shipyards, Inc.; Bollinger Shipyards Lockport, LLC; Bollinger Algiers, LLC; Bollinger Amelia Repair, LLC; Bollinger Calcasieu, LLC; Bollinger Fourchon, LLC; Bollinger Larose, LLC; Bollinger Marine Fabricators, Inc.; Bollinger Morgan City, LLC; Bollinger Quick Repair, LLC; Bollinger Texas City, L.P.; Bollinger Gretna, LLC; Bee Mar, LLC; Bee Mar Crews, LLC; Bee Mar - Honey Bee, LLC; Bee Mar - Worker Bee, LLC; Bee Mar - Bayou Bee, LLC; Bee Mar - Bumble Bee, LLC; Bee Mar - Busy Bee, LLC; Bee Mar - Bee Sting, LLC; Bee Mar - Queen Bee, LLC; and Bee Mar - Bee Hive, LLC were also plaintiffs-appellees below.

Respondents here were defendants-appellants below. In the lower court, those parties were Kenneth Salazar, Secretary of the Interior; the United States Department of the Interior; the Bureau of Safety and Environmental Enforcement; and Michael R. Bromwich, Director, Bureau of Safety and Environmental Enforcement. Pursuant to Rule 35.3, Sally Jewell, who was sworn in on April 12, 2013 as Secretary of the Interior, should be substituted for Kenneth Salazar. Likewise, James Watson, who is the current Director of the Bureau of Safety and En-

vironmental Enforcement, should be substituted for Michael Bromwich.

CORPORATE DISCLOSURE STATEMENT

Hornbeck Offshore Services, LLC, is a wholly-owned subsidiary of Hornbeck Offshore Services, Inc. No publicly held company owns 10% or more of the stock of Hornbeck Offshore Services, Inc.

Martin Holdings, LLC; C-Port, LLC; C-Port 2, LLC; Offshore Support Services, LLC; Fourchon Heavy Lift, LLC; Clean Tank, LLC; Sea Fluids, LLC; C-Innovation, LLC; Alpha Marine Services, LLC; Nautical Solutions, LLC; Nautical Ventures, LLC; Reel Pipe, LLC; North American Fabricators, LLC; North American Shipbuilding, LLC; Gulf Ship, LLC; and Tampa Ship, LLC are privately owned entities. No publicly held company owns 10% or more of the stock of any of these entities.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 713 F.3d 787. That opinion replaced the court's earlier opinion (App., *infra*, 20a-50a), which is reported at 701 F.3d 810. The opinion of Judge Clement, joined by Judges Jones, Smith, and Elrod, dissenting from denial of rehearing en banc (App., *infra*, 84a-89a) is not reported. The opinion of the district court imposing sanctions for civil contempt (App., *infra*, 51a-59a) is not reported. The district court's preliminary injunction order (App., *infra*, 60a-62a) and its opinion granting the motion for a preliminary injunction (App., *infra*, 63a-83a) are also not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2013, and the court of appeals denied rehearing en banc on that date. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

This case presents fundamental questions regarding the power of a federal district court to ensure compliance with its orders—both as a general matter and in the particular context of abuse of government power by the Executive Branch.

The district court here found that the government's order imposing a blanket moratorium on drilling of oil wells in the Gulf of Mexico, which affected 33 previously-permitted wells, was likely arbitrary and capricious because the court was "unable to divine or fathom a relationship between the [factual

record] and the immense scope of the moratorium." App., *infra*, 78a. Given the enormous adverse economic impact on the drilling industry and the entire Gulf community, the district court issued a preliminary injunction barring enforcement of the moratorium and permitting drilling to resume.

The government immediately undertook a series of actions designed to undermine the district court's order. As the district court concluded, "each step the government took following the Court's imposition of a preliminary injunction showcases its defiance." App., *infra*, 58a.

Thus, on the very day that the court issued its order, Secretary of the Interior Salazar publicly announced that the moratorium was appropriate and promised to issue a new order to bar drilling. The next day, he stated repeatedly in the course of congressional testimony that the moratorium was "in place" notwithstanding the court's order. Subsequently, during a meeting with members of the oil industry, the Interior Department sought to chill renewed drilling activities by emphasizing the costs that industry would incur under the new, forthcoming moratorium. Finally, without seeking a remand from the district court, the Department issued a second, substantively-identical moratorium.

The district court found that "[s]uch dismissive conduct, viewed * * * in light of the national importance of this case, provide this Court with clear and convincing evidence of the government's contempt of [the district court's] preliminary injunction Order." App., *infra*, 58a-59a. It ordered the government to pay petitioners' legal fees as a sanction.

The Fifth Circuit reversed. Although the court of appeals majority acknowledged that the government had effected an "end-run" around the injunction, it reversed because the actions of the government were not "explicitly prohibited" by its construction of the district court's order, which it interpreted *de novo*. App., *infra*, 16a. Judge Elrod dissented from the panel's decision, and five judges dissented from the denial of rehearing en banc. They concluded:

> The majority's holding enervates the judicial contempt power by prohibiting a district court from finding contempt where a party technically abides by the terms of the court order but nonetheless acts for the purposes of evading that order. * * * The district court's finding of contempt was amply supported by facts indicating that the Government acted solely to evade the court's injunction against enforcing the moratorium.

Id. at 88a-89a (Clement, J., dissenting).

This case presents for review two substantial questions that have divided the lower courts. *First*, courts disagree as to the scope of a district court's authority to sanction conduct that, although not violative of the letter of an injunction, is nonetheless designed to circumvent its purpose. Several courts have found that a district court necessarily possesses contempt authority in these circumstances; indeed, this Court itself has indicated that such power is inherent to a federal court. But the court below rejected that principle, severely limiting a district court's ability to enforce compliance with its orders.

Second, the lower courts disagree regarding the standard of review that applies when reviewing a

district court's interpretation of its own order. The court below utilized a *de novo* standard, but most other courts of appeals defer to a court's interpretation of an order it wrote. A district court's analysis plainly deserves deference, both because that court is best positioned to interpret its own orders and because such discretion is necessary to provide the court with authority to ensure compliance with its orders.

