No.

In the Supreme Court of the United States

CHRISTOPHER MICHAEL MARINO AND VALERIE MARGARET MARINO, PETITIONERS

v.

OCWEN LOAN SERVICING, LLC

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under 11 U.S.C. 105(a), debtors may recover attorney's fees incurred on appeal to remedy a discharge violation.

RELATED PROCEEDINGS

United States Bankruptcy Court (D. Nev.):

In re Christopher Michael Marino & Valerie Margaret Marino, No. 13-50461-BTB (June 18, 2013) (discharge order)

In re Christopher Michael Marino & Valerie Margaret Marino, No. 13-50461-BTB (Sept. 15, 2016) (order denying reconsideration of contempt order)

United States Bankruptcy Appellate Panel (9th Cir.):

Ocwen Loan Servicing, LLC v. *Marino (In re Marino)*, Nos. 16-1229 & 16-1238 (Dec. 22, 2017)

Ocwen Loan Servicing, LLC v. *Marino (In re Marino)*, Nos. 16-1229 & 16-1238 (July 3, 2018) (fee order)

United States Court of Appeals (9th Cir.):

Ocwen Loan Servicing, LLC v. *Marino (In re Marino)*, Nos. 18-60005, 18-60006, 18-60040, & 18-60041 (Feb. 10, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

Cases—continued:

Page

Cases—continued:

Constitution, statutes, and rule:

Miscellaneous:

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Christopher Michael Marino and Valerie Margaret Marino respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 949 F.3d 483. The order of the bankruptcy appellate panel regarding appellate fees (App., *infra*, 10a-13a) is unreported. The opinion of the bankruptcy appellate panel regarding contempt (App., *infra*, 14a-42a) is reported at 577 B.R. 772. The order of the bankruptcy court regarding contempt (App., *infra*, 43a-44a) is unreported; the order of the bankruptcy court denying reconsideration (App., *infra*, 45a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2020. A petition for rehearing was denied on April 27, 2020 (App., *infra*, 47a-48a). On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari due on or after the order's date to 150 days from "the date of the lower court judgment * * * or order denying a timely petition for rehearing"; that order had the effect of extending the deadline to file this petition to September 24, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

Section 524 of the Bankruptcy Code, 11 U.S.C. 524, provides in pertinent part:

(a) A discharge in a case under this title—

* * * * *

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived * * * .

* * * * *

Section 105 of the Bankruptcy Code, 11 U.S.C. 105, provides in pertinent part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement

court orders or rules, or to prevent an abuse of process.

* * * * *

Rule 38 of the Federal Rules of Appellate Procedure provides in its entirety:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

INTRODUCTION

This case presents an important and recurring question of federal bankruptcy law: whether, under 11 U.S.C. 105(a), debtors may recover attorney's fees incurred on appeal to remedy a discharge violation.

Congress granted courts broad remedial authority under 11 U.S.C. 105(a) to issue "any" order "necessary or appropriate" to enforce the Bankruptcy Code. Nothing in that broad language categorically precludes awarding fees on appeal. Indeed, it is settled that Section 105(a) authorizes "make-whole relief," permits fees at the trial level, and protects the debtor's fresh start, which is frustrated when debtors are left out of pocket trying to enforce their basic rights under the Code.

Yet according to the Ninth Circuit, "§ 105 does not authorize appellate fees." *In re Del Mission Ltd.*, 98 F.3d 1147, 1154 (9th Cir. 1996). In adopting that position, the Ninth Circuit did not identify any textual hook for excluding any category of relief on appeal, did not explain how such a rule was consistent with the Code's text or purpose, and did not square its position with bedrock authority regarding civil remedial contempt. The court instead held that Fed. R. App. P. 38 somehow occupies the field and

impliedly precludes Section 105—even though the two provisions each apply in their respective spheres, and each plainly has coverage that the other lacks.

The Ninth Circuit's decision is wrong. It conflicts with multiple lines of this Court's authority, established contempt principles, the Code's text and purpose, and other cases in directly analogous areas. It creates jarring "discrepanc[ies]" within the Code itself (*Higgins* v. *Vortex Fishing Sys., Inc.*, 379 F.3d 701, 709 n.3 (9th Cir. 2004)), and it effectively eliminates the Code's key mechanism for enforcing the discharge injunction and securing a debtor's fresh start.

