No. 15-1406

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *ET. AL*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Is a federal court required to tailor compensatory civil sanctions imposed under inherent powers to harm directly caused by sanctionable misconduct when the court does not afford sanctioned parties the protections of criminal due process?

LIST OF PARTIES

Petitioner The Goodyear Tire & Rubber Company ("Goodyear") was an appellant in the Ninth Circuit proceedings, and a defendant and sanctionee in the District of Arizona. Fennemore Craig, P.C., Graeme Hancock, and Basil Musnuff were also appellants in the court of appeals and sanctioned by the district court. These latter individuals and entity have now settled with Plaintiffs.

Goodyear, Spartan Motors, Inc., and Gulfstream Coach, Inc. were defendants in the district court and the Maricopa County Superior Court.

Leroy Haeger, Donna Haeger, Barry Haeger, and Suzanne Haeger, Respondents in this case, were appellees in the Ninth Circuit proceedings, and plaintiffs in the proceedings before the district court and the Maricopa County Superior Court.

RULE 29.6 STATEMENT

Petitioner Goodyear has no parent company and no publicly-held corporation owns 10 percent or more of Petitioner's common stock.

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The original Ninth Circuit opinion is reported at 793 F.3d 1122 (9th Cir. 2015), and the panel opinion as amended (Pet. App. 1a-50a) is reported at 813 F.3d 1233 (9th Cir. 2016). The order of the Ninth Circuit denying rehearing and rehearing en banc (Pet. App. 5a-6a) is available at 2016 U.S. App. Lexis 2722 (9th Cir. Feb. 16, 2016).

The proposed order of the District of Arizona finding grounds for sanctions (Pet. App. 51a-82a) is unreported but publicly available on PACER, and the decision imposing sanctions (Pet. App. 83a-172a) is reported at 906 F. Supp. 2d 938 (D. Ariz. 2012). The court's decision allocating costs and fees (Pet. App. 173a-196a) is available at 2013 U.S. Dist. LEXIS 189796 (D. Ariz. Aug. 26, 2013).

JURISDICTIONAL STATEMENT

The Ninth Circuit denied Goodyear's petition for rehearing on February 16, 2016 in conjunction with the issuance of its amended opinion. Pet. App. 5-6a. A timely Petition followed on May 16, 2016, and this Court granted *certiorari* on September 29, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the federally-recognized "inherent authority" of a court to impose sanctions and the constitutional separation of powers and due process restraints upon such authority. U.S. CONST. amend. V ("No person shall be … deprived of life, liberty, or property, without due process of law[.]").

STATEMENT

In this case, the district court, invoking its inherent power, issued a $2.7 million sanction—the largest ever in the District of Arizona and one of the largest ever imposed pursuant to a court's inherent power—against Goodyear and its outside counsel.

A. Background on the Underlying Litigation

The sanctions proceedings stem from certain documents that were not produced during the course of discovery in the underlying litigation. The document featured most prominently by Plaintiffs was a "Heat Rise" test relating to an allegedly defective Goodyear tire.

Plaintiffs Leroy, Donna, Barry, and Suzanne Haeger sued Goodyear and others in Arizona state court in June 2005 (subsequently removed), claiming that a defect in a Goodyear "G159" tire caused a motor home accident. Pet. App. 8a; J.A. 36. Around the time of this case, Goodyear faced a number of lawsuits in different jurisdictions involving G159 tires. Goodyear accordingly retained Basil Munsuff of Roetzel & Andress, LPA as national coordinating counsel to manage the litigation and to coordinate discovery efforts across the various cases. Goodyear also hired Graeme Hancock of Fennemore Craig, P.C. as local counsel.

Mr. Munsuff worked directly with Goodyear engineers and technicians to locate documents. At the direction of counsel, Goodyear personnel combed through multiple electronic databases, engineering files, and documents in long-term storage in scores of banker's boxes and filing cabinets. ER426-27,

ER431-33.[1] Goodyear also reached out to former employees for assistance with these efforts. *Id.* Goodyear personnel eventually located all of the available testing data (including the Heat Rise test) and sent these documents directly to Mr. Munsuff. ER431-33, ER1013-14, ER1057-58.

In their initial set of document requests, Plaintiffs asked for a multitude of testing data, including "[a]ll test records for the G159 tires," which would have encompassed the Heat Rise test. ER639. Goodyear objected to the first set of requests for a variety of reasons, including overbreadth. Plaintiffs never filed a motion to compel in response.

Mr. Musnuff later advised Goodyear that the discovery requests had been narrowed, and consistent with that advice, Plaintiffs submitted a third request for production. It sought only "any speed or endurance testing" for "highway purposes" at 65 mph and 75 mph. ER680. After consulting with technicians at Goodyear regarding its internal purposes and uses for the various tests, Mr. Munsuff made the legal determination that the Heat Rise test was not responsive to this request: "I determined that it did not need to be produced." ER128-29.

The Heat Rise test was, however, produced in at least two other G159 cases that Goodyear was defending, *Schalmo* v. *Goodyear* in Florida and *Woods* v. *Goodyear* in Alabama. *Schalmo* went to trial, resulting in a $5.6 million verdict against

[1] "ER" cites reference the Excerpts of Record filed at the Ninth Circuit in this case.

Goodyear. Pet. App. 114a-119a. The parties settled *Woods* just before trial. *Id.*; ER944.

After five years of intense litigation in the *Haeger* case, the parties settled on the eve of trial in April 2010.

B. The District Court Sanctions Goodyear and Counsel Under Its Inherent Authority.

Over a year after the settlement, Plaintiffs moved for sanctions for discovery fraud because Goodyear did not produce the Heat Rise test, relying on Fed. R. Civ. P. 16(f), 26(g), 37(b), and 37(c). ER720. Goodyear's response accordingly focused on the standards under those rules and did not address the prospect of inherent authority sanctions. ER573-88. Both parties requested oral argument.

Without waiting for oral argument, the district court issued proposed "findings of fact and conclusions of law," determining that Mr. Musnuff, Mr. Hancock, and Goodyear deliberately sought to "prevent the disclosure of the internal heat test results." Pet App. 51a-82a. Though the parties had not briefed the issue, the court relied on its inherent authority as its primary basis for sanctions. *Id.* at 69a-70a. The court also invoked 28 U.S.C. § 1927 against counsel (recognizing that the statute could not reach Goodyear), but declined to rely on any of Plaintiffs' arguments regarding sanctions under the discovery rules.

After deeming Goodyear and counsel guilty of withholding documents, the proposed order stated that the only issues left were determining who was responsible "for each instance of misconduct" and

"the appropriate amount to be awarded." *Id.* at 82a. But the court had already charted its course: "the Court must impose sanctions." *Id.* at 81a. It then directed the potentially sanctioned parties to respond to certain questions and attend an evidentiary hearing.

Both Mr. Musnuff and Mr. Hancock testified at the subsequent hearing. ER87-ER285. Mr. Musnuff explained that he made the decisions to object or produce documents, and he further confirmed that Goodyear's in-house counsel, Deborah Okey, never said "in words or in substances, don't produce the heat rise tests." ER175-76. Nonetheless, the district court later found that Ms. Okey retained final authority for approving discovery responses, and was copied on some of the emails between outside counsel regarding discovery. Pet. App. 88a, 93a-94a.

In the wake of the hearing, the district court ordered the production of additional documents, including privileged communications between counsel and Goodyear. Goodyear produced over 13,000 pages of documents, none of which revealed any directive by Goodyear to withhold the Heat Rise test or any other information.

After further briefing, the district court issued a final sanctions decision that largely reiterated its earlier conclusions. The court found that Goodyear, Mr. Hancock, and Mr. Musnuff all acted in bad faith in the course of "adopt[ing] a plan of making discovery as difficult as possible." Pet. App. 83a-172a, 150a. Although it did not find that Goodyear took any specific action to direct counsel to withhold documents, the court held that Goodyear was responsible for the conduct of its outside counsel.

