No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Statutes and rules:

In the Supreme Court of the United States

No. 18-489

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

The question initially presented in this case was the narrow issue whether a creditor's "good faith belief" is sufficient to excuse a discharge violation, "even if the creditor's belief is unreasonable." All sides now agree that the Ninth Circuit's "good faith" standard is incorrect. That alone is sufficient to reverse the Ninth Circuit, which departed from the overwhelming national rule applied in other jurisdictions for decades. In those courts, unlike the Ninth Circuit, a creditor who violates the discharge is subject to a statutory remedial order under Section 105, and the creditor's reasons or motivations for violating the injunction are irrelevant.

Rather than follow this clear authority, however, respondents and the government now propose a novel rule for the bankruptcy setting. According to their theory, a creditor who actually violates the discharge is categorically immune from liability if the creditor had a "fair" or "reasonable" basis for its action.

This proposed rule is likewise wrong. A discharge violation imposes reals costs on other parties, and the creditor's subjective or objective beliefs do not make those costs disappear. The question thus becomes who is going to bear the consequences of violating the discharge: the creditor who committed the violation, or the debtor who is protected by the Code's decree from precisely this kind of conduct.

The answer is clear from this Court's traditional contempt authority, and a straightforward application of the Code. Section 105 creates broad discretionary authority for bankruptcy judges to remedy discharge violations, and the bankruptcy laws set out a specific, inexpensive, efficient procedure for creditors to obtain guidance on their rights where there is legitimate confusion about the discharge's scope. A creditor who is aware of the discharge and plows ahead anyway—refusing to seek a ruling before impairing the debtor's fresh start—is subject to remedial relief under Section 105. The government and respondents' contrary position would upset decades of settled practice, frustrate the Code's proper administration, and eliminate the Code's primary tool for protecting debtors from serious abuse.

The decision below should be reversed.

ARGUMENT

A. All Sides Now Agree That The Ninth Circuit Applied The Wrong Legal Standard

1. In the decision below, the Ninth Circuit held that a "creditor's good faith belief that the discharge injunction does not apply * * * precludes a finding of contempt, even if the creditor's belief is unreasonable." Pet. App. 12a; see

also *id.* at 13a ("Although the Creditors * * * were ultimately incorrect, their good faith belief, even if unreasonable, insulated them from a finding of contempt."). As petitioner explained (Pet. Br. 13-25), that holding was directly at odds with this Court's longstanding rules for general civil contempt and a proper application of the Bankruptcy Code. There was no analytical support for the Ninth Circuit's position, and a "good faith" rule would eviscerate the debtor's "fresh start" and frustrate the bankruptcy system.

All sides to this case now agree that the Ninth Circuit's rule is wrong. Although respondents resisted this conclusion below, they now concede that good faith alone cannot immunize a creditor from contempt. Resp. Br. 31-33; see also, *e.g.*, *id.* at 35 (admitting the Ninth Circuit's decision is "[in]consistent" with *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949)). And the government likewise has confirmed that a subjective-intent standard has no legal foundation in the bankruptcy context. See, *e.g.*, U.S. Br. 22 ("The court of appeals erred in treating subjective bad faith as a prerequisite to contempt remedies.").

The Ninth Circuit did not try to justify the merits of its position at any point in its opinion; it simply identified its "good faith" rule in an earlier circuit decision, and declared itself "b[ound]" going forward. Pet. App. 13a. Its holding was indefensible below, and it is now undefended in this Court. Because the decision below was premised on an incorrect legal standard, reversal is plainly warranted.

2. While admitting the Ninth Circuit's operative rationale was wrong, respondents nonetheless attempt to avoid a quick reversal. They first insist that the Ninth Circuit's holding—declaring a party's subjective intent dispositive—was merely "dictum." Resp. Br. 31. This is baseless. The Ninth Circuit did not announce its holding in "stray language" (contra Resp. Br. 33); it unequivocally

stated its holding multiple times in the opinion (Pet. App. 12a-14a), and the court plainly meant what it said. The government understood the holding the same way (U.S. Br. 29); lower courts and commentators have understood the holding the same way (NACBA Amicus Br. 8-14; Pet. 3 n.1); and even *respondents themselves* previously understood the holding the same way (Br. in Opp. 2). Respondents may now prefer to defend an "objective reasonableness" standard, but they cannot simply rewrite the Ninth Circuit's decision.

