No. ________

In The
Supreme Court of the United States

TIM OSICKA,

Petitioner,

v.

OFFICE OF LAWYER REGULATION,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court err in determining that an assessment for costs and fees for the Wisconsin Office of Lawyer Regulation (OLR) in an administrative attorney disciplinary proceeding, did not compensate the government for an "actual pecuniary loss" under 11 U.S.C. §523(a)(7) and therefore was a nondischargeable debt in bankruptcy, when that assessment reimbursed the government for the exact dollar amount it spent in its prosecution?

PARTIES TO THE PROCEEDING

Petitioner Tim Osicka was the plaintiff in the bankruptcy court proceedings and appellant in the district court and circuit court of appeals proceedings. Respondent Office of Lawyer Regulation was the defendant in the bankruptcy court proceedings and appellee in the district court and circuit court of appeals proceedings.

RELATED CASES

- *Osicka v. Office of Lawyer Regulation*, No. 11-15541-7, Adversary No. 19-83, U.S. Bankruptcy Court for the Western District of Wisconsin. Judgment entered May 15, 2020.
- *Osicka v. Office of Lawyer Regulation*, No. 20-cv-478, U.S. District Court for the Western District of Wisconsin. Judgment entered March 24, 2021.
- *Osicka v. Office of Lawyer Regulation*, No. 21-1566, U.S. Court of Appeals for the Seventh Circuit. Judgment entered February 7, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tim Osicka ("Petitioner" or "Osicka") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 25 F.4th 501 (7th Cir. 2022). Neither the opinion of the district court nor the bankruptcy court are reported but are available at 2021 WL 1115926 and 2020 WL 2516492, respectively.

JURISDICTION

The Court of Appeals entered its judgment on February 7, 2022. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

11 U.S. Code §523—Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

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(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

STATEMENT OF THE CASE

Petitioner, Tim Osicka, filed an adversary action seeking an order declaring a debt of $12,500.64 for costs owed to the Office of Lawyer Regulation ("OLR") was discharged in his 2011 bankruptcy because the discharge was required before the Wisconsin Supreme Court reinstated his law license. (Bank. Dkt. 1).

Osicka earned his license to practice law in Wisconsin in 1986. (Bank. Dkt. 12-1, ¶3). In 2009, The OLR brought professional disciplinary proceedings that eventually resulted in Osicka's public reprimand. (*Id.*). In its decision reprimanding Osicka, the Wisconsin Supreme Court, following the Court's general practice, ordered Osicka to pay the full costs of the disciplinary proceeding. (*In re Osicka*, 2009 WI 38, ¶59, 317 Wis.2d 135).

In 2011, Osicka officially closed his law office and terminated his practice. *In re Osicka*, 2014 WI 33, ¶55, 353 Wis.2d 656. (Bank. Dkt. 12 2:6, ¶55). Osicka then filed for Chapter 7 bankruptcy in September 2011 (Bank. Dkt. 1:3, ¶12). Osicka disclosed the debt owed to the OLR in his voluntary petition, and in December 2011, the bankruptcy court discharged Osicka's debts, including the debt owed the OLR for costs. (Bank. Dkt. 16:5).

Eventually, Osicka sought to reinstate his law license and has complied with all the obligations the Wisconsin Supreme Court imposed except one: payment of $12,500.64 in costs to the OLR. (Bank. Dkt. 1:2, ¶4; Bank. Dkt. 12-3, Ex. C). The Wisconsin Supreme Court deferred action on Osicka's petition for reinstatement until the federal courts determined whether Osicka's bankruptcy discharged the cost assessment. (*Id.*).

Osicka petitioned the bankruptcy court for a determination, and the parties agreed this case presented only legal issues and stipulated to the following facts:

> a. The Wisconsin Supreme Court entered a disciplinary judgment for costs against Osicka, a Wisconsin licensed lawyer, to pay the OLR $12,500.64, for its costs and expenditures associated with the disciplinary case, *In re Disciplinary Proceedings Against Osicka*, 2009 WI 38, ¶59, 317 Wis.2d 135, 765 N.W.2d 775.

b. Osicka filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code.

c. Osicka included the $12,500.64 debt on Schedule F filed with the Bankruptcy Court.

d. Osicka received an Order discharging his debts.

e. OLR is a governmental unit.

(Bank. Dkt. 7:2-3).

Upon cross motions for summary judgment, the Bankruptcy Court granted the OLR's judgment and declared the debt nondischargeable. (Bank. Dkt. 11, 14, 16, 17). Osicka appealed to the District Court and the Seventh Circuit, which examined the issues *de novo* and affirmed. (Dist. Ct. Dkt. 6, App. 14).

The Seventh Circuit determined the assessment penalized Osicka but did not reimburse the OLR for its "actual pecuniary loss." The court utilized a legal dictionary to conclude that such a loss results from "the disappearance or diminution of something having monetary value resulting from the real and substantial destruction of property which usually occurs in an unexpected or relatively unpredictable way and often because of another's misconduct." (Slip Op. p. 9, App. 9). Though Congress felt no need to define these simple words, much less adopt such a long and cumbersome definition, the Seventh Circuit concluded this meant money spent as an "expense of governing" or without "expecting to create a debtor-creditor relationship" became nondischargeable under §523(a)(7). (Slip Op. p. 9, App. 10). The statute confirms no such Congressional intent. Nevertheless, the court added three other federal circuit Courts of Appeals endorsed similar conclusions. The observation overlooked *Shaffer* and two bankruptcy courts which disagreed and the Ninth Circuit's harsh criticism in *In re Albert-Sheridan*, 960 F.3d 1188, 1995 (9th Cir. 2020).

