No. 23-___

IN THE
Supreme Court of the United States

TONY EVERS, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF WISCONSIN,

Petitioner,

v.

MICHAEL DEAN *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is "well established that a federal court may consider collateral issues," including "motions for costs and attorney's fees," even after the underlying action "is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990).

In conflict with this "well established" rule and with all other courts of appeals to have addressed the issue, the Seventh Circuit holds that district courts lack jurisdiction to consider a motion under 28 U.S.C. § 1927 for excess costs and fees when that motion is filed after a court of appeals has issued its mandate directing dismissal of the underlying case.

The question presented is: Did the Seventh Circuit err in holding under those circumstances that district courts lack jurisdiction to consider motions under Section 1927?

PARTIES TO THE PROCEEDINGS

The parties to the sanctions proceeding below were petitioner Governor Tony Evers and respondents Michael Dean, Daniel J. Eastman, Julia Z. Haller, Brandon Johnson, Howard Kleinhendler, Emily P. Newman, Sidney Powell, and L. Lin Wood.

The plaintiff in the underlying lawsuit seeking declaratory and injunctive relief was William Feehan. The defendants in the underlying suit were Governor Evers, the Wisconsin Elections Commission, and Commissioners Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., and Mark L. Thomsen.

RELATED PROCEEDINGS

Feehan v. Wisconsin Elections Comm'n, No. 20-cv-1771 (E.D. Wis. Dec. 9, 2020)

Feehan v. Wisconsin Elections Comm'n, No. 20-3448 (7th Cir. Feb. 1, 2021)

In re Feehan, No. 20-859 (U.S. Mar. 1, 2021)

Feehan v. Wisconsin Elections Comm'n, No. 20-cv-1771 (E.D. Wis. Aug. 24, 2022)

Feehan v. Evers, No. 22-2704 (7th Cir. Aug. 2, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tony Evers, the Governor of Wisconsin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-16a) is unpublished but available at 2023 WL 4928520, and the Seventh Circuit's order denying rehearing en banc (Pet. App. 49a-50a) is unpublished. The district court's memorandum opinion denying petitioner's motion for attorney's fees (Pet. App. 17a-48a) is unpublished but available at 2022 WL 3647882.

The district court's memorandum opinion dismissing the underlying suit for lack of subject-matter jurisdiction and failure to state a claim (Pet. App. 51a-98a) is available at 506 F. Supp. 3d 596. The Seventh Circuit's order dismissing the subsequent appeal as moot (Pet. App. 99a-100a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2023. Pet. App. 1a. A timely petition for rehearing was denied on September 25, 2023. *Id.* 49a-50a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1927 provides: "Any attorney or other person admitted to conduct cases in any court of the

United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

INTRODUCTION

Several provisions of federal law permit courts to impose costs and attorney's fees under a variety of circumstances. In a trio of cases, this Court held that a motion seeking costs or fees is "collateral" to the merits; therefore, a district court retains jurisdiction over such motions regardless of whether it still has, or indeed ever had, jurisdiction over the underlying case. *White v. New Hampshire Dep't of Emp. Sec.*, 455 U.S. 445 (1982); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Willy v. Coastal Corp.*, 503 U.S. 131 (1992).

Nevertheless, the Seventh Circuit holds that a district court lacks jurisdiction to award costs and fees under 28 U.S.C. § 1927 (which applies to attorneys whose "unreasonabl[e]" conduct imposes excess costs and fees on their adversaries) if the motion for fees and costs is filed after the court of appeals has issued a mandate directing the district court to dismiss the underlying action. That is because the Seventh Circuit believes such motions are "inexorably bound to the underlying merits of the case." *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 793 (7th Cir. 1983).

The Seventh Circuit's *Overnite* rule is wrong. Every other circuit to consider the rule has recognized that it conflicts with Supreme Court precedent. Yet, in

the decision below, the Seventh Circuit adhered to this incorrect jurisdictional rule. Its error warrants this Court's review. Indeed, it may well justify summary reversal.

STATEMENT OF THE CASE

1. Petitioner in this case is Wisconsin Governor Tony Evers. Among his responsibilities are signing and transmitting to the U.S. Administrator of General Services the state's certificate showing "the names of the persons elected" to serve as the state's presidential electors. Wis. Stat. Ann. § 7.70(5)(b) (West 2016).

Respondents are the attorneys responsible for filing a suit against Governor Evers seeking to force him to "de-certify" the 2020 presidential election results in Wisconsin because of alleged "massive election fraud." Compl. ¶ 1, ECF No. 1.[1]

Six of them were recently sanctioned under Rule 11 and 28 U.S.C. § 1927 for their role in bringing similar "frivolous" and "abusive" claims in Michigan. *King v. Whitmer*, 556 F. Supp. 3d 680, 689, 712 (E.D. Mich. 2021), *aff'd in part*, *rev'd in part*, 71 F.4th 511 (6th Cir. 2023).