A district court's ability to prevent deliberate circumvention of its orders is essential to maintaining the effectiveness of and respect for the federal judiciary. And that is especially true "where, as here, the contemnor represents a co-equal branch of government. As the least dangerous branch among equals, the Judiciary must be vigilant regarding compliance with its orders, lest it become toothless." App., *infra*, 19a (Elrod, J., dissenting) (footnote omitted). See also *id.* at 88a (Clement, J., dissenting from denial of rehearing en banc) ("[s]uch behavior is especially concerning when undertaken by the Government as a litigant" because "'[u]nder no circumstances should the Judiciary become the handmaiden of the Executive. * * * The Constitution commands that the judicial power of the United States must be reposed in an independent Judiciary, free from potential domination by other branches of government.'").

This Court should grant review to resolve the conflicting approaches of the courts of appeals and reaffirm the proper scope of a district court's authority to punish deliberate attempts to evade its orders.

A. The Government Imposes A Drilling Moratorium Following The Deepwater Horizon Incident.

On April 20, 2010, the Deepwater Horizon oil platform exploded in the Gulf of Mexico. App., *infra*, 64a. Eleven crew members died and millions of barrels of oil spilled into the Gulf over the weeks that followed. *Id*. at 64a n.2.

President Obama ordered the Secretary of the Interior (then Ken Salazar) to conduct a review of the Deepwater Horizon incident and to report, within thirty days, "what, if any, additional precautions and technologies should be required to improve the safety of oil and gas exploration and production operations on the outer continental shelf." App., *infra*, 64a.

The Secretary issued a report on May 27, 2010, that identified certain immediate and long-term reforms to improve drilling safety. App., *infra*, 65a.[1] The report's executive summary also recommended "a six-month moratorium on permits for new wells being drilled using floating rigs" as well as "an immediate halt to drilling operations on the 33 permitted wells, not including relief wells currently being drilled by BP, that are currently being drilled using floating rigs in the Gulf of Mexico." *Ibid*.

The report's executive summary stated that "the recommendations contained in this report have been peer-reviewed by seven experts identified by the National Academy of Engineering." App., *infra*, 65a. This statement, however, was false; the experts

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[1] The report, Increased Safety Measures for Energy Development on the Outer Continental Shelf, is available at http://tinyurl.com/interior-report.

called it both "misleading" and a "misrepresentation." *Ibid.* Although "the experts agreed with the safety recommendations contained in the body of the main report, five of the National Academy experts and three of the other experts * * * publicly stated that they 'do not agree with the six month blanket moratorium' on floating drilling." *Ibid.* These experts instead "envisioned a more limited kind of moratorium, but a blanket moratorium was added after their final review, they complain, and was never agreed to by them." *Ibid.*

The Department of the Interior's Inspector General later determined that, "after peer review, White House officials had inappropriately modified the report." App., *infra*, 3a.

On May 28, 2010, the Secretary issued the "May Directive," which imposed a drilling moratorium. App., *infra*, 4a. It barred for six months "all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions." *Ibid.* "Deepwater" was defined as depths greater than 500 feet. *Ibid.* This moratorium thus affected approximately 4,500 active leases in the Gulf, including the 33 permitted wells that were being drilled at the time the Secretary imposed the moratorium. *Ibid.*

B. The District Court Enjoins The Moratorium.

The offshore oil industry is of vital economic importance to Gulf communities. Approximately 150,000 relatively high-paying jobs are directly related to offshore oil operations. App., *infra*, 68a. And the roughly 3,600 structures in the Gulf account for about 31% of total domestic oil production. *Ibid.*

Petitioners—companies that own vessels engaged in deepwater oil exploration and/or provide support services for deepwater exploration and production—initiated this action in the United States District Court for the Eastern District of Louisiana seeking to invalidate the moratorium on the grounds that it exceeded the government's authority. App., *infra*, 63a n.1, 68a. In order to resume their drilling activities, petitioners sought a preliminary injunction. *Id.* at 68a-69a.

The district court (Feldman, J.) granted petitioners' request for a preliminary injunction. App., *infra*, 63a-83a. The court reviewed the Secretary's exercise of authority under the Outer Continental Shelf Lands Act (OCLSA) pursuant to the Administrative Procedure Act (APA), which prohibits the Secretary from taking actions under the OCLSA that are "arbitrary and capricious." *Id.* at 77a.

The court was "unable to divine or fathom a relationship between the findings" of the Secretary's report "and the immense scope of the moratorium." App., *infra*, 78a. For example, the report "offer[ed] no time line for implementation" and it "lack[ed] any analysis of the asserted fear of threat of irreparable injury or safety hazards posed by the thirty-three permitted rigs also reached by the moratorium." *Ibid.* Moreover, the report "is incident-specific and driven: Deepwater Horizon and BP only. None others." *Ibid.* Although the moratorium banned drilling at depths greater than 500 feet, "there is no mention of the 500 foot depth anywhere in the Report itself;" instead, the report considered "deepwater" "as drilling beyond a depth of 1000 feet." *Id.* at 78a.

The court also found that omissions in the record demonstrated irrational decision-making. "There is

no evidence presented indicating that the Secretary balanced the concern for environmental safety with the policy of making leases available for development." App., *infra*, 80a. Likewise, "[t]here is no suggestion that the Secretary considered any alternatives: for example, an individualized suspension of activities on target rigs until they reached compliance with the new federal regulations said to be recommended for immediate implementation." *Ibid*.

At bottom, because the government "failed to cogently reflect the decision to issue a blanket, generic, indeed punitive, moratorium with the facts developed during the thirty-day review," the court concluded that petitioners had "established a likelihood of successfully showing that the Administration acted arbitrarily and capriciously in issuing the moratorium." App., *infra*, 81a-82a. In light of "the immeasurable effect on the plaintiffs, the local economy, the Gulf region, and the critical present-day aspect of the availability of domestic energy in this country," the court granted a preliminary injunction. *Id*. at 82a-83a.

The district court on June 22, 2010, entered an injunction that "prohibited" the Secretary of the Interior "from enforcing the Moratorium." App., *infra*, 61a.

