No. 18-408

In The
Supreme Court of the United States

KOHN LAW GROUP,

Petitioner,

v.

AUTO PARTS MANUFACTURING MISSISSIPPI, INC.,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF FEDERAL BAR ASSOCIATION SDNY CHAPTER, NETWORK OF BAR LEADERS, ERWIN CHEMERINSKY, RAYMOND J. DOWD, CHRISTOPHER A. DUGGAN, VINCENT E. JOHNSON, DOUGLAS W. KMIEC, EDWARD J. NEVIN III, RICHARD W. PAINTER, AND THOMAS J. PORTER IN SUPPORT OF GRANTING THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF GRANTING THE PETITION FOR CERTIORARI

1. Counsel of record for *Amici Curiae* is familiar with the requirements of Rule 37 of this Court. After timely notice of intent to file the attached brief, petitioner consented and respondent declined to consent, necessitating this motion. Aware that "[s]uch a motion is not favored." Rule 37.2(b), *amici* identify their interests and offer reasons for granting the motion.

IDENTITY OF *AMICI CURIAE*

2. *Amici curiae* include associations of lawyers and several individual lawyers, all of whom have reflected carefully about the constitutional and ethical issues in the questions presented in this case. *Amici curiae* include both *practicing lawyers*, including Bar leaders responsible for safeguarding zealous advocacy within the bounds of the law, and (b) *law professors* engaged in scholarship on constitutional law and on professional responsibility. *Amici* are identified by name and briefly described below.

3. The Southern District of New York Chapter of the Federal Bar Association joins this brief in its name only and not in that of the national Federal Bar Association. Neither this brief nor the Chapter's decision to join it should be interpreted to reflect the views of the national Federal Bar Association nor of any judicial member of the Association, including any judicial

member of the Southern District of New York Chapter. This brief was not circulated to any judicial member prior to filing. No inference should be drawn that any judicial member has participated in the adoption of or endorsement of the positions in this brief.

4. The Network of Bar Leaders is a coalition of 50 member bar associations dedicated to bringing together the leadership of the diverse bar associations of the greater New York Metropolitan area. The purposes of the Network are to . . . develop a cordial relationship and spirit of unity and common understanding between the various member bar associations for the benefit of the public and the profession; and to take positions in the name of the Network and to advance commonly shared views pertaining to the administration of justice, both civil and criminal, pertaining to the delivery of legal services to the public and bearing upon the public image of the judicial system and of the Bar.

5. Erwin Chemerinsky is the Jesse Choper Professor of Law and Dean of the University of California, Berkeley School of Law.

6. Raymond J. Dowd is a partner at Dunnington, Bartholow & Miller LLP in New York.

7. Christopher A. Duggan is a partner at Smith Duggan Buell & Rufo LLP in Boston.

8. Vincent E. Johnson is the South Texas Professor of Law at St. Mary's University School of Law.

9. Ambassador (ret.) Douglas W. Kmiec is the Caruso Family Professor of Law at Pepperdine Law School.

10. Edward J. Nevin III is the 2003 President of The American Board of Trial Advocates and the former 2008 President of The International Society of Barristers.

11. Richard W. Painter is the S. Walter Richey Professor of Law at the University of Minnesota Law School.

12. Thomas J. Porter is Of Counsel, Mellick & Porter, Boston, and Co-Executive Director and Lecturer Religion and Conflict Transformation Program, Boston University School of Theology.

REASONS FOR GRANTING THE MOTION

13. Movants offer four reasons in support of this motion. First, we discuss *practical benefits* of requiring clarity in judicial orders. Greater clarity promotes harmony between the bench and bar, encourages greater civility on both sides, and safeguards the right of the People to be ably represented by lawyers who protect their clients' interests with respect for judges, but without craven fear of them.

14. Second, we discuss the contempt proceedings in this case within the larger constitutional value of procedural regularity. *Amici* will use the tool of constitutional history to underscore the central value of due

process in the colonial history leading up to the American rebellion against imperial governance and to the elaboration of *written constitutions* securing procedural protections of "natural rights" of humans to life, liberty, and property.

The proposed brief contrasts two rationales for what to take into consideration in a contempt proceeding. The first rationale—adopted in the First, Second, Fourth, and Seventh Circuits—seeks to enforce clear and unambiguous mandates and prohibitions easily discoverable within the "four corners" of a judicial order. The Fifth Circuit here adopted a looser and vaguer standard for contempt proceedings—called simply "flexibility"—provoking a split in circuit authority that this Court can easily mend by granting the petition. If vagueness can render a statute void, the same vice may impede compliance with a judicial order. Clarity gives persons an adequate opportunity to conform behavior to legal requirements.

