No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

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A. There Is A Clear And Intractable Conflict

1. As the petition established, the circuit conflict is clear, undeniable, and entrenched. Pet. 11-23. Respondents suggest the conflict is not real, but their arguments are not credible. The Ninth Circuit squarely held that "good faith" precludes liability for discharge violations; multiple circuits (and dozens of lower courts) have reached the opposite conclusion, declaring "subjective" beliefs irrelevant. Pet. 11-19.

This stark disagreement turns directly on each side's view of the controlling "rule of law." Pet. App. 12a. The Ninth Circuit acknowledged its "tension" with other circuits, but still found itself "b[ound]" by circuit authority. Pet. App. 13a & n.5 (contrasting *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996)).[1] The First Circuit reaffirmed its contrary position *after* the decision in this case—with a dissent flagging the obvious conflict. See *IRS* v. *Murphy*, 892 F.3d 29, 38-40 (1st Cir. 2018); see also *id.* at 47 n.12 (Lynch, J., dissenting) (invoking the decision below in declaring "no consensus" in "the § 524 discharge injunction context"). And the same obvious split has already been recognized by multiple judges, experts, and treatises. Pet. 3 & n.1; see Rutter Group, 22-B *Cal. Practice Guide: Bankruptcy* ¶ 22:111.3 (Dec. 2018 update) (citing "disagree[ment]" with the Ninth Circuit); 2 *Law of Debtors & Creditors* § 15:4 n.7 (Nov. 2018 update) ("Courts have not agreed on whether a creditor's good faith may be a defense to a discharge injunction violation."). All of these judges and neutral commentators are not somehow

[1] Respondents quibble that the Ninth Circuit actually cited a *different* case that *quoted* the key holding from *Hardy*. Opp. 16. Yet the panel attributed that language directly to the Eleventh Circuit, and the embedded citation obviously had no effect on *Hardy*'s plain meaning. Neither the panel nor respondents could reconcile *Hardy*'s unambiguous holding with the Ninth Circuit's conflicting legal standard.

confused; under any fair reading, the circuits are intractably divided.

2. According to respondents, however, all of these courts and experts are simply wrong. Respondents, of course, have no actual support for their unique view. They could not identify a single judge, court, expert, or academic explaining away the conflict or declaring that courts uniformly accept "good faith" as precluding liability for discharge violations.

a. Starting broadly, respondents assert that the conflicting decisions "construe[d] different Code provisions containing materially different statutory language." Opp. 13. This is perplexing. Each key decision asked whether a violation of Section 524 was sanctionable under Section 105. *E.g.*, *In re Pratt*, 462 F.3d 14, 17, 19 (1st Cir. 2006). Those are the identical provisions at issue here, and the question turns directly on the controlling legal standard. The Ninth Circuit says that the creditor's state of mind is dispositive, and the other courts hold that it is irrelevant. That conflict plainly warrants the Court's review.

b. Respondents next try to avoid the square conflict with *Hardy*. Opp. 14-16. But *Hardy* resolved the identical question presented here in the opposite way. According to the Ninth Circuit, a creditor's "good faith belief * * * precludes a finding of contempt." Pet. App. 12a. But according to *Hardy*, a creditor's good faith is *irrelevant*: "'the focus of the court's inquiry * * * is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 97 F.3d at 1390. This is why the BAP faulted the bankruptcy court for "rel[ying] on the *Hardy* test rather than using the Ninth Circuit's test" (Pet. App. 48a), and why the Ninth Circuit ultimately concluded the bankruptcy court "appl[ied] an incorrect rule

of law" (*id.* at 12a). The outcome at each stage turned on the role (or not) of "good faith."

Because the conflict is undeniable, respondents try to change the subject. They argue that *Hardy* is distinguishable on its facts because, unlike here, "the IRS did not first obtain a court order resolving the discharge question in its favor." Opp. 14. That may have some relevance under *the BAP's* alternative holding (Pet. App. 46a-47a), but it had nothing to do with *the Ninth Circuit's* operative decision. The Ninth Circuit adopted a pure legal standard that excuses discharge violations upon a showing of good faith; it did not even *recount* the BAP's logic that seeking preclearance somehow excused an attempt to collect discharged fees. Pet. App. 10a. And courts today are applying the decision below irrespective of whether the creditor sought preclearance. *E.g.*, *In re Bruce*, No. 8:15-AP-01028, 2018 WL 3424581, at *5 (Bankr. C.D. Cal. July 12, 2018).[2]