Because this case raises legal and practical issues of surpassing importance, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Code's "principal purpose" is granting debtors "'a new opportunity in life and a clear field of future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). To achieve this "fresh start," the Code "discharges" most pre-petition debts (11 U.S.C. 727(b)), and "enjoins" creditors from seeking to collect discharged debts. *Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 444 (1st Cir. 2000) (describing 11 U.S.C. 524(a)(2)). Congress designed the Code "to give complete effect to the discharge": the discharge injunction "eliminate[s] any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts," and "insure[s] that once a debt is discharged, the debtor will not be pressured in any way to repay it." H.R. Rep. 95-595, at 365-366 (1977). The discharge, in short, "is the 'legal embodiment'" "'of the fresh start.'" *In re Ybarra*, 424 F.3d 1018, 1022 (9th Cir. 2005).

Congress enforced these rights with Title 11's statutory contempt powers. Under 11 U.S.C. 105(a), courts may issue "any" order "necessary or appropriate" to "carry out the [Code's] provisions" and "enforce or implement court orders." Section 105 authorizes "'full remedial relief'" (*Bessette*, 230 F.3d at 445), measured by a simple objective: to "make [the debtor] whole." *Espinosa* v. *United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 n.7 (9th Cir. 2008).

2. Petitioners purchased their "'dream house'" in Verdi, California, with a loan serviced by respondent. App., *infra*, 2a, 18a. After encountering financial difficulty, they "unsuccessfully" tried "to modify their mortgage payments," and eventually had to abandon their house. *Id.* at 18a. Petitioners filed for Chapter 7 bankruptcy, surrendered the property, and received a full discharge. *Ibid.*

Notwithstanding the discharge, respondent embarked on a nearly two-year campaign to collect petitioners' discharged debt. App., *infra*, 16a-17a. It repeatedly called petitioners and sent them letters, falsely stating they owed money and were "responsible" for "interest payments," while notifying them (repeatedly) of "force-placed insurance, which made Mr. Marino think that he had to pay for the insurance on the Property, even though they had surrendered and vacated it." *Id.* at 18a. This pressure took a personal toll on petitioners: it damaged their marriage, induced anxiety attacks and health problems (including "severe stomach pains"), and left them "humiliated, tormented, and harassed." *Id.* at 18a-19a. Despite the discharge, petitioners "were not able to move on with their lives, because 'the calls [from creditors] did not stop.'" *Id.* at 19a-20a.

Petitioners sought relief in bankruptcy court, moving to hold respondent in contempt. App., *infra*, 17a. It was

undisputed that "'[respondent] was aware of the bankruptcy, was aware of the discharge,'" and "'sent the various letters.'" *Id.* at 18a. Respondent had no excuse for its conduct: it admitted its letters followed "'an internal policy,'" and "'[m]ost'" were "never reviewed by a human being." *Id.* at 20a.

3. The bankruptcy court held respondent in contempt. App., *infra*, 23a-24a, 43a-44a. It found that "[respondent] had called approximately a hundred times following the discharge to ask [petitioners] to pay the discharged debt," in addition to sending "nineteen offending letters." *Id.* at 24a. It awarded petitioners "damages for emotional distress, actual damages, and attorneys' fees and costs"; it further noted it lacked "authority to impose punitive damages," but "'[i]f [it] did, [it] probably would.'" *Ibid.*[1]

4. The BAP affirmed in part. App., *infra*, 14a-42a.

a. It first affirmed that respondent violated the discharge: "'[respondent] could not have been doing anything but trying to get the debtor to give them some more money,'" and "[respondent's] repeated dunning deprived [petitioners] of a fresh start 'unhampered by the pressure and discouragement of pre-existing debt.'" App., *infra*, 23a, 35a. Respondent thus was properly held in contempt, and the damages award (including fees) under 11 U.S.C. 105(a) was appropriate. *Id.* at 27a-40a.