The decision specifically faulted Ms. Okey for her description of a court order from another case in a declaration during the sanctions proceeding. *Id.* at 133a, 164a. The court also found that another Goodyear employee, Mr. Olsen, had inaccurately characterized his knowledge of the Heat Rise test in a deposition and a declaration. *Id.* at 134-35a.

As it imposed sanctions, the court noted that Plaintiffs "may wish to affirm their settlement agreement and pursue an independent cause of action for fraud." Pet. App. 153a. Duly prompted, Plaintiffs later commenced a separate state court lawsuit for fraud, abuse of process, and negligent misrepresentation against Mr. Musnuff, Mr. Hancock, Goodyear, and others in state court. *See Estate of Leroy Hager* v. *Goodyear Tire & Rubber Co.*, No. 2013-052753 (Maricopa Co. Sup. Ct.). Among other relief, Plaintiffs seek the same fees and costs that were awarded in this case. Mr. Musnuff, Mr. Hancock, and their associated law firms recently settled with Plaintiffs in both the state court matter as well as this case. Consequently, both have dismissed their cases before this Court pursuant to S. Ct. R. 46.

C. The District Court Declines to Limit Its Award to Compensatory Damages.

The district court awarded Plaintiffs "*all* of the attorneys' fees and costs" they incurred after Goodyear responded to Plaintiffs' initial discovery requests for "all test records." Pet. App. 152a (emphasis in original). The total fee award amounted to $2,741,201, nearly all of the fees and costs Plaintiffs incurred over the entire litigation. Pet. App. 44a, 185a. The court ordered that

Goodyear and Mr. Musnuff were jointly liable for 80% of the award ($2,192,960), with Mr. Hancock responsible for the remaining 20% ($548,240). *Id.* at 169a-170a, 185a.

In fashioning this award, the court found it would be "inappropriate to limit the award to the fees and costs that could be directly linked to the misconduct" because "it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred." Pet. App. 151a-152a, 180a. The court reasoned that if Goodyear had produced "all responsive documents," it "might have decided to settle the case immediately," in which case "one could conclude practically all of Plaintiffs' fees and costs were due to misconduct." *Id.* at 152a.

The record evidence on this point, however, refuted the court's conclusion. In the *Schalmo* case in which Goodyear produced the Heat Rise test, the parties did not settle as soon as the document was turned over—much to the contrary, the case went all the way through trial. Likewise, in *Woods*, over nine months after the Heat Rise test was produced in that case, it settled on the courthouse steps.

Despite assuming the Heat Rise test might trigger an immediate settlement, the court found only that the tests were "relevant to Plaintiffs' claims." Pet. App. 129a. The district court did not determine the significance of the test, even though Goodyear's engineers explained that, as performed and used internally by Goodyear, the test had a limited scope and utility.

Appreciating the potential for reversal on appeal "in the event a direct linkage between the

misconduct and harm is required," the district court offered an "alternative" award that would have deducted $722,406.52 from the $2.7 million figure. Pet. App. 180a, 185a. Yet even this alternative deduction did not reflect a true causation analysis, focusing only on fees expended in litigating against Goodyear's co-defendants and proving medical damages. ER1352-53. Regardless, neither the district court nor the Ninth Circuit ever applied this deduction.

D. The Ninth Circuit's Decision.

Applying an abuse of discretion standard, the Ninth Circuit affirmed both the district court's imposition of sanctions as well as the amount. But the panel split on how the amount of sanctions should be determined. The majority held that *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 50 (1991), obviated any requirement "that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct." Pet. App. 21a, 28a. Reasoning that because *Chambers* allowed all attorney's fees based on "fraud," a similar award was appropriate in this case once Goodyear and its outside counsel "began flouting their clear discovery obligations." *Id.* at 32a. The majority thus refused to apply any causation requirement to the sanctions imposed.

In dissent, Judge Watford explained that the rule requiring a "causal connection" between compensatory sanctions and misconduct "reflects the well-established principle, fully consistent with Supreme Court precedent, that a sanction can be deemed compensatory only if it compensates the

injured party for losses sustained as a result of the sanctionable misconduct." Pet. App. 46a-47a; *see also id*. at 49a (discussing *Int'l Union* v. *Bagwell*, 512 U.S. 821 (1994)). Judge Watford faulted the lack of any "causal link between Goodyear's misconduct and the fees awarded." Pet. App. 45a. He deemed it "unlikely" that Goodyear would have settled immediately, citing the *Schalmo* example and noting that the undisclosed test "did not provide conclusive proof that the Haegers' tire failed due to its defective design." *Id*. at 45-46a.

This Court subsequently granted *certiorari*.

SUMMARY OF ARGUMENT

The inherent authority of federal courts encompasses two types of monetary sanctioning powers—bad faith attorney's fee sanctions and contempt. These powers share a common lineage and a common purpose. They also place far-reaching powers in the hands of a single judge to make the rule, determine its violation, and assess its penalty.

In *Bagwell*, this Court drew a distinction between civil and criminal contempt that largely turned on the question of causation. Civil contempt is remedial, and it can be either coercive (affording the party the opportunity to comply) or compensatory. If there is no opportunity to avoid the fine, remedial monetary penalties must be "calibrated" "to compensate the complainant for losses sustained." Otherwise, the penalties trespass on the criminal realm and demand the due process protections of criminal contempt.

Bagwell simply built on this Court's prior precedent recognizing that civil contempt sanctions

are constrained by causation principles. Causation functions as an important check on a court's inherent power. Without this constraint, courts are free to impose more drastic monetary sanctions under inherent powers than those available for the ostensibly more serious sanction of contempt. Given the similarities between civil contempt and bad faith sanctions, their common dangers, and the overlapping caselaw, the same restriction should apply to these inherent authority sanctions.

The Ninth Circuit majority avoided this result by pointing to *Chambers*, suggesting that it created a different test for non-contempt inherent authority sanctions. But *Chambers* too recognized basic causation principles, emphasizing that "all" of the conduct involved in that case was sanctionable. It is accordingly best understood as a case applying a causation standard on unusual facts.

Chambers certainly did not repudiate basic causation restrictions, and for good reason. All of the other main sanctioning regimes (Rule 11, 28 U.S.C. § 1927, and the discovery rules) require direct causation. Civil contempt demands the same for remedial sanctions. It would be anomalous for inherent authority sanctions to sweep more broadly in terms of available remedies than all of these other powers.

That would also be dangerous. Without any legislative check, inherent authority sanctions would be subject to no limiting principle other than "bad faith." But "bad faith," reviewed under an abuse of discretion standard, does not alone provide a sufficient check on inherent authority sanctions, and it offers no check on the amount of sanctions. It is difficult to conceive how any attorney's fee award, no

matter how high or shocking, could ever be overturned without a direct causation requirement. There would simply be no limiting principle on the amount a court could award.

Consistent with the "restraint and discretion" espoused by this Court, and with its prior cases discussing and applying causation, this Court should limit inherent authority sanctions to those attorney's fees directly caused by the claimed misconduct. The Ninth Circuit's judgment affirming the amount of sanctions should accordingly be vacated.

ARGUMENT

I. A Federal Court Must Apply Causation When Imposing Monetary Inherent Authority Sanctions

The federal courts have long recognized that they possess certain "inherent" powers necessary to ensure the efficient functioning of the judiciary. Most of these recognized powers concern basic case administration functions—powers that generally may be exercised unless overridden by Congress or the Federal Rules. But this Court has been cautious in any expansion of the sanctioning power (both contempt and inherent authority sanctions) because of the separation of powers and due process issues implicated, and because of the costs borne (monetary and reputational) by the sanctioned party. Although the Court has imposed various limits, it should now formally recognize—consistent with its prior cases in this area—that attorney's fee sanctions under inherent power are limited by a direct causation requirement.