The vice of vagueness led Justice Frankfurter to dissent long ago in a case with strong similarities to the instant case: "Obedience must of course be secured for the command of a court. To secure such obedience is the function of a proceeding for contempt. But courts should be explicit and precise in their commands and should only then be strict in exacting compliance. To be both strict and indefinite is a kind of judicial tyranny." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949) (Frankfurter, J., dissenting).

All three dimensions of procedural fairness are present in this case. Did the court give *adequate notice* to potential contemnors by a mandate that is clear and unambiguous? Was the *hearing full and fair* since foreseeable issues had already been framed with precision? Did the judge remove any doubt about the *impartiality of the tribunal* by avoiding any arbitrariness in the mandate? Since these questions persist and are presented here, this case is an apt vehicle for the Court to reconsider its ruling on civil contempt in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949).

Limiting the scope of civil contempt enforcement to provisions within the "four corners" of a prior judicial decree is a harmonious development or extension of the Court's ruling on consent decrees in *United States v. Armour & Co.*, 402 U.S. 673 (1971).

United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994), offered clear guidance on the difference between civil and criminal contempt, but the fact that lower courts drift back to *McComb* suggests that it is time to eliminate that tension between *McComb* and *Bagwell* by overruling *McComb*. This case is a good vehicle to do just that. *See also Bagwell, id*. at 840 (1994) (Scalia, J., concurring), and *id.* at 845 (Ginsburg, J., concurring in part and concurring in the judgment).

15. Third, *amici* argue that the contempt proceedings in the instant case violate the constitutional value of preserving *separation of powers*. As noted above in # 14, Justice Scalia initiated a conversation

linking the power of civil contempt to the theme of separation of powers when he called attention to the fact that "one and the same person . . . make[s] the rule, . . . adjudicate[s] its violation, and . . . assess[es] its penalty." *Bagwell*, 512 U.S. at 840. In *Bagwell* Justice Blackmun also noted: "Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." 512 U.S. at 831. Granting the petition in this case would enable conversation about *separation* of powers to be sustained at a time when *concentration* of power is emerging in many countries, including our own republic.

16. Fourth, by locating judicial work within a matrix of human understanding that demands attention to facts, intelligence in grasping their meaning, reasonableness in rendering a judgment, and responsibility in effectuating decisions, *amici curiae* seek to bring to the Court's attention relevant matter not discussed by the parties.

For the reasons stated above, counsel of record for *amici curiae* hereby MOVES this Court to order the Clerk of the Court to accept the attached brief *amicus curiae* for filing under No. 18-408.

Respectfully submitted,

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STATEMENT OF INTERESTS

This case involves application of civil contempt to a *law firm* under circumstances that raise serious issues of violation of procedural fairness and of separation of powers, and serious ethical matters about Rambo-style litigation in federal courts.[1]

Amici curiae are associations of lawyers concerned with the rights and obligations of attorneys relating to advocacy that is rigorous and vigorous, but also courteous and reasonable. *Amici* also seek to promote mutual respect between the bench and bar in all courts of law.

Other *amici* are individual lawyers—practitioners and academics—who have reflected carefully throughout their careers about issues presented by this case: procedural fairness, respect for the distinct powers of all three coordinate branches of the federal government, and harmony between the bench and bar. These lawyers are identified more particularly in the accompanying motion.

[1] Pursuant to Rule 37 counsel of record for *amici curiae* affirm that no counsel for a party authored this brief *amicus curiae* in whole or in part. No such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the *amici curiae*, their members or counsel made such a monetary contribution to the preparation or submission of the brief. After timely notice of intent to file the attached brief, petitioner consented and respondent declined to consent, necessitating the attached motion.

SUMMARY OF ARGUMENT

In Part I *amici* offer the Court a roadmap to core facts of a lengthy litigation in two district courts. In Part II *amici* discuss due process and in Part III we discuss separation of powers. Both constitutional claims are meritorious since both are grounded on the fatally flawed character of an order of the district court purporting to achieve two goals, discharge and injunction. Pet. App. 82-94.

This order of March 3, 2014 is critical to the determination of the legitimacy of the subsequent contempt proceedings discussed below. First, we note that in this order, the district court discharged respondent—an auto parts plant in Guntown, Mississippi that is a wholly-owned subsidiary of Toyota Motor Corporation, App. iii—only "from the case" (Pet. App. 94, 96), not from any of its disputed debts. The very same order discloses that respective rights of parties asserting those debts were *not yet determined*. *See* Pet. App. 88 & n.3 (citing *Noatex Corp. v. King Constr., LLC*, 732 F.3d 479, 488 (5th Cir. 2013), and 28 U.S.C. § 1335(b)).