2. Wisconsin was a central battleground in a nationwide flood of unsuccessful litigation seeking to overturn the results of the 2020 presidential election. As Justice Brian Hagedorn of the Wisconsin Supreme

[1] "ECF No." refers to the docket in *Feehan v. Wisconsin Elections Commission* (E.D. Wis. No. 20-cv-17771). "CA7 Dkt." refers to the docket in *Feehan v. Wisconsin Elections Commission* (7th Cir. No. 20-03448).

Court framed it, the flurry of litigation in Wisconsin involved "the most dramatic invocation of judicial power [he had] ever seen." Unpublished Order at 2, *Wisconsin Voters All. v. Wisconsin Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020) (Hagedorn, J., concurring). The challengers' demands were "built on so flimsy a foundation" that any acquiescence to them threatened to "do indelible damage to every future election." *Id.*

3. This lawsuit offers a vivid illustration. On December 1, 2020—in a last-ditch effort after other suits had failed to derail Wisconsin's casting of its electoral votes—respondents filed this suit in the U.S. District Court for the Eastern District of Wisconsin. *See* Compl., ECF No. 1.

Among other things, respondents claimed—in a 383-page filing—that Governor Evers had used election technology created "by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation" in order to "make certain Venezuelan dictator Hugo Chavez never lost another election." Compl. ¶¶ 6-8, ECF No. 1. The complaint declared that it could "identify with specificity sufficient ballots required to set aside the 2020 General Election results" and that the Governor and his "collaborators" had implemented fraudulent "schemes and artifices" that "resulted in the unlawful counting, or fabrication, of hundreds of thousands of illegal, ineligible, duplicate or purely fictitious ballots in the State of Wisconsin." *Id.* ¶¶ 3-4.

Later that day, respondents filed a motion for a temporary restraining order, ECF No. 2; ECF No. 3,

and hours after that, they filed another motion to amend or correct that motion, ECF No. 6. Apparently copying and pasting from filings they had submitted in other states, respondents opened their memorandum in support of the temporary restraining order by stating that "Joe Biden has been declared the winner of *Georgia's* General Election for President by a difference of 20,585 votes." ECF No. 3, at 1 (emphasis added).

Two days later, respondents filed an amended complaint with nineteen attachments totaling 354 pages. ECF No. 9. They also filed another amended motion for injunctive relief. ECF No. 10.

The day after that, respondents filed a brief in support of the amended motion for injunctive relief, ECF No. 42, as well as a motion to file separate reply briefs, ECF No. 43, and a motion to hold a consolidated evidentiary hearing, ECF No. 44.

On top of all this, respondents pushed for an expedited briefing schedule to take place over a weekend, ECF No. 10-1, at 1, suggesting Governor Evers be given one day to respond to the request for a temporary restraining order. *Id.*

These lengthy filings contained myriad deficiencies and procedural defects. For example, respondents were forced to amend their complaint because one of the original plaintiffs had never consented to participating in the lawsuit.[2] Another of

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[2] Molly Beck, *GOP Candidate Says He Was Used Without Permission as a Plaintiff in a Lawsuit to Overturn Wisconsin*

respondents' filings relied on alleged irregularities at a voting center that was not in Wisconsin. Compl. ¶ 143, ECF No. 1 (calling for the "[i]mmediate production" of surveillance footage at a facility in Detroit). To support their arguments, respondents submitted anonymous and pseudonymous "expert reports" that they had hijacked without authorization from other cases—reports that turned out to have been written by people who lacked any qualifications. ECF No. 98, at 2. One of these "experts" proclaimed that Wisconsin's election software had been "certainly compromised by rogue actors, such as Iran and China." ECF No. 3, at 4.

4. Governor Evers was represented by outside counsel in this case. The Wisconsin Department of Justice represented the Wisconsin Elections Commission and its members (all of whom were also named defendants).

On December 7, 2020, Governor Evers filed a motion to dismiss. ECF No. 51. Two days later, the district court denied respondents' various motions for preliminary relief and granted Governor Evers' motion. Pet. App. 97a-98a. The district court emphasized the principle that "[f]ederal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so." *Id.* 52a. It then held that the remaining plaintiff lacked Article III standing and

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Election Results, Milwaukee J. Sentinel (Dec. 1, 2020), https://perma.cc/XW8S-FVFC; *see also* ECF No. 9 (removing original plaintiff who had not consented).

that "much of the requested relief was moot." *Id.* 2a; *see id.* 97a-98a. Moreover, the court explained that the suit could not proceed in any event because the government defendants either could not be sued under Section 1983, *id.* 88a-89a, or were immunized by the Eleventh Amendment, *id.* 89a-91a.

5. Before the district court entered judgment, respondents filed a notice of appeal to the Seventh Circuit. ECF No. 84. A few days later, they filed an amended notice of appeal from the judgment dismissing the complaint, ECF No. 90, along with a motion to consolidate the two separate appeals, CA7 Dkt. 5. Before the Seventh Circuit could act, respondents rushed to this Court with an emergency petition for a writ of mandamus. Emergency Petition Under Rule 20 for Extraordinary Writ of Mandamus, *In re Feehan*, No. 20-849 (U.S. Dec. 15, 2020).

On February 1, 2021, the Seventh Circuit dismissed the pending appeals because the case had become moot. Pet. App. 99a-100a. Pursuant to Federal Rule of Appellate Procedure 41(b), the court of appeals then issued its mandate on February 23, 2021. *Id.* 2a.

