No. 21-1379

In the

Supreme Court of the United States

TIM OSICKA,

Petitioner,

v.

WISCONSIN OFFICE OF LAWYER REGULATION,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Fines, penalties, and forfeitures owed to the government that are not compensation for an actual pecuniary loss are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(7). The circuit courts of appeal unanimously hold that this exception to discharge includes debts owed by disciplined attorneys to the government for the costs of prosecuting their misconduct.

Consistent with unanimous federal precedent, did the court of appeals correctly hold that the Petitioner's debt to the Wisconsin Office of Lawyer Regulation for its costs in prosecuting his lawyer misconduct was not discharged in his bankruptcy case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Petitioner Tim Osicka is a former attorney who seeks to discharge in bankruptcy his debt to the government for the costs it incurred prosecuting him for attorney misconduct. Every circuit court of appeals to address this issue has held that this exact type of debt cannot be discharged in bankruptcy. Following this unanimous precedent, the Seventh Circuit held that Osicka's debt was not discharged. Because this issue is well settled throughout the country, there is no reason for this Court to grant certiorari.

This Court should deny the petition.

STATEMENT OF THE CASE

I. Fines and penalties owed to the government cannot be discharged in bankruptcy.

This case concerns whether a debt owed to Wisconsin's Office of Lawyer Regulation (OLR) for the costs of prosecuting an attorney for misconduct qualifies as a nondischargeable debt under Bankruptcy Code section 523(a)(7). That statute provides that a discharge "does not discharge an individual debtor from any debt . . . 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." 11 U.S.C. § 523(a)(7).

II. Attorney disciplinary proceedings in Wisconsin

OLR is an arm of the Wisconsin Supreme Court and carries out the court's constitutional responsibility to supervise the practice of law and protect the public from lawyer misconduct. SCR 21.02.[1] In this role, OLR investigates and prosecutes attorney misconduct. *Id.* at (1). In prosecuting disciplinary cases, OLR "represent[s] the interests of the supreme court and the public in the integrity of the lawyer regulation system in its search for the truth." SCR 21.12.

OLR commences a disciplinary proceeding by filing a complaint alleging misconduct in the Wisconsin Supreme Court. SCR 22.11. The rules of civil procedure and evidence apply, and a court-appointed referee presides over the trial with the same powers as a circuit court judge (Wisconsin's trial-level court). SCR 22.16. At the trial, OLR "has the burden of demonstrating by clear, satisfactory and convincing evidence that the respondent has engaged in misconduct." *Id.* at (5). Within 30 days after the trial, the referee must file with the Wisconsin Supreme Court its findings of fact, conclusions of law regarding misconduct, and a recommendation of discipline if misconduct is found. *Id.* at (6). The referee also files a recommendation as to the assessment of costs. *Id.* at (7). The respondent

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[1] The Wisconsin Supreme Court rules are available at https://www.wicourts.gov/supreme/sc_rules.jsp (last visited May 24, 2022).

may appeal the referee's report to the Wisconsin Supreme Court. SCR 22.17. If no appeal is filed, the court reviews the referee's report and can adopt, reject, or modify any findings or conclusions and determine and impose discipline. *Id.* at (2). If an appeal is filed, the case proceeds with briefing and a final decision as in a regular civil appeal. *Id.* at (3).

If, after reviewing the referee's report, the Wisconsin Supreme Court finds that an attorney committed misconduct, in addition to imposing other discipline, it "may assess against the respondent all or a portion of the costs of [the] disciplinary proceeding in which misconduct is found." SCR 22.24(1). While the rule also states that it is the court's "general policy" to "impose all costs" in proceedings where misconduct is found, the rule gives the court discretion to "reduce the amount of costs imposed upon a respondent." *Id.* at (1m). In exercising that discretion, the court must consider, among other factors, the number of counts charged, contested, and proven, the nature of the misconduct, the lawyer's cooperation with the disciplinary process, and the lawyer's prior discipline. *Id.*