C. The Government Prevents Resumption Of Drilling Operations Despite The Court's Injunction.

Notwithstanding the district court's order, the Secretary of the Interior "[i]mmediately" took a number of steps "to ensure that the intended effect of the May Moratorium—that no one drill in the Gulf—

remained intact." App., *infra*, 41a. Among other things:

- Within hours of the court's injunction, "Secretary Salazar publicly announced that the May Moratorium 'was and is the right decision' and promised to 'issue a new order in the coming days that eliminates any doubt that a moratorium is needed, appropriate, and within our authorities.'" *Ibid.* The Secretary made this statement "before the consideration of any new information." *Hornbeck Offshore Servs., LLC* v. *Salazar*, No. 10-cv-1663, at 5 n.3 (Sept. 1, 2010) (Dkt. # 165).
- The next day, June 23, 2010, Secretary Salazar—during testimony at a congressional hearing—referred to the moratorium, on multiple occasions, as "in place." App, *infra,* 41a-42a.
- Shortly thereafter, the Interior Department hosted a meeting with representatives of the oil and gas industry and indicated that it intended to issue a second moratorium. *Id.* at 42a. One industry participant explained that this signaled "that the cost and expense of resuming drilling should not be undertaken by the industry because the second moratorium would prevent that activity from continuing once it was issued." *Ibid.*
- Although the Department had notified thousands of entities of its May moratorium directive, it informed only the lessees of the 33 active wells of the district court's decision enjoining that directive. *Id.* at 42a-43a.

"Ultimately," Judge Elrod explained, "these actions had the same effect as the May Moratorium: no one resumed drilling." *Id.* at 43a.[2]

On July 12, 2010, Interior issued a new moratorium. The July Moratorium was, "[w]ithout doubt," "the same 'in scope and substance'" as the original moratorium. App., *infra*, 7a. The two moratoriums were "mirror images of one another, covering the same rigs and the same deepwater drilling for the same period." *Id.* at 43a. The government, moreover, "issued the July Moratorium without seeking remand to reopen its administrative proceedings." *Ibid.*

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[2] The government took an interlocutory appeal of the injunction. App., *infra*, 6a-7a. The Fifth Circuit denied a stay. *Id.* at 7a. Of particular relevance to this proceeding, it did so because the Secretary had "made no showing that there is any likelihood that drilling activities will be resumed pending appeal." *Hornbeck Offshore Servs., LLC* v. *Salazar*, No. 10-30585, at 2 (5th Cir. July 8, 2010). After the government issued a revised moratorium in July 2010, the Fifth Circuit remanded the matter to the district court to determine whether the new policy mooted the case. App., *infra*, 7a. See also *Hornbeck Offshore Servs., LLC* v. *Salazar*, No. 10-30585 (5th Cir. Aug. 16, 2010).

The district court held that the lawsuit was not moot because the "second moratorium arguably fashions no changes from the first moratorium," and the court of appeals subsequently dismissed the appeal of the preliminary injunction as moot. App., *infra*, 7a-8a. But the court of appeals specifically noted that it would "not express any opinion on whether the issuance of a second moratorium * * * violated the district court's preliminary injunction" or "was done merely to avoid judicial review." *Hornbeck Offshore Servs., LLC* v. *Salazar*, No. 10-30585, at 2 n.2 (5th Cir. Sept. 29, 2010). The court instead left those questions for resolution by the district court.

The government lifted the July Moratorium on October 12, 2010, which allowed drilling operations to resume. App., *infra*, 43a-44a. This effectively mooted petitioners' lawsuit (*ibid.*), which was ultimately dismissed with prejudice. *Id.* at 51a.

D. The Civil Contempt Proceedings.

Petitioners sought reimbursement of their legal fees as a sanction for civil contempt based on federal officials' actions violative of the district court's order. App., *infra*, 56a.

1. The district court agreed that respondents "were in civil contempt." App., *infra*, 51a. It awarded $528,801.18 in fees and $444.33 for costs (*id.* at 52a), under its "inherent authority in cases of civil contempt to enforce * * * judicial orders through an assessment of attorney's fees." *Id.* at 56a.

The court emphasized that it was not the Secretary's issuance of a second moratorium on July 12, 2010 that alone provided a basis for contempt. App., *infra*, 58a. Instead,

> each step the government took following the Court's imposition of a preliminary injunction showcases its defiance: the government failed to seek a remand; it continually reaffirmed its intention and resolve to restore the moratorium; it even notified operators that though a preliminary injunction had issued, they could quickly expect a new moratorium.

Ibid. "Such dismissive conduct, viewed in tandem with the reimposition of a second blanket and substantively identical moratorium and in light of the national importance of this case," provided "clear and convincing evidence of the government's contempt of

this Court's preliminary injunction Order." *Id.* at 58a-59a.

2. The Fifth Circuit reversed by a divided vote. Although it reviewed the "contempt findings for abuse of discretion," it applied a *de novo* standard to "the interpretation of the scope of the injunctive order." App., *infra*, 28a (quotation omitted).

The court noted that, "[i]f the purpose" of the injunction was "to assure the resumption of operations until further court order, it was not clearly set out in the injunction." App., *infra*, 34a. Thus, while the court acknowledged that the government effected an "end-run" around the injunction, "[a] more broadly worded injunction that explicitly prohibited the end-run taken by Interior would have set up issues more clearly supportive of contempt." *Ibid.*

In reaching this conclusion, the panel majority found that "[t]he national importance of this case weakens, not strengthens, the propriety of the court's contempt finding." App., *infra*, 34a. "The controversial policy decisions that the May and July Directives reflected were made at the highest level of government." *Ibid.*

Judge Elrod dissented. In her view,

> [b]y, among other things, referring to the May Moratorium as 'in place' without simultaneously indicating that drilling could proceed pursuant to the court's injunction, emphasizing its immediate intent to issue a new, identical moratorium, and notifying only the thirty-three wells that were being drilled at the time of the Deepwater Horizon incident, Interior ensured that the May Moratorium remained *de facto* in place.

App., *infra*, at 48a-49a. That result was directly counter to the "clear" purpose of the injunction: that "Interior could not enforce the May Moratorium on drilling." *Id.* at 48a.