On March 1, 2021, this Court denied the emergency mandamus petition. *In re Feehan*, 141 S. Ct. 1510 (2021) (mem.).

6. Later that month, Governor Evers filed a motion for sanctions. He asserted that this case "had been, from its inception, legally and factually baseless." Pet. App. 2a. At that point, Governor Evers' contracted attorneys had spent 266 hours defending the case, incurring over $72,000 in fees (at a steeply

discounted rate) and costs to be borne by Wisconsin taxpayers. ECF No. 99.

As is relevant here, Governor Evers invoked 28 U.S.C. § 1927, which authorizes district courts to impose liability for excess fees and costs on any attorney who multiplies the proceedings through a course of "unreasonabl[e] and vexatious[]" conduct.[3] Such conduct can include "rais[ing] baseless claims despite notice of the [claims'] frivolous nature," *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184-85 (7th Cir. 1992), or otherwise "pursu[ing] a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound," *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985); *see also* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 23(A)(1) (6th ed. 2020). It may also include maintaining a frivolous appeal. *See* Joseph, *supra*, § 23(A)(4).

Roughly a year-and-a-half later, the district court denied the motion on the grounds that it lacked jurisdiction even to consider whether Section 1927 sanctions were warranted. Pet. App. 48a. Its holding rested on the Seventh Circuit's decision in *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983). There, the court of appeals held that once an appellate mandate affirming dismissal has issued, "no case or controversy any longer exist[s]" under Article III, and thus, courts are

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[3] Governor Evers also sought sanctions under the court's inherent authority. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991). Those sanctions are not at issue here.

powerless to consider imposing sanctions. *Id.* at 792. The district court recognized that in this case "counsel had little time to file a sanctions motion before the mandate issued." Pet. App. 39a. Nonetheless, it believed itself bound by *Overnite*'s jurisdictional rule. *Id.*

7. The Seventh Circuit affirmed. It held that "the district court correctly followed our precedent in *Overnite* in concluding that it lacked jurisdiction over Governor Evers' motion for sanctions under Section 1927." Pet. App. 12a. And the panel declined to revisit the *Overnite* rule, rejecting Governor Evers' contention that the decision was irreconcilable with intervening Supreme Court precedent and that it warranted reconsideration because of other circuits' uniform rejection of the *Overnite* rule based on that same precedent. *Id.* 6a-9a.

Judge Scudder declined to join the majority's reasoning, writing that he had "a hard time seeing how *Overnite*'s bright-line prohibition" could "survive[] the direction supplied" by this Court's decisions in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), and *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). Pet. App. 15a. Those decisions had established "that a district court does not lose authority to entertain a motion for sanctions after dismissing an action and entering judgment." *Id.* To the contrary, those cases "underscore that a motion for sanctions—which fairly seems to include a motion under 28 U.S.C. § 1927—is a collateral matter" and therefore one over which

district courts retain jurisdiction even once the underlying case is no longer live. *Id.* Judge Scudder concurred in the judgment, however, because he thought that the district court's error in holding that it lacked jurisdiction was harmless. *Id.* 15a-16a.

8. The Seventh Circuit denied Governor Evers' petition for rehearing en banc. Pet. App. 49a-50a.

REASONS FOR GRANTING THE WRIT

This case raises an important question involving a district court's power to curb baseless litigation, and provides an ideal vehicle for resolving that question.

It is "well established that a federal court may consider collateral issues" even once the underlying action "is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). Yet in *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983), the Seventh Circuit established a jurisdictional bar against such consideration. The *Overnite* rule, which the Seventh Circuit declined to abolish here, conflicts with this Court's precedent because costs and attorney's fees are "collateral issues." Furthermore, every court of appeals to consider the *Overnite* rule has rejected it based on this established principle of law.

Even setting aside the *Overnite* rule's conflict with this Court's precedent, it makes no sense to treat issuance of an appellate mandate as an act that cuts off a district court's ability to consider these motions. Section 1927 sanctions penalize a course of vexatious conduct, which may become fully apparent only at litigation's end. And especially where—as here—cases

are brought, dismissed, and appealed on an expedited basis, Section 1927 is vital to remedying litigation abuses.

This Court should grant review and reverse the judgment of the Seventh Circuit.

I. The Seventh Circuit's *Overnite* rule conflicts with this Court's precedent, decisions from every other circuit to address the issue, and fundamental legal principles.

The Seventh Circuit holds that district courts are "without jurisdiction" to consider motions for fees and costs under Section 1927 filed after an appellate mandate has issued. *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 793-94 (7th Cir. 1983). The basis for the rule is the Seventh Circuit's belief that such motions are "so inexorably bound to the underlying merits of the case" that they cannot survive once the underlying case or controversy no "longer exist[s] between the litigants." *Id.* at 792-93. Put another way, the *Overnite* rule rests on the proposition that motions for fees and costs are not collateral proceedings.