A. Inherent Powers Must Be Limited By Principles of Separation of Powers, Due Process, the American Rule, and Judicial Restraint

The Ninth Circuit's rule would create a sanctioning power freed from the basic protections available under extant rules and statutes, and beyond the bounds of the typical restraints on inherent authority. Because a court's inherent powers are "governed not by rule or statute," this Court has recognized the need to impose limits on those powers. *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016) (quoting *Link* v. *Wabash R.R. Co.*, 370 U. S. 626, 630-31 (1962)). In *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980), the Court declared that, "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *See also Dietz*, 136 S. Ct. at 1893 ("Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint."). *Missouri* v. *Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) ("As with any inherent judicial power, however, we ought to be reluctant to approve its aggressive or extravagant use, and instead we should exercise it in a manner consistent with our history and traditions."). Specific limits are required to hold courts accountable "both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 501 U.S. at 50. The reason for this reluctance springs from the very nature of a court's inherent authority—free from

legislative constraints, the court alone fashions and applies that power.

1. Unbridled or amorphous inherent powers threaten core constitutional principles in view of the concentration of power in a single judge's hands: "That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers." *Int'l Union* v. *Bagwell*, 512 U.S. 821, 840 (1994) (Scalia, J., concurring); *Degen* v. *United States*, 517 U.S. 820, 823 (1996) ("The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."). Such concerns are magnified because the abuse of discretion standard of review generally insulates the trial judge's decision on appeal.

These constitutional problems become more pronounced when judges feel that their authority has been questioned: "Contumacy 'often strikes at the most vulnerable and human qualities of a judge's temperament,' and its fusion of legislative, executive, and judicial powers 'summons forth the prospect of 'the most tyrannical licentiousness[.]'" *Bagwell*, 512 U.S. at 831 (citations omitted). This Court's observation that contempt is "uniquely … liable to abuse," *id.*, applies with equal, if not greater, force to fee-shifting sanctions. After all, Congress has at least put some legislative parameters around the contempt power. *See, e.g.*, 18 U.S.C. § 401; *see also* Fed. R. Crim. P. 42.

2. Consistent with these constitutional limitations, and to prevent overreach, the Court has

often intervened to require that the exercise of inherent powers be necessary and proportionate to the wrong committed. Under the necessity principle, "[a] court's inherent power is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829. This principle recognizes that "[t]he inherent powers of federal courts are those which 'are necessary to the exercise of all others.'" *Roadway Express*, 447 U.S. at 764 (quoting *United States* v. *Hudson*, 7 Cranch 32, 34 (1812)). Where "alternative means" of accomplishing a court's objectives exist, no "necessity" justifies a harsher sanction. *Degen*, 517 U.S. at 827, 828 ("Both interests are substantial, but disentitlement is too blunt an instrument for advancing them."); *Gen. Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 398-99 (1982) (discussing "fundamental limitations on the remedial powers of the federal courts" which "could extend no farther than required by the nature and the extent of th[e] violation") (internal quotations omitted).

The proportionality requirement furthers the same ends. The Court recognizes that "[p]rinciples of deference counsel restraint in resorting to inherent power, and require its use to be a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823-24 (citation omitted); *Dietz*, 136 S. Ct. at 1892 ("[A]n inherent power must be a reasonable response to a specific problem."); *Bagwell*, 512 U.S. at 832 ("Our jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness . . . ."). This Court has also rejected other specific forms of sanctions "where 'means more narrowly tailored to deter objectionable . . . conduct are available.'" *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) (quoting *United*

States v. *Hasting*, 461 U.S. 499, 506 (1983)); *Degen*, 517 U.S. at 829 ("There was no necessity to justify the rule of disentitlement in this case. . . ."). These basic principles resonate throughout this Court's sanctions jurisprudence, and they laid the foundation for *Bagwell*, discussed more fully in Section B, below.

3. A court's inherent power to assess attorney's fees—the sanction at issue here—is further limited by the American Rule. "[D]eeply rooted in our history and in congressional policy," the Rule provides that the prevailing party ordinarily cannot recover its own attorney's fees against the adverse party. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 271, 260 (1975). Of course, Congress can, and sometimes does, override that rule in specific legislation through a "prevailing parties" provision. But, generally, the responsibility for altering the American Rule rests with Congress, and "it is not for [the courts] to invade the legislature's province by redistributing litigation costs." *Id.* at 271; *see also Baker Botts LLP* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) ("We consequently will not deviate from the American Rule absent explicit statutory authority.") (internal quotations omitted).

Duly cognizant of the American Rule, this Court has recognized a potential exception for fee shifting under inherent powers, but only "in narrowly defined circumstances." *See Roadway Express*, 447 U.S. at 765. Under the bad-faith exception applied here, a court may assess attorney's fees "against a party who has litigated in bad faith," or "against counsel who willfully abuse judicial processes." *Id.* at 766; *see also Alyeska*, 421 U.S. at 258-59 (recognizing that a court may assess attorney's fees when a party has

"acted in bad faith, vexatiously, wantonly, or for oppressive reasons") (internal quotations omitted). At the same time, Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.* at 260. Therefore, this exception must be narrowly limited lest it swallow the rule.

4. Finally, it is well-settled that "[w]hatever the scope of this 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with" the Federal Rules of Civil and Criminal Procedure. *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996). "[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia*, 487 U.S. at 255. Judicial restraint and respect for congressional prerogatives generally militate against imposition of inherent authority sanctions, because Congress has already defined the types of sanctionable conduct and the procedures for holding someone accountable.

Illustrating these points, the Sixth Circuit recently reversed an inherent authority sanction against counsel in a criminal case. *See United States* v. *Aleo*, 681 F.3d 290 (6th Cir. 2012). Concurring, Judge Sutton explained that the rules "spell[] out the procedural prerequisites for imposing a sanction," such as "who may seek sanctions," "the types of sanctions available," and "the purpose and limits of a sanction." *Id.* at 307 (Sutton, J., concurring). While inherent authority may "fill a gap in the Civil Rules," courts should not "invoke that power to ease the burden of satisfying existing Civil Rules—to punish practices exempted by a Rule or that fall short of

meeting a Rule's standard for sanctionable conduct." *Id.*

B. *Bagwell* Recognizes a Causation Requirement

Building on the above background principles, the Court in *Bagwell* imposed a causation requirement on monetary sanctions for civil contempt. To "protect the due process rights of parties" and prevent "the arbitrary exercise of official power," 512 U.S. at 834, the Court rejected the "relatively unlimited judicial power to impose noncompensatory civil contempt fines" that had been embraced by some lower courts, *id.* at 830. Reversing fines that were not "calibrate[d]" to losses caused by the misconduct, the Court held that noncompensatory fines constitute criminal sanctions that require the protection of basic criminal due process. *Id.* at 834, 837, 838. The Ninth Circuit erred in rejecting the limitations recognized by *Bagwell*.

1. This Court has chronicled "the unwisdom of vesting the judiciary with *completely untrammeled power* to punish contempt, and . . . the need for *effective safeguards* against that power's abuse." *Bloom* v. *Illinois*, 391 U.S. 194, 207 (1968) (emphasis added). Judicial overreach in early contempt cases led to congressional curtailment of the power as well as a recognition that courts had to be vigilant in policing its scope: "[t]hat contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." *Id.* at 202 n.4 (quoting *Sacher* v. *United States*, 343 U.S. 1, 12 (1952)). Writing against this backdrop, the Court in *Bagwell* strictly limited a

court's inherent power to punish through noncompensatory means, largely hinging the distinction between civil and criminal contempt on causation.

Bagwell underscored that "the stated purposes of a contempt sanction alone cannot be determinative." Rather than rely on the label announced by the district court, the reviewing court must look to "the 'character and purpose' of the sanction involved." 512 U.S. at 827-28; *Penfield Co. of Cal.* v. *SEC*, 330 U.S. 585, 590 (1947) ("It is the nature of the relief asked that is determinative of the nature of the proceeding.").

