Case No. 15-1446

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Government-Appellee

v.

DOREEN HENDRICKSON,
Defendant-Appellant

On Appeal from the Judgment of Conviction and Sentence Entered in
The United States District Court for the Eastern District of Michigan

District Court No. 13-20371

APPELLANT DOREEN HENDRICKSON'S PETITION FOR *EN BANC* RE-HEARING

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Doreen Hendrickson, by her counsel, and pursuant to Fed.R.App. 35, and 6 Cir. R. 35, hereby seeks Petition for Rehearing *En Banc*. Mrs. Hendrickson previously appealed her conviction on a single count of criminal contempt under the terms of 18 U.S.C. § 401(3). The charge alleges criminal culpability for disobeying Orders commanding her to make and sign sworn statements concerning her subjective belief(s); statements which she believes to be false. Mrs. Hendrickson challenged the conviction and sentence on multiple grounds, only two of which will be discussed here.

Fed. R. App. 35(b) Statement

The panel decision of March 11, 2016, leaving Mrs. Hendrickson's conviction undisturbed, conflicts with well-settled precedents of this Court and the Supreme Court on questions of exceptional importance including, but not limited to: *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321 (2013); *Newsom v. Morris*, 888 F.2d 371 (6th Cir. 1989); *Hudson v. Coleman*, 347 F.3d 138 (6th Cir. 2003); *United States v. Cotton*, 535 U.S. 625 (2002); *Jordon v. Gilligan*, 500 F.2d 701 (6th CA, 1974); *Burrell v. Henderson, et al.*, 434 F.3d 826, 831 (6th CA 2006); *Maness v. Meyers*, 419 U.S. 449; *In re Smothers*, 322 F3d 438 (6th Cir. 2003) and *United States v. Hynes*, 467 F.3d 951, 957 (6th Cir. 2006). The decision also conflicts with well-settled precedents of other circuits, as will be discussed below.

The Panel Incorrectly 1) Upheld the Orders Ostensibly Violated by Mrs. Hendrickson and 2) Incorrectly Concluded That She is Precluded From Challenging the Orders in the Confines of These Contempt Proceedings.

It is not disputed that Mrs. Hendrickson sincerely believes the income tax is an indirect excise on the conduct of gainful privileged activities, and both Constitutional and beneficial. But she also believes that the tax has been systematically misapplied to non-privileged earnings since the early 1940s.[1]

Based on her trial testimony, it is clear that Mrs. Hendrickson believes the misapplication of the tax is deeply harmful to America's rule of law, and has led to widespread corruption in our public institutions. She believes that each time any American improperly reports non-privileged earnings to be subject to the tax, more damage is done. And she believes that her earnings as a private tutor and a movie extra, and her husband's from work for a private-sector property management firm, are not privileged.

In fidelity to her beliefs, Mrs. Hendrickson timely filed tax returns concerning 2002 and 2003 on which her and her husband's earnings are not reported as "income". In 2006 the government asked a federal district court to force Mrs. Hendrickson to replace her freely-made, sworn returns with new ones on which she would be compelled to swear she believes her and her husband's

[1] The bases for Mrs. Hendrickson's believes are set forth in the book Cracking the Code- The Fascinating Truth About Taxation In America ("Cracking the Code") by Peter Hendrickson.

earnings are tax-relevant "income." As Mrs. Hendrickson sees it, the Orders required her to falsely declare that she believes those earnings to be taxable, that the tax is not an excise tax of limited application but, most importantly to this matter, that her initial returns were materially false.

The district court which issued the Orders also directed Mrs. Hendrickson to not file returns based on what was incorrectly said to be argued in the book Cracking the Code that only federal, state and local government workers are subject to the tax-- something she had never done and never would do, both because this claim *isn't* made in the book, and because Mrs. Hendrickson doesn't believe it to be true in any event. Effectively, this second Order threatens Mrs. Hendrickson with punishment if she files returns failing to say what the government directs she should say.

