No. 13-56

IN THE
Supreme Court of the United States

HORNBECK OFFSHORE SERVICES, LLC, ET AL.,

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs. This case concerns Cato because it presents the questions of whether the government has to live by the same rules as the governed and, to that end, the scope of the judicial branch's power to check and balance the power of its coordinate branches.

SUMMARY OF ARGUMENT

As demonstrated in the Petition for Certiorari, the Circuits are divided over whether civil contempt is available to remedy the violation of an injunction's clear purpose. (Petition for a Writ of Certiorari 17-23.) *Compare United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972); *Youakim v. McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995); and *Alley v. U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1205 (11th Cir. 2009), *with Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir.

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[1] In accordance with Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. As required by Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

2002); *Drywall Tapers & Pointers of Greater New York, Local 1974 v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n*, 889 F.2d 389, 395 (2d Cir. 1989); *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 724 (5th Cir. 1982); *Hatten-Gonzales v. Hyde*, 579 F.3d 1159, 1168 (10th Cir. 2009). Rather than repeat the able discussion of this conflict by Petitioners, this brief will instead emphasize the importance of resolving this question because of the potential for the federal government to circumvent judicial authority. The events of this case illustrate that importance.

On April 20, 2010, an explosion took place on the Deepwater Horizon offshore drilling rig operating in the Gulf of Mexico. After this explosion, the Executive apparatus kicked into high gear. The President immediately called for a report, within 30 days, on additional regulations to address the safety of deepwater drilling. (Pet.App.2a-3a.) The Secretary of the Interior then announced that he would unilaterally suspend all applications for drilling permits until the report was published. *Id.* at 3a. The report itself announced a complete moratorium on all applications for drilling permits as well as all drilling currently underway. *Id.* Interested parties sought an injunction in district court against the moratorium. When the report was revealed to be politically motivated, and to have falsely claimed the support of industry experts, the court preliminarily enjoined operation of the moratorium, roughly a month after it was issued. *Id.* at 3a-5a Already the Executive's intrinsic advantages were on display: it could act quickly and decisively, whereas court-ordered relief, at its fastest,

took a full month. But for those on the wrong side of the political issue, it would only get worse.

After the injunction issued, the Secretary immediately took steps to negate it; he issued a press release attacking the injunction and announcing he would soon issue a new moratorium. *Id.* at 5a-6a. The government also appealed the injunction to the Fifth Circuit. *Id.* at 6a. Four days after that appeal was denied, the Secretary issued a new moratorium *that was "the same in scope and substance" as the original*, and argued that the case should be declared moot. *Id.* at 7a (internal quotation marks omitted; emphasis added). After a remand to the district court, which found the claim live, the Fifth Circuit reversed and declared the case moot. This was now four months after the first, six-month moratorium took effect. *Id.* at 7a-8a. Before the district court could rule on the second moratorium, a few weeks before it was set to expire anyway, the government lifted the moratorium and mooted the merits case for good. *Id.* at 8a. When the original plaintiffs sought to find the government in contempt, and the district court agreed, the Fifth Circuit reversed on the ground that the injunction only prohibited the government from enforcing the first moratorium, not the second. *Id.* at 8a-9a, 16a.

This demonstrates how the government wields substantial powers to evade, delay, and generally wreak havoc with even the most carefully considered injunctions. And if it is intent on defying a court order, the scope of the remedy addressing this defiance—i.e., a court's power to hold the government in civil contempt—becomes a matter of particular concern.

The government should not be above the law, and its failure to be held accountable represents a failure by the judiciary to maintain the tenuous balance among our "constitutional system of checks and balances." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982). The rule of law requires that *all* parties, private and public, play by the same rules when litigating in the courts of the United States. This is especially true when dealing with courts' power to hold parties in contempt, because that is the only power that ensures that courts are more than "mere boards of arbitration, whose judgments and decrees would be only advisory." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). For these reasons, and those set forth in the Petition, this Court should grant certiorari and correct the error of the court below. To do otherwise would severely limit the power of injunctions to restrain the federal government.

ARGUMENT

Private parties and the government should be bound by the same rules of civil contempt. It is critical to the rule of law that the government not receive special advantages in its legal dealings with private parties, and that it not be able to use its vast resources to concoct an "end-run" around judicial authority, as transpired below. (Pet.App.16a.).

I. THE GOVERNMENT AND PRIVATE PARTIES ARE GENERALLY HELD TO THE SAME STANDARDS WHEN ACTING AS LITIGANTS.

It has long been settled that the government should play by the same litigation rules as private litigants. *See, e.g.*, *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002) ("[L]imitations

principles should generally apply to the government in the same way that they apply to private parties." (internal quotation marks omitted)); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) ("[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."); *United States v. Stinson*, 197 U.S. 200, 205 (1905) ("The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."); *United States v. Am. Bell Tel. Co.*, 167 U.S. 224, 268 (1897) ("[T]he government is as much bound by the laws of congress as an individual, and when congress has created a tribunal . . . determination[s in that tribunal] should be held conclusive upon the government, subject to the same limitations as apply in suits between individuals."); *United States v. Robeson*, 34 U.S. 319, 325 (1835) ("[A] claim for unliquidated damages cannot be pleaded by way of a set-off, in an action between individuals; and the same rule governs in an action brought by the government.").

