No. 13-742

In the Supreme Court of the United States

SAM DROGANES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
DAVID A. O'NEIL
Acting Assistant Attorney General
APRIL A. CHRISTINE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in the absence of any statutory waiver of federal sovereign immunity, a district court may impose monetary sanctions against the United States for litigation misconduct in a criminal proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 728 F.3d 580. The opinion of the district court (Pet. App. 65-131) is reported at 893 F. Supp. 2d 855.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2013. A petition for rehearing was denied on October 7, 2013 (Pet. App. 132-133). The petition for a writ of certiorari was filed on December 17, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of distributing explosive materials with-

out a license, in violation of 18 U.S.C. 842(a)(3)(B). He was sentenced to four months of imprisonment to be followed by two years of supervised release (beginning with four months of home confinement) as well as to forfeiture of the portion of fireworks that the government seized from him and determined to be "display fireworks." Pet. App. 6; D. Ct. Doc. 107, at 2-4 (Apr. 8, 2010). Petitioner moved for monetary sanctions against the government, including attorney's fees and expenses, claiming that the government acted in bad faith in the course of litigating about which fireworks were to be forfeited and which were to be returned to petitioner. Pet. App. 5-6. The district court held that federal sovereign immunity prevented the court from imposing an award of monetary sanctions against the United States. *Id.* at 7. The court of appeals affirmed. *Id.* at 1-21.

1. "[D]isplay fireworks" are more powerful than "consumer fireworks" and are classified under federal law as "explosive materials," which may not be purchased, transported, or distributed without a license. 18 U.S.C. 842(a)(1), (3)(A), and (3)(B); 27 C.F.R. 555.11; Pet. App. 3.

Petitioner owns and operates Premium Fireworks, a company that sells fireworks in northern Kentucky. Pet. App. 3-4. In 2007, federal agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) suspected that, in addition to selling "consumer fireworks," petitioner was also selling "display fireworks." *Id.* at 4. Acting pursuant to search and seizure warrants, ATF agents seized both display and consumer fireworks that were already in petitioner's inventory or in transit to petitioner's business. *Ibid.* The ATF

shipped the seized fireworks to a former ammunition depot for storage and sorting. *Ibid.*

In July 2008, petitioner was indicted on one count of engaging in the business of importing, manufacturing, and dealing in explosive materials without a license, in violation of 18 U.S.C. 842(a)(1) and 844(a)(1); three counts of transporting and receiving explosive materials without a license, in violation of 18 U.S.C. 842(a)(3)(A) and 844(a)(1); and one count of distributing explosive materials without a license, in violation of 18 U.S.C. 842(a)(3)(B) and 844(a)(1). D. Ct. Doc. 1, at 2-4. The sixth count of the indictment sought forfeiture of the seized display fireworks pursuant to 18 U.S.C. 844(c)(1). D. Ct. Doc. 1, at 4-6.[1]

Because many of the fireworks had been mislabeled as consumer fireworks (when they were in fact stronger), the process of testing and separating the display fireworks from the consumer fireworks was a lengthy one. Pet. App. 4, 67-74. The government eventually produced three inventories: a "Green list" of consumer fireworks, a "Red list" of display fireworks, and an "Orange list" of remaining fireworks of uncertain classification. *Id.* at 5.

2. a. In October 2008, before the inventory of the fireworks had been completed, petitioner filed a motion pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure seeking the return of his consumer fireworks.[2] Pet. App. 5; D. Ct. Doc. 17 (Oct. 7, 2008). On February 19, 2009, the district court ordered the gov-

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[1] In January 2009, a superseding indictment included the same charges. Pet. App. 74 n.7.

[2] Rule 41(g) provides that "[a] person aggrieved * * * by the deprivation of property may move for the property's return" in "the district where the property was seized."

ernment to complete testing of the fireworks by March 11, 2009, at which time the government was to provide petitioner with a list of the consumer fireworks and a timetable for their return. Pet. App. 5; D. Ct. Doc. 44, at 3-4.

