No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
MARK B. STERN
SARAH CARROLL
THOMAS J. CLARK
PAUL A. ALLULIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, under the Bankruptcy Code, a creditor's subjective good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and rules:

Statutes and rules—Continued: Page

Rules—Continued: Page

In the Supreme Court of the United States

No. 18-489

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

The question presented in this case concerns the circumstances under which a creditor may be subject to civil-contempt sanctions for attempting to collect a debt after the entry of a discharge order under the Bankruptcy Code. The Attorney General appoints United States Trustees to supervise the administration of bankruptcy cases and trustees throughout the country. 28 U.S.C. 581-589a. United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307. The United States also is the Nation's largest creditor. Federal agencies often seek to recover debts from persons who have filed for bankruptcy, and the application of the discharge order to debts owed to the govern-

ment is not always readily apparent. The question presented therefore is of substantial importance to the United States.

STATEMENT

1. a. When a debtor successfully completes its bankruptcy case, the bankruptcy court typically enters a discharge order releasing the debtor from liability for most pre-bankruptcy debts. See 11 U.S.C. 727 (Chapter 7), 1141 (Chapter 11), 1228 (Chapter 12), and 1328 (Chapter 13). A discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such [discharged] debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2).

Although most pre-bankruptcy debts are discharged by such an order, certain debts are not, see 11 U.S.C. 523(a)(1)-(19), including various categories of debts commonly held by the government, *e.g.*, 11 U.S.C. 523(a)(1), (7), (8), (11), (12), (13), (14B), and (18). Often it is clear whether a particular debt falls into one of these exceptions to discharge. There rarely is any doubt, for example, whether a debt is one for "payment of an order of [criminal] restitution." 11 U.S.C. 523(a)(13). Other times it is not so clear, as with tax debts "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. 523(a)(1)(C). Whether a debtor "willfully attempted" to "evade or defeat" a tax can be a hotly contested question.

With respect to some of the potentially nondischargeable debts listed in Section 523(a), the Code states that a particular debt will be discharged unless a party obtains an advance determination to the contrary from the bankruptcy court. 11 U.S.C. 523(c)(1); see

11 U.S.C. 523(a)(2), (4), and (6). And for student-loan debts, a debtor must file an adversary complaint in the bankruptcy case, and obtain a determination that the debt is dischargeable, or the debt will not be discharged. See *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 268-269 (2010). With respect to most types of debts, however, no advance determination as to dischargeability is necessary, and the question whether a particular debt has been discharged is left for future resolution. Cf. Fed. R. Bankr. P. 4007. That resolution need not occur in the bankruptcy court. Rather, other courts, including state courts, have concurrent jurisdiction to resolve dischargeability disputes—as, for instance, when discharge is raised as a defense in a state-court collection action. See 28 U.S.C. 1334(b) (vesting district courts with "original but not exclusive jurisdiction of all civil proceedings arising under title 11").

Dischargeability disputes arise most frequently in Chapter 7 cases. Most Chapter 7 cases are resolved relatively quickly, and the typical discharge order simply identifies the debtor and states that a "discharge under 11 U.S.C. § 727 is granted." Official Bankruptcy Form No. 318, at 1, www.uscourts.gov/sites/default/files/form_b318_0.pdf; see Official Bankruptcy Form No. 18 (superseded Dec. 1, 2015), www.uscourts.gov/sites/default/files/b_018_1207.pdf; see also Fed. R. Bankr. P. 9009(a). Rather than identify the particular debts of the debtor that are (or are not) discharged, the standard Chapter 7 discharge order typically includes an "[e]xplanation" stating that "[m]ost debts are covered by the discharge, but not all," and that "[b]ecause the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case." Official Bankruptcy Form No. 318, at 1-2 (emphasis

omitted); see *id.* at 2 (listing "[e]xamples of debts that are not discharged"). A summary discharge of this type is consistent with the need "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period,'" which is "a chief purpose of the bankruptcy laws." *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966) (citation omitted).

b. Although Section 524 states that a discharge order "operates as an injunction" against any attempt to collect a discharged debt, 11 U.S.C. 524(a)(2), it does not prescribe a remedy for violations of the discharge injunction. Section 105, however, authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. 105(a).

Courts have read Sections 105(a) and 524(a)(2), taken together, as authorizing civil-contempt actions against creditors who attempt to collect discharged debts. *E.g.*, *In re Canning*, 706 F.3d 64, 69 (1st Cir. 2013); *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006); see Fed. R. Bankr. P. 9020 (recognizing that bankruptcy courts may conduct contempt proceedings). Since the United States has waived its sovereign immunity for purposes of Section 105, the power to impose civil-contempt remedies generally extends to governmental creditors. See 11 U.S.C. 106(a)(1). Some courts have stated that a bankruptcy court also has inherent power to enforce a discharge injunction through civil-contempt sanctions, but that such power should be exercised with "restraint" and only when the creditor engages in "bad-faith conduct." *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996) (quoting *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 44, 50 (1991)).

Two related provisions bear mention. First, under Section 362, the filing of a petition for bankruptcy "operates as a stay" of most collection or enforcement efforts against the debtor during the pendency of the bankruptcy case. 11 U.S.C. 362(a). Unlike with the discharge injunction, the Bankruptcy Code prescribes a specific remedy for certain violations of the automatic stay: "an individual injured by any willful violation of [the automatic] stay" generally "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. 362(k)(1).

