No. 20-409

In the Supreme Court of the United States

CHRISTOPHER MICHAEL MARINO AND VALERIE MARGARET MARINO, PETITIONERS

v.

OCWEN LOAN SERVICING, LLC

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

REPLY BRIEF FOR THE PETITIONER

CHRISTOPHER P. BURKE
702 Plumas St.
Reno, NV 89509

CHRISTINA L. HENRY
HENRY & DEGRAAFF, P.S.
787 Maynard Ave. S.
Seattle, WA 98104

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE & JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

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As the petition established, this case presents an important and recurring question of bankruptcy law that has divided the lower courts: whether debtors may recover their appellate fees in remedying a discharge violation.

Respondent's opposition is a well-crafted exercise in misdirection. It tries to dodge the conflict by refocusing the question at the wrong level of generality. It says the question "rarely" arises and is not important even when it does—two points incompatible with judicial experience and common sense. It suggests the case is a poor vehicle because it is interlocutory—even though *the fee question is undeniably final*. And it argues that the Ninth Circuit is right on the merits, which only highlights the well-developed arguments on each side of this critical legal question.

In the end, nothing respondent says can change the obvious. It is astounding that there is not a clear answer to this pure legal question. It involves one of the most important practical elements of a discharge appeal—and it is fundamental to a debtor's ability to protect his or her core rights. The lower courts are squarely divided over the question, and the Ninth Circuit's holding is impossible to square with the decisions of other circuits—which hold that appellate fees are plainly authorized when enforcing or remedying the violation of an injunction (*i.e.*, the exact contempt principles that apply "straightforwardly" in the discharge context).

Discharge-related litigation is not going away, and courts will continue to divide over this fundamental question until this Court intervenes. And delay will only jeopardize debtors' rights—while wasting the time of parties and courts alike in sorting out an important question that warrants a clear answer. The petition should be granted.

A. The Decision Below Conflicts With Decisions From Other Courts

1. Respondent argues there is no conflict over this issue, but that is wrong on multiple levels. Other circuits, unlike the Ninth Circuit, permit appellate fees in bankruptcy under 11 U.S.C. 105 or the court's inherent authority. *E.g.*, *In re Horne*, 630 F. App'x 908, 912 (11th Cir. 2015) (per curiam); *Liberis* v. *Craig*, 845 F.2d 326, *5-*8 (6th Cir. 1988) (unpublished). Moreover, outside bankruptcy, multiple circuits permit appellate fees as part of traditional civil contempt to enforce injunctions (*e.g.*, *Weitzman* v. *Stein*, 98 F.3d 717, 719-721 (2d Cir. 1996)), which this Court just confirmed presents the identical legal question: "traditional civil contempt principles apply *straightforwardly* to the bankruptcy discharge context."

Taggart v. *Lorenzen*, 139 S. Ct. 1795, 1802 (2019) (emphasis added). The Ninth Circuit's position cannot be squared with those cases.

Bankruptcy courts also authorize appellate fees in the relevant setting (Section 105 and inherent authority) (*e.g.*, *In re Rodriguez*, 517 B.R. 724, 738-739 (Bankr. S.D. Tex. 2014)), and multiple courts reject the Ninth Circuit's analytical foundation. *E.g.*, *In re John Richards Homes Building Co., LLC*, 405 B.R. 192, 215-217 (E.D. Mich. 2009), aff'd, 552 F. App'x 401, 408 (6th Cir. 2013) (identifying its "crucial flaw[s]"). This Court routinely grants review in the face of even shallow conflicts over bankruptcy issues (see Pet. 19-20), and this case readily crosses that threshold.

2. Respondent attempts to avoid the conflict by reframing the question at the narrowest level of generality (Opp. 14-15), but this Court in *Taggart* has already explained why respondent's focus is wrong. See Pet. 18 n.6. As *Taggart* established, "the statutes specifying that a discharge order 'operates as an injunction, § 524(a)(2), and that a court may issue any 'order' or 'judgment' that is 'necessary or appropriate' to 'carry out' other bankruptcy provisions, § 105(a), bring with them the 'old soil' that has long governed how courts enforce injunctions." 139 S. Ct. at 1801. That "'old soil' includes the 'potent weapon' of civil contempt," which authorizes "sanctions to 'coerce the defendant into compliance' with an injunction or 'compensate the complainant for losses' stemming from the defendant's noncompliance with an injunction." *Ibid.*