As a second attempt, respondents also declare that the Ninth Circuit assessed the "objective basis" for their beliefs, and "[n]o one in this case ever suggested that respondents' belief" was "unreasonable." Br. 32. This is again false. Putting aside for now that (i) respondents' proposed standard is wrong; and (ii) respondents' cannot satisfy their own (wrong) standard on these facts (see *infra*), the Ninth Circuit nowhere found that respondents had a "reasonable" basis for their conduct. It solely noted that respondents acted in "good faith," and stressed, repeatedly, that this "good faith belief, *even if unreasonable*, insulated them from a finding of contempt." Pet. App. 13a (emphasis added). The Ninth Circuit had every opportunity to explain why respondents' discharge violation was somehow objectively reasonable, but it instead brushed aside that factor in light of the categorical weight it assigned to "good faith." Respondents cannot manufacture new findings out of thin air—and if a court ever does apply respondents' novel standard, respondents will flunk the test.

B. The Government's And Respondents' Proposed Standards Are Incompatible With Traditional Contempt Principles And The Bankruptcy Code

Both the government and respondents admit that the Ninth Circuit erred in adopting a per se rule that "good faith" automatically forecloses any remedial relief for actual discharge violations. But the government and respondents now each commit a new error in replacing one per se rule with another. According to the government, Section 105 remedial orders are off-limits any time there is a "fair ground" to doubt the discharge applies. And according to respondents, a creditor's "objectively reasonable" belief is sufficient to categorically insulate the creditor from liability.[1]

Both standards are wrong. Under this Court's settled decisions, remedial contempt is appropriate to secure the benefits of a decree; here, the discharge strictly prohibits the collection of discharged debts, and its protections are not contingent on the *reason* a party violates the discharge. Likewise, the Code independently authorizes statutory remedial relief whenever the discharge injunction is violated. Congress granted bankruptcy courts broad discretion under Section 105 to enter any order "necessary" or "appropriate" to enforce the Code's provisions. There is absolutely nothing in this Court's authority

---

[1] The government and respondents suggest that subjective intent plays some role in the analysis, but their theories are incoherent. The government obliquely suggests that a creditor's good faith might somehow cast light on the "fair[ness]" of its views. U.S. Br. 23-24; see also Resp. Br. 35 ("[t]he government's brief does not elaborate"). But objective and subjective standards are analytically distinct. The fact that one creditor ardently (*but wholly unreasonably*) thinks it can escape the discharge does not make its views any "fairer"; at the very most, it would represent a single data point about how *one person* views the situation—which is "fair" only to the extent that person holds *fair views*. And respondents say that creditors must establish *both* good faith and objective reasonableness to foreclose liability; "good faith" thus matters under their view only to the extent a creditor takes a "reasonable" position *in bad faith*. Resp. Br. 37. In other words, while bad faith may itself expose a creditor to liability, good faith alone is irrelevant. Because good faith is not disputed here, this aspect of respondents' proposal is irrelevant to the case's disposition.

or the Code itself that eliminates the court's discretion whenever a creditor has some explanation for *actually violating the law*. Each violation imposes real costs that someone must ultimately incur; there is no basis for shifting those costs to the innocent party.

While the usual exercise of discretion under Section 105 will lead to full remedial relief, bankruptcy courts do retain discretion to take into account the totality of the circumstances, including any reasonable basis for the creditor's actions. That means that while a discharge violation always exposes a creditor to liability, the court "may" calibrate the level of relief as appropriate under the circumstances. 11 U.S.C. 105(a). That discretion itself is an important protection for creditors who take every precaution short of abandoning their claim. But there is no per se rule that inoculates the creditor *as a matter of law* any time it can identify some "fair" (but *incorrect*) basis for insisting its conduct fell outside the discharge.