Second, Congress amended the Internal Revenue Code in 1998 to provide that, if an IRS officer or employee "willfully violates" either the automatic stay or the discharge injunction, the affected taxpayer "may petition the bankruptcy court to recover damages against the United States." Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3102(c)(1), 112 Stat. 730-731 (26 U.S.C. 7433(e)(1)). With respect to discharge violations, "such petition shall be the exclusive remedy for recovering damages" against the IRS. 26 U.S.C. 7433(e)(2)(A).

Both of these provisions require a "willful" violation of the automatic stay or discharge injunction before a court may award damages to the debtor. 11 U.S.C. 362(k)(1); see 26 U.S.C. 7433(e)(1). Although neither Section 105 nor Section 524 uses that term, some courts have said that the imposition of civil-contempt sanctions under Section 105 likewise requires a "willful" violation of the discharge injunction. *E.g.*, *Hardy*, 97 F.3d at 1390; Pet. App. 58a (bankruptcy-court decision below).

2. a. This case arises out of a business dispute. Petitioner once held an interest in an Oregon company.

Pet. App. 4a. Respondents are the company's other owners, their former attorney (now replaced by the executor of his estate), and the company itself. *Id.* at 4a-5a. (For simplicity, this brief will use the term "respondents" even when referring only to some of them, unless the distinction is material.)

Believing that petitioner had improperly attempted to transfer his interest in the company without offering the other owners a right of first refusal, respondents sued petitioner in state court. Pet. App. 5a. Shortly before trial, petitioner filed a voluntary petition for bankruptcy under Chapter 7. *Ibid.* The state-court action was stayed pending completion of the bankruptcy case. *Ibid.*

After petitioner received a bankruptcy discharge, respondents resumed the state-court litigation. Pet. App. 5a. In light of the discharge order, respondents abandoned their monetary claims and instead sought only injunctive relief to unwind the transfer of petitioner's interest in, and to expel petitioner from, the company. *Id.* at 5a-6a. After the court granted that relief, respondents filed a petition for attorney's fees, limited to "those fees that had been incurred after the date of [petitioner's] bankruptcy discharge." *Id.* at 6a.

Respondents' fee petition "alerted the state court to the existence of [petitioner's] bankruptcy discharge." Pet. App. 6a. Relying on in *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), cert. denied, 547 U.S. 1163 (2006), however, respondents contended that a claim for attorney's fees incurred after the bankruptcy case commenced, even if arising from litigation that was initiated before the bankruptcy, is not discharged if the debtor has "'returned to the fray'" by "willingly engag[ing]" in further post-discharge litigation. Pet. App. 6a-7a. The state

court concluded that petitioner had returned to the fray, and it therefore granted the fee petition. *Id.* at 7a.

Meanwhile, petitioner moved the bankruptcy court to hold respondents "in contempt for violating the discharge by seeking an award of attorneys' fees against him in the state court action." Pet. App. 7a. The bankruptcy court at first denied the motion, Br. in Opp. App. 12a-35a, but the district court reversed that denial, finding that petitioner's actions "were not sufficiently affirmative and voluntary to be considered returning to the fray" under *Ybarra*, *id.* at 11a. Relying on the district court's reversal, the state appellate court then reversed the trial court's grant of fees. *Sherwood Park Bus. Ctr., LLC* v. *Taggart*, 341 P.3d 96, 104 (Or. App. 2014).

b. On remand from the district court, the bankruptcy court held respondents in contempt for violating the discharge injunction. Pet. App. 52a-64a.

The bankruptcy court stated that "[a]n alleged contemnor's violation of the discharge injunction must be 'willful' in order to be subject to sanctions for violating the discharge injunction." Pet. App. 58a. To establish willfulness, the court explained, petitioner was required to prove "first, that the alleged contemnor knew that the discharge injunction applied, and second, that the alleged contemnor intended the actions that violated the discharge injunction." *Ibid.* The court observed that there was "no dispute" that the second element was satisfied. *Id.* at 63a.

As to the first inquiry, and relying on the Eleventh Circuit's decision in *Hardy*, the bankruptcy court interpreted the phrase "knew that the discharge injunction *applied*," Pet. App. 58a (emphasis added), to mean

"knew the discharge was '*invoked*,'" *id.* at 59a (emphasis added). In the bankruptcy court's view, that test "in effect imposes a strict liability standard": a creditor need only be "'aware of the discharge injunction,'" and need not know that the injunction applies to the particular debt at issue. *Id.* at 60a (quoting *Hardy*, 97 F.3d at 1390); see *ibid.* ("Only lack of notice of the discharge may serve as a defense to contempt sanctions."). The court observed that "it is not disputed that Respondents had actual knowledge" of the existence of petitioner's discharge, *id.* at 61a, and were thus "on notice that seeking fees from [petitioner] might implicate the discharge injunction," *id.* at 63a.

After an evidentiary hearing, the bankruptcy court awarded petitioner slightly more than $105,000 in attorney's fees and costs; $5000 in damages for emotional distress; and $2000 in punitive damages. Pet. App. 69a, 75a.

c. The bankruptcy appellate panel (BAP) reversed. Pet. App. 21a-51a. In the BAP's view, and contrary to *Hardy*, civil contempt is an appropriate remedy for a violation of a discharge order only if "the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim." *Id.* at 44a; see *id.* at 36a (criticizing the bankruptcy court for following *Hardy*). The BAP found that "the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs," *id.* at 46a, as evidenced in part by the state trial court's initial holding "that the discharge did not bar [respondents'] claim for attorneys' fees," *id.* at 47a. The BAP concluded that respondents "could not possibly have been aware that the discharge injunction was applicable to their fee request until the *Ybarra* question was adjudicated." *Id.* at 50a.