Other circuits have already held that these "traditional principles" authorize appellate fees in this context—actions seeking to remedy a party's noncompliance with an injunction. See, *e.g.*, *Schauffler* v. *United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting*

Indus. of U.S., 246 F.2d 867, 870 (3d Cir. 1957) (authorizing courts "to impose as a penalty the expenses incurred in defending the propriety of the original imposition in an appeal court"). Contrary to respondent's view (Opp. 24-25), these courts expressly reject the notion that appellate fees "were not 'caused by' [a violator's] contempt"; on the contrary, these courts recognize that "none of this would have been necessary if [the violator] had respected the [court's] order." *Weitzman*, 98 F.3d at 719-720; see also *Liberis*, 845 F.2d at *8 ("the costs associated with these appeals were a direct result of the plaintiffs' initial contumacious conduct").

Unlike the Ninth Circuit, these courts find appellate fees appropriate "to ensure that the innocent party receives the benefit of the injunction." *Robin Woods Inc.* v. *Woods*, 28 F.3d 396, 400 (3d Cir. 1994) ("'restor[ing] the parties to the position they would have held had the injunction been obeyed'"). Any other rule would wrongly "reduce any benefits gained by the prevailing party from the court's violated order." *Cook* v. *Ochsner Found. Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977); see also *Robin Woods*, 28 F.3d at 400 ("Only with an award of attorneys' fees can RWI be restored to the position it would have occupied had Mrs. Woods and Alexander complied with the district court's injunction.").

In short, respondent's "unsuccessful appeals of the civil contempt order forced [petitioners] to incur expenses in defending the court's order." *Liberis*, 845 F.2d at *7. Their "appellate expenses stemmed directly from [respondents'] intentional disregard of the initial order of the bankruptcy court." *Ibid.* Contrary to the Ninth Circuit's position, "fees and expenses incurred on appeal are [thus]

allowable." *Ibid.* Respondent cannot explain how that unequivocal rationale is compatible with the Ninth Circuit's position.[1]

3. Respondent also attempts to distinguish these cases on a granular level, but its efforts fall short.

First, contrary to respondent's contention, the Eleventh Circuit's decision in *Horne* was not limited to the automatic stay (contra Opp. 12-13); the party's motion specifically sought appellate fees for *discharge violations* (630 F. App'x at 909-910), and the Eleventh Circuit corrected the lower court's statement that such fees were "'not authorized'"—by construing the order as "presumably exercising its *discretion* not to award attorney's fees for Defendants' expenses during the appeal." 630 F. App'x at 912 (emphasis added). The Eleventh Circuit's message was unmistakable: while appellate fees in the "discharge" context may be discretionary, they most certainly *are authorized*. *Ibid.* That position conflicts directly with the Ninth Circuit's holding.

Second, even if the Sixth Circuit's *Liberis* decision involved a stay violation (Opp. 12), *the court authorized relief under inherent authority*, not under 11 U.S.C. 362(k). See 845 F.2d at *7 ("in the instant case, the bankruptcy court relied on its inherent judicial authority to impose attorneys' fees as a sanction for civil contempt"). It thus makes no difference what Section 362(k) provides; it had nothing to do with *Liberis*'s square holding that "fees and expenses incurred on appeal are allowable." *Ibid.* This is presumably why respondent all but ignores *Liberis* in its extended filing.

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[1] *Liberis* further confirms that, in the bankruptcy setting itself, courts have invoked the same "traditional" contempt powers to authorize appellate fees. 845 F.2d at *6-*8.