Judge Elrod criticized the majority's hyper-technical approach to the terms of the district court's injunction; in her view, "the majority opinion suggests that a litigant can undermine and avoid a district court's order, provided that it does not, as a very technical matter, engage in activity that the order expressly prohibits." App., *infra*, 47a. Rather, Judge Elrod explained that "[a] district court order need not anticipate every creative or strategic tactic a litigant may take to evade it." *Ibid.*

Judge Elrod also found "troubling" the majority's view that the "national importance" of the case "weaken[ed]" the court's contempt power. App., *infra*, 49a. "Our Founding Fathers," she explained, "stressed the necessity of protecting the independence of the Judiciary, especially in light of its unique vulnerability to attack by the other branches of government." *Ibid.* That the moratorium stemmed from "the highest levels of government" "does not insulate those decisions from judicial review." *Id.* at 49a. Instead, "[t]he Judiciary's inherent contempt power is essential to preserve judicial independence and to ensure that judicial decrees are not impotent." *Id.* at 49a.

3. The Fifth Circuit sua sponte considered whether to grant rehearing en banc. The panel issued an amended opinion and rehearing en banc was denied by a divided vote.

The panel's revised opinion (App., *infra*, 1a-19a) excised the discussion of the national importance of

the drilling moratorium, but continued to recognize that the government's actions effected an "end-run" around the district court's injunction. *Id*. at 16a.

The panel majority stated that "a district court is entitled to a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order," but it subsequently required that "the injunction's provisions must be 'clear in what conduct they [have] mandated and prohibited.'" App., *infra*, 10a, 11a. See also *id*. at 15a (refusing to find contempt because of the absence of an "explicit[] prohibit[ion]" in the court order). In overturning the district court's finding of contempt, the majority stated that "[a] more broadly worded injunction that explicitly prohibited the end-run taken by Interior would have set up issues more clearly supportive of contempt." *Id*. at 16a.

Judge Elrod again dissented. She observed that the majority opinion "now recognizes" that a district court may "look to the totality of circumstances" in determining whether a litigant violated an injunction but concluded that the majority's "cramped application" of that standard "may give incentive for litigants creatively to circumvent district court orders." App., *infra*, 19a. And "[t]his is especially troubling where, as here, the contemnor represents a co-equal branch of government." *Ibid*.

4. Five judges dissented from the denial of rehearing en banc. Judge Clement, joined by Judges Jones, Smith, and Elrod, issued a dissenting opinion.

App., *infra*, 85a.[3] In her view, the panel decision "raises troubling questions regarding the extent of the Judiciary's contempt power," and will have the inevitable effect of "enervat[ing] the judicial contempt power by prohibiting a district court from finding contempt where a party technically abides by the terms of the court order but nonetheless acts for the purposes of evading that order." *Id*. at 85a, 88a.

Judge Clement stated that although the majority opinion "pays lip service" to the district court's authority to base a finding of civil contempt on the intentional circumvention of a court order, "[s]everal passages within the revised opinion indicate that the majority reached its decision by" applying the legal standard contained in the panel majority's original opinion—"that a district court could not have found the Government in contempt absent an explicit violation of the injunction's terms." App., *infra*, 86a-87a. Indeed, she stated, "it is nearly impossible to find a set of facts more suggestive of intent to evade a court order, but still short of outright defiance of that order's explicit terms." *Id*. at 86a.

The dissenting judges emphasized "that a foreseeable extension of the majority opinion 'may give incentive for litigants creatively to circumvent district court orders.'" App., *infra*, 88a. And "[s]uch behavior is especially concerning when undertaken by the Government as a litigant." *Ibid*.

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[3] Judge Owen also voted in favor of rehearing en banc, but did not join Judge Clement's dissenting opinion. App., *infra*, 85a.

REASONS FOR GRANTING THE PETITION

The contempt power distinguishes the federal courts from "mere boards of arbitration, whose judgments and decrees would be only advisory." *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911). This case presents for review two important questions regarding the scope of the civil contempt power as to which the lower courts are divided and whose proper resolution is essential to protect the courts' authority to require compliance with their orders.

First, the courts of appeals disagree as to whether a court may sanction conduct that is intentionally designed to defeat the understood purpose of a judicial order, but nonetheless does not violate the order's express terms. Several circuits have held that courts may sanction such purposeful circumvention of their orders, but others, including the court below, tie the contempt power to violations of the express terms of the order. As the dissenting judges below recognized, that approach provides an affirmative incentive for creative circumvention of court orders, which is precisely what occurred in this case.

Second, this case presents the question of the standard of review that a court of appeals should apply in reviewing a district court's interpretation of its own orders. The majority of courts of appeals defer to the district court's construction of its own orders, an approach that is not only sensible—the court that drafted an order is the best interpreter of its meaning—but also necessary to ensure that a trial court has authority to manage the litigants before it. Here, by subjecting the trial court's construction of its own order to *de novo* review, the Fifth Circuit again improperly circumscribed the district court's authority.

Both of these questions arise frequently in the lower courts and both are important for the additional reason that they relate to the district courts' authority to require compliance with their orders. Here, moreover, they arise in a uniquely important context—the courts' authority to ensure compliance by the Executive Branch with judicial orders and thereby protect citizens from impermissible exercises of government power.

Once the Fifth Circuit's legal errors are corrected there can be no doubt that the district court plainly acted within its authority to impose sanctions based on the government's conduct in this case. Review by this Court is warranted.

I. The Courts Of Appeals Are Divided Regarding The Questions Presented.

There is a clear, deep division among the lower courts both as to the scope of a district court's power to sanction conduct undertaken specifically to circumvent restrictions imposed by a court order, as well as the standard of review applicable to a district court's construction of its own order.

A. The Lower Courts Have Reached Conflicting Conclusions Regarding A Court's Power To Sanction Actions Specifically Undertaken To Defeat The Purpose Of A Court Order.

The courts of appeals have adopted divergent standards as to whether a district court may sanction conduct that violates the clear purpose, but not the explicit terms, of an injunction. Some circuits, embracing a broad view, authorize district courts to issue contempt sanctions in these circumstances to preclude conduct specifically designed to undermine

the court's order. Other circuits, by contrast, take a restrictive approach, narrowly confining the contempt power to violations of the precise terms of an injunction's text. The Tenth Circuit has expressly recognized this conflict among the lower courts. *Consumers Gas & Oil, Inc.* v. *Farmland Indus., Inc.*, 84 F.3d 367, 371 (10th Cir. 1996) (adopting a restrictive interpretation, but recognizing that "[n]ot all circuits strictly construe [Fed. R. Civ. P.] 65(d)" and citing the Eleventh Circuit's standard to demonstrate the disagreement).