The BAP explained that "[a]lthough the discharge order was in place at the time [respondents] made their fee request in the state court, the order itself did not advise [respondents] of the scope of the injunction under the *Ybarra* rule." *Id.* at 51a.

3. The court of appeals affirmed. Pet. App. 1a-15a. The court agreed with the bankruptcy court that civil contempt requires a showing "that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Id.* at 11a (citation omitted). Like the BAP, however, the court of appeals rejected the bankruptcy court's near-strict-liability gloss on that test, explaining that "knowledge of the applicability of the injunction * * * may not be inferred simply because the creditor knew of the bankruptcy proceeding." *Ibid.* Rather, the court of appeals stated, a "creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a.

The court of appeals agreed with the BAP's finding that, when respondents sought attorney's fees in the state-court proceeding, they "possessed a good faith belief that the discharge injunction did not apply to their claims based on their contention that [petitioner] had 'returned to the fray.'" Pet. App. 13a. The court stated that respondents had "relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees," and that "their good faith belief, even if unreasonable, insulated them from a finding of contempt." *Ibid.*

SUMMARY OF ARGUMENT

A. By specifying that a discharge order "operates as an injunction," 11 U.S.C. 524(a)(2), Congress indicated

that bankruptcy courts have the same powers to enforce their discharge orders as courts have to enforce any other injunction in the ordinary civil context. One of the fundamental principles governing the enforcement of ordinary civil injunctions is that civil-contempt sanctions may not be imposed if there is a fair ground of doubt that the conduct at issue violated the injunction. *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609, 618 (1885). Indeed, "basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974) (per curiam).

These principles should apply with equal force in the bankruptcy-discharge context. Nothing in the Bankruptcy Code indicates that enforcement of a discharge order should be governed by standards different from those that apply to enforcement of ordinary civil injunctions. The fact that Congress has expressly modified the remedies for violations of other bankruptcy provisions, but has not done so for violations of the discharge injunction (except for violations committed by the IRS), reinforces the inference that the traditional standard for civil contempt should continue to govern here. Cf. 11 U.S.C. 362(k); 26 U.S.C. 7433(e).

Unlike an ordinary civil injunction, which typically specifies the precise conduct that is prohibited, a bankruptcy discharge order usually does not state which debts are and are not discharged. With respect to the large majority of debts, however, the Bankruptcy Code provides a clear answer to that question. But with respect to the subset of debts whose dischargeability is reasonably in doubt, it is both consistent with traditional equitable principles, and important to the proper balancing of debtor and creditor interests, that the

availability of civil-contempt sanctions be governed by the traditional "fair ground of doubt" standard.

B. The court of appeals erred in suggesting that an unreasonable subjective good-faith belief that particular conduct is consistent with a discharge order precludes a finding of civil contempt. "Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). A putative contemnor's good faith might be relevant to the determination whether there exists, as an objective matter, a fair ground of doubt about whether the debt has been discharged. The court of appeals in this case, however, did not treat respondents' subjective good faith as evidence of objective reasonableness. Rather, the court erroneously held that respondents' subjective good faith standing alone precluded the imposition of contempt sanctions, even if respondents' belief in the legality of their conduct was objectively *un*reasonable.

C. Petitioner's proposed standard also is incorrect. Petitioner supports the near-strict-liability standard for contempt adopted by the bankruptcy court below and by the Eleventh Circuit in *Hardy*. Under that standard, a creditor is subject to contempt as long as it was aware of the existence of the discharge and then intentionally committed an act that a court later determines violated the discharge injunction. That standard is incompatible with the traditional standards governing enforcement of injunctions, since it authorizes imposition of civil-contempt remedies even in circumstances where the applicability of the discharge order to a particular debt was in reasonable doubt at the time the collection efforts occurred.

Petitioner argues that, in order to insulate themselves from potential contempt sanctions, creditors should be required to seek an advance determination of dischargeability from the bankruptcy court rather than litigating the question during collection proceedings brought in other forums. That approach would often be impractical, especially in cases involving governmental creditors, and would unduly hamper creditors' rights to recover non-discharged debts owed to them. It also would create artificial incentives for creditors to seek advance bankruptcy-court determinations whenever they believe particular debts to be nondischargeable, despite Congress's express judgment that only three statutory exceptions to discharge require such advance determinations.

D. Respondents may ultimately prevail under the traditional standards governing injunctive relief and civil contempt, by establishing a fair ground of doubt about whether respondents' conduct violated the discharge order. See *In re Ybarra*, 424 F.3d 1018, 1026-1027 (9th Cir. 2005), cert. denied, 547 U.S. 1163 (2006). That the courts below disagreed on the question supports that conclusion. Cf. *California Artificial Stone Paving*, 113 U.S. at 618 ("If the judges disagree there can be no judgment of contempt."). This Court, however, is one "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court accordingly should vacate the judgment below and remand the case to allow the lower courts to make that determination in the first instance.

