No. 21-1322

IN THE

Supreme Court of the United States

JAN M. SENSENICH,
CHAPTER 13 TRUSTEE
Petitioner,

v.

PHH MORTGAGE CORPORATION,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE HON. MELANIE CYGANOWSKI (RET.), HON. JUDITH FITZGERALD (RET.), HON. BRUCE MARKELL (RET.), HON. EUGENE WEDOFF (RET.) AND LAW PROFESSORS GEORGE KUNEY, NANCY RAPOPORT AND JACK WILLIAMS IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Supreme Court Rule 37.1(b), the Honorable Melanie Cyganowski (ret.), the Hon. Judith Fitzgerald (ret.), the Hon. Bruce Markell (ret.), the Hon. Eugene Wedoff (ret.), and Law Professors George Kuney, Nancy Rappaport and Jack Williams, respectfully move for leave to file the accompanying brief as *amici curiae.* The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

Your amici are the following:

The Honorable Melanie Cyganowski (ret.) formerly on the Bankruptcy Court for the Eastern District of New York from 1993 to 2007 (and its Chief Judge from 2005 to 2007), currently in private practice and an Adjunct Professor in the Practice of Law at St. John's University School of Law.

The Honorable Judith Fitzgerald (ret.), formerly on the Bankruptcy Court for the Western District of Pennsylvania from 1987 to 2013 (and its Chief Judge from 2000 to 2005), currently in private practice and a Professor in the Practice of Law at the University of Pittsburgh School of Law. She is an elected member of the American Law Institute and a Fellow of the American College of Bankruptcy.

The Honorable Bruce A. Markell (ret.) formerly a bankruptcy judge for the District of Nevada from 2004 to 2013, a member of the Bankruptcy Appellate Panel for the Ninth Circuit from 2007 to 2013 and is currently a Professor of Bankruptcy Law and Practice at the Northwestern University Pritzker School of Law. He is a conferee of the National Bankruptcy Conference, a fellow of and former Scholar in

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The Honorable Eugene R. Wedoff (ret.) formerly a U.S. Bankruptcy Judge in the Northern District of Illinois in Chicago from 1987 to 2015 and Chief Judge from 2002 until 2007. He served as a member and as the chair of the Advisory Committee on Bankruptcy Rules from 2004 to 2014, and as a governor, secretary, and president of the National Conference of Bankruptcy Judges through 2015. He was the president of the American Bankruptcy Institute. He is a Fellow of the American College of Bankruptcy and an emiritus member of the National Bankruptcy Conference.

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Professor Nancy B. Rapoport is a UNLV Distinguished Professor and the Garman Turner Gordon Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. She is also a Fellow of the American College of Bankruptcy, a Fellow of the American Law Institute, and a recipient of the Commercial Law League of America's Lawrence P. King Award for Excellence in Bankruptcy.

Professor Jack F. Williams is a Professor of Law at Georgia State University College of Law and the Center for Middle East Studies, where he teaches

and conducts research on bankruptcy and business reorganizations; mergers and acquisitions; and taxation and statistics. He is the Scholar in Residence of the Association of Insolvency and is a fellow in the American College of Bankruptcy. He holds a B.A. in economics from the University of Oklahoma, a J.D. with High Honors from George Washington University National Law Center, and a Ph.D in archaeology from the University of Leicester in Leicester, United Kingdom.

AMICI'S GROUNDS FOR SEEKING LEAVE TO FILE AN AMICUS BRIEF

Our interest in seeking leave to file an amicus brief is to address an important issue of first impression:[1] whether a bankruptcy court has the power to award noncompensatory (e.g., "punitive damages") for violations of Bankruptcy Rule 3002.1(c).

Leave is also sought in order to address the related issued of whether noncompensatory damages may be awarded for persistent violations of Rule 3002.1(c) under either 11 U.S.C. § 105(a) or a court's inherent powers.[2] This issue has divided the circuit courts. "The United States Courts of Appeals have been deeply divided for many years on the question of whether bankruptcy courts have the power to punish criminal contempts or impose punitive sanctions. *PHH Mortgage Corp. v. Sensenich,* 2017 WL 6999820 at * 6 (D. Vt. Dec. 18, 2017).

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[1] *PHH Mort. Corp. v. Sensenich, (In re Gravel*), 6 F.4th 503 (2d Cir. 2021) ("*Gravel*").

[2] The terms "Code" and "Bankruptcy Code" herein refer to 11 U.S.C. § 101 et. seq.

Rule 3002.1(c) serves a central role in the administration of Chapter 13, and provides a key safeguard for debtors seeking to retain their homes. The Rule requires a home mortgage lender to file and serve on a debtor a notice itemizing all fees, expenses or charges that have been incurred after the bankruptcy case was filed and that the lender contends are recoverable against the debtor. Rule 3002.1(i) provides that if the lender fails to provide the required information a court may preclude the lender from presenting evidence in any proceeding on the amounts claimed, or "award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure."

Rule 3002.1 was intentionally modelled after Fed. R. Civ. P. 37(c) which also provides that a court may award "other appropriate sanctions" for a failure to comply with the rule. An "overwhelming majority" of the courts have held that Rule 37 permits an award of punitive, noncompensatory damages. The same outcome should pertain to Rule 3002.1. *See Gravel,* 6 F.4th at 522-23 (Bianco, J. dissenting).

The Second Circuit held that Rule 3002.1, by its express terms, does not authorize a bankruptcy court to impose punitive damages even in the face of repeated disregard of the rule. The Second Circuit did not dispute that a bankruptcy court has the inherent power to award punitive damages, but held that the Bankruptcy Court had failed to either invoke such powers or to make a finding of bad faith.

Circuit Judge Joseph Bianco wrote a lengthy dissent in *Gravel,* arguing that both the text of Rule 3002.1 and the court's inherent powers fully justified the award of $75,000 for the repeated violations of the Rule. At least two reported cases subsequent to *Gravel* have agreed with the dissent. *See Blanco v.*

Bayview Servicing LLC (In re Blanco), 633 B.R. 714 (Bankr. S.D. Tex. 2021) and *In re Legare-Doctor,* 634 B.R. 453 (Bankr. D.S.C. 2021).