1. The Third, Seventh, and Eleventh Circuits authorize a district court to enter a contempt sanction where a party circumvents the purpose of an injunction, even if the conduct does not technically violate the order's terms as narrowly construed. These courts base their approach on this Court's longstanding guidance that a judicial "decree must be read in view of the issues made and the relief sought and granted." *Haskell* v. *Kan. Natural Gas Co.*, 224 U.S. 217, 223 (1912).

The Third Circuit, citing *Haskell*, holds that "[t]he language of an injunction must be read in the light of the circumstances surrounding its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, *and the mischief that the injunction seeks to prevent*." *United States* v. *Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972) (emphasis added). Thus, "where an injunction does give fair warning of the acts that it forbids," it cannot "be avoided on merely technical grounds." *Ibid.* Under this approach, it is the "thrust" of the order that is critical to its subsequent enforcement. *Harris* v. *City of Philadelphia*, 47 F.3d 1342, 1353 (3d Cir. 1995).

Thus, after a district court had enjoined the selling of certain fireworks assembly-kits, the Third Circuit found that the order was violated by sales of individual components and by sales of different, but equivalent, kits. *Christie Industries*, 465 F.2d at 1007-1008.

The Seventh Circuit likewise applies the principle that "conduct" may "violate an injunction if it threatens the spirit if not the literal language of the earlier order." *Youakim* v. *McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995). Also relying on *Haskell*, the court explained that an order must be interpreted, in part, against "the mischief the injunction was designed to eradicate." *Ibid.* Thus "the terms of an injunction, like any other disputed writing, must be construed in their proper context." *Ibid.*

As Judge Posner explained, "[i]f narrow literalism is the rule of interpretation, injunctions will spring loopholes, and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes." *Schering Corp.* v. *Ill. Antibiotics Co.*, 62 F.3d 903, 906 (7th Cir. 1995)). See also *3M* v. *Pribyl*, 259 F.3d 587, 598 (7th Cir. 2001) (same). Thus, in *Schering*, the court held that an order barring the sale of an antibiotic solution was violated by sales of the solution in powder, rather than liquid, form. *Schering*, 62 F.3d at 907.

The Eleventh Circuit, also pointing to *Haskell*, holds that the purpose of an injunction must control, as "the narrowest conceivable interpretation of an injunction is not necessarily the correct one." *Alley* v. *U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1205 (11th Cir. 2009). "Otherwise an enjoined party could assert 'an overly literal or hypertechnical read-

ing' of an injunction in order to slip the restraints that it imposes on that party." *Ibid.* (quoting *AmBrit, Inc.* v. *Kraft, Inc.*, 812 F.2d 1531, 1548 n.89 (11th Cir. 1986)). Where the purpose of the injunction is "readily ascertainable to an ordinary person," the order may not be circumvented "even though the injunction does not recite in precise detail the particular way in which the forbidden end would be brought about." *Id.* at 1206-1207.

Alley rested on the court's earlier opinion in *Abbott Laboratories* v. *Unlimited Beverages, Inc.*, 218 F.3d 1238, 1241 (11th Cir. 2000), which held that a consent judgment, like any other judicial order, "is to be read in the light of the circumstances surrounding its formation." There, the order barred the marketing of certain solution in square bottles; that order, the court concluded, also barred the party from selling the same product to a third party, who would then market it in square bottles. A court's order "need not recite every possible way in which a violation might occur when the proscribed conduct is readily ascertainable to an ordinary person." *Ibid.*

Thus, the Eleventh Circuit directs that "Rule 65(d) should not be applied strictly; rather the inquiry should be whether the parties subject to the injunctive order understood their obligations under the order." *Williams* v. *City of Dothan*, 818 F.2d 755, 761 (11th Cir. 1987).

2. The First, Second, and Tenth Circuits—like the Fifth Circuit in the present case—apply a much more technical approach, concluding that contempt sanctions may be imposed only if a party has violated the technical terms of the injunction. According to these courts, the violation must be found within the "four corners" of the injunction.

That standard was applied by the court below in reversing the district court's finding of contempt. The Fifth Circuit determined that, to support the sanction, the district court would have had to have issued a "more broadly worded injunction that explicitly prohibited the end-run taken by Interior." App., *infra*, 16a.

That is consistent with the holding of prior Fifth Circuit panels that an injunction's reach is limited to "the four corners of the order." *FTC* v. *Sw. Sunsites, Inc.*, 665 F.2d 711, 724 (5th Cir. 1982) (quotation omitted). Enforcement of an injunction, accordingly, cannot venture outside the "four corners of the order." *Seattle-First Nat'l Bank* v. *Manges*, 900 F.2d 795, 800 (5th Cir. 1990).[4]

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[4] In its amended opinion, the court below stated that "a district court is entitled to a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order." App., *infra*, 10a. But that statement—which did not appear in the court's earlier decision—follows Fifth Circuit precedent that focuses on the *terms of the order* as controlling, and precludes sanctions where a party's actions were intentionally designed to circumvent the obvious purpose of the court's order. Indeed, the court below made clear that contempt is limited to circumstances where the injunction "explicitly prohibit[ed]" the conduct at issue. *Id*. at 15a. See also *id*. at 86a-87a (Clement, J., dissenting from denial of rehearing en banc) (although panel majority "pays lip service" to the district court's authority to base a finding of civil contempt on the intentional circumvention of a court order, "[s]everal passages within the revised opinion indicate that the majority reached its decision by presuming that a district court could not have found the Government in contempt absent an explicit violation of the injunction's terms").

The Tenth Circuit also "strictly construe[s] Rule 65(d)." *Consumers Gas & Oil*, 84 F.3d at 371. The court pointed to the Fifth Circuit's decision in *Seattle-First National Bank* as support for the "strict[]" rule. *Ibid.* See also *Hatten-Gonzales* v. *Hyde*, 579 F.3d 1159, 1168 (10th Cir. 2009) ("This strict approach mandates that the parties 'be able to interpret the injunction from the four corners of the order.'" (quoting *Seattle-First Nat'l Bank*, 900 F.2d at 800)).

The First Circuit has also embraced the "four corners" rule. The test is "'whether the putative contemnor is able to ascertain from the four corners of the order precisely what acts are forbidden.'" *United States* v. *Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005) (quoting *Goya Foods, Inc.* v. *Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002)).