Bagwell itself involved fines levied against a labor union for violations of an injunction. 512 U.S. at 823-24. In a series of contempt hearings following strike-related activities, the trial court found over 400 instances of contempt and levied $52 million in noncompensatory fines payable to the Commonwealth of Virginia and two counties impacted by the unlawful activity. *Id* at 824.

To determine the process due for these noncompensatory fines, *Bagwell* expounded upon the distinction between civil and criminal contempt. A contempt sanction is civil "if it is remedial, and for the benefit of the complainant." *Bagwell*, 512 U.S. at 827 (internal quotations and citations omitted). To be "remedial," a fine must either be "compensatory" or "coercive," meaning it offers the sanctioned party "an opportunity to purge." *Id.* at 829.

On the other hand, a sanction is "criminal" if "the sentence is punitive, to vindicate the authority of the court." *Id.* at 828. These punishments include "fixed, determinate, retrospective criminal fines

which petitioners had no opportunity to purge once imposed." *Id.* at 837. "Thus, a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." *Id.* at 829 (quoting *Penfield Co.*, 330 U.S. at 588). A court's criminal sanction "operates not to coerce a future act from the defendant for the benefit of the complainant, but to uphold the dignity of the law, by punishing the contemnor's disobedience." *Id.* at 845 (Ginsburg, J., concurring in part and in judgment).

Applying this dichotomy, *Bagwell* held that serious noncompensatory fines are "punitive," not "remedial," and therefore warrant basic criminal due process protections. *Id.* at 829, 835-39. Highlighting the fine's punitive character, the Court emphasized that the trial court did not "***calibrate the fines to damages caused by the . . . contumacious activities***," or "***indicate that the fines were 'to compensate the complainant for losses sustained.***'" *See id.*, 512 U.S. at 834 (emphasis added) (quoting *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947)). In other words, the key line of demarcation between civil and criminal contempt is causation.[2] *See also Bagwell*, 512 U.S. at 847 (Ginsburg, J., concurring in part and in judgment) (explaining that fines were criminal, among other reasons, because the state did not "t[ie] the exactions exclusively to a claim for compensation").

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[2] *Bagwell* also noted that the fines were to be paid not to a party but to government entities that never asked for compensation, and that the union had no opportunity to purge. 512 U.S. at 834, 837.

In this regard, the Court built upon the foundation of *United Mine Workers*: "[w]here compensation is intended, . . . [s]uch fine must of course be based upon evidence of complainant's *actual loss*. . . ." *United Mine Workers*, 330 U.S. at 304 (emphasis added). But the causation requirement has deeper roots. *See, e.g., Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (sanction "operates . . . solely as punishment" where it "cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury *caused by* the disobedience") (emphasis added). *Bagwell* thus clarified the importance of causation in differentiating between civil and criminal contempt.

2. Although *Bagwell* addressed a contempt scenario, the Court has long recognized the intertwined nature of contempt and inherent authority sanctions, including their common purpose: "[T]he award of attorney's fees for bad faith *serve[s] the same purpose* as a remedial fine imposed for civil contempt,'" which before *Bagwell*, included "vindicate[ing] the District Court's authority over a recalcitrant litigant.'" *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) (emphasis added). But *Bagwell* explained that vindication of the court's authority is a goal of *criminal* contempt. *See* 512 U.S. at 827-28. In the aftermath of *Bagwell*, an award of attorney's fees for bad faith that serves the same "punitive" purpose as criminal contempt should be treated in the same manner.

Not only do these sanctions serve similar functions, but they flow from the same source. The contempt power, after all, is itself an inherent power—indeed, it lies at the heart of the inherent power to punish. *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924)

("That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law."). Exemplifying this overlap, the principle that inherent powers "must be exercised with restraint and discretion" when shifting fees for bad-faith conduct derives from cases limiting the contempt power. *See Roadway Express*, 447 U.S. at 764-65 (citing *Gompers*, 221 U.S. at 450-51 (contempt case)). Accordingly, the contempt power and the inherent power to shift fees for bad-faith conduct are cut from the same doctrinal cloth.

3. In fact, there is all the more reason to exercise vigilance over a court's invocation of its inherent power when it is not denominated as "contempt." The historical concerns over abuse of power that animate *Bagwell*'s causation requirement resonate with even greater force where the court operates without even the constraints of the contempt statute and procedural rules. "In punishing contempt, the Judiciary is sanctioning conduct that violates *specific duties* imposed by the court itself, arising directly from the parties' participation in judicial proceedings." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 (1987) (emphasis added). Operating in the interstices, inherent authority should not be used as an excuse for evading otherwise applicable limits on the sanctioning power. *See Aleo,* 681 F.3d at 311 (Sutton, J., concurring) ("A court's inherent power to sanction is not a second-division contempt power to be used when an attorney's conduct is almost, but not quite, punishable under § 401 and Rule 42.").

Consistent with this analysis, when faced with the question, most courts of appeals have applied *Bagwell*'s reasoning to inherent powers sanctions

and/or sanctions imposed under the Rules. *See, e.g.*, *Mackler Prods., Inc.* v. *Cohen*, 146 F.3d 126, 130 (2d Cir. 1998) (explaining that "sanctions and contempts raise certain similar concerns," and concluding "that the imposition of a sufficiently substantial punitive sanction requires . . . the procedural protections appropriate to a criminal case"); *Bradley* v. *Am. Household, Inc.*, 378 F.3d 373, 379 (4th Cir. 2004) (holding that fines imposed pursuant to "inherent authority" and Rule 37 were "for criminal contempt" and required "the procedural protections necessary for a judgment of criminal contempt"); *Crowe* v. *Smith*, 151 F.3d 217, 221, 226-29 (5th Cir. 1998) (applying *Bagwell* to vacate monetary sanctions imposed under district court's "inherent power"); *Baycol Steering Comm.* v. *Bayer Corp.*, 419 F.3d 794, 808-09 (8th Cir. 2005) (remanding inherent authority sanction because it was "payable to the clerk of the court and not concretely tailored to compensate . . . for actual costs resulting from the misconduct"); *F.J. Hanshaw Enters.* v. *Emerald River Dev., Inc.*, 244 F.3d 1128, 1139 (9th Cir. 2001) ("We agree with the reasoning of . . . *Mackler Productions*, which held substantial punitive sanctions to be enough like criminal contempt to warrant the same due process protections."); *but see United States* v. *Romero-Lopez*, 661 F.3d 106, 107-08 (1st Cir. 2011) (declining to apply *Bagwell*'s reasoning to $1500 fine for attorney's failure to attend hearing imposed as non-contempt inherent powers sanction); *De Manez* v. *Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 590-92 (7th Cir. 2008) (explaining that "inherent power. . . . is distinct from the contempt power," and declining to apply *Bagwell*).

The prevailing view makes sense, particularly in light of the shared lineage between contempt and

inherent authority sanctions. Given that contempt covers direct defiance of a court order, one would not expect inherent authority sanctions to entail much more sweeping relief for subtler forms of misconduct. Perversely, had Goodyear refused a court order to produce the Heat Rise test and been found in contempt, it would not have faced as high of a monetary sanction than when the court resorted to its inherent authority under the Ninth Circuit's rule.

C. *Chambers* Does Not Repudiate Causation

In rejecting a causation test, the Ninth Circuit majority turned to *Chambers*, interpreting it as establishing that a compensatory sanctions award need not link the amount to the misconduct so long as there were "frequen[t] and sever[e] . . . abuses of the judicial system." 501 U.S. at 56. But this elevates the inherent authority sanctioning power to be more potent than contempt—which stands fundamentally at odds with *Chambers* itself. *Chambers* simply is not a vehicle for evading the foundational causation requirement recognized by *Bagwell* and rooted in this Court's jurisprudence.