Although exceptions may be made to this general principal by rule, *e.g.*, Fed. R. App. P. 4(a)(1) (requiring private parties to file a notice of appeal within 30 days after entry of judgment, but allowing the United States 60 days after entry of judgment), or by statute, *e.g.*, Equal Access to Justice Act, Pub. L. No. 96-481, § 202(b), 94 Stat. 2321, 2325 (1980) ("The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard

governing an award against a private litigant, in certain situations."), it is the prevailing standard by default.

And the justifications provided by this Court in the only judicially created exception to this general rule, in *United States v. Mendoza*, 464 U.S. 154 (1984), are completely inapplicable to civil contempt. In *Mendoza*, this Court held that nonmutual offensive collateral estoppel does not apply against the government. The Court listed several reasons that a new litigant could not invoke collateral estoppel against the United States. It noted that the United States was "a party to a far greater number of cases on a nationwide basis than even the most litigious private entity," *id.* at 159; that the government was therefore "more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues," *id.* at 160; and that allowing the government to be collaterally estopped in this way "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari," *id.* (citing *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977)).

As to civil contempt, it makes no difference that the United States is more likely to be involved in more lawsuits than a private party—contempt findings are necessarily tailored to address problems in one particular litigation. *See Mendoza*, 464 U.S. at 159. Likewise, it makes no difference that the United States is more likely to be involved in litigation with different parties presenting the same legal issues—contempt findings in a particular case will address

the different facts of that case; underlying issues of law will likely be irrelevant. *See id.* at 160. And finally, applying a uniform standard of civil contempt against the government would in no way prevent the percolation of legal issues among the courts of appeals. *See id.*

II. IT IS STRUCTURALLY IMPORTANT TO THE SEPARATION OF POWERS THAT THE GOVERNMENT AND PRIVATE PARTIES BE HELD TO THE SAME RULES OF CIVIL CONTEMPT.

The general rule that government and private litigants be held to the same standards is particularly important in the context of civil contempt, which is one of the most important checks that the judiciary, as the "weakest branch," has on the Executive.

The ability of courts to check the Executive's power is critical to the institutional legitimacy of the federal courts. The Founders understood the inherent weakness of a branch of government that had "no influence over either the sword or the purse." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). What Hamilton called "the natural feebleness of the judiciary" put it "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches." *Id.* at 466; *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (discussing "litigants' right to have claims decided before judges who are free from potential domination by other branches of government"). Because courts "have neither FORCE nor WILL but merely judgment," they "must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgments." *The*

Federalist No. 78, at 465. Despite the judiciary's weakness, its status as a co-equal branch of government has proven crucial in realizing Hamilton's other prediction: that courts, insulated from the winds of partisan faction, can be an "excellent barrier to the encroachments and oppressions of the representative body," and "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." *Id.*

This case presents the problem of what happens when the judgment of a court is pitted against the full force of the Executive. At first, it might appear that courts have no real way of enforcing their decisions. As President Jackson reportedly put it after Chief Justice Marshall ordered the release of Indian missionaries in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), "John Marshall has made his decision; *now let him enforce it!*"[2] And at the most basic level, the judiciary depends on a general acceptance of the principle that courts have power to issue binding judgments whenever jurisdiction lies. *See* William Baude, *The Judgment Power*, 96 Georgetown L.J. 1807 (2008).

But even assuming a court's power to issue binding judgments, those judgments bind only the parties in a particular case. Without openly flouting a

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[2] President Jackson in fact wrote to John Coffee that "[t]he decision of the supreme court has fell still born" "and they find that it cannot coerce Georgia to yield to its mandate." *See* Paul F. Boller, Jr. & John George, *They Never Said It: A Book of False Quotes, Misquotes, and Misleading Attributions* 53 (1989). But Jackson's supposed exclamation retains its force as a practical matter, barring the dispatch of federal marshals, which was not then the custom.

judgment, there are numerous ways for the Executive to continue to advance its interests beyond litigation. It could act against other parties, waiting for them to resort to the courts, then rely on delay to accomplish its objectives before the courts are able to decide each separate controversy. It could act administratively and meet every court challenge with its legions of lawyers.

Through the equitable power of an injunction, courts may forestall some of these maneuvers, but even then a clever Executive can evade the courts, who may neither initiate litigation nor act with the speed and coordination of the unitary Executive. *See Federalist No. 70*, at 423 (Alexander Hamilton) (describing the "vigorous" and "energetic" Executive as "essential" to our plan of government). As the government did in this case, it could make an "end-run" around an injunction by repeating its enjoined conduct in a barely distinguishable form. (Pet.App.16a.)