1. The New Proposed Standards Are At Odds With Traditional Contempt Authority

a. The government and respondents have no real answer for *McComb*. As petitioner explained (Br. 13-16), *McComb*'s rationale was clear—a decree exists for the benefit of the protected class, and the party's reasons for violating that decree are irrelevant:

> Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

336 U.S. at 191.

The government agrees that, "'[s]ince the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act.'" U.S. Br. 11 (quoting *McComb*, 336 U.S. at 191). But the government makes no attempt to square that rationale with its proposed rule. The "remedial" purpose is unfulfilled whether the prohibited act was done "reasonably" or not. The fact remains that the act was unlawful and the creditor violated the protected class's rights. *McComb* declared that sufficient to activate "the power of a court to grant the relief that is necessary to effect compliance with its decree." 336 U.S. at 193; see also, *e.g.*, *Robin Woods, Inc.* v. *Woods*, 28 F.3d 396, 400 (3d Cir. 1994) ("[c]ompensatory awards seek to ensure that the innocent party receives the benefit of the injunction"; they "'make reparation to the injured party and restore the parties to the position they would have held had the injunction been obeyed").[2]

The government also suggests that the decree in *McComb* was clear, eliminating any possible "fair" ground for the violator's conduct. This is pure fiction. *McComb* specifically talked about "uncertainty in the decree" (336 U.S. at 193); both lower courts *rejected* contempt because "neither the law nor the injunction specifically referred to or condemned the practices which were found to violate the Act" (*id.* at 190-191); and the dissent confirmed the view that "the practices" were not on "any fair consideration" covered by the injunction (*id.* at 196 (Frankfurter, J., dissenting)).[3]

---

[2] This "power" is an exact parallel to the bankruptcy court's power under Section 105 to order any relief "necessary" or "appropriate" to effect compliance with the Code. 11 U.S.C. 105(a).

[3] Indeed, the district court ultimately construed the contempt request as "an amended complaint seeking a *broadening* of the previous decree" in order to capture the challenged conduct. 336 U.S. at 190

Yet *McComb* still found that a remedial award was appropriate: the parties "undertook to make their own determination of what the decree meant. They knew they acted at their peril." 336 U.S. at 192. And because "the aim is remedial and not punitive, there can be no complaint that the burden of any uncertainty in the decree is on respondent's shoulders." 336 U.S. at 192, 193.

These principles contradict the government's and respondents' proposed standards. The discharge secures the debtor's fresh start, and that benefit is impaired irrespective of the creditor's rationale for violating the law. Creditors have every right to seek clarification or guidance on the discharge's scope; and, indeed, the bankruptcy rules provide a specific, inexpensive, efficient procedure designed precisely for that purpose. Fed. R. Bankr. P. 4007; see also *McComb*, 336 U.S. at 192 (noting the violator's ability to seek a "modification, clarification or construction of the order"). A creditor who is put on notice of the discharge and elects to plow ahead anyway—in the face of a "reasonable" basis for knowing the discharge *applies*—assumes the risk of guessing wrong.

b. In attempting to sidestep *McComb*, the government and respondents trot out a series of cases involving traditional contempt power outside the bankruptcy context. These cases address different issues, do not undermine *McComb* (unsurprisingly), and have nothing to do with the bankruptcy court's statutory remedial authority under Section 105.

First, according to the government and respondents, this Court articulated the "fair ground" standard in *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S.

(emphasis added); see also *id.* at 197 (Frankfurter, J., dissenting) (noting "the conclusion of the two lower courts that there was no contempt because there was no disobedience of the injunction").

609 (1885). As they read that decision, this Court held that (i) remedial contempt is strictly prohibited whenever "there is a fair ground of doubt" that the injunction applies, and (ii) "if the judges disagree there can be no judgment of contempt." 113 U.S. at 618.

The government and respondents have badly misread this decision. First and foremost, they overlook the apparent reason that contempt was unavailable "if the judges disagree"—*the case arose from a 1-1 vote on a two-judge panel*. See 113 U.S. at 615. In other words, a *tie vote* cannot lead to contempt. The Court did not say that any judicial disagreement foreclosed contempt, and such a holding would be strictly at odds with *McComb*—where, again, the lower courts (and a two-Justice dissent) disagreed with the ultimate conclusion.

Nor did the Court say that a "fair ground" *precluded* contempt. Quite the contrary, the Court expressly noted that the complainant could "seek review of that decision in this court, or bring a new suit against the defendant." 113 U.S. at 618. The Court did not say that appeal would be futile because of the violator's "fair" position or the "disagree[ment]" below; it specifically confirmed further review as an open option. And rather than categorically foreclosing anything, the Court simply noted what "should" happen, not what *must*: a new suit "is by far the most appropriate [method] where [the violation] is really a doubtful question." *Ibid.* The Court thus assuredly did *not* hold that a "fair ground of doubt" is an absolute bar to remedial relief; it merely explained that where, as in that case, a judge-crafted injunction enjoined certain conduct, reasonable disputes about the parties' rights are better resolved in a new case. Any contrary reading would set up a direct conflict with *McComb* itself.

