No. 25-808

IN THE

Supreme Court of the United States

JAMES E. MCNAIR,

Petitioner,

v.

K. JOHNSON,

Respondent.

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

BRIEF OF PROFESSORS ROBERT J. PUSHAW, HOWARD M. WASSERMAN, AND BENJAMIN H. BARTON AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici are legal scholars who teach and write on federal courts and civil procedure. Robert J. Pushaw, Jr., is the James Wilson Endowed Professor of Law at Pepperdine University Caruso School of Law. His scholarship has studied the influence of eighteenth-century Anglo-American political and legal theory on modern law governing the federal courts, particularly the justiciability doctrines and inherent judicial powers. His scholarly writings have appeared in dozens of law journals. Howard M. Wasserman is a Professor of Law at Florida International University College of Law, where he teaches and writes on civil procedure, federal courts, and civil rights litigation. Benjamin H. Barton is the Helen and Charles Lockett Distinguished Professor of Law at the University of Tennessee College of Law, where he teaches and writes on issues related to access to justice and the regulation of the legal profession.

Amici have an interest in ensuring that lower courts have a proper understanding of when and how they can invoke their inherent powers, particularly in the context of issuing sanctions.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Respondent and Petitioner received timely notice of, and consented to, the filing of this brief.

SUMMARY OF ARGUMENT

Article III vests federal courts with "judicial power": the authority to apply the law to the facts and render a final judgment. In order to effectively exercise this judicial power, courts possess certain implied powers, or "inherent authority," that flow from courts' very existence. These powers "cannot be dispensed with . . . because they are necessary to the exercise of all others," *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (Marshall, C.J.), and they enable courts to protect their integrity, manage their cases, and sanction misconduct in order to effectively carry out their judicial power.

History makes clear that this authority is narrowly circumscribed: courts have traditionally invoked it only when indispensably necessary and where no federal statute or procedural rule otherwise controls. By separating the judicial power from executive prerogatives, and by giving Congress—not the judiciary—broad implied authority, the Framers imposed structural limits on courts' inherent authority. This Court's early cases reflect this intent and confirm that inherent authority should be invoked only when necessary to carry out powers that are indispensable to exercising judicial functions.

But this Court's more recent cases have strayed from the original understanding, despite a proliferation of statutes and rules that should have reduced the need for courts to invoke their inherent power. While the Court continues to reiterate that courts should exercise inherent authority cautiously, some of its holdings can be read to

suggest the opposite. Most notably, in *Chambers v. NASCO*, *Inc.*, 501 U.S. 32 (1991), the Court affirmed the exercise of inherent power even when applicable statutes or rules of procedure obviate the need to resort to it. The Court continued this expansion in *Dietz v. Bouldin*, 579 U.S. 40 (2016), sustaining a district court's invocation of an unprecedented inherent power without a showing that it was indispensably necessary.

Such decisions have left lower courts with little guidance as to when they should and should not exercise their inherent authorities. This lack of clarity creates myriad problems, particularly in the context of sanctions. For one, broad understandings of inherent powers to impose sanctions deprives litigants of clear standards for what conduct is and is not sanctionable. For another, without clear bounds, district courts face confusion about how to exercise the restraint and caution that this Court has repeatedly demanded, and appellate courts have virtually no guidance to conduct meaningful review.

This case presents the opportunity to reaffirm the limited role of courts' inherent authority under the Constitution's separation of powers. Inherent powers exist to protect courts from conduct that abuses the judicial process or undermines the integrity of the judicial system. Consistent with that justification, courts must at minimum make a finding of bad faith before invoking their inhere- authority to impose sanctions. A bad-faith requirement would not only respect the limited role of inherent powers in the Constitutional scheme but

also provide clarity for courts and fair notice for litigants.

ARGUMENT

I. The Historical Evolution Of This Court's Inherent Authority Doctrine Has Produced Conflicting Understandings Of The Scope Of Inherent Powers.

Inherent judicial power has historically been understood as a narrowly circumscribed power that courts can invoke when essential to carry out the core functions of the judiciary. But this Court's more recent decisions can be—and have been—read as allowing courts to exercise inherent powers that are not indispensably necessary, even when applicable statutes or rules of procedure preclude the need to resort to inherent power.