This proposition, and the *Overnite* rule erected upon it, cannot be squared with three of this Court's decisions, one issued prior to *Overnite* and two issued subsequently. For that reason, the Second, Third, Fourth, and Sixth Circuits have rejected the *Overnite* rule and authorized consideration of sanctions in precisely the circumstances that *Overnite* prohibits. And even if this Court were to address the issue on a blank slate, it should reject the *Overnite* rule.

A. This Court's decisions in *White*, *Cooter & Gell*, and *Willy* foreclose the *Overnite* rule.

This Court has repeatedly held that a district court's authority to consider imposing fees and costs in no way hinges on its jurisdiction over the underlying case or controversy. Because the *Overnite* rule depends on exactly the opposite proposition, it cannot survive.

1. Start with *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), which preceded the Seventh Circuit's decision in *Overnite*. *White* concerned 42 U.S.C. § 1988, a statute that authorizes courts to award "reasonable attorney's fees to prevailing parties" in cases brought under a variety of civil rights-related statutes. While the underlying case was on appeal, the parties reached a settlement and the case was remanded. 455 U.S. at 447. The district court then entered judgment. More than four months later, the plaintiff filed his Section 1988 fees motion. *Id.* at 447-48. This Court held that a motion for fees under Section 1988 is "collateral" to the main cause of action and therefore not a "motion to alter or amend the judgment" for purposes of Federal Rule of Civil Procedure 59(e), which required such a motion to be filed within ten days of final judgment.[4] *Id.* at 451-52. The fee litigation could proceed because,

[4] At the time, Rule 59(e) required that motions to alter or amend the judgment be filed within ten days of final judgment. Fed. R. Civ. P. 59 advisory committee's note to 2009 amendment. That deadline has subsequently been extended to twenty-eight days. Fed. R. Civ. P. 59(e).

as the Court explained, "[r]egardless of when attorney's fees are requested" they "require an inquiry separate from the decision on the merits." *Id.* at 451-52.

Subsequent to *Overnite*, this Court issued two additional decisions confirming that *White*'s holding applies to fees motions across the board, including fees sought as sanctions.

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), the Court extended *White*'s reasoning from Section 1988 to Rule 11, holding that a district court retained jurisdiction to impose Rule 11 sanctions over three-and-a-half *years* after the plaintiff voluntarily dismissed the underlying complaint. *Id.* at 389, 398 (Rule 11 authorizes courts to impose sanctions for "pleading[s], written motion[s], and other paper[s]" that are factually or legally baseless.) The Court explained that "motions for costs or attorney's fees" can be entertained even after the underlying action is "no longer pending" because those motions involve "independent proceeding[s]." *Id.* at 395 (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 170 (1939)). Just like the award of costs or attorney's fees, "the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process." *Id.* at 396. Such determinations "may be made after the principal suit has been terminated." *Id.*

Finally, in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), this Court held that even where a district court never had subject-matter jurisdiction over the

underlying suit, it could still entertain a Rule 11 sanctions motion. The Court reiterated that sanctions motions are "collateral to the merits" and "therefore do[] not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction." *Id.* at 137-38. The Court emphasized that the interest in deterring litigation misconduct "does not disappear" simply because the underlying case is no longer pending. *Id.* at 139.

2. The Seventh Circuit concluded that these three decisions of this Court do not control here. But this attempt at hairsplitting fails.

First, the Seventh Circuit thought *White*, *Cooter & Gell*, and *Willy* do not control here because those decisions did not address fees and costs under Section 1927 specifically. Pet. App. 6a-9a. But nothing in this Court's reasoning was limited to any particular fees or costs provision. To the contrary, this Court was expressing a general proposition about the collateral nature of fees and sanctions proceedings. Indeed, in applying *White*, a Section 1988 case, to the facts of *Cooter & Gell*, a Rule 11 case, the Court confirmed that there was no material difference between the two contexts; both concerned the award of fees or costs and therefore both qualified as "collateral" to the merits. *Cooter & Gell*, 496 U.S. at 395-96.

So too with Section 1927. Like Rule 11, which addresses whether an attorney "has abused the judicial process," *Cooter & Gell*, 496 U.S. at 396, Section 1927 addresses "limiting the abuse of court processes," *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980). That explains why other courts of

appeals have consistently found "no material difference between the collateral character of sanctions under Rule 11 and sanctions awarded under 28 U.S.C. § 1927." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006); *see also Hyde v. Irish,* 962 F.3d 1306, 1310 (11th Cir. 2020) (citing decisions of the Third, Fifth, Sixth, and Eighth Circuits).

In short, the Seventh Circuit has never offered any explanation for why a Section 1927 motion would not be collateral when all other motions for fees and costs are. That alone justifies reversal.

Second, the Seventh Circuit thought this Court's decisions do not control here because it believed that those cases involved motions that were "already pending before the district court before the appellate mandate issue[d]." Pet. App. 9a. That observation is at once factually mistaken and legally irrelevant.