Second, while courts do insist that *judge-made* injunctions be sufficiently definite and precise, those concerns are a poor fit for the *statutory* injunction in the Code. No one thinks the Code is "too vague to be understood." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Congress made the determination about the level of specificity required to put creditors on notice of the discharge's terms, and Congress specifically declared that the discharge (*as framed*) "operates as an injunction." 11 U.S.C. 524(a)(2). It is inconceivable that Congress intended discharge violations to be set aside whenever any party could conjure up some "fair" ground to say a discharged debt fell outside the Code. And that is especially true given what Congress did *not* include in Section 524: there is no textual hook for recognizing a "good faith" or "fair ground" defense to the discharge—Congress prohibited *all* attempts to collect discharged debts, not just "unreasonable" attempts.[4]

Respondents make much ado about the discharge order itself, highlighting its terseness and lack of specificity. But this misunderstands the way bankruptcy works. The discharge order is ultimately premised *on the Code*; the details are supplied by Sections 523 and 524, and the debts are listed directly on the debtor's bankruptcy schedules. The relevant available detail is thus robust. And respondents further overlook that exceptions to the discharge are indeed *exceptions*, not the rule; those exceptions are construed narrowly, and creditors should be well aware that any debt that plausibly falls within the Code's terms is likely to fall within the discharge. See, *e.g.*, *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991); *Whitehouse*, 277 F.3d at

[4] And the logic of the bankruptcy laws is apparent: Instead of excusing creditors for violating the Code in good faith (or with a "fair" argument), the scheme permits creditors to invoke the inexpensive, efficient procedure under Rule 4007 to obtain guidance and *avoid* violations in the first place. See, *e.g.*, *Whitehouse* v. *LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002).

575. Any remaining doubts about the discharge's scope are still available for determination under Rule 4007, which, again, is designed precisely for that purpose.

Third, the true dangers of inherent authority are not present in this context. "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980). But judicial authority here is exercised pursuant to Congress's express authority under Section 105, and construed to "carry out" the precise legislative commands in the Code. See *Law* v. *Siegel*, 571 U.S. 415, 420-421 (2014). This vastly diminishes any dangers of judicial overreaching; it does not present the same risks or concerns as judge-crafted injunctions setting out substantive legal boundaries on an ad-hoc basis.[5]

Finally, the government and respondents misstate the ultimate effect of the vast majority of their authority. These cases respond to the concerns and dangers of judge-made injunctions by construing the injunction *not* to apply—so there is no violation in the first place. See, *e.g.*, *NBA Props., Inc.* v. *Gold*, 895 F.2d 30, 32-34 (1st Cir. 1990) (Breyer, J.). These cases did not say that the decree *does* apply but the actual violation is excused.

This logic does not carry over in this setting. The Code means whatever it means. The issue is always binary: either the discharge was violated or it was not. There is no room for construing "ambiguities" in the Code to mean

[5] The government and respondents also invoke decisions striking down certain injunctions as being effectively "unintelligible." See, *e.g.*, *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). No one, again, believes that the Code is invalid or impermissibly vague. The specific statutory commands in Section 523 and Section 524 put parties on fair notice that they might fall under the ambit of the discharge.

different things in different cases. If a creditor actually violates the Code, their intent or motivation is irrelevant; the creditor is subject to "pay[ing] the damages caused by their violations of the decree." *McComb*, 336 U.S. at 193.

These principles are perhaps best illustrated by one of the government's and respondents' own cases—*TiVo Inc.* v. *EchoStar Corp.*, 646 F.3d 869 (Fed. Cir. 2011) (en banc). In *TiVo*, the Federal Circuit rejected the exact argument the other side is pressing here: that "contempt is improper where the defendant engaged in diligent, good faith efforts to comply with the injunction and had an objectively reasonable basis to believe that it was in compliance." 646 F.3d at 880 (internal quotation marks omitted). The court declared flatly that "EchoStar misreads the law": "We have made it clear that, under Supreme Court precedent, a lack of intent to violate an injunction alone cannot save an infringer from a finding of contempt." *Ibid.* (also quoting *McComb*). "[W]here a party faced with an injunction perceives an ambiguity in the injunction, it cannot unilaterally decide to proceed in the face of the injunction and make an after-the-fact contention that it is unduly vague." *Id.* at 885.