Respondents may wish to rewrite the Ninth Circuit's actual holding, but that holding is clear: respondents did not prevail because they sought preclearance from the state court (a dubious proposition anyway). Respondents prevailed because, unlike *Hardy*, the Ninth Circuit holds

[2] In any event, respondents simply ignore that they acted without preclearance *from the bankruptcy court*, which is the only court that actually matters. The state court's order was "void[]" (11 U.S.C. 524(a)(1)), and respondents were wrong to impose real costs on petitioner by forcing him to resist the imposition of discharged fees in state litigation. *E.g.*, *In re Fina*, 550 F. App'x 150, 153-155 (4th Cir. 2014) (per curiam); *In re Martin*, 474 B.R. 789, *10 (B.A.P. 6th Cir. 2012) (unpublished). At some level, even the BAP understood the flaws in its (alternative) position. Pet. App. 47a-48a & n.13.

that a "good faith belief"—whatever its source—"precludes a finding of contempt." Pet. App. 12a.[3]

Respondents also argue that *Hardy*'s holding has been "abrogated" (Opp. 2), as the creditor there was the IRS, and Congress later enacted legislation providing for specific sanctions against the government. Opp. 15 (citing 26 U.S.C. 7433(e)). This is baseless.

Hardy announced the legal standard in the Eleventh Circuit for discharge violations under Section 105. Section 7433(e) may have carved out a rule for *actions against the IRS*, but it did nothing to "supplant" *Hardy*'s rule for *actions against private parties*. Indeed, this is why courts, including the Eleventh Circuit, still invoke *Hardy* as establishing the controlling standard in this setting. *E.g.*, *In re McLean*, 794 F.3d 1313, 1323 (11th Cir. 2015); *Alderwoods Group, Inc.* v. *Garcia*, 682 F.3d 958, 967 n.18 (11th Cir. 2015). Put simply, even if respondents think *Hardy*'s vitality is in question, the Eleventh Circuit itself disagrees.[4]

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[3] Respondents further suggest that the Eleventh Circuit excuses good-faith "'[c]onduct that evinces substantial, but not complete, compliance with the court order.'" Opp. 14 (quoting *Howard Johnson Co.* v. *Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990)). But respondents' failure to comply here was *total*. They sought discharged fees in state court and forced petitioner to expend significant funds defending himself from conduct that violated the Code. The fact that they acted in conjunction with a (void) state-court order—and without first seeking available review in the bankruptcy court—does not override *Hardy*'s unequivocal rule that subjective intent is irrelevant.

[4] Respondents attack petitioner for the "striking misrepresentation" that "the panel"—not Judge Bea—recognized the "ineluctable" conflict "at oral argument." Opp. 16. Yet as everyone knows, *all* statements at "oral argument" come from a single judge; panels do not speak in unison on cue, and no one thinks otherwise. The only thing "striking" here is respondents' refusal to acknowledge that one respondent (Lorenzen) conceded the circuit split. Pet. 13. In any event,

c. According to respondents, there is no conflict with the First Circuit (in *Pratt* or *Murphy*), and petitioner's contrary assertion is "puzzling." Opp. 17.

Yet puzzled or not, respondents have no answer for what *Pratt* actually said:

> We can only conclude that the [creditor's] refusal to release its valueless lien so that the vehicle could be junked—though presumably not made in bad faith—was "coercive" in its effect, and thus willfully violated the discharge injunction. [Debtors] are therefore entitled to establish and recover their compensatory damages, together with other appropriate relief under Bankruptcy Code § 105(a).

462 F.3d at 20; see also *id.* at 21 (linking the discharge standard to the automatic-stay standard, which does not excuse "good faith mistake[s]"). *Pratt* thus specifically authorized contempt sanctions under Section 105 for a discharge violation, *even where the creditors lacked "bad faith."* Respondents cannot reconcile that holding with the Ninth Circuit's decision.