When that date arrived, the government had not completed testing, but an Assistant United States Attorney sent a letter to petitioner explaining what criteria would be used to classify the fireworks, stating that the ATF had determined that damage to the consumer fireworks made shipping them back to petitioner infeasible, and proposing that petitioner would instead be paid the wholesale value of unreturned consumer fireworks. Gov't C.A. Br. 27; Pet. App. 5, 73; D. Ct. Doc. No. 48-4 (Mar. 20, 2009).

b. In July 2009, petitioner pleaded guilty, pursuant to a plea agreement, to one count of distributing explosive materials without a license and agreed to forfeit whichever fireworks the ATF determined to be display fireworks. Pet. App. 6, 12. In April 2010, the district court sentenced petitioner to four months of imprisonment to be followed by two years of supervised release (which would begin with four months of home confinement). *Id.* at 6, 75; D. Ct. Doc. 107, at 2-4. At the sentencing hearing, the court also considered the scope of the property that petitioner would be required to forfeit. Pet. App. 75-76. The government proposed a preliminary order of forfeiture for the fireworks identified on the "Red" list as display fireworks. *Id.* at 6. Petitioner objected to the proposed order, asserting that the government had applied an improper standard in determining what constituted a display firework. *Ibid.*

c. In July 2010, before the district court had ruled on petitioner's objection to the proposed forfeiture order, petitioner filed a motion for sanctions against the government. D. Ct. Doc. 119 (July 8, 2010). Petitioner had received a letter, dated January 4, 2010, from an Associate Chief Counsel of the ATF denying petitioner's demand for compensation for the seized consumer fireworks on the ground that the government had not waived its sovereign immunity. D. Ct. Doc. 119-6, at 1 (July 8, 2010). The letter stated that petitioner had the right to sue the ATF for "negligent handling or storage of property" under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, but that the ATF would oppose any such suit under the exception to the FTCA's waiver of sovereign immunity for the detention of property by law-enforcement officers. D. Ct. Doc. 119-6, at 1; see 28 U.S.C. 2680(c).

Petitioner's motion for sanctions sought compensation for the retail value of the consumer fireworks, for storage costs, and for the attorney's fees and expenses associated with pursuing the sanctions motion. D. Ct. Doc. 119, at 1. Petitioner contended that the district court could use its civil contempt power and its inherent authority to impose monetary sanctions to direct the government to compensate petitioner. *Id.* at 6-13. The government opposed the motion, contending that sanctions were not appropriate and that, notwithstanding the government's previous representations that it would pay for the value of unreturned fireworks, sovereign immunity would preclude the court from awarding monetary sanctions under Rule 41(g). D. Ct. Doc. 134, at 7-15 (Sept. 15, 2010). The government later filed a motion for destruction of all of the fireworks, contending that the fireworks had deteriorated such

that shipping them back to petitioner would be dangerous and that high storage costs exceeded the fireworks' value. D. Ct. Doc. 142, at 1-2 (Jan. 14, 2011).

d. The magistrate judge conducted an evidentiary hearing on all three motions (petitioner's objections to the preliminary judgment of forfeiture, petitioner's motion for sanctions, and the government's motion for destruction of the fireworks). Pet. App. 23. The magistrate judge recommended that the fireworks the government identified as display fireworks on the Red list be subject to forfeiture. *Id.* at 37-48. The magistrate judge also recommended that the government be sanctioned for failing to complete testing of the fireworks by the deadline established by the district court and for making repeated misstatements about the condition of the fireworks in its refusals to return what were later found to be undamaged consumer fireworks that could in fact be returned to petitioner. *Id.* at 49-60, 123-124. The magistrate judge recommended that the district court use its civil contempt power and its inherent authority to impose monetary sanctions against the government in an amount sufficient to reimburse petitioner for attorney's fees and expenses incurred in seeking the return of consumer fireworks after May 11, 2009. *Id.* at 49, 60. In light of those recommendations on the first two motions, the magistrate judge recommended that the government's motion to destroy the fireworks be denied as moot. *Id.* at 61-62. Petitioner and the government both filed objections to the magistrate judge's report and recommendation. *Id.* at 66.

e. In August 2012, the district court ruled on the objections with respect to all three motions. Pet. App. 6, 65-66. The district court overruled petitioner's objection to the forfeiture order, concluding that his

methodological objections were foreclosed by his plea agreement and that the government had proved by a preponderance of the evidence that the 944 display fireworks designated in the Red list and the Orange list were subject to forfeiture. *Id.* at 7, 78-94.[3]

With respect to petitioner's motion for sanctions, the district court concluded as an initial matter that the forfeiture proceeding was part of petitioner's criminal case and was therefore governed by the Federal Rules of Criminal Procedure rather than civil rules. Pet. App. 97-102. The court agreed with the magistrate judge that the government had "engaged in bad-faith conduct that would justify sanctions." *Id.* at 123. The court also concluded that the government's conduct was "the type that may be sanctioned in a criminal case under the court's inherent authority." *Id.* at 111. Nevertheless, the court concluded that, in the absence of any waiver of the government's sovereign immunity, it could not employ its inherent authority to impose monetary sanctions against the United States. *Id.* at 111-123.