In sum, the government and respondents attempt to make up in quantity what they lack in authority. But they fail to cite any relevant precedent in the bankruptcy context—indeed, it appears that they could not cite *any* authority holding that Section 105 remedial orders are flatly prohibited whenever a creditor can imagine up some "fair" or "reasonable" explanation for its conduct. Petitioner, by contrast, relies on the majority rule followed by jurisdictions nationwide: If a creditor is aware of the bankruptcy and actually violates the discharge, the creditor is subject to potential liability under Section 105. See, *e.g.*, *IRS* v. *Murphy*, 892 F.3d 29, 38-39 (1st Cir. 2018);

Pet. 11-21 (outlining authority in multiple circuits, two bankruptcy appellate panels, and multiple district courts).

2. The New Proposed Standards Are At Odds With The Courts' Statutory Remedial Authority Under The Bankruptcy Code

As petitioner already established, Section 105 provides clear statutory authority to redress discharge violations and restore the status quo. This follows directly from Code's text, context, purpose, and history, and neither the government nor respondents have remotely established that this authority disappears whenever a creditor offers a "reasonable" basis for violating the discharge.[6]

a. In lodging many of their objections, the government and respondents overlook a key feature of Section 105: it provides *discretionary* authority to award relief. While the exercise of discretion will usually require the provision of "full remedial relief" (*McComb*, 336 U.S. at 193), courts do have the power to consider all the circumstances underlying a violation. That consideration can include deciding to focus the contempt order on the creditor, not the creditor's attorney, and adjusting the remedial amount to reflect the comparative equities of the parties.

This broad, equitable discretion is flatly inconsistent with the categorical prohibitions proposed by the govern-

---

[6] Although courts typically use the "contempt" label in describing relief under Section 105, the use of the word "contempt" is somewhat out of place. These orders are statutory remedial orders. See, *e.g.*, *In re Hardy*, 97 F.3d 1384, 1391 (11th Cir. 1996). The Code does not use the word "contempt" anywhere in Section 105, and the function is not to punish or shame creditors; the entire purpose is to carry out the Code by enforcing and restoring the discharge injunction. The power flows from that directive, and this Court could provide useful guidance to lower courts by clarifying the proper nature of the remedial award.

ment and respondents. There is nothing in the text of Section 105 or Sections 523 and 524 that suggests that a creditor's "reasonableness" is grounds for automatically foreclosing a remedial order under Section 105. Congress knows how to draft such preconditions where it so wishes (see, *e.g.*, 11 U.S.C. 362(k)(2)), and yet it barred "all" efforts to collect discharged debts, and authorized courts to issue "any" order necessary to carry out the Code. The bright-line proposals have no grounding in the text.

b. The bankruptcy law's scheme is also readily apparent. As noted earlier, the rules provide an express mechanism exclusively for obtaining dischargeability rulings. Fed. R. Bankr. P. 4007. In response, the government and respondents argue that the Code only requires "advance determinations" in certain situations (*e.g.*, 11 U.S.C. 523(a)(2)), and pointing creditors to Rule 4007 is inconsistent with those mandatory provisions.

This is baseless. No one is saying that creditors are *required* to use Rule 4007. The entire point is that the Code provides the *option* of seeking review for those creditors who worry about the consequences of collecting a discharged debt. This inexpensive, streamlined provision accommodates the interests of both debtors and creditors, and it eliminates the excuse of those creditors who are aware of potential problems with the discharge and yet decide to collect anyway.[7]

---

[7] Petitioner has already explained how Congress's refusal to adopt a "good faith" or "reasonableness" standard under Section 362(k) or 26 U.S.C. 7433 suggests that courts operating under Section 105 should follow the same lead. Aside from (sheepishly) suggesting that Section 362(k) excuses damages for good-faith conduct, respondents argue that there are reasons to differentiate between stay violations and discharge violations. This is wrong. Courts have always applied

c. The government and respondents are likewise wrong that pointing to Rule 4007 creates an anomaly: petitioner admits that the debtor would be required to cover the costs of litigating a Rule 4007 proceeding, but is permitted to seek remedial relief for litigating discharge issues in the context of a state-court collection suit.

