No. 13-742

In the Supreme Court of the United States

SAM DROGANES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

Steven D. Jaeger
Counsel of Record
The Jaeger Firm
23 Erlanger Road
Erlanger, KY 41018
(859) 342-4500
sdjaeger@thejaegerfirm.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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This case presents a question vital to the future authority of the Judicial Branch: whether a Court's inherent, Constitutional authority to impose monetary sanctions against the government or its agencies is dependent on Congress and trumped by the government's protection under sovereign immunity. Despite the government's assertions to the contrary, there is an obvious conflict among the lower courts regarding this question. Based on this Court's prior opinions, Petitioner contends that the Sixth Circuit's opinion was incorrect. Thus, the government's brief in opposition should do little to sway this Court from granting the Petition for Writ of Certiorari.

1. The government contends (Br. in Opp. 10-16) that "The court of appeals' decision is correct…" holding that "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." That position misses the mark. The government's defense of the Court of Appeals' decision is unpersuasive.

The government cites *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), to support that sovereign immunity "shields the Federal Government and its agencies from suit." Br. in Opp. 10. The government further argues that "any waiver of federal sovereign immunity must be contained in an express and particularized statement by Congress and cannot be interfered with by the courts." *Id*. However, the issue presently before this Court is more properly concerned with the scope and validity of a court's constitutionally granted inherent authority to control the parties and proceedings before

it. When such is properly considered, the doctrine of sovereign immunity has no place in the conversation, and surely such authority cannot be dependent upon Congress, or else the court's authority to enforce its orders becomes secondary to the power of the other branches.

Despite the government's argument that Petitioner's position is unsupported by this Court's previous rulings, they openly acknowledge in their brief that this Court has recognized a court's inherent power "to impose a sanction for conduct which abuses the judicial process," as well as the truth that those powers "are not governed by rule or statute." Br. in Opp. 11-12, citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 , 764 (1980) and *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991). Yet conveniently, the government now argues that due to the lack of congressional, statutory authority permitting the issuance of such sanctions against the government and its agencies, this case should not be reviewed. Such an argument is without merit, and should in no way undermine that this Court should grant review.

In addition, the government attempts to rely on a string of cases that limits a court's inherent authority when such authority circumvents or conflicts with the Federal Rules of Criminal Procedure or established constitutional principles. Br. in Opp. 12. However, the government seemingly overlooks the basic fact that if this Court were to adopt its argument, then the very nature of a court's constitutional existence is called into question. How can a court not inherently possess the authority necessary to control the parties before it? If a court does not possess authority to enforce its orders

and sanction conduct that violates those orders, how can a court carry out its constitutional functions?

To support its position that monetary sanctions cannot be imposed in cases such as this one, the government mistakenly relies in part on this Court's decision in *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926). However, such reliance is misplaced. In that case, this Court addressed the issue of whether or not the United States can be forced by a court to pay for the costs associated with a case. In so deciding, the Court determined that there was no statutory authorization to allow such cost shifting. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926). But cost shifting was not present here. Instead, a direct court order was issued for the ATF to either return to defendant his lawful property or pay him for it. The authority to enforce that Order existed under the very nature of the Court's constitutional existence.

Next, the government attempts to distinguish this Court's holding in *Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991), arguing that this opinion does not apply because it did not involve a governmental entity or agency and therefore did not trigger sovereign immunity considerations. Br. in Opp. 13. The government even goes so far as to boldly claim that the Federal Government is entitled to additional, special privileges that those citizens from which it derives its power are themselves, not entitled to. Br. in Opp. 14. Had a private litigant ignored the Order of the District Court as the ATF did in this case, there is little doubt that such party would find itself in contempt of court and likely fined or incarcerated. Surely, such cannot be permitted, and only the guidance from this Court can

properly check the scope of the executive and legislative authority, and make judicial authority valid.

This Court itself, after granting review, framed the issue in *Chambers* as "whether the District Court…properly invoked its inherent power in assessing ... a sanction for a party's bad faith conduct…" *Id.* at 50. 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." *Id*. There is no reason why this same rationale should not apply in the present criminal case.

While it is true that the *Chambers* case concerned private litigants in a civil case, the government fails to offer any reason as to why this similar issue should not merit the same time and consideration of this Court in a criminal case. Unless and until this Court intervenes, the Court of Appeals' decision will curtail a court's ability to enforce its own orders when the government is a party before it.