In *Saccoccia*, the court had entered an order barring a criminal defendant's attorneys from transferring funds held by the defendant; the district court subsequently held the attorneys in contempt after they remitted some of those monies to themselves in satisfaction of fees. 433 F.3d at 26. The First Circuit reversed, however, finding that there was no evidence that "the payments were within the activities *expressly* forbidden by the Order." *Id.* at 30 (emphasis added). See also *Harvey* v. *Johanns*, 494 F.3d 237, 242 (1st Cir. 2007) ("A court's power to enforce a judgment is confined to the four corners of the judgment itself.").

The Second Circuit also applies the "four corners" rule; "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden." *Drywall Tapers & Pointers of Greater New York, Local 1974* v. *Local 530 of Opera-*

tive Plasterers & Cement Masons Int'l Ass'n, 889 F.2d 389, 395 (2d Cir. 1989). See also *Fonar Corp* v. *Deccaid Servs., Inc.*, 983 F.2d 427, 429, 430 (2d Cir. 1993) (vacating contempt finding despite submission "that defendants knew precisely what was prohibited" because forbidden acts were not within "the four corners of the order").

B. The Lower Courts Are Also Divided As To The Standard For Reviewing A District Court's Interpretation Of Its Order.

This case implicates a second, related conflict that often arises in tandem with the first—the proper standard of review to apply on appeal with respect to a district court's construction of its own order. Most courts of appeals defer to the interpretation of an order by the court that drafted it, while other courts—including the court below in this case—review the construction *de novo*. The District of Columbia Circuit has acknowledged this conflict. *United States* v. *W. Elec. Co.*, 900 F.2d 283, 294 (D.C. Cir. 1990) (per curiam).

1. The First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits accord substantial deference to a district court's construction of its own order.

The First Circuit, for example, "accord[s] deference to the district court's interpretation of the wording of its own order." *Harvey*, 494 F.3d at 242. That approach recognizes "the special role played by the writing judge in elucidating the meaning and intendment of an order which he authored." *Martha's Vineyard Scuba Headquarters, Inc.* v. *Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1066-1067 (1st Cir. 1987). See also *Goya Foods*, 290

F.3d at 75 ("we evaluate [the district court's] ultimate finding on contempt for abuse of discretion").

Similarly, in the Fourth Circuit, review of a contempt order is "for abuse of discretion," and "[w]hen a district court's decision is based on an interpretation of its own order," the "review is even more deferential because district courts are in the best position to interpret their own orders." *JTH Tax, Inc.* v. *H & R Block E. Tax Servs., Inc.*, 359 F.3d 699, 705 (4th Cir. 2004). Accordingly, "the district court's interpretation of its own" orders deserves "especial respect." *In re Grand Jury Subpoena (T-112)*, 597 F.3d 189, 195 (4th Cir. 2010).

The Third, Sixth, Eighth, and Tenth Circuits apply the same standard. *WRS, Inc.* v. *Plaza Entm't, Inc.*, 402 F.3d 424, 428 (3d Cir. 2005) ("great deference is given to a district court's interpretation of its own order"); *Kendrick* v. *Bland*, 931 F.2d 421, 423 (6th Cir. 1991) ("The District Court's interpretation of its own order is certainly entitled to great deference."); *Hartis* v. *Chicago Title Ins. Co.*, 694 F.3d 935, 947 (8th Cir. 2012) (deferring to district court's construction of its order); *G.J.B. & Assocs.* v. *Singleton*, 913 F.2d 824, 831 (10th Cir. 1990 ("[t]he district court surely knows more about the meaning of its own orders than we do, and we are not prepared to second guess its construction").

The Seventh and Eleventh Circuits similarly accord "broad deference" to "a district court in its interpretation of its own orders," because "[t]hat court is in the best position to interpret its own orders." *Southworth* v. *Bd. of Regents of Univ. of Wis. Sys.*, 376 F.3d 757, 766 (7th Cir. 2004) (quotation omitted); *Alley*, 590 F.3d at 1202 ("review[ing] a district court's interpretation of its own orders only for an abuse of

discretion"). Where, however, the order "was entered by a different district judge," the court "accord[s] his interpretation no deference and review[s] the requirements of that judgment de novo." *Youakim*, 71 F.3d at 1282-1283. See also *Alley*, 590 F.3d at 1202.

2. The Second, Fifth, District of Columbia, and Federal Circuits, by contrast, review the district court's construction of its own order *de novo*.

In this case, for example, the Fifth Circuit stated that "'the interpretation of the scope of the injunctive order is a question of law to be determined by the independent judgment of this Court.'" App., *infra*, 9a (quoting *Drummond Co.* v. *Dist. 20, United Mine Workers*, 598 F.2d 381, 385 (5th Cir. 1979)). Applying a *de novo* standard, both *Drummond* and the court below reversed the district court's construction of its own order. See *Drummond*, 598 F.2d at 387.

The D.C. Circuit follows the same approach. That court holds that "the scope of the injunction is to be 'determined by the independent judgment'" of the appellate court. *United States* v. *Philip Morris USA Inc.*, 686 F.3d 839, 844 (D.C. Cir. 2012) (*quoting Int'l Ass'n of Machinists & Aero. Workers* v. *E. Air Lines, Inc.*, 849 F.2d 1481, 1485 (D.C. Cir. 1988)). See also *W. Elec. Co.*, 900 F.2d at 294 (expressly "reject[ing]" the argument that a "particular district judge's interpretations should be afforded some 'special' deference because he drafted the pivotal provision of the decree"); *United States* v. *Pollard*, 959 F.2d 1011, 1023 (D.C. Cir. 1992) (same).

The Second and Federal Circuits agree: "when a district court's ruling on a contempt motion is challenged on appeal, its interpretation of the terms of the underlying order or judgment is subject to *de no-*

vo review." *Latino Officers Ass'n* v. *City of New York*, 558 F.3d 159, 164 (2d Cir. 2009); *Abbott Labs.* v. *TorPharm, Inc.*, 503 F.3d 1372, 1382 (Fed. Cir. 2007) ("interpretation of the terms of an injunction is a question of law [the court] review[s] de novo").

II. The Questions Presented Are Important.

Both questions presented recur with great frequency in the lower courts. In circuits that have addressed whether a district court's civil contempt power may reach beyond the precise terms of the order, the "anti-circumvention"[5] and the "technical"[6] standards are often applied.