There is no anomaly at all. These two types of proceedings—an affirmative action to collect a debt and a declaratory action seeking guidance under Rule 4007—are different in degree and kind. The scope of the proceedings are vastly different: a debtor is forced to litigate *all* the issues in a state-court collection action; a Rule 4007 proceeding is focused exclusively on the single discharge issue. Moreover, the Rule 4007 proceeding is designed to provide quick, inexpensive, and efficient answers to discharge questions; it has the advantage of an expert bankruptcy judge who is familiar with the issues, unlike a state court where procedures may be more cumbersome (and the judge may be less familiar with the questions).

And, critically, it also has the advantage of keeping the burden on the creditor, not the debtor. A debtor can always decide to rely on the bankruptcy judge to resolve the discharge issue, even without the debtor's participation. (The judge, after all, will not declare the debt beyond the discharge without making an actual finding that the debt is beyond the discharge.) In a state court, by contrast, the debtor is forced to affirmatively litigate at the risk of giving up his or her rights.

Aside from these practical differences, there is also an important legal difference: A request for declaratory relief under Rule 4007 does not violate any provision of the

---

the same standards to each under Section 105 (for conduct falling outside Section 362(k) (see, *e.g.* Pet. Br. 21); and Congress expressly treated the violations the same under 26 U.S.C. 7433.

discharge; an affirmative petition to collect discharged debts, by contrast, falls squarely within the heartland of banned conduct (11 U.S.C. 524(a)(2))—precisely the type of activity that upsets the debtor's fresh start, imposes unnecessary costs on a debtor who has emerged from bankruptcy, and creates the risk that the debtor will be coerced into paying a debt that was properly excused in the bankruptcy case.

Neither the government nor respondents have any answer to these obvious considerations.[8]

d. Finally, respondents and the government suggest that a potential remedial award for a "reasonable" violation upsets the proper balance between creditors and debtors. This is perplexing. For one, it ignores the obvious impairment of the Code. This sets up a clear "heads I win, tails you lose" scenario: A creditor can simply try to collect without any real fear of paying the consequences for the costs it imposes on others. If the debtor gives up and pays, the creditor might collect a discharged debt; if the debtor fights, the creditor will know it is safe so long as it has a "fair" ground for its position. This is not a recipe for a fair or effective bankruptcy regime.[9]

Any creditor interested in pursuing its rights can do so directly (assuming the creditor is not concerned about

---

[8] Respondents suggest they had no choice but to proceed in state court before their fee motion was due within 14 days of the judgment. This overlooks that Oregon law, like the law in virtually all States, grants trial courts discretion to adjust the deadlines on any terms "that may be just." Or. R. Civ. P. 68(C)(4)(d)(ii).

[9] Debtors typically cannot afford to hire attorneys to fight discharge violations; if remedial orders are unavailable under Section 105, debtors will generally be left fighting off creditors on their own—or, more realistically, simply giving up the fresh start by acquiescing in the collection attempt.

the possibility of covering the costs of a violation). And any creditor concerned about potential remedial orders can seek an inexpensive determination under Rule 4007. There is no reason that any creditor with any legitimate claim will forgo collection.[10]

And while respondents suggest the sky will fall unless creditors are free to pursue marginal theories over discharged debts, experience again suggests otherwise. Respondents ignore that petitioner's "rule" is not new. Unlike respondents and the government, petitioner suggests the Court retain the same status quo that has existed in countless jurisdictions for decades, apparently without any concrete effect on the ability of creditors to collect legitimate debts. There is no reason to upset the status quo now.

C. Even If A Reasonableness Standard Applies, Respondents' Conduct Was Patently Unreasonable

If this Court does adopt a "reasonableness" standard, respondents' conduct was patently unreasonable. While such a question is better suited for disposition in the first instance on remand, suffice it to say that respondents' aggressive, misleading take merely highlights the problems debtors face with litigious creditors who refuse to respect the discharge.

