

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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SAM DROGANES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States...to controversies to which the United States shall be a party.” U.S. Const. Art. III, §2. The inherent power of federal courts is necessary to their judicial duty, *U.S. v. Hudson and Goodwin*, 11 U.S. 32, 34 (1812), and such power is “essential to the administration of justice,” *Michaelson v. U.S. ex rel. Chicago, St. P., M.&O. Ry. Co.*, 266 U.S. 42, 65-66 (1924), and to the administration of criminal justice. *McNabb v. U.S.*, 318 U.S. 332 (1943).

The decision below determined that the Court lacked the inherent authority to impose monetary sanctions against the Government, because the Government’s sovereign immunity trumps a Court’s inherent authority pursuant to the Constitution. (App. 16). In so deciding, the Sixth Circuit accorded with decisions in the First, Federal and D.C. Circuits, but ruled at odds with holdings of the Fifth and Ninth Circuits, creating a deeper divide on this exceptionally important issue.

Thus, the question presented in this case is:

Whether a Court has the inherent authority to impose monetary sanctions against the Government despite the doctrine of sovereign immunity, when the Government acts in bad faith by making misrepresentations to the Court and by violating and ignoring the terms of an otherwise valid and enforceable Court Order.

**PARTIES TO THE PROCEEDINGS BELOW**

The parties to the proceedings in the Eastern District of Kentucky include the United States of America and the Petitioner. There are no other parties to the proceedings other than those named in the petition.

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**PETITION FOR WRIT OF CERTIORARI****INTRODUCTION**

Petitioner, owner of a small, family-owned fireworks store, seeks review of the Sixth Circuit's decision denying monetary sanctions against the Government for its undisputed bad faith and nearly fraudulent conduct and its deliberate defiance of the District Court's Orders in the criminal case below. In so holding, the Sixth Circuit determined that "the government's sovereign immunity wins when it comes head-to-head with a lower court's inherent authority." (App. 16). Such a decision further divides the existing circuit conflict and squarely opposes contrary holdings in the Fifth and Ninth Circuit that a court's inherent authority to sanction the Government is not restricted by sovereign immunity concerns. Certiorari is warranted and necessary to resolve this growing conflict among the circuits and to address this matter of exceptional national importance.

The resolution of the issue presented in this case has significant implications for the fair administration of criminal justice in any Article III Court. The decision below stands for the principle that an Article III Court lacks the inherent authority to impose monetary sanctions against the Government for its bad faith conduct and defiance of the Court's Orders, and therefore seemingly erodes any power that a Court may have to effectively administer criminal justice in a case before it. Thus, Courts around the country and the parties below desperately need this Court's guidance to resolve the broad sweeping divide among the Circuits and the present case is a perfect vehicle for determining such an issue.

Further review by this Court is mandated.

### **OPINIONS AND ORDERS**

The opinion of the United States Court of Appeals, Sixth Circuit was rendered on August 27, 2013, is reported on Westlaw at *Droganes v. U.S.*, 728 F.3d 580 (6<sup>th</sup> Cir. 2013) and is reproduced in the Appendix (App. 1). The order of the United States Court of Appeals, Sixth Circuit, denying rehearing and rehearing *en banc*, was entered on October 7, 2013, and is unpublished but is reproduced in the Appendix (App. 132). The Memorandum Opinion and Order of the United States District Court, Eastern District of Kentucky, entered on August 21, 2012, is available on Westlaw at 893 F. Supp. 2d 855 (E.D. Ky. August 21, 2012) and is reproduced in the Appendix (App. 65). The Report and Recommendation of the Magistrate Judge in the United States District Court, Eastern District of Kentucky, made on May 18, 2012, is available on Westlaw at 2012 WL 3610219 (E.D. Ky. May 18, 2012), and in addition, is included in the Appendix (App. 23).

### **JURISDICTION**

The Sixth Circuit Court of Appeals had appellate jurisdiction over this case pursuant to the District Court's Memorandum Opinion and Order entered on August 21, 2012, (App. 65) and the Amended Judgment in a Criminal Case entered on September 11, 2012. Such jurisdiction was conferred on that Court under Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1291. Subject matter jurisdiction existed for that Court pursuant to 18 U.S.C. §3742.

Following the issuance of the Sixth Circuit's Opinion on August 27, 2013 (App. 1), Petitioner filed a timely Motion for Rehearing and Rehearing En Banc, which was denied on October 7, 2013. (App. 132). This petition is timely because it is being filed within the required time period of ninety (90) days after the Sixth Circuit's denial of Petitioner's request for Rehearing and Rehearing En Banc. Sup. Ct. R. 13(1) and (3).

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) to review the Circuit Court's decision on a writ of certiorari.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **Federal Constitutional Provisions**

Article III of the United States Constitution provides in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States...to controversies to which the United States shall be a party."

## **STATEMENT OF THE CASE**

Petitioner, Sam Droganes, is the sole owner of Premium Fireworks, Inc., located in Covington, Kentucky. Premium Fireworks has been in Petitioner's family for more than eighty years. On June 27, 2007, an undercover CPSC agent purchased thirteen different types of fireworks from Premium Fireworks. All were alleged to be display fireworks. As a result, on July 2, 2007, seven search warrants were executed by the ATF for several locations involving Petitioner and his business. The search warrants were for 'illegal

contraband,' ie, explosives in the form of display fireworks. However, despite the scope of the search warrant, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATFE") seized and shipped 868 miles west, nearly Petitioner's entire inventory, including both consumer and display fireworks. In fact, the ATFE seized "more than 800,000 pounds of merchandise, only a portion of which proved to be contraband." (App. 2). In August, 2007, the ATFE served seizure warrants for three additional conex containers containing more fireworks belonging to Petitioner.