We submit that the Second Circuit was wrong on the textual interpretation of Rule 3002.1, the powers of a bankruptcy court under Code § 105, and a court's inherent powers. These rulings will strip the bankruptcy courts of important tools for deterring widespread and repeated creditor malfeasance.

The need for review by this Court is urgent due to the continuing and persistent misconduct by creditors in Chapter 13 bankruptcy. PHH's history shows a persistent pattern of disregard of the banrkuptcy rules. *See*, *e.g., In re Gravel*, 556 B.R. 561, 567 (Bankr. D. Vt. 2016) (describing the multi-year practices of improper home mortgage lending practices).

GROUNDS FOR APPROVING MOTION FOR LEAVE TO FILE AMICUS BRIEF

The general standards for granting a motion to file an amicus brief are found in *Neonatology Assocs. P.A. v. Comm'r of Internal Revenue,* 293 F.3d 128, 132 (3d Cir. 2002). The Third Circuit stated that the "criterion of desirability set out in Rule 29(b)(2) is open ended, but a broad reading is prudent. . . . [I]t is preferable to err on the side of granting leave." And, "[e]ven when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned." *Id*. at 133. "[O]ur court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Id.*

Courts in other jurisdictions have followed *Neonatology*. "[T]here are no strict prerequisites that

must be established prior to qualifying for amicus status: an individual seeking to appear must merely make a showing that his participation is useful to or otherwise desirable to the court." *Duronslet v. City of Los Angeles,* No. 2-16-cv-08933-ODW(PLAX), 2017 WL 5643144, at *1 (C.D. Cal. Jan. 23, 2017).

CONCLUSION

These standards for permitting the filing of an amicus brief are amply satisfied in this case, and we respectfully request that this Court permit the filing of the proposed amicus brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
I. The petition for certiorari should be granted to end a recurring and persistent abuse of the Chapter 13 statutory scheme for home mortgage loans	6
A. Rule 3002 requires that home mortgage lenders provide Chapter 13 debtors with accurate and timely notice of all fees due under a home mortgage	6
B. PHH persistently failed to comply with Rule 3002 and was found to be a "serial violator."	9
II. The statutory standard for when punitive damages are "appropriate" was satisfied in this case	14
A. Rule 3002.1 permits a court to award "other appropriate relief," which includes punitive damages for recurring misconduct.	14
B. The phrase "other appropriate relief" has a fixed and accepted meaning under the analogous language in Fed. R. Civ. P. 37	15

TABLE OF CONTENTS—Continued

Page

C. The Second Circuit erred in holding that the phrase "expenses and attorney's fees" limits the meaning of "appropriate relief." 18

D. The correct interpretation of "appropriate relief" should apply the rule of statutory construction that assumes the availability of all remedies 18

III. The Constitutional requirement for awarding punitive damages was amply satisfied. 20

A. Repeated misconduct is an indicia of reprehensible conduct that makes an award of punitive damages appropriate. 20

IV. The Bankruptcy Court had the power to award noncompensatory damages under Code § 105 or under its inherent powers. 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES Page(s)

American Surety Co. v. Marotta,
287 U.S. 513 (1933)..... 14

Bell v. Hood,
327 U.S. 678 (1946)..... 19

Bessette v. Avco Financial Services, Inc.,
230 F.3d 439 (1st Cir. 2000) 22

Best v. Ocwen Loan Servicing, LLC,
No. 15-cv-13007, 2016 WL 125875
(E.D. Mich. 2016) 11

Blanco v. Bayview Loan Servicing, LLC,
633 B.R. 714 (Bankr. S.D. Tex.
2021) 9, 14, 16, 17

BMW of N. Am. v. Gore,
517 U.S. 559 (1996).....*passim*

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 16, 22, 23

Ditullio v. Boehm,
662 F.3d 1091 (9th Cir. 2011)..... 19

Edwards v. Climate Conditioning Corp.,
942 A.2d 1148 (2008) 16

Englert v. Ocwen Loan Servicing,
495 B.R. 266 (Bankr. W.D. Pa. 2013)..... 11

Franklin v. Gwinnett County Pub. Schs.,
503 U.S. 60 (1992)..... 18, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Goodyear Tire & Rubber v. Haeger,
137 S. Ct. 1178 (2017)..... 23

Harlan v. Lewis,
982 F.2d 1255 (8th Cir. 1993)..... 23

In re Alley,
No. 09-21500, 2014 WL 2987656
(Bankr. D. Me. July 1, 2014) 11

In re Charbono,
790 F.3d 80 (1st Cir. 2015) 22, 23

In re Dyer,
322 F.3d 1178 (9th Cir. 2003)..... 2, 21, 22, 23

In re Franklin,
614 B.R. 534 (Bankr. M.D.N.C. 2020).... 6, 20, 21

In re Gravel,
556 B.R. 561 (Bankr. D. Vt. 2016)..... 9, 21

In re Gravel,
601 B.R. 873 (Bankr. D. Vt. 2019)..... 15

In re Green,
No. 12-13410, 2014WL 1089843
(N.D. Ohio Mar. 19, 2014) 11

In re Legare-Doctor,
634 B.R. 453 (Bankr. D.S.C. 2021)..... 17

In re Lescinskas,
628 B.R. 377 (Bankr. D. Mass. 2021)..... 16

TABLE OF AUTHORITIES—Continued

Page(s)

In re McKain,
No. 08-10411, 2009 WL 2848988
(Bankr. E.D. La. May 1, 2009) 10, 11

In re Schafer,
No. 07–61297–13, 2013 WL 1197612
(Bankr. D. Mont. Mar. 25, 2013)..... 11

In re Stambaugh,
531 B.R. 191 (Bankr. S.D. Ohio 2015) 11

In re Tollstrup,
No. 15-33924, 2018 WL 1384378
(Bankr. D. Or. March 16, 2018) 15

J.J. Case Co. v. Borak,
377 U.S. 426 (1964)..... 19

Jove Eng'g, Inc. v. I.R.S.,
92 F.3d 1539 (11th Cir. 1996)..... 2, 6, 22

Marrama v. Citizens Bank of Mass.,
549 U.S. 365 (2007)..... 8, 23

Nobelman v. Amer. Sav. Bk.,
508 U.S. 324 (1993)..... 8

Nycomed U.S. Inc. v. Glenmark Generics Ltd.,
No. 08-CV-5023, 2010 WL 3173785
(E.D.N.Y. Aug. 11, 2010) 15

