No. 19-61

IN THE

Supreme Court of the United States

MARITIME LIFE CARIBBEAN LTD.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

Certiorari should be granted based on the overriding importance of the question presented: "whether a district court's usurpation of the Attorney General's power to appoint a private attorney to represent the interests of the United States—over the United States' objection—is subject to harmless error review." Pet. *i.*

In its petition, Maritime Life Caribbean Ltd. ("Petitioner") argued that application of the harmless error standard was improper for two independent reasons. First, the district court violated the constitutional principle of separation of powers and exercised authority it did not have when it authorized a private attorney, who represented a foreign sovereign, the Republic of Trinidad and Tobago ("Trinidad" or the "Foreign Sovereign"), to litigate "on behalf of the United States," App. 22a, "to get the Government out of the picture," App. 25a. Pet. 11–20. Second, consistent the Court's plurality decision in *Young v. Unites States ex rel. Vuitton et Fils S.A. et al.*, 481 U.S. 787 (1987), the appointment of an interested party to represent the United States was a structural error immune from harmless error review. Pet. 20–23.

Respondent principally focused its response on Petitioner's second argument, arguing that *Young* applies in criminal cases only. Resp. 15–20. In so doing, Respondent overlooked the critical distinction between the facts of this case and those at issue in *Young*—facts that corroborate the correctness of Petitioner's first argument. The district court in *Young* had inherent authority to appoint a special prosecutor, whereas the district court here lacked any such authority.

1. In *Young*, the district court appointed a private attorney to investigate and prosecute a criminal contempt proceeding. *Young*, 481 U.S. at 793. On certiorari, the petitioner argued that the district court lacked authority to appoint "*any* private attorney to prosecute the contempt action against them." *Id.* The Court disagreed, holding that "courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute such contempt." *Id.* This authority, the Court explained, arose out of necessity: "The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Id.* at 796.

In a later case, the Court clarified that 28 U.S.C § 516, although implicated but not discussed in *Young*, "provide[s] for the Attorney General's exclusive control over specified litigation *except as otherwise provided or authorized by law.*" *United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988). "A fair reading of *Young* indicates that a federal court's inherent authority to punish disobedience and vindicate its authority is an excepted provision or authorization with the meaning of §§ 516 and 547." *Id.* Where no such exception exists, the authority to conduct litigation in which the United States has an interest is vested exclusively in the Attorney General. *See* 28 U.S.C. § 516; *cf. Providence Journal,* 485 U.S. at 705 (dismissing petition for writ of certiorari pursuant to 28 U.S.C § 518, which requires the Attorney General or Solicitor General to conduct and argue Supreme Court cases in which the United States is interested, where private attorney, appointed by the district court, had no authority to file

petition); *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (dismissing petition for writ of certiorari pursuant to 28 U.S.C. § 518).

It is undisputed that Section 516 applies here, and no such exception exists, or is argued to exist. Contrary to Respondent's argument, Resp. 15, it is irrelevant that Section 853(n) proceedings are civil in nature, because the plain text of the statute does not distinguish between civil and criminal matters. *See* 28 U.S.C. § 516. Rather, Section 516 provides that "the conduct of litigation in which the United States . . . is interested is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. There is no dispute that the present case is one in which the United States is interested. Pet. 12–13; *see generally* Resp. Thus, unlike *Young*, officers of the Department of Justice, under the direction of the Attorney General, had the exclusive authority to conduct the litigation at issue here.

2. By appointing counsel for the Foreign Sovereign to litigate "as a surrogate for the Government," App. 21a, the district court acted without authority and, simultaneously, usurped the power of the Attorney General in contravention of the principles underlying the separation of powers doctrine. Pet. 16.

Respondent does not dispute that "[a]bsent the power to act, a court lacks authority and its judicial rulings must be vacated." Pet. 17 (citing *Gomez v. United States*, 490 U.S. 858, 875 (1989); *United States v. Providence Journal Co.*, 485 U.S. 693, 698 (1988); *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983)). Further, Respondent does not challenge that a "violation of the separation of powers

cannot be harmless." Pet. 16–17 (citing *INS v. Chadha*, 462 U.S. 919, 958 (1983); *Myers v. United States*, 272 U.S. 52 (1926); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)).

Certiorari is necessary to correct the mistaken application of harmless error in a circumstance, such as this, where the district court acts without authority and violates the constitutional system of checks and balances. Indeed, this case presents an even more pernicious threat to our constitutional protections. Congress conditioned the Attorney General's ability to appoint special attorneys by requiring that the appointed attorneys swear an oath to faithfully execute their constitutional duties. 28 U.S.C. § 544; Pet. 16. These protections were flouted and, in any event, could not have been followed in this case. The appointed attorneys represented the Foreign Sovereign and therefore owed their ethical duties to zealously represent the Foreign Sovereign's interest—not the interests of the United States. The appointed attorneys had an inherent conflict of interest that permeated the entire decade-long litigation. The district court had no power to authorize private attorneys to litigate on behalf of the United States, much less attorneys who represented the Foreign Sovereign.