REASONS FOR GRANTING THE PETITION

I. Summary of reasons supporting review.

Debts for fines, forfeitures, and penalties payable to or benefitting a government are dischargeable if they compensate that government for its "actual pecuniary loss." 11 U.S.C. §523(a)(7).

That makes penalties that reimburse the OLR for costs and expenditures it incurred in prosecuting Tim Osicka dischargeable by the statute's plain terms. The lower courts declined to apply the rule, even though the sum reflects the OLR's expenditures to the penny and can be nothing but reimbursement, the Seventh Circuit called the assessment primarily penal and concluded that its penal nature alone nullified discharge, even though §523(a)(7) states no such thing. (Slip Op. pp. 9-10, App. 10-11). The court therefore added an extra provision to that statute—that costs imposed primarily to penalize somehow fall outside the statute, despite that §523(a)(7) discharges all penalties that compensate the government for an actual pecuniary loss.

Furthermore, the Seventh Circuit supplemented the statute in a second way, adopting a highly unusual definition for the term "actual pecuniary loss," one well outside normal understanding and well beyond what any other court has endorsed. (Slip Op. pp. 8-9, App. 9-10). The definition confined the phrase to losses resulting from the unexpected destruction of property that carries a monetary value. (*Id.*). The construction contradicts the meaning courts have historically attributed to the term in other contexts, how Congress used the phrase elsewhere in the Bankruptcy Code, and the interpretation that several other appellate courts have applied. The court added that when the government spends budgeted funds to fulfill a governmental role, that expenditure is somehow not a "pecuniary loss." (Slip Op. p. 9, App. 10). Those conclusions transformed the clear and plain language the Congress adopted in §523(a)(7) into something strained and complicated.

Finally, the case presents a conflict among the Circuit Courts of Appeals concerning whether the assessment of costs in professional disciplinary proceedings constitutes a penalty and an actual pecuniary loss. Bankruptcy courts addressing the issue are not unanimous either. The Sixth Circuit expressly rejected the rule the Seventh Circuit implemented when *Schaefer v. Louisiana State Board of Dentistry*, 515 F.3d 424 (5th Cir. 2008), held that the assessment of costs in a dental disciplinary proceeding were dischargeable under 11

U.S.C. §523(a)(7). The Ninth, Eleventh, and First Circuits concluded otherwise in lawyer disciplinary proceedings, *Richmond v. New Hampshire Supreme Court Committee*, 542 F.3d 913 (1st Cir. 2008), *In re Feingold*, 730 F.3d 1268 (11th Cir. 2013), and *In re Findley*, 593 F.3d 1048 (9th Cir. 2010), though the Ninth Circuit forcefully criticized this Court's decision in *Kelly v. Robinson*, 479 U.S. 36 (1986), which it concluded compelled it. *In re Albert-Sheridan*, 960 F.3d 1188 (9th Cir. 2020). The same court observed *Kelly* created "considerable confusion among federal courts and practitioners about §523(a)(7)'s scope" and supplied examples. *In re Scheer*, 819 F.3d 1206, 1210 (9th Cir. 2016). In fact, the Seventh Circuit's broad and expansive view of *Kelly* here contradicts the narrow and limited view of the case it espoused in *In re Towers*, 162 F.3d 952, 956 (7th Cir. 1998).

II. The text of §523(a)(7) contradicts the court's conclusion that the OLR received no compensation for its "actual pecuniary loss."

A. Section 523(a)(7) discharges penalties that compensate for losses.

The debate should begin at the end of §523(a)(7) rather than at the beginning. Debts owed the government for penalties and the like are nondischargeable "to the extent such debt . . . is not compensation for actual pecuniary loss. . . ." 11 U.S.C. §523(a)(7). Nevertheless, the Seventh Circuit declared the OLR cost assessment nondischargeable simply "because it was a punishment" and added that because the OLR incurred the costs as a budgeted operating expense, repaying them would somehow not compensate the OLR for its expenditure. (Slip Op. pp. 9-11, App. 9-10, 12). Yet that conclusion cannot be accurate, because the plain text of the statute states otherwise. If the cost assessment fails to qualify as a fine, penalty, or forfeiture, it is dischargeable. And, even if it qualifies, it remains dischargeable provided it compensates the OLR for an actual pecuniary loss. Paraphrased, §523(a)(7) provides that some fines, penalties, and forfeitures are nondischargeable debts, but others are not. It does not matter, then, whether the Supreme Court intended to assess these costs as a penalty; as long as they compensated the OLR for its expenses, they are dischargeable.

The court's interpretation is inherently flawed. Everything the statute applies to involves a penal purpose, since the statute applies exclusively to the government and to the fines, penalties, and forfeitures it levies. Punishment is what every fine, forfeiture, or penalty imposes. Ultimately, then, the Seventh Circuit adopted a false choice: It concluded that dischargeability depends on whether assessing costs punishes Osicka (nondischargeable) or compensates the OLR (dischargeable). Yet, even if the assessment of costs here theoretically served a dual purpose—punish Osicka *and* compensate the Government for its loss in prosecuting him—the plain language of the statute still makes the debt dischargeable. Whether the OLR incurred these costs intending to prosecute Osicka and protect the public makes no difference under §523(a)(7).