The Court of Appeals and the government in its brief, both seemingly attempt to rationalize that their positions do not "vitiate the courts' inherent power to control the participants in proceedings before them," particularly since there are other, non-monetary methods for a court to use. Br. in Opp. 15. However, if such were as obvious as they would lead the Court to believe, one has to wonder why the District Court in this case failed to utilize any of these other options. A review of the record shows that the Court had little to no control over the government, particularly the ATF and its agents, and that the Court was unable to find

any adequate way to enforce its multiple Orders that the ATF either return to the defendant his lawful property or pay him for it. It is Petitioner's adamant position that such was not done by the District Court because in fact, the inability to impose a monetary remedy, can and did neuter the Court's ability to enforce its Orders.

The government's argument that the Court of Appeals' decision is correct is invalid, and is unpersuasive in offering any reason why this issue should not be heard by this Court.

Thus, Petitioner reasserts that review should be granted.

2. The government contends (Br. in Opp. 16-21) that "no conflict exists" among the courts below "because none of the cases petitioner identifies involved circumstances similar to this case." *Id*. at 16. This outrageous claim is simply incredible, and requires the government to completely ignore what the conflicting cases actually say. In fact, the assertion is so absurd that it even directly contradicts the District Court's own acknowledgment in this case that a "clear split of authority" exists on this issue. (App. to Petition, 117).

Additionally, the facts, holdings and considerations of those cases from other circuits refute the government's effort to distinguish them, therefore making their contention meritless. It is clear that the Sixth Circuit, First Circuit, Federal Circuit and D.C. Circuits opined that Article III Courts do not have the inherent authority to impose monetary sanctions against the government for its undisputed bad faith conduct. However, contrary decisions have clearly been

rendered in the Fifth and Ninth Circuit Courts. Thus, a conflict is clearly present.

a. Respondent contends that the Fifth Circuit cases cited by Petitioner are distinguishable because "the court of appeals did not actually impose [or affirm] monetary sanctions against the government." Br. in Opp. 17. But the Fifth Circuit could not have been more clear that it would allow a court to impose monetary sanctions against the government pursuant to its inherent authority if the circumstances so warranted. The government's contention to the contrary should be viewed as little more than a desperate attempt to downplay an obvious conflict among the lower courts.

In fact, the government's failure to acknowledge the conflict with the Fifth Circuit's decision in *Bradley v. United States*, 866 F. 2d 120 (5th Cir. 1989), is simply without logic. To argue that the Court "provided no indication that it had reached any considered decision about the ability of federal courts' inherent authority to overcome sovereign immunity," Br. in Opp. 17, is to simply ignore the clear language of the opinion and the well-reasoned logic of the Court. The Court clearly considered whether or not sanctions could be imposed in circumstances similar to this case, as it directed that "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." *Id*. at 127-128. As the government recognizes, the Fifth Circuit Court of Appeals 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. Thus, in so holding and instructing, the Fifth Circuit clearly considered, and even outright permitted and 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. To now argue that the Fifth Circuit failed to provide any indication about a federal court's inherent ability to overcome sovereign immunity is disingenuous and such an argument should be ignored by this Court.

The government also tries to distinguish the Fifth Circuit's opinion in *Chilcutt v. United States*, 4 F. 3d 1313 (5th Cir. 1993). Here, they argue that the court's indication "that monetary sanctions against the government itself are possible," should not be considered in this case because *Chilcutt* involved the Federal Torts Claim Act and not a criminal forfeiture proceeding. Br. in Opp. 18. But this position skews the issue.

The government's position once again seeks to elevate the status of the Federal Government, specifically the executive and legislative branches, above that of the judicial branch. It is this exact concern that the Fifth Circuit concluded justified the imposition of sanctions against the government, because to preclude such would "rob federal courts of power they inherited at their inception: power to preserve order in judicial proceedings and enforce judgments." *Chilcutt v. United States*, 4 F. 3d at 1327. Again, because monetary sanctions were precluded in this present case, the District Court was robbed of its ability to preserve judicial order and enforce its

judgment as displayed by ATF's blatant disrespect for that court's orders. Thus, the government's attempt to distinguish *Chilcutt* is not successful, as the exact concern expressed has come to fruition here.