ARGUMENT

A CREDITOR'S SUBJECTIVE GOOD FAITH DOES NOT PRECLUDE A FINDING OF CIVIL CONTEMPT, BUT CIVIL-CONTEMPT REMEDIES ARE NOT AVAILABLE IF THERE IS AN OBJECTIVELY FAIR GROUND OF DOUBT ABOUT WHETHER THE CREDITOR'S CONDUCT VIOLATES A DISCHARGE ORDER

A. Traditional Principles Governing Injunctive Relief Apply To The Enforcement Of Discharge Orders Entered In Bankruptcy Cases

Under traditional equitable principles, a litigant may not be held in civil contempt for violating an injunction if there exists a fair ground of doubt about whether the injunction prohibited the challenged acts. That traditional principle applies to the enforcement of bankruptcy discharge orders as well.

1. Under the Bankruptcy Code, a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. 524(a)(2). Although Section 524 does not specify a remedy for violations of the discharge injunction, Section 105(a) authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" Title 11. 11 U.S.C. 105(a).

Taken together, these provisions incorporate general principles of injunctive relief, including the principles that govern the imposition of sanctions for contempt. Contempt is the traditional means by which courts enforce their injunctions. See, *e.g.*, *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 796 (1987). Indeed, a court's power to impose contempt

"is essential to the administration of justice." *Michaelson* v. *United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65 (1924).

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); see *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013). Particularly when read in light of that interpretive principle, the statutory directive that a discharge order "operates as an injunction," 11 U.S.C. 524(a)(2), is best understood to authorize bankruptcy courts to enforce their discharge orders under Section 105(a) in accordance with the same principles that govern courts' traditional powers to enforce their injunctions. Consistent with that natural understanding of the statutory text, courts of appeals largely have recognized that the imposition of civil contempt for violations of a discharge injunction "is governed by the same standards * * * applicable to all civil contempt proceedings." *In re Zilog, Inc.*, 450 F.3d 996, 1008 n.12 (9th Cir. 2006); cf. *Cox* v. *Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (Posner, J.) (looking to "standard remedies in cases of civil contempt"); *Pertuso* v. *Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000) (explaining that "[t]he obvious purpose" of Section 524 "is to enjoin the proscribed conduct," and that "the traditional remedy for violation of an injunction lies in contempt proceedings").

2. One fundamental principle governing enforcement of injunctions is that civil-contempt sanctions may

not be imposed if there is an objectively fair ground of doubt that the conduct at issue violated the injunction. In *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609 (1885), for example, this Court agreed with the lower court's refusal to impose contempt, and it ordered that the case be dismissed. *Id.* at 618. The defendant in *California Artificial Stone Paving* previously had been enjoined from infringing a patent that protected "an improvement in concrete pavement." *Id.* at 610. The improvement consisted of "laying the pavement in detached blocks" instead of in a "continuous sheet," which was "liable to crack in irregular directions." *Id.* at 610-611. After the injunction was issued, the defendant "varied his mode of making" pavement by no longer making "separate and detached blocks," but "only making a mark or indentation on the surface" of a large sheet, which apparently was "sufficient to produce the results obtained by [the patented] process." *Id.* at 613.

The lower-court judges disagreed about whether the defendant's new production method infringed the patent, and the circuit judge decreed that the defendant could not be held in contempt for violating the injunction. *California Artificial Stone Paving*, 113 U.S. at 613. On appeal, this Court stated that "[i]f the [lower court] judges disagree" about whether the defendant had violated the injunction, "there can be no judgment of contempt." *Id.* at 618. The Court explained that "[p]rocess of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct." *Ibid.*

An objectively fair ground of doubt about the applicability of an injunction can arise from a lack of clarity in the terms of the injunction itself. In *International Longshoremen's Association* v. *Philadelphia Marine*

Trade Association, 389 U.S. 64 (1967), this Court reversed a finding of contempt that had been entered against a union for violating an order requiring compliance with an arbitral award. *Id.* at 74. The Court observed that the order "contain[ed] only an abstract conclusion of law, not an operative command capable of 'enforcement.'" *Ibid.* Echoing *California Artificial Stone Paving*, the Court warned that "[t]he judicial contempt power is a potent weapon" and that "[w]hen it is founded upon a decree too vague to be understood, it can be a deadly one." *Id.* at 76. To that end, this Court has long cautioned that "defendants ought to be informed as accurately as the case permits what they are forbidden to do." *Swift & Co.* v. *United States*, 196 U.S. 375, 401 (1905). An "injunction to obey the law" is thus unenforceable, *ibid.*, in part because "a general injunction against all possible breaches of the law" would be too "vague" to justify putting a defendant "at the peril of a summons for contempt," *id.* at 396. Federal Rule of Civil Procedure 65(d) incorporates these traditional principles, requiring "[e]very order granting an injunction" to "state its terms specifically" and to "describe in reasonable detail * * * the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B) and (C).

