No. 20-409

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL MARINO AND
VALERIE MARGARET MARINO,

Petitioners,

v.

OCWEN LOAN SERVICING, LLC,

Respondent.

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

BRIEF IN OPPOSITION TO CERTIORARI

Melissa C. Cassel
O'MELVENY & MYERS LLP
2 Embarcadero Center
San Francisco, CA 94111
(415) 984-8700

Anton Metlitsky
Counsel of Record
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

QUESTION PRESENTED

11 U.S.C. § 105(a) allows bankruptcy courts to issue "order[s] … that [are] necessary or appropriate to carry out the" Bankruptcy Code but does not reference attorney's fees. Federal Rule of Appellate Procedure 38 and Bankruptcy Rule 8020 specifically address appellate attorney's fees, permitting them only when an appeal is frivolous. The question presented is:

Whether § 105(a) allows a bankruptcy court to award appellate attorney's fees incurred by a debtor after a creditor appeals a discharge violation, even when the debtor cannot show that the creditor's appeal is frivolous.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

INTRODUCTION

This case presents the exceedingly narrow question whether 11 U.S.C. § 105(a)—a general Bankruptcy Code remedial provision that does not mention attorney's fees—allows a bankruptcy court to award appellate attorney's fees incurred by a debtor after a creditor appeals a discharge violation. Only one court of appeals has ever considered that question—once 25 years ago in *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996), and once in the decision below applying *Del Mission* as binding precedent. *Del Mission* held that § 105(a) does not authorize appellate attorney's fees in this circumstance because Fed. R. App. P. 38 and Bankruptcy Rule 8020 specifically instruct that appellate fees are permissible only when an appeal is frivolous. Even bankruptcy courts have considered the question presented only 8 times in the past 25 years, and most of them have followed *Del Mission*.

None of the ordinary grounds for this Court's review exists. The question presented implicates no circuit conflict and, indeed, barely ever arises at all. This petition, moreover, is a poor vehicle to consider the question because it arises in an interlocutory posture and further proceedings after remand could moot the issue altogether. Petitioners seem to understand all that, because, at bottom, their pitch for certiorari is that "the decision below is so obviously wrong." Pet. 8. But error-correction is no basis for this Court's intervention, and there is no error in any event: the court of appeals' unchallenged, quarter-century-old decision is correct.

The petition should be denied.

STATEMENT

A. Legal Background

1. Under "[t]he bedrock principle known as the American Rule," each "litigant pays his own attorney's fees, win or lose." *Baker Botts LLP v. ASARCO LLC*, 576 U.S. 121, 126 (2015) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010)). "The American Rule has roots in our common law reaching back to at least the 18th century." *Id.* Courts "recognize[] departures from the American Rule only in 'specific and explicit provisions for the allowance of attorneys' fees under selected statutes'" or rules. *Id.* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975)).

Fed. R. App. P. 38 represents one such departure. Rule 38 allows attorney's fee awards "[i]f a court of appeals determines that an appeal is frivolous." Fed. R. App. P. 38. The Federal Rules of Bankruptcy Procedure include a parallel provision, Rule 8020, which likewise allows attorney's fee awards "[i]f the district court or [Bankruptcy Appellate Panel (BAP)] determines that an appeal [from a bankruptcy court decision] is frivolous." Fed. R. Bankr. P. 8020(a).

2. This case involves a request for attorney's fees in a narrow bankruptcy context: a creditor's appeal from a discharge violation. "At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1799 (2019); *see* 11 U.S.C. § 727. "This order, known as a discharge order [or injunction], bars creditors from attempting to collect any debt covered

by the order." *Taggart*, 139 S. Ct. at 1799; *see* 11 U.S.C. § 524(a)(2). If a creditor attempts to collect a debt in violation of the discharge injunction, and "there [was] not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful," a bankruptcy court may "hold [the] creditor in civil contempt." *Taggart*, 139 S. Ct. at 1804.

This authority to issue civil-contempt sanctions does not derive from the text of 11 U.S.C. § 524(a)(2)'s discharge provision, which prescribes no remedy for discharge violations. But § 105(a) authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code, and courts have read § 524(a)(2) together with 11 U.S.C. § 105(a) to find that civil-contempt authority. *See In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006).

Courts have also ruled that, as part of the civil-contempt sanctions for a discharge violation, § 105(a) allows bankruptcy courts to award attorney's fees that debtors incur while securing the contempt order. *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). The apparent (though usually unexplained) justification for such attorney's fee awards is a narrow common-law exception to the American Rule. That exception allows courts to "assess attorney's fees for the willful disobedience of a court order"—here, the creditor's disobedience of the discharge injunction. *Alyeska*, 421 U.S. at 258 (quotation omitted).

Once a bankruptcy court issues sanctions for a creditor's willful disobedience of a discharge injunc-

tion, the American Rule resumes its normal operation. The American Rule thus applies when a creditor exercises its right to appeal from a bankruptcy court's finding that the creditor violated a discharge injunction. After all, "the mere act of taking an appeal from an order finding a violation of the discharge injunction" is not "a further violation of the discharge injunction." *In re Lapides*, 2016 WL 93527, at *2 (Bankr. D. Minn. 2016). And sanctions provisions like § 105(a) do not "shift the entire cost of litigation; they shift only the cost of a discrete event"—in this case, securing a contempt order. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 553 (1991).

Accordingly, the Ninth Circuit has long held that § 105(a) does not entitle a debtor to recover appellate attorney's fees when a creditor appeals from a bankruptcy court's discharge-violation contempt ruling. *See In re Del Mission Ltd.*, 98 F.3d 1147, 1154 (9th Cir. 1996). Any other conclusion, the Ninth Circuit has reasoned, would impermissibly prioritize § 105(a)'s general remedial provision over Fed. R. App. P. 38 and Bankruptcy Rule 8020's specific requirement that attorney's fees are available only for frivolous appeals. *Id.* Besides the Ninth Circuit, no court of appeals has ever addressed whether a debtor may recover appellate attorney's fees in these circumstances.