When it comes to *White*, the Seventh Circuit got the facts wrong. Just as in Governor Evers' case, an appellate mandate had issued *before* the plaintiff made his fee motion. The parties in *White* had reached a settlement agreement while the underlying class action was pending on appeal. 455 U.S. at 447. Accordingly, the court of appeals issued a mandate that "remanded [the case] to the District Court" to approve a consent judgment embodying the agreement. *Id.* More than four months later, "after the entry of [the] final judgment" on remand, the plaintiff filed his fee motion. *Id.* at 448. So in both *White* and this case, the fee motion came after both an appellate mandate and a judgment resolving the underlying

case. Thus, there is no material difference between the two cases. And yet, although *White* predated *Overnite* by almost a year, *Overnite* never addressed that case.

The Seventh Circuit was equally off-base to assert that "the most important factor" in *Cooter & Gell* was that "the sanctions motion had been pending when the plaintiff voluntarily dismissed the case." Pet. App. 7a. That wasn't a factor at all. To the contrary, the Court in *Cooter & Gell* explained that the determination of collateral matters like fees and costs "may be made after the principal suit has been terminated," 496 U.S. at 396, which is exactly the status of a case after an appellate mandate directing dismissal of a complaint has issued. Indeed, the Court relied on *White* and reiterated its rule that courts may consider a fee award "even years after the entry of a judgment." *Id.* at 395-96 (internal quotation marks omitted). The Court in *Cooter & Gell* placed no weight whatsoever on the timing of the motion relative to when the district court ceased to have jurisdiction over the underlying case.

As for *Willy*, it establishes that a district court need not *ever* have had jurisdiction over an underlying case to consider sanctions. 503 U.S. at 132. So it is irrelevant whether the district court does not have jurisdiction over the underlying suit but at one point thought it did, as in *Willy*, or does not have jurisdiction over the underlying suit because that case is over, as in the cases governed by *Overnite*. Either way, the court has jurisdiction over the collateral issue of fees and costs.

In the end, the Seventh Circuit's cramped reading of this Court's decisions in *White*, *Cooter & Gell*, and *Willy* is unsustainable. Judge Scudder recognized as much when he stated that *Overnite* cannot "survive[] the direction supplied by these Supreme Court decisions." Pet. App. 15a.

B. Every other court of appeals to consider the issue has rejected the *Overnite* rule.

Four circuits have read this Court's decisions to foreclose adopting *Overnite*'s jurisdictional bar. And no circuit has adopted anything like the Seventh Circuit's idiosyncratic approach. Even the court below acknowledged this split. Pet. App. 10a.

1. Three circuits—the Second, Fourth, and Sixth—have expressly held that district courts retain jurisdiction to award sanctions under Section 1927 when motions are filed after an appellate mandate has issued.

In *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323 (2d Cir. 1999), the Second Circuit held that under *Cooter & Gell* and *Willy*, the "District Court clearly had jurisdiction to impose sanctions [under Section 1927] irrespective of the status of the underlying case because the imposition of sanctions is an issue collateral to and independent from the underlying case." *Id.* at 331, 333. The court thus dismissed as "meritless" the appellants' request that it adopt the *Overnite* rule. *Id.* at 333.

Likewise, in *Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165 (4th Cir. 1986), the Fourth Circuit considered and rejected *Overnite*. *Id.* at

1166-67. It held that a district court retained jurisdiction to consider a post-mandate motion for excess fees and costs under Section 1927, explaining that, though *White* dealt with a fee award under Section 1988, its "reasoning applies as well" to awards under Section 1927. *Id. White* therefore compelled the conclusion that a "district court has jurisdiction to consider and grant a motion for the allowance of fees, though made several months after the conclusion of all appellate proceedings." *Id.* at 1167.

The Sixth Circuit followed suit in *In re Ruben*, 825 F.2d 977 (6th Cir. 1987). It held that "[t]he district judge properly rejected Ruben's reliance on *Overnite*" and it then remanded the case for consideration of a post-mandate motion for fees and costs under Section 1927. *Id.* at 982, 991.

2. The Third Circuit has also rejected *Overnite*'s reasoning—there, in a case involving Rule 11. In *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988), it explained that even when a motion for sanctions is filed after the appellate court's mandate, the district court still has jurisdiction to consider the motion because the motion is "collateral to the appeal on the merits" governed by the mandate. *Id.* at 98. The Third Circuit was persuaded that "the rationale of *White* governs post-appeal Rule 11 filings." *Id.* The court emphasized that *Overnite* was not persuasive because that decision had failed entirely to discuss "the Supreme Court's holding in *White*." *Id.*

3. Absent this Court's intervention, the conflict between the Seventh Circuit and everyone else is certain to persist. Despite this Court's antecedent

decision in *White* and its subsequent decisions in *Cooter & Gell* and *Willy*—not to mention a contrary circuit consensus—the Seventh Circuit has refused to reconsider *Overnite*. Pet. App. 12a; *id.* 49a-50a. And the rule continues to be applied, not only to motions under Section 1927, but also to motions under Section 1988. Indeed, in *Trump v. Wisconsin Elections Commission*, 2021 WL 5771011 (E.D. Wis. Dec. 6, 2021), the district court declared that "but for *Overnite*," it would have granted the City defendants' motion for excess costs and fees under both provisions. *Id.* at *5.