Second, in 2012 petitioner filed an action in the California district court to collect well-invoiced debts for goods delivered by Noatex—a California business represented by petitioner—to respondent's auto parts plant in Mississippi. Third, the Mississippi district court did not purport to enjoin further litigation in California, but only enjoined "filing any proceedings against [respondent] relating to the interpleader fund." Pet. App. 94, 96.

All three aspects of due process are implicated in this case. First, the district court failed to give petitioner *adequate notice* of any specific command or prohibition. Second, the inadequate notice vitiated the *fullness and fairness of the subsequent hearing* and proceedings in 2016-2017 for alleged "civil contempt." Third, the arbitrariness of many rulings of the district court—including an award of $373,692.50 for attorney fees accumulated by respondent's pursuit of civil contempt against petitioner—raises doubt about the *impartiality* of the tribunal.

In Part III *amici* discuss a related but independent constitutional violation: separation of powers. *Amici* underline that the *same judge* who (1) failed for years to order discovery or conduct evidentiary hearings to determine amounts owed by respondent for invoiced services of petitioner's client, and (2) failed to give any clear and unambiguous instructions in the order of March 3, 2014 purporting to underly civil contempt proceedings against petitioner in 2016, was also (3) the same person to adjudicate the reasonableness of the entire contempt proceeding urged by respondent against the petitioner and to decide the sanctions imposed on petitioner.

In Part IV *amici* locate these abuses of judicial authority within the culture of "Rambo-style litigation" deplored by thoughtful commentators on the ethics of the legal profession, including Chief Justice Burger and Justices O'Connor and Kennedy. As noted above, *amici* support mutual respect between the bench and bar in all courts of law. But when, as here, a record

contains constitutional errors that erode rather protect procedural regularity, *amici* call attention to the blunt warning that Justice Frankfurter—a strong advocate of procedural fairness—once delivered: "To be both strict and indefinite is a kind of judicial tyranny." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949) (Frankfurter, J., dissenting).

ARGUMENT

I. The Duty of Attentiveness and the Need for Deep Familiarity with What Really Happened in this Case and Contempt Proceeding

Amici offer reasons in support of granting this petition. In each Part of the brief we underscore four dimensions of the petition relevant to the disposition of this petition, and we correlate each section with one of the four imperatives of human understanding made famous by one of the most influential philosophers of the past century, Bernard Lonergan: *Be attentive. Be intelligent. Be reasonable. Be responsible*.[2]

Amici begin with attentiveness to facts. Nearly all the facts about who did what and to whom in this case are laid out with crystal clarity in the petition. If the Court grants the petition, the record in this case is an

[2] Bernard J.F. Lonergan, *Insight: A Study of Human Understanding* (1957). In 1971 Lonergan received the highest civic honor bestowed by Canada on its citizens, Companion of the Order of Canada. His collected writings, published by the University of Toronto Press, currently include 27 volumes.

excellent vehicle to explore the important questions presented. Pet. 33-35. Facts matter, both at the petition and the merits stage of a case.

A. Undisputed Background Facts

At its core this case is about the failure of a district court and a court of appeals to limit civil contempt to violations of clear and unambiguous judicial orders.

As common law adjudication generally does, this case raises questions best understood by detailed awareness of underlying facts. Two other companies played an important role in this project. King Construction—a Mississippi company—provided labor and materials to improve factory on respondent's land. Noatex—a California business—provided tools and installed equipment at respondent's plant.

On September 23, 2011, King issued a lien against respondent's land in Mississippi. It also issued a "Stop Notice" attachment against Noatex's right to receive payment in California. Petitioner—a small law firm in Santa Monica, California—represented Noatex and sued King for declaratory judgment in federal court in Mississippi to invalidate the "Stop Notice" attachment. Although Noatex prevailed in the Fifth Circuit, which ruled that the Mississippi statute was unconstitutional, Pet. 8-10, the district court curiously denied attorney's fees to petitioner on the ground that the suit to invalidate the unconstitutional state law for violating due process did not involve "state action." *Noatex Corp. v. King Constr. LLC*, 74 F. Supp. 3d 764, 788 n.14

(N.D. Miss. 2014), *aff'd*, 609 Fed. App'x 164 (5th Cir. 2015). *But see Connolly Dev., Inc. v. Superior Court*, 17 Cal. 3d 803, 816 (1976) (finding state action in a similar context), *appeal dismissed*, 429 U.S. 1056 (1977).