Third, while some of the lower-court decisions invoked inherent authority outside the discharge context (Opp. 11-12 & n.3), respondent never explains why the court's *identical powers* are sufficient to award appellate fees to remedy certain violations but not others.[2] The fact is that these decisions recognized, consistent with traditional contempt principles, that courts may remedy violations of a court order with full relief designed to make the protected party whole, including compensating that party for expenses related to the initial violation. See, *e.g.*, *PlayNation Play Sys., Inc.* v. *Velex Corp.*, No. 14-1046, 2020 WL 6895183, at *1-*2 (N.D. Ga. May 7, 2020) (awarding "attorney's fees and expenses incurred as a result of the Respondents appealing this Court's contempt orders"; "'[i]n ordering the award of attorneys' fees for compensatory purposes * * * the court is merely seeking to ensure that its original order is followed'"; "'[o]therwise, the benefits afforded by that order might be diminished by the attorneys' fees necessarily expended in bringing an action to enforce that order'") (citing multiple circuits); *Ohr* v. *Latino Express, Inc.*, No. 11-2383, 2015 WL 13000252, at *3 (N.D. Ill. May 28, 2015) ("Because Respondents contested the validity of the Contempt Order on appeal, the Director needed to expend additional resources defending the order before the appellate court."); see also Pet. 16-18 (citing additional cases). Respondent and the Ninth Circuit, however, read the law exactly the opposite way. Opp. 24-

[2] Indeed, respondent itself illustrates how these cases all address the same operative question. See Opp. 15 (describing cases, *e.g.*, as "addressing attorney's fees after party violated court 'order'"; "addressing attorney's fees after party violated anti-strike injunction"; "addressing attorney's fees after party violated injunction").

25; Pet. App. 8a. The split over that important question is stark, and this Court alone can resolve it.[3]

B. The Question Presented Is Important And Recurring And Warrants Review In This Case

1. The legal and practical importance of this question is obvious. It arises every time a discharge violation is affirmed on appeal. It involves fundamental questions about invoking "traditional civil contempt principles" (*Taggart*, 139 S. Ct. at 1802) to enforce and remedy injunctions. The effect on a debtor's rights is self-evident: respondent has no answer for those courts explaining, unequivocally, the importance of fees in safeguarding a debtor's core protections under the Code. Pet. 18-19 (providing multiple examples). And the debtor's rights do indeed hang in the balance: it does little good to secure relief from a discharge violation in bankruptcy court if one cannot defend that relief on appeal—especially where, as here, the creditor's appeal attempts to *reinstate its right to restore the same offensive practice* prohibited below. See, *e.g.*, Pet. App. 29a, 32a-33a.

Whether courts are authorized to award appellate fees in this setting is a pure legal question. The answer is binary; one side is right and the other is wrong. This fundamental issue cries out for a clear, definitive answer.

2. Respondent attempts to duck review by questioning the issue's importance. Its efforts are transparent.

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[3] Respondent says that the Ninth Circuit's (puzzling) disregard for implied-repeal principles does not constitute the type of "circuit conflict" warranting the Court's review. Opp. 13-14. But petitioners never suggested otherwise—petitioners were simply explaining that the Ninth Circuit's holding was plainly wrong under the settled law applied in other circuits and this Court. Pet. 9-10. That merely reinforces the urgent need to grant review to resolve the *actual* conflict flagged above: the split over judicial authority to award appellate fees when enforcing and remedying compliance with a court injunction.

According to respondent, this issue "rarely" ever arises. Opp. 16. It says that in all of 2019, there were at most 23 discharge violations, premising its entire position on the BAPCPA report for that year. Opp. 16 & n.5. Yet that same report notes there were *over 760,000 consumer bankruptcies* in 2019, involving millions of creditors. See U.S. Courts, *2019 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* <https://tinyurl.com/bapcpa-2019>. It notes that its reporting is not necessarily accurate or complete. See *ibid.* ("this table does not provide a comprehensive picture of sanctions imposed against creditors in bankruptcy courts"). And the "creditor misconduct" category—where respondent gets its "23" number—covers "at least" 11 different violations (including "automatic stay" violations, "sanctionable filings," "collusive bidding," "discovery" misconduct, etc.), with each jurisdiction (admittedly) not even including every category in its count. See *ibid.* ("What may be reported as creditor misconduct in one district may not be reported in another."). It does not even say that this haphazard tally uniformly includes discharge violations at all.