The district court also ordered that the consumer fireworks be returned to petitioner and denied the government's motion to destroy the consumer fireworks as moot. Pet. App. 131. The government thereafter returned 272,000 pounds of consumer fireworks to petitioner. *Id.* at 7.

3. The court of appeals affirmed. Pet. App. 1-21. As relevant here, the court held that petitioner was not entitled to an award of monetary sanctions against the

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[3] Eighteen days before the district court's order, the government had submitted an amended Orange list which identified all of the previously unclassified fireworks as either consumer or display fireworks. Pet. App. 6; D. Ct. Doc. 199-3 (Aug. 3, 2012).

government. *Id.* at 13-17. Its reasoning was based on two different grounds.

First, the court of appeals explained that petitioner's motion for sanctions was "indistinguishable in substance" from his unsuccessful motion for the return of his property under Rule 41(g), which does not in any event permit an award of money damages when property cannot be returned. Pet. App. 16. The court stated that the proper mechanism for obtaining monetary relief would have been to file a claim under the FTCA. *Ibid.* The court was, however, unwilling to "endorse an end run" around the FTCA's "principles and procedures." *Ibid.*

Second, the court of appeals held that the district court's inherent authority to sanction a party for litigation misconduct does not "trump[] the government's sovereign immunity." Pet. App. 16. The court explained that "monetary claims" against the government are barred in the absence of an "unequivocal expression in statutory text" waiving the government's immunity. *Id.* at 14-15. Even though the court accepted petitioner's assumption "that the inherent authority to sanction parties remains as robust in criminal proceedings as it is in civil proceedings," it emphasized that neither petitioner nor the court had identified any statute that unequivocally waived the government's immunity to monetary sanctions in the context of this case. *Ibid.* The court recognized that "most circuits" to have considered the question "have suggested that the government's sovereign immunity wins when it comes head-to-head with a lower court's inherent authority." *Id.* at 16-17 (citing *United States* v. *Horn*, 29 F.3d 754, 761-766 (1st Cir. 1994); *Coleman* v. *Espy*, 986 F.2d 1184, 1191-1192 (8th Cir.), cert. denied, 510 U.S.

913 (1993); *Barry* v. *Bowen*, 884 F.2d 442, 444 (9th Cir. 1989)). The court saw "no good reason to chart a different course at this time." *Id.* at 17.

The court of appeals explained that its conclusion did not leave the courts "powerless to control the government when it refuses to play by the rules." Pet. App. 17. It noted that Congress has authorized sanctions against the government itself in other instances, and it cited the First Circuit's list of "other weapons in [the courts'] armamentarium." *Ibid.* (brackets in original) (quoting *Horn*, 29 F.3d at 766).

Although the court of appeals affirmed the district court's denial of monetary sanctions, it concluded that petitioner "deserved better treatment from his party-opponent," and it stated that it was "disturbed by the [government's] seemingly interminable delays in testing the seized fireworks" and "by the government's doublespeak regarding the condition of the consumer fireworks and its ability to return them to [petitioner]." Pet. App. 17-18.[4]

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[4] The court of appeals also rejected other contentions that petitioner raised on appeal but does not advance in this Court. It held that "[t]he district court did not err in accepting [the government's] determination that 944 items seized from [petitioner] were subject to forfeiture." Pet. App. 11. The court applied plain-error review to two constitutional arguments that petitioner raised for the first time on appeal. *Id.* at 18. It held that the seizure of petitioner's fireworks did not constitute a taking of private property without just compensation in violation of the Fifth Amendment, *id.* at 19, and that the value of the forfeited property was not so disproportionate to the gravity of his offense as to constitute an excessive fine in violation of the Eighth Amendment, especially since the display fireworks were contraband in which he could have no property interest, *id.* at 19-21.