III. Osicka's disciplinary proceeding

OLR prosecuted Osicka for misconduct in 2009. *In re Disciplinary Proceedings Against Osicka*, 2009 WI 38, 317 Wis. 2d 135, 765 N.W.2d 775. (Bankr. Dkt. 1: Ex. A.)[2] The referee found that Osicka had

[2] For the Court's convenience, this brief cites to the bankruptcy court's docket for record citations.

committed two counts of misconduct: he failed to respond to a client's request for information and later failed to cooperate with OLR's investigation. The referee recommended a 60-day suspension of his license and that he be ordered to pay restitution to a former client. *Id.* ¶ 1. The referee also recommended that Osicka be ordered to pay the costs of the disciplinary proceeding. *Id.*

Osicka appealed the referee's decision to the Wisconsin Supreme Court. *Id.* That court affirmed the referee's decision, except that it imposed the sanction of a public reprimand instead of a suspension. *Id.* ¶ 56. The court also ordered that Osicka "should be responsible for paying the full costs of this disciplinary proceeding." *Id.* ¶ 59. Those costs totaled $12,500.64. *Id.*

IV. Osicka's bankruptcy case

Osicka filed for Chapter 7 bankruptcy in 2011. (App. 24.) He received a discharge a few months later. (App. 24.)

In 2019, Osicka moved to reopen his bankruptcy case to have the court determine whether his debt to OLR was discharged. (App. 24.) The court granted the motion, and Osicka filed an adversary proceeding against OLR alleging that his debt had been discharged. (App. 24.) The parties stipulated to the facts, including that OLR is a governmental unit, and filed cross-motions for summary judgment. (App. 25.)

The bankruptcy court granted summary judgment to OLR. (App. 24.) The court held that Osicka's debt had not been discharged because it was a nondischargeable fine or penalty under 11 U.S.C. § 523(a)(7). The court first noted that "most courts that have considered this issue . . . have concluded that costs and expenses associated with attorney disciplinary proceedings are fines or penalties under section 523(a)(7)." (App. 29–30 (collecting cases).) The court found the discretionary nature of the cost award significant because it indicated that costs are penal. (App. 30–31.) The court further noted that "Wisconsin case law as developed reflects a policy of treating assessed costs as penal in nature." (App. 31 (citing to Wisconsin Supreme Court disciplinary cases).) For these reasons, the court found that Osicka's debt was a fine or penalty under section 523(a)(7). (App. 31–32.)

Next, the court rejected Osicka's argument that the costs did not qualify for section 523(a)(7) because they compensate OLR for an "actual pecuniary loss." The court noted that several courts had considered and rejected this exact argument. (App. 32–34.) Further, the court explained that OLR "performs a critical public function of government by holding attorneys in Wisconsin accountable for their misconduct." (App. 35.) The expenses OLR incurs for carrying out this critical public function is accordingly not an actual pecuniary loss. (App. 35–36.)

For these reasons, the court held that the costs satisfied the elements of section 523(a)(7) and were not discharged. Osicka appealed the bankruptcy court's decision to the district court pursuant to 28 U.S.C. § 158(a)(1).

V. The district court appeal

The district court affirmed the bankruptcy court's decision. (App. 14.) It concluded that Osicka's argument "cannot be squared with the weight of judicial authority" to the contrary. (App. 18.) The court explained that "there are numerous other cases in which courts have held that costs assessed for attorney disciplin[e] are [nondischargeable] including decisions from three federal courts of appeal and five bankruptcy courts in this circuit." (App. 20.) On the other hand, "Osicka doesn't cite *any* cases that remain good law." (Dkt. 23:6 (emphasis added).) Thus, the court concluded that Osicka's debt to OLR "is a non-dischargeable penalty." (Dkt. 23:7.) Osicka appealed to the United States Court of Appeals for the Seventh Circuit.