A. History and tradition support a constrained view of inherent authority.

1. The concept of "inherent authority" stems from English courts that predate our Constitution. English kings' "executive power" included the "prerogative to do justice," and they delegated to judges the function of rendering judgments about the law in particular cases. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 805 (2001); *see* 1 William Blackstone, *Commentaries* *266–70 (monarch was considered "the fountain of justice and general conservator of the peace of the kingdom"); 3 *id.* at *23–24. For many centuries, English courts independently developed all laws—including rules governing practice, procedure, and

evidence (known as "adjective" rules). Pushaw, *supra* at 747, 805. Courts also asserted power to manage litigation (e.g., through "prerogative" writs like mandamus) and maintain their authority by (1) fining or jailing litigants for contempt or (2) dismissing cases for abuse of process. *See id.* at 812–15. These powers were "inherent" in the sense that they derived from the Crown's sovereignty. *Id.* at 810.

Even when Parliament became sovereign in 1689, it continued recognizing the power to do justice as one of the king's "executive powers." 3 William Blackstone, *Commentaries* *23–24 ("[A]ll courts of justice, which are the medium by which [the king] administers the law, are derived from the power of the crown."). By that point, English judicial procedures had become so intricate and entrenched—and had proven to be sufficiently effective—that Parliament invariably declined to interfere with them. *See* Pushaw, *supra*, at 815. "[C]ertain powers that had originated in the royal prerogative came to be seen as inherent characteristics of a 'court.'" *Id.* at 810 (citing Ronald Goldfarb, *The Contempt Power* 12 (1963)). Those powers included the power to "control [judicial] proceedings in order to promote the fair and efficient administration of justice." *Id.* Courts could make procedural and administrative rules; arrange their internal business (i.e., set dates for hearings and trials); punish misconduct; and hold supervisory authority. *Id.* at 812–14.

2. While the Framers adopted some of "the wisdom of the English system," they rejected the

idea that federal judges should possess vast inherent powers. *Id.* at 823. Rather, the Framers established a fundamentally different constitutional structure reflecting a significantly more constrained view of inherent judicial authority.

Taken alone, the Framers' constitutional structure suggests that the idea of "inherent judicial power" is foreclosed altogether. *Id.* at 824; *see* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 Cath. Univ. L. Rev. 1, 12 (2011) ("The language and structure of the Constitution do not suggest that a strong inherent judicial power exists."). Rather than vesting sovereignty in the government or the monarch, the Constitution locates sovereignty in "the People," who ratified a Constitution that divided the national government into independent branches with different roles. *See* The Federalist No. 39, 46–49, 51, 55 (Madison); *id.* Nos. 36, 60, 84 (Hamilton). And unlike the English system, the Framers expressly separated the executive power from the judicial power. Article II vested "executive power" in the President, while Article III vested "judicial power" in the courts. U.S. Const. arts. II, III. This division meant that Article III judges—unlike English Courts—were fully separate from the executive, and therefore derived no executive powers or prerogatives.

The Constitution also granted Congress "legislative power" to make all laws and specified several provisions that authorized Congress to shape the judiciary. U.S. Const. art. I, § 8. Notably, while Congress was required to create a Supreme

Court and grant it original jurisdiction over specific cases, Congress had significant discretion regarding other features of the judiciary. For example, Congress could (1) make exceptions and regulations to the Court's appellate jurisdiction, *id.* art. III, § 2, cl. 2; (2) decide whether to create "inferior" federal courts and determine their structure and jurisdiction, *id.* art. III, § 1; and (3) set forth the substantive and procedural rules those courts would apply, *id.* art. I, § 8, cl. 18.

Notably, the Framers gave Congress the power to make all laws "necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any other Department or Officer thereof." *Id.* Article III has no such language. While the Framers clearly intended that Congress have power to enact laws it considered "necessary and proper" to effectuate the powers of the judicial department, it conspicuously did ***not*** give that same power to the judiciary.

At the same time, the Framers recognized that certain implied powers must be inferred for any government branch to operate, including the judiciary. As James Madison explained, "there can be no doubt . . . that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included." The Federalist No. 44, at 304–05. How this principle applied to the federal judiciary was left to be worked out by Congress and the courts.