ARGUMENT

Petitioner renews (Pet. 14-34) his contention that a district court may, in the absence of any statutory waiver of sovereign immunity, exercise its inherent authority to impose monetary sanctions against the United States in a criminal proceeding. That contention lacks merit, as does petitioner's claim that the decision below conflicts with decisions of this Court or of any other court of appeals. Further review is unwarranted.

1. The court of appeals' decision is correct. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). Indeed, "the 'terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Ibid.* (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Because no statute has waived the government's immunity in this context, the district court could not use its inherent authority to impose a compensatory monetary sanction on the United States.

a. This Court has explained that any waiver of federal sovereign immunity must be contained in an express and particularized statement by Congress and cannot be inferred by the courts. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). Even where a statute has waived the government's immunity, any ambiguities in its scope must be construed in favor of the sovereign. *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012).

The Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable" for "monetary exactions,"

United States v. *Idaho*, 508 U.S. 1, 8-9 (1993), because such claims present heightened separation-of-powers concerns. In part because the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7, neither the Executive Branch nor the Judicial Branch can effect a waiver of sovereign immunity. See *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990); *United States* v. *Shaw*, 309 U.S. 495, 501-502 (1940). Narrow construction of statutory waivers of immunity ensures that courts do not mistakenly impose burdens on the public fisc that Congress did not authorize and that "public funds will be spent [only] according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM*, 496 U.S. at 428, 432.

b. As in the court of appeals (see Pet. App. 15), petitioner does not contend that Congress has waived the government's sovereign immunity from monetary sanctions in this case. Instead, he contends (Pet. 21-27) that a district court's inherent authority to control judicial proceedings is sufficient to override the government's sovereign immunity from monetary exactions. That conclusion is not supported by this Court's decisions.

This Court has recognized that federal courts possess "inherent powers * * * which 'are necessary to the exercise of all others.'" *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). A lower court's inherent powers "are governed not by rule or statute but by the control necessarily vested in

courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation and internal quotation marks omitted). Those powers generally include the authority to impose a "sanction for conduct which abuses the judicial process." *Id.* at 44-45.

But the federal courts' inherent powers are not absolute. This Court has repeatedly recognized that district courts may not invoke their inherent supervisory power in ways that would "circumvent or conflict with the Federal Rules of Criminal Procedure" or with constitutional principles. *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996) (holding that supervisory power cannot be used to circumvent time limits prescribed in Fed. R. Crim. P. 29(a)); see *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) (holding that supervisory power cannot be used circumvent the harmless-error inquiry prescribed by Fed. R. Crim. P. 52(a)); *United States* v. *Hasting*, 461 U.S. 499, 506 (1983) (holding that supervisory power cannot be used to reverse a conviction in order to deter prosecutorial misconduct); *United States* v. *Payner*, 447 U.S. 727, 736-737 (1980) (holding that supervisory power cannot be used to suppress evidence otherwise admissible under the Fourth Amendment); see generally *Bank of Nova Scotia*, 487 U.S. at 254 ("[I]t is well established that 'even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.'") (quoting *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985)) (brackets omitted).

The Court has accordingly required express statutory authorization before the government can be compelled to pay the kinds of litigation expenses that could

be imposed on other parties. In *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1 (1926), the Court modified a judgment ordering the United States to pay the costs of transcripts and copying. *Id.* at 20. The Court reasoned that, in the absence of any such specific authority (as of 1926) in which Congress consented to having such costs taxed against the government, the government could not be required to pay them. *Id.* at 20-21. Similarly, despite petitioner's suggestion (Pet. 24) that a party's bad-faith conduct may require it to reimburse the other side for attorney's fees, the Court has recognized that sovereign immunity bars an award of attorney's fees against the government in the absence of a statutory waiver. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) (narrowly construing statute authorizing fee awards including attorney's fees because it applied to "awards against the United States, as well as against private individuals"); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 267-268 (1975) (stating that fee awards against the government, "if allowable at all, must be expressly provided for by statute").

c. Although petitioner concedes (Pet. 23) that this Court's discussions of inherent authority in criminal cases have "never address[ed] the imposition of monetary sanctions against the Government," he nevertheless contends (Pet. 25-27) that the decision below "is inconsistent with" the decision in *Chambers*, *supra*.