On September 18, 2012, petitioner sued respondent in federal court in Los Angeles to collect unpaid amounts allegedly owed by respondent to Noatex. At the time of this suit, respondent had made payments to Noatex that reduced its unpaid balance to $260,410.15. Pet. 10. King and Noatex had different debts with respondent for different amounts and for different materials and services. King also claimed that respondent owed the same amount of $260,410.15, but on a different debt. *None of these disputed claims was ever determined in the district court in Mississippi*. The principal purpose of commencing litigation in California in September 2012 was to collect respondent's unpaid debts owed to Noatex, after the "Stop Notice" attachment of those debts was vacated as unconstitutional in April 2012, but respondent continued refusing to pay Noatex for other, unrelated reasons. King settled with Noatex and neither is a party to the action now before this Court.

B. Facts Relevant to Constitutional Violations

1. Order of March 3, 2014

On March 3, 2014, the judge discharged respondents in the manner described above. On June 14, 2017—as part of the contempt proceedings and for the first time in this case—the district court ordered

petitioner to dismiss the case in California. We comment now on the judicial order of 2014 that was offered as the basis for holding petitioner in civil contempt in 2017.

1. The judge acknowledged that respondent's debts to King and to Noatex could exceed the amount of $260,410.15 that respondent contended it owed. Pet. App. 87-88 & note 3. This is true since the unpaid amount that respondent owed to Noatex did not include the value of *anything* that King may have provided. Pet. 16.

2. The discharge of respondent from the case was not from further liability to Noatex, and the district judge did not intend his ruling to be a final judgment since he expressly anticipated further proceedings to determine the case. Pet. App. 88.

3. Whatever the order of March 3, 2014 was, under 28 U.S.C. § 2361 (cited, Pet. 31), it was emphatically *not a final determination* of the case. First, the text of the order itself left contrary possibilities dangling in the air; hence the whole point of the litigation in California was to reach clear understandings of what happened (or fact-based insights). Second, the indeterminacy of the proceedings in Mississippi is precisely what led the district judge in California to rule that there was no final determination of who owed how much and to whom, and to allow the case to proceed. *Kohn Law Group v. Auto Parts Manufacturing Mississippi, Inc.*, 2016 WL 6517085, *6 (C.D. Cal. Feb. 3, 2016). Third, honest and fair dealing broke down.

Tardy payments morphed into bad debts when respondent offered several "reasons"—none persuasive to petitioner—for nonpayment. Fourth, far from assisting petitioner in determining disputed facts by ordering motions for summary judgment, the district court simply tried to shut down the case in California. But even this stated goal was unavailing since this order nowhere mentioned, let alone prohibited petitioner from pursuing the case in the district court of California.

4. At the appellate stage the Fifth Circuit treated the case as an *interlocutory* appeal. Pet. App. 62. Although the district court had never stated in 2014 that he was issuing a permanent injunction, the Fifth Circuit held that the document was a "permanent injunction." Pet. App. 63-64. The inaccurate label stuck, polluting the creek and muddying the waters later in the contempt proceedings that commenced in 2016.

5. Because the district judge candidly acknowledged that he did not know who owed what to whom, he could not possibly have given an unambiguous or clear order about the case at that moment in time. Yet in 2016—after respondent filed a motion to hold petitioner in "civil contempt of court"—the same district judge referred to his indeterminate 2014 order as a "permanent injunction" that petitioner had been "flagrantly" violating. Pet. App. 25-26.

2. Civil Contempt Proceedings (April 14, 2016—June 14, 2017)

Some negotiators of transactions urge candidly that the "art" of the deal permits one party to make dubious or false claims to entice agreement. If the other side doubts the probability of a claim, one famous businessman even urges that the next move is to resort to an even more implausible claim, hoping thereby to remove the earlier doubt by sowing more confusion in the negotiation. Whatever one makes of this strategy as an ethical matter, the next chapter in the story of this case sparked the return to this Court on a new issue. Rather than filing a cross-motion for summary judgment or settling the matter, respondent's lawyers devised a bold new strategy. On April 14, 2016, respondent filed a motion to charge petitioner with contempt of court.

On June 23, 2016, the district court in Mississippi issued an order setting a hearing on the so-called "permanent injunction" of March 3, 2014 discussed above. Even three years later the court acknowledges that there is more fact-finding to occur. The judge wrote:

> To the extent that the California Plaintiff Kohn Law Group, Inc. seeks to recover funds that heretofore have been the subject of this interpleader action, the same is a violation of this Court's permanent injunction. To the extent that the California Plaintiff Kohn Law Group, Inc. seeks recovery over and above or in excess of the interpleader funds, the same is not in violation of this Court's permanent

> injunction. It is obvious that a determination must be made as to the subject matter of the California district court case as it relates to the subject matter of this interpleader action. At this juncture, this Court is of the opinion that an evidentiary inquiry must be made as to whether the California district court action constitutes a violation of said permanent injunction.