1. Contrary to the Ninth Circuit majority's reading, *Chambers* does not create a separate category of inherent powers sanctions for misconduct involving widespread abuses that are free from any causation constraints. Instead, the Court found a causal connection between the sanctions award and the extraordinary misconduct at issue in that case. In fact, it recognized that part of the purpose for inherent authority sanctions was "making the prevailing party whole for expenses *caused by* his opponent's obstinacy." *Chambers*, 501 U.S. at 46

(emphasis added) (quoting *Hutto*, 437 U.S. at 689, n.14).

Mr. Chambers, the owner of a television station, agreed to sell the station's facilities and broadcast license to respondent NASCO, Inc., but subsequently had second thoughts. *Id.* at 35-36. When NASCO decided to seek specific performance and a temporary restraining order in federal court, Mr. Chambers and his attorney orchestrated a relentless campaign of fraud and frivolous litigation. *Id.* at 36-38. The district court ultimately exercised its inherent power to impose nearly $1 million in sanctions, representing "the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40.

Under these exceptional circumstances, the Court found that the fee award causally linked to the misconduct. As Judge Watford explained, "[b]ecause the district court found that Chambers never had a good-faith basis for resisting the relief NASCO sought . . . , it seems fair to say that all of NASCO's attorney's fees were incurred as a direct result of Chambers' misconduct." Pet. App. 48a. Or, as this Court summarized it, "*all* of [the] litigant's conduct [was] deemed sanctionable." *Chambers*, 501 U.S. at 51 (emphasis added).

Nowhere in *Chambers* does the Court "expressly reject[] the linkage argument," as the Ninth Circuit posited. Pet. App. 32a. Absent Mr. Chambers' "'sordid scheme of deliberate misuse of the judicial process,'" there would have been no litigation at all. *Chambers*, 501 U.S. at 57 (quoting *Nasco, Inc.* v. *Calcasieu TV & Radio*, 124 F.R.D. 120, 128 (W.D. La. 1989)). Therefore, *Chambers* is fully consistent with a causation requirement, albeit an unusual application of one.

This reading of *Chambers* is buttressed by the Court's frequent reliance on *Hutto* v. *Finney*, 437 U.S. 678 (1978) in its opinion. *Hutto* expressly equated an attorney fee award for bad faith misconduct with civil contempt, as noted above: "the award of attorney's fees for bad faith served the same purpose as a remedial fine imposed for civil contempt." *Id.* at 691. In this respect, *Hutto* highlighted the causation factor that applies to both: "That the award had a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience." *Id.* at 691 n.17. *Hutto* concluded that an attorney's fee award imposed pursuant to a court's inherent authority "makes the prevailing party whole for expenses *caused by* his opponent's obstinacy." *Id.* at 689 n.14 (emphasis added). But *Hutto* declined to go even that far—its fee award did not "adequately compensate counsel for the work that they have done. . . ." *Id.* at 691 (quoting *Finney* v. *Hutto*, 410 F. Supp. 251, 285 (E.D. Ark. 1976)).

2. To the extent that *Chambers* stands in tension with *Bagwell*, however, *Bagwell* should control. As Judge Watford noted, *Chambers* made clear that the "dual purpose" sanctions award was "partly punitive." Pet. App. 48a-49a. Subsequent to *Chambers*, this Court in *Bagwell* sharply delineated between compensatory and punitive contempt sanctions and required certain criminal due process protections to be afforded for the latter. *See id.* at 49a (Watford, J., dissenting) ("Moreover, the law has changed since *Chambers* was decided."). As described above, *Bagwell* clarified that monetary sanctions imposed without satisfying a causation

requirement are punitive and must be addressed as criminal contempt.

The *Chambers* Court did not have occasion to consider the due process question raised in *Bagwell*. Without evaluating those concerns, *Chambers* rightfully appreciated that the contempt jurisprudence should guide the exercise of inherent powers. It highlighted the intertwined nature of contempt and inherent authority sanctions. 501 U.S. at 53 (quoting *Hutto*, 437 U.S. at 691). And it summoned authority in the contempt context to support an award for all fees. *Id.* at 45 ("[A] court's discretion to determine 'the degree of punishment for contempt' permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation.") (quoting *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 428 (1923)). But *Bagwell* has since clarified the landscape on which *Chambers* relied, holding that a "punitive" monetary sanction "to vindicate the authority of the court" constitutes criminal contempt, 512 U.S. at 828, and squarely addressing a question that simply was not before the Court in *Chambers*.

Chambers did acknowledge, however, that inherent authority sanctions were viewed as a less potent sanction than contempt, describing "the more drastic sanctions available for contempt of court." *Id.* at 46 (quoting *Hutto*, 437 U.S. at 689 n.14). One would not expect to see far more sweeping remedies under inherent authority sanctions than those available under the "more drastic" contempt regime. But as the Ninth Circuit majority shows, without clear standards, courts are enabling inherent authority sanctions to become a transcendent power overshadowing (and more potent than) contempt.

4. To the extent that *Chambers* is read as endorsing a largely unchecked version of inherent authority sanctions, that view is also refuted by another case decided shortly after *Bagwell*, *Degen* v. *United States*. In *Degen*, the Government advocated that a district court's inherent power authorized it to strike certain claims under the fugitive disentitlement doctrine. 517 U.S. at 822-23. After some lower courts embraced that theory, this Court unanimously reversed. Fundamentally, the Court highlighted the disproportionate nature of the sanction to the perceived violation, emphasizing "the lack of necessity for the harsh sanction of absolute disentitlement." *Id.* at 827. Consistent with the *Bagwell* analysis, the Court held that the "need to redress the indignity visited upon the District Court" does not justify using "too blunt an instrument" for advancing that purpose. *Id.* at 828. *Degen* confirmed that a court's exercise of its inherent powers cannot be "an arbitrary response to the conduct it is supposed to redress or discourage." *Id.*

Writing shortly (and largely unanimously) after the divided decision in *Chambers*, this Court in two different contexts (*Bagwell* and *Degen*) placed important limits on inherent power. These limits of causation and necessity confirm that *Chambers* did not spell the demise of causation for inherent authority sanctions. Therefore, the Ninth Circuit erred in relying on *Chambers* to eliminate causation for inherent authority sanctions.

D. Other Sanctions Mechanisms Require A Direct Causation Standard

Recognizing a causation limitation on inherent authority sanctions also comports with other sanctioning regimes. The three most common—Rule

11, 28 U.S.C. § 1927, and the discovery rules—all limit sanctions to those attorney's fees directly caused by the misconduct. This Court's analysis in *Fox* v. *Vice*, 563 U.S. 826 (2011), lends further support on this point.

1. Offering an instructive model, Rule 11 of the Federal Rules of Civil Procedure limits fee shifting for baseless claims and defenses to those expenses "directly resulting from the violation." Fed. R. Civ. P. 11(c)(4). In *Chambers*, this Court expressly recognized the parallels between the bad faith inherent authority sanctions and certain aspects of Rule 11. *See* 501 U.S. at 46 n.10.

If a court desires to shift attorney's fees to the movant under Rule 11, the remedy is limited to "part or all of the reasonable attorney's fees and other expenses *directly resulting* from the violation." Fed. R. Civ. P. 11(c)(4) (emphasis added). This means, for example, that a plaintiff confronted with a frivolous counterclaim does not receive all fees related to its defense, but just "those *directly caused* by inclusion of the improper count, and not those resulting from the filing of the . . . answer itself." Fed. R. Civ. P. 11(b) and (c) advisory committee's note to 1993 Amendments (emphasis added). The direct causation requirement also requires the other side to effectively mitigate its damages by bringing an early challenge to a groundless claim or defense. *See id.*

This Court adopted a direct causation requirement in this context when interpreting an earlier, less stringent version of Rule 11 that limited fees to those incurred "because of" the violation. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 406-08 (1990). Rejecting an "overbroad" reading of causation, the Court held that "Rule 11 is more sensibly understood

as permitting an award only of those expenses *directly caused* by the filing." *Id.* at 406 (emphasis added). The Court declined to endorse a broader view that "would lead to the conclusion that expenses incurred 'because of' a baseless filing extend indefinitely," *id.*, instead adopting a direct causation requirement later codified in the Rule.