The Orders at issue plainly assert government control over Mrs. Hendrickson's speech and conscience and seek to forcibly co-opt her expressions ostensibly as tools of government political and fiscal policy.[2] The Orders are

[2] Truth be told, these Orders have nothing whatsoever to do with any alleged tax liabilities. If taxes are actually owed, the government axiomatically needs no tax-return agreement by Mrs. Hendrickson. In fact, the government may create its tax returns asserting that the Hendricksons' earnings are of a taxable variety if it believes this to be true (26 U.S.C. § 6020(b)) and such forms are then prima facie good for all legal purposes. The government has made no such returns. Further, Treasury Dept. Certificates of Assessment and IRS Master File transcripts indicate that the Hendrickson's have never had any tax liability assessed for the years in

plainly violations of the First Amendment of a sort very explicitly identified by the Supreme Court in multiple decisions:

> It is, however, a basic First Amendment principle that *freedom of speech prohibits the government from telling people what they must say.* (citations omitted). *At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.* (citations omitted) *(The government may not . . . compel the endorsement of ideas that it approves).*
>
> . . .
>
> [W]e cannot improve upon what Justice Jackson wrote for the Court 70 years ago: If there is any fixed star in our constitutional constellation, it is that *no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. Barnette,* 319 U. S., at 642.

Agency for Int'l Development v. Alliance for Open Society Int'l, Inc., 133 S. Ct. 2321 (2013) (Emphasis added.)

Both the Supreme Court and this Court have held that infringements on First Amendment rights are, by their very nature, irreparably injurious:

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regard to which they were ordered to say otherwise. *See* Appellant's Reply Exhibit 1.

> [E]ven minimal infringement upon First Amendment values constitutes *irreparable injury*...

Newsom v. Morris, 888 F.2d 371 (6th Cir. 1989) (citing to *Elrod v. Burns*, 427 U.S. 347 (1976)) (emphasis added). In addition to being First Amendment violations and irreparably injurious, these Orders command Mrs. Hendrickson to commit perjury, a crime under state, federal and moral law.[3] Such orders are transparently invalid and lack even a pretense of validity.

Further, Mrs. Hendrickson believes the Courts are without jurisdiction to enforce the Orders in question. This Court has held there can be no judicial jurisdiction over matters not authorized by the Constitution or by statute:

> [I]t is well established that federal courts are courts of limited jurisdiction, possessing only that power authorized by the Constitution and statute.

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[3] 18 U.S.C. § 1621, which proscribes "perjury," states:

> Whoever-
>
> . . .
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;
>
> is guilty of perjury...

Hudson v. Coleman, 347 F.3d 138, 141 (6th Cir. 2003)

Plainly, the Constitution does not authorize First Amendment violations -- on the contrary, it prohibits them. Mrs. Hendrickson believes that any Constitutional challenge to government action is an inherent subject-matter jurisdiction challenge. The Supreme Court squarely holds that subject-matter jurisdictional infirmities are never waived, and require correction perpetually:

> [S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.

United States v. Cotton, 535 U.S. 625, 630 (2002)

This Court has agreed that it is duty-bound to vacate judgments entered in excess of a court's jurisdiction.

> [A] court must vacate any judgment entered in excess of its jurisdiction. *Jordon v. Gilligan*, 500 F.2d 701 (6th CA, 1974). [D]enying a motion to vacate a void judgment is a per se abuse of discretion.

Burrell v. Henderson, et al., 434 F.3d 826, 831 (6th CA 2006)

Mrs. Hendrickson stands convicted of resisting facially invalid Orders which trample on her constitutionally guaranteed rights and command her to perjure herself, and do her irreparable injury. Nonetheless, the panel affirmed her conviction.

In affirming Mrs. Hendrickson's conviction, the panel incorrectly invoked the "collateral bar" doctrine. In doing so, the panel itself acknowledges three of the limitations on collateral bar relevant to this appeal:

> [W]e have found that a defendant in a criminal contempt proceeding may [] contest the validity of the underlying court order, [] on the grounds that the issuing court lacked jurisdiction or its order was transparently invalid or had only a frivolous pretense to validity. (*Dever v. Kelly*, 348 F. App'x 107, 112 (6th Cir. 2009) (quoting *Walker*, 388 U.S. at 315).

Slip Op. at 5. The panel also noted the exception for orders inflicting irreparable injury:

> The foundational case for this exception, *Maness v. Meyers*, 419 U.S. 449, 458–61 (1975), described instances when a trial court orders a witness to give testimony under circumstances that, in the witness's estimation, violate her Fifth Amendment right against self-incrimination. Because an appellate court would not be able to "unring the bell" and completely cure the error, the Court held that the witness may refuse to comply with the trial court's order and seek appellate review. Id. at 460.

Slip Op. at 6.