Pet. App. 52. Noting precisely the lack of finality in the district court in Mississippi, the district court in California retained jurisdiction over that case and allowed petitioner to pursue summary judgment. *Kohn Law Group v. Auto Parts Manufacturing Mississippi, Inc.*, 2016 WL 6517085, *6. This process disclosed that respondent had no fact-based evidence supporting defenses claimed by respondent for failure to pay the money Noatex claimed was owed to them.

On June 14, 2017—for the *first and only time* in this record—the district court entered an Order and Judgment commanding petitioner to end the action he had brought in the district court in California in 2012. The judge imposed coercive daily penalties that petitioner could purge only by dismissing the litigation in California. Pet. App. 25-26. And he held petitioner in in "*civil contempt*" of court for "flagrantly disobeying the Court's *permanent injunction*." He awarded a compensatory fine in the amount of $373,692.50, payable to counsel for respondent for attorney fees. Pet. App. 27-39. Petitioner sought to question the billing records to determine their accuracy or to dispute any duplicative

billing. On April 3, 2017, the judge denied petitioner's motion in its entirety. ROA 6018 par. 3.

II. Intelligence: Grasping the Connection between the American Revolution and the Constitutional Value of Procedural Fairness

As noted in Part I above, Bernard Lonergan noted that the first step to take in human understanding is to take the time to be fully *attentive* to what has happened or is happening. In the common law tradition we call this the "statement of facts." Full attention is necessary to grasp what has happened in a case because such things can recur, with or without significant differences, which is why and how we distinguish cases. As we notice a pattern developing, we yearn to understand the pattern itself. We ask the "why?" question, seeking intelligibility. In this second operation of human understanding lawyers and judges inquire "What is the meaning of this statute or set of decisions?" We are guided in this inquiry by Lonergan's second imperative: *Be intelligent*, try to grasp the meaning of the data or facts learned by being attentive.

Judges and lawyers—including the bench and bar of this Court—can play a significant role in energizing Americans to become much better informed about constitutional values, which can unify us and give us fresh hope for our future. Due process of law is exactly one of those overarching and unifying constitutional values. It has served this role in our national story from the beginning. Some think of our rebellion against the

Mother Country as a tax revolt. Not quite. The rallying cry was "No taxation *without representation*." The big problem was the imperial one. The Emperor and his Court and Parliament were in London. There was no one from Boston to Charleston to represent the sentiments of any of the colonists in Parliament. No officer of the Crown and no Member of Parliament was listening to Americans over there. Westminster did not provide to colonists *adequate notice* of government policy affecting them, a *fair and full hearing* of their views, or an *impartial tribunal* deciding what was best for both Londons and both Cambridges separated by an ocean. In short, imperial governance was not due process of law. Due process begins when we, the People, empower our own representatives in the new state constitutions and in the new federal constitution to write, carry out, and adjudicate laws governing us.

In each October Term this Court can help us learn or remember what due process means, and to value procedures to be followed—including the right to counsel—when our own servants and representatives in our federal, state, and local governments threaten to deprive us of our liberties, our property, and our very lives. No. 18-408 is precisely such a case. The record established in the petition enables discussion of all three requirements of due process: *adequate notice* of what a law may require of us; *fair and full hearings* to determine what is really going on; and *impartial tribunals*, not biased judges who have their judgments ready at hand long before they give a quick glance at "facts."

Amici note several reasons why this Court's voice should again be heard on constitutionality of contempt proceedings. In *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), this Court clarified the importance of differentiating civil and criminal contempt. In the instant case, both the district court and the court of appeals characterized the proceedings against petitioner as a *civil* contempt, although it had all the marks leading the *Bagwell* Court to hold that such a proceeding is *criminal* in nature. In the opinion of the Court, Justice Blackmun enunciated a due process argument that the district court in the instant case did not cite or discuss. Civil contempt must be tightly focused on "discrete, readily ascertainable acts, such as turning over a key or payment of a judgment." *Bagwell*, *supra*, 512 U.S. at 833. The procedure in the instant case was not "simple" or "quick" as Justice Scalia imagines a civil contempt procedure to be, *Bagwell*, *id.* at 840. In this case the opening hearing lasted a full day, during which both sides offered dozens of exhibits. Pet. 16 and Pet. App. 164-183. The entire proceedings in this case lasted for 14 months, including full briefing. *See also* concurring opinion of Justice Ginsburg, *id.* at 844-48.