3. Consistent with this framework, early legislative practice and judicial decisions made clear that courts' "inherent powers" could be invoked only when indispensably necessary to carry out the express powers of the judiciary.

Several provisions of the Judiciary Act of 1789 bespeak the Framers' intent for Congress—not the courts—to establish court process and procedure. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (Judiciary Act of 1789 "was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning") (overruled on unrelated grounds). First, Congress gave federal judges clearly articulated powers like issuing writs of habeas corpus, mandamus, and prohibition. Act of Sept. 24, 1789, ch. 20, §§ 13-14, 1 Stat. 73. Second, while judges had "discretion" to punish "contempts of authority," they could only do so by imposing "fine or imprisonment" as punishment. *Id.* § 17. And third, Congress set forth a number of procedural rules, including rules governing jury trials; district court process; removal, attachment, and discovery in land disputes; production of writings; appeals; venue for capital crimes; certain dispositions; and bail. *Id.* §§ 9, 11, 12, 15, 22, 25, 26, 29, 30, 33. These provisions reflect Congress's belief that the power to regulate the courts and to prescribe procedure was an Article I power—not an Article III power.

Early Supreme Court cases supported this allocation of authority. In *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court recognized the

Framers' rejection of broad implied powers characteristic of English courts. In *Bollman*, two alleged co-conspirators were detained on charges of treason and sought habeas relief from the Supreme Court. *Id.* at 75–76. The Court rejected the claim that "issuing writs of habeas corpus . . . is one of those inherent powers, bestowed by the law upon every superior court as incidental to its nature." *Id.* at 80. Instead, it held that authority to issue writs must be provided by statute. *Id.* at 94. Chief Justice Marshall distinguished this power from courts' implied power "to protect themselves, and their members, from being disturbed in the exercise of their functions." *Id.*

In *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), the Court considered whether federal courts have jurisdiction to prosecute and punish common law crimes in the absence of a statute enacted by Congress that defines the offense, specifies a punishment, and confers jurisdiction on the court. The Court determined that only Congress could delineate federal criminal jurisdiction. *Id.* at 33–34. Courts possess only certain "implied powers" that stem "from the nature of their institution"—those that "are necessary to the exercise of all other powers." *Id.* at 34. Those powers include the authority "[t]o fine for contempt," "imprison for contumacy," and "inforce [sic] the observance of order[.]" *Id.* But courts do ***not*** have the implied power to prosecute common law crimes simply by virtue of their existence. *Id.*

Then, in *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court sharply contrasted

Congress's broad implied powers under Article I with the judiciary's narrow implied powers under Article III. In *McCullough*, the Court upheld Congress's Article I power to establish a National Bank corporation. *Id.* at 400–25. Chief Justice Marshall explained that the Necessary and Proper Clause gives "the national legislature . . . discretion" to choose the best means to effectuate the express powers conferred in Article I. *Id.* at 421–22. This discretion includes not only those powers which are "necessary," but also those which are "convenient" or "useful." *Id.* at 413. But he made clear that the judiciary does not have this same sort of broad discretion. He illustrated this distinction by noting that Congress alone had power to criminalize conduct as a means of facilitating

> the beneficial exercise of [an express] power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

Id. at 417. This passage reveals a remarkably constrained view of judges' implied powers, as arguably a court could not properly discharge its core "judicial power" of finding facts if it could not punish those who stole or falsified its "record or process."

And in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), the Court again contrasted the judiciary's implied powers with Congress' authority. In *Anderson*, the Court considered Congress's contempt authority to punish individuals who disrupted legislative proceedings. The Court analogized Congress's authority to that of the courts, which were "universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates." *Id.* at 228. The "corollary" to this authority is the power to "preserve themselves and their officers from the approach and insults of pollution." *Id.* But the Court was very clear: these powers are ***only*** those that are "indispensable" to carrying out "the powers which the people have intrusted [sic] to them." *Id.* at 226–27. Because the Constitution is "hostile to the exercise of implied powers," any "auxiliary and subordinate" powers should only be exercised if they are "indispensable to the attainment of the ends" specified. *Id.* at 225–26.

This early history and the Court's original interpretations of courts' "inherent authority" underscore that these powers were originally construed narrowly and exercised by courts only when absolutely necessary to carry out core Article III functions—protecting courts' authority and integrity, managing their cases and internal affairs, and sanctioning courtroom misconduct and disobedience of their orders.