It does not take much imagination to find this reporting (with 23 total instances of *any* creditor misconduct in 760,000 cases over an entire year) somewhat underinclusive. And a quick Westlaw search bears that out—where it is not hard to identify at least that same number of discharge violations in the reporting period. And the decisions appearing on Westlaw vastly underrepresent the total universe of discharge litigation, as bankruptcy disputes are routinely resolved without published orders. And, of course, in jurisdictions outside the Ninth Circuit, fees often *are* available, reducing the incentive for creditors to drag out disputes—and quick settlements are unreported. Cf., *e.g.*, *1199 SEIU United Healthcare Workers*

E. v. *Alaris Health at Hamilton Park*, No. 18-CV-3336, at *1 (S.D.N.Y. Sept. 10, 2020) (after an appeal confirming sanctions for violating a court order, "[p]etitioner now seeks a supplemental order awarding attorneys' fees incurred in connection with th[e] appeal, including work on this motion. *Respondents do not contest that petitioner is entitled to reasonable attorneys' fees for its work in connection with the appeal*") (citation omitted; emphasis added).

But all that aside, respondent's argument fails on its own terms. On respondent's own telling, the issue arises nearly two dozen times each year in bankruptcies nationwide, and it squarely divides the lower courts in those cases. Opp. 11, 16. The fee question is critical to debtors' ability to assert their rights (Pet. 18-19), and yet discharge litigation has continued for decades (in hundreds of disputes) without a clear answer. There is no reason the confusion over this pure legal question should still persist.

3. Respondent also maintains that review should be denied because the case is "interlocutory." Opp. 18-19. This is baseless.

It is well settled that where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013). The question presented is a discrete legal issue; it was definitively resolved at the circuit level, and nothing about it will change on remand. Indeed, the panel declared itself bound by *existing* circuit authority (Pet. App. 8a-9a)—so there is especially no basis for any lower court to revisit the question. Delay will only generate additional waste (and require additional litigation) after the bankruptcy court's underlying order is eventually reaffirmed. There

is simply no obstacle to this Court reviewing the important, independent legal question presented at this stage.[4]

4. Respondent's last dodge is the contention that granting review now would "short-circuit the Ninth Circuit's en banc process"—by not giving the circuit yet another chance to correct its mistake. Opp. 19-20. This is bizarre.

There is no need to wait to ask the full Ninth Circuit *again* to review the identical, definitive holding it already refused, definitively, to review. It is fanciful to think that the circuit denied rehearing below only because it assumed it would take up the question later in the same case—even though three more rounds of litigation would be required before the case returns, and those rounds of litigation would have absolutely nothing to do with the fee question.

The upshot of respondent's argument is striking: It apparently believes that petitioners (former debtors) should pay for *three more rounds* of litigation before having any idea whether they can afford the legal fees necessary to press their case. If anything, this type of conduct illustrates precisely why appellate fees are warranted where a creditor violates the discharge and insists on aggressive litigation to avoid responsibility.

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[4] Moreover, this Court routinely grants review even where a respondent maintains it can prevail on alternative grounds on remand. See, *e.g.*, Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 (filed Nov. 19, 2018). And, besides, there is little reason to think that respondent's alternative arguments have any shot at prevailing: the courts below found its conduct not merely prohibited, but likely worth of punitive damages. Pet. App. 24a, 40a-42a.

The issue is important and recurring, and this is the rare opportunity to resolve it. Review is warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTOPHER P. BURKE
702 Plumas St.
Reno, NV 89509

CHRISTINA L. HENRY
HENRY & DEGRAAFF, P.S.
787 Maynard Ave. S.
Seattle, WA 98104

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE & JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

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[5] Respondent's merits arguments only confirm that there is a clear and developed dispute over the legal question. Each side's position is fully ventilated. And while petitioners will reserve a full rebuttal for any plenary review, suffice it to say for now: Respondent errs in doubling down on the Ninth Circuit's core theory—and it still cannot explain how Fed. R. App. P. 38 somehow occupies the field and impliedly precludes Section 105—even though the two provisions each apply in their respective spheres, and each has obvious coverage that the other lacks. It says that Section 105 lacks any "fee-shifting" language—yet oddly is ready to effectively concede that fees *are appropriate at the trial level*. Those fees are plainly authorized under a court's inherent authority over civil remedial contempt; the only question is whether *appellate* fees are also authorized, which is the question that squarely divides the courts. And, finally, respondent has no answer for this simple question: If fees are available to establish the discharge violation and enforce the discharge below, why fees suddenly *not* available to establish the same violation and enforce the same discharge on appeal? There is a reason that courts award appellate fees in applying "traditional civil contempt principles," and respondent cannot explain why those same reasons do not squarely apply in this indistinguishable context.