VI. The Seventh Circuit appeal

The Seventh Circuit again affirmed. (App. 1.) The court began its analysis with the plain language of section 523(a)(7). (App. 5.) Because Congress did not define "fine, penalty, or forfeiture," the court was "left to give them their ordinary meanings, informed by the context in which they operate." (App. 6 (citing *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021).) The plain meaning of a penalty, the court said, is a

"punishment imposed on a wrongdoer that can take the form of a sum of money exacted as punishment." (App. 7 (citing Black's Law Dictionary) (quotation marks omitted).) Applying that definition to Osicka's costs, the court observed that, under Wisconsin's disciplinary rules, "attorney discipline uniquely requires a 'finding of misconduct' as a precondition" for ordering costs. (App. 7 (citing SCR 22.24(1m).)

The court went further: "That rule also grants referees the discretion to set the cost order after weighing culpability factors—including the nature of the misconduct, the number of charges, the attorney's disciplinary history, and the attorney's cooperation." (App. 7–8.) Thus, the "structure of Rule 22.24(1m) unambiguously singles out attorney discipline as a penal endeavor." (App. 8.) That mattered, the court noted, because this Court's decision in *Kelly v. Robinson*, 479 U.S. 36 (1986), "emphasized . . . that § 523(a)(7) creates a 'broad exception' to dischargeability for all 'penal sanctions.'" (App. 8.) Going further, the court explained that the referee "imposed costs only after assessing various aggravating and mitigating factors" in Osicka's individual case. (App. 8.) For these reasons, the court concluded, "it is plain the cost order is a 'penalty' within the meaning of § 523(a)(7)." (App. 7.)

Next, the court rejected Osicka's argument that his disciplinary costs compensated OLR for a pecuniary loss. (App. 9.) The court reasoned that "[t]he incurrence of operating expenses to prosecute a disciplinary investigation is not an actual pecuniary

loss" because the "OLR had simply expended money that it had already allocated 'in the furtherance of its public responsibilities,'. . . which include 'disciplinary investigations and actions.'" (App. 9–10 (citation omitted).) The use of OLR's funds for this purpose did not result in either a "disappearance or diminution of value, nor the real and substantial destruction of property," and therefore was not an "actual pecuniary loss" under that term's plain meaning. (App. 10.) Put differently, the court said that OLR's costs were "part of the expense of governing," which were not undertaken "expecting to create a debtor-creditor relationship." (App. 10 (citation omitted).) Rather, OLR had to carry out its civic responsibilities independent of cost recoveries in individual cases.

The court also observed that its holding was consistent with *Kelly*. (App. 10–11.) Osicka's costs served similar deterrence and rehabilitation purposes as the restitution debt at issue in *Kelly*. (App. 10.) And the court rejected Osicka's argument that *Kelly* applied only to criminal sanctions, observing that this Court had already extended *Kelly* to civil cases. (App. 11 (citing *Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990); *Cohen v. de la Cruz*, 523 U.S. 213 (1998).) Finally, the court observed, "*every other circuit* to have confronted the question presented has come to the same conclusion." (App. 13 (citing cases) (emphasis added).)

For these reasons, the court affirmed the bankruptcy court's decision that Osicka's debt for the costs of his disciplinary proceeding is

nondischargeable under section 523(a)(7). Osicka timely petitioned this Court for certiorari. For the reasons discussed below, this Court should deny that request.

REASONS FOR DENYING THE PETITION

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. There is no reason to grant Osicka's petition. There is no conflict among the circuits, and this case does not involve an important question of federal law. Instead, this case involves a question that has been answered repeatedly and consistently by the circuit courts of appeal. At bottom, Osicka, having lost in three different forums, simply seeks a fourth bite at the apple. He does not present any compelling reason for this Court to grant certiorari.

I. There are no splits of authority among the circuits; to the contrary, the circuits unanimously hold that attorney disciplinary costs are not dischargeable.