In *Chambers*, this Court held that a district court did not abuse its discretion in using its inherent authority to assess attorney's fees as a sanction for bad-faith conduct in litigation. 501 U.S. at 50-51. But that case is inapplicable here because it involved sanctions against a nonfederal party and therefore did not impli-

cate sovereign-immunity concerns. Petitioner urges the Court to subject the federal government "to the same type of authority as that of the private litigant in *Chambers*." Pet. 26; see also Pet. 17 (stating that "a private litigant" who "acted in bad faith as the Government did here * * * would be exposed to the possibility of sanctions"). But that would flout this Court's acknowledgment of the "crucial point that, when it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties." *Lane* v. *Pena*, 518 U.S. 187, 196 (1996); cf. *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1662 n.8 (2011) (noting, in the context of state sovereign immunity, that the essence of sovereign immunity "is that remedies against the government differ from 'general remedies principles' applicable to private litigants") (citation omitted).

d. Petitioner also suggests that whatever sanctions are available in civil cases must also be available in criminal ones. Pet. 20 (citing cases involving Rules 11, 37, and 38 of the Federal Rules of Civil Procedure). But "[t]here are good reasons to think Congress and the Rules drafters meant to treat civil cases and criminal cases differently when it comes to regulating attorney misconduct. * * * Surely the decision not to import Civil Rule 11 into the Criminal Rules, to take one example, was an intentional and sensible one." *United States* v. *Aleo*, 681 F.3d 290, 308 (6th Cir. 2012) (Sutton, J., concurring). Furthermore, even in the context of a "proceeding to enforce the [grand-jury] secrecy mandate of Rule 6(e)(2)" of the Federal Rules of Criminal Procedure—a proceeding that "is civil in nature and may be initiated by a private plaintiff"—the D.C. Circuit has observed that "[t]he plaintiff in a Rule

6(e)(2) suit would not, of course, be entitled to seek monetary damages or attorneys' fees and costs from an errant prosecutor, even though such damages are commonly awarded in civil contempt actions." *In re Sealed Case*, 151 F.3d 1059, 1069, 1070 (1998).[5] Accordingly, no foundation exists for petitioner's assumption (which the court of appeals accepted *arguendo*, Pet. App. 14) that civil and criminal proceedings should be treated equivalently in this regard.

e. Nor does a bar on monetary sanctions against the government (where Congress has not authorized them) vitiate the courts' inherent power to control the participants in proceedings before them. As the decision below recognized, the courts retain "other weapons." Pet. App. 17 (quoting *United States* v. *Horn*, 29 F.3d 754, 766 (1st Cir. 1994)). Petitioner asserts (Pet. 25) that "in some circumstances, money is the only viable remedy," but in support of that proposition he tellingly cites Justice Harlan's opinion concurring in the judgment in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which recognized liability for federal officials only in their

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[5] Petitioner suggests (Pet. 14, 21) that the D.C. Circuit has squarely held that lower courts cannot use their inherent authority to impose monetary sanctions on the government. In fact, however, that court—like most of the courts of appeals—has not resolved the question. In *United States* v. *Waksberg*, 112 F.3d 1225 (D.C. Cir. 1997), which was a civil action brought by the United States to enforce a settlement agreement, the court declined, in light of principles of judicial restraint, to decide whether a contempt order against the government could include monetary sanctions because it was not yet clear whether a ruling against the government in that case would require monetary compensation. *Id.* at 1227. The D.C. Circuit has apparently had no occasion to consider the question in the 17 years since *Waksberg*.

individual capacity and acknowledged that "[h]owever desirable a direct remedy against the Government might be * * *, the sovereign still remains immune to suit." *Id.* at 410. Similarly, in the passage cited by the decision below, the First Circuit in *Horn* noted that a court may, in addition to imposing other nonmonetary sanctions, require a prosecutor individually to pay a monetary penalty without violating the principle of sovereign immunity. 29 F.3d at 766 & n.14 (citing other cases upholding monetary sanctions against government attorneys).[6]

Because petitioner has identified no statutory waiver of sovereign immunity—much less the kind of unambiguous waiver that would be required by this Court's cases—he errs in contending that the district court was able to award monetary sanctions against the United States in his criminal forfeiture proceeding.