2. Statutory remedies for bad faith conduct also limit an award of attorney's fees by a causation requirement. 28 U.S.C. § 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously" may be ordered to pay "the excess costs, expenses, and attorneys' fees reasonably incurred *because of* such conduct." (emphasis added). Courts recognize that sanctions under Section 1927 and inherent powers are similar. *See Oliveri* v. *Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (noting that "the only meaningful difference" between inherent power and Section 1927 is that "an award under the court's inherent power may be made against . . . a party").

"[A]imed at specific conduct and claims," Section 1927 "authorizes awards only for actual fees and costs which proscribed conduct has caused." *Browning* v. *Kramer*, 931 F.2d 340, 346 (5th Cir. 1991). These awards must "identify the specific conduct . . . which unreasonably and vexatiously multiplied the proceedings" and "then determine the excess fees and costs incurred by the opponents in meeting such claims." *Id.* This analysis aligns with *Cooter & Gell*'s interpretation of the phrase "because of"—courts should "award only . . . those expenses directly caused" by the misconduct under that statute. *Cooter & Gell*, 496 U.S. at 406; *see, e.g.*, *Manion* v. *Am. Airlines, Inc.*, 395 F.3d 428, 433 (D.C.

Cir. 2004) (panel included Roberts, J.) (noting that "much of [*Cooter & Gell*'s] rationale applies with equal force in the § 1927 context").

3. Discovery sanctions, too, are expressly limited by a causation requirement. *See, e.g.*, *Batson v. Neal Spelce Assoc., Inc.*, 765 F.2d 511, 516 (5th Cir. 1985) (reversing fee award for lack of causation because "[t]he plain language of Rule 37 . . . provides that only those expenses, including fees, caused by the failure to comply may be assessed against the noncomplying party"). Rule 37 authorizes the award of reasonable expenses for a variety of discovery violations. Fed. R. Civ. P. 37(a)(5)(A)-(C), (b), (c), (d), (f). The court may award only those reasonable attorney's fees "caused by" the misconduct, Fed. R. Civ. P. 37(b)(2)(C), (c)(1)(A), (d)(3), (f), or "incurred in" remedying the misconduct, Fed. R. Civ. P. 37(a)(5), (c)(2); *see also* Fed. R. Civ. P. 26(g)(3) ("The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.").

Recent rules amendments, furthermore, discourage resort to inherent powers to remedy discovery violations. The Advisory Committee Notes to the new amendments expressly state that the new Rule 37(e) governing spoliation sanctions for electronically-stored information "forecloses reliance on inherent authority or state law to determine when certain measures should be used." Fed. R. Civ. P. 37(e) advisory committee's note to 2015 Amendment. The Committee observed that the "[f]ederal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information." *Id.* Likewise, without a clear

causation standard cabining a district court's discretion, lower courts will continue to vary widely in their application of inherent powers sanctions.

4. Consistent with these sanctioning regimes, the Court recently addressed remedies for frivolous claims in the civil rights context, imposing a "but-for" causation requirement on fee awards to defendants under 42 U.S.C. § 1988. In *Fox* v. *Vice,* the Court held that, in a suit involving both frivolous and non-frivolous claims, a defendant could recover "only for costs that the defendant would not have incurred but for the frivolous claims." 563 U.S. at 829. In endorsing a but-for causation test, the Court rejected a "fairly attributable" test proposed by plaintiffs as largely meaningless. *See id*. at 836 ("[C]ongressional policy points to a different and more meaningful standard."). The Court reasoned that, "if the defendant would have incurred those fees anyway, to defend against *non*-frivolous claims, then a court has no basis for transferring the expense to the plaintiff." *Id.* Accordingly, it endorsed but-for causation in part because "[a] standard allowing more expansive fee-shifting would furnish windfalls to some defendants, making them better off because they were subject to a suit including frivolous claims." *Id*. at 837.

Although it arose in a different context, the *Fox* analysis largely echoes the "directly resulting from" requirement under current Rule 11 and this Court's decision in *Cooter & Gell*.

5. As all of these examples illustrate, Congress and the Rules Committee have seen fit to impose a causation requirement on attorney's fees awarded for bad faith, vexatious, and frivolous litigation. The policy judgment here is sound—sanctions should be narrowly tailored to the harm directly caused by the

misconduct, rather than afford some type of wide-ranging damages remedy. To prevent courts from evading this legislative judgment, the Court should likewise recognize a causation limit on a court's inherent power to impose monetary sanctions. Otherwise, the temptation will exist for courts to look to inherent authority first, rather than secondarily, and circumvent the restrictions associated with statutory and rule-based sanctions.

II. This Case Illustrates the Need for a Direct Causation Requirement

Direct causation is needed as an important check on the inherent authority sanctioning power. Without any legislative oversight, the only other conceivable checks are this Court's admonition that "restraint and discretion" should be exercised—which does not tangibly restrict the imposition of sanctions—and the "bad faith" requirement—which is vague and applied inconsistently. Direct causation, however, limits district court discretion and ensures that inherent power sanctions will be applied consistently and not in such a way that eclipses the statute and rule-based sanctioning regimes.

A. The Courts Below Did Not Apply the Correct Standard

1. Both the district court and the Ninth Circuit majority refused to apply a causation limitation on the inherent authority sanctions imposed in this matter. Before Plaintiffs submitted a single billing record, the district court concluded that any causation linkage would be "impossible," and thus it declined to "separate the fees incurred due to legitimate activity from the fees and costs incurred

due to Goodyear's refusal to abide by clear and simple discovery obligations." Pet. App. at 151a-52a. Abdicating any responsibility to tailor sanctions, the court awarded nearly all fees and then arbitrarily allocated responsibility 80% jointly to Mr. Musnuff and Goodyear, and 20% to Mr. Hancock. *Id.* at 169a-170a, 185a.

Shielded by the court's order, Plaintiffs made no attempt to establish a causal link in their subsequent fee application. J.A. 54; J.A. 80. Goodyear pointed out (among other things) that Plaintiffs incurred a substantial portion of their fees litigating against other defendants and substantiating their medical injuries and damages, none of which bore any relation to any alleged misconduct. J.A. 58. The district court's only response was to suggest an alternative amount "in the event a direct linkage between the misconduct and harm is required" on appeal, which would deduct over $700,000 from the total sanction. Pet. App. 180a. But even this causation "deduction" (which neither the district court nor the Ninth Circuit actually adopted) did not apply a true causation analysis—it only represented the fees incurred by Plaintiffs in litigating against other defendants and substantiating their amount of medical damages.

On appeal, the Ninth Circuit majority validated the district court's refusal to apply causation, rejecting the rule "that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct." Pet. App. 28a.

2. Although a district court typically enjoys discretion in sanctions matters, such deference is only warranted when it applies the correct standard:

"A trial court has wide discretion when, but only when, it calls the game by the right rules." *Fox*, 563 U.S. at 839. As discussed above, the failure to require a direct causal link violates this Court's precedent on inherent powers, infringes on the due process rights of sanctioned parties, and is inconsistent with other sanctioning regimes. The Court should enforce a direct causation requirement that limits attorney's fees sanctions awards to the strictly compensatory and remand for the trial court to apply that correct standard.

Under the direct causation standard, attorney's fee awards imposed under a court's inherent power must compensate the injured party only for fees "incurred as a direct result of" the sanctionee's misconduct. *Baycol Steering Comm.*, 419 F.3d at 808. Where the monetary sanction does not "relate[] *concretely* to costs . . . *directly incurred* because of" the sanctionee's misconduct, it is not compensatory. *Id.* (emphasis added). Such sanctions must be appropriately "*tailored* to compensate the complaining party" for "any losses incurred by [them] as a result of [the defendant's]'" bad faith actions. *Bradley*, 378 F.3d at 378 (emphasis added, citing *Buffington* v. *Balt. Cty.*, 913 F.2d 113, 134 (4th Cir. 1990)). Direct causation parallels the "direct effect" test under Rule 11 and the "but for" test recognized in *Fox*, and thus should be familiar to federal courts.