In any event, whatever respondents may think of *Pratt*, the First Circuit, again, disagrees. In *Murphy*, the court read *Pratt* to mean exactly what it said: it followed earlier circuit authority to "'reject[] the proposition that a stay violation could not be actionable (*viz.*, 'willful') if the creditor had made a good faith mistake.'" *Murphy*, 892 F.3d at 40 (quoting *Pratt*, 462 F.3d at 21) ("we used the same standard to evaluate whether a violation of a discharge order was willful"). Respondents retort that *Murphy*'s observation was "unthinking" (Opp. 18), but even a

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the fact that the conflict was flagged at argument confirms that the Ninth Circuit did not create this split by accident; it was aware of contrary authority in *Hardy*, and it nevertheless adopted the opposite rule.

quick skim through the opinion proves them wrong. The panel carefully examined decisions nationwide to discern the prevailing standards on the very question presented here. The majority was joined by Justice Souter, who is not known for his "unthinking" approach to the law. Respondents may wish to avoid a direct conflict, but their ipse dixit cannot eliminate the obvious conflict with the First Circuit.[5]

Finally, respondents repeatedly maintain that, "even if good faith were not 'a defense to liability' for contempt, it would still be possible for a contemnor 'to raise its good faith belief * * * as a means of mitigating damages.'" Opp. 21 (quoting *Murphy*, 892 F.3d at 39). Respondents inexplicably elide a key phrase: the IRS's good faith was relevant under "*preexisting provisions of the Tax Code*." 892 F.3d at 39 (emphasis added). As *Murphy* explained, those specific provisions—which have nothing to do with contempt under Section 105—let the government off the hook for attorney's fees if it acted in good faith. The Tax Code does not carry over here, and respondents err in (silently) suggesting otherwise.

d. Respondents brush aside the multitude of other decisions (including those from the Fourth Circuit and two

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[5] Respondents say petitioner's reliance on *Murphy* is "bewildering" because the case ultimately "concerned Section 7433(e)," not Section 105. Yet the entire point of *Murphy*'s discussion was asking whether the law (both pre- and post-Section 7433) authorized "good faith" as a defense to discharge violations. See 892 F.3d at 35; Pet. 15 n.7 (so explaining). *Murphy* cited both *Pratt* and *Hardy* as establishing a clear legal rule that subjective intent is irrelevant. *Id.* at 38, 40. And *Murphy*'s dissent argued that the rule was *not* clear *partly because the Ninth Circuit's decision conflicts with the majority position*. *Id.* at 47 n.12 (Lynch, J., dissenting). There is nothing "bewildering" about confirming that the legal standard in other circuits is the opposite of the standard adopted below.

bankruptcy appellate panels) because they were unpublished. Opp. 19. But published or not, these decisions still confronted and resolved the question here by adopting the *opposite* position as the Ninth Circuit. And these decisions have still guided lower courts for years. *E.g.*, *In re Joseph*, 584 B.R. 696, 705 (Bankr. E.D. Ky. 2018) (citing *Martin*); *In re Schwarz*, No. 15-44-8, 2016 WL 7413478, at *3 (Bankr. E.D.N.C. Dec. 22, 2016) (citing *Fina*).

This Court frequently grants review to resolve even shallow conflicts over the Code. Pet. 25. This substantial body of authority establishes the obvious confusion over this vital question, and it cries out for the Court's review.

e. Respondents finally argue that the stark division is acceptable because contempt determinations are "discretionary" and "context-dependent outcomes are expected." Opp. 2. But the question presented turns on the gateway legal standard, and the Ninth Circuit held there is *no* discretion where the creditor acts in good faith. That legal determination sets a categorical rule for remedying discharge violations, and it squarely conflicts with the standard adopted by other courts nationwide. The fact that courts might have some degree of discretion downstream does not explain away the clear conflict over this significant threshold question.[6]

[6] Respondents maintain that other courts "routinely" excuse discharge violations due to "good faith." Opp. 22 n.8. Respondent has misread its own authority. *E.g.*, *In re Everly*, 346 B.R. 791, 797 (B.A.P. 8th Cir. 2006) (excluding sanctions where the creditor "had no actual knowledge of the debtor's bankruptcy case"). Besides, respondent has at most identified a *deeper* conflict on the question presented—while also confirming its frequent recurrence.

B. The Question Presented Is Important And Recurring

Respondents diminish the issue's importance (Opp. 19-23), but their posturing is transparent. It is not necessary to poll the nation's leading bankruptcy scholars and former judges to confirm its obvious significance. But as it happens, those very groups have done exactly that. They have confirmed the central importance of the discharge, the corresponding need to ensure a viable enforcement mechanism, and the risks and errors of the Ninth Circuit's approach. See Wedoff Amicus Br.; NCBRA Amicus Br. Respondents' mere say-so does not counteract these studied presentations.