Pereira v. Narrangansett Fishing Corp.,
135 F.R.D. 24 (D. Mass. 1991)..... 15

Peter v. Nantkwest, Inc.,
140 S. Ct. 365 (2019)..... 18

TABLE OF AUTHORITIES—Continued

Page(s)

PHH Mortgage Corp. v. Sensenich,
2017 WL 6999820
(D. Vt. Dec. 18, 2017) 2

PHH Mortgage Corp. v. Sensenich
(*In re Gravel*),
6 F.4th 503 (2d Cir. 2021) 2, 4, 15, 17, 18

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 20

Taggart v. Lorenzen,
139 S. Ct. 1795 (2019) 16

Tanvir v. Fnu Tanzin,
894 F.3d 449 (2d Cir. 2018), *aff'd*
141 S. Ct. 486 (2020) 19

Update Art, Inc. v. Modiin Publ'g, Ltd.,
843 F.2d 67 (2d Cir. 1988) 16

STATUTES

11 U.S.C. § 101(30) 7

11 U.S.C. § 102(3) 14

11 U.S.C. § 105 ..... *passim*

11 U.S.C. § 105(a) ..... *passim*

11 U.S.C. § 109(e) 6

11 U.S.C. § 524 22

11 U.S.C. § 1322(b)(2) 7

11 U.S.C. § 1328(a) 8

TABLE OF AUTHORITIES—Continued

RULES Page(s)

Bankr. R. 3002 ..... *passim*

Bankr. R. 3002.1 ..... *passim*

Bankr. R. 3002.1, Adv. Com Notes 17

Bankr. R. 3002.1(b) 17

Bankr. R. 3002.1(c) 1, 17

Bankr. R. 3002.1(i) ..... *passim*

Bankr. R. 3002.1(i)(2) 5, 17

Bankr. R. 3002.1(g) 17

Fed. R. Civ. P. 37 ..... 5, 15, 16

Fed. R. Civ. P. 37(b) 16

Fed. R. Civ. P. 37(c)(1) 15

COURT FILINGS

Amended Class Action Complaint, *Taylor v. Ocwen Loan Servicing LLC*, First Case No. 4:16-cv-04167-SLD-JEH (C.D. Ill. Aug. 10, 2017) Dkt. No. 9. 11

Brief of Amicus Curiae Attorneys General of [33 states], *Vincent Morris v. PHH Mortgage*, No. 20-CV-60633 RS, (Jan. 29, 2021), ECF Dkt. 118-2 ..... 12, 13

Complaint, *Vincent Morris v. PHH Mortgage Corp*., Case No. 0:20-cvi-60633 RS, (S.D. Fla. March 25, 2020) ECF Dkt. 1 12

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

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Page(s)

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INTEREST OF *AMICI CURIAE*

Your *amici curiae* are retired bankruptcy judges and law professors at various universities where they teach courses on bankruptcy law, conduct research, and are frequent speakers and lecturers at seminars and conferences on bankruptcy law.[1]

Our interest is in assisting the courts in resolving the complex issues that arise in bankruptcy litigation—especially when such cases affect thousands of individuals each year. This is such a case.

This appeal involves the interpretation of Bankruptcy Rule 3002.1(i). Rule 3002.1(c) requires mortgage lenders of a Chapter 13 debtor to provide to the debtor accurate and timely notice of all fees, expenses or charges that were incurred after the bankruptcy case was filed. It is a critical rule that permits debtors to stay current on their home mortgage during the course of the bankruptcy case, and thus, not be subject to claims of late payment, default and potential foreclosure. In short, this seemingly simple requirement is part of the critical mechanism that permits a Chapter 13 debtor to achieve a discharge and a fresh start.

Rule 3002.1(i) states that if a lender fails to provide this information, a debtor may seek sanctions including attorney's fees, exclusion of evidence and "other appropriate relief." We contend that this key phrase of "other appropriate relief" includes the power to

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[1] Pursuant to this Court's Rule 37.3(a), the Petitioner has consented to the filing of this brief. Respondent was asked to consent but refused. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed any money to fund its preparation or submission.

award non-compensatory (e.g., punitive) damage for repeated failure to comply with the Rule.

This appeal involves a question of first impression. "The question of whether Rule 3002.1(i) authorizes the imposition of punitive sanctions appears to be a question of first impression, not just in the Second Circuit, but across the nation." *PHH Mortgage Corp. v. Sensenich*, 2017 WL 6999820 at *5 (D. Vt. Dec. 18, 2017) ("Dist. Ct.")

A related question is whether a bankruptcy court may award noncompensatory damages under either its inherent powers or under Bankruptcy Code § 105. This question has divided the circuit courts. "The United States Courts of Appeals have been deeply divided for many years on the question of whether bankruptcy courts have the power to punish criminal contempts or impose punitive sanctions." Dist. Ct. at *6.[2]

The Circuit Court below based its decision, concerning the $75,000 sanction on the text of Rule 3002.1(i)(2) and held that the statutory language of "appropriate relief" does not permit an award of punitive damages. "We hold that Rule 3002.1 does not authorize punitive monetary sanctions. . ." *PHH Mortgage Corp. v. Sensenich* (*In re Gravel*), 6 F.4th 503, 508 (2d Cir. 2021).

On the second issue presented, the Circuit Court stated that bankruptcy courts *have* the inherent

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[2] *See, e.g., Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1554 (11th Cir. 1996) ("Therefore, the plain meaning of § 105(a) encompasses *any* type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions of' the Bankruptcy Code.") *But cf. In re Dyer,* 322 F.3d 1178, 1193 n. 15 (9th Cir. 2003).

power to award punitive damages, but found that the Bankruptcy Court had not ruled on that basis, but had relied solely on Rule 3002.

Our purpose in submitting this amicus brief is to urge this Court to hold that Rule 3002.1 does permit a bankruptcy court to award punitive damages as part of its express power to award "other appropriate relief." The text of Rule 3002.1, and its purpose to serve as a meaningful deterrent to prevent misconduct as occurred here show precisely why non-compensatory damages are critical. Further, this Court's ruling in *BMW of N. Am. v. Gore*, 517 U.S. 559, 576-577 (1996), held that recurring misconduct is a key indicia of the level of reprehensibility that warrants an award of punitive damages.