B. Factual Background

1. Petitioners Christopher and Valerie Marino owned a home located in Verdi, California. App. 2a.

Respondent Ocwen Loan Servicing[1] serviced the mortgage on their home. *Id.* After petitioners fell behind on their mortgage payments, they left their home and permitted Ocwen to foreclose on it. *Id.*

Petitioners then filed a Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the District of Nevada. App. 16a. Three months later, their debt was discharged. *Id.*

Following petitioners' discharge, Ocwen sent letters and made phone calls to petitioners about their former home. App. 3a. "The letters included account statements, notices regarding force-placed insurance, escrow statements, and other matters." App. 16a. Many of these letters included disclaimers stating that "if you received a [bankruptcy] discharge, please be advised that this notice is for information purposes only and is not an attempt to collect a pre-petition or discharged debt." App. 17a.

2. In response to Ocwen's communications, petitioners moved to reopen their bankruptcy case and hold Ocwen in contempt for an alleged violation of the discharge injunction. App. 17a. Petitioners' motion "only mentioned [Ocwen's] written correspondence." *Id.* n.3. Nonetheless, relying on both Ocwen's letters and phone calls, the bankruptcy court held that Ocwen violated the discharge injunction by supposedly attempting to collect petitioners' discharged debt. App. 44a. As sanctions, the court ordered

---

[1] Following the events at issue in this case, Ocwen Loan Servicing merged with, and is now known as, PHH Mortgage Corporation. For ease of reference, this brief refers to Ocwen.

Ocwen to pay petitioners $760 in actual damages and $119,000 in "emotional distress damages." *Id.* The court arrived at that $119,000 figure by multiplying the number of alleged contacts Ocwen had with petitioners (119) by $1,000. *Id.* 100 of those alleged 119 contacts were phone calls—which, again, petitioners had not mentioned in their motion. *Id.*

On top of the $119,760 in damages, the bankruptcy court awarded petitioners the "attorney fees and costs" they incurred in securing the contempt order. *Id.* It declined to impose punitive damages, concluding that it lacked legal authority to do so. *See* App. 24a.

Ocwen moved for reconsideration, providing a call log showing that Ocwen made 35 calls to petitioners during the relevant period—not the 100 calls that the bankruptcy court relied on when awarding damages. *See* App. 37a. But the bankruptcy court denied Ocwen's motion without any reasoning. App. 46a.

3. Ocwen appealed the bankruptcy court's order to the Bankruptcy Appellate Panel (BAP). App. 25a. Petitioners cross-appealed the bankruptcy court's ruling that it lacked authority to award punitive damages. *Id.*

a. As to Ocwen's appeal, the BAP held that the bankruptcy court did not err in finding that Ocwen had violated the discharge injunction. App. 29a. "Even if some of the notices may not have violated the discharge injunction," the BAP concluded that the bankruptcy court did not clearly err in finding "that the cumulative effect of all the letters demanding

money created the perception that [petitioners] needed to pay Ocwen." App. 32a.

The BAP also rejected Ocwen's argument that the bankruptcy court should not have considered Ocwen's phone calls to petitioners when awarding damages. App. 35a. The BAP recognized that "Ocwen is correct that [petitioners'] Motion for Contempt focused exclusively on the written correspondence." App. 36a. But because "Ocwen was on notice that [petitioners] sought sanctions for violation of the discharge injunction," the court believed that Ocwen "should reasonably have known that the trial could span all instances of improper contact with [petitioners]." *Id.*

Finally, the BAP held that the bankruptcy court's $119,000 emotional-distress damages award was "reasonable and supported by the evidence." App. 38a. According to the BAP, the bankruptcy court's decision to award $1,000 per instance that Ocwen allegedly contacted petitioners was not "arbitrary." App. 39a. The BAP also suggested that there is not even a requirement that "a compensatory award" be rational and non-arbitrary at all. *Id.* And it rejected the possibility that petitioners' emotional distress stemmed from their difficult bankruptcy—not from Ocwen's phone calls and letters "post-discharge." *Id.*

b. As to petitioners' cross-appeal, the BAP vacated and remanded the bankruptcy court's decision. App. 42a. The BAP held that "[t]he bankruptcy court misstated the law" when it concluded that it "lacked authority" to impose punitive damages. App. 40a. The BAP did "not hold that the bankruptcy court must award a fine or punitive damages." App. 41a. But it

"remand[ed] so that the bankruptcy court [could] consider whether to do so." *Id.*

4. Following the BAP's decision, petitioners moved for an award of $16,950 in appellate attorney's fees. App. 11a. The BAP rejected that motion. It first held that petitioners could not obtain appellate fees under Bankruptcy Rule 8020 because Ocwen's appeal was not frivolous. App. 12a. It then rejected petitioners' alternative argument that they were nonetheless entitled to appellate fees under 11 U.S.C. § 105(a). The BAP reasoned that the Ninth Circuit "has clearly said that discretionary appellate attorney's fees may not be awarded under 11 U.S.C. § 105 and must be awarded under the relevant rule." App. 12a. (citing *Del Mission*, 98 F.3d at 1154 & n.7).