The BAP, however, reversed on punitive damages: upon finding a willful discharge violation, the bankruptcy court "'may award actual damages, punitive damages and attorney's fees to the debtor.'" App., *infra*, 40a. Because the bankruptcy court erred in "preclud[ing] itself from

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[1] Respondent sought reconsideration, producing its own "call logs" as "'newly discovered' evidence." App., *infra*, 24a-25a. Those logs allegedly showed that respondent made "only" 35 calls during this period. *Id.* at 25a.

considering" punitive damages, the BAP remanded for further proceedings. *Id.* at 41a-42a.

b. Petitioners moved for appellate fees (No. 18-60040 C.A. E.R. 203-205), which the BAP denied (App., *infra*, 10a-13a). As relevant here, the BAP rejected petitioners' argument that Section 105 authorized fees to "avoid diluting the bankruptcy court's award—the purpose of which was to make [petitioners] whole from the damages caused by [respondent's] violations." *Id.* at 11a. The BAP did not doubt that denying appellate fees would leave petitioners out of pocket. But it explained that the Ninth Circuit "has clearly said that discretionary appellate attorney's fees may not be awarded under 11 U.S.C. § 105." *Id.* at 12a (citing *Del Mission*, 98 F.3d at 1154 & n.7). Because *Del Mission* was "controlling," petitioners' Section 105 motion was foreclosed. *Id.* at 12a-13a (noting that "binding circuit precedent can only be overturned by statute, the Circuit ruling en banc, or the Supreme Court").

5. a. The Ninth Circuit affirmed the order denying appellate fees. App., *infra*, 7a-9a. It explained it was bound by *Del Mission*, which "held that section 105(a) does not authorize an award of attorney's fees." *Id.* at 8a. Because "'[a] panel not sitting *en banc* has no authority to overturn Ninth Circuit precedent,'" it held that petitioners "are not entitled to appellate attorney's fees under section 105(a)." *Id.* at 8a-9a.[2]

Del Mission, in turn, had addressed "whether a bankruptcy court may award fees and costs incurred in prior appellate proceedings as a contempt sanction under 11 U.S.C. § 105." 98 F.3d at 1149. *Del Mission* acknowledged

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[2] Respondent separately appealed the non-final contempt order, but the panel dismissed for lack of jurisdiction. App., *infra*, 5a (noting respondent's appeal flunked all "four factors" of the jurisdictional test).

that "§ 105(a) has been construed as a vehicle to award discretionary fees at the trial court level." *Id.* at 1153. But it invoked prior Ninth Circuit authority to "instruct[]" that "we should not imply from that limited grant of authority a similar authority to award fees at the appellate level." *Id.* at 1153-1154.

Del Mission then concluded that Fed. R. App. P. 38 occupies the field. 98 F.3d at 1154. "[B]ecause an award under § 105(a) is discretionary, its use as a device to award previously incurred appellate fees would overlap with Rule 38." *Ibid.* According to the court, "[g]iven that Rule 38 already provides for a discretionary award of fees in frivolous appeals, it would be superfluous to treat § 105(a) as another vehicle to award appellate fees." *Ibid.* The court thus "h[e]ld that the only authority for awarding discretionary appellate fees in bankruptcy appeals is Rule 38." *Ibid.*

Del Mission accordingly concluded that "§ 105(a) does not authorize an award of appellate fees." 98 F.3d at 1153.

b. The Ninth Circuit denied a petition for rehearing en banc without any member of the court requesting a vote. App., *infra*, 47a-48a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Profoundly Misreads A Critical Section Of The Bankruptcy Code

This is the unusual case where certiorari is primarily warranted because the decision below is so obviously wrong.

1. According to the Ninth Circuit, Section 105(a) cannot authorize appellate fees without impermissibly "overlap[ping]" with Fed. R. App. P. 38: because Rule 38 already authorizes fees for "frivolous" appeals, it would be "superfluous" to read "§ 105(a) as another vehicle to award appellate fees." *Del Mission*, 98 F.3d at 1154. This

logic fails on every conceivable level. Rule 38 provides relief for *frivolous appeals generally*; Section 105(a) provides relief for *Bankruptcy Code violations*. The fact that some "frivolous" appeals happen to involve violations of the Bankruptcy Code—or that some Bankruptcy Code violations happen to go up on appeal—is utterly besides the point. Both Rule 38 and Section 105(a) have plenty of work to do in their respective spheres, and one statute does not override another because two provisions "address the same subject in different ways." *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (Easterbrook, J.); see *In re Rodriguez*, 517 B.R. 724, 738-739 (Bankr. S.D. Tex. 2014).

Indeed, "[w]hether overlapping and not entirely congruent remedial systems can coexist is a question with a long history at the Supreme Court, and an established answer: yes." *Randolph*, 368 F.3d at 731 (discussing this Court's settled jurisprudence). "'[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001). Unlike the Ninth Circuit here, most circuits have understood this directive: courts are prohibited from reading one provision to override another "unless the later statute expressly contradicts the original act" or "such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013) (quoting *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 663 (2007)).