A year after the initial seizure, a Six Count Indictment was returned against Petitioner on July 10, 2008. A Superseding Indictment was later filed containing the same allegations.

The ATFE then prepared the fireworks for storage at Heritage Storage, and separated them into Red (Display), Green (Consumer) or Orange (uncertain) containers and lists. When the process was completed, there were seventeen (17) bunkers of Red fireworks and twelve (12) bunkers of Green and Orange fireworks.

On October 3, 2008, defense counsel sent a letter to Government officials, inquiring into the nature of the property seized by the ATFE. On October 7, 2008, Petitioner asked the District Court, pursuant to Federal Rule of Criminal Procedure 41(g), to order the return of what he argued to be consumer fireworks that were taken by the ATFE during the execution of the search warrants issued on July 2, 2007. In response, the AUSA advised, by letter, that the ATFE would be directed to return all consumer fireworks seized under the search warrants. This was the first of many

misrepresentations that would be made throughout this case. In fact, following a November 24, 2008, telephone conference with the District Court and defense counsel, the Government sent a letter detailing the status of the fireworks and indicating that it could not make a decision regarding the return and/or legality of the fireworks they had taken from Petitioner. This was yet another example of the Government's recalcitrance during this case.

In light of their inability to make the determination of which fireworks were consumer or display, the issue was referred to the Magistrate Judge, for hearing. Following that hearing, the Magistrate issued a Report and Recommendation which ultimately concluded that despite the inordinate procedural delays caused by the Government's segregation and testing of the fireworks, the United States was still entitled to retain all fireworks labeled as consumer fireworks for such time as would be required to complete its testing. However, in this Report and Recommendation, the Magistrate also conclusively determined that, "The defendant has further demonstrated that: 1) some portion of the fireworks seized and retained by the United States are legal 1.4G fireworks which are not subject to criminal forfeiture under the existing indictment; and 2) continued retention of legal fireworks would be unreasonable...What the defendant has shown is that the delays by the United States in making this determination have been inordinately lengthy."

The District Court agreed, finding that although the segregation and/or testing of the seized consumer and display fireworks had taken an inordinately long time, the United States was entitled to complete its testing

and was then ordered to return all non-explosive, consumer fireworks to Petitioner. The United States was also ordered to complete its testing and provide Defendant with a list of those consumer fireworks by March 11, 2009. That deadline was never satisfied.

Instead, on that date, the AUSA sent another letter which attached a list compiled by the ATFE of purported consumer fireworks that were going to be returned to Petitioner. In this letter, however, the Government falsely claimed that while all of the fireworks were being stored in the Government contractor facility in Nebraska, nearly all of the seized items were exposed to extreme weather conditions and rodent infestations, causing damage. Because of that damage, the AUSA informed Petitioner that the ATFE believed that all of the fireworks on the list were unfit to be transported back into interstate commerce, and thus, could not be returned to Petitioner. This was in direct contradiction to the United States District Court's previous order and was the second misrepresentation made by the Government in this case.

In an apparent attempt to smooth over their non-compliance, the United States, on their own initiative, temporarily agreed to compensate Petitioner for the wholesale price of the destroyed consumer fireworks. However, such an agreement was short-lived as the ATFE notified Petitioner on January 4, 2010, that the legal fireworks were not going to be returned to him, nor would they compensate him for any of the consumer fireworks taken, as they now claimed protection under the "detention of goods" exception to the waiver of sovereign immunity pursuant to the



Federal Torts Claims Act. Again, it is important to note that this claim was made after the Government had offered to reimburse Petitioner for his property. Nevertheless, after that letter, there was no further discussion about the return or compensation to Petitioner for the consumer fireworks or their value.

After a Plea Agreement was entered, the District Court again ordered during the Sentencing Hearing that the ATFE must reimburse Petitioner for any seized consumer fireworks still in its possession. The Court stated, “I think I said this once, and I’ll say it again. If there were consumer grade, 1.4 grade [fireworks] that were seized and should be returned... ATF is eventually going to have to reimburse him. . . . I think there has to be some recognition that... the consumer grade fireworks either, A, have to be returned or, B, in the absence of that, he needs to be reimbursed for that. . . .I think we have an acknowledgment that there’s some consumer grade fireworks that have to be returned or he needs to be reimbursed for that...” Consistent with their previous misconduct, this Order was also never followed by the Government. More shockingly, however, this clear directive was also never enforced by the Court.

After the consumer fireworks were still not returned, and no compensation offered to Petitioner, defense counsel filed a Motion for Sanctions on July 8, 2010. In that motion, Petitioner sought to receive payment for the consumer fireworks taken and not returned, as well as his attorney fees and expenses incurred in his efforts to obtain governmental compliance with the Court’s Orders. Specifically, Petitioner sought payment for the retail value of the

consumer fireworks that the ATFE refused to return, for the United States to pay the rental costs of the conex containers that accrued while the containers were in the Government's custody, which were not unloaded for eighteen months (App. 55), and for them to pay the attorney fees and expenses related to his efforts to enforce the orders of the Court for them to return the items. (App. 62).

The Motion for Sanctions was referred to a Magistrate for review and recommendation. Following the August 29-31, 2011 evidentiary hearing, the Magistrate Judge issued a Report and Recommendation on May 18, 2012. The Magistrate noted that the Government agreed the Court had the inherent power to sanction it, stating, "The parties agree that the Court has the power to sanction a party for violating its orders under both its civil contempt power and the Court's inherent authority to enforce its own orders." (App. 49). In light of that inherent authority, the Magistrate recommended the imposition of sanctions against the Government for its clear bad-faith conduct in this case. The Magistrate recommended that, "Defendant's Motion for Sanctions be granted in part and that Defendant be ordered to file within thirty (30) days of the District Court's Order an itemization, supported by affidavits of counsel, of the costs, expenses and attorneys' fees reasonably incurred after May 11, 2009, in Defendant's effort in this matter to have his lawful property returned. The United States should also be ordered to reimburse Defendant the reasonable expenses he actually incurred for the use of the conex containers during the time of the seizure and Defendant shall file the bill for the Court's review." (App. 62-63).