5. Both parties then appealed the BAP's decisions to the Ninth Circuit. Ocwen sought review of the BAP's ruling affirming the discharge violation and emotional-distress damages, as well as its ruling vacating and remanding for the bankruptcy court to consider awarding punitive damages. App. 3a. Petitioners sought review of the BAP's denial of appellate attorney's fees. *Id.*

a. The Ninth Circuit first dismissed Ocwen's appeal for lack of jurisdiction. App. 7a. The court held that the BAP's decision was not a final and appealable order because the BAP had remanded for further proceedings on punitive damages. App. 5a-7a. The court therefore never addressed whether the bankruptcy court erred in finding a discharge violation—meaning that Ocwen can again raise that issue if and when the case "climb[s] back up the appellate ladder." App. 5a.

b. The Ninth Circuit then considered petitioners' appeal. Like the BAP, the Ninth Circuit first held that because Ocwen's "appeal was not frivolous," petitioners could not satisfy Fed. R. App. P. 38 or Bankruptcy Rule 8020. App. 8a. Then, relying on *Del Mission*, the court held that petitioners could not circumvent those specific rules governing appellate attorney's fees through § 105(a)'s general remedial provision. *Id.*

6. The panel denied rehearing and rehearing en banc. App. 48a. No Ninth Circuit judge requested a vote on whether to rehear the case en banc. *Id.*

The petition followed.

REASONS FOR DENYING THE PETITION

Petitioners offer no plausible basis for this Court's review. There is no circuit conflict on the question presented; petitioners do not even attempt to allege one. In fact, only two court of appeals decisions have ever been issued on the question—a 25-year-old Ninth Circuit decision and the decision below from the same court. This petition is a poor vehicle through which to consider this splitless, rarely-arising question. And the decision below is correct. The petition should be denied.

A. There Is No Circuit Conflict Over The Question Presented

1. a. Petitioners do not allege a circuit conflict over the question presented, *viz.*, whether a bankruptcy court has the authority under § 105(a) to award appellate attorney's fees incurred by a debtor after a creditor appeals a discharge violation. In fact, only

two court of appeals decisions have ever addressed the question, both from the Ninth Circuit, 25 years apart.

The first was *In re Del Mission*, 98 F.3d 1147 (9th Cir. 1996), where the Ninth Circuit held that § 105(a) does not authorize appellate attorney's fee awards after discharge violations, and that such awards are instead available only if the appellee can demonstrate frivolousness under Fed. R. App. P. 38 or Bankruptcy Rule 8020. *Id.* at 1154. The second was the decision below, applying *Del Mission*.

In fact, published court of appeals decisions outside the Ninth Circuit have only even *cited Del Mission* five times total in the past decade-and-a-half. Four of those cases cited *Del Mission* for propositions unrelated to the fees issue here.[2] And the one case that did involve attorney's fees case did not address a creditor's appeal from a discharge violation; it instead addressed "an appeal from the dismissal of an involuntary bankruptcy petition." *See In re Rosenberg*, 779 F.3d 1254, 1265 (11th Cir. 2015). Such an appeal presents a distinct issue because the governing Code provision—unlike § 105(a)—*expressly* mentions "a reasonable attorney's fee." *Id.* at 1264 (quoting 11 U.S.C. § 303(i)(1)). The Eleventh Circuit distinguished *Del Mission* on that basis. *See id.* at 1265 n.7 (noting that *Del Mission* "did not involve the dismissal of an involuntary petition but rather appellate fees awarded as

---

[2] *See In re Denby-Peterson*, 941 F.3d 115, 121 n.13 (3d Cir. 2019); *In re Fulton*, 926 F.3d 916, 923, 925 (7th Cir. 2019); *In re Cowen*, 849 F.3d 943, 948 (10th Cir. 2017); *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 702 (7th Cir. 2009).

contempt sanctions under 11 U.S.C. § 105(a)"). But neither that court nor any other appellate court outside the Ninth Circuit has considered, let alone determined, whether § 105(a) authorizes an attorney's fee award for an appeal of a discharge violation.

b. Petitioners do cite several bankruptcy-court decisions considering the question presented. Even if there were a conflict between bankruptcy courts on the question presented, the district courts and courts of appeals could resolve it without this Court's intervention. But if anything, the bankruptcy-court landscape only demonstrates how rarely the question presented arises.

Ocwen has identified just eight bankruptcy-court decisions from outside the Ninth Circuit addressing *Del Mission*'s appellate attorney's fees holding. And the majority of those decisions *agree* with that holding. *See Lapides*, 2016 WL 93527, at *3-4; *In re Brown*, 2009 WL 10633429, at *9-10 (Bankr. M.D. Fla. 2009); *In re Clay*, 334 B.R. 623, 626 (C.D. Ill. 2005); *In re Law Ctr.*, 304 B.R. 136, 139-40 (Bankr. M.D. Pa. 2003); *In re Allen-Main Assocs., Ltd. P'ship*, 229 B.R. 577, 578 (Bankr. D. Conn. 1999).

Petitioners cite three bankruptcy-court decisions that arguably question *Del Mission*'s logic. Pet. 9 (citing *In re Rodriguez*, 517 B.R. 724, 738-39 (Bankr. S.D. Tex. 2014)); *id.* at 15 n.5 (citing *In re John Richards Homes Bldg. Co.*, 405 B.R. 192, 215-17 (Bankr. E.D. Mich. 2009)); *id.* at 17 (citing *In re Lopez*, 576 B.R. 84 (Bankr. S.D. Tex. 2017)). But two of those decisions were issued by the same bankruptcy court from the Southern District of Texas, with *Lopez* simply following *Rodriguez* absent independent analysis. *See*

Lopez, 576 B.R. at 96. And none of the three decisions involved an appeal from a discharge violation—the only issue here. *See id*. at 91 (appeal from discovery violation); *Rodriguez*, 517 B.R. at 739 (appeal from class-certification order); *John Richards*, 405 B.R. at 217 ("proceedings arising out of the filing of an involuntary [bankruptcy] petition").[3]

c. Petitioners also cite two unpublished court of appeals decisions addressing a separate issue: whether a debtor may recover appellate attorney's fees when a creditor appeals from a violation of the automatic stay that protects debtors in bankruptcy proceedings. Pet. 16 (citing *In re Horne*, 630 F. App'x 908 (11th Cir. 2015) (unpublished); *Liberis v. Craig*, 845 F.2d 326 (6th Cir. 1988) (unpublished)). Neither decision references *Del Mission*, much less disagrees with the Ninth Circuit's rule that, in the very different context of creditor appeals from *discharge* violations, § 105(a) cannot override the specific authorities in Fed. R. App. P. 38 and Bankruptcy Rule 8020.