3. Respondent offers no merits defense to these points. Instead, Respondent resists certiorari by attempting to justify the erroneous harmless error conclusion. Resp. 17. According to Respondent, the Foreign Sovereign did not "assume the decision-making authority vested in the government attorneys or represent the government before the district court." Resp. 18. The issue of whether Petitioner was prejudiced is not before the Court. Nonetheless, Respondent's arguments are mistaken. As

the district court and the court of appeals made clear, the Foreign Sovereign appeared, not in its own right, but on behalf of the United States Government. App. 22a ("I'm going to allow the Trinidad entity to remain in the association not in their own rights, but as I said before, to do the work on behalf of the Government."); App. 12a ("Maritime also argues, and we agree, that the district court erred in permitting Trinidad, a foreign sovereign, to intervene in the ancillary proceeding to litigate on behalf of the United States.").

Further, neither the Court nor Petitioner are privy to the extent of decision-making that Trinidad assumed in the district court. All evidence, however, indicates that it was substantial. For example, Trinidad, on behalf of the United States, took a position that was inconsistent with the United States' theory of forfeiture. ECF No. 1003. Specifically, Trinidad argued that an entity, Inversiones Rapidven S.A., and not the criminal defendant, was the true owner of the property at issue. *Id.* Contrary to Respondent's position, Resp. 20 n. 4, this fact is significant. If Trinidad were correct, and the criminal defendant did not own the property at issue, then the Government would have had no authority to forfeit that property in the first instance. *See* ECF No. 1014 ("The criminal forfeiture provisions on which the Government relies are *in personam*, and authorize the Government to seek forfeiture of a named defendant's interest in the subject property. If [the criminal defendant] had no 'interest in the Red Road Property to give,' *the Government should not have moved to forfeit that property in the first instance*.").

Respondent's contention that the "Government made the decision . . . to litigate third-party claims for more than

a decade[,]" Resp. 17, is unsupported by the record, and at best speculative given the context. As the Government made clear twelve years ago when it moved to set aside forfeiture as to the Red Road Property—the property at issue—"[i]t was always the United States' intent, as stated in its motion for Preliminary Order and Judgment of Forfeiture, to move for an order vacating the Order of Forfeiture, as to the Red Road Property . . . in favor of the restitution, when determined." ECF No. 512. Notably, Trinidad alone opposed the Government's motion to set aside the forfeiture. ECF No. 515. Just five days later, the Government acceded to Trinidad's objection and withdrew its motion to vacate the order of forfeiture. ECF No. 520. Further, the cost (both in terms of money and time) to oppose Petitioner's third-party claim for more than a decade well exceeded the value of the property in dispute. Respondent's argument that the Government decided on its own to litigate the third-party claims, without Trinidad's influence, is the less reasonable inference under the circumstance.

No one doubts that victims may aid the Government in gathering information and otherwise preparing for judicial proceedings. Resp. 18. That is not what happened here.[1] There is a marked difference between providing

1. Trinidad prepared and filed 95% of the documents for the Government, including case-dispositive summary judgment motions. *See, e.g.*, ECF Nos. 1003, 1239. Trinidad appeared at court-mandated mediation for the Government. ECF Nos. 1114, 1123. Trinidad led fourteen depositions across the United States, as well as in Canada and Aruba, on behalf of the Government, including the defense of the Government's Federal Rule of Civil Procedure 30(b)(6) deposition. ECF Nos. 1239; 1276-6. Of the 48 ½ hours of deposition testimony taken in the case, the Government asked a sum total of twelve

assistance, on the one hand, and having a private attorney who represents a foreign sovereign appear for, speak on behalf of, file court papers for, and elicit evidence for the United States Government, on the other. More to the point, there is no dispute that the district court authorized Trinidad, a party without standing, to participate in the proceedings on behalf of the United States for more than ten years. App. 12a.

4. Respondent's final argument is that the circumstances of this case are "sufficiently idiosyncratic that they are unlikely to recur with any frequency[.]" Resp. 20. Respondent is mistaken. Whether the proper party is representing the interests of the United States Government is not an idiosyncratic aberration. Indeed, some form of this issue has reached the Court on at least two prior occasions, albeit under the parallel Section 518 statute, which dictates who may represent the United States before the Supreme Court. *See Providence Journal Co.*, 485 U.S. at 704; *NRA Political Victory Fund*, 513 U.S. at 90–98.

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questions. ECF 1239. The Assistant United States Attorney also acknowledged the indispensable role the Trinidad-led depositions played in the case against Maritime: "We couldn't go forward without those depositions, Your Honor." ECF No. 1234. Moreover, Trinidad's law firm referred to itself as the Government's "first chair," and confirmed to the district court, in relation to the "raging debate between Maritime Life and our side about my firm and my client's role here," that "when I say 'we,' it's really the royal we of this side of the argument." ECF No. 1001. In short, consistent with the district court's directive to litigate "on behalf of" the Government, App. 22a, Trinidad dictated the litigation strategy against Maritime on every material level.

Moreover, the Court should grant certiorari because the issue is an important federal question that has not been, but should be, settled by the Court. The Eleventh Circuit held that the district court's erroneous appointment, over the United States' objection, of a private attorney to litigate for the United States is subject to harmless error review. Where, as here, the private attorney represented an interested foreign sovereign, injury to the system, and not just the parties, is especially apparent. Absent a ruling by this Court, this important issue will evade review.

CONCLUSION

The district court usurped the role of the Attorney General by authorizing counsel on behalf of a foreign sovereign to litigate for the United States. In so doing, the district court acted without authority and violated the constitutional principle of separation of powers. Harmless error does not apply to the district court's ruling. Certiorari is warranted.

Respectfully Submitted,

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