The Ninth Circuit made no attempt to apply these established principles—indeed, it apparently failed to recognize that they even exist. Aside from the oddity of presuming that a *rule* overrides a *statute*, the court identified

minor "overlap" and immediately presumed that one provision would become "superfluous" despite each operating in a distinct space. *Del Mission*, 98 F.3d at 1154.[3] There is no plausible basis for declaring Rule 38 and Section 105(a) in "'irreconcilable conflict'" or believing one "covers the whole subject" of the other and "'is clearly intended as a substitute.'" *Branch* v. *Smith*, 538 U.S. 254, 273 (2003). Section 105(a) applies exclusively in bankruptcy; it authorizes "any" relief (*without* excluding fees) to "enforce" the Bankruptcy Code. Rule 38, by contrast, applies generally to *all* appeals; it authorizes fees for "frivolous" appeals, whether related to the Bankruptcy Code or not. These provisions address different subjects and apply different standards in different ways, and it is not hard to read the provisions to coexist peacefully in their respective spheres. "It would be better to recognize that the statutes overlap, each with coverage that the other lacks." *Randolph*, 368 F.3d at 731; see also *POM Wonderful LLV* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014). Contrary to the Ninth Circuit's rationale, "'a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.'" *National Ass'n of Home Builders*, 551 U.S. at 663.

The Ninth Circuit's competing position is indefensible. It profoundly misread Section 105(a) and Rule 38, and it declared an implied repeal without applying this Court's established standard. Had this case arisen in any other circuit, it presumably would have come out the other way.

2. The decision below further reverses the default presumption that attorney's fees are authorized on appeal if attorney's fees are authorized below. See, *e.g.*, *Commis-*

[3] It is hardly obvious that a judicial rule can *ever* impliedly preclude a federal statute. Cf. *Bowles* v. *Russell*, 551 U.S. 205, 210-211 (2007).

sioner v. *Jean*, 496 U.S. 154, 161-162 (1990). Yet for bankruptcy cases in the Ninth Circuit, the rule is now the opposite: "[t]he controlling principle arising from *Del Mission* is that 'we should not [infer] from [a bankruptcy court's express discretionary authority to award fees at the trial level] a similar authority to award fees at the appellate level.'" *Higgins* v. *Vortex Fishing Sys., Inc.*, 379 F.3d 701, 708-709 (9th Cir. 2004) (bracketed text in original). This is deeply mistaken.

All sides agree that Section 105(a) permits attorney's fees for initially prosecuting a discharge violation. *E.g.*, *Walls*, 276 F.3d at 507. Yet it makes little sense to "dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation" on appeal in order to preserve that initial award. *Jean*, 496 U.S. at 161-162 (internal quotation marks omitted); accord *Anchondo* v. *Anderson, Crenshaw & Assocs., LLC*, 616 F.3d 1098, 1107-1108 (10th Cir. 2010). And that logic has special force where, as here, a creditor continues to resist a discharge finding: If fees are appropriate when prosecuting the action "in the court of first instance," there is no reason fees should suddenly disappear when litigating the identical issues (to protect and establish the identical rights) at the appellate level. *In re Schwartz-Tallard*, 803 F.3d 1095, 1100-1101 (9th Cir. 2015) (en banc) (Watford, J.) (so finding for automatic-stay violations); accord *In re Horne*, 876 F.3d 1076, 1082 (11th Cir. 2017).

These bedrock presumptions should have "quickly dispose[d]" of this issue (*Schwartz-Tallard*, 803 F.3d at 1101), but the Ninth Circuit departed, inexplicably, from settled law (including as that law *is otherwise applied in the Ninth Circuit*); see, *e.g.*, *Legal Voice* v. *Stormans Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014) ("Generally, a party that is entitled to an award of attorneys' fees in the district

court is also entitled to an award of attorneys' fees on appeal."). Here, the Ninth Circuit previously established that Section 105(a) authorizes bankruptcy courts to award "attorneys fees" for discharge violations. *Walls*, 276 F.3d at 507 (declaring fees "'necessary or appropriate to carry out the [Code's] provisions'"). Once those fees were authorized below, those fees ought to have been "necessarily" authorized on appeal (*Legal Voice*, 757 F.3d at 1016)—indeed, fee awards are every bit as "necessary" and "appropriate" to enforce the Code no matter where those fees were incurred. *Schwartz-Tallard*, 803 F.3d at 1100-1101. Had the Ninth Circuit simply applied the longstanding default (which it faithfully applies everywhere else), it would have resolved this issue correctly. Yet it denied rehearing en banc over these precise objections, confirming that this Court alone can correct the circuit's mistake.