The Magistrate further determined that "...the government's noncompliance with this Court's Order to complete testing, provide Defendant with a list of 1.4G fireworks and a timetable for their return not later than March 11, 2009, was done in bad faith." (App. 51). She stated, "the one ordered to comply should not be permitted to dictate what constitutes compliance. The Government's unilateral decision that all of the fireworks were unfit to return and consequently that no timetable would be provided simply does not amount to good faith compliance with the Court's Order." (App. 54).

She also concluded that the Government's misrepresentations that the fireworks were damaged, and the government's continued refusal to return legal consumer fireworks were done in bad faith. (App. 59). The Magistrate concluded, "The Government made statements to this Court that were not supported by the evidence causing this action to be unnecessarily delayed for years. Not only has the Court's judicial resources been greatly taxed by ATF's continued misrepresentations...it also caused Defendant to have to go to great lengths and expense in seeking their return." (App. 59). The Magistrate even gave the Government the benefit of the doubt and stated that "The Court will stop short of finding ATF committed a fraud upon the Court...but does find such assertions were made in bad faith, (App. 59), as the "fireworks are not unfit to be returned to Defendant and should have been returned more than three years ago." (App. 54).

In light of this clearly egregious conduct by the Government, the Magistrate conclusively recommended that: "For the foregoing reasons, it will be

recommended that the presiding District Judge grant in part Defendant's motion for sanctions. The District Court ordered that the classification testing and separation of inventory be completed by March 11, 2009, and a list of consumer fireworks be provided. Thus, affording the Government sixty days as a reasonable time frame within which it could have returned the fireworks provided by March 11, 2009, it will be recommended that the Government be ordered to reimburse Defendant the expenses, including attorneys' fees, he incurred in seeking the return of his lawful property after May 11, 2009. It will also be recommended as a sanction that, under the Court's inherent powers, the presiding District Judge order the Government to reimburse Defendant for expenses he incurred as a result of the Government's use of the conex containers during the eighteen months they sat at Heritage." (App. 60).

After reviewing the Report and Recommendation, the District Court Judge agreed that the "[G]overnment's conduct is exactly the type that other courts of appeals have recognized may be sanctioned under a court's inherent authority." (App. 110). The District Judge also pointed out that "the Government first recognized the Court's inherent authority to impose sanctions..." (App. 103) and that "the Magistrate Judge appropriately concluded the government engaged in bad-faith conduct that would justify sanctions." (App. 123). The District Court pointed to the fact that "the Government failed to comply with this Court's February 19, 2009, Order requiring the Government to complete its testing and provide Defendant with a final list of 1.4G fireworks, as well as a timetable for the return of the legal fireworks

no later than March 11, 2009.” (App. 124). The District Court also pointed to the fact that “the Court also Ordered the Government to complete its testing, including the segregation of 1.4G and 1.3G fireworks not later than March 11, 2009. However, the Government failed to comply with that Order as well.” (App. 125).

Most egregious, however is that “the Government knew it had not completed its testing, but never brought it to the attention of the Court....Instead, it implicitly represented on March 11, 2009, that testing was complete and it had produced a final, accurate list of 1.4G fireworks.” (App. 125). Further, “instead of providing a timetable, the Government represented that all of the fireworks were unfit to be transported....However, the Government proved that only a small amount of the fireworks were actually damaged and unfit for transportation.” (App. 126). However, because the Government claimed protection under the doctrine of sovereign immunity, the District Court inexplicitly determined that the finding of bad faith “has little consequence because the Court’s authority to impose sanctions is trumped by the government’s sovereign immunity.” (App. 130).

To support that opinion, the Court determined that the Government’s sovereign immunity trumps the Court’s ability to enforce its own orders, particularly “if Congress has not waived the sovereign’s immunity in a given context, the courts are obliged to honor that immunity.” (App. 113). So here, the District Court denied the imposition of sanctions against the Government because “Defendant has failed to establish that Congress has waived sovereign immunity in this

context...” (App. 119). Such a decision leads Petitioner to conclude that an Article III Court’s authority is subordinate to that of other branches, and that the Court in fact has no inherent authority to control the conduct of the Government in a case before it.

Upon review, the United States Court of Appeals, Sixth Circuit, framed the question in this case to be “whether a waiver or other means of overriding sovereign immunity exist in this case,” particularly in light of Petitioner’s inherent authority argument. (App. 13). Unfortunately for Petitioner, after *de novo* review, the Court determined that a Court’s inherent authority under Article III was secondary to the Government’s protection under the doctrine of sovereign immunity. In fact, the Sixth Circuit Court went so far as to state “it is hardly clear that a district court has any such authority in the criminal context....the government’s sovereign immunity wins when it comes head-to-head with a lower court’s inherent authority.” (App. 16). So in effect, the Sixth Circuit has now made the Constitution subordinate to a doctrine.

Again, the Sixth Circuit Court inexplicitly made this decision despite the fact that they agreed that the level of bad faith misconduct by the Government was disturbing, explaining, “Nor does our holding condone what the government has done here. Like the district court, we are disturbed by the seemingly interminable delays in testing the seized fireworks, many of which the government knew not to be display fireworks. We are also disturbed by the government’s doublespeak regarding the condition of the consumer fireworks and its ability to return them to Drohanes. While we ultimately affirm the denial of his motion for sanctions

for the reasons given, we acknowledge that Droganes deserved better treatment from his party-opponent.” (App. 17-18).