The conclusion that the penal nature of the assessment alone forecloses dischargeability also makes unnecessary the statutory passage excepting penalties which compensate the government for its actual pecuniary loss from nondischargeability. Such a construction renders that last component of the statute superfluous, something this Court has long forbidden. *National Assn. of Mfgrs. v. Department of Defense*, ___ U.S. ___, 138 S.Ct. 617, 632, 199 L.Ed. 2d 501 (2018) ("Absent clear evidence that Congress intended this surplusage, the Court rejects an interpretation that would render an entire subparagraph meaningless. As this Court has noted time and time again, the Court is obliged to give effect, if possible, to every word Congress used."). Stated differently, if penalties are nondischargeable, whether they compensate the government does not matter. But that interpretation cannot be right, because recouping the OLR's costs is an exception to nondischargeability, even if the assessment also penalizes. According to §523(a)(7), penalties that reimburse the government are nevertheless dischargeable.

B. Reimbursing the OLR for its expenditures compensates the agency's losses in prosecuting Osicka.

The Seventh Circuit held that assessing costs penalized Osicka, despite the fact that it compensated the OLR for the exact amount of its expenditures. (Slip Op. pp. 8-9, App. 9). Yet, it is beyond debate that this assessment fully compensates the OLR, for, if paid, the OLR receives the exact amount it expended in prosecuting Osicka, nothing more, nothing less. *In re Osicka*, 2009 WI 38, ¶59, 317 Wis.2d 135. That single fact should end any controversy—because even if the assessed costs constituted a penalty, the fact that those costs compensated the OLR for its actual loss makes the debt dischargeable under §523(a)(7). Its conclusion places the Seventh Circuit at odds with the Tenth Circuit. *In re Seneca Oil Co.*, 906 F.2d 1445, 1453-55 (10th Cir. 1990), concluded that the government's claim against an oil producer for overcharges was not a fine, forfeiture, or penalty under a related bankruptcy statute since it sought restitution "based solely on the actual pecuniary loss."

C. The court redrafted §523(a)(7) by adopting an unnecessary, complex, and limiting definition of "actual pecuniary loss."

The Seventh Circuit concluded the critical phrase "actual pecuniary loss" does not describe the OLR's prosecution costs. (Slip Op. pp. 8-9, App. 9). The court took this simple phrase and, after some contortion, made it needlessly complex. In ordinary language, actual means "truly happened," pecuniary means "money," loss means a "deficit" or "deficiency" so that the OLR had fewer resources after prosecuting Osicka than it possessed before that prosecution. By paying lawyers and investigators to prosecute Osicka, the

OLR spent money and therefore had less—it suffered an actual pecuniary loss.

Despite this clarity, the Seventh Circuit created its own, new definition of the key term "actual pecuniary loss," a definition neither the litigants, the lower courts, nor any appellate or bankruptcy court adopted or endorsed. The court resorted to BLACK'S LAW DICTIONARY to look for meaning in the definitions of the terms "loss," "actual loss," and "pecuniary loss." According to the court, "loss" means an unexpected disappearance or diminution in value, an "actual loss" occurs with the unanticipated "real and substantial destruction of . . . property," and a "pecuniary loss" involves losing money or something with a monetary value. (Slip Op. pp. 8-9, App. 9). That last definition aptly describes the money OLR spent to prosecute Osicka. Yet the court conflated all three terms and concluded that "reading these definitions together, an actual pecuniary loss is the disappearance or diminution of something having monetary value resulting from the real and substantial destruction of property, which usually occurs in an unexpected or relatively unpredictable way and often because of another's misconduct. Fraud is a classic example." (*Id.*).[1]

[1] The district court noted that Osicka's interpretation of the statute "has some support in the text of the statute. If a party is ordered to pay the amount of another party's expenses, one might view the payment as 'compensation for an actual pecuniary loss.' " (Dist. Ct. Dkt. 23:4, App. 18). The court added that another "reasonable view of the statutory language" existed, *id.*, but not one the Seventh Circuit endorsed. The district court's theory suffers flaws but is especially important here, for it furnished yet another

Multiple problems exist with the court's analysis.

1. The definition clashes with other statutes and cases addressing the same phrase.

First, the Seventh Circuit overlooked the fact that Congress did not isolate the term "actual pecuniary loss" to §523(a)(7) in the Bankruptcy Code. Courts look to "parallel provisions" in the law to discern what a term or phrase means, and "the presumption that equivalent words have equivalent meaning when repeated in the same statute has particular resonance." *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998).

Under 11 U.S.C. §§365(b)(1)(A), (B), bankruptcy trustees may assume executory contracts or unexpired leases only upon payment for any "actual pecuniary loss" a creditor experiences. Likewise 11 U.S.C. §507(a)(1)(8)(G) subordinates certain governmental penalties that were assessed "in compensation for actual pecuniary loss" to other debts. According to *In re Shangri-La, Inc.*, 167 F.3d 843, 849 (4th Cir. 1999), the term "actual pecuniary loss" encompassed attorney's fees and costs, so it is hard to reconcile the Fourth Circuit's view under §365 with the Seventh Circuit's definition of the same phrase under §523(a)(7), when each

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definition of the term "actual pecuniary loss." So many definitions among courts suggests the phrase might be ambiguous. Yet, ambiguity deserves a construction favoring debtors like Osicka, not the OLR. "Exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor." *Matter of Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985).

involved attorney's fees and litigation costs. Likewise, *In re Hardee*, 137 F.3d 337, 342 (5th Cir. 1998), held interest assessed against delinquent taxpayers constituted an "actual pecuniary loss" to the IRS under §523)(a)(7), making distinguishing between interest on one hand and fees and costs on the other exceedingly difficult under the statute.

