No. 13-56

# 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**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Apparently recognizing that it could not defeat certiorari by facing up to the conflicting decisions of the courts of appeals regarding the questions presented—reflected in the disagreements among the members of the court below—the government instead has chosen obfuscation and denial.

The brief in opposition fails to describe, even cursorily, the reasons for Judge Elrod's dissent from the panel opinion and the rationale of the dissent from denial of rehearing *en banc*. Those omissions allow the government to claim that we fail to show that our preferred legal standard "would make any difference here" (Opp. 16)—without mentioning that the dissenters below found the different legal standard outcome determinative, and without explaining why this Court should ignore that fact.

And the omissions allow the government to ignore the dissenters' explanation of the significant practical importance of the issues presented for review. As Judge Clement explained (joined by Judges Jones, Smith, and Elrod dissenting from the denial of rehearing *en banc*) the panel's decision "raises troubling questions regarding the extent of the Judiciary's contempt power." Pet. App. 85a. Because "it is nearly impossible to find a set of facts more suggestive of an intent to evade a court order" (*id*. at 86a), the panel's "holding enervates the judicial 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.

Leaving this decision undisturbed would have "foreseeable" implications: providing "incentive[s] for

litigants creatively to circumvent district court orders." Pet. App. 88a (quotation omitted). *Amici* echo that concern. Offshore Marine Serv. Ass'n Br. 12 ("[t]he Fifth Circuit's ruling * * * will serve as an invitation to litigants in all kinds of cases to evade rather than obey court rulings").

Disobedience to a court's injunction "is especially concerning when undertaken by the Government as a litigant" (dissent from denial of rehearing *en banc*) (Pet. App. 88a). "[R]eview is * * * urgently needed, not only to resolve the split of authority identified by the Petitioners, but also to rein in the government when it attempts an end-run around the authority of the courts." CATO Br. 12. "[I]f federal district courts lack sufficient latitude to sanction contemptuous conduct by the Executive Branch, our constitutional system of checks and balance will be rendered a dead letter." Washington Legal Found. Br. 23.

Review by this Court is clearly warranted.

### A. This Court Should Resolve The Conflict Over The Scope Of A District Court's Civil Contempt Authority.

In opposing certiorari on the first question—whether the reach of an injunction is limited by the four corners of its text, or must be determined on the basis of the order's text, purpose, and context—the government advances four arguments: that petitioners waived this contention, that there is no conflict among the lower courts, that the decision below is right, and that the correct rule would not alter the outcome here. Opp. 12. Each is demonstrably wrong.

*1. There was no waiver.*

"Any issue pressed or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (quotation and citations omitted). Even where a claim was "not raised by petitioner below," the Court may nonetheless "address it" so long as "it was addressed by the court below." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Here, the court of appeals passed on the precise issue presented in the petition's first question. See, *e.g.*, Pet. App. 15a-16a. Indeed, the majority's conclusion that civil contempt was impermissible here because the government's particular method for effecting an "end-run" around the district court's injunction was not "explicitly prohibited" by the underlying injunction was the principal basis for the dissent's disagreement. *Id.* at 16a, 19a. And the dissent from the denial of rehearing *en banc* addressed the same issue. *Id.* at 85a.

Moreover, petitioners *did* press this argument in the court of appeals, arguing, for example, that an order need "not choreograph every step, leap, turn and bow" in order to "specif[y] the end results expected." C.A. Br. 25 (quotation omitted). The panel itself characterized petitioners' position as arguing that civil contempt was warranted because the government "ignored the purpose of the district court's injunction." Pet. App. 15a-16a.[1]

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[1] The government points (Opp. 13-14) to *American Airlines, Inc.* v. *Allied Pilot Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000), but petitioners cited that case for the proposition that a

The government, like the panel majority, takes the view that the reach of a court order is assessed by interpreting its words in the technical manner, like that applied in construing a property conveyance. Petitioners, like the dissenters below, argue that the scope of an order should be determined based on its language, purpose, and context. Those conflicting views were presented below and were the basis of the differing rulings below.

*2. The courts of appeals are divided.*

Given the Tenth Circuit's express recognition of the circuit conflict on this issue (see *Consumers Gas & Oil, Inc.* v. *Farmland Indus., Inc.*, 84 F.3d 367, 371 (10th Cir. 1996)), the government cannot credibly dispute that different courts apply different rules.

The government relies on obfuscation in addressing decisions of the Seventh and Eleventh Circuits rejecting the narrow four-corners approach applied below. It wrests from context the Seventh Circuit's statement (quoted in whole by the Eleventh Circuit) that the court has "no quarrel with the general rule"—the "general rule" the court was referencing is the truism that "injunctions should be construed narrowly." *Schering Corp.* v. *Ill. Antibiotics Co.*, 62 F.3d 903, 906 (7th Cir. 1995). See also *Alley* v. *U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1206 (11th Cir. 2009).

But the government omits the court's subsequent, critical qualifying statement: both Circuits expressly reject "narrow literalism," which would "spring loopholes." *Schering*, 62 F.3d at 906; *Alley*,

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court has power to sanction circumvention of an order that does not violate the order's text (C.A. Br. 25), the precise argument that petitioners advance here.