For the reasons presented in the Argument below, the Sixth Circuit “has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter” and “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.” Sup. Ct. R. 10(a). Furthermore, the Sixth Circuit has “decided an important federal question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. R. 10(c). Thus, Petitioner now implores this Court to provide him with the better treatment that the lower court recognizes that he deserves, yet failed to give him, and states that review is warranted to address the vital issues presented herein.

### **REASONS FOR GRANTING THE PETITION**

This Court should grant certiorari to address the issue of whether or not the Courts are vested with the inherent authority to enforce their own orders against the Government by imposing monetary sanctions against them, despite the claim of protection under the doctrine of sovereign immunity. In holding that the Government’s sovereign immunity trumps a court’s inherent authority to impose sanctions, the Sixth Circuit deepened the growing divide among the circuit courts on this extremely vital issue.

The Sixth Circuit’s decision also decided an important federal question in a way that is at odds

with the relevant precedent produced by this Court.

This case is a clean vehicle to address the issue because the relevant fact of the Government's bad faith conduct was determined by the Magistrate, affirmed by both the District Court and Circuit Court, and remains undisputed. Furthermore, the issue regarding the imposition of sanctions for that bad faith conduct was fully briefed, argued and clearly ruled upon by the Courts below.

Thus the time is ripe for this Court to clearly define the scope of a federal court's power and grant review of this Petition.

**I. CERTIORARI IS WARRANTED TO ALLOW THIS COURT TO RESOLVE THE GROWING CONFLICT AMONG THE CIRCUIT COURTS.**

The Sixth Circuit's decision below joined the First Circuit in *U.S. v. Horn*, 29 F. 3d 754 (1<sup>st</sup> Cir. 1994), the Federal Circuit in *Tippett v. United States*, 98 Fed. Cl. 171, 181 (Fed. Cl. 2011), and the D.C. Circuit in *Alexander v. F.B.I.*, 541 F. Supp. 2d 274, 301 (D.D.C. 1994), in holding that an Article III Court does not have the inherent authority to impose monetary sanctions against the Government for its undisputed bad faith conduct. In so holding, the Court denied to follow previous, contrary decisions rendered in the Fifth and Ninth Circuit Courts. The District Court in this case recognized that "this clear split of authority" existed. (App. 117).

The Sixth Circuit's decision further entrenched this divide.



### **A. Conflict with the Fifth Circuit.**

The Fifth Circuit has addressed the issue of the scope of the Court's inherent authority, and whether such authority allows a Court to impose sanctions against the Government, despite sovereign immunity concerns. The sound decisions of the Fifth Circuit are irreconcilable to the decision below.

For example, the Fifth Circuit determined that it was "best to put the parties into the position in which they would have been had the government complied...on remand the district court, *pursuant to its inherent power to enforce its own rules*...should impose sanctions upon the government for the breach of its duties under the rules. *Bradley v. United States*, 866 F. 2d 120, 127-128 (5<sup>th</sup> Cir. 1989), emphasis supplied. The Court even went so far as to instruct the lower Court on remand that it should consider "requiring the government to compensate the Bradleys and their counsel for their *expenses attributable to the government's conduct*." *Id.* at 128, emphasis supplied. Thus, in so holding and instructing, the Fifth Circuit clearly permitted, if not outright encouraged the district court to exercise its inherent authority to enforce its own rules, and to do so by imposing monetary sanctions against the Government. This sound logic is diametrically opposed to the faulty decision rendered by the Sixth Circuit in the case below, and it is Petitioner's position that this same holding and reasoning should apply to not only a Court's rules, but to its Orders as well.

The Fifth Circuit became further entrenched in its position when it decided *Chilcutt v. United States*. In that case, the United States of America failed to

properly respond to discovery requests, resulting in the district court's order for the Government to produce previously requested documents and answers to interrogatories. The Government disobeyed the district court's order, and that district court imposed sanctions. On appeal by the Government, the Fifth Circuit held "that to restrict a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch, would violate the separation of powers doctrine. Such a decision would invite members of our sister branches to ignore acceptable standards of decorum in courts and flout court orders." *Chilcutt v. United States*, 4 F. 3d 1313, 1327 (5<sup>th</sup> Cir. 1993). Thus, the Fifth Circuit concluded that to rule otherwise would "rob federal courts of power they inherited at their inception: power to preserve order in judicial proceedings and enforce judgments." *Id.* The Sixth Circuit in this case held the exact opposite, and in doing so, has permitted the United States to ignore the District Court's Orders, and has thus failed to participate in the effective and fair administration of criminal justice.

The Fifth Circuit again addressed this issue in *F.D.I.C. v. Maxxam*, 523 F.3d 566 (5<sup>th</sup> Cir. 2008). In that case, the F.D.I.C. sued an individual in federal district court for his alleged involvement in the failure of a large thrift in Texas. The allegations, however, proved to be meritless and the F.D.I.C. moved to dismiss its suit in the district court. Upon such a motion, the court found that the F.D.I.C.'s claims were baseless and had an improper purpose of pursuing any claims against the Defendant, and that such actions constituted harassment of the Defendants. Thus, the Court imposed large sanctions against the FDIC.