B. Modern Supreme Court decisions have significantly expanded the scope of inherent authority.

Despite the early conception of inherent powers as limited to those that "cannot be dispensed with" and are "necessary to the exercise of all others," *Hudson*, 11 U.S. (7 Cranch) at 34, the Court has more recently adopted a broader construction of such powers. Confusingly, it has done so despite the proliferation of congressionally enacted rules of procedure that significantly reduce the need to resort to implied powers.

1. Beginning with the Federal Rules of Civil Procedure in 1938, Congress has enacted comprehensive and uniform procedural laws after a national deliberative process that featured substantial input from the Supreme Court, other federal judges, and legal experts. Rules Enabling Act of June 19, 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072). Amendments to Rule 23 in both 1966 and 2005 set forth procedures and policies for the "modern class action." Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Power in Multidistrict Litigations*, 48 B.Y.U. L. Rev. 1869, 1899–1900 (2023). Congress set forth the procedure for multidistrict litigation in 1969. 28 U.S.C. § 1407. Amendments to Rule 16 in 1983 and 1993 provided guidance for judges to manage discovery, settlements, and adopting "special procedures" to handle particularly complex cases. Pushaw & Silver, *supra*, at 1899–1900. Congress also adopted the Federal Rules of Criminal Procedure in 1946

(Act of June 29, 1940, ch. 445, 54 Stat. 688); the Federal Rules of Appellate Procedure in 1968 (Act of Nov. 19, 1968, 102 Stat. 4648); and the Federal Rules of Evidence in 1975 (Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926).

Under the original conception of inherent powers as those indispensably necessary, this explosion of written rules of procedure and evidence should have dramatically reduced the need for courts to resort to their inherent authority. Instead, the opposite has occurred: courts have increasingly invoked unprecedented "inherent authority," often with endorsement from the Supreme Court.

2. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), represents the most significant departure from the original understanding. In *Chambers*, the Supreme Court considered the scope of a federal court's inherent authority to sanction litigation misconduct by ordering payment of attorneys' fees. The district court had invoked its "inherent authority" to sanction a litigant's conduct by ordering him to pay all of the opposing party's attorneys' fees and costs. *Id.* at 40–41. The district court declined to issue sanctions under Federal Rule of Civil Procedure 11, which imposes sanctions for the filing of frivolous pleadings, or under 28 U.S.C. § 1927, which governs a federal court's ability to impose sanctions against frivolous, unreasonable, or bad faith litigation. *Id.* Instead, it required payment of nearly $1 million in attorneys' fees on the sole basis of its "inherent power" to do so. *Id.*

The Court began its analysis by emphasizing the familiar notion that inherent powers should only be

invoked when indispensably necessary. *Id.* at 43 (implied powers are those that are "***necessary*** to the exercise of all others") (quoting *Hudson*, 11 U.S. (7 Cranch) at 34) (emphasis added). In particular, the Court warned that these powers "ought to be exercised with great caution," *id.* (quoting *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824)), and only when "necessary to the integrity of the courts," *id.* at 44; *see id.* ("Because of their very potency, inherent powers must be exercised with restraint and discretion.").

Nonetheless, the Court affirmed the district court's issuance of sanctions—despite its concession that the party's actions could have been sanctioned under existing statutes and procedural rules, rather than through the court's inherent authority. *Id.* at 50–51. The Court reasoned that the sanctioning scheme set forth in Rule 11 and Section 1927 did not "displace[] the inherent power to impose sanctions." *Id.* at 46. Because Rule 11 and Section 1927 "reache[d] only certain individuals or conduct," and some of the party's "conduct was beyond the reach" of those rules, *id.*, the district court did not abuse its discretion by solely "rely[ing] on its inherent power," *id.* at 42.