If the Court grants the petition in this case, it will have an excellent opportunity to address due process of law comprehensively, and to reply to questions such as these. Was the district judge's "permanent injunction" written clearly and unambiguously to give the petitioner *adequate notice*? Was the process of deciding whether petitioner was in contempt of court *fair and*

full just because it took fourteen months to get from the beginning to the end? Which trial judge discharged more faithfully the duty of *judicial impartiality* and attentiveness to facts, the district court in Mississippi or the district court in California? Why did the Mississippi court coerce the petitioner to abandon his access to the court in California, and why did he wait five years to do so?

The Court in *Bagwell* was unanimous in its judgment, and that unanimity is likely to occur again when the Court decides to revisit this issue. If the Court places this case on its docket, *amici* foresee that respect for due process—a unifying theme—will be advanced in another unanimous opinion, perhaps written by the one who argued the case for the respondent back in 1993, or perhaps with a concurring opinion from a colleague who does not mind being known as a woman who is notoriously supportive of equality and fair dealing. The probability that the Court can speak to all your fellow Americans with one voice on the important constitutional questions raised in No. 14-408 is another good reason to grant the petition.

This case is also a good vehicle to announce that appellate courts must be attentive to a full record and review it *de novo*. Pet. 28-30. An appellate tribunal should not rubber-stamp a final order of a trial court by evoking misguided slogan that facts "speak for themselves." Facts are stubborn, so we should not skip over them lightly as though they don't matter. But in any serious account of human understanding, facts do not "speak." We read about them; we try to grasp their

meaning. Thanks to due process, we assess whether our insights are probably true or in need of further correction *before* we can reach a *reliable judgment* (Part I above).

III. Reasonableness: Confirming the Link between Greater Clarity in Judicial Orders and the Constitutional Value of Separation of Powers

In his study of human understanding Bernard Lonergan noted that attentiveness to facts leads to inquiry, a search for understanding. One's insight may be a good start, but may be incomplete, requiring dialogue with others to hear their perspectives, or further reflection to ensure that one is not overlooking a relevant or important consideration. That is why a rush to judgment is often a mistake, and why reflection should precede judging the rightness of things. When views compete for adherence, the ones that prevail generally do so by being persuasive. So a person interested in understanding must be not only attentive and intelligent, but must also heed Lonergan's third imperative: *Be reasonable*.

Placing reasonable limits on the use of the contempt power is not only informed by due process concerns, but also by who is doing what to whom, an insight undergirded by another profound commitment of constitutional history: separation of powers.

As Justice Scalia noted in his lectures on separation of powers, only a literalist would search in the text

of our federal Constitution for the "Separation of Powers Clause." But the idea is certainly there in Montesquieu and Madison and Hamilton. And the Court pays attention to this theme when an opportune moment arises. No. 18-408 presents the Court with a teaching moment about the risks and perils of concentrated power.

In his public conversations with Justice Scalia, Justice Breyer noted that separation of power and constitutionalism more generally are not anarchic. Our Constitution is *empowering*, but remains skeptical about too much power concentrated in any one leader or representative of the People.

To focus on separation of powers is not to diminish the significance of due process of law. On the contrary, these two big ideas have a common source and are mutually reinforcing. To return to the origins of our republic, from the Stamp Act Congress to the Declaration of Independence and the Constitution, once again imperial governance was a major concern. Not all Americans were disloyal to the Crown or rebellious against its authority. But those who pledged their "lives, fortunes and sacred honor" to the cause of "independency" articulated strong grievances in their Declaration specifically repudiating the arrangements of an emperor in London governing his "subjects" from afar without affording to the colonists any opportunity for a "hearing" in Parliament.

These Americans similarly disliked the idea of power concentrated in a monarch or king. This was

especially true after the publication of Thomas Paine's radical pamphlet *Common Sense* on New Year's Day in 1776, which exploded the notion that King George III was a benign ruler trapped by wicked ministers. All of the state constitutions adopted in the year of separation from the United Kingdom radically divided powers in a way no other Constitution had done. When 1787 came along, both Federalist and Anti-Federalists agreed to coordinate, but *separate* powers.

When the Court last explored the issue of contempt of court in *Bagwell*, the judgment of the Court was unanimous. In his opinion for the Court Justice Blackmun expressly discussed separation of powers: "Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." 512 U.S. at 831. Justice Scalia similarly called attention to the fact that "one and the same person . . . make[s] the rule, . . . adjudicate[s] its violation, and . . . assess[es] its penalty." *Bagwell*, 512 U.S. at 840. *See also Mackler Products, Inc. v. Cohen*, 146 F.3d 126, 128 (2d Cir. 1998) ("trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed."