2. The definition cannot be right if it makes some fraud dischargeable.

Second, the court's conclusion that losses attributable to "fraud" provide "a classic example" of an actual pecuniary loss makes little sense. (Slip Op. p. 9). Under §523(a)(7), debts compensating for an actual pecuniary loss remain dischargeable. Yet "the Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor,'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). And, fraud is already excepted from discharge under §§523(a)(2) and (4). So, having already confirmed that exception, Congress was unlikely to repeat (and contradict) itself in §523(a)(7) by making pecuniary losses attributable to fraud the government experiences dischargeable.

Moreover, the observation also overlooks *Kelly v. Robinson*, *supra*, given that that case involved restitution for welfare fraud but this Court found the debt nondischargeable under §523(a)(7). Were the Seventh

Circuit's definition accurate, *Kelly* would have turned out differently.

3. The definition promotes impractical distinctions.

Next, the definition not only duplicates and clashes with other portions of §523, it also promotes irrational distinctions in §523(a)(7). For example, by the court's logic, subtracting the same sum (here $12,500) from the same operating budget may or may not constitute a pecuniary loss depending on how and why that deficit occurs. According to the court, spending $12,500 as an operating expense to prosecute Osicka creates no such loss, but had the prosecuting lawyer deceptively exaggerated a legal bill to procure the same sum, the OLR now suffers an "actual pecuniary loss" for fraud.

4. Resorting to dictionaries confused rather than clarified §523(a)(7).

Fourth, the court used a 2019 version of BLACK'S LAW DICTIONARY, but courts construing language Congress selected ascribe the common meaning the words possessed when Congress created the law. *Wisconsin Central Ltd. v. United States*, ___ U.S. ___, 138 S.Ct. 2067, 2070 (2018). Congress revised the Bankruptcy Code in 1978. An earlier, more pertinent version of BLACK'S LAW DICTIONARY contains no precise definition of "loss" and actually explains "loss is a generic and relative term; it is not a word of limited, hard, and fast meaning." Loss, BLACK'S LAW DICTIONARY (4th Ed. Revised, 1968). The same dictionary defines "pecuniary" as "monetary; relating to money; financial," and it defines a "pecuniary loss" as "a loss of money or of something by which money or something of monetary value can be acquired." (*Id.*). Finally, it defines an "actual loss" as "one resulting from the real and substantial destruction of the property insured." And the dictionary the court used, the 2019 (11th edition) BLACK'S LAW DICTIONARY, defines actual loss as "a loss resulting from the real and substantial destruction of *insured* property." [emphasis supplied]. The court modified that last definition to better fit its theory when it eliminated the term "insured" from the definition it quoted. (Slip Op. p. 8, App. 9). The full definition becomes largely irrelevant, since Congress confined neither the Bankruptcy Code generally nor §523(a)(7) particularly to "insured property."

Nor is there any reason to believe Congress utilized a specialty legal dictionary to enact the Bankruptcy Code in the first place. Courts construe statutory terms according to common, ordinary meanings, *Wisconsin Central*, *supra*, 138 S.Ct. at 2070, so a common dictionary better defines the words as Congress employed them. According to the AMERICAN HERITAGE DICTIONARY (2ND COLLEGE ED., 1986), actual means "existing in fact"; pecuniary, "of or pertaining to money"; and loss, "the harm or suffering caused by losing." Synonyms for loss include "deficit," "debit," "debt," "lack of profit," "deficiency," "losing," and "depletion." (*Id.*). The important points: the definition the court employed has no support in the statute itself, these common terms require no special definition or analysis, and eliminating keywords from dictionary definitions hardly sheds light on the meaning Congress intended.

5. The court adopted a definition which contravened the historical use of the phrase.

Fifth, confining the definition of "actual pecuniary loss" to the unexpected loss of "property" contradicts the courts' historical use of the phrase. This Court has repeatedly applied the term "actual pecuniary loss" to address the loss of money and the expenditure of funds. *See*, *e.g.*, *Federal Aviation Administration v. Cooper*, 566 U.S. 284, 298 n.9 (2012); *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 297 U.S. 500, 506 (1936); *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964); *Gulf, Central & San Francisco Railway Co. v. Moser*, 275 U.S. 133; *Maryland Steel Co. v. United States*, 235 U.S. 451, 455 (1915); and *United States v. Burke*, 504 U.S. 229, 236 & n.9 (1992). Actual pecuniary losses are traditionally measured by the out-of-pocket rule—what victims actually spent as a result of misconduct. *Ostano Commerzanstalt v. Telewide Systems*, 794 F.2d 763, 766 (2nd Cir. 1986).

D. The conclusion that no debtor-creditor relationship existed contradicts the bankruptcy code.

The court also declared that no debtor-creditor relationship between Osicka and the OLR existed because the OLR incurred its costs while superintending the legal profession and protecting the public. (Slip Op. p. 11, App. 12). The Code suggests otherwise. Under the Code, debtor means a "person . . . concerning which a case under this title has been commenced," so Osicka is a debtor. 11 U.S.C. §101(13). Creditor means "an entity that has a claim against the debtor . . . ," so the OLR is a creditor. 11 U.S.C. §101(10)(A). Osicka's obligation to pay the assessed costs qualifies as a "debt" under both 11 U.S.C. §§101(5) and (12), which define debt as "liability on a claim." In short, Osicka owes the OLR money, thus a debt; the OLR was entitled to collect it, thus it is a creditor. Suggesting no debtor-creditor relationship exists when Osicka is a debtor, OLR a creditor, and he owes a debt plainly contradicts the Code.