Despite the Court's warning that inherent power "ought to be exercised with great caution," *id.* at 43 (quotations omitted), *Chambers* "effect[ed] a vast expansion of the power of federal courts, unauthorized by Rule or statute." *Id.* at 60 (Kennedy, J., dissenting). In dissent, Justice Kennedy pointed out that this "expansion" conflicts with two central premises: (1) "Congress defines the

procedural and remedial powers of federal courts . . . and controls the costs, sanctions, and fines available there," and (2) Congress has invoked this authority by providing "a comprehensive arsenal of Federal Rules and statutes" to implement sanctions as necessary. *Id.* at 61–62 (citations omitted). "By allowing courts to ignore express Rules and statutes on point, however, the Court treats inherent powers as the norm and textual bases of authority as the exception." *Id.* at 63. This is, of course, "backwards," and ignores the long-held understanding that inherent authority should be invoked "only when ***necessary*** to preserve the authority of the court." *Id.* at 64 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)) (emphasis added); *id.* ("[O]ur cases recognize that Rules and statutes limit the exercise of inherent authority."). In short, the majority "brushe[d] aside" "the necessity limitation," giving courts authority to "ignore any and all textual limitations on sanctioning power." *Id.* at 64, 67.

More recently, in *Dietz v. Bouldin*, 579 U.S. 40 (2016), the Court again moved away from a narrow construction of inherent powers. In *Dietz*, the district court invoked its inherent power to re-empanel a dismissed jury after realizing there was a legal error in the verdict. *Id.* at 43–44. Like in *Chambers*, the Court again cautioned that judges "should not think they are generally free to discover new inherent powers that are contrary to civil practice as recognized in the common law," and that "a district court's inherent powers must be exercised with restraint." *Id.* at 48, 52. Despite these

warnings—and despite the unbroken common law tradition prohibiting judges from recalling discharged jurors—the Court sustained the district court's use of an unprecedented inherent power to recall the jury. *Id.* at 51. In doing so, the Court seemed to articulate a new standard for invoking inherent powers. Instead of being limited to "necessity," *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting), inherent powers were subject to only two constraints: (1) "the exercise of an inherent power must be a reasonable response to the problems and needs confronting the fair administration of justice," and (2) the power "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz*, 579 U.S. at 45 (majority op.) (quotations omitted). This is a far cry from when inherent powers, as originally understood, could be invoked.

II. The Court Should Clarify Proper Uses Of Inherent Powers And Prevent Their Further Expansion.

As the Court has moved away from the original understanding of inherent powers—and seemingly allowed their invocation on a case-by-case basis—the lack of clear standards has increased confusion for litigants and courts alike. This is particularly problematic in the context of sanctions, where parties should have notice about what conduct is considered sanctionable.

1. It is fundamental that due process "entitle[s] [individuals] to be informed as to what the State commands or forbids." *Chambers*, 501 U.S. at 68

(Kennedy, J., dissenting) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Unlike inherent powers, the federal rules governing sanctions "emerged from a deliberative process supervised by the Court, thereby ensuring uniformity and giving litigants and their attorneys the notice required by the Due Process Clause." Pushaw & Silver, *supra* at 1911. Inherent power sanctions, by contrast, are applied "without specific definitional or procedural limits." *Chambers*, 501 U.S. at 68 (Kennedy, J., dissenting). "[A]llowing inherent power to be exercised without constraint" therefore "threatens to surprise litigants by subjecting them to unknown and unclear standards." Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 Ga. L. Rev. 411, 455 (2020). Without that clarity, the "standardless exercise of judicial power . . . can be applied to chill the advocacy of litigants attempting to vindicate all other important federal rights." *Chambers*, 501 U.S. at 68 (Kennedy, J., dissenting).

As Petitioner argues, requiring a finding of bad faith for inherent authority sanctions would at least provide some guidance to litigants, while still allowing courts to invoke their inherent power when necessary. Appellate courts have explained the purpose of a bad-faith requirement: where "a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process," it, by definition, interferes with a court's ability to exercise its core "functions." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993); *Aoude v. Mobil Oil Corp.*, 892 F.2d

1115, 1118 (1st Cir. 1989) (describing as "elementary" a district court's inherent authority to sanction "fraud on the court" where a party intentionally "interfere[s] with the judicial system's ability impartially to adjudicate a matter").