Moreover, respondents' belief that the issue rarely arises defies common sense. Creditors can resist every discharge violation by identifying any good-faith basis for their conduct. And common sense is confirmed by shepardizing the major decisions (which will not even count unreported orders).

This question is essential to securing the debtor's fresh start and promoting the sound administration of the Code. This Court's urgent guidance is necessary.

C. This Case Is A Perfect Vehicle

Contrary to respondents' contention, this case is an optimal vehicle. The issue is outcome-determinative. The bankruptcy court adopted *Hardy*'s standard and petitioner won; the BAP and Ninth Circuit rejected *Hardy*'s standard and petitioner lost. And that legal determination was the sole basis of the decision below, as respondents concede. Opp. 2. Indeed, the Ninth Circuit did not even

recap the BAP's alternative holding, and it expressly "declined" to reach any other issues. Pet. App. 14a. There is no conceivable barrier to review.[7]

Respondents nevertheless insist this is a poor vehicle because they believe they would prevail under the BAP's alternative holding. The short answer is that the Ninth Circuit (as respondents admit) declined to decide that question; this Court can do the same. Indeed, this Court recently granted review over an identical objection. See Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 ("The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason.").

The longer answer is the Ninth Circuit likely refused to embrace the BAP's alternative holding for a reason. Respondents did not obtain the necessary "approval" before forcing petitioner to engage in full-blown litigation over his discharged debt. They plowed ahead in state court without once asking the bankruptcy court for permission; rather, petitioner himself was forced to seek the bankruptcy court's protection—and the answer came after thousands of dollars were wasted defending himself on parallel tracks. Pet. App. 6a-8a.

Petitioner does not suggest that a creditor faces sanctions for seeking relief from the bankruptcy court (contra Pet. App. 46a-47a); respondents' mistake was focusing on the wrong forum. State courts have no power to rewrite Section 524 or modify the Code's discharge injunction. Where, as here, they guess wrong, their orders are "void."

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[7] Respondents' contention that this is a "fact-bound decision" (Opp. 13) is an odd way to describe an opinion determining a dispositive "rule of law." Pet. App. 12a.

11 U.S.C. 524(a)(1). Nothing prevented respondents from lodging a proper request with the bankruptcy court.

Finally, this vehicle is especially attractive because one respondent (Lorenzen) has waived alternative grounds for affirmance. Respondents resist that conclusion, but they cannot square their position with the record. The Ninth Circuit could not have spoken more plainly on the issue: Lorenzen admitted that, "in [her] view, [intervening authority] commands resolution of whether Creditors violated the discharge against the Creditors." Pet. App. 14a n.6. And Lorenzen was explicit about the nature of the challenge she later waived. C.A. Lorenzen Supp. E.R. 4 (contesting the district court's holding that she "violated the discharge injunction").

Lorenzen may now regret that tactical choice, but it confirms the ideal presentation of the sole question now in dispute.

D. The Decision Below Is Incorrect

While respondents defend the decision below, their arguments only confirm the fundamental disagreement over this important question. Those disagreements are better suited for exploration on plenary review.

For now, three points suffice.

First, respondents could not explain how the Ninth Circuit's position is consistent with bedrock contempt principles. Pet. 27-28. This Court established the controlling framework in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), and there is no reason the same principles escape the bankruptcy context alone.

Second, respondents simply ignore the obvious harm and unfairness in asking good-faith debtors to pay for a good-faith creditor's mistake. Section 105 provides ample authority to redress discharge violations and restore the status quo ante—which requires compensating the debtor for the losses suffered via the creditor's error.

Finally, respondents wrongly argue that *Hardy* "unthinkingly" imported principles from the automatic-stay context into the discharge context. For one, respondents overlook that *both areas involve principles of general civil contempt*. This Court set the rules back in *McComb*, and there is no reason to depart from those rules now. For another, respondents are wrong that *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539 (11th Cir. 1996), was rooted to the particular language in Section 362(k). Indeed, *Jove* held that *Section 362(k) did not apply*, and thus decided the question, as here, under Section 105. 92 F.3d at 1555 (citing *McComb*). Thus, the entire foundation of respondents' argument is premised on a clear misreading of an unambiguous decision.

CONCLUSION

The petition should be granted.

Respectfully submitted.

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

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