590 F.3d at 1206. A "narrow literalism" standard is precisely what was applied below.

The Third Circuit also holds that "where an injunction does give fair warning of the acts that it forbids," it cannot "be avoided on merely technical grounds." *United States* v. *Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972). In *Harris* v. *City of Philadelphia*, 47 F.3d 1342, 1353 (3d Cir. 1995), the court reaffirmed that one cannot "avoid following an injunction or court order 'on merely technical grounds.'" As the government notes (Opp. 14-15), *Harris* held that the language of the order is the starting point for this inquiry. 47 F.3d at 1352. But the "thrust" of the order remains critical. *Id.* at 1353.

The government's contention that "[n]one of those courts held that contempt may lie for conduct not prohibited or required by an actual term of a court order" (Opp. 15-16) is flatly wrong. For example, in *Abbott Laboratories* v. *Unlimited Beverages, Inc.*, 218 F.3d 1238, 1241 (11th Cir. 2000)—a case ignored by the government—the order did "not specifically address" whether a party enjoined from selling a certain solution could provide it to third parties for sale. Although that action was "not specifically enjoined," contempt was nonetheless proper. *Alley*, 590 F.3d at 1206. Accord, *Schering*, 62 F.3d at 907 (explaining that a solution and powder form, notwithstanding specific language of order barring only the former, are equivalents); *Christie Indus.*, 465 F.2d at 1006-1009 (order barring the sale of kits also barred selling individual components that permitted a purchaser to assemble a kit).

The government's basis for distinguishing these decisions is that "the 'purpose' of the order as determined by the court was grounded in the express

terms of the provision at issue." Opp. 15. But that is the precise position that we advance and that the dissenting judges adopted: that a purpose grounded in and apparent from the language of the order can render sanctionable conduct not prohibited under a technical reading of the order's words. These decisions thus adopt the very argument rejected below and confirm the conflict.

*3. The decision below is wrong.*

The government contends that "a rule permitting punishment for conduct purportedly violative of an injunction's asserted 'purpose' but not its terms would not comport with * * * this Court's cases." Opp. 14. But that assertion ignores entirely the decisions from this Court that control the issue.

In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192-193 (1949), the Court held that the contempt power is not limited to what was "specifically enjoined," as that would undermine the "remedial benefits of a decree." See also *Haskell* v. *Kansas Natural Gas Co.*, 224 U.S. 217, 223 (1912), ("decree must be read in view of the issues made and the relief sought and granted"); Pet. 18, 29-30 (discussing cases).

Instead of responding to this authority, the government invokes boilerplate noting that the contempt power "creates the potential for abuse." Opp. 12-13. But that hardly answers the question whether the contempt power is sufficiently broad to preclude purposeful circumvention of an order.

The government's own authority explains (see Opp. 12) that while "a decree that can only be described as unintelligible" is invalid under Federal Rule of Civil Procedure 65(d), that principle does not

immunize "a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate." *Int'l Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

Although Rule 65(d) "requires every injunction to be 'specific in terms' and to 'describe in reasonable detail the act or acts sought to be restrained,'" it "does not require the impossible." *Scandia Down Corp.* v. *Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th Cir. 1985) (Easterbrook, J.). Because "[t]here is a limit to what words convey," "[t]he more specific the order, the more opportunities for evasion ('loopholes')." *Ibid.* An injunction that informs a party as to "what is forbidden"—that is, that conveys the purpose of an order—complies with the Rule 65(d) requirements. *Id.* at 1432. Importantly, a party subject to an injunction has a "right to seek clarification or modification of the injunction." *Ibid.*

Finally, the Administrative Procedure Act (APA) is not to the contrary. While a court has limited power to require *affirmative* conduct by an agency through day-to-day supervision (see *Norton* v. *S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004)), a court certainly can enjoin illegal agency action. 5 U.S.C. § 706; *FCC* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003). The government's apparent view—that an agency can circumvent a court's injunction by reissuing the same policy (Opp. 17)—is the precise gamesmanship that the contempt power should and does foreclose.

*4. This issue is outcome determinative.*

The purpose of the injunction here was clear—it "required the government not to enforce the first moratorium and ***its associated suspensions***." Pet.

App. 57a (emphasis added). The memorandum decision accompanying the order made apparent that permitting resumption of drilling was its central purpose. The irreparable harm identified by the Court was the moratorium's "effect on employment, jobs, [and] loss of domestic energy supplies." Pet. App. 82a. The order also required the government to report on its compliance within 21 days. *Id*. at 62a.

The government instead announced a new moratorium was forthcoming, continuously referred to the moratorium as in place, warned industry not to undertake renewed drilling, and ultimately issued a new moratorium. *Id*. at 41a-42a, 58a-59a.