Without a bad-faith requirement, there would be virtually no limit to what courts could sanction parties for, so long as a court determines that "neither [a] statute nor the Rules are up to the task." *Chambers*, 501 U.S. at 50. That opens litigants to standardless sanctions for "[b]eing late to trial, missing a dispositive hearing, missing a filing deadline, [or] making a mistake on a court-mandated form," even if done inadvertently. Pet. 23. This rule lands most heavily on pro se litigants—many of whom are incarcerated, like Petitioner—and are "likely not well versed in complex procedural rules," *Hendrix v. Blager Concrete Co.*, 412 F. App'x 891, 892 (7th Cir. 2011), and more likely to make litigation missteps. Indeed, that is precisely what happened in this case: Petitioner was sanctioned for his mistaken misunderstanding of what a court form was asking him. Pet. 6–7.

2. Both trial and appellate courts would also benefit from guidance over the scope and extent of inherent authority sanctions. The circuit split at issue here make that especially clear: there is both inter- and intra-circuit conflict on courts' authority to invoke implied powers. *See* Pet. 10–20. And as this Court has noted time and time again, invocation of this authority should not be taken lightly: "Because inherent powers are shielded from direct democratic controls, they must be exercised with

restraint and discretion." *Roadway Express, Inc.*, 447 U.S. at 764; *Chambers*, 501 U.S. at 50 ("A court must, of course, exercise caution in invoking its inherent power."); *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 n.5 (2017) (inherent authority "should be exercised with especial restraint and discretion") (citation omitted). But as this Court's doctrine on inherent authority has become "vague and inconsistent," Pushaw & Silver, *supra*, at 1874 n.20, it becomes more and more difficult for district courts to exercise such "restraint," "discretion," and "caution."

Indeed, without standards to guide them, federal judges have demonstrated considerable creativity in fashioning sanctions that include not only more traditional punishments like "charging fines and attorneys' fees to ordering adverse presumptions and dismissal," Dobbins, *supra*, at 435, but also case-specific sanctions that have no basis in precedent.

In one recent case, pursuant to its inherent authority, a district court ordered attorneys to provide "a formal written apology to community members" affected by disruptive litigation conduct. *Hicks v. City of Philadelphia*, 753 F. Supp. 3d 409, 415 (E.D. Pa. 2024). Plaintiff's counsel broadcast the sound of a woman screaming for over an hour as part of a "test" to determine whether a scream could be heard two blocks away. *Id.* at 412–13. The court determined no "rule- or statute-based powers" covered the conduct, and therefore invoked its inherent authority to implement a sanction based on its determination that counsel's use of this "scream test" "fell short of the sort of ethical standards by

which all attorneys practicing in the district must abide." *Id.* at 414–15. Noting that there was no evidence of bad faith, the court mandated that Plaintiff's counsel "prepare a written apology that explains their transgression and takes full responsibility for the repercussions of the scream test," and "personally visit the homes and businesses [of those impacted] . . . to reasonably endeavor to apologize in person." *Id.* at 416.

Another federal judge recently invoked his inherent power to address social media harassment. *DePalma v. Kerns*, 2023 WL 6302559 (M.D. Ga. Sept. 25, 2023). After determining that "Rule 11 sanctions [were] not warranted," the court cited its "inherent power to sanction parties and attorneys" and ordered the harassing parties to read an article titled "How Did America Get So Mean?" and write 2,000-word essays "examining and critiquing [the author's] thesis." *Id.* at *2 & n.6, *3.

To be sure, these sanctions were not necessarily unreasonable under the circumstances. But they highlight that courts are indeed using their significant discretion with virtually no standards to guide them.

The lack of clarity also hinders appellate courts' ability to conduct "meaningful review for misuse of discretion," which "focuses on the misapplication of legal standards." *Chambers*, 501 U.S. at 68 (Kennedy, J., dissenting). A trial court's invocation of inherent authority is reviewed for "abuse [of] discretion," *Dietz*, 579 U.S. at 51, for which "deference" is the "hallmark." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). But meaningful

review—especially under such a deferential standard—is "nearly impossible" where "existing law does not set bounds on the judge's discretion by identifying the range of outcomes that are permissible." Pushaw & Silver, *supra*, at 1897 n.154. This case invites the Court to clarify at least one of those "bounds."

* * *

So few guiding standards exist when it comes to inherent authority sanctions, and removing one more—the requisite finding of bad faith—would further untether courts' inherent power from its original conception. This Court should grant *certiorari* to both provide parties and courts with much-needed guidance and to prevent further expansive invocations of these powers, which were never intended to have such a broad reach.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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