E. The decision defies many of this Court's cases by adding terms and requirements to §523(a)(7) that it does not contain.

Reconciling the Seventh Circuit theory with the statutory language that Congress actually employed is, therefore, impossible. Only the enacted law, not the unenacted intent, binds the public, so this Court has repeatedly forbidden precisely the type of departure from the statutory text that the Seventh Circuit indulged in. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-2 (1989). *Bostock v. Clayton County*, ___ U.S. ___, 140 S.Ct. 1731 (2020), recently rejected similar efforts to circumvent a statute and adopt a jurisprudence divorced from the text based on a Congressional intent divined by the judiciary.

> This court has explained many times over many years, that when the meaning of a statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extra textual consideration.
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> *****
>
> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

Id. at 1749, 1738.

Thus, courts may not contravene specific statutory provisions, no matter how strongly they may believe that the Congress could not have endorsed what the statute requires. *Bostock*, 140 S.Ct. at 1751, ("Often lurking behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group. . . . This Court emphatically rejected that view, explaining that in the context of an unambiguous statutory text, whether a specific application was anticipated by Congress is irrelevant." [emphasis original]). That applies especially well to the Bankruptcy Code because, as *Law v. Siegel*, 571 U.S. 415, 427 (2014), explained, "Congress balanced the difficult choices" between debtors and creditors implicit in exemptions from discharges, and "it is not for courts to alter the balance struck by the statute"—even with the goal of improving the Code.

Too many cases exist to make this point even debatable. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text. . . . It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' "); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (same); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("In answering this question, we begin with the understanding that Congress says in a statute what it means and means in a statute what it says there."); *West Virginia University Hospitals, Inc. v.*

Casey, 499 U.S. 83, 98 (1991) ("The best evidence of that [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted. . . . Where, as here, the statute's language is plain, the sole function of the court is to enforce it according to its terms."); *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (same).

In short, because the Seventh Circuit's embellishment of the statutory text changes and contradicts its terms, this Court should review and reject it.

III. *Kelly v. Robinson* merits examination because of confusion it has generated in the lower courts.

A. Nothing in *Kelly* suggests it applies §523(a)(7) outside criminal proceedings.

The root of the problem is the unwarranted extrapolation of *Kelly v. Robinson*, 479 U.S. 36 (1986), well past the limits the Supreme Court intended. The Seventh Circuit emphasized that this Court's decision in *Kelly* excepts from discharge under §523(a)(7) "a broad category of penal sanctions imposed as part of a criminal sentence and that further the state's interests in 'rehabilitation and punishment.' " (Slip Op. p. 9, App. 10). *Kelly*, the Seventh Circuit noted, extends to civil penalties, such as this cost assessment the Wisconsin Supreme Court imposed. (Slip Op. p. 10, App. 11).

Yet, *Kelly* dealt exclusively with a criminal restitution order and the decision there centered on the Supreme Court's "serious doubt whether Congress intended to make criminal penalties 'debts' within the meaning of Section 101(4) of the Code," 479 U.S. at 50, dicta *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 555 (1990), later repudiated. Interpreting §523(a)(7), *Kelly* expressed its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings," given "the fundamental policy against federal interference with state criminal prosecutions." 479 U.S. at 47. Nothing in *Kelly* suggested the Court meant to extend the judiciary's strong respect for federalism and historical restraint from meddling in state court criminal prosecutions to professional administrative proceedings. It was not criminal for Osicka to fail to keep a client informed or to cooperate less than fully with the OLR. And no comparable historical reluctance exists as to state administrative determinations, so, extending *Kelly*'s reach to this civil proceeding goes too far.

Nevertheless, the Seventh Circuit reasoned confining *Kelly* to "criminal penalties . . . overlooks . . . the Supreme Court's express extension of its holding in *Kelly* to the civil context. In *Pennsylvania Department of Public Welfare v. Davenport*, the court understood *Kelly* to exempt from discharge 'both civil and criminal fines.' 495 U.S. 552, 562 (1990)." (Slip Op. p. 10, App. 11).

The court's interpretation of *Davenport*'s "express . . . holding" departs from its prior characterization of

Davenport's conclusion in *In re Towers*, 162 F.3d at 954, where the court observed that *Davenport* "implies in dictum that *Kelly* is applicable to civil restitution orders." Conflict aside, the court was correct in *Towers* and incorrect here. *Davenport*, like *Kelly*, involved a criminal restitution order, expressly addressed only whether criminal restitution orders are "debts" (they are), and "held restitution orders are not exempt from discharge under Chapter 13 of the Bankruptcy Code . . . " *id.*, for the simple reason that Chapter 13 carried no statute comparable to §523(a)(7). For purposes of this petition, the case at bar merits review because the Seventh Circuit expands *Davenport* beyond its holding and contradicts its own precedent in *Towers*.