Indeed, automatic-stay violations are critically different from discharge violations. As the Eleventh Circuit's decision in *Horne* explains, under the Code's un-

---

[3] Petitioners' cited decisions that do not address *Del Mission*'s holding are even less relevant. None involved an appeal from a discharge violation or considered the relationship between § 105(a) and Fed. R. App. P. 38 or Bankruptcy Rule 8020. *See In re Markus*, 619 B.R. 552, 573-74 (Bankr. S.D.N.Y. 2020) (violation of discovery order); *In re Van Winkle*, 598 B.R. 297, 302 (Bankr. D.N.M. 2019) (violation of stipulated order to avoid judicial lien); *Williamson v. Recovery Ltd. P'Ship*, 2017 WL 1196147, at *1 (S.D. Ohio 2017) (violation of consent order).

ambiguous terms, "an award of attorney's fees is mandatory for a stay violation." 630 F. App'x at 912; *see* 11 U.S.C. § 362(k)(1)) ("an individual injured by any willful violation of a stay provided by this section *shall* recover actual damages, including costs and *attorneys' fees*" (emphasis added)). *Del Mission* expressly distinguished the automatic-stay provision from § 105(a) on this ground. *See* 98 F.3d at 1154 n.7 ("We do not consider whether … § 362(h) [the 1996 version of the automatic-stay provision] may provide for a mandatory award of appellate fees.").

2. Unable to allege a circuit split on the question presented, petitioners assert two purported methodological disputes between the Ninth Circuit and other circuits. Those disputes do not exist and would not warrant this Court's intervention in any event.

a. Petitioners first contend that the Ninth Circuit "declared an implied repeal" of § 105(a) in circumstances where other circuits "presumably would have come out the other way." Pet. 10. But petitioners' premise is flawed: *Del Mission* does not "declare[] an implied repeal." Rather, *Del Mission* recognizes that specific provisions addressing appellate attorney's fees in Fed. R. App. P. 38 and Bankruptcy Rule 8020 take priority over § 105(a)'s general terms. *See* 98 F.3d at 1154. That is not an implied repeal. *See, e.g.*, *Strawser v. Atkins*, 290 F.3d 720, 733 (4th Cir. 2002) (distinguishing application of the specific-controls-general canon from a "repeal by implication"). Petitioners' cited cases, by contrast, expressly addressed "whether one [provision] implicitly repeals the other." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004); *see Simon v. FIA Card Servs., N.A.*, 732 F.3d

259, 274 (3d Cir. 2013) (applying the "presumption against the implied repeal of one federal statute by another"). When (unlike in *Del Mission*) the Ninth Circuit does apply the implied-repeals canon, it employs the same test as the Seventh and Third Circuits. *See, e.g.*, *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1070 (9th Cir. 2010).

Even if *Del Mission* had involved an implied repeal, there would still be no circuit conflict warranting this Court's review. After all, *Randolph* and *Simon* involved an entirely distinct statutory question: whether 11 U.S.C. § 362 (a Bankruptcy Code provision) displaces 15 U.S.C. § 1692e(2)(A) (a Fair Debt Collections Practices Act provision). *Randolph*, 368 F.3d at 730; *Simon*, 732 F.3d at 274. The Seventh and Third Circuits' answers to that question say nothing about how those courts would decide the question here. That is why this Court customarily awaits concrete conflicts over the meaning and application of particular statutory provisions, rather than weighing in on abstract (and, in this case, nonexistent) methodological disputes.

b. Petitioners next contend that *Del Mission* is inconsistent "with general contempt principles applied in other courts" outside the bankruptcy context. Pet. 17. But the cases petitioners cite simply have nothing to do with the question their petition actually presents, i.e., the interaction between § 105(a) of the Bankruptcy Code, on the one hand, and Appellate Rule 38 and Bankruptcy Rule 8020, on the other. *See* Pet. (I); *id.* at 3-4. Indeed, these cases involve neither the Bankruptcy Code nor Rule 38's frivolity require-

ment, and thus could not possibly bear on the question presented. *See Weitzman v. Stein*, 98 F.3d 717, 718-20 (2d Cir. 1996) (addressing attorney's fees after party violated court "order to seize a car"); *Shauffler v. United Ass'n of Journeymen*, 246 F.2d 867, 870 (3d Cir. 1957) (addressing attorney's fees after party violated anti-strike injunction); *Ohr v. Latino Express, Inc.*, 2015 WL 13000252, at *3 (N.D. Ill. 2015) (addressing attorney's fees after party violated injunction obtained by National Labor Relations Board).