Separately, we write to urge this Court to hold that a bankruptcy court has the power to award noncompensatory damages under either § 105 or its inherent powers and that the Bankruptcy Court sufficiently invoked such power.

The need for review by this Court of both questions is urgent. The misconduct by PHH is widespread and recurring, and is impairing the integrity of the bankruptcy system. PHH is one of the largest holders or servicers of home mortgage loans of Chapter 13 debtors. PHH appears often in bankruptcy courts and its conduct has become the subject of repeated scrutiny. PHH has been recognized as a serial violator of Rule 3002.1. Its repeated and seemingly ceaseless misconduct has adversely affected both debtors and the bankruptcy system. In the present case, not only did PHH repeatedly disregard the requirement for giving accurate notice, but it repeatedly misled the bankruptcy court by promising to correct its errors, and then utterly disregarding those assurances.

We are not alone in our concern either with what happened below in this case, or what has occurred often and elsewhere with PHH. Circuit Court Judge Bianco wrote a lengthy and detailed dissent, setting forth why the Panel was incorrect and why the harms that have already occurred, will continue to occur unless the decision is reversed. Notably, he found that PHH's conduct constituted "flagrant and repeated violations of the Rule," and that PHH was a "serial violator." *Gravel,* 6 F.4th at 518 (Bianco, J., dissenting).

This Court should rectify the Second Circuit's legal error by holding the phrase "appropriate relief" permits an award of noncompensatory damages under Rule 3002.1, or alternatively that a bankruptcy court has such authority as part of its inherent power or pursuant to Code § 105(a).

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted for the following reasons.

First, certiorari should be granted because the need to resolve this issue is timely and critical. In the absence of review by this Court, continued abuses of and disregard for Rule 3002.1 are almost certain to recur with alarming regularity. PHH, one of the country's largest mortgage servicers, has a documented record of disregarding the bankruptcy rules at the expense of vulnerable consumers. The dissent correctly found that PHH's conduct constituted "flagrant and repeated violations of the Rule," and that PHH was a "serial violator" of the Rules. *Gravel*, 6 F.4th at 518 (Bianco, J., dissenting). If its repeated misconduct cannot be the basis for punitive sanctions, then the

ability of a bankruptcy court to ensure that the Code's fundamental goals are achieved will be imperiled.

Second, certiorari should be granted to resolve a legal question of first impression—namely, whether the text of Bankruptcy Rule 3002.1 authorizes a bankruptcy court to award punitive damages for the willful and repeated failure to comply with the Rule. This is an important question of federal law that speaks ultimately to the protection and integrity of the federal bankruptcy system. The need for clarity from this Court on the ability to impose punitive damages will serve to protect the public and the integrity of the bankruptcy system.

Third, Rule 3002.1(i)(2) expressly permits an award of "appropriate relief, including reasonable expenses and attorney's fees" when a lender violates the disclosure requirements of Rule 3002.1. Rule 3002 was modeled after Fed. R. Civ. P. 37 which permits the court to award "other appropriate sanctions." Cases decided under Rule 37 have held that an award of punitive damages is permitted.

Fourth, the Circuit Court incorrectly interpreted the language of Rule 3002.1 by ruling that the phrase "expenses and attorney's fees" limited the phrase "appropriate relief," when instead the phrase merely served to obviate the American Rule on the award of legal fees. This Court has held that the American Rule of attorney's fees governs unless there is a precise statement permitting fee shifting. Rule 3002.1 contains this language and its intent was to be precise and enlarge a debtor's recovery; but the Circuit Court misconstrued the rule as *limiting* what can be recovered and not as *expanding* the available relief. This was legal error.

Fifth, an award of punitive damages for repeated violations of Rule 3002.1 comports with the well-established law by this Court on the constitutional standards for awarding punitive damages. A key factor in justifying punitive damages is the degree of reprehensibility. *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996). Courts have held that "reprehensibility" in turn examines "whether the conduct involved repeated actions." *In re Franklin*, 614 B.R. 534, 550 (Bankr. M.D.N.C. 2020).

Sixth, alternatively, the Bankruptcy Court had the authority to sanction the misconduct of PHH by imposing noncompensatory damages under either its inherent power or under Code § 105. *See, e.g., Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1554 (11th Cir. 1996). ("Therefore, the plain meaning of § 105(a) encompasses *any* type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions of' the Bankruptcy Code.").

LEGAL ARGUMENT

I. The petition for certiorari should be granted to end a recurring and persistent abuse of the Chapter 13 statutory scheme for home mortgage loans.

A. Rule 3002 requires that home mortgage lenders provide Chapter 13 debtors with accurate and timely notice of all fees due under a home mortgage.

Chapter 13 of the Bankruptcy Code is designed primarily for individuals who have a regular stream of income. *See* 11 U.S.C. § 109 (e). The term "individual with regular income" means an individual whose income is sufficiently stable and regular to enable

such individual to make payments under a plan under chapter 13." Code § 101(30). The debtor must also have secured and unsecured debts below a certain ceiling.

In 2019 there were over 700,000 bankruptcy cases filed by individual debtors mostly with consumer debt.[3] Of those, about 37 percent were Chapter 13 cases.[4] The median average monthly income reported by all debtors was $2,978. It is likely that many of those cases involved debtors who owned a home and wished to retain their home through compliance with the Code's provisions.

Under Chapter 13, a debtor may propose a plan for payment to its creditors. The plan will generally require that the debtor devote most of his or her disposable income to the payment of creditors, subject to certain exceptions. The payment obligation generally runs five years. At the end of the plan, the debtor will be granted a discharge and thus a fresh start, if and only if the debtor has fulfilled its obligations to the mortgage lender.

Home mortgages are a central aspect of Chapter 13.[5] Indeed, there is likely no more important goal than the fair protection of the home mortgage. The home

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[3] "Approximately 764,000 consumer cases were closed during calendar year 2019. Sixty-three percent of the closed consumer cases had been filed under chapter 7, about 37 percent under chapter 13, and less than 1 percent under chapter 11." United States Courts, BAPCPA Report 2019, https://www.uscourts.gov/statistics-reports/bapcpa-report-2019 (last visited April 1, 2022)

[4] *Id*.