B. The lower federal courts conflict over the appropriate interpretation of *Kelly*.

Ironically, the Seventh Circuit and other courts have limited *Kelly* for just the reason the court rejected here. The Seventh Circuit observed in *In re Towers*, 162 F.3d 952, 954 (7th Cir. 1978), that "*Kelly* dealt with a criminal restitution order and . . . its animating concern was limited to criminal cases," and concluded, "the principal interpretive tool used in *Kelly*—the proposition that courts are reluctant to interpret bankruptcy statutes to remit state criminal judgments"—limited its application to that setting. That coincides with the Fifth Circuit's observations in *Schaffer*, where the court likewise noted, "because *Kelly*'s reasoning rests on a constitutionally-footed hesitation to interfere in state criminal matters, its aptness for civil proceedings is dubious." 515 F.3d at 429. Thus, the court concluded "that the reasoning for nondischargeability in criminal cases does not wholly apply to civil administrative decisions." (*Id.*). In *Hughes v. Sanders*, 469 F.3d 475, 478 (6th Cir. 2006), the court refused to extend *Kelly* to cover court-assessed discovery sanctions in a legal malpractice action. "We therefore hold *Kelly* applies narrowly to criminal restitution payable to a governmental unit. We are not alone in this view." (*Id.*) [citing *In re Rashid*, 210 F.3d 201, 208 (3d Cir. 2000), *In re Towers*, 162 F.3d 952, 956 (7th Cir. 1998), and several bankruptcy court decisions]. Most recently, *In re Albert-Sheridan*, 960 F.3d 1188, 1195 (9th Cir. 2020), again intimated *Kelly* should apply only to criminal restitution.

> *Kelly* was animated by a "long history" of judicial exceptions for criminal restitution payments in discharge statutes and a concern for "disturbing state criminal proceedings."
>
> *****
>
> Based on its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings," the [*Kelly*] Court held that §523(a)(7) prevents the discharge of restitution despite it not being for the benefit of a governmental unit.

The court went further, noting *Kelly*'s detachment from the statutory text it construed and the disarray it created in the lower courts supported revisiting and reexamining it:

> [G]iven that *Kelly* was based on a "deep conviction" rather than statutory language, we have raised concerns that it has "led to considerable confusion among federal courts and practitioners about section 523(a)(7)'s scope. We further compared *Kelly*'s approach of "untethering statutory interpretation from the statutory language" to a relic of the 1980s. Like other relics of the 1980s, such as big hair, jam shorts and acid-wash jeans, *Kelly*'s atextual interpretive method should not come back into fashion. Thus, we have sought to cabin *Kelly*'s reach. . . .

(*Id.*) [citations omitted]. *See also In re Scheer*, 819 F.3d 1206, 1210 (9th Cir. 2016) (Collecting cases which demonstrate the "confusion" *Kelly* has created among lower courts about §523(a)(7)).

Yet the Courts of Appeals are not unanimous in reading *Kelly* this way. As here, some courts read *Kelly* broadly to cover anything "primarily punitive in nature," and even note that it does not matter under §523(a)(7) whether the debt ultimately compensates someone besides the government in order to make a debt nondischargeable. *United States Department of Housing & Urban Development*, 64 F.3d 920, 928 (4th Cir. 1995).

In sum, *Kelly* involved the same statute but very different circumstances that had nothing to do with lawyer discipline or even the assessment of costs in civil or administrative proceedings. Indeed, *Kelly*'s holding was quite narrow: "[W]e hold that §523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence." *Id.* at 50. *Kelly* articulated legitimate fears over the notion of federal bankruptcy courts invalidating the results of state criminal proceedings to upset the longstanding prohibition "against federal interference with state criminal prosecutions," something which "would require state prosecutors to defend particular state criminal judgments before federal bankruptcy courts," and may well lead "to federal remission of judgments imposed by state criminal judges." *Id.*, 479 U.S. at 47-49. This case, however, presents no chance of disrupting state criminal proceedings, and the confusion *Kelly* has generated among lower courts justifies its clarification.

IV. A conflict in the lower courts exists on this issue.

A. The Courts of Appeals disagree over whether civil disciplinary cost assessments are dischargeable.

The Seventh Circuit noted that other circuit courts and several bankruptcy courts had unanimously concluded likewise. (Slip Op. p. 12, App. 13). That is not entirely accurate, for two Circuit Courts of Appeals and several bankruptcy courts disagree. *State Bar of Cal. v. Taggart*, 249 F.3d 987 (9th Cir. 2001), [legislatively overruled], a case the Ninth Circuit decided before legislation changed a key California statute, determined that the assessment of disciplinary costs was not penal based upon a statutory scheme similar to Wisconsin's. As *Taggart* explained, one California statute permitted attorneys to be fined for misconduct while another, entirely separate statute addressed the assessment of costs against them. Wisconsin Supreme Court rules mirror that approach. *Taggart* fell not because of a failure in its reasoning, but because the California legislature changed the disciplinary scheme to declare costs assessments constituted a penalty. *In re Findley*, 593 F.3d 1048, 1051–2 (9th Cir. 2010).

The Fifth Circuit adopted a contrary view involving the imposition of disciplinary costs against a dentist. *Schaffer v. Louisiana State Bd. of Dentistry*, 515 F.3d 424, 428 (5th Cir. 2008), held, "In permitting the assessment of costs in addition to a fine, a plain reading of the text suggests that costs are not a fine, penalty, or forfeiture under Section 523(a)(7)." And two bankruptcy courts also contradict the Seventh Circuit's view. *In re Love*, 442 B.R. 868, 882 (M.D. Tenn. 2011), concluded that "cost assessments in attorney disciplinary proceedings in Tennessee are singularly intended to compensate the [Tennessee Board of Professional Responsibility] for actual pecuniary loss," and thus were dischargeable in bankruptcy under §523(a)(7). *In re Stasson*, 472 B.R. 748, 754 (E.D. Mich. 2012), reached the same conclusion for the same reasons *Love* expressed. So there plainly exists a conflict among the lower courts.