Despite its recognition of these exceptions to the "collateral bar" doctrine and, arguably to avoid the discussion of the Constitutional infirmities of the Orders at issue in this case, from the very beginning of its decision ("As a threshold matter, the collateral bar rule prevents Hendrickson from challenging the

constitutionality of the underlying order in the course of her criminal contempt proceeding.") to the very end ("Under these circumstances, the collateral bar rule applies, and the constitutionality of the underlying order is not at issue in this case."), the Court invokes "collateral bar." With due respect to the panel, in so doing, the panel misinterprets, or fails to address, the precedents of this Court.

Perhaps in recognition of the shortcomings of its analysis as discussed above, the panel eventually invokes an alternative rationale for its failure to reverse Mrs. Hendrickson's conviction thereby essentially affirming the underlying Orders. Specifically, the panel suggests that Mrs. Hendrickson had the Orders reviewed and upheld by this Court previously. But this is not supported by the record. The earlier ruling referenced by the panel, *United States v. Hendrickson*, No. 07-1510 (6th Cir. 2008), does not even contain the words "Constitution" or "First Amendment".

In fact, the only words concerning the district court's Orders in the entire ruling is a recitation of the generic statutory authorization for making judicial orders in a tax case, and not even a recitation by the appellate panel itself: 26 U.S.C. § 7402(a) gives district courts the authority to grant injunctions "necessary or appropriate for the enforcement of the internal revenue laws." *United States v. First Nat'l City Bank*, 379 U.S. 378, 380 (1965)." Nothing whatever is said about

the "necessity" or "propriety" of these particular orders, despite both being squarely challenged by Mrs. Hendrickson's earlier appeal.

This earlier appellate outcome was hardly a binding review of the validity of these orders, as the panel suggests.[4] The earlier ruling simply affirmed the district court's grant of summary judgment and did not address the Constitutional infirmities of prosecuting Mrs. Hendrickson for contempt because she refused to misstate under oath that which she sincerely believes. Through invocation of the "collateral bar" Doctrine, the panel has effectively avoided the same Constitutional infirmities not addressed in the earlier appeal.

The Panel Wrongfully Upheld the Jury Instruction Removing an Element of the Charged Offense From the Jury's Consideration.

In addition to incorrectly deciding the Constitutional issues discussed above, the panel's decision incorrectly addresses a second important issue. Specifically, the panel sanctioned the district court's decision to withhold an essential element of the crime from the jury's consideration and thereby lessened the government's burden of proof.

[4] Similarly, the subsequent denial of the Hendrickson's petition for certiorari by the Supreme Court, to which the panel also refers, was not binding: "[I]t is elementary, of course, that a denial of a petition for certiorari decides nothing." *Hughes Tool Co. v. Trans World Airlines, Inc.* 409 U.S. 363, (1973); see also *United States et al. v. Carver et al.*, 260 U.S. 482, (1923) (""The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.").

At both of Mrs. Hendrickson's trials[5] the district court instructed the jury that, "[I]t is not a defense to the crime of contempt that the court order that the defendant is accused of violating was unlawful or unconstitutional." Mrs. Hendrickson strenuously objected to this instruction.

The panel excuses this unprecedented removal of the "lawful" element from trial by suggesting that to let the jury consider the lawfulness of the orders would compromise the "collateral bar" doctrine:

> Hendrickson's position [that "lawful" is an element and must be proven to the jury] is at odds with the prevailing interpretation of § 401(3) and the longstanding collateral bar rule.

Slip Op. at 8.

That doctrine, the panel effectively argues, should shield all judicial orders from all challenges, and at any cost-- even the sacrifice of a defendant's right to have her jury determine whether the government has successfully proven that she has actually committed the crime charged.

The statute for which Mrs. Hendrickson was convicted criminally states, "…disobedience or resistance to its **lawful** writ, process, order, rule, decree, or

[5] Mrs. Hendrickson's was tried twice. The first, at which she read to the jury Sixth Circuit and Supreme Court rulings on First Amendment rights, ended with a hung jury. The second, where her stand-by counsel intentionally and admittedly usurped control of the questions she had prepared for herself and prevented her from reading those case, resulted in conviction.

command," 18 U.S.C. § 401(3) (emphasis added). By definition, the lawfulness of the Orders in question is an element of a contempt charge, in the most classic and concrete sense of that expression.

Plainly, if Congress had meant for judicial orders to be spared any challenge, and their lawfulness to not be a matter for the determination of a jury, it would not have put "lawful" in the contempt statute. But it DID put it in the statute, and for obvious good reasons.