2. Petitioner contends that there is a "growing conflict among the circuit courts" about whether lower federal courts' inherent authority permits them "to impose monetary sanctions against the Government for its undisputed bad faith conduct." Pet. 14 (capitalization modified). But no conflict exists, because none of the cases petitioner identifies involved circumstances similar to this case.

a. Petitioner asserts (Pet. 15-18) that the decision below is "irreconcilable" with three decisions of the Fifth Circuit. Petitioner first discusses *Bradley* v. *United States*, 866 F.2d 120 (5th Cir. 1989), and *Chilcutt* v. *United States*, 4 F.3d 1313 (5th Cir. 1993), cert. denied, 513 U.S. 979 (1994). As an initial matter, both

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[6] Even in the civil context, some monetary sanctions may be imposed only on attorneys rather than the parties they represent. See Fed. R. Civ. P. 11(c)(1)(5).

of those cases are distinguishable because they involved civil tort actions brought against the government under the FTCA, which reflects Congress's waiver of sovereign immunity for such actions. See *Levin* v. *United States*, 133 S. Ct. 1224, 1228 (2013) (noting that the FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort") (citation omitted). This case, by contrast, involves a criminal forfeiture proceeding in which Congress has provided no statutory waiver of sovereign immunity.

Moreover, the court of appeals did not actually impose (or affirm) monetary sanctions against the government in either case. In *Bradley*, the court stated that, on remand, the district court "may consider," "[i]n its discretion," whether to require "the government to compensate the [plaintiffs] and their counsel for their expenses attributable to the government's conduct." 866 F.2d at 128. But the Fifth Circuit did not directly order the imposition of such fees. More importantly, it never mentioned sovereign immunity and thus provided no indication that it had reached any considered decision about the ability of federal courts' inherent authority to overcome sovereign immunity, as opposed to any waiver of immunity contained in the FTCA or in Rules 11 or 26 of the Federal Rules of Civil Procedure, none of which would be applicable here.

In *Chilcutt*, the Fifth Circuit upheld a sanctions order requiring an Assistant United States Attorney "to *personally* reimburse the plaintiffs for attorney's fees which arose from the Government's discovery abuse" in a civil suit under the FTCA. 4 F.3d at 1315, 1325-1327 (emphasis added). The sanction against the government itself in that case was nonmonetary. *Id.* at 1315.

To the extent that the court indicated that monetary sanctions against the government itself are possible, it relied on what it believed to be Congress's clear intention to allow such treatment in 28 U.S.C. 2412(b) and in Rule 37 of the Federal Rules of Civil Procedure. 4 F.3d at 1325-1326. Again, petitioner does not, and could not, contend that either of those provisions applies to this criminal forfeiture proceeding.

The third decision of the Fifth Circuit that petitioner discusses (Pet. 16-17) is *FDIC* v. *MAXXAM, Inc.*, 523 F.3d 566 (2008), but it, too, is distinguishable. In *MAXXAM*, the FDIC brought a civil suit against MAXXAM's CEO "for his alleged involvement in the failure of [a] large Texas thrift" and later dismissed that action. *Id.* at 568. The district court found that the FDIC's claims had been "baseless and had an improper purpose of gaining government ownership of approximately 3,800 acres of California redwoods owned by MAXXAM * * * and harassing [the CEO and others]." *Id.* at 568-569 (footnote omitted). The CEO requested sanctions. *Id.* at 575. Acting in relevant part pursuant to its inherent authority and to Rule 11 of the Federal Rules of Civil Procedure, the district court entered a sanctions order requiring the FDIC to pay attorney's fees and interest. *Id.* at 576, 594. The court of appeals sustained that award to the extent that it reflected costs that "resulted from the FDIC's manner of prosecuting the suit" before the district court. *Id.* at 597. With respect to sovereign immunity, the court of appeals observed that "[t]he 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.* at 595. But that observation came after the court had already

explained that Congress had enacted "a broad waiver" of the FDIC's immunity from suit. *Id.* at 595 n.160 (quoting *Meyer*, 510 U.S. at 475) (internal quotation marks omitted). That waiver was contained in the FDIC's organic statute, which provided that the agency could "sue and be sued, and complain and defend, in any court of law or equity, State or Federal." *Ibid.* (quoting 12 U.S.C. 1819(a) (Supp. II 1990)).

As this Court has explained, such a sue-and-be-sued clause "broadly waives sovereign immunity," because it reflects Congress's intention that the agency be "'launched * * * into the commercial world and [made] no[] less amenable to judicial process than a private enterprise under like circumstances.'" *Loeffler* v. *Frank*, 486 U.S. 549, 555, 564 (1988) (quoting *FHA* v. *Burr*, 309 U.S. 242, 245 (1940)). A sue-and-be-sued clause therefore generally waives an agency's immunity from any award that "is recoverable against a private party as a normal incident of suit." *Id.* at 557.