Lower courts routinely apply the "fair ground of doubt" standard in deciding whether the defendant should be sanctioned for violating an injunction in the ordinary civil context. See, *e.g.*, *TiVo Inc.* v. *EchoStar Corp.*, 646 F.3d 869, 882 (Fed. Cir. 2011) (en banc); *Latino Officers Ass'n City of N.Y., Inc.* v. *City of New York*, 558 F.3d 159, 164-165 (2d Cir. 2009); *United States* v. *Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005). Consistent with that test, courts recognize that injunctions must "have clearly and unambiguously forbidden the

precise conduct on which the contempt allegation is based" before the court may impose contempt sanctions. *Saccoccia*, 433 F.3d at 28 (emphasis omitted); see, *e.g.*, *CFE Racing Prods., Inc.* v. *BMF Wheels, Inc.*, 793 F.3d 571, 598 (6th Cir. 2015) (contempt available only for violation of "a definite and specific order of the court" listing "particular act or acts" that are forbidden) (citations omitted); *City of New York* v. *Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) ("an injunction must be more specific than a simple command that the defendant obey the law") (citation omitted); cf. *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1546 (11th Cir. 1996) (statutory injunctions must be "clear, definite and unambiguous" to support contempt). And in applying that test, courts generally resolve ambiguities in favor of the putative contemnor. See, *e.g.*, *Axia NetMedia Corp.* v. *Massachusetts Tech. Park Corp.*, 889 F.3d 1, 13 (1st Cir. 2018); *Gascho* v. *Global Fitness Holdings, LLC*, 875 F.3d 795, 800 (6th Cir. 2017), cert. denied, 138 S. Ct. 2576 (2018).

3. There is no reason these traditional principles cannot apply to the bankruptcy context here. To be sure, Rule 65(d) does not directly apply to a bankruptcy discharge order or to bankruptcy contempt proceedings. See Fed. R. Bankr. P. 9014(c), 9020. And neither Rule 65(d) nor Section 524(a)(2) requires a discharge order to identify which debts are discharged with the kind of specificity that Rule 65(d) requires for an ordinary civil injunction. Application of Rule 65(d)'s specificity requirements to bankruptcy discharge orders would be both undesirable and inconsistent with longstanding bankruptcy practice. See pp. 3-4, *supra*. But Congress's directive that a discharge order "*operates* as an injunction," 11 U.S.C. 524(a)(2) (emphasis added),

nevertheless has important implications for *enforcement* of a discharge order once it has been entered. In particular, that directive indicates that contempt-like remedies should be unavailable when a creditor had reasonable grounds for doubting that particular conduct would violate the discharge order, even if the court ultimately determines that a violation occurred.

In one important respect, application of that principle in the bankruptcy-discharge setting differs from enforcement of a usual civil injunction. If an ordinary injunction complies with the specificity requirements of Rule 65(d), the requisite clear notice that particular conduct is prohibited usually will appear within the four corners of the injunction itself. Bankruptcy discharge orders, by contrast, typically decree that all dischargeable debts are discharged, without specifying *which* debts are dischargeable. Cf. *Jove Eng'g*, 92 F.3d at 1546. To determine whether a discharge order prohibits continued efforts to collect a particular debt, a creditor therefore must look beyond the four corners of the order itself and consult the applicable provisions of the Bankruptcy Code.

Despite that difference, the "no fair ground of doubt" standard can cogently be applied to circumstances where a creditor continues to undertake collection efforts after a discharge order has been entered. But in determining whether a fair ground of doubt exists, the court in deciding whether contempt sanctions are warranted should not limit its inquiry to the express terms of the discharge order. A bankruptcy discharge could not serve its intended purpose if a creditor could continue efforts to collect discharged debts and then avoid contempt sanctions simply by pointing out that the or-

der itself did not specify which debts had been discharged. Rather, the court should ask whether the discharge order, read in light of and in conjunction with the applicable Code provisions, left legitimate doubt as to the discharge of a particular debt.

With respect to the large majority of debts owed by persons who obtain bankruptcy discharges, the applicable law will leave no fair ground of doubt that the debt has been discharged, even if the discharge order standing alone does not speak to the point. Absent an allegation of fraud, for example, prepetition consumer debts (including credit-card debts) are unlikely to fall within any of the statutory exceptions to discharge listed in 11 U.S.C. 523(a). A creditor who attempts to collect such debts thus likely could not show a "fair ground of doubt" that the debt survived the discharge. *California Artificial Stone Paving*, 113 U.S. at 618. And for certain categories of debt, the Code provides that the debt will be discharged unless the bankruptcy court makes an advance determination to the contrary. 11 U.S.C. 523(c)(1); see 11 U.S.C. 523(a)(2), (4), and (6). A creditor who fails to obtain an advance determination before attempting to collect these types of debts also would have no valid defense to contempt.

Moreover, under established equitable principles, the "fair ground of doubt" inquiry should be conducted on a debt-by-debt basis. Even when real doubt exists as to whether *one* debt has been discharged, there may be no similar uncertainty as to the dischargeability of the debtor's *other* debts. A creditor who attempts to collect a clearly- discharged debt in that circumstance can be subjected to contempt sanctions, notwithstanding the existence of real uncertainty about a different aspect of the discharge order's scope. That result follows

from the established rule that, even if an injunction is unclear in some respects, the court may impose civil-contempt sanctions if there is no fair ground of doubt that the injunction prohibited the specific conduct in which the alleged contemnor engaged. See, *e.g.*, *Chao* v. *Gotham Registry, Inc.*, 514 F.3d 280, 292 (2d Cir. 2008) (evaluating "not whether the decree is clear in some general sense, but whether it unambiguously proscribes the challenged conduct"); *Abbott Labs.* v. *Unlimited Beverages, Inc.*, 218 F.3d 1238, 1241 (11th Cir. 2000); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 939 F.2d 57, 64 n.11 (3d Cir. 1991).