Contrary to Osicka's argument, there is no split of authority among the circuits. In fact, the circuit court decisions are unanimous: disciplinary costs like Osicka's are not dischargeable in bankruptcy.

Four circuit courts have considered whether the costs of an attorney disciplinary proceeding are dischargeable under section 523(a)(7). *In re Findley*, 593 F.3d 1048 (9th Cir. 2010); *Richmond v. N.H. Sup. Ct. Comm. on Prof'l Conduct*, 542 F.3d 913 (1st Cir.

2008); *In re Feingold*, 730 F.3d 1268 (11th Cir. 2013); *Osicka v. Off. of Law. Regul.*, 25 F.4th 501 (7th Cir. 2022). All four agreed that such debts are not dischargeable. As the Seventh Circuit said, "*every other circuit* to have confronted the question presented has come to the same conclusion." (App. 13 (emphasis added).)

Osicka incorrectly asserts that the circuits are split on this issue. (Pet. 25–26.) He cites *In re Taggart*, 249 F.3d 987 (9th Cir. 2001), but that case is no longer good law in the Ninth Circuit. *In re Findley*. 593 F.3d at 1054. Instead, *In re Findley* provides the governing law of the Ninth Circuit, and it holds that disciplinary costs like Osicka's are not dischargeable under section 523(a)(7).

Osicka also cites *In re Schaffer*, 515 F.3d 424 (5th Cir. 2008). *Schaffer*, however, is readily distinguishable from the attorney discipline cases. In *Schaffer*, the court held that a disciplined dentist's costs did not qualify as a nondischargeable penalty under the language in the disciplinary statute, which allowed for both costs and a fine in the same provision. *Id.* at 428. Because the dentist had not been fined, only assessed costs, that meant that the costs were not punitive under the statute's plain language. *Id.* Importantly, the court distinguished its decision from authorities holding attorney disciplinary costs were nondischargeable penalties: "th[o]se cases differ substantially from the facts here. None of those cases involved a unitary statute with language providing for the imposition of a fine *and* costs." *Id.* at 429.

Crucially, one such case the *Schaffer* court distinguished was a Wisconsin bankruptcy case addressing the dischargeability of attorney disciplinary costs imposed by OLR—the exact debt at issue here. *Id.* at 430–31 (discussing *In re Haberman*, 137 B.R. 292 (Bankr. E.D. Wis. 1992)). *Haberman* differed, the court explained, because the Wisconsin Supreme Court Rules—the very rules at issue here—defined costs as a form of discipline. "In *Haberman*, the rule providing for the assessment of costs listed costs as a 'type[ ] of discipline.' . . . In contrast, the Louisiana statute does not define assessment of costs as a form of 'discipline.'" *Id.* Thus, the court concluded that "[t]he unique text of the Louisiana statute compels us to reach a result that differs from holdings in other circuits." *Id.* at 431.

In short, *Schaffer* has no bearing on the issue presented. By the Fifth Circuit's own admission, *Schaffer* is limited to its "unique" facts. *Id.* It therefore does not conflict with any of the circuits holding that attorney disciplinary costs like Osicka's are nondischargeable. In fact, *Schaffer*'s distinguishing of Wisconsin's attorney disciplinary rules suggests that the Fifth Circuit, if presented with the issue here, would reach the same conclusion as every other circuit: Osicka's costs are non-dischargeable.

II. There are no other reasons to grant the petition.

Other than arguing—incorrectly—that there is a split of authority in the circuits, Osicka does not

advance any other reason that justifies granting certiorari. For example, he does not argue that this case involves an important question of federal law. For good reason—this case concerns the dischargeability of an uncommon category of debt unique to disciplined attorneys and, at most, other professionals. The question is not a pressing question of federal law that this Court needs to resolve. Moreover, as discussed, it is a question with a clear answer.