3. Finally, petitioners allege an *intra*-circuit conflict between *Del Mission* and two other Ninth Circuit decisions. *See* Pet. 11 (citing *In re Schwartz-Tallard*, 803 F.3d 1095, 1101 (9th Cir. 2015) (en banc); *Voice v. Stormans, Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014)). The conflict does not exist. *Schwartz-Tallard* involved the distinct automatic-stay issue discussed above, *see supra* at 13, and the court relied on 11 U.S.C. § 362(k)'s express language (conspicuously absent in § 105(a)) "mak[ing] an award of … attorney's fees mandatory." 803 F.3d at 1099. *Voice* is even further afield: it involved attorney's fees "under Federal Rule of Civil Procedure 45(d)(2)(B)(ii)" for "complying with [a] subpoena duces tecum," and simply noted that "*generally*"—though not always—"a party that is entitled to an award of attorneys' fees in the district court is also entitled to an award of attorneys' fees on appeal." 757 F.3d at 1016 (emphasis added). Regardless, if an intra-circuit dispute ever did develop on the question presented, the Ninth Circuit could (and presumably would) resolve it without this Court's intervention.

B. The Question Presented Is Neither Recurring Nor Important

The petition should also be denied because the question presented rarely arises, and thus lacks sufficient importance to warrant this Court's attention.

1. The question presented rarely arises—as shown in the previous Section, in the past 25 years, only one court of appeals[4] and eight bankruptcy courts have considered the question. That is not surprising. The question raised in the petition is quite narrow: whether "under 11 U.S.C. 105(a), debtors may recover attorney's fees incurred on appeal to remedy a discharge violation." Pet. i. And it will only arise when three conditions are simultaneously met—which almost never happens.

First, a bankruptcy court must find that a creditor has violated a discharge injunction. But discharge violations are few and far between. U.S. Bankruptcy Courts recorded only 23 instances in which a creditor was fined for "misconduct" in a consumer case closed in 2019.[5] Because the category of creditor "misconduct" includes not only discharge violations but also various other behaviors like willful automatic-stay violations, the number of discharge violations may have been even less than 23.

---

[4] The question presented has also arisen once before the Ninth Circuit BAP. *See In re Wallace*, 2014 WL 5438826, at *3 (B.A.P. 9th Cir. 2014).

[5] *See* 2019 Report of Statistics Required By the Bankruptcy Abuse and Consumer Protection Act of 2005, U.S. Courts, https://www.uscourts.gov/statistics-reports/bapcpa-report-2019.

Second, even if a bankruptcy court finds that a creditor has violated a discharge injunction, the question presented can arise only if the creditor chooses to appeal that finding. But even petitioners admit that "[f]ew litigants find enough at stake to litigate in bankruptcy court and continue all the way through the appellate process." Pet. 20. And statistics show that the number of bankruptcy appeals fell 11% in 2020 and has fallen 21.9% since 2016.[6] This case is an outlier in which the bankruptcy court's extraordinary $119,000 emotional-distress damages award prompted Ocwen's appeal. *See supra* at 6.

Third, even if a creditor does appeal, appellate attorney's fees would not be warranted unless the debtor were to prevail on appeal—which is certainly not a guarantee.

The foregoing conditions will seldom be met in a single case, which is presumably why judicial decisions have so rarely addressed the question presented.

2. Petitioners nonetheless gamely argue that "[t]he question presented is of great legal and practical importance." Pet. 18. Not so.

First, petitioners contend that Ninth Circuit's rule "debilitates" the Code's debtor protections. Pet. 18. Yet petitioners do not explain how a rule that courts

---

[6] *See* Federal Judicial Caseload Statistics 2020, U.S. Courts, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020.

so rarely invoke could have such a powerful effect, especially when everyone agrees that attorney's fees *can* be granted for frivolous creditor appeals.

Second, petitioners maintain that review is "essential" to ensuring the Code's "uniform[]" administration. Pet. 19-20. It is of course true that uniformity in bankruptcy administration is essential, but the lack of any circuit conflict demonstrates that there is no disuniformity here.

Third, petitioners worry that the Court may not "find another opportunity to correct the Ninth Circuit's mistake." Pet. 20. The Ninth Circuit made no "mistake" in need of correction. *See infra* Section D. Even if it did, this Court does not normally correct splitless errors, especially over questions that barely ever arise. If a circuit conflict ever does develop on this issue, the Court could grant review in the case that creates the conflict.

C. This Case Is An Unsuitable Vehicle For Considering The Question Presented

1. Even if the question presented were certworthy in theory, this case is a poor vehicle in light of its interlocutory posture. *See* Robert Stern & Eugene Gressman, Supreme Court Practice, Ch. 4, § 4.18; *see, e.g.*, *NFL v. Ninth Inning, Inc.*, 2020 WL 6385695, at *1 (U.S. 2020) (Kavanaugh, J., statement respecting denial of certiorari) ("[T]he interlocutory posture is a factor counseling against this Court's review.").

The case is interlocutory because while the Ninth Circuit considered the question presented on petitioners' cross-appeal, it has not ruled on the merits of Ocwen's appeal. Instead, the court held that it lacked

appellate jurisdiction over the bankruptcy court's discharge-violation finding and damages award because damages questions still remained for the bankruptcy court to consider on remand. App. 5a-7a. Once the bankruptcy court considers those questions—*viz.*, "whether to … award a fine or punitive damages," App. 5a (internal quotation marks omitted)—the parties will "almost certainly climb back up the appellate ladder" to the BAP, and then to the court of appeals, *id.* And if Ocwen's merits appeal does return to the Ninth Circuit, Ocwen may well prevail, in which case any issue about appellate attorney's fees would become moot—if Ocwen is the prevailing party, there obviously would no longer be a valid discharge violation or a question about attorney's fees. Pet. 11 (hinging attorney's fees argument on the debtor's successful "prosecut[ion of] a discharge violation" and "protect[ion]" of "identical rights … at the appellate level"). This Court should not grant certiorari to decide an issue that could well become moot—especially in the absence of a circuit conflict.