Moreover in that case, the Court acknowledged that “The threshold question in a sanctions case is whether the court has the power to sanction a party for frustrating its Article III functions.” *F.D.I.C. v. Maxxam*, 523 F.3d 566, 595 (5<sup>th</sup> Cir. 2008). This is precisely the issue in Petitioner’s case below. Unlike the Sixth Circuit in the matter below, the Fifth Circuit Court, upon appeal by the F.D.I.C., determined that “The question of the scope of a waiver of sovereign immunity falls away when a court acts under its sanctioning powers and does not abuse its discretion in so doing.” *Id.* Moreover, the Court concluded that “The government...is subject to the same ethical and procedural rules as a private litigant, and risks the same sanctions if it fails to abide by these rules.” *Id.* Thus, as the District Judge in this case noted, “according to the Fifth Circuit, the Court may always impose monetary sanctions against the Government when it frustrates the court’s Article III functions.” (App. 116).

Such a position is in stark contrast to the decision of the Sixth Circuit below. During the oral argument before the Circuit Court, the Sixth Circuit panel called the Government’s conduct unconscionable, acknowledged that had the events of this case transpired, and a private litigant acted in bad faith as the Government did here, such a litigant would be exposed to the possibility of sanctions, including imprisonment. In light of this, it is difficult to see how the Article III functions of the Court could have been any more frustrated than they were by the Government in Petitioner’s case below.

In fact, it is clear that “...the government’s noncompliance with this Court’s Order to complete testing, provide Defendant with a list of 1.4G fireworks and a timetable for their return not later than March 11, 2009, was done in bad faith.” (App. 77). Also, it is undisputed that the government’s representations that the fireworks were damaged, and the government’s continued refusal to return legal consumer fireworks was also done in bad faith. (App. 51). Finally, the Court stopped “short of finding ATF committed a fraud upon the Court...but does find such assertions were made in bad faith.” (App. 59). As a result of all of these bad faith actions and their continuous and flagrant disregard for the Court’s orders, the Court was unable to effectively administer justice in this case and Petitioner was forced to incur extreme additional expenses and costs that would not otherwise have been incurred.

Thus, under the guidance of the Fifth Circuit, the Court clearly had the inherent authority to restore to Petitioner what was rightfully his, or to repay him, to impose sanctions against the Government, for costs and expenses incurred to enforce court orders, and fulfill its Article III purpose to ensure the effective administration of justice.

### **B. Conflict with the Ninth Circuit.**

The Ninth Circuit has likewise issued an opinion that is in direct contradiction to the opinion rendered by the Sixth Circuit below in this case. In that Circuit, the Court of Appeals decided *United States v. Woodley*. In that case, the government failed to timely disclose *Brady* and Rule 16 discovery materials. In response, the District Court ordered the government to pay \$6,916.64 as attorneys’ fees and costs related to the

Government's discovery violations. The Government appealed, arguing that such an award was barred by sovereign immunity.

Upon review, the Ninth Circuit addressed the issue of whether sovereign immunity bars the imposition of sanctions. When answering that question, the Court determined that "Sovereign immunity does not bar a court from imposing monetary sanctions under an exercise of its supervisory powers. These powers are judicially created to remedy a violation of recognized statutory, procedural, or constitutional rights, and to deter future governmental misconduct and to protect the integrity of the judicial process." *United States v. Woodley*, 9 F. 3d 774 (9<sup>th</sup> Cir. 1993). Thus, in so holding, the Ninth Circuit clearly declared its firm position that a court's inherent authority allows it to impose monetary sanctions against the Government, despite sovereign immunity concerns. This is in direct contradiction to the decision below.

### **C. Conflict with other areas of the law.**

The present case directly deals with the imposition of sanctions against the Government in a criminal case. This is an issue that this Court has not directly addressed, and that the Sixth Circuit declared "is hardly clear that a district court has any such authority in the criminal context." (App. 16). However, Circuit Courts around the country have clearly determined that monetary sanctions are permitted against the Government and not barred by sovereign immunity in other classes of cases, where such abuses are present.

For instance, as the First Circuit has summarized:

*See, e.g., M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1181-82 (Fed.Cir.1993) (holding that the EAJA works a waiver of immunity sufficient to allow the imposition of fees under Fed.R.Civ.P. 37); *In re Good Hope Indus., Inc.*, 886 F.2d 480, 482 (1st Cir.1989) (same, in respect to fees under 28 U.S.C. § 1912 and Fed.R.App.P. 38); *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir.1988) (same, in respect to monetary sanction under Fed.R.Civ.P. 11); *United States v. Gavilan Joint Comm'y Coll. Dist.*, 849 F.2d 1246, 1251 (9th Cir.1988) (similar); *see also Schanen v. United States DOJ*, 798 F.2d 348, 350 (9th Cir.1985) (imposing monetary penalty against government under Fed.R.Civ.P. 60(b) without addressing sovereign immunity); *United States v. National Medical Enters., Inc.*, 792 F.2d 906, 910-11 (9th Cir.1986) (upholding penalty against government imposed under Fed.R.Civ.P. 37(b) without addressing sovereign immunity). Two panels in the Ninth Circuit have suggested that the Civil Rules themselves, having been authorized by Congress, may provide the basis for a waiver of sovereign immunity. *See Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir.1991) (discussing Fed.R.Civ.P. 11); *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir.1989) (same). *U.S. v. Horn*, 29 F.3d 754, 762 -763 (1<sup>st</sup> Cir. 1994).

It is inconsistent to now dictate, as the Sixth Circuit has done in this case, that a court does not have the authority to accomplish, by the very nature of its existence, what can and has otherwise been

accomplished in other areas of the law. Thus, review of the decision below is warranted.

#### **D. Conclusion.**

The Sixth Circuit's decision in this case, joining that previously espoused by the First, Federal and D.C. Circuits, is flatly inconsistent with the rule established in the Fifth and Ninth Circuits, as well as those addressing the Court's authority in other areas of the law and Constitution. Thus, review is warranted.