1. As an initial matter, respondents' legal theory is unsupportable. Putting aside that *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2015), itself stands on suspect footing, respondents cannot plausibly maintain that their actions fit within *Ybarra*'s narrow license. That case involved a debtor who *deliberately initiated new litigation*. See 424

---

[10] Even for minimal claims, a creditor can hardly suggest unfairness because it cannot troubled to spend any resources to determine if its action will violate the Code. Surely the cost wrongly imposed on the debtor for resisting will outweigh the creditor's imposition.

F.3d at 1023-1024. And the court merely "held that post-petition attorney fee awards are not discharged where post-petition, the debtor voluntarily 'pursue[d] a whole new course of litigation,' commenced litigation, or 're-turn[ed] to the fray' voluntarily." *Id.* at 1024. The court's emphasis was on the debtor's "voluntary" acts and conduct that *initiated* new proceedings and created new expense.

The Ninth Circuit confirmed the narrowness of *Ybarra* in *In re Castellino Villas, A.K.F. LLC*, 836 F.3d 1028 (9th Cir. 2016) (Ikuta, J.). *Castellino Villas* relied on *pre-existing* circuit authority to explain that contingent claims—like those at issue in pending litigation—that were in "fair contemplation" at the time of the bankruptcy are discharged:

> Accordingly, if a creditor and debtor are engaged in prepetition litigation pursuant to a contract that includes an attorneys' fees provision, and the creditor 'can fairly or reasonably contemplate' that it will have a claim for attorneys' fees if an 'extrinsic event' occurs (that is, if it prevails in the litigation), then the creditor's claim for attorneys' fees will be discharged in the debtor's bankruptcy even if the creditor incurs attorneys' fees after the debtor was discharged.

Id. at 1034. The court further grounded this reasoning in cases dating back to 2009, well before the bankruptcy at issue here. *Ibid.*; see also U.S. Br. 30 (citing authority for similar legal propositions regarding "'prepetition claim[s]'").

2. Respondents cannot plausibly justify their conduct under this authority. First, respondents were certainly aware of the pending litigation at the time of the bankruptcy; the litigation itself prompted the filing.

Second, respondents did *not* seek permission from any state court before pursuing post-discharge fees. Contra

Resp. Br. 1. They submitted a general judgment that proposed offsetting those fees, and they litigated the discharge issue in response to *petitioner's* discharge defense. See, *e.g.*, J.A. 63-69, 75-80, 81-83, 84-86. The state court did not rule on the issue until after petitioner had already been put through the burden and expense of litigating on parallel tracks in two separate tribunals (after he resorted to seeking relief in the bankruptcy court). Indeed, respondents even threatened to seek *additional* fees if petitioner refused to give in to their request. C.A. E.R. 694. This, again, was before any ruling on their initial fee motion.

Finally, there is no plausible basis for suggesting that petitioner "voluntarily" re-entered the litigation. Quite the contrary: petitioner immediately sought to be dismissed from the case, but respondents *opposed* the motion; petitioner resisted efforts to depose him a second time; and petitioner otherwise sought to "extricate" himself from the proceedings. Pet. Br. 5-6 & n.1. The very best respondents can do is argue that petitioner failed to formally drop his counterclaim for fees—a claim that became unwinnable once he moved to limit his involvement from the case. J.A. 116-117.

Respondents were certainly aware of their contingent claim for fees at the time of the discharge; the claim was listed on the schedules, and they themselves admit the claim for pre-petition fees were off the table. Respondents instead forced petitioner to engage in extensive litigation to avoid a fee award that was one of the driving forces of his actual bankruptcy.

3. Finally, respondents cannot avoid justifying their conduct directly by leaning on the reversed decisions of the state-trial court and bankruptcy court. As is true throughout multiple areas of the law ("abuse of discre-

tion"; "clear error" review, etc.), the fact that a judicial officer reaches a determination on an issue does not automatically establish its reasonableness. See, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510 (2003) (AEDPA); *Xitronix* v. *KLA-Tencor Corp.*, 916 F.3d 429, 431 (5th Cir. 2019) (refusing to accept a transfer as "implausible"). A quick skim through the state appellate opinion and federal district court opinions—the ones that reversed the incorrect first-level rulings on these issues—emphatically show why that is so. See, *e.g.*, J.A. 112-117.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

APRIL 2019