[5] DOUGLAS BAIRD, ELEMENTS OF BANKRUPTCY (5th ed. 2010)

mortgage may *not* be restructured or reduced.[6] *See Nobelman v. Amer. Sav. Bk.*, 508 U.S. 324 (1993). Instead, the debtor is obligated to maintain the loan as current.[7] The debtor receives a discharge only after "completion by the debtor of all payments under the plan." 11 U.S.C. § 1328(a).[8] A failure to pay the mortgage loan can result in plan failure, loss of discharge, and foreclosure on the home.

Retention of one's home thus requires accurate knowledge of all amounts due and owing. Lenders frequently add charges for various and often obscure costs, including servicing fees, taxes, administration costs and the like. And, as this case demonstrates, mortgage lenders or servicers frequently fail to disclose the existence of such fees.

Rule 3002.1(i)(c) requires mortgage lenders to file and serve a notice of all fees, expenses, or charges incurred on a home mortgage in a Chapter 13 bankruptcy case after the bankruptcy case is commenced. Rule 3002.1 permits debtors to ensure that they have made full payment on their home mortgage and to avoid collection actions and home foreclosure based on unknown charges by lenders.

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[6] *See* 11 U.S.C § 1322(b)(2) (stating that a plan may modify secured claims "other than a claim secured only by a security interest in real property that is the debtor's principal residence").

[7] "[D]uring the Chapter 13 plan period and afterward, debtors must continue to pay off the mortgage in full, even if the value of the home has fallen far below the outstanding amount of the debt." BAIRD, ELEMENTS OF BANKRUPTCY, at 55.

[8] "Chapter 13 authorizes an individual with regular income to obtain a discharge after the successful completion of a payment plan approved by the bankruptcy court." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007).

The failure to disclose the fees leads to the failure to pay the undisclosed fees. The lender may then declare the loan in default during the five years of plan performance. Conversely, after the plan is complete and the debtor receives a discharge, the lender may wrongfully declare the loan to be in default, demand payment for undisclosed fees, and initiate foreclosure on the home. "It is well recognized that a creditor's failure to comply with the notice requirements of Rule 3002.1 can hinder the honest debtor's right to a fresh start following bankruptcy." *In re Blanco*, 633 B.R. 714, 754 (Bankr. S.D. Tex. 2021).

B. PHH persistently failed to comply with Rule 3002 and was found to be a "serial violator."

It is well documented that PHH (and its corporate affiliates) are serial violators of both Rule 3002.1 and the bankruptcy process in general. PHH is a wholly-owned subsidiary of Ocwen Financial Corp;[9] both PHH and Ocwen (including its affiliates) have been the subject of challenges because of their repeated disregard of the bankruptcy process. *See, e.g., In re Gravel,* 556 B.R. 561, 567 (Bankr. D. Vt. 2016) (describing the Trustee's repeated but futile efforts to have PHH comply with the Rule in other cases for over two years).[10]

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[9] OCWEN, "Ocwen Financial Completes Acquisition of PHH Corporation." (Oct. 4, 2018), https://shareholders.ocwen.com/ news-releases/news-release-details/ocwen-financial-completes-acquisition-phh-corp oration-glen

[10] "PHH had been chastised by another bankruptcy court [for] violating Rule 3002.1. . . . PHH had assessed improper charges in other cases in this District" and that PHH had been previously sanctioned for misapplication of mortgage payments and the

As early as 2009, Ocwen's disregard of both Rule 3002.1 and the bankruptcy discharge injunction has been the subject of judicial scrutiny including class actions. Its repeated violations have been described as a "continuing disregard for bankruptcy law and procedure" and it has "consistently shown an inability or refusal to comply with … basic statutory tenets." *In re McKain*, No. 08-10411, 2009 WL 2848988, at *4 (Bankr. E.D. La. May 1, 2009). Even before 2009, Ocwen had developed a repeated pattern of ignoring the law. *See, e.g.*, *Id.* at *2 ("This is not the first time Ocwen has appeared before the Court for improperly administering a loan or attempting to collect fees and costs to which it was not entitled.")[11]

In 2009, after cataloging Ocwen's *repeated failure* to honor the bankruptcy process, the Bankruptcy Court held that Ocwen's conduct was in bad faith and reflected a "continuing disregard for bankruptcy law and procedure:"

> Ocwen has repeatedly abused the claims process and failed to honor the discharge injunction by attempting to collect from debtors and their bankruptcy estate disallowed or undisclosed debts. The court finds that this practice is in bad faith and requires greater regulation of Ocwen's behavior to curtail further abuse of the bankruptcy sys-

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"issuance of dozens of erroneous monthly mortgage statements" over a two year period. 556 B.R. at 567.

[11] "The Court has been involved with six other cases in the last four years where Ocwen either included improper fees in its claim; attempted to collect, post-discharge, fees and costs that were undisclosed but assessed during a bankruptcy; or attempted to foreclose on disallowed or discharged debts." *In re McKain,* 2009 WL 28488988 at *2.

> tem. The record reflects that this is an ongoing pattern that imposes burdens on debtors and the Court to monitor Ocwen's claims and pleadings. The Court has repeatedly struck improper charges and has issued monetary sanctions against Ocwen. *Ocwen's continuing disregard for bankruptcy law and procedure is a clear indication that monetary sanctions are simply ineffective.*"

In re McKain, 2009 WL 2848988 at * 5 (emphasis added).

Between 2013 and 2016 Ocwen was repeatedly alleged to have violated bankruptcy court orders and rules. *See, e.g.*, *In re Schafer*, No. 07–61297–13, 2013 WL 1197612 (Bankr. D. Mont. Mar. 25, 2013); *In re Green*, No. 12-13410, 2014WL 1089843 (N.D. Ohio Mar. 19, 2014); *Englert v. Ocwen Loan Servicing*, 495 B.R. 266 (Bankr. W.D. Pa. 2013); *In re Alley*, No. 09-21500, 2014 WL 2987656 (Bankr. D. Me. July 1, 2014); *In re Stambaugh*, 531 B.R. 191 (Bankr. S.D. Ohio 2015); *Best v. Ocwen Loan Servicing*, *LLC*, No. 15-cv-13007, 2016 WL 125875 (E.D. Mich. 2016).