Nor is there any argument that the Seventh Circuit misapplied this Court's precedent. Osicka argues that the Seventh Circuit's decision "defies many of this Court's cases" by interpreting section 523(a)(7) as it did, but he merely cites to this Court's cases discussing how to interpret statutes generally, not section 523(a)(7) specifically. (Pet. 17–20.) Further, as this Court's precedent instructs, interpreting a statute depends upon whether the statute's meaning is clear. If it is, the language controls. But if not, the Court relies upon interpretative tools. As this Court explained in a case involving a bankruptcy statute: "In any event, while pre-Code practice 'informs our understanding of the language of the [Bankrupty] Code', it cannot overcome that language. It is a tool of construction, not an extratextual supplement. We have applied it to the construction of provisions which were 'subject to interpretation,'" like section 523(a)(7). *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) (quotation and quotation marks omitted) (citing *Kelly*, 479 U.S. at 50.) Thus, Osicka's

reliance on precedent interpreting unambiguous statutes is misplaced. The Seventh Circuit's interpretation of section 523(a)(7) is entirely consistent with this Court's precedent, including *Hartford* and *Kelly*.

Osicka also argues that *Kelly* "merits examination" and that lower courts "conflict over" its interpretation. (Pet. 20–25.) He cites to cases declining to extend *Kelly* to certain debts, such as civil restitution and discovery sanctions, but none of those cases involved debts like that at issue here: costs assessed against an attorney after being found guilty of misconduct. As discussed, the circuits are united on the meaning of *Kelly* and section 523(a)(7) as applied to the debt at issue in this case. This case is accordingly not the proper vehicle to address whatever confusion, if any, may exist in applying *Kelly* to other types of debt.

III. The Seventh Circuit's decision is correct

Osicka devotes much of his petition arguing that the Seventh Circuit erred. Error correction is not a compelling reason to grant certiorari under Supreme Court Rule 10. In addition, Osicka is incorrect. The Seventh Circuit properly applied the well-settled law that attorney disciplinary costs like Osicka's are not dischargeable under section 523(a)(7).

It is well settled that attorney disciplinary costs are non-dischargeable penalties under section 523(a)(7). Prior to the Seventh Circuit's decision below, there were three unanimous decisions from its

sister circuit courts of appeal. *In re Findley*, 593 F.3d at 1054; *Richmond*, 542 F.3d at 921; *In re Feingold*, 730 F.3d 1268 at 1276. Further, bankruptcy courts within the Seventh Circuit had unanimously reached the same conclusion. *In re Haberman*, 137 B.R. 292 (Bankr. E.D. Wis. 1992); *In re Netzer*, 545 B.R. 254 (Bankr. W.D. Wis. 2016); *In re Betts*, 149 B.R. 891 (Bankr. N.D. Ill. 1993); *In re Carlson*, 202 B.R. 946 (Bankr. N.D. Ill. 1996); *In re Lewis*, 151 B.R. 200 (Bankr. C.D. Ill. 1992).

Consistent with this precedent, the Seventh Circuit correctly held that Osicka's debt to OLR for his disciplinary costs were non-dischargeable penalties under section 523(a)(7). The court correctly held, first, that his debt for costs qualified as a penalty, and second, that the costs did not compensate OLR for an actual pecuniary loss.

First, the court correctly concluded that Oscika's costs qualified as a "penalty" under section 523(a)(7). As Congress did not define "penalty," the court properly gave the term its ordinary meaning of "punishment imposed on a wrongdoer," (App. 7), consistent with this Court's precedent. *E.g., United States v. Santos*, 553 U.S. 507, 511 (2008). Under that definition, Osicka's debt for costs was a penalty for several reasons. Importantly, a lawyer must be found guilty of misconduct before the Wisconsin Supreme Court can assess costs. (App. 7.) That illustrates their penal nature, as several other courts have recognized. *Richmond*, 542 F.3d at 918; *In re Feingold*, 730 F.3d at 1274–75.