But it bears emphasizing that the direct causation standard establishes only the upper limit on sanctions, which can (and generally should) be reduced from there. Courts are obligated to exercise "'the least possible power adequate to the end proposed.'" *Spallone* v. *United States*, 493 U.S. 265, 280 (1990), citing *Anderson* v. *Dunn*, 19 U.S. (6

Wheat) 204, 231 (1821); *see also Charbono* v. *Sumski (In re Charbono)*, 790 F.3d 80, 88 (1st Cir. 2015) (affirming $100 inherent power sanction because lower court opted for "the least extreme sanction reasonably calculated to achieve the appropriate punitive and deterrent purposes") (citation omitted); *Natural Gas Pipeline Co. of Am.* v. *Energy Gathering*, 86 F.3d 464, 467 (5th Cir. 1996) ("the [inherent authority] sanction chosen must employ 'the least possible power adequate to the end proposed'") (citation omitted). The causation standard helps ensure that courts comply with this tailoring obligation—this requirement would not be met if a court awarded the impacted party *more* fees than it incurred in response to the misconduct.

Turning its back on these principles, the district court essentially threw up its hands at the specter of calculating sanctions caused by the misconduct. Its award of "all" fees does not comply with a causation requirement, as this Court and others have recognized. *See, e.g.*, *Roadway Express*, 447 U.S. at 756 n.3 ("[Section] 1927 provides only for excess costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation.'") (internal quotations omitted); *Maynard* v. *Nygren*, 332 F.3d 462, 471 (7th Cir. 2003) (under Rule 37: "As long as the suit as a whole was not frivolous . . . the remaining attorney's fees would have been incurred even without the discovery violation; thus, the causality requirement was not met."); *Topalian* v. *Ehrman*, 3 F.3d 931, 937 (5th Cir. 1993) (under Section 1927, Rule 11, and the discovery rules: "Certainly, an award of *all* costs incurred in defending this cause of action would not

be appropriate if the violations consisted primarily of abuses of the discovery procedures[.]").

As with other sanctions, a direct causation requirement could be applied here: the district court found specific instances of misconduct, those instances of misconduct gave rise to certain fees, and as Judge Watford explained, "[t]hose fees can be calculated." Pet. App. 50a. Courts routinely are required to undertake the analysis that the lower courts avoided in this case. Even if it proves difficult, a causation analysis is necessary to demonstrate that monetary sanctions are not vindictive, overly harsh, or rising to the level of criminal penalties.

To avoid straying beyond compensatory civil sanctions, the district court should have "limited the award to fees that can be linked in a non-speculative way to the misconduct" such as "those wasted on expert discovery that took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist." *Id.* at 50a (Watford, J., dissenting). Other categories of recoverable fees in this case might include those incurred seeking supplemental discovery and attending hearings where potential misconduct occurred or where these discovery matters were discussed. But ultimately this would be Plaintiff's burden to prove—a burden they did not attempt to meet below. *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 391 & n.21 (3d Cir. 1997) (partially overruled on other grounds) (affirming denial of monetary award under inherent powers: "[T]he applicant for fees has an affirmative responsibility to assist the court in sorting through, organizing, and evaluating a fee request."); *Cf. FTC* v. *Kuykendall*,

371 F.3d 745, 754 (10th Cir. 2004) (en banc) ("[I]n compensatory civil contempt proceedings. . . district court judges should require proof of contempt by clear and convincing evidence and proof of the amount of compensatory damages by a preponderance of the evidence.").

The court's mere speculation cannot satisfy direct causation, or else it renders the standard meaningless. *See Allied Materials Corp.* v. *Superior Products Co.*, 620 F.2d 224, 227 (10th Cir. 1980) ("In the absence of evidence showing the amount of the loss, any sum awarded by the court is speculative and therefore arbitrary."). The award here was driven by the possibility that Goodyear might have settled "immediately" upon producing the tests, prompting a sanction of all fees from that point forward. Pet. App. 152a. Awash in speculation, this reasoning cannot support a compensatory sanctions award under the inherent powers. As Judge Watford highlighted, "the only relevant data point in the record supports the opposite conclusion" from that reached by the district court. *Id.* at 46a. When Goodyear did produce the Heat Rise test in other cases, there was no immediate settlement—one case went through trial and the other settled as trial was poised to begin.

Disclosure of the test results would not have prevented Goodyear from continuing to defend the case because, unlike the petitioner in *Chambers*, Goodyear had good faith defenses to Plaintiffs' claims: "The test results did not provide conclusive proof that the Haegers' tire failed due to its defective design." Pet. App. 45a (Watford, J., dissenting). *Cf. Browning*, 931 F.2d at 346 (vacating award of all fees because "[e]xcept when the entire course of

proceedings were unwarranted and should neither have been commenced nor persisted in, an award under § 1927 may not shift the entire financial burden of an action's defense"). In fact, the district court declined to find the Heat Rise test conclusive, and instead simply deemed it "relevant." Pet. App. 129a. Relevant evidence generally does not dictate immediate capitulation.

Allowing speculation to support a sanctions award simply masks sanctions that are truly punitive. Judge Watford acknowledged that the ultimate amount awarded under a causation analysis might seem inadequate to the district court. Pet. App. 50a. But vindicating a court's desire to punish without the protections of criminal contempt renders the award impermissibly criminal and does not reflect a regime with any true constraints.

B. Failure To Require Direct Causation Creates an Unworkable Standard Without Meaningful Checks

1. Underscoring these points, the Ninth Circuit majority offered no real answer to how an inherent authority sanctions regime could be limited or even applied without requiring a direct link between misconduct and a fee award. The court tried to articulate a standard for inherent authority sanctions by borrowing the "frequen[t] and sever[e]" abuses language from *Chambers*. Pet. App. 32a-34a. But the suggestion that a pattern of misconduct might justify an award of all the other party's fees is neither a standard nor a practical limitation at all. Likewise, the district court's proposed distinction between "truly egregious" cases (which, in its view, obviated any causation analysis) and "less egregious" cases (which might require some type of tailoring) is

equally untenable. *Id.* at 157-58a. These attempts at divining a substitute standard for causation would offer no guidance to federal courts—other than perhaps an assurance that they could award whatever sanction they wanted.

The notion that it should be easier for a court to impose free-wheeling sanctions in more complex or egregious cases also cannot be squared with this Court's precedent. *Bagwell* established that heightened procedural protections are even more important for "out-of-court disobedience" in a "complex" case that "require[s] elaborate and reliable factfinding." 512 U.S. at 833-34. Faced with 400 instances of contempt, *Bagwell* emphasized that "disinterested factfinding and evenhanded adjudication [a]re essential" where a court has "effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed." *Id.* at 837-38.

The Court concluded that the protections of a jury trial are all the more necessary in these circumstances, where the conduct may be "widespread" and the "fines assessed were serious." *Id.* at 837; *see also id.* at 843 (Scalia, J. concurring) (stressing the importance of "the factfinding protections of the criminal law"). In light of these concerns, fee shifting under inherent powers should not permit a broader recovery than the ostensibly "more drastic" contempt sanction. *Chambers*, 501 U.S. at 46 (quoting *Hutto*, 437 U.S. at 689 n.14).