Apparently undeterred, Ocwen was sued again in 2016 in a class action for "systematically and repeatedly ignoring court orders related to the successful completion of Chapter 13 plans."[12] The class action specifically alleged that Ocwen had failed to comply with Rule 3002.1 and had ignored the discharge granted to debtors. The class action complaint noted

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[12] Amended Class Action Complaint, *Taylor v. Ocwen Loan Servicing LLC*, First Case No. 4:16-cv-04167-SLD-JEH (C.D. Ill. Aug. 10, 2017) Dkt. No. 9.

that "Ocwen has been chastised for repeated disregard of bankruptcy orders."[13]

PHH's alleged misconduct has infected its practices in all phases of home mortgage lending. In 2017, the United States Government announced a settlement with PHH based on allegations it had violated the False Claims Act by knowingly originating and underwriting mortgage loans insured by the U.S. Department of Housing and Urban Development, that failed to comply with legal requirements—a practice that had been going on for at least five years.[14]

PHH's misconduct affected nearly one million home owners. On March 25, 2020, a class action suit was filed against PHH in the United States District Court for the Southern District of Florida.[15] According to an amicus brief filed by the Attorneys General of thirty-three states, PHH had engaged in a practice of charging "processing fees" or "convenience fees" for home borrowers when "neither the mortgages themselves nor applicable statutes authorize such fees."[16] This unlawful conduct was alleged to have affected 695,000 mortgage loans for 943,706 mortgage borrowers.[17] This misconduct was alleged to have been recur-

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[13] *Id.* at 10.

[14] U.S. Dept. of Justice, "PHH Agrees to Pay Over $74 Million," (August 8, 2017), https://www.justice.gov/opa/pr/phh-agrees-pay-over-74-million-resolve-alleged-false-claims-act-liability-arising-mortgage (last visited March 21, 2022)

[15] Complaint, *Vincent Morris v. PHH Mortgage Corp*., Case No. 0:20-cvi-60633 RS, (S.D. Fla. March 25, 2020) ECF Dkt. 1

[16] Brief of Amicus Curiae Attorneys General of [33 states], *Vincent Morris v. PHH Mortgage*, No. 20-CV-60633 RS, (Jan. 29, 2021), ECF Dkt. 118-2

[17] *Id.*

ring "for years,"[18] and is but one example of PHH's mortgage loan abuses.[19]

These abuses of Rule 3002 are not limited to PHH. On December 7, 2020 the Department of Justice announced an agreement assessing three other mortgage lenders with $74 million in "remediation" to address violations of Rule 3002 dating back to 2011 and involving 60,000 home mortgages.[20]

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[18] Red Lake Nation News, "Attorney General Ellison co-leads bipartisan coalition fighting for homeowners," (Feb. 1, 2021), https://www.redlakenationnews.com/story/2021/02/01/news/attorney-general-ellison-co-leads-bipartisan-coalition-fighting-for-homeowners/95537.html

[19] "Ocwen has been the subject of various state regulatory enforcement actions for its deficiencies in mortgage servicing and recently settled regulatory actions with 29 states and the District of Columbia for its failure to comply with servicing laws and regulations. In 2018, PHH entered into a $45 million settlement with 49 State Attorney Generals and 45 state mortgage regulators for improper mortgage servicing. In the past decade, New York's Department of Financial Services has entered into five consent order or agreements with Ocwen and PHH for their servicing failures. In 2017, the CFPB sued Ocwen for serious mortgage servicing errors. *See CFPB et. al. v. Ocwen Financial Corp*." *Morris v. PHH Mortgage,* Brief of Amicus Curiae Attorneys General of [33 states], ECF Dkt. 118-2, at 7.

[20] U.S. Dept. of Justice, "US Trustee Program Reaches Agreement with Three Mortgage Services Providing More than $74 million in Remediation to Homeowners in Bankruptcy." (Dec. 7, 2020), https://www.justice.gov/opa/pr/us-trustee-program-reaches-agreements-three-mortgage-servicers-providing-more-74-million

II. The statutory standard for when punitive damages are "appropriate" was satisfied in this case.

A. Rule 3002.1 permits a court to award "other appropriate relief," which includes punitive damages for recurring misconduct.

Rule 3002.1(i) states that the failure to provide the required information of mortgage balances and fees may result in the bankruptcy court precluding the lender from presenting the omitted information in any form, or the award of "other appropriate relief, including reasonable expenses and attorney's fees."

The text's plain language "places few restrictions on the types of remedies bankruptcy courts can issue," and suggests no prohibition on a bankruptcy court's ability to award punitive damages. *Blanco v. Bayview Loan Servicing, LLC*, 633 B.R. 714, 754 (Bankr. S.D. Tex. 2021).

The governing rule of construction is found in Code § 102(3) which defines "including" as meaning "not limiting." The legislative history indicates that paragraph (3) "is a codification of *American Surety Co. v. Marotta,* 287 U.S. 513, 516 (1933)."[21] "In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *Id.* at 517.

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[21] 1 COLLIER PAMPHLET EDITION 2020 (Richard Levin & Henry J. Sommer eds., Matthew Bender)

B. The phrase "other appropriate relief" has a fixed and accepted meaning under the analogous language in Fed. R. Civ. P. 37.

Rule 3002.1 was based on Fed. R. Civ. P. 37(c)(1). Rule 37 allows awarding of "reasonable expenses, including attorney's fees," and "other appropriate sanctions." This similarity in language to Rule 3002.1 was by design. *See, e.g., In re Tollstrup*, No. 15-33924, 2018 WL 1384378 at * 4 (Bankr. D. Or. March 16, 2018) ("This sanction is analogous to the sanction in Federal Rule of Civil Procedure 37."). There is "no daylight between the deterrent purpose of the sanctions provisions in Bankruptcy Rules 3002.1 . . . and the identical purpose of Rule 37, upon whose language [it] was modeled." *In re Gravel*, at 523 (Bianco, J. dissenting). PHH agreed that the two rules have "substantively identical language."[22]

Rule 37 has been interpreted to permit punitive damages. *In re Gravel,* 601 B.R. 873, 886 (Bankr. D. Vt. 2019). The "overwhelming majority of courts . . . have concluded such authority [to impose punitive, noncompensatory sanctions] exists under Rule 37." *Gravel,* 6 F.4th at 522-523 (Bianco, J., dissenting).[23]

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[22] *In re Gravel,* 601 B.R. 873, 885, n.12 (2019).