Disciplinary costs are also penalties because, the court observed, they are discretionary and the amount can be adjusted after considering a number of "culpability factors" in the rule, "including the nature of the misconduct, the number of charges, the attorney's disciplinary history, and the attorney's cooperation." (App. 7–8); SCR 22.24. Indeed, the Wisconsin Supreme Court has exercised that discretion to reward or punish disciplined attorneys depending on their conduct. *Compare In re Disciplinary Proceedings against Arellano*, 2013 WI 24, ¶ 59, 346 Wis. 2d 340, 827 N.W.2d 877 (75% cost reduction), *and In re Disciplinary Proceedings Against Ruppelt*, 2014 WI 53, ¶ 28, 354 Wis. 2d 738, 751, 850 N.W.2d 1 (50% reduction), *with In re Disciplinary Proceedings against Kratz*, 2014 WI 31, ¶ 65, 353 Wis. 2d 696, 851 N.W.2d 219 (imposing full costs to punish the lawyer's "tooth-and-nail litigation approach").

For these reasons, the court correctly concluded that Osicka's debt for disciplinary costs was, per the term's ordinary meaning, a "penalty" under section 523(a)(7).

Second, the court correctly held that the costs do not compensate OLR for an "actual pecuniary loss." 11 U.S.C. § 523(a)(7). As with "penalty," this term is undefined. Under that term's ordinary meaning, however, the court correctly concluded that OLR's use of its operating budget to prosecute attorney misconduct was not a pecuniary loss because OLR

"simply expended money that it had already allocated . . . [for] disciplinary investigations and actions." (App. 10.) There was accordingly no loss at all, merely a government agency using its budget to carry out its civic duties independent of cost recoveries in individual cases.

Kelly also supports the Seventh Circuit's conclusion that Osicka's costs do not compensate OLR for a pecuniary loss. In interpreting that phrase in the context of criminal restitution, the Court focused on the purpose of the underlying action. "The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him." *Kelly*, 479 U.S. at 52. Moreover, the "victim has no control over the amount of restitution awarded." *Id.* And the Court distinguished restitution from "an obligation which arises out of a contractual, statutory or common law duty" because restitution "is rooted in the traditional responsibility of a state to protect its citizens." *Id.* (citation omitted). For these reasons, the Court concluded that restitution was more penal than compensatory and therefore not compensation for a pecuniary loss *Id.* at 53.

Here, like the restitution in *Kelly*, Osicka's disciplinary costs are more penal than compensatory. As with criminal prosecutions, attorney prosecutions benefit the public, not OLR. "The ultimate objective [of bodies like OLR] . . . is 'the protection of the public, the purification of the bar and the prevention of a

re-occurrence.'" *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (citation omitted). Indeed, protection of the public is paramount in the preamble to the rule establishing OLR: "The lawyer regulation system is established to carry out the supreme court's constitutional responsibility to supervise the practice of law *and protect the public from misconduct* by persons practicing law in Wisconsin." Wis. Sup. Ct. R. 21 (Preamble). Further, like criminal defendants, disciplinary costs are only imposed upon convicted lawyers. That the acquitted are not responsible for costs shows that the costs serve a different purpose than purely compensating OLR, as several courts have observed. *Haberman*, 137 B.R. at 295; *Netzer*, 545 B.R. at 260; *Feingold*, 730 F.3d at 1274; *Richmond*, 542 F.3d at 920; *In re Smith*, 317 B.R. 302, 310 (Bankr. D. Md. 2004). Moreover, like the restitution victim in *Kelly*, OLR does not decide the amount of cost awards. As discussed, the Wisconsin Supreme Court has—and exercises—discretion to lower the costs based upon the lawyer's conduct under several "culpability factors." (App. 7.) For these reasons, *Kelly* supports the Seventh Circuit's conclusion that Osicka's disciplinary costs do not compensate OLR for an actual pecuniary loss.

In short, the Seventh Circuit correctly concluded that, consistent with the other circuits, Osicka's disciplinary costs meet the discharge exception for penalties under section 523(a)(7).

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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