But where there is an objectively reasonable dispute about whether a particular debt has been discharged, it is both consistent with traditional equitable principles, and important to the achievement of an appropriate balance between debtor and creditor interests, to hold that a creditor's attempt to collect *that debt* cannot subject it to civil contempt. In an analogous Chapter 13 context involving a claimed violation of a plan confirmation, the Eighth Circuit recently declined to hold a state agency in civil contempt for seeking to collect domestic-support obligations from the debtors because the agency "had a reasonable basis for believing that the * * * debt would survive the Chapter 13 bankruptcy case." *In re Spencer*, 868 F.3d 748, 752 (2017). "Even if [the agency] was wrong on the merits," the court held, "its action did not warrant a contempt order and sanctions." *Ibid.*; see, *e.g.*, *In re Gervin*, 300 Fed. Appx. 293, 301 (5th Cir. 2008) (per curiam) (no contempt where applicability of the discharge injunction to the claim was unsettled and "caused extensive litigation"); *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 309 (3d Cir. 1999) (no contempt where creditor had "at least a colorable argument").

The fact that contempt remedies are unavailable in those circumstances does not mean that *no* relief can be awarded. If a creditor successfully collects a discharged debt after the discharge order has been entered, the bankruptcy court can direct the creditor to return the property it has collected in violation of the order, even if the existence of reasonable doubt about dischargeability at the time of collection precludes the imposition of contempt sanctions. And going forward, an order directing the creditor to return the property in those circumstances would remove any fair ground of doubt about whether the debt had been discharged, thus exposing the creditor to contempt sanctions if it renewed its collection efforts.

B. The Court Of Appeals Erred In Holding That A Creditor's Unreasonable Good-Faith Belief That Its Collection Efforts Are Lawful Precludes The Imposition Of Contempt Sanctions

Consistent with the principles described above, the court of appeals observed that civil contempt is available only where the movant can establish that the alleged contemnor "violated a specific and definite order of the court." Pet. App. 11a. Relying on Ninth Circuit precedent, however, the court also stated that "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a. The court found it to be undisputed that respondents "possessed a good faith belief that the discharge injunction did not apply to their claims because [petitioner] had 'returned to the fray,'" *id.* at 13a, and it held that respondents' "good faith belief, even if unreasonable, insulated them from a finding of contempt,"

ibid. The court of appeals erred in treating subjective bad faith as a prerequisite to contempt remedies.

Under traditional principles governing the enforcement of ordinary civil injunctions, subjective bad intent is not required to support a finding of civil contempt. Unlike criminal contempt, civil contempt is "remedial," not "punitive." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Shillitani* v. *United States*, 384 U.S. 364, 369 (1966). "Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); see 2 James L. High, *A Treatise on the Law of Injunctions* § 1418, at 1427 (4th ed. 1905) ("Nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsibility for the violation.").

Courts of appeals thus generally recognize that "[t]he 'intent of the recalcitrant party is irrelevant' in a civil contempt proceeding," *Food Lion, Inc.* v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (citation omitted), and that "good faith is not a defense to civil contempt," *Robin Woods Inc.* v. *Woods*, 28 F.3d 396, 399 (3d Cir. 1994). See *CFE Racing Prods.*, 793 F.3d at 598 ("no requirement to show intent" to impose contempt); but see *First State Bank of Roscoe* v. *Stabler*, 914 F.3d 1129, 1140 (8th Cir. 2019) ("Sanctions generally should be unavailable where a creditor acts * * * in good faith reliance on the belief that their actions are permissible."). Respondents have identified no reason why a different rule should apply in the bankruptcy context. Cf. Br. in Opp. 26 n.9 (discussing *McComb*).

With respect to certain bankruptcy-law violations—*e.g.*, violations of the automatic stay and certain violations by the IRS—Congress has specified a particular mental-state requirement and the penalties that may be imposed. See 11 U.S.C. 362(k); 26 U.S.C. 7433(e). By contrast, the Bankruptcy Code does not specify any mental-state requirement to discipline violations of a discharge order under Section 105(a). The Code's directive that a discharge order should "operate[] as an injunction," 11 U.S.C. 524(a)(2), therefore, is best understood to incorporate the traditional principles governing ordinary civil injunctions, under which a subjective good-faith belief, standing alone, does not preclude a finding of civil contempt.

To be sure, a defendant's subjective good-faith belief that it is complying with an injunction might sometimes be relevant to the determination whether the belief was objectively reasonable, *i.e.*, whether there was "fair ground of doubt" that the injunction proscribed the defendant's conduct. But the court of appeals in this case did not treat respondents' subjective good faith as evidence of objective reasonableness. Rather, the court stated that respondents' "good faith belief, *even if unreasonable*, insulated them from a finding of contempt." Pet. App. 13a (emphasis added); see *id.* at 12a. That holding has no basis in the general principles that govern enforcement of civil injunctions. If there is no objectively reasonable ground for disputing that an injunction proscribes particular conduct, a party who engages in that conduct cannot avoid civil contempt by claiming confusion about the order's scope. See, *e.g.*, *Robin Woods*, 28 F.3d at 399 (imposing sanctions where the injunction left "no ground to doubt the wrongfulness

of the conduct" at issue). And given Congress's directive that a bankruptcy discharge order "operates as an injunction," 11 U.S.C. 524(a)(2), there is no sound basis for treating subjective good faith as determinative in the discharge-violation context.