[23] *See, e.g.*, *Nycomed U.S. Inc. v. Glenmark Generics Ltd.*, No. 08-CV-5023, 2010 WL 3173785, at *10 (E.D.N.Y. Aug. 11, 2010) ("substantial monetary fines . . . are appropriate sanctions, as they will adequately advance 'the prophylactic, punitive and remedial rationales' of discovery sanctions"); *see also*, *Pereira v. Narrangansett Fishing Corp.*, 135 F.R.D. 24, 28 (D. Mass. 1991) (imposing "$2500 as a punitive monetary sanction for disobedience" of a Rule 37 violation).

The surrounding provisions—the preclusion remedy and the fee shifting remedy—are non-compensatory. Evidence preclusion in Rule 37 has long been understood as a severe punitive sanction—and not as "compensatory." *See Edwards v. Climate Conditioning Corp.*, 942 A.2d 1148, 1154 (2008) ("Discovery sanctions under Rule 37(b) are intended to be punitive as well as compensatory."); *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988) (Under Rule 37, the "harshest sanctions available are preclusion of evidence and dismissal of the action," which ensure Rule 37 serves "as a credible deterrent 'rather than a paper tiger.'").

Likewise, fee shifting is punitive. "[T]he underlying rationale of 'fee shifting' is, of course, punitive. . . . That the award ha[s] a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences for a contemnor's disobedience." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 53–54 (1991) (citations omitted).

Rule 3002.1(i) is "at its core, a sanctions provision." *Gravel,* 6 F.4th at 521. The advisory committee described subdivision (i) as "sanctions." *Id.* at 521. *See also*, *In re Lescinskas*, 628 B.R. 377, 382 (Bankr. D. Mass. 2021) (noting that Rule 3002.1 was a sanctions provision permitting "penalties" to serve as a "sobering reminder" of the need to comply with the disclosure requirements).

Given that Rule 3002.1 transplants Rule 37's language, 3002.1's "other appropriate relief" cannot be cabined to exclude punitive damages. "When a statutory term is "obviously 'transplanted from another source,' it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) Thus, "once the

evidence-preclusion penalty is properly classified as a potentially punitive sanction . . . then the 'other appropriate relief' language in Rule 3002.1 naturally includes from a textual standpoint, punitive monetary sanctions." *In re Gravel*, at 522 (Bianco, J. dissenting).

At least two subsequent courts have not followed *Gravel*. In *Blanco v. Bayview Loan Servicing*, *(In re Blanco),* 633 B.R. 714 (Bankr. S.D. Tex. 2021) the court held that Rule 3002.1(i) permitted punitive damages because it was adopted specifically for the purpose of remedying a problem—mortgagees adding undisclosed fees to the debtor's mortgage during the pendency of the bankruptcy case. The court held that "limit[ing] the remedies permitted under Rule 3002.1 to compensatory awards would likely render that provision an insufficient deterrent, where the fees assessed by mortgagees are often relatively small and either go unnoticed by debtors or debtors choose not to fight them. *Id*. at 753. "[W]ithout the possibility of punitive damages, mortgagees have little incentive to make the systemic changes required to service loans properly in chapter 13." *Id.* at 753.

In *In re Legare-Doctor*, 634 B.R. 453, 462 (Bankr. D.S.C. 2021), the court held, "Rule 3002.1(i)(2) grants the Court expansive authority to frame a remedy—including an award of attorney's fees and costs or even punitive damages—for a lender's non-compliance with the disclosure requirements of Rules 3002.1(b), (c), and (g)." *Id.* at 462. The court cited to the Advisory Committee Notes for Rule 3002.1 and explained that "[t]he risk of an immediate foreclosure action after conclusion of a Chapter 13 reorganization because of an unpaid postpetition charge is precisely the risk that Rule 3002.1 was designed to mitigate." *Id.*

C. The Second Circuit erred in holding that the phrase "expenses and attorney's fees" limits the meaning of "appropriate relief."

One of the Circuit Court's principle arguments was that the reference to "expenses and attorney's fees" in Rule 3002.1 (i)(2) was meant to "cabin" the meaning of "other appropriate relief." *Gravel*, 6 F.4th at 514-15.

In so doing, the Circuit Court misconstrued the purpose of the phrase "expenses and attorney's fees." This language was included merely to reverse the American Rule which otherwise holds that prevailing parties must pay their own legal fees. The American Rule has been a "bedrock principle" for over 200 years, and thus "Congress must provide a sufficiently 'specific and explicit' indication of its intent to overcome the American Rule's presumption against fee shifting." . . . *Peter v. Nantkwest, Inc*., 140 S. Ct. 365, 372 (2019). "The requirement that Congressional intent be specific and explicit is a high bar." *Hyatt v. Hirshfeld,* 16 F.4th 855, 859 (1st Cir. 2021).

Rule 3002.1's reference to attorney's fees was meant to satisfy this "high bar," and was not intended to limit the other available sanctions, but to expand them.

D. The correct interpretation of "appropriate relief" should apply the rule of statutory construction that assumes the availability of all remedies.

The Panel's narrow interpretation of "other appropriate relief" is contrary to this Court's decision in *Franklin v. Gwinnett County Pub. Schs.,* 503 U.S. 60 (1992). Here this Court stated that "we presume the availability of all appropriate remedies unless

Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence." *Id.* at 66 (citations omitted). Further, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 66, (citing *Bell v. Hood*, 327 U.S. 678 (1946)).

In *Franklin*, the Court also held that monetary damages were justified even if a statute was silent on sanctions: "[t]hat a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not authorize execution to issue on a judgment.'" *Id.* at 68 (citations omitted). Further, "[t]he power to enforce implies the power to make effective right of recovery . . . [which] implies the power to utilize any of the procedures or actions normally available . . . according to the exigencies of the particular case." *Franklin*, 503 U.S. at 68, (citing *J.J. Case Co. v. Borak*, 377 U.S. 426 (1964)).