As Judge Clement explained in dissent, "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." Pet. App. 86a. In fact, the majority recognized that the government had effected an "end run" around the order but reversed the contempt finding because the order did not "explicitly prohibit[]" the precise form of circumvention employed by the government. *Id*. at 16a.[2]

If the majority had adopted the rule advocated by the dissenters below, it would have reached the same conclusion as the dissent, and affirmed the contempt

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[2] While the panel's second opinion (not its first) did pay "lip service" to the principle that a court may sanction circumvention of its orders, the dissenters below recognized that "[s]everal passages within the revised opinion indicate that the majority reached its decision by presuming that a district court could not have found that the Government in contempt absent an explicit violation of the injunction's terms." Pet. App. 86a-87a (dissent from denial of rehearing *en banc*).

finding. The government's contrary assertion—which it does not even attempt to reconcile with the different conclusions of Judge Elrod and Judge Clement based on application of the conflicting legal standard—is simply wishful thinking.

### B. The Conflict Over Whether A Court Of Appeals Must Defer To A District Court's Construction Of Its Own Order Is Ripe For Review.

The government acknowledges the conflict among the courts of appeals with respect to the standard of review of a court's construction of its own order. Opp. 19. And the government does not defend the *de novo* standard applied by the majority below, apparently conceding that the majority erred by failing to defer to the district court's construction of its own order. Pet. 31-33. The arguments against review that the government does advance are meritless: the issue is squarely presented; the correct rule would alter the outcome of this case; and the question is one of great practical importance.

#### *1. The standard of review is squarely presented.*

Because the court of appeals expressly applied a *de novo* standard in reviewing the lower court's construction of the order (Pet. App. 9a), the lower court plainly "passed" on that issue. *Verizon Commc'ns*, 535 U.S. at 530. Moreover, petitioners argued that an "abuse of discretion standard applies to review *of the contempt order itself*," and further that "the *de novo* standard * * * does not apply here." C.A. Br. 22-23 n.7 (emphasis added).

The government tries to invent an inconsistency between the two questions presented (Opp. 17), but

none exists. Whether the scope of an injunction turns solely on its plain language, or in addition requires consideration of purpose and context, a court of appeals can either address the scope question *de novo*, or defer to the district court's construction. That issue arises regardless of the substantive legal standard governing the scope question.

*2. The standard of review will affect the outcome here.*

The government advances two reasons why the deferential standard would not alter the result. Opp. 17-18. It first argues that there is no "particular district court interpretation" that "was entitled to deference." *Ibid*. It also contends that its subsequent actions were consistent with the injunction. Opp. 20-21. Both are wrong for the same reason.

The district court interpreted the meaning of its order in the plainest of terms—it "required the government not to enforce the first moratorium and its associated suspensions." Pet. App. 57a. This meant that each of the government's efforts to bar renewed drilling was a violation of the order. *Id*. at 58a.

The court of appeals, however, interpreted the injunction quite differently. It found that the sole basis for the injunction was "a procedural failure to explain" the basis for the first injunction. Pet. App. 15a. Even though the district court construed its order to bar the oil-drilling "suspensions" (*id*. at 57a), the court of appeals concluded that "[i]f the purpose were to assure the resumption of operations until

further court order, it was not clearly set out in the injunction." *Id.* at 16a.[3]

If the court of appeals had deferred to the district court's interpretation, it would have agreed that the government violated the order and affirmed—as the dissenters below concluded.

*3. The standard of review is important and warrants this Court's attention.*

Despite acknowledging that there is a conflict among the lower courts regarding the standard of review applicable to "a district court's construction of its order in a contempt case," the government denigrates the question by suggesting that "it is not apparent that these boiler-plate recitations of standard of review made a difference in any of those cases." Opp. 19.

The government's dim view of the importance of standards of review is inconsistent with this Court's repeated consideration of such issues. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38 (2007); Pet. 28 (listing cases); see also *Highmark Inc.* v. *Allcare Mgmt. Sys.*, No. 12-1163 (standard of review for attorney's fee awards).

Although the government concedes that the Fourth, Sixth, Seventh, and Eleventh Circuits are in conflict with the decision below (Pet. 24-25; Opp. 19),

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[3] The district court's statement that petitioners "too broadly" read the injunction simply rejected the argument that the issuance of a second injunction was, standing alone, sufficient to establish contempt. Pet. App. 57a-58a. The district court plainly determined that "each step the government took following the Court's imposition of a preliminary injunction showcases its defiance." *Id.* at 58a.

it quibbles that the cases we cite from the First, Third, Eighth, and Tenth Circuits did not involve contempt proceedings. Opp. 18-19. That is a distinction without a difference. The question of the standard of review for a district court's construction of its own orders arises in a variety of contexts.

In any event, the First, Third, and Eighth Circuits *have* applied a deferential review standard in the specific context of contempt. See, *e.g.*, *In re Grand Jury Proceedings*, 872 F.2d 5, 10 n.3 (1st Cir. 1989); *Oparaji* v. *N.E. Auto-Marine Terminal*, 372 F. App'x 331, 333 (3d Cir. 2010); *Flavor Corp. of Am.* v. *Kemin Indus., Inc.*, 493 F.2d 275, 283 n.14 (8th Cir. 1974). The conflict in the lower courts is clear.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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