Perhaps more troubling, the absence of a causation requirement pries open the door to an almost boundless view of monetary awards under inherent authority. The Ninth Circuit majority took a step in that direction, implying that lost settlement value

might justify a high sanctions amount. Pet. App. 30a. But going beyond fees would be the equivalent of transforming an inherent powers sanctions award into a tort remedy, creating a host of proof and due process problems, *see also* Pet. App. 50a (Watford, J., dissenting) (noting that such a remedy would be "obviously fraught with proof problems"), and expanding inherent authority sanctions well beyond the bounds ever recognized by this Court. Yet the Ninth Circuit has seemed to embrace a tort-like vision of inherent authority sanctions in prior cases. *See B.K.B.* v. *Maui Police Dept.*, 276 F.3d 1091, 1108-09 (9th Cir. 2002) (affirming award of "compensatory damages" sanctions under inherent power for "the embarrassment and pain suffered by Plaintiff").

Not only does some nebulous tort remedy represent a radical expansion of inherent authority sanctions, but it also raises the risk of duplicative recovery or inconsistent standards, all of which implicate due process concerns. Other mechanisms exist for parties to pursue such relief if they would otherwise be entitled to it. Confirming the point, Plaintiffs here have sued Goodyear and others for fraud and abuse of process in state court. In that action, Plaintiffs seek the very damages to which the Ninth Circuit alluded. Inherent authority should not be viewed as an excuse to create new causes of actions and novel damages remedies, unshackled by any realistic limitations.

2. Without restrictions on inherent authority, courts would wield "completely untrammeled power" without "effective safeguards." *Bloom*, 391 U.S. at 207. Sanctions carry wide-ranging nonmonetary consequences in addition to the pecuniary ones. They can be career-ending (ER1286-89) and haunt

parties in subsequent litigation. Pet. App. 170a. That is why the Court has reiterated the need for "restraint and discretion" in their application. But that admonition does not tangibly restrain courts, and the other existing checks on the sanctioning power (apart from causation) suffer from flaws that often render them inadequate. *See* Robert J. Pushaw, Jr., *Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739, 765 (2001) (describing federal courts' "broad and virtually unreviewable inherent authority" and arguing that "the sanctioning power itself has long been exercised arbitrarily").

The need for direct causation is highlighted by the abuse of discretion standard, which generally insulates sanctions awards from exacting appellate scrutiny. Under the abuse of discretion standard, it is difficult to envision how the amount of any monetary sanction would be subject to reversal if causation is eliminated as a constraint. Illustrating the point, in *Williamson* v. *Dispatch Printing Co.*, 826 F.3d 297, 306 (6th Cir. 2016), the Sixth Circuit rejected a "perfect causal connection between the sanctioned conduct and the attorney's fees awarded," but failed to offer a meaningful alternative. Instead, it suggested that inherent authority "sanctions cannot be so unreasonable that they constitute an abuse of discretion." *Id.* But this is circular. Like the Ninth Circuit, such a "know-it-when-you-see-it" approach to the amount of sanctions offers no guidance (or protection) to litigants or federal courts. And it is rife with the potential for abuse. *See Mackler Prods.*, 146 F.3d at 130 (noting the perils "if courts were to operate without any framework of rules or cap on their power to punish").

The challenges of this standard were on vivid display in this case. The Ninth Circuit majority was highly deferential to the district court's calculation of the award, affirming an almost $3 million sanction because the district court "reasonably believed" it was appropriate (in a one-paragraph analysis of the amount). Pet. App. 33a. Announcing that "[n]othing more is required," the court of appeals did not parse the awarded fees. *Id.* A causation standard would obligate the reviewing court to take a closer look. It would also force the district court to make a clear record for the amount of fees, enabling more effective appellate review.

A direct causation requirement also will help focus scrutiny on the underlying conduct—which did not happen in this case. Conflating Goodyear's conduct with that of its counsel, the court of appeals devoted only one paragraph to the specific misconduct alleged against Goodyear (as opposed to counsel), Pet. App. 25-26a, failing to address Goodyear's arguments on the substance of its actions. For example, the district court condemned Ms. Okey for claiming that a court order in another case required production of "all tests," when Plaintiffs characterized the order in the same way. *Compare* Pet. App. 133a *with* ER1121. The court also blamed her for (truthfully) stating that a discovery request asked for "heat" testing. *Compare* Pet. App. 133a-134a *with* ER704-05. Such details might get swept under the rug in an abuse of discretion review, but direct causation would help ensure a more meaningful appraisal of the substance as well as damages.

3. Similarly, the requirement of "bad faith," which serves as the primary limit on inherent authority sanctions, poses two problems. First, it

does not provide any guidance or direction on the amount of sanctions to impose. The bad faith standard only applies to ascertaining whether the conduct at issue is sanctionable.

Second, Justice Kennedy's dissent in *Chambers* served as a harbinger for the difficulties faced by the lower courts when he warned that "[t]he only limitation on this sanctioning authority appears to be a finding at some point of 'bad faith,' a standard the Court fails to define." 501 U.S. at 63 (Kennedy, J., dissenting). Courts have, somewhat predictably, struggled with applying this bad faith standard. The Sixth Circuit recently noted that (almost two decades post-*Chambers*) there was still "confusion" in its case law on the standard for bad faith relating to inherent authority sanctions. *BDT Products, Inc.* v. *Lexmark Int'l, Inc.*, 602 F.3d 742, 752-53 (6th Cir. 2010). It purportedly resolved that confusion by creating a "something more" test, requiring "something more" than simply pursuit of meritless claims to warrant sanctions. *Id.* But this "something more" test exemplifies, rather than resolves, the problem. *See also Fink* v. *Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) (noting that "with respect to standards for sanctions under the court's inherent power . . . . some confusion is understandable"). Such confusion confirms that the "bad faith" requirement, viewed through the abuse of discretion lens, does not serve as a sufficient check on a district court's power to impose inherent authority sanctions or on their amount. Causation is thus needed to enhance the effectiveness of the bad faith requirement.

4. In the end, the lack of a direct causation requirement would turn inherent authority sanctions into a crutch for federal courts. Lax restrictions

create incentives for courts to evade the strictures of the other, more specific sanctioning regimes, with confusion currently punctuating the circuits on this point. *Compare First Bank* v. *Hartford Underwriters Ins. Co.*, 307 F.3d 501, 513 (6th Cir. 2002) ("We do not interpret *Chambers* to require the district court, in every instance, to exhaust consideration of sanctions under other relevant rules and/or statutes.") *with Montrose Med. Group Participating Sav. Plan* v. *Bulger*, 243 F.3d 773, 785 (3d Cir. 2001) (reversing sanctions under inherent powers because the district court did not consider whether any rule or statute covered the conduct); *ClearValue, Inc.* v. *Pearl River Polymers, Inc.*, 560 F.3d 1291, 1309 (Fed. Cir. 2009) (holding that it was abuse of discretion to sanction discovery violation under inherent powers because "[d]iscovery violations are appropriately addressed through the application of Rule 37").

If there is no limit on fees imposed under inherent powers, courts operating under a deferential standard of review are free to invoke their inherent powers to avoid the requirements of other regimes and insulate their awards from realistic scrutiny. As with the district court in *Aleo*, 681 F.3d at 307, inherent authority then serves as a reservoir of power when applying the rules or statutes proves difficult or inconvenient. Forcing courts to apply direct causation, however, will require them to appropriately tailor their sanctions when using their inherent powers (consistent with the mandates under the other sanctioning regimes).

As this Court underscored in *Bloom*, 391 U.S. at 208, genuine respect for courts "will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those

institutionalized procedures which have been worked out over the centuries." *Bloom* further explained that when a contempt charge was serious, "considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power." *Id*. at 209.

Those admonitions certainly ring true for attorney's fees sanctions under inherent authority as well. A causation requirement helps ensure that inherent authority sanctions are exercised with "restraint and discretion," *Roadway Express*, 447 U.S. at 764, and do not become a "roving authority" to award any amount of fees that the district court desires, *Alyeska*, 421 U.S. at 260.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court reverse the Ninth Circuit, vacate the award of attorney's fees, and remand with instructions to apply a direct causation standard for inherent authority sanctions as set forth in this Court's opinion.

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