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[5] **Third Circuit:** *Fishkin* v. *Susquehanna Partners, G.P.*, 2010 WL 547509 (E.D. Pa. 2010); *Equinox Software Sys., Inc.* v. *Airgas, Inc.*, 1997 WL 12133 (E.D. Pa. 1997) (examination of an injunction "requires not only a review of its express language but also of its 'thrust' and the circumstances surrounding its entry"). **Seventh Circuit:** *United States* v. *Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009); *FTC* v. *Cleverlink Trading Ltd.*, 519 F. Supp. 2d 784, 798 (N.D. Ill. 2007); *Hinrichs* v. *Bosma*, 2005 WL 3544300, at *3 (S.D. Ind. 2005). **Eleventh Circuit:** *Planetary Motion, Inc.* v. *Techsplosion, Inc.*, 261 F.3d 1188, 1204 (11th Cir. 2001); *SEC* v. *Pension Fund of Am., L.C.*, 2006 WL 1104768 (S.D. Fla. 2006); *Exter Shipping Ltd.* v. *Kilakos*, 310 F. Supp. 2d 1301, 1308 (N.D. Ga. 2004) ("Numerous courts have found conduct to violate an injunction when it threatens the spirit, if not the language, of the original order."); *Chandler* v. *James*, 998 F. Supp. 1255, 1269 (M.D. Ala. 1997).

[6] **First Circuit:** *Aronov* v. *Napolitano*, 562 F.3d 84, 92 n.11 (1st Cir. 2009); *Hoult* v. *Hoult*, 2003 WL 1716683 (D. Mass. 2003); *UTGR, Inc.* v. *Mutuel/Gaming Clerks Union*, 2010 WL 231122 (D.R.I. 2010); *Fatsis* v. *Braunstein*, 405 B.R. 1 (B.A.P. 1st Cir. 2009) (per curiam). **Second Circuit:** *U.S. Polo Ass'n* v. *PRL USA Holdings, Inc.*, 2013 WL 837565 (S.D.N.Y. 2013); *United States* v. *Acquest Transit LLC*, 2010 WL 6350470, at *10 (W.D.N.Y. 2010); *Yash Raj Films (USA),*

Moreover, in virtually every case in which the grant or denial of a contempt sanction is appealed, the reviewing court necessarily must apply a standard of review to the lower court's construction of its order. There can be little doubt, accordingly, that the questions presented here are of substantial practical importance to the efficient operation of the legal system.

But the significance of these issues extends far beyond their sheer numerical recurrence. The scope of the contempt power is fundamental. As the Court has long explained, "[i]f 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 'judicial power of the United States' would be a mere mockery." *Gompers*, 221 U.S. at 450.

A court's "inherent" power "to punish for contempts" "is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Ex parte Robinson*, 86 U.S. 505, 510 (1873).

And the power of the judiciary to sanction conduct is of exceptional importance when, as here, the government itself is a litigant. "The Federal Judici-

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Inc. v. *Bobby Music Co. & Sporting Goods, Inc.*, 2006 WL 2792756, at *6-7 (E.D.N.Y. 2006). **Fifth Circuit:** *Williams* v. *Recovery Sch. Dist.*, 859 F. Supp. 2d 824, 833 (E.D. La. 2012). **Tenth Circuit:** *FTC* v. *Kuykendall*, 371 F.3d 745, 761 (10th Cir. 2004); *Abdulhaseeb* v. *Jones*, 2013 WL 1288642 (W.D. Okla. 2013); *Millennium Labs., Inc.* v. *Rocky Mountain Tox, LLC*, 2011 WL 843935 (D. Colo. 2011); *In re Van Vleet*, 2009 WL 3162212 (D. Colo. 2009).

ary was * * * designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." *N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982). It would frustrate the constitutional separation of powers if district courts lacked adequate authority to sanction contemptuous behavior by the government.

Finally, determining the appropriate standard of review also has independent importance. As Judge Edwards has explained, "[s]tandards of review" "are critically important in determining the parameters of appellate review and in allocating authority between trial courts and agencies, on the one hand, and the appellate bench, on the other." Harry T. Edwards & Linda A. Elliott, Federal Standards of Review, at vii-viii (2007).

Given the importance of such issues, it is no surprise that this Court often grants review to resolve the lower courts' disagreements regarding the standard of review governing particular questions. See, *e.g.*, *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997); *Koon* v. *United States*, 518 U.S. 81, 100 (1996); *Cooter & Gell* v. *Hartmarx Corp.,* 496 U.S. 384, 399-405 (1990); *Pierce* v. *Underwood*, 487 U.S. 552, 557-563 (1988). Resolution of the proper governing standard is similarly both appropriate and necessary here.

III. The Court Below Erred In Reversing The Finding Of Civil Contempt.

The deep divisions among the courts of appeals with respect to these frequently-recurring questions

provides reason enough to grant review. In addition, the court of appeals reached the wrong result with respect to both issues in this case.

1. The Fifth Circuit's view that a district court lacks power to sanction conduct intended to circumvent the purpose of the district court's own order is plainly wrong.

In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 189 (1949), the district court had entered an injunction requiring a defendant to comply with certain aspects of the Fair Labor Standards Act, such as proper calculation of overtime pay. The company subsequently engaged in activity that—while not violative of the express terms of the injunction—nonetheless defeated its purpose. *Id.* at 190. For example, the company fictitiously characterized certain pay as a bonus so as to avoid overtime requirements. *Ibid.*

The Court flatly rejected the contention that the company was immune from contempt because its conduct "was not specifically enjoined." *McComb*, 336 U.S. at 192. Permitting this defense "would give tremendous impetus to the program of experimentation with disobedience of the law"—a result that the Court "condemned" because it would "operate to prevent accountability for persistent contumacy." *Ibid.* If a party could avoid an injunction through creative circumvention, "a whole series of wrongs is perpetrated and a degree of enforcement goes for naught." *Id.* at 193. Accordingly, to preclude "easy evasion," the Court refused to limit the contempt power to those acts that were "specifically enjoined," as that would defeat the "remedial benefits of a decree." *Ibid.*