From its earliest days, this Court recognized one means by which it could check the actions of the other branches of government. Courts, it explained, possess certain "implied powers," which draw "from the nature of their institution" and are necessary to implement their judgments. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). In some ways these powers were greater than those of "[t]he legislative authority of the Union," because courts need not "first make an act a crime" before they can punish it. *Id.* Those powers include the ability "[t]o fine for contempt—imprison for contumacy—inforce [*sic*] the observance of order, &c." *Id.* These powers "are necessary to the exercise of all

other[]" powers, *id.*, by ensuring that parties comply with court orders, and are "essential to the preservation of order in judicial proceedings" as well as "the due administration of justice," *Ex parte Robinson*, 86 U.S. 505, 510 (1873); *see also Chambers v. NASCO*, Inc., 501 U.S. 32, 46 (1991) (discussing courts' inherent powers).

There is also little danger in holding the government to the prevailing rules for civil contempt because findings of contempt against high-level government officials are rare. Such a finding most recently occurred in 1999, when the U.S. District Court for the District of Columbia found two Cabinet-level Secretaries in contempt during litigation over the government's trusteeship of Indian lands. *See Cobell v. Babbitt*, 37 F. Supp. 2d 6, 14 (D.D.C. 1999) (Lamberth, J.). This event was remarkable enough to provoke scholarly investigation into such high-level contempts, which revealed the extent of their rarity. *See* Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of the Interior*, 56 Admin. L. Rev. 235, 235 (2004); Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in* The Administrative Law Review, 57 Admin. L. Rev. 229, 249 (2005). The author of one of these articles, defending Judge Lamberth's decision, pointed to a civil contempt order against the Secretary of Agriculture in 1992, against the Administrator of the Environmental Protection Agency in 1984, and against the Attorney General in 1979. Raskin, *supra*, at 249 (citing *McBride v. Coleman*, 955 F.2d 571 (8th Cir. 1992); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984); *In re Attorney General of the United States*, 596 F.2d 58 (2d Cir. 1979), *cert. denied sub nom.*, *Socialist Workers Party v. Attorney*

General of the United States, 444 U.S. 903 (1979)). Beyond these rare instances, occurring roughly once a decade, finding high-level government officials in contempt is exceptional. *See, e.g.*, *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1127 (E.D. Ark. 1999) (President of the United States "g[ave] false, misleading and evasive answers that were designed to obstruct the judicial process"). *But see Am. Civil Liberties Union v. Dep't of Defense*, 827 F. Supp. 2d 217, 230-33 (S.D.N.Y. 2011) (refusing to find the Central Intelligence Agency in contempt for destroying videotapes of testimony that had been ordered to be produced by the court). And some of these instances have been reversed on appeal. *See, e.g.*, *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002), *vacated*, 334 F.3d 1128 (D.C. Cir. 2003).

The rarity of contempt proceedings against the government only heightens their importance. Indeed, particularly given the government's position, it would be pernicious to excuse its misconduct any more than that of a private party. Consider the words of Judge Lamberth before holding the government in contempt in 1999: "The court is deeply disappointed that any litigant would fail to obey orders for production of documents," "[b]ut when that litigant is the federal government, the misconduct is even more troubling." *Cobell v. Babbitt*, 37 F. Supp. 2d at 38. He went on to say that "I have never seen more egregious misconduct by the federal government," *id.*, signaling the importance of the case, and the need for it to be addressed with sanctions.

And if government attorneys choose to defy a court, they have mighty powers at their disposal. This case illustrates the point vividly. The United States

commissioned the opinions of numerous experts, and then distorted those views to reach the politicized, predetermined conclusion that there would be no deepwater drilling for six months. (Pet.App.3a-5a.) Calling foul on the government's unjustified actions against the Gulf economy, the district court used its equitable powers to enjoin the enforcement of this moratorium. *Id.* at 5a. But the Executive's impunity continued, and showed even more clearly in its response to the court's injunction—it essentially ignored it. *Id.* at 5a-7a. After making immaterial changes to the report, it crafted an "end-run" around the injunction and issued a new moratorium that "was the same in scope and substance" as the original. *Id.* at 7a, 16a (internal quotation marks omitted). As noted earlier, after the district court held the government in contempt, the Fifth Circuit reversed, on the grounds that the government's enforcement of the *new* moratorium did not violate the district court's injunction from enforcing the *old* moratorium.

Indeed, it is often the case that the government's extraordinary resources will empower it to act with few restraints. Judges are often the only guardians against the potential for such government overreach. This Court's review is therefore urgently needed, not only to resolve the split of authority identified by the Petitioners, but also to rein in the government when it attempts an end-run around the authority of the courts.

CONCLUSION

For these reasons, and those stated by Petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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