No. 18-408 serves as a good vehicle for the Court to clarify that trial judges should not hold any person—including a lawyer with a responsibility for

effective representation of clients—in contempt based on an order that is vague or unclear.

Granting the petition in No. 18-408 would enable an important conversation about separation of powers to be sustained at a time when concentration of power is emerging in many countries, including our own republic. Placing this case on the Court's docket for plenary review would afford the Court an opportunity to educate Americans about constitutional limits on all governmental authority, while expressing gratitude for the American revolution that generated *written constitutions* in which the governed set limits on the governors. *See, e.g.*, Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969); Gordon S. Wood, *The Radicalism of the American Revolution* (1991).

IV. Responsibility: Requiring Greater Clarity in Judicial Orders Advances The Growth of Civility between the Bench and Bar

In his study of human understanding Bernard Lonergan noted that responsibility is the cumulation of a series of deeply and dynamically inter-related operations in the act of human understanding: fact-finding, insight, and assessment of value or truth of a claim. A reasonable conviction of the truth or validity or correctness of a judgment leads finally to what one must do about it. A person seeking understanding must ultimately reflect about a decision to take this action, another action, or no action at all. But whatever the ultimate decision of an individual might be, the

search for a fact-based, intelligent, reasonable remedy under the circumstances is unavoidable. To attempt to avoid obligations flowing from conscientious decision-making is precisely what is meant by being irresponsible. As with the other three imperatives of human understanding (attentiveness, intelligence, and reasonableness) responsibility is a transcendental operation required of everyone engaged in human understanding. So there is no exemption from these operational imperatives for lawyers and judges.

Amici now assess this record as to the exercise of responsibility. Judges must pay *attention* to careful fact-finding, search for an *insight*, and assess impartially the validity of often competing claims and reach a *judgment* that, to the best of a judge's ability, seems correct. Every judge is responsible for his or her judgments, but this responsibility is always exercised within a community of other judges engaged in the same operations of attentiveness to facts, intelligence in grasping their meaning, and reasonableness in explaining why one's views are correct.

Amici note briefly the context within which the contempt proceedings came to pass—in the wake of a sharp turn of many lawyers away from civility to "Rambo-style litigation." *See, e.g.*, Warren E. Burger, "The Necessity For Civility," 52 F.R.D. 211 (1971); Sandra Day O'Connor, "Civil Justice System Improvements," Remarks Before ABA (Dec. 14, 1993) ("It is not always the case that the least contentious lawyer loses. It is enough for the ideas and positions of the parties to clash; the lawyers don't have to."); Anthony

M. Kennedy, Address to ABA Annual Meeting (Summer 1997) ("Civility has deep roots in the idea of respect for the individual . . . respect for the dignity and worth of a fellow human being.").

Amici offer a small sample of the abundant literature on abuse of sanctions as the matrix within which the civil contempt proceedings took place. Professor Richard W. Painter—a former judicial clerk of the late circuit judge, scholar, and law professor John T. Noonan, Jr.—has published a revised version of Judge Noonan's materials on professional responsibility. *See* John Noonan and Richard Painter, *Professional and Personal Responsibilities of the Lawyer* 667-688 (3rd ed. 2011) (Rule 11 Sanctions). Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1st ed. 1989; current ed. 2013) (documenting "avalanche of cases" in the wake of 1983 version of Rule 11, F.R. Civ. P., leading to a major revision of the rule in 1993 that was the context of Judge Pointer's testimony). Judges, too, have voiced strong views about abuse of sanctions; congressional testimony of Hon. Sam C. Pointer, then Chair of Judicial Conference Advisory Committee on Civil Rules (June 16, 1993). And *see Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure* (ABA, 2016).

To safeguard the independence of the judiciary, judges must maintain order in a courtroom and in the effectuation of their decrees. In this case no one—neither petitioner nor the *amici*—doubts the necessity of the judicial contempt power. On the contrary, petitioner laid out the case for a plausible development of

the law that gained the approval of four circuit courts, but not the approval of the Fifth Circuit in the instant case, creating a split in circuit authority, Pet. 20-25, which *amici* urge this Court to resolve expeditiously by granting the petition in this case.

Aware of this Court's unanimous holding in *United States v. Armour*, 402 U.S. 673, 682 (1971) (limiting enforcement of consent decrees to what is expressed clearly within the "four corners" of the decree), the First, Second, Fourth, and Seventh Circuits extended this reasoning to the context of contempt proceedings. If the Court grants this petition, it can easily unify the path to a more reasonable rule than the "flexibility" standard adopted by the Fifth Circuit.