C. Even beyond its deviation from this Court's precedent, the *Overnite* rule is wrong.

There are at least three additional reasons why this Court should reject the *Overnite* rule.

1. There is no reason to treat issuance of an appellate mandate as an act that cuts off a district court's jurisdiction to entertain a Section 1927 sanctions motion. After all, a mandate simply returns jurisdiction to the district court. *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court."). It does not alter the district court's relationship to the parties and attorneys before it.

To begin, in cases where there is no appeal at all, district courts undeniably retain jurisdiction to consider a Section 1927 motion—or other motions for fees and costs, for that matter—filed after the entry of final judgment. *See White*, 455 U.S. at 451. Indeed, the

Seventh Circuit itself recognizes as much. In *Lightspeed Media Corp. v. Smith*, 761 F.3d 699 (7th Cir. 2014), the Seventh Circuit reasoned that because there had been "no appeal" of the underlying judgment, the district court retained jurisdiction to consider a Section 1927 motion filed roughly *seven-and-a-half months*—more than twice as long as elapsed in this case—after the district court dismissed the suit. *Id.* at 707-08.

The fact that the losing party files an unsuccessful appeal should not change that result—and certainly not by immunizing the losing party or its counsel from liability for excess fees and costs. As *Overnite* recognizes, a party can seek fees under Section 1927 while an appeal is pending, Pet. App. 4a, because a notice of appeal divests the district court only of "those aspects of the case involved in the appeal," *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1919 (2023) (citation omitted). But the district court is in the same posture after a mandate issues directing dismissal of the underlying case as it was when the appeal was pending: It is without jurisdiction over the underlying case or controversy but "free" as to issues that were not before the court of appeals. *Sprague*, 307 U.S. at 168. And because a Section 1927 sanctions motion filed post-mandate could not have been part of the appeal, the district court is free to consider it. *See id.* at 168-70 (holding that the issue of equitable fees and costs was not "disposed of in the main litigation" and thus not "foreclosed by the mandate"). In reality, the district court post-mandate is in the same position as if there had been no appeal at all.

2. The *Overnite* rule undercuts the core purposes of Section 1927.

Section 1927 was enacted to punish a course of "unreasonabl[e] and vexatious[]" conduct that burdens litigants and courts with undue expense and delay. Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* §§ 20, 23(A)(1) (6th ed. 2020). Those harms have already been inflicted, and therefore remain, even once the underlying suit is no longer pending. Litigants or their counsel should not be able to escape punishment, and opposing parties who have incurred excess costs and fees should not be deprived of their remedy, simply because the underlying case is over. *See Cooter & Gell*, 496 U.S. at 398 (explaining that a litigant who files baseless litigation "merits sanctions even after a dismissal").

The imposition of a time-based jurisdictional bar like the *Overnite* rule is especially unwarranted when it comes to Section 1927. While Rule 11 and Rule 54, which governs the routine award of costs, contain time limits tied to the entry of final judgment, Section 1927 does not. In 1993—after *White* declined to specify a time limit for fees and costs motions, 455 U.S. at 454 & n.16—the Rules Committee amended Rule 54 to include a deadline for motions seeking attorney's fees (fourteen days after judgment). *See* Fed. R. Civ. P. 54(d) advisory committee's note to 1993 amendment. Section 1927 was the only provision explicitly exempted from this new deadline. *Id.*

There's good reason why Congress has not imposed a jurisdictional bar on considering Section 1927 motions filed after final judgment. Rule 11

focuses on a specific pleading or written motion. Fed. R. Civ. P. 11(b). But Section 1927 asks "whether the *proceedings* have been unreasonably and vexatiously multiplied," and this "may become apparent only at or after the litigation's end." *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006) (emphasis added). The propriety of Section 1927 sanctions may also be "unsettled as long as there is a pending appeal." *Hicks*, 805 F.2d at 1167. And it is often even more difficult to determine "what are truly excess costs, expenses, and attorney fees" incurred from such misconduct until the close of litigation. *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 102 (3d Cir. 2008) (citation omitted). Litigants should not be barred from using this tool precisely when an opposing party's course of misconduct, and the consequences of that misconduct, become most apparent.

Even less justifiably, the *Overnite* rule presents parties subjected to vexatious litigation with an unattractive choice: either they must file a placeholder motion while an appeal is pending or, once they win the appeal, they must file a motion seeking to stay the appellate court's mandate *affirming their own victory* in order to preserve their ability to seek sanctions in the district court. A rule that requires such pointless maneuvers ironically itself "multiplies" the proceedings and cannot be right.

3. The Seventh Circuit's only affirmative justification for the *Overnite* rule was its concern that allowing a post-mandate motion for sanctions might be unfair to the person being sanctioned. Pet. App.

11a-12a. This concern cannot justify a jurisdictional rule.