See also Tanvir v. Fnu Tanzin, 894 F.3d 449 (2d Cir. 2018), *aff'd* 141 S. Ct. 486 (2020) sustaining a claim for punitive damages where statute permitted court to award "appropriate relief." The Court cited with approval *Ditullio v. Boehm,* 662 F.3d 1091, 1098 (9th Cir. 2011)(holding that the Trafficking Victims Protection Act, which permits the recovery of "damages," permits punitive damages based on *Franklin.)* 894 F.3d at 468.

III. The Constitutional requirement for awarding punitive damages was amply satisfied.

A. Repeated misconduct is an indicia of reprehensible conduct that makes an award of punitive damages appropriate.

One of the key tests for when punitive damages are appropriate is whether the conduct was "reprehensible." *BMW of N. Am. v. Gore,* 517 U.S. 559, 571 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

Repeated misconduct, as evidenced in this case, is especially reprehensible. "Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." *BMW* 517 U.S. 559, at 577.

BMW was affirmed by this Court which again restated that "repeated misconduct" was an important indicium of reprehensible conduct justifying punitive damages. "We have instructed courts to determine the reprehensibility of a defendant by considering whether. . . the conduct involved repeated actions or was an isolated incident" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

When confronted with repeated misconduct the courts have also held that the punitive damage award is appropriate even when compensatory damages are low. "Where actual damages are low, the ratio of actual damages to punitive damages 'has less significance' because a simple multiple of actual damages "'would utterly fail to serve the traditional purposes underlying an award of punitive damages,

which are to punish and deter.'" *In re Franklin*, 614 B.R. 534, 549–50 (Bankr. M.D.N.C. 2020).

IV. The Bankruptcy Court had the power to award noncompensatory damages under Code § 105 or under its inherent powers.

As noted above, "The United States Courts of Appeals have been deeply divided for many years on the question of whether bankruptcy courts have the power to punish criminal contempts or impose punitive sanctions." (Dist. Ct. at *6). This important split has sometimes obscured whether the authority to impose punitive sanctions may be invoked under either Code § 105(a) and/or a court's inherent powers. *See In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) ("[I]t is tempting to conclude that a bankruptcy court's inherent sanction power and the civil contempt powers of § 105(a) are interchangeable. Our cases have been less than clear concerning whether they are.")

Section 105 differs from inherent powers in at least three respects. First, it is an express grant of statutory power by Congress. Second, there is no statutory requirement for bad faith. And third, the statutory limit is measured by "appropriate" and "necessary. This Court's jurisprudence on when punitive damages are appropriate provides ample guidance for the lower courts. *See BMW of N. Am. v. Gore*, 517 U.S. 559.

The Bankruptcy Court looked primarily to § 105 for its award of $75,000 for violating Rule 3002.1. "Based upon these findings, in the exercise of its § 105 powers and pursuant to Rule 3002.1(i) the Court concludes a sanction [of $75,000] is warranted." *Gravel,* 556 B.R. at 571.

Nothing in § 105 bars a court from imposing punitive sanctions. The rule announced in the Eleventh

Circuit should pertain here. "Under § 105, Congress expressly grants courts independent statutory powers in bankruptcy proceedings to "carry out the provisions of" the Bankruptcy Code through "any order, process, or judgment that is necessary or appropriate." Further, the "plain meaning of § 105(a) encompasses *any* type of order, whether injunctive, compensative or punitive, so long as it is 'necessary or appropriate to carry out the provisions' of the Bankruptcy Code." *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1554. *Jove* indicated that the same result arises under a court's inherent powers. Thus, "the power to punish for contempts is inherent in all courts." *Id.* at 1553 (citing *Chambers v. NASCO*, *Inc*. 501 U.S. 32, 44 (1991).

The District Court below, however, after noting a circuit split, elected to follow a contrary rule from *Dyer*. Dist. Ct. at * 7. *Dyer* greatly reduced the scope and meaning of § 105 ("The bankruptcy court's inherent sanction authority. . .like its civil contempt authority [under§ 105] does not authorize significant punitive damages . . ."). *Dyer,* 322 F.3d at 1197.

Other circuits, however, have not followed *Dyer.* In *Bessette v. Avco Financial Services, Inc.,* 230 F.3d 439 (1st Cir. 2000) the First Circuit held that § 105 "provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have." *Id*. at 445. "[B]ankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief in the form of actual damages, attorney's fees and *punitive damages* when creditors have engaged in conduct that violates § 524." *Id*. at 445 (emphasis added).

More recently, the First Circuit held that a bankruptcy court "possess the inherent power to impose

punitive non-contempt sanctions for failures to comply with their orders." *In re Charbono,* 790 F.3d 80, 87 (1st Cir. 2015). The First Circuit rejected the notion that "any punitive sanction is perforce a criminal contempt sanction" and that a court could award a "punitive non-contempt sanction." *Id*. at 85. "[C]ourts may levy sanctions (including punitive sanctions) for such varied purposes. . ." *Id*. at 85-86.[24]

Dyer's narrow reading of § 105 is inconsistent with this Court's rulings. *Marrama v. Citizens Bank of Mass*., 540 U.S. 365, 373, (2007) held that § 105(a) grants bankruptcy judges "broad authority . . . to take any action that is necessary or appropriate 'to prevent an abuse of process.'"

In *Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991) this Court stated that "the power to punish for contempts is inherent in all courts" and that while the inherent power must be "exercised with restraint and discretion" it may also include a "particularly *severe sanction*" such as dismissal of a law suit. *Id*. at 44-46 (emphasis added). *But cf., Goodyear Tire & Rubber v. Haeger,* 137 S. Ct. 1178 (2017) (holding that a fee shifting sanction had to be only compensatory when exercised as part of a court's inherent powers).

This case well illustrates that without the power to impose serious, noncompensatory damages for violation of Rule 3002.1, the misconduct shown by PHH will almost certainly continue.

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[24] *See also Harlan v. Lewis*, 982 F.2d 1255, 1259 (8th Cir. 1993) (approving imposition of a non-contempt monetary sanction as within district court's inherent powers).

CONCLUSION

According, we respectfully request that this Court grant the petition for certiorari.

Respectfully submitted,

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