As Judge Easterbrook more recently explained, "[t]here is a limit to what words can convey," and Rule 65(d) "does not require the impossible." *Scandia Down Corp.* v. *Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th Cir. 1985). In a trademark case, for example, there "are millions of possible logos" to which an infringer "could have turned;" "[a]ny effort to identify and prohibit one million of them would have left another million or more subject to dispute." *Ibid.*

For just that reason, this Court has long interpreted judicial orders by reference to their purpose, and not solely their literal text. Indeed, a century ago, the Court found it "well settled" that "a decree is to be construed with reference to the issues it was meant to decide." *City of Vicksburg* v. *Henson*, 231 U.S. 259, 269 (1913). See also *Haskell*, 224 U.S. at 223 (an injunction "must be read in view of the issues made and the relief sought and granted"). That is, a court must look to the "objectives" the order is meant to accomplish. *Salazar* v. *Buono*, 130 S. Ct. 1803, 1819 (2010). See also *id.* at 1843 (Breyer, J., dissenting) ("[A] court should construe the scope of an injunction in light of its purpose and history, in other words, 'what the decree was really designed to accomplish.'" (quoting *Henson*, 231 U.S. at 273)).

If a party is uncertain as to whether its conduct complies with a judicial order, it can—indeed it should—seek "a modification, clarification or construction of the order" from the court that issued it. *McComb*, 336 U.S. at 192. See also *Scandia*, 772 F.2d at 1432 ("The right to seek clarification or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed."). Permitting a district court to sanction intentional circumvention encourages a party to do exactly that.

The contrary approach—limiting the contempt power based on a technical reading of the order's express terms—encourages a party purposefully to circumvent the order, and then use its creative evasion as a defense to contempt. Without the power to sanction such intentional evasion under its contempt authority, which this Court has described as a "necessary and integral part of the independence of the judiciary," a federal court is rendered a "mere board[] of arbitration, whose judgments and decrees would be only advisory." *Gompers*, 221 U.S. at 450.

2. The Fifth Circuit was also wrong to subject the district court's construction of its own order to *de novo* review. An appellate court should defer to the district court's interpretation of its injunction.

It is "sound administration of justice" to defer to the "judicial actor" that "is better positioned than another to decide the issue in question." *Pierce*, 487 U.S. at 559-560 (quotation omitted). There can be little dispute "that 'the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes.'" *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 227 (1947) (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940)). And, as Judge Friendly recognized, "a sound judicial system also requires a good deal of deference to trial court decisions." Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 759 (1982).

Accordingly, "the 'construction given to' an 'injunction by the issuing judge * * * is entitled to great weight.'" *Buono*, 130 S. Ct. at 1843 (Breyer, J., dissenting) (quoting *Madsen* v. *Women's Health Ctr., Inc.,* 512 U.S. 753, 795 (1994) (Scalia, J., concurring

in judgment in part and dissenting in part)). See also *Missouri* v. *Jenkins*, 495 U.S. 33, 49-50 (1990) ("The Eighth Circuit surely knows more than we do about the meaning of its orders, and we accept its action for what it purports to be.").

This Court's decision in *Cooter* is particularly instructive. There, the Court concluded that an abuse-of-discretion standard applies to all aspects of a district court's determination of sanctions under Federal Rule of Civil Procedure 11. *Cooter*, 496 U.S. at 405. It did so for several reasons. *First*, because Rule 11 determinations often require a court to consider fact and law together, a district court—which is "[f]amiliar with the issues and litigants"—"is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard." *Id.* at 402. *Second*, because the result of this inquiry is necessarily context-specific—and thus "is unlikely to establish clear guidelines for lower courts" and will not "clarify the underlying principles of law"—there was diminished basis for *de novo* review. *Id.* at 405. *Third*, deferential review "streamline[s] the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court," and it "discourage[s] litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." *Id.* at 404. *Fourth*, the Court concluded that "[d]eference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them." *Ibid.*

Those factors weigh decisively in favor of deferential review here as well. The interpretation of an injunction is necessarily a context-driven task that is

best undertaken by the court that authored the order. That interpretation is fact-bound and will thus have limited (and likely no) effects outside the immediate litigation. See Friendly, *supra,* 31 Emory L.J. at 760 ("[A] principle supporting deference to rulings of the trial court is the absence of the benefits that ordinarily flow from appellate review in establishing rules that will govern future cases.").

Deferential review also will streamline the litigation process and discourage marginal appeals. See *Pierce*, 487 U.S. at 560 ("even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense"). Finally, deference to a court's construction of its own order provides district courts with the essential power of "control[ling] the litigants before them." *Cooter*, 496 U.S. at 404.

3. These twin errors fatally infected the result below. The court reviewed the injunction issued by the court *de novo*. App., *infra*, 9a ("the interpretation of the scope of the injunctive order[] is a question of law to be determined by the independent judgment of this Court" (quotation omitted)). And then, after construing the injunction narrowly, the Fifth Circuit concluded that the district court lacked power to sanction the government's "end-run" around it. *Id*. at 16a. Contempt required, in the view of the court below, a "***more broadly worded*** injunction that ***explicitly prohibited*** the end-run taken by Interior." *Ibid*. (emphasis added).

But the district court *did* have authority to sanction the government's "end-run." Under the anti-circumvention rule adopted by several circuits—and required by this Court's precedent—the district court

acted within its authority. And that is especially so given that the district court has substantial discretion in construing the original order that it issued.

As Judge Clement's dissent from the denial of rehearing en banc explained, "it is nearly impossible to find a set of facts more suggestive of an intent to evade a court order, but still short of outright defiance of that order's explicit terms." App., *infra*, 86a. It is in precisely these circumstances that a district court must be empowered to sanction noncompliance. Any rule to the contrary "enervates the judicial contempt power by prohibiting a district court from finding contempt where a party technically abides by the terms of the court order but nonetheless acts for the purposes of evading that order." *Id*. at 88a.

And this conclusion is all the more true where it is the *government* itself that has derogated from a judicial order. The Constitution safeguards both "the role of the independent judiciary within the constitutional scheme of tripartite government" and a litigant's "right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986) (quotations omitted). The government's "end-run" around the order of the district court, if left unremedied, frustrates the independence of the judiciary and the judiciary's ability to protect citizens from abuse of government power. The Fifth Circuit's improper limitation of the contempt power of the district court, accordingly, should be corrected by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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