2. Even setting aside the potential mootness problem, granting review in this interlocutory posture would short-circuit the Ninth Circuit's en banc process. During the likely second round of appellate review described above, petitioners' appellate attorney's fees would accumulate. If petitioners were to prevail before the BAP and Ninth Circuit, they would surely reassert an entitlement to those fees. While a Ninth Circuit panel would be bound by *Del Mission* to deny that request, petitioners could seek en banc review. The Ninth Circuit could then consider for itself—in

the context of a case that had reached final judgment—whether to revisit *Del Mission*. Accordingly, petitioners' assertion that "this Court alone can correct" the Ninth Circuit's decision, Pet. 12, is wrong. If the Ninth Circuit believed that *Del Mission* were wrongly decided, the court could reconsider it later in this very case—and should be afforded the opportunity to do so before this Court intervenes.

D. The Decision Below Is Correct

None of the ordinary indicia of certworthiness are evident here—no circuit split, no recurring question, no final judgment—so petitioner is forced to admit that "certiorari is primarily warranted because the decision below is so obviously wrong." Pet. 8. Again, pure error correction is no basis for certiorari. But the decision below is correct in any event: the American Rule, settled interpretive canons, and this Court's precedent all compel the conclusion that § 105(a) does not entitle petitioners to appellate attorney's fees.

1. a. In any case about the propriety of an attorney's fee award, the starting point is the "bedrock" American Rule that "[e]ach litigant pays his own attorney's fees." *Baker Botts*, 576 U.S. at 126 (quoting *Hardt*, 560 U.S. at 252-53). This Court has "recognized departures from the American Rule only in 'specific and explicit provisions for the allowance of attorneys' fees under selected statutes.'" *Id.* (quoting *Alyeska*, 421 U.S. at 260). To achieve the level of "clarity" required to overcome the American Rule, a provision must generally "authorize the award of 'a reasonable attorney's fee,' 'fees,' or 'litigation costs,' and usually refer to a 'prevailing party.'" *Id.* (internal quotation marks omitted).

Under the American Rule, this case is straightforward. Petitioners base their attorney's fees request on 11 U.S.C. § 105(a). Pet. 3. But § 105(a) lacks the clear statement necessary to surmount the American Rule. It does not mention "attorneys' fees," "fees," "litigation costs," or "prevailing parties." Rather, it simply allows bankruptcy courts to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). That sort of general, formulaic language does not suffice—especially since "other provisions of the Bankruptcy Code expressly transfer the costs of litigation from one adversarial party to another," showing that Congress "easily could have done so" in § 105(a) had it intended that result. *Baker Botts*, 576 U.S. at 129. Indeed, in *Baker Botts*, this Court held that a Code provision referring to both "compensation" and "attorney[s]" could not "displace the American Rule." *Id.* at 128. The same result follows *a fortiori* here.

b. Recognizing that § 105(a)'s general terms cannot overcome the American Rule, petitioners argue that the American Rule does not apply. According to them, this case falls within an exception to the American Rule for "acts in 'willful disobedience of a court order.'" Pet. 15 (quoting *Alyeska*, 421 U.S. at 258-59).[7]

---

[7] Petitioners erroneously state that when this exception applies, "courts *must* permit fees 'unless forbidden by Congress.'" Pet. 15 (quoting *Alyeska*, 421 U.S. at 258) (emphasis added). In fact, the exception simply gives courts discretion to award fees if they so choose. *See Alyeska*, 421 U.S. at 258 ("a court *may* assess attorneys' fees for the willful disobedience of a court order" (emphasis added)).

But that "exception[] to the American Rule ha[s] [no] application whatsoever" when a creditor *appeals* a discharge-violation and contempt ruling. *Lapides*, 2016 WL 93527, at *4 n.8. "[T]he mere act of taking an appeal from an order finding a violation of the discharge injunction"—which the creditor "ha[s] a clear, legal right to [do]"—cannot reasonably be characterized as "a further violation of the discharge injunction, absent some other indicia of bad faith." *Id.* at *2, *4; *accord Clay*, 334 B.R. at 626 (creditor's "appeal of [a] prior contempt order" did not "constitute[] further contempt which would be punishable by further sanctions"). That is particularly true here, since petitioners themselves *cross-appealed* the bankruptcy court's decision in this case, App. 40a, making "it somewhat disingenuous for [them] to attempt to attach some nefarious character to [Ocwen's] appeal," *Lapides*, 2016 WL 93527, at *2 n.7. Because a creditor's appeal of a discharge-violation and contempt ruling does not itself amount to "willful disobedience of a court order," *Alyeska*, 421 U.S. at 258-59 (quotation omitted), petitioners cannot escape the American Rule.[8]

---

[8] This does not necessarily mean that the American Rule, as opposed to the common-law exception, also applies when a bankruptcy court issues a contempt order in the first place (a question the Court would not need to decide in this case). The only issue here is whether a creditor's appeal constitutes "*further* contempt" that can "be punishable by *further* sanctions." *Clay*, 334 B.R. at 626 (emphasis added); *see Bus. Guides*, 498 U.S. at 553 (holding that sanctions provisions like § 105(a) "shift only the cost of a discrete event"—here, the discharge violation—not "the entire cost of litigation").

2. Even without the American Rule's presumption against attorney's fee awards, petitioners would not be entitled to appellate fees here. Fed. R. App. P. 38 speaks directly to the circumstances in which appellate fees are permitted: "If a court of appeals determines that an appeal is frivolous." Likewise, Bankruptcy Rule 8020 allows appellate fees only "[i]f the district court or BAP determines that an appeal [from a bankruptcy-court decision] is frivolous." In this case, both the BAP and Ninth Circuit held that Ocwen's appeal was *not* frivolous. App. 8a, 11a-12a. Petitioners do not dispute that conclusion.