First, district courts may establish local timeliness rules for fees and costs motions. In *White*, this Court held that the district court could consider a fees motion filed roughly four-and-a-half months after final judgment. 455 U.S. at 447-48, 450. But in doing so, the Court observed that district courts were "free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees" in order to prevent "a postjudgment motion [from] unfairly surpris[ing] or prejudic[ing] the affected party." *Id.* at 454; *see also Cooter & Gell*, 496 U.S. at 398. Some courts have done just that. *See, e.g.*, D. Conn. Civ. R. 11, available at https://perma.cc/V9FM-495U. Appellate courts may also impose supervisory timeliness rules.[5]

These timeliness rules avoid the "harsh consequences" that jurisdictional rules like *Overnite* can impose. *See United States v. Kwai Fun Wong*, 575 U.S. 402, 408-09 (2015); *see also Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 (2019) (explaining that jurisdictional rules may "occasion wasted court resources" and "disturbingly disarm litigants" (citation omitted)). That's because, unlike jurisdictional rules, timeliness rules can be waived or subject to other equitable considerations. *See Hicks*,

[5] The Third Circuit in *Mary Ann Pensiero*, while rejecting the *Overnite* rule, imposed a "supervisory" timeliness rule requiring that a Rule 11 sanctions motion be filed in the district court before the entry of final judgment. 847 F.2d at 98-100. It has not, however, imposed such a rule on Section 1927 motions. *See In re Schaefer*, 542 F.3d at 102.

805 F.2d at 1167-68 (affirming award of fees under Section 1927 notwithstanding the appellants' contention that the motion had been untimely filed under a local rule, as that argument had been forfeited). In particular, under a timeliness rule, courts can consider legitimate reasons a party might have had for filing its motion after issuance of a mandate—including, as in this case, that the district court proceedings were highly expedited and the appeal period was unusually short due to the appeal being dismissed as moot before merits briefing. Pet. App. 2a; *id.* 39a (district court finding that "counsel had little time to file a sanctions motion before the mandate issued").

Second, even in the absence of a timeliness rule, a district court can deny sanctions motions that are filed so late as to be prejudicial to the responding party. *See, e.g.*, *White*, 455 U.S. at 454 (highlighting the existence of discretion to deny a fee motion that "unfairly surprises or prejudices the affected party"); *Hicks*, 805 F.2d at 1167 (pointing to the "equitable considerations that a district judge may weigh" in deciding whether to impose sanctions even "[i]n the absence of an applicable local rule").

II. This case presents an ideal vehicle to address the question presented.

1. The issue whether the district court had jurisdiction to award fees and costs under the circumstances here was pressed and passed upon below. *See* Pet. App. 12a. The Seventh Circuit squarely refused to revisit its precedent. *Id.* 49a-50a.

This case also presents a rare opportunity to address the *Overnite* rule head-on. Given the entrenched nature of the *Overnite* rule, litigants within the Seventh Circuit are deterred both from seeking sanctions post-mandate in the first place and from appealing denials of sanctions on these grounds. *See, e.g.*, *Trump v. Wisconsin Elections Comm'n*, 2021 WL 5771011, at *5 (E.D. Wis. Dec. 6, 2021) (no appeal where motions under Sections 1927 and 1988 were dismissed for lack of jurisdiction on *Overnite* grounds).

2. If this Court were to reject the *Overnite* rule, the decision below would have to be vacated.

The Seventh Circuit held that the district court could not consider Governor Evers' sanctions motion because the *Overnite* rule barred his post-mandate motion. Once this Court corrects that erroneous application of general jurisdictional principles, the Court should leave the question whether that error was harmless for remand. *See, e.g.*, *MOAC Mall Holdings v. Transform Holdco LLC*, 143 S. Ct. 927, 940 & n.10 (2023) (reversing based on lower court's "mistaken belief" that a statutory requirement was jurisdictional and remanding for further consideration of "other questions" unnecessary "to resolve the question presented"); *Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022) (leaving "any harmlessness questions for the courts to address on remand").

The Seventh Circuit panel never addressed the question of harmless error here. And Judge Scudder's two-sentence discussion in his concurrence hardly disposes of the issue. Pet. App. 15a-16a.

In fact, there is strong reason to believe that the error here was not harmless. The district court recognized that "patently" meritless claims could warrant sanctions. But it assumed that, even absent the *Overnite* rule, it could not sanction respondents because it had "dismissed the case on procedural grounds" and thus never reached the merits of the plaintiff's complaint. Pet. App. 42a-43a. That assumption confuses two possible rationales for sanctions and produces two legal errors.

First, a district court might award sanctions under Section 1927 against a lawyer who abused the litigation process by pressing substantively meritless claims. *See* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 23(A)(1) (6th ed. 2020). To be sure, if that were the basis for a party's sanctions motion, it *would* require some consideration of the merits to determine whether the course of litigation was unreasonable and vexatious. But the district court cited no authority for the proposition that, having not reached the merits in its disposal of the underlying case, it therefore lacked the power to consider the merits in addressing the sanctions question. *Cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (permitting Rule 11 sanctions when a complaint is "not legally or factually tenable" despite voluntary dismissal prior to the court's reaching the merits of the complaint).

Second, it is entirely possible that a sanctions motion will not depend solely (or even at all) on the lack of a substantively meritorious legal argument. A sanctions motion might rest on excess costs imposed

on a party in the course of a lawsuit that is defeated on the basis of threshold defects—for example, a lack of standing or the presence of sovereign immunity. *See, e.g.*, *Hernandez v. Joliet Police Dep't*, 197 F.3d 256, 264 (7th Cir. 1999) (affirming an award of sanctions where "basic research" would have shown that the action was "barred by the Eleventh Amendment"). In this situation, the district court's inability to address the merits is a symptom of, not an excuse for, the vexatiousness of the litigation.