C. This Court Should Not Adopt Petitioner's Proposed Rule

Although the court of appeals erred in treating respondents' subjective good faith as precluding imposition of contempt sanctions, petitioner's proposed rule also is flawed. Petitioner endorses (Br. 18-19; Pet. 27-31) the standard applied by the bankruptcy court below and by the Eleventh Circuit in *In re Hardy*, 97 F.3d 1384 (1996). Under that approach, a creditor who violates a discharge order can be held in contempt, even if it reasonably believed that its conduct was consistent with the order, so long as the creditor was "aware of the discharge injunction" and "intended the actions" that violated it. *Id.* at 1390. That standard is incorrect and leads to impractical results.

1. The standard that petitioner advocates is inconsistent with the principles that govern imposition of civil-contempt sanctions for violations of ordinary civil injunctions. Under petitioner's proposed rule, civil contempt is justified as long as the creditor (1) knows of the existence of the discharge injunction and (2) intentionally takes an act that a court later determines was prohibited by that injunction. Pet. Br. 19; *Hardy*, 97 F.3d at 1390. If a court determines that the debt at issue was discharged, the second element almost always will be satisfied, since the sorts of collection efforts (such as filing a collection lawsuit) that would violate a discharge order rarely will be undertaken accidentally (*i.e.*, unin-

tentionally). As a practical matter, adoption of petitioner's approach thus would mean that, whenever the bankruptcy court determines that a violation of its discharge order has occurred, the violator can be subjected to contempt sanctions so long as it knew of the discharge order itself, no matter how reasonable the creditor's position that its own collection activities involved a nondischargeable debt.

That expansive conception of civil contempt is inconsistent with the traditional equitable principles described above. Under those principles, a person who is found to have violated an injunction cannot be held in contempt based solely on proof that he knew the injunction existed. Rather, it must be shown that the injunction left no fair ground of doubt that it prohibited the specific actions in which the putative contemnor engaged. See *California Artificial Stone Paving*, 113 U.S. at 618. Similarly in the bankruptcy-discharge context, a creditor who violates the discharge order cannot be held in contempt if there was fair ground of doubt that the discharge covered the specific debt that the creditor sought to collect.

This Court's decision in *McComb* is not to the contrary. The injunction in that case "enjoined any practices which were violations of [certain] statutory provisions" of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, while specifying that its scope was limited to provisions dealing with "minimum wages, overtime, and the keeping of records." 336 U.S. at 191-192. The Court observed that the decree violated in that case "provides the formula by which the amounts" that the defendants were required to pay "can be simply computed." *Id.* at 194. That characterization of the injunction suggests that the Court did not view the fact of

the defendants' non-compliance as subject to reasonable dispute. The Court also stated that the defendants had demonstrated a "proclivity for unlawful conduct" and "persistent contumacy" in committing "continuing and persistent violations of the Act," *id.* at 192, thereby finding not only a lack of objectively reasonable doubt about the injunction's scope but something akin to bad faith, which also has traditionally supported civil-contempt sanctions. See *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 50 (1991). The *McComb* Court's conclusion that the defendants there were in contempt thus does not suggest approval of petitioner's approach here, under which contempt sanctions can be based solely on a creditor's awareness that a discharge injunction existed and a court's ex post determination that the injunction was violated.

2. Petitioner's proposed rule also would produce impractical results. Petitioner argues (Br. 22 & n.11, 23 n.12; Pet. 28-29) that, in order to avoid the risk of being found in contempt, a creditor who is unsure about whether its claim is barred can seek a determination from the bankruptcy court before undertaking any collection action. Cf. *McComb*, 336 U.S. at 189. The existence of that alternative, however, provides no sound basis for the near-strict-liability approach that petitioner advocates for cases where the creditor elects to proceed in another forum instead.

The Bankruptcy Code identifies only three types of debts for which creditors are required to obtain an advance determination from the bankruptcy court that an exception to discharge applies before continuing collection efforts. See 11 U.S.C. 523(a)(2), (4), and (6). The other discharge exceptions are "self-executing," so that a creditor need not "obtain a judgment declaring the debt excepted from discharge" before seeking to collect.

In re Williams, 438 B.R. 679, 687 (B.A.P. 10th Cir. 2010); see *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 450 (2004) (describing the discharge exception in Section 523(a)(8) as "self-executing") (citation omitted). The Code contemplates that any disputes about the applicability to particular debts of these self-executing exceptions typically will be litigated in the collection action itself. See 28 U.S.C. 1334(b); Fed. R. Civ. P. 8(c)(1) advisory committee's note (2010 Amendment) ("The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or—in most instances—in another court with jurisdiction over the creditor's claim.").

The rule that petitioner advocates would create a strong incentive for creditors to seek advance judicial determinations from the bankruptcy court as to *all* claims they believe to be excepted from discharge, even when the exception at issue is self-executing under the terms of the Code. That approach would effectively override Congress's decision to require advance determination only under specified exceptions. It also would create undue delay and expense for all parties to the bankruptcy proceedings, and thereby thwart "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966) (citation omitted). That is particularly true for government creditors, for whom it would be infeasible to institute adversary proceedings for each debt they attempt to collect from individual debtors, especially as the individual debts often are quite small.