The decisions the Seventh Circuit invoked—*Richmond v. New Hampshire Supreme Court Committee*, 542 F.3d 913 (1st Cir. 2008), *In re Feingold*, 730 F.3d 1268 (11th Cir. 2013), and *In re Findley*, 593 F.3d 1048 (9th Cir. 2010)—carry the same deficiencies the decision at bar presents. *Richmond* rewrote §523(a)(7) to declare that assessments that punish, deter, rehabilitate, or protect the public are nondischargeable, even if they happen to reimburse the government, and therefore concluded:

> It is irrelevant that the cost assessment may be calculated by reference to the actual loss. In fact, there was no question that, in *Kelly*, the restitution award was calculated in reference to the victim's loss. . . . This did not determine the outcome, however, because it was the purpose of the penalty that was in issue.

Id. at 921.

Feingold relied on *Richmond* and, thus, suffered the same flaw. *Feingold* also found that repaying costs would not compensate for an actual pecuniary loss because it is "the cost of performing such a governmental function [and] the Disciplinary Board would perform its public function whether it could recoup the costs associated with it or not." *Id.* at 1276. The court added that "what matters is the Disciplinary Board's purpose, which . . . is penal in nature." (*Id.*).

Findley departed from the Ninth Circuit's prior opinion in *Taggart*. *Findley* determined a new statute that declared the imposition of costs a penalty "undermines the result in *Taggart*." *Findley*, 593 F.3d at 1054. Wisconsin, of course, has no such statute. *In re Albert-Sheridan*, 960 F.3d at 1195, followed *Findley* but strongly criticized *Kelly* for its distortion of clear statutory terms and the confusion it created.

These decisions defy the language of the critical statute. Section 523(a)(7) says nothing about excluding from the statute's exception fines, penalties, and forfeitures that are *primarily* penal in nature. Every fine, penalty, or forfeiture is penal, yet the statute decrees that those which repay the government for a loss are dischargeable. Nor does the statute declare that its exception fails to apply to those reimbursed expenses if the government agency would perform its public function anyway, regardless of whether it actually recouped its costs. The statute declares that if the cost assessment reimburses the government for a loss, it is dischargeable.

And cost assessments undoubtedly compensate a loss. No OLR prosecution is free. The OLR is financed by the Wisconsin bar and spends its funds in prosecuting lawyers. As a matter of simple accounting, the expenditure of those funds creates a deficit—a pecuniary loss under §523(a)(7). Recouping those funds erases that deficit. How the facts that cost assessments might penalize or OLR prosecutors perform a public function utilizing public funds changes that accounting is a mystery that goes unexplained.

These cases, however, share two common features: First, none suggest that 11 U.S.C. §523(a)(7) is ambiguous, thus justifying an inquiry into congressional intent beyond the statutory text, but, like *Kelly*, they indulge in those ruminations anyway. Second, all fail to convincingly explain how an assessment of costs plainly intended to reimburse the government for expenditures is "not compensation for an actual pecuniary loss."

B. The decision conflicts with other Courts of Appeals on other related issues.

The Seventh Circuit also put itself at odds with its sister circuit courts when it incorrectly noted that cost assessments resemble "monetary sanctions federal courts routinely impose on vexatious litigants" which "survive the bankruptcy case." (Slip Op. p. 11, App. 12). The court cited *Law v. Siegel* for the holding but overlooked the facts that *Law* had nothing to do with §523 and actually reversed a lower court determination foreclosing a discharge. *Law* observed only the obvious: bankruptcy courts may refuse a discharge to vexatious litigants for misconduct *in* the B.R. proceedings. 571 U.S. 415, 417 (2014). It said nothing about costs assessed against vexatious litigants for litigation misconduct preceding a bankruptcy filing.

On that subject, *In re Albert-Sheridan* found those assessments dischargeable under §523(a)(7) because those costs compensate for an actual pecuniary loss and do not benefit a governmental entity. 960 F.3d at 1194-5. The Sixth Circuit agreed in *Hughes v. Sanders*, 469 F.3d 475, 477-8 (6th Cir. 2006).

C. The decision contravenes Seventh Circuit precedent.

The Seventh Circuit ignored *In re Towers, supra*, and the limited interpretation it applied to *Kelly* (*supra*, p. 14) and, instead, emphasized *In re Zarzynski*, 771 F.2d 304 (7th Cir. 1985), which addressed whether costs imposed in criminal proceedings were dischargeable in bankruptcy, as analogous. It suggested that no difference exists between the criminal prosecution in *Zarzynski* and OLR's disciplinary proceedings against Osicka here. The analogy, however, is less than apt.

The debtor in *Zarzynski* was convicted of negligent homicide, and there are obvious differences between homicide and Osicka's failure to communicate adequately with a client and stalling in dealings with the OLR. According to *Richmond*, characterizing attorney disciplinary proceedings as criminal in nature would require "enhanced due process protections and notice requirements," something the OLR and the courts "might wish to avoid." 542 F.3d at 918. The OLR is not a prosecutor possessing the powers and authority that Chapter 978 of the Wisconsin Statutes confers. *Zarzynski* held only that criminals may not find relief from the consequences of their crime in the Bankruptcy Code and never mentioned administrative proceedings involving professional licenses.