Amici support these prudential judgments of the federal judges who opted for the "four corners" approach. This standard does not invite disrespect for judicial authority. On the contrary, compliance with judicial decrees is easier when a judicial decree communicates clearly and unambiguously what the judge is seeking to mandate. The "four corners" of a court order should be the subsequent measure effectiveness of compliance with a court order. *See* concurring opinions of Justices Scalia and Ginsburg in *Bagwell*, *supra*.

Under the approach followed by the district court and the court of appeals in the instant case, "flexibility" made it much easier for a trial court to impose sanctions upon a lawyer doing his job to the best of his ability, when the very same judge failed even to bring litigation to finality and then obscured that fact by

calling a document a "permanent injunction." This stubborn fact reinforces the insight that it is a violation of due process and separation of powers when the same person who ruled ambiguously in a judicial decree is also the judge imposing sanctions on a lawyer for behavior the judge failed to clarify within the "four corners" of the decree. Similarly, it is easier for a circuit court to avoid responsibility when it picks a rule of deference over the rule of de novo review, transforming meaningful review of errors into rubber-stamping by a court of summary affirmance. Pet. App. 1-3.

Because of the abiding and deep interest of *amici* in mutual respect between the bench and bar, which can only be strengthened, not diminished, by standards requiring greater clarity by judges before imposing heavy sanctions on lawyers in contempt proceedings, *Amici* urge the court to grant the petition.

The sanctions themselves are also cause for concern by *amici*. As noted above, in 2012 petitioner sought relief for Noatex by filing a suit in the district court in California. The district judge determined that he had jurisdiction in the matter since there was no finality of judgment in Mississippi. Respondent claimed affirmative defenses to payment of bills, ROA 3787-3803 (defendant's First Amended Answer), but when the district judge allowed discovery to proceed, that exposed the vulnerability of these claims since they lacked a factual basis. Pet. 15. When petitioner moved for summary judgment, respondent could have filed a cross-motion. Instead, respondent retreated to the considerable advantage of playing out the last phase of

this litigation on his own "home court." Returning to a friendlier forum, respondent managed to distract attention away from unpaid bills. In 2016 the bright, shining object it tossed into a federal court was an unfounded allegation that petitioner was in contempt of court because of a court order in 2014 akin to a statute the is void for vagueness. Why so? Because it failed to specify any command to dismiss the litigation petitioner had commenced in California in 2012. Again, why so? Because in 2014 the district court in Mississippi had failed to determine who owed what and to whom.

The lengthy and expensive *civil contempt* proceedings culminated in coercive sanctions that petitioner could end only by surrendering access for his client to a district judge willing to be attentive, intelligent, reasonable, and responsible under all the circumstances of this bizarre tale. In 2015 the Fifth Circuit affirmed the district court's denial of attorney's fees to petitioner for his successful litigation invalidating on Due Process grounds the Mississippi law relied on by King Construction to block payment to petitioner's client Noatex. *Noatex v. King Construction*, *supra*. In 2017 the district court imposed on petitioner a "compensatory fine" in the amount of $373,692.50 for attorney's fees and expenses incurred by respondent in the "civil contempt" proceedings. Pet. 17. *Amici* are capable of doing all the arithmetic necessary to conclude that petitioner is a victim of arbitrary judicial behavior, without any plausible reason for such disparity and

severity. Pet. 26-28. This, too, is an additional reason to grant the petition in No. 18-408.

Judicial rulings on civil contempt in this convoluted case may have a negative effect of inducing dubious battles between members of the bench and bar. Tension of this sort is fruitless because it is unnecessary. This Court need only require federal judges to communicate clearly in documents that may be used to measure compliance of attorneys and others with legitimate judicial orders. In our view, this would enhance mutual respect between the bench and bar. For this very reason, it provides additional support for granting the petition in No. 18-408.

Justice Frankfurter commented often on the central importance of procedural regularity. *Amici* conclude this brief with sage counsel written by the justice in 1949, but that remain relevant for all of us today: "Obedience must of course be secured for the command of a court. To secure such obedience is the function of a proceeding for contempt. But courts should be explicit and precise in their commands and should only then be strict in exacting compliance. To be both strict and indefinite is a kind of judicial tyranny." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949) (Frankfurter, J., dissenting). *See also* Timothy Snyder, *On Tyranny* (2016).

CONCLUSION

For the reasons stated in the Motion for Leave to File a Brief *Amicus Curiae*, and in this Brief *Amicus Curiae*, *Amici* urge the Court to grant the petition.

Respectfully submitted,

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