Accordingly, notwithstanding some broader language in the opinion in *MAXXAM*, its holding was supported by an express statutory waiver and rationale that are not present here.[7] No statute permits a nonprevailing party to sue the United States for monetary sanctions in a criminal forfeiture proceeding, and the initiation of such a proceeding does not indicate that the government is acting in a commercial capacity.

b. Petitioner next contends (Pet. 18-19) that the decision below conflicts with *United States* v. *Woodley*, 9 F.3d 774 (9th Cir. 1993). In that case, the district

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[7] The court in *MAXXAM* also noted, without deciding, that the FDIC could be seen as having waived its sovereign immunity by acting in its capacity as a receiver rather than in a governmental capacity. 523 F.3d at 594 n.158, 597.

court assessed attorney's fees against the government as a sanction for failing to make timely disclosure of certain materials as required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and Rule 16 of the Federal Rules of Criminal Procedure. 9 F.3d at 776, 781. The Ninth Circuit reversed the fee award. *Id.* at 782. It held that the award could not be sustained under the local rules or the Federal Rules of Criminal Procedure, because they did not constitute explicit waivers of sovereign immunity. *Id.* at 781. Although the court did state that "[s]overeign immunity does not bar a court from imposing monetary sanctions under an exercise of its supervisory powers," that statement was dictum (and was not supported by any citation), as the court went on to explain that "alternatives to monetary sanctions, such as holding the attorney in contempt or reporting the misconduct to the state bar for disciplinary proceedings, are more proper remedies." *Id.* at 782. Nor does the Ninth Circuit appear to have sustained, in any other case, a monetary sanction against the government under an inherent-authority rationale in the 21 years since *Woodley*. Moreover, in *Barry* v. *Bowen*, 884 F.2d 442 (9th Cir. 1989), which the court of appeals cited here (Pet. App. 17), the Ninth Circuit vacated a district court order imposing monetary sanctions against the government for contempt in a civil case in part because it could not find "anything which suggests that the United States expressly has waived its sovereign immunity with respect to contempt sanctions" and therefore had "doubts about the power of the district court to impose monetary sanctions." 884 F.2d at 443-444.

Because petitioner has identified no case in which a court of appeals has granted relief under circumstances

comparable to this case, no conflict in the courts of appeals would be resolved by granting further review.

3. Petitioner contends (Pet. 29) that this case presents a question of "vital importance" because precluding monetary sanctions against the government in the absence of a waiver of sovereign immunity would purportedly "strike[] directly at the heart of Judicial Power." It is, however, well established that Congress retains wide-ranging authority to limit courts' supervisory powers generally. *Chambers*, 501 U.S. at 47 ("[T]he exercise of the inherent power of lower federal courts can be limited by statute and rule, for 'these courts were created by act of Congress.'") (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1874)) (brackets omitted). That principle applies with particular force where the Constitution vests power over the public fisc in Congress alone. See *OPM*, 496 U.S. at 425 ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."). Moreover, courts' inability to act unilaterally to impose monetary sanctions directly on the government does not make the government, as petitioner suggests (Pet. 32), "free to ignore federal court orders with impunity." The courts retain many other means of encouraging compliance with their orders, including the ability to impose various nonmonetary sanctions on the government as well as both monetary and nonmonetary sanctions on its attorneys. See *Horn*, 29 F.3d at 766-767; *Woodley*, 9 F.3d at 782; Pet. App. 17; pp. 15-16, *supra*.

Finally, the extreme scarcity of cases dealing with the question belies petitioner's claim (Pet. 33) that this Court's resolution is "vital to the future administration

of criminal justice in this country, and for the respect and acceptance of future court rulings." Most courts of appeals have never had to address whether the federal courts' inherent power authorizes monetary sanctions against the United States in the absence of any statutory waiver. And petitioner provides no evidence that courts that have rejected that power, such as the First Circuit, see *Horn*, 29 F.3d at 767-767, have suffered any diminution in their ability to administer criminal justice and maintain public respect. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
DAVID A. O'NEIL
Acting Assistant Attorney General
APRIL A. CHRISTINE
Attorney

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