These specific rules take precedence over § 105(a), a remedial provision that says nothing about attorney's fees and could hardly speak in more general terms: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Code. 11 U.S.C. § 105(a). As this Court has held, § 105(a)'s "general authority" is necessarily "limited by more specific provisions" in other statutes and rules. *Law v. Siegel*, 571 U.S. 415, 421 n.1 (2014). This "is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere." *Id.* at 421.[9]

---

[9] *Law* shows that the specific-controls-the-general canon governs where, as here, the question is whether a specific provision limits § 105(a)'s general terms. Petitioners' cited cases applying the implied-repeals canon all arose outside the § 105(a) context and are thus inapposite. *See* Pet. 9 (citing *Nat'l Ass'n of Home Builders v. Def. of Wildlife*, 551 U.S. 644, 662 (2007); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001)).

Application of that axiom here makes clear that § 105(a) does not authorize appellate attorney's fee awards when a creditor appeals a discharge violation. Even if § 105(a)'s general terms ("any order … that is necessary or appropriate") could otherwise plausibly cover appellate attorney's fees, those terms are "limited by" the "more specific provisions" in Rules 38 and 8020. *Id.* at 421 n.1. As this Court has recognized in other statutory schemes, general phrases using the word "any" may be narrowed by "context." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 320 (2014). *Contra* Pet. 12.

Contrary to petitioners' submission, this construction does not "override" § 105(a) or render it "[in]effective." Pet. 9. Rather, construing § 105(a)'s general terms in light of Rule 38's and Rule 8020's targeted language simply adheres to the Court's instruction to read all relevant provisions not "in isolation, but in the context of the *corpus juris* of which they are a part." *Branch v. Smith*, 538 U.S. 254, 281 (2003). Under that proper contextual view, a debtor "cannot circumvent established procedural rules to recover his appellate attorneys' fees" through § 105(a). *Brown*, 2009 WL 10633429, at *9.

This Court reached a similar conclusion in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). There, the Court held that parties are not entitled to appellate attorney's fees incurred in defending a district court's Rule 11 sanctions award absent a showing of frivolity. *Id.* at 406-09. Although Rule 11's terms (allowing a "reasonable attorney's fee" if "incurred because of the [baseless] filing," *id.* at 406) could plausibly apply to appeals, the Court reasoned that "[t]he

Federal Rules of Appellate Procedure place a natural limit on Rule 11's scope." *Id.* at 407. The contrary reading would authorize appellate attorney's fees "even when the appeal would not be sanctioned under the appellate rules." *Id.* "To avoid this somewhat anomalous result," the Court concluded that "Rules 11 and 38 are better read together as allowing expenses incurred on appeal to be shifted onto appellants only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal can ultimately be traced to a baseless filing in district court." *Id.*

The same logic applies here. Rules 38 and 8020 "place a natural limit" on § 105(a)'s "scope," just as Rule 38 does with Rule 11. *Id.* And § 105(a) should be construed to avoid the "anomalous result" of allowing appellate attorney's fees absent a showing of frivolity. *Id.* That a contempt order "upheld on appeal can ultimately be traced to" a creditor's discharge violation is insufficient to justify appellate fees. *Id.*[10]

3. Petitioners' contrary arguments lack merit.

---

[10] Petitioners passingly suggest (Pet. 10 n.3) that the scope of a statutory provision like § 105(a) cannot be limited by nonstatutory rules like Fed. R. App. P. 38 or Bankruptcy Rule 8020. But because these rules "represent[] a valid exercise of Congress' rulemaking authority, which originates in the Constitution," *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4 (1987), their commands naturally bear on the meaning of other congressional enactments (like § 105(a)). Petitioners' only cited authority simply stands for the unrelated proposition that nonstatutory rules cannot limit federal-court jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 210-11 (2007).

a. Petitioners contend that the Ninth Circuit's decision "reverses the default presumption that attorney's fees are authorized on appeal if attorney's fees are authorized below." Pet. 10. But this Court has never recognized any "default presumption" that the availability of attorney's fees in the district court leads to the availability of attorney's fees on appeal. And to the extent such a default presumption exists, it applies only to "fee-shifting provisions," not "sanctions [provisions]." *In re S. Cal. Sunbelt Dev., Inc.*, 608 F.3d 456, 462 (9th Cir. 2010); *see Rosenberg*, 779 F.3d at 1266 (relying on "the distinction between fee-shifting and sanctions provisions"). In *Commissioner v. Jean*, 496 U.S. 154 (1990)—the only case from this Court that petitioners cite on this issue—the Court held that the Equal Access to Justice Act's express "fee-shifting" provision "provide[s] compensation for all aspects of fee litigation." *Id.* at 162 (emphasis added).[11] By contrast, in *Cooter & Gell*, the Court held that Rule 11's sanctions provision allows attorney's fees in district court, but *not* on appeal. 496 U.S. at 407-08. The Court reasoned that sanctions provisions do not express clear congressional intent to

---

[11] All but one of petitioners' cited court of appeals decisions (Pet. 11-12) also involved fee-shifting provisions, not sanctions provisions. *See In re Horne*, 876 F.3d 1076, 1082 (11th Cir. 2017) ("fee-shifting statute[]"); *Schwartz-Tallard*, 803 F.3d at 1099 ("explicit[]" fee-shifting provision "that deviate[s] from the American Rule"); *Anchondo v. Anderson, Crenshaw & Assocs., LLC*, 616 F.3d 1098, 1107 (10th Cir. 2010) ("fee-shifting provision[]"). The lone exception is the Ninth Circuit's decision in *Voice*, but the court there cited only fee-shifting cases and did not consider the distinction between sanctions and fee-shifting provisions. *See* 757 F.3d at 1016-17.

override the American Rule, so "the policies for allowing district courts to require the losing party to pay appellate, as well as district court attorney's fees, are not applicable." *Id.* at 409.