Finally, the government's attempt to differentiate *F.D.I.C. v. Maxxam*, 523 F.3d 566 (5th Cir. 2008), also fails. The government illogically argues that the Fifth Circuit's "holding was supported by an express statutory waiver and rationale that are not present here." Br. in Opp. 19. However, the Fifth Circuit clearly defined in that case 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 at 595. Surely, this Court now recognizes that this is an identical question to that which is presently before this Court.

When answering that question, the Fifth Circuit clearly held 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, according to the Fifth Circuit, sovereign immunity should not even be considered in cases such as those presently before this Court. Obviously, this holding is in stark conflict with that of the Sixth Circuit herein, and completely undermines the government's argument set forth in their brief.

Because the government fails to meaningfully distinguish the Fifth Circuit cases relied upon by

Petitioner, and because it is clear that a conflict between the Fifth and Sixth Circuits exist, their distinctions should be rejected, their contention that no conflict exists be ignored, and review be granted.

b. The government attempts to downplay the conflict among the Circuits by arguing that the Ninth Circuit opinion in *United States v. Woodley* is consistent with the Sixth Circuit herein. Such a position is not supported by a plain reading of the cases. In fact, the Ninth Circuit specifically addressed the same issue that is currently pending before this Court: whether sovereign immunity bars the imposition of sanctions against the government. When answering that question, the Ninth Circuit 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… deter future governmental misconduct and to protect the integrity of the judicial process." *United States v. Woodley*, 9 F. 3d 774 (9th Cir. 1993). This is in direct opposition to the government's argument and the decision below, and thus it is clear that a conflict exists.

The government attempts to offer *Barry v. Bowen*, 884 F. 2d 442 (9th Cir. 1989), in support of its argument that the Ninth Circuit is consistent with the Sixth Circuit. However, as pointed out in their brief, the Ninth Circuit in that case merely expressed "doubts about the power of the district court to impose monetary sanctions" against the government, it did not preclude it altogether. *Barry v. Bowen*, 884 F. 2d 442, 443-444 (9th Cir. 1989).

Thus, it is clear that the government's argument that there is no conflict among the lower courts is clearly flawed. In fact, the cases relied upon by Petitioner clearly show that there is a disagreement among the courts as to whether or not monetary sanctions can be imposed against the government in cases such as this. Thus, review by this Court is warranted to resolve this conflict.

3. Respondent next argues that this case does not present an issue of vital importance. Br. in Opp. 21-22. The Sixth Circuit Court of Appeals' decision denied a court its inherent, constitutional authority to impose monetary sanctions against the government or its agencies for undisputed bad faith conduct and a blatant disregard for otherwise valid court orders. If the Court of Appeals opinion is affirmed, or if the government's brief in opposition is adopted, and this Court denies hearing this issue, this Court would act to further embolden an already out of control executive and legislative branch. By restricting a court's constitutional authority to enforce its own Orders against members of the executive branch, and by making that power dependent upon express congressional authority, the supposed horizontal, equal tripartite branches of our government will be converted into a vertical system with the judicial branch located at the bottom. Thus, Petitioner continues to assert that the scope of a court's inherent authority to effectively administer justice is a vital issue of national importance that warrants this Court's review. If such an issue is not vitally important to the future of the criminal justice system, it is impossible to know what would be as it strikes at the core of the judicial

system's existence and calls into question the very integrity of that system.

Unless this Court intervenes, both the legislative and executive branches will continue to usurp and erode the inherent authority rendered to the Courts in Article III of the Constitution. Respondent seeks to minimize the serious harm that may be wrought to a court's inherent power if the lower decisions are permitted to stand and if this Court denies granting the Petition. Respondent's unavailing attempts to argue against granting review are unpersuasive, and cannot diminish the critical need for this Court to review this incredibly important issue.

The petition for certiorari should be granted.

4. The fundamental, underlying principle in Respondent's argument is that the courts are reliant upon congressional authority in order to impose monetary sanctions against the government and its agencies. However, conveniently enough, the government overlooks the clear fact that such authority has already been given to the courts by the very nature of its constitutional existence, particularly when such is necessary to enforce its own orders. The founders of the United States set up a court with "the Judicial Power of the United States," *U.S. Const.* art. III, §1, and because of such, "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).

CONCLUSION

For the foregoing reasons and those stated in the Petition, review should be granted.

Respectfully submitted,

Steven D. Jaeger
Counsel of Record
23 Erlanger Road
Erlanger, KY 41018
(859) 342-4500
sdjaeger@thejaegerfirm.com