3. The Ninth Circuit's views also fail under a straightforward reading of the Code's text and purpose.

First, the Ninth Circuit's position is profoundly atextual. Section 105 provides broad authority for "any" order "necessary or appropriate" to effectuate the Code. Congress could not have spoken in plainer, or broader, terms: "*any*" order is permissible, and the text nowhere excludes an entire category of relief (like appellate fees). The Ninth Circuit had no basis for carving a judicial exception from that statutory grant of power.

Indeed, the only textual limitation—that relief is "necessary or appropriate"—is unquestionably satisfied here. *In re Dyer*, 322 F.3d 1178, 1193 (9th Cir. 2003); *In re Greenspan*, 464 B.R. 61, *3 (B.A.P. 6th Cir. 2011). First, "[f]ull remedial relief" is the traditional measure of what is *necessary and appropriate* to restore a party's rights under a judicial decree. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191, 193 (1949) (the proper "measure of

the court's power in civil contempt proceedings" is "the requirements of *full remedial relief*"; civil contempt "is a sanction to enforce compliance with an order of the court or *to compensate for losses or damages sustained* by reason of noncompliance") (emphases added).

The Ninth Circuit's decision flouts this basic rule. "[F]ull remedial relief" means exactly what it says—it requires *full* relief to make protected parties whole. Yet debtors are *not* made whole if forced to pay fees out of pocket to defend their rights on appeal. See *PlayNation Play Sys., Inc.* v. *Velex Corp.*, 939 F.3d 1205, 1215-1216 (11th Cir. 2019). Unless attorney's fees are reimbursed, debtors are forced to "defend the lawsuit" themselves, generating "a financial cost that interfere[s] with [their] right to a fresh economic start." *In re Fina*, 500 F. App'x 150, 156 (4th Cir. 2014).

In any event, it is undisputed (as noted above) that fees are deemed "necessary or appropriate" at the *trial* level; it is puzzling to say the same fees incurred to litigate the same issues are somehow *not* "necessary or appropriate" on appeal—especially when denying those fees fails to reinstate the proper baseline under the discharge injunction. *Bessette*, 230 F.3d at 444-445; *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1554 (11th Cir. 1996); see also 11 U.S.C. 105(a) (authorizing relief to "enforce" orders—like the discharge—under the Code).

Second, the Ninth Circuit itself has articulated precisely why appellate fees are necessary and appropriate here: "Congress undoubtedly knew that unless debtors could recover the attorney's fees they incurred in prosecuting an action for damages, many would lack the means or financial incentive (or both) to pursue such actions." *Schwartz-Tallard*, 803 F.3d at 1100 (explaining the identical dynamic under the automatic stay). "After all," the court explained, "the very class of plaintiffs authorized to

sue—individual debtors in bankruptcy—by definition will typically not have the resources to hire private counsel," and "in many cases the actual damages suffered by the injured debtor will be too small to justify the expense of litigation, even if the debtor can afford to hire counsel." *Ibid.*

The upshot is obvious: If appellate fees are barred, few debtors will enforce or defend the discharge, knowing that an initial victory will disappear unless debtors personally front the expense of defending the judgment on multiple rounds of appeal.

Finally, Congress drew the same conclusion in a parallel context (Section 362(k)'s remedies for automatic-stay violations), and that legislative judgment should inform the exercise of judicial authority here. When addressing general judge-made actions, courts are required to examine the "bounds [Congress] delineated for comparable express causes of action." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975).[4] Section 362(k) reflects precisely what Congress considered necessary or appropriate in an indistinguishable setting. See *In re Zilog, Inc.*, 450 F.3d 996, 1008 n.12 (9th Cir. 2006) (no "material difference between the discharge injunction and the automatic stay"); *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996). And Section 362(k) allows full fee recovery at every level, including appellate fees to defend awards below. *Schwartz-Tallard*, 803 F.3d at 1101.

Congress "took care to delineate" Section 362(k)'s "boundaries"; "[a]bsent a compelling justification, courts should not deviate from that model." *Jesner*, 138 S. Ct. at

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[4] Section 105's remedial award are *statutory*, not "judge-made," but its general