### **II. CERTIORARI IS WARRANTED TO ENSURE CONSISTENCY WITH THIS COURT'S PRIOR DECISIONS AND TO FURTHER DEFINE THE SCOPE OF THE INHERENT AUTHORITY OF THE FEDERAL COURTS.**

#### **A. Conflict with General Precedent.**

By finding that a district court's inherent authority is secondary to the Government's sovereign immunity, the Sixth Circuit panel in this case has sanctioned a lower court's departure from the accepted and usual course of judicial proceedings.

It is clear that Federal Courts have the inherent power to supervise the parties and cases before them, including the Government. The Court first acknowledged its inherent authority in *U.S. v. Hudson and Goodwin*. In that case, this Court held that "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution...powers which cannot be dispensed with in a Court." *U.S. v. Hudson and Goodwin*, 11 U.S. 32, 34 (1812). This Court has also explained that "Upon

formation by any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it...Certain implied powers must necessarily result to our Courts of justice from the nature of the institution.” *Id.* at 33. Then, this Court declared that “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary, to this proposition, to preserve themselves and their offices from the insults of pollution.” *Anderson v. Dunn*, 19 U.S. 204, 227 (1822). All of these precepts were seemingly ignored by the Sixth Circuit in the case below.

Since these early cases, it has repeatedly been held that, “The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.” *Ex Parte Robinson*, 86 U.S. 505 (1873); see also *Michaelson v. United States ex rel. Chicago, St. P., M., & O. R. Co.*, 206 U.S. 42, 65-66 (1924). The identification of “any subject” in that decision would clearly include the Government, its agencies, and any agents thereof. If not, as Justice Brandeis observed, the Courts would undermine “respect for the law” and fail to “preserve the judiciary from contamination.” *Olmstead v. U.S.*, 277 U.S. 438, 484 (1928)(Brandeis, J., dissenting). Once again, however, by exempting the Government from the reach of the Court’s inherent authority in a criminal case, the Sixth Circuit excluded it from being classified as “any subject.”



The inherent authority of the Court was further broadened when this Court determined that courts had the “inherent power to provide themselves with appropriate instruments required for the performance of their duties.” *In re Peterson*, 253 U.S. 300, 312 (1920). This was even further expanded upon by this Court when it was held that “if Congress fails to act,” the Court could act on its own. See *Funk v. U.S.*, 290 U.S. 371, 381-84 (1933). This was particularly true when the inherent authority was applied “to the enforcement of judgments, orders, and writs of the courts, and consequently to the administration of justice.” *Ex Parte Robinson*, 86 U.S. at 510. This was echoed in a more recent decision where this Court also asserted that “courts have inherent power to enforce compliance with their lawful orders...” *Spallone v. U.S.*, 493 U.S. 265, 276 (1990).

In fact, this Court has rendered a litany of decisions that allow the use of the Court’s inherent authority in a criminal case, though never addressing the imposition of monetary sanctions against the Government in a case such as the one below. For instance, see *Piemonte v. U.S.*, 367 U.S. 556, 561-64 (1961)(recognizing the Court’s supervisory authority over summary contempt); *Ballard v. U.S.*, 329 U.S. 187 (1946)(recognizing the Court’s supervisory power over a trial jury); *Marshall v. U.S.*, 360 U.S. 310, 312 (1959)(recognizing the Court’s inherent ability to grant a new trial when jurors are exposed to pretrial publicity); *Rosales-Lopez v. U.S.*, 451 U.S. 182, 190-192 (1981)(recognizing the Court’s authority to regulate voir dire); and *U.S. v. Nobles*, 422 U.S. 171 (1975)(acknowledging the Court’s inherent power to address discovery and disclosure issues). Perhaps the

most important decision from this Court occurred when it acknowledged that the Courts had supervisory authority “over the administration of criminal justice in the federal courts.” *McNabb v. U.S.*, 318 U.S. 332, 341 (1943), later extended to lower Federal Courts through *Heiwig v. U.S.*, 162 F. 2d 837 (6<sup>th</sup> Cir. 1947) and *Bartone v. U.S.*, 375 U.S. 52, 54 (1963).

Recent decisions further support that the Sixth Circuit’s decision sanctions a departure from the judicial norms. As an example, the Supreme Court has previously held that “the general rule in federal courts is that a litigant cannot recover his counsel fees. But that rule does not apply when the opposing party has acted in bad faith.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980), citing *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). This Court also clearly determined that “the ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicating its own authority without complete dependence on other branches.” *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

Perhaps most telling of this Court’s position on sanctions was its instruction that “No one thus doubts that a court may punish parties for “willful disobedience of a court order.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980)... (R. 186: R&R, Page ID# 1810). Such doubt has been expressed by the Sixth Circuit, who failed to overturn the lower court’s decision to the contrary. This Court has even gone so far as to proclaim that contempt orders are “characteristically given teeth by equity’s traditional coercive sanctions for contempt: fines and bodily

commitment imposing compliance or agreement to comply,” *United States Department of Energy v. Ohio*, 503 U.S. 607, 623 (1992), and that in some circumstances, money is the only viable remedy. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 409-410 (1971).

**B. Application of *Chambers v. NASCO*, 501 U.S. 32 (1991).**

The decision of the panel below is inconsistent with this Court’s previous decision in the civil case of *Chambers v. NASCO*, 501 U.S. 32 (1991). The holdings and logic applied by this Court in that case should also apply to Petitioner’s situation, as well as to criminal cases generally.