V. The assessment of costs was not a penalty.

The other subject here involved whether the OLR cost assessment constituted a fine, penalty or forfeiture. Nothing objectively establishes the Wisconsin Supreme Court assessed costs to punish Osicka. Its reprimand and restitution order accomplished that purpose.

Moreover, that question is almost beside the point. If the assessment of costs is not penal, the debt is dischargeable and the statutory exception fails to apply, since it only involves fines, penalties or forfeitures. If it is penal, courts must still look to whether it compensates the OLR for what it spent in prosecuting Osicka, for that is an exception to nondischargeability.

The Seventh Circuit concluded imposing costs was unlikely a forfeiture, possibly a fine, but certainly a penalty. (Slip Op. pp. 6-7, App. 6-7). The court reasoned that assessing costs must serve as a penalty because the Wisconsin Supreme Court imposes costs only after finding misconduct.[2] (*Id.*).

The conclusion not only contradicted *Schaefer* (and *Taggart*) (*supra*, p. 15), but the court overlooked multiple facts, each one contradicting its conclusion. First, the Wisconsin Supreme Court called the costs "reimbursement" and never declared this assessment a further penalty. *In re Osicka*, 2009 WI 38, ¶59. And it calculated those costs precisely to compensate the

[2] The Seventh Circuit inaccurately suggested a referee recommended Osicka pay full costs because of "aggravating and mitigating factors." (Slip Op. p. 7, App. 8). In fact, the referee supplied no reason for the recommendation, *In re Osicka*, 2009 WI 38, ¶¶ 37, 59, an unsurprising development, because the pertinent Supreme Court rule required Osicka pay the OLR's full costs. S.C.R. 22.24(1m).

agency only for what it spent. (*Id.*). In calling the costs "reimbursement," the Court recognized that the costs repaid the OLR more than penalized Osicka. After all, "reimbursing" the agency can mean nothing else.

Second, S.C.R. 22.24(1m) codifies "[t]he Court's general policy . . . that upon a finding of misconduct it is appropriate to impose all costs, including the expenses of counsel for the Office of Lawyer Regulation, upon the respondent." The court imposes costs in almost every case.

Third, in hundreds of disciplinary decisions issued over the years, the Wisconsin Supreme Court has never described this policy as a penalty, but rather explains it exists:

> . . . for a common-sense reason: It is only fair that a disciplined lawyer should shoulder, to the extent the lawyer is able, the costs of an OLR proceeding that the lawyer's misconduct necessitated, rather than transferring those costs to the other members of the bar who have not engaged in misconduct.

Disciplinary Proceedings against Stern, 2016 WI 6, ¶13, 366 Wis.2d 431, 439. The legal profession, not the public, finances the OLR, S.C.R. 20.21, and the Court invariably imposes full costs not to punish, but rather, given the choice between imposing costs on the lawyer whose conduct necessitated the proceeding or the profession at large, fairness requires that the lawyer bear those costs.

Fourth, an attorney's license "may be reinstated notwithstanding the failure to pay costs or make restitution provided the attorney has been unable to do so due to a lack of financial resources." *In re Disciplinary Proceedings Against Biester*, 2016 WI 74, ¶29, 371 Wis.2d 577, 589, 882 N.W.2d 856, 862 (Abrahamson, J., concurring). If repayment of OLR cost assessments against disciplined attorneys depends on whether the lawyer is poor, they are not disciplinary.

Fifth, assessing costs is entirely unrelated to the severity of the lawyer's misconduct and closely associated with the vigor of the prosecution and defense. Smaller transgressions aggressively defended might yield higher cost assessments than more serious charges conceded. Dishonest lawyers can easily pay lower costs, if they surrender promptly, than lawyers, like Osicka, who do nothing dishonest, eventually pay. Cost assessments depend more on OLR prosecution efforts than a lawyer's actual misconduct and, as such, clearly constitute compensation for pecuniary losses.

Sixth, S.C.R. 22.001(3) defines costs, but nothing there suggests that they represent a fine, penalty, or forfeiture.

Seventh, S.C.R. 21.16(1m) lists the many penalties that "may be imposed upon an attorney as discipline for misconduct . . . ," but the assessment of costs is not among them. Indeed, the rule allows for the court to fine attorneys who engage in misconduct, but that did not occur here. The Seventh Circuit surmised the Wisconsin Supreme Court imposed costs as a monetary payment under the rule, (Slip Op. pp. 7-8, App. 7-8), but the Supreme Court decision fails to corroborate that conjecture and a separate rule [S.C.R. 22.24(1m)] imposes costs apart from discipline.

Eighth, the Seventh Circuit emphasized that only those involved in misconduct pay costs, so cost assessments must penalize. But even lawyers engaging in no misconduct pay costs before reinstatement. For example, S.C.R. 22.24 imposes costs in instances of medical incapacity when no misconduct has occurred.

Finally, cost assessments most resemble taxable costs imposed at the end of a litigation under Fed. R. Civ. P. 54 and 28 U.S.C. §1920 et seq. or, even more, costs imposed under one of many fee shifting statutes. Cf. S.C.R. 22.001(3). No one suggests that taxable costs or those imposed under 42 U.S.C. §1988, for example, constitute a penalty. In fact, *Albert-Sheridan* added that, while a cost assessment survived a bankruptcy discharge, discovery sanctions assessed in a civil proceeding were in fact dischargeable—despite *Kelly*.

CONCLUSION

For all these reasons, the Petitioner respectively urges review of the Seventh Circuit's decision.

Respectfully submitted this 22nd day of April, 2022.

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