Such delay also would unduly hinder a creditor's legitimate efforts to collect non-discharged debts. Under

petitioner's rule, a creditor could not safely pursue a collection action until all appeals over dischargeability have been exhausted. As this case illustrates, that process could take years. Indeed, the limitations period for a suit to collect the debt could expire before a final judicial determination of dischargeability, thereby extinguishing the creditor's rights altogether. Petitioner's proposed rule thus would be unfair to creditors and would upset the Bankruptcy Code's careful balancing of debtor and creditor rights.

Petitioner's proposed rule would create a further anomaly as well. As the damages award in this case illustrates, the principal economic harm a debtor is likely to suffer from a violation of the discharge injunction is the attorney's fees he will incur in contesting the creditor's efforts to collect the relevant debt. Cf. *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978). Because respondents sought to litigate the dischargeability question in the state-court collection action, petitioner argues that he can recover his fees as a contempt sanction for respondents' purported violation of the discharge order. But if (as petitioner recommends) a creditor instead asks a bankruptcy court to render an advance determination that a particular debt is nondischargeable, and the debtor wishes to contest the point, the debtor is likely to incur substantially the same attorney's fees. And if the bankruptcy court finds that the debt has been discharged, the debtor generally will not be entitled to attorney's fees under the traditional "American Rule." See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975); cf. 11 U.S.C. 523(d) (requiring the creditor to pay the debtor's attorney's fees only if it unsuccessfully attempts to collect a debt under the

fraud exception to dischargeability in Section 523(a)(2), and only if its position is "not substantially justified").

Thus, if the Court adopted petitioner's proposed rule and future creditors responded by asking bankruptcy courts to render advance determinations as to the dischargeability of particular debts, debtors in petitioner's position still would suffer the same economic harm (attorney's fees incurred to litigate dischargeability) for which the contempt sanction in this case was intended to compensate. That regime would simply create an artificial incentive for creditors to litigate such issues in bankruptcy court rather than in other forums. Given Congress's decision to require advance determinations of dischargeability only with respect to three specified categories of debts (see pp. 26-27, *supra*), there is no reason to suppose that creation of such an incentive would further the purposes of the Bankruptcy Code.

D. The Court Should Vacate The Judgment Below And Remand The Case To Allow The Court Of Appeals To Apply The Correct Standard In The First Instance

The court of appeals held that respondents' "good faith belief" that their collection efforts were consistent with the discharge order, "even if unreasonable, insulated them from a finding of contempt." Pet. App. 13a. For the reasons set forth above, that holding was erroneous. In this as in other contexts where litigants request contempt sanctions for violations of injunctive orders, the propriety of such sanctions turns on whether there was an objective "fair ground of doubt" that the alleged contemnor's conduct was prohibited. The Court therefore should vacate the judgment below and remand the case so that the court of appeals can apply the correct standard.

Under that standard, and in light of the Ninth Circuit's prior decision in *In re Ybarra*, 424 F.3d 1018 (2005), cert. denied, 547 U.S. 1163 (2006), respondents may ultimately prevail by demonstrating an objectively fair ground of doubt about whether the discharge injunction prohibited their state-court collection efforts. In accordance with typical practice in Chapter 7 cases, the discharge order in petitioner's bankruptcy case stated that petitioner "shall be granted a discharge under § 727 of Title 11, United States Code," and it provided an "explanation of bankruptcy discharge in a Chapter 7 case" from Official Bankruptcy Form No. 18. 09-39216 Bankr. Ct. Doc. 15, at 1 (Feb. 23, 2010) (capitalization and emphasis omitted). The discharge order itself did not specify which of petitioner's debts was discharged.

The applicable statutory provisions likewise do not specifically address whether a discharge order like this one precludes efforts to collect the attorney's fees at issue here. Section 727 states that a discharge "discharges the debtor from all debts that arose before the date of the order for relief." 11 U.S.C. 727(b). Under *Ybarra*, attorney's fees incurred *after* the discharge order are not discharged if the debtor "return[s] to the fray" of litigation. 424 F.3d at 1026-1027; but see 11 U.S.C. 101(5)(A) (prepetition "claim" includes a "contingent" or "disputed" claim); 5 *Collier on Bankruptcy* ¶ 553.03[1][h][i], at 553-20 (16th ed. 2013) (attorney's fees incurred post-bankruptcy "in connection with * * * a prepetition claim" are themselves "prepetition in nature"). The first two courts to address the issue in this case (the state trial court and the bankruptcy court) held that petitioner had "returned to the fray," and that

the discharge injunction therefore did not prohibit respondents' attempts to collect post-discharge attorney's fees. Cf. *California Artificial Stone Paving*, 113 U.S. at 618 ("If the judges disagree there can be no judgment of contempt."). Objectively viewed, these circumstances may well lead the courts below to conclude that, at the time respondents initiated their collection efforts, there was at least a fair ground of doubt about whether the discharge injunction prohibited their actions. At a minimum, the bankruptcy court's imposition of punitive damages would seem to be in significant tension with the non-punitive purposes of civil contempt. See *Shillitani*, 384 U.S. at 369; *Gompers*, 221 U.S. at 441.

This Court has repeatedly emphasized, however, that it is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) (citation omitted). Because none of the courts below applied the correct legal standard in determining whether respondents could be subjected to contempt sanctions for violating the discharge order, they should be given the first opportunity to apply that standard to the circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
MARK B. STERN
SARAH CARROLL
THOMAS J. CLARK
PAUL A. ALLULIS
Attorneys

FEBRUARY 2019