In that case, there was clear bad faith conduct by one of the parties that the lower Court chose to impose sanctions against. To impose those sanctions, the Court utilized its inherent authority instead of some other available statute or rule, because neither were sufficient to address the conduct that occurred. *Chambers v. NASCO*, 501 U.S. 32, 40-42 (1991). Much like the issue here, this Court phrased the issue in that case as one requiring “us to explore the scope of the inherent authority of a federal court to sanction a litigant for bad faith conduct. Specifically...whether the District Court...properly invoked its inherent power in assessing as a sanction for a party’s bad faith conduct...” *Id.* In response, this Court declared that when imposing sanctions, “if in the informed discretion of the Court, neither the statute nor the Rules are up to the task, the Court may safely rely on its inherent power.” *Chambers v. NASCO*, 501 US 32, 50 (1991). There is no reason why this same rationale should not

apply in the present criminal case, and why the Government should not be subject to the same type of authority as that of the private litigant in *Chambers*.

In fact, allowing sanctions to be imposed against the Government would also be consistent with this Court's previous finding that sanctions are "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Id.* at 43-44, because "the underlying concern that gave rise to the contempt power...was disobedience to the orders of the Judiciary." *Id.* at 44. This is precisely the scenario present in this case.

A review of the case supports this finding. In fact, the Courts' failure below to enforce its own orders against the Government, and by allowing the Government to openly disobey it without consequence, shows that the Court failed to exercise any control and to manage its own affairs to ensure the proper administration of justice. Such a failure is exemplified by the inordinate length of the case, confusion surrounding the items subject to forfeiture, and the ultimate result that the Government's bad faith conduct was never sanctioned by the Court. If such failures are allowed to continue, it would undoubtedly damage the criminal justice system and allow any branch of the Government to flout the rules and orders imposed by the Judicial Branch.

It was clear in *Chambers* that if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled, it may assess attorney's fees against the responsible party, as it may when a party shows bad faith by delaying or disrupting

the litigation or by hampering enforcement of a court order. The imposition of sanctions in this instance transcends a court's equitable power...and reaches a court's inherent power to police itself..." *Id.* at 46. In the case below, all of the Courts are in agreement that the Government's conduct amounted to bad faith and the Magistrate stopped just short of determining that the Government committed a fraud upon the Court. (App. 59; See also App. 123). The Sixth Circuit even commented that the Petitioner deserved better than the treatment received in this case. (App. 17-18). However, both the District Court and Circuit Court failed to do anything about it, thereby permitting the temple of justice to be defiled. Such Governmental bad faith conduct clearly led to a delay and disruption of the proceedings below and hampered the enforcement of the court's Order, and the implementation of the Court's Article III function.

Thus review is warranted by this Court.

### **C. Conclusion.**

In light of this Court's endorsements of specific uses of the Court's inherent authority, and in light of *Chambers v. NASCO*, it is again difficult to understand how the Sixth Circuit's decision in this case can stand, when such a decision directly challenges the authority of any Article III Court, and sanctions such a departure from established precedent by the District Court.

### **III. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE**

Every day this Court meets in a hallowed building where "Equal Justice under law" is forever etched in

stone above its entrance. It is difficult for one to believe that this fundamental, American ideal still exists in a world where decisions such as those rendered in this case below are permitted to stand. Thus this Court should grant review of this Petition to ensure that the phrase “Equal Justice under law” still applies, even when the Government is a party to a case. Just as foundational a doctrine as the Court below declares sovereign immunity to be to the Government, more so should this Court assert the importance of a Court’s inherent authority to effectively administer justice pursuant to the Constitution.

It is clear that “the effective functioning of the judicial system requires public respect for and acceptance of the court’s ruling.” *Burdeau v. McDowell*, 256 U.S. 465, 477 (1927). Failing to resolve the vital question presented by this case will not only profoundly impact the future administration of criminal justice in the United States, but it will also affect the respect and dignity that the public will have for a Judiciary that purports to provide equal justice for all, but then permits a Government to openly flout and disrespect its authority. If such is permitted to occur, this Court would be permitting the direct erosion of a Court’s ability to fairly and equitably administer criminal justice, thus tipping the scales of justice in favor of the Government and rendering the citizens of this country into mere subjects of a Government free to run amok.

The importance of a Court’s ability to assert authority over the Government has long been recognized by federal courts. These Court have expressed the importance of this issue by explaining that the power of the Court to impose sanctions for

contempt against the Government is necessary to ensure that other branches “treat with impunity the valid orders of the judicial branch.” *Nelson v. Steiner*, 279 F. 2d 844, 948 (7<sup>th</sup> Cir. 1960). Strong language from the Eighth Circuit indicates that: “If sovereign immunity can bar compensatory sanctions from contempt against the United States, the judiciary becomes completely dependent on the good graces of the executive branch for compliance with its orders.” *McBride v. Coleman*, 955 F. 2d 571, 581-82 (8<sup>th</sup> Cir. 1992). Furthermore, “the federal courts must have the inherent authority to enforce executive branch compliance with judicial orders which serve to restore to the status quo a party injured as a direct result of the government’s contumacious conduct. Otherwise, the judiciary would be powerless to impose the most effective remedy for ensuring compliance with its orders against the most frequent litigant in federal court.” *Id.* at 582-583. (Lay, C.J., concurring and dissenting). Even the D.C. Circuit has commented that “such coercive sanctions are necessary to ensure that...government [does not] treat with impunity the valid orders of the judicial branch.” *Armstrong v. Executive Office of the President*, 821 F. Supp. 761, 773 (D.D.C. 1993). All of the above illustrate the vital importance of reviewing the decision below, as it strikes directly at the heart of Judicial Power.

The founders of the United States set up a court with “the Judicial Power of the United States,” *U.S. Const.* art. III, §1, however they failed to define the source of authority and scope of that power. Thus, “there is no clear standard establishing when courts may legitimately invoke their inherent powers to take some action that has not been specifically licensed by

rule or statute.” Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, NYU Annual Survey of American Law, p. 41 (2008). Because the Constitution and the Court have “never articulated an overarching standard establishing when these powers may be used,” *Id.* at 49, this crucial issue must be decided by this Court.