The district court's decision here rested on errors with respect to each of the categories. When a district court has "based its ruling on an erroneous view of the law," it has "necessarily abuse[d] its discretion." *Cooter & Gell*, 496 U.S. at 405. Thus, the Seventh Circuit needs to address these issues on remand.

III. District courts' jurisdiction to award sanctions under Section 1927 is an important issue that warrants this Court's intervention.

1. Sanctions are essential to a district court's power to manage its proceedings and to control the conduct of those who appear before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). As this Court has explained, "enforcing sanctions against vexatious litigation" is the "best" method to curb "abuse[s] of process." *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 645 n.12 (1985). In particular, the ability to issue sanctions provides a "significant deterrent" to litigation that is directed "for purposes of political gain or harassment." *Clinton v. Jones*, 520 U.S. 681, 708-09 (1997).

2. In some situations—including here—Section 1927 is the most appropriate mechanism for remedying abuses of the litigation process. Rule 11 sanctions may not be available at all. After a district court enters judgment, a party cannot seek them because doing so would "prevent[] giving effect to [Rule 11's 21-day] safe harbor provision." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1337.2 (4th ed. 2023).

This case offers a textbook example of that problem. The district court dismissed the complaint only eight days after filing, so the 21-day safe harbor provision would have precluded awarding sanctions under Rule 11 even if Governor Evers had filed the required notice on the very day the suit was filed. The Tenth Circuit's decision in *Roth v. Green*, 466 F.3d 1179 (10th Cir. 2006), shows that Section 1927 sanctions fill an important gap in precisely these circumstances. *Id.* at 1193 (awarding sanctions under Section 1927 in a case where Rule 11 sanctions were not available because notice of the motion was filed after the district court entered judgment).[6]

Moreover, when faced with a flurry of multi-front litigation, as Governor Evers was here, it is often impracticable to expect parties to prepare and file sanctions motions while those lawsuits are ongoing.

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[6] While sanctions under a district court's inherent authority might technically be available, they require a finding of subjective bad faith and should be exercised with "restraint and discretion." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764, 767 (1980) (affirming sanctions under Section 1927 but remanding for consideration of inherent-authority sanctions).

The district court recognized as much when it found that counsel worked "around the clock to address pleadings filed in multiple cases in multiple forums" and therefore "had little time to file a sanctions motion before the mandate issued." Pet. App. 39a. This Court should thus reject the Seventh Circuit's overly optimistic assumption that there is "no need to overrule circuit precedent to relieve a party of the effects of a rule it could have complied with so easily." *Id.* 11a. It was simply not so easy to comply, especially given the gravity of the litigation. Governor Evers and his lawyers were hit with six election-related lawsuits over the course of fourteen days, all of which were expedited and demanded immediate attention, as losing any of one them could have cost Wisconsin its ability to cast electoral votes in a close presidential election.[7]

The proliferation of election litigation and emergency temporary restraining orders—which necessarily occur on a compressed timeline—highlights the general problem. The Federal Judicial Center recently issued a 1302-page report cataloging the rise of expedited election-related litigation. *See* Fed. Jud. Ctr., *Emergency Election Litigation in*

[7] Unpublished Order, *Wisconsin Voters All. v. Wisconsin Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020); Unpublished Order, *Mueller v. Jacobs,* No. 2020AP1958-OA (Wis. Dec. 3, 2020); Unpublished Order, *Trump v. Evers*, No. 2020AP1917-OA (Wis. Dec. 3, 2020); *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020); Letter from Jon P. Axelrod & Deborah C. Meiners, Special Counsel, Wisconsin Elections Comm'n, to Dean Knudson (Apr. 30, 2021), available at https://perma.cc/UY75-XSHA.

Federal Courts: From Bush v. Gore *to Covid-19*, at 11 (2023), available at https://perma.cc/JMQ2-B5DC (showing that the number of emergency election-related cases in federal courts in 2020 more than doubled from the previous presidential election cycle). These cases demand attention from both the courts and the opposing party "within days, hours, or even minutes of being filed." *Id.* at 10. Under these circumstances, a jurisdictional barrier to filing sanctions motions once the dust has settled raises serious questions about district courts' ability to control the litigation process.

Even when other sanctions are available, Section 1927 remains an important tool. "Section 1927 is a formidable fraud-fighting instrument, even as compared to Rule 11. While Rule 11 depends on 'a writing,' [Section] 1927 broadly encompasses any misconduct." Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 Mich. L. Rev 639, 683 (2017). And unlike Rule 11, Section 1927 accomplishes compensatory goals by "explicitly authoriz[ing] monetary penalties that flow to the party aggrieved." *Id.*

In sum, the *Overnite* rule limits district courts' jurisdiction to consider sanctions in precisely the cases where they are most needed. This Court's intervention is critical.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the Seventh Circuit reversed.

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