Section 105(a) is a sanctions provision. *See Zilog*, 450 F.3d at 1007 ("[a] party who knowingly violates the discharge injunction" may face "contempt sanctions" under "section 105(a)"). It is not a fee-shifting provision because it does not use fee-shifting language, *see supra* at 3, and creates "no entitlement to fees," *Cooter & Gell*, 496 U.S. at 409; *see Bus. Guides*, 498 U.S. at 553 (similar). Accordingly, the presumption petitioners invoke does not apply here.

b. Petitioners next rely on 11 U.S.C. § 362(k)'s "parallel context" authorizing "remedies for automatic-stay violations." Pet. 14. But that provision supports Ocwen's position, not petitioners'. As noted above, § 362(k) *expressly mandates* "actual damages, including costs and attorneys' fees" for debtors "injured by any willful violation of [the automatic] stay." 11 U.S.C. § 362(k)(1). This provision thus shows that if Congress had "wished to shift the burdens" for debtors injured by discharge violations "in a similar manner, it easily could have done so." *Baker Botts*, 576 U.S. at 129. Yet neither § 524's discharge provision nor § 105(a)'s remedial provision says anything about shifting attorney's fees. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted).

Inverting this established canon, petitioners contend that because the "indistinguishable setting" of "Section 362(k) allows full fee recovery," so too must §§ 524 and 105(a). Pet. 15; *see id.* at 19. But this Court recently rejected petitioners' premise that automatic stays and discharges are indistinguishable, explaining that § 362(k)'s language "differs from the more general language in section 105(a)," and "[t]he purposes of automatic stays and discharge orders also differ." *Taggart*, 139 S. Ct. at 1804. Moreover, petitioners' only authority (Pet. 14) for their novel rule is two cases that rely on "comparable express causes of action" when *declining* to extend *judge-made* causes of action. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975); *see Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (plurality). Petitioners do not explain how those cases could apply in this statutory context, when one provision (§ 362(k)) expressly includes a fee-shifting remedy while another provision in the same statute (§ 105(a)) does not. The only plausible inference is that Congress intended these very different provisions to be construed differently.

c. Finally, petitioners rely heavily on policy-based arguments. These arguments reduce to the idea that debtors should be entitled to appellate attorney's fees in order to make them whole and ensure that they receive the fresh start that the Bankruptcy Code envisions. *See* Pet. 13-16 & n.5; *id.* at 18-19. Ocwen fully recognizes the importance of affording debtors the ability to "rebuild from financial misfortune." Pet. 18. But for multiple reasons, policy arguments do not justify petitioners' proposed rule here.

First, petitioners' position contradicts the countervailing "policy of not discouraging meritorious appeals." *Cooter & Gell*, 496 U.S. at 408. "If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to" discharge-violation decisions "would be discouraged." *Id.* Congress did not intend the Code's debtor protections to unduly "chill [creditors'] right to appeal." *Lapides*, 2016 WL 93527, at *4. Petitioners' reading would risk "alter[ing] the balance struck by the statute." *Law*, 571 U.S. at 427.

Second, the narrow issue in this case has little bearing on whether debtors are able to obtain a "fresh start" after bankruptcy. Pet. 3. Under the Ninth Circuit's decision, a debtor still will have the protection of the discharge injunction itself, as well as any damages and attorney's fees awarded by the bankruptcy court as part of its contempt sanctions. This case relates *only* to appellate attorney's fees. And those appellate fees will generally be minimal in comparison to the other damages and fees the debtor has recovered. Here, for instance, the bankruptcy court awarded petitioners $119,760 in damages, plus attorney's fees for securing the discharge-violation and contempt order, and it may still award punitive damages on remand. App. 44a. Petitioners' appellate fees, meanwhile, were only $16,950. App. 11a. And of course, in some cases (though not this one), debtors will recover appellate attorney's fees because a creditor's appeal is frivolous. *See, e.g.*, *In re Moo Jeong*, 2020 WL 1277575, at *8 (B.A.P. 9th Cir. 2020). Overall, then, petitioners' concerns about "securing a

debtor's fresh start," Pet. 4—while valid in the abstract—are not particularly compelling here, and certainly do not warrant chilling appellate rights absent clear congressional intent.

Third, similar policy concerns are frequently raised in cases about attorney's fees, and this Court has consistently rejected them as "a natural concomitant of the American Rule." *Cooter & Gell*, 496 U.S. at 408. "Even assuming that attorney's fees are necessary to achieve full compensation," the Court has made clear, "this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority." *Summit Valley Indus. Inc. v. Local 112*, 456 U.S. 717, 724 (1982). Petitioners' argument, in other words, is "nothing more than a 'restate[ment] of one of the oft-repeated criticisms of the American Rule.'" *Id.* at 725.

The American Rule carries no less force in the bankruptcy context. In *Baker Botts*, the Court rejected "policy-oriented predictions" about how applying the American Rule would affect bankruptcy proceedings, explaining that it lacked "roving authority to allow counsel fees whenever [it] might deem them warranted." 576 U.S. at 134-35 (internal quotation marks omitted). "[The Court's] unwillingness to soften the import of Congress' chosen words even if [it] believe[s] the words lead to a harsh outcome is longstanding,' and that is no less true in bankruptcy than it is elsewhere." *Baker Botts*, 576 U.S. at 134 (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004)). Because Congress did not expressly authorize attorney's fee awards for debtors after a creditor

appeals from a discharge violation, such fees are unavailable, as the court below correctly held.

CONCLUSION

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

Respectfully submitted,

Melissa C. Cassel
O'MELVENY & MYERS LLP
2 Embarcadero Center
San Francisco, CA 94111
(415) 984-8700

Anton Metlitsky
Counsel of Record
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com

January 26, 2021