The first of those good reasons is this: no one should be made to obey unlawful orders. Axiomatically, unlawful orders *have no force of law*, and it cannot be a crime to disobey them. Thus, the lawfulness of the orders is the most basic element of a charge of criminal contempt. This leads to the second of several reasons Mrs. Hendrickson believes Congress expressly includes "lawful" as an element of criminal contempt. The Constitution requires trial by jury because courts can, at times, be used as tools of the government to issue unlawful orders in furtherance of government purposes. The jury system oversees and polices this process.

Mrs. Hendrickson's is a perfect case study of why the Framers provided for juries, and why Congress expressly reference "lawful" in the criminal contempt statute. The district court Orders alleged to have been violated in this case and which were requested by the executive department are illegal. Every court dealing

with these orders has struggled to shield them from review. One could argue that the jury is there, and "lawful" is specified, to protect Mrs. Hendrickson and any other defendant from this sort of potential institutional abuse.

The panel decision, however, has the effect of elevating "collateral bar" above Congress, above the jury and above even the Constitution. This is a logical and legal fallacy and embraced for no good purpose, since removing "lawfulness" from a jury's consideration essentially shields the Orders which cannot be proven lawful to the satisfaction of twelve (12) citizens. The panel's decision on this issue should be overturned.

Struggling to shore up its "collateral bar"-trumps-the-Sixth-Amendment argument, the panel states that "lawful" isn't even really an element of 18 U.S.C. § 401(3) anyway:

> This court has stated that the elements for criminal contempt under § 401(3) are that the defendant (1) had notice of a reasonably specific court order, (2) disobeyed it, and (3) acted with intent or willfulness in doing so.

Slip. Op. p. 8. The panel then cites to a handful of cases to support this one-element-short description of criminal contempt. The cases cited, however, do not support the panel's interpretation.

None of the cited cases say "lawfulness is not an element", or "lawfulness need not be proven to a jury in a trial for contempt" or anything similar to either of

these propositions. Instead, the panel has simply invoked cases in which the issue of lawfulness never arose (or was taken as so fundamental and obvious as to need no mention), and so went unstated.

When courts have spoken authoritatively of the elements of contempt "lawfulness" is invariably among them (all emphasis added):

> The essential elements of [] criminal contempt...are that the court entered a *lawful order* of reasonable specificity, [it was] violated [], and the violation was willful. Guilt may be determined and punishment imposed *only if each of these elements has been proved beyond a reasonable doubt.* (citations omitted).

United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987);

> ...18 U.S.C. § 401(3). This section grants federal courts the power to punish when there is "disobedience or resistance to its *lawful* writ, process, order, rule, decree or command. ... "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose... submission to their *lawful* mandates. (citations omitted).

In re Smothers, 322 F3d 438 (6th Cir. 2003).

> A [] contempt order can only be upheld if it is supported by clear and convincing evidence that *(1) the underlying order allegedly violated was valid and lawful.* (citations omitted).

United States v. Koblitz, 803 F.2d 1523, 1527 (11th Cir. 1986);

"Lawful" is an element of criminal contempt. The question of the lawfulness of the orders in this case was required to go to the jury to determine whether the government had carried its burden of proof on this element.

> The government must prove every element of the crime charged beyond a reasonable doubt.

Sixth Circuit Pattern Instruction 1.03

> The Sixth Circuit has approved the entire 1.03 instruction as correct.

United States v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006).

Saying otherwise, as the panel does, is in direct conflict with this Court's well-settled precedents, those of the Supreme Court, Congress, and the Sixth Amendment itself.

CONCLUSION

All told, the panel Decision now published on the government's motion, enshrines as proper, and in any event unassailable and irremediable, a court's issuance and enforcement of unlawful orders -- even unto the coercion of sworn testimony dictated by the government, but believed to be false by the declarant. Such Orders, however defiant of the Constitution, however unjustified in their purposes or nature, however dramatic and unjust their harm, should not be shielded

from the corrective hand of a jury, or ignored by appellate courts due to the incorrect application of some procedural bar.

The panel has incorrectly decided important issues of law in a manner inconsistent with precedents of this Court as well as the Supreme Court, and works a grave injustice on Doreen Hendrickson.

In light of all the foregoing, Doreen Hendrickson respectfully petitions the Court to rehear her appeal *en banc*.

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Dated: March 25, 2015

By: */s/ Mark E. Cedrone*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 25th day of March, 2016, via the Court's Electronic Case Filing ("ECF") System, upon the following:

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