In so doing, the Court should determine that “The appropriate interpretation is not that Congress must vest the judicial power in the federal judiciary, but that the Constitution itself does the vesting.” Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. U.L. Rev. 671, 699 (1997). “At least some elements of judicial potency were conceived from the outset to inhere in federal courts by virtue of their being judicial bodies – notwithstanding the absence of authorizing legislation, and no matter what their subject matter might be.” David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. Rev. 75, 89 (1999). This is also supported by the fact that “Article III confers the judicial power without restriction, upon the federal courts.” See Anclien at 58.

The vital question in this case is whether the Sixth Circuit’s decision to the contrary can stand, when such a decision clearly imposes limits upon a federal court’s Article III power. Such limits further bolster the Government’s ability to participate in any type of misconduct that it so desires, without concern of recourse, meaningful admonishment or punishment from the Court. Such a decision has profound repercussions, and is damaging to the Judicial Branch’s



existence if not overturned. Such a decision clouds the very nature and power of the Article III Court, and compounds the issue of the Court's authority to enforce its own orders against the Government. If not overturned, the decision in this case provides the United States with an impenetrable shroud of protection any time they wilfully want to ignore a valid order of a Court that they simply do not like or agree with. If that opinion is allowed to stand, the Court shall be rendered powerless to effectively administer justice. The decision of the Sixth Circuit allows the Government to openly and willfully disregard and disobey valid Court orders and to refuse to provide an iota of protection to the damaged party.

These protections have been affirmed and enjoyed by individuals in other Circuits. In fact, had this case occurred in either the Fifth or Ninth Circuits, it is more than likely that the Court would have rightfully used its inherent authority and sanctioned the Government for its clear, bad faith non-compliance with the Court's orders, and that such a decision would have been upheld on appeal. Such a realization makes it clear that Petitioner is victim to a disparate and inequitable system of justice, further underscoring the importance for this Court's review.

Other federal courts have cautioned against allowing such conduct to remain unpunished. "Quite as important as assuring a fair trial to the defendants not before us is assuring that the circumstances that gave rise to the misconduct won't be repeated in other cases." *U.S. v. Kojayan*, 8 F.3d 1315, 1324 (9<sup>th</sup> Cir. 1993). Furthermore, it is a "fundamental principle that society wins ...when criminal trials are fair; our system

of the administration of justice suffers when any accused is treated unfairly.” *U.S. v. Doe*, 860 F. 2d 488, 494 n. 4 (1<sup>st</sup> Cir. 1988). This Court has echoed these findings, stating that the “tampering with the administration of justice... involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public.” *Chambers v. NASCO*, 501 U.S. at 44, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

Allowing other branches of the Government to avoid sanctions in these circumstances interferes with the ability of the Court to perform its constitutionally assigned functions under Article III of the Constitution. Most obviously, the Government would be free to ignore federal court orders with impunity, and would have no worry about negative repercussions against them. The federal judiciary also would lose the ability to enforce its lawful orders and mandates against the Government, making a farce of their own authority, much like the case below has exhibited. Where such occurs, as in this case, Petitioner was unnecessarily forced to expend his own resources in order to attempt to get the United States to comply with otherwise valid Court Orders to obtain what he was rightfully entitled to receive. If the Government in a criminal case is able to openly defy court orders without accountability or consequence, then the integrity of the Judicial Branch is forever tainted, if not outright destroyed.

As this Court previously explained: “If 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 v. Buck Stove & Range Co.*, 221 U.S. 418, 450 (1911). Furthermore, this Court declared that the contempt power is necessary to ensure that such disobedience to Court orders does not occur. The Court stated, "For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would be only advisory." *Id.* This is exactly what would happen if this Court were to allow the decision of the Sixth Circuit to stand.

The decision below turns the fundamental principles regarding the power of our Nation's Judicial Branch on their head. Is a Court's inherent constitutional authority truly trumped by considerations of the Government's sovereign immunity? This question is particularly important in a criminal case, where the United States is a party in all matters. Thus it is clear that the issue in this case is extremely important and vital to the future administration of criminal justice in this country, and for the respect and acceptance of future court rulings. As such, review of this Petition is warranted.

#### **IV. THIS CASE IS A CLEAN VEHICLE.**

As can be seen above, the facts are straightforward. There can be no doubt that the United States clearly violated and willfully ignored the District Judge's multiple orders. Therefore, this case is a clean vehicle for allowing this Court to determine the scope of a

federal court's inherent authority, and to address the important issue of whether or not the United States may openly disobey a Court's orders in a criminal case, thereby causing great financial harm in the process, and then shielding itself from sanctions pursuant to the doctrine of sovereign immunity.

Indeed in this case and others like it, the Government has consistently protected itself with the blanket of the sovereign immunity doctrine, and will continue to do so again in the future. However, review on this issue should not await any further proceedings in the lower courts, as no further percolation of this issue is necessary to warrant this Court's review at this time. Further delay will only allow a more deepened confusion to take hold among the Circuit Courts with regard to the appropriate scope of a Court's authority in such situations, and will result in the continuation and expansion of the unjust administration of criminal justice. Nobody stands to benefit from the doubt surrounding the scope of a Court's authority to enforce its own orders, and such doubt should be quelled by this Court.

This is the only Court that possesses the ability to resolve the legal question in this case, and as such the granting of this petition is warranted.

### **CONCLUSION**

This case exemplifies the growing conflict among the Circuit Courts and that the issue presented in this case is a fundamentally important question that requires guidance from this Court. For the foregoing

reasons, Petitioners respectfully request that a Writ of Certiorari be issued so full review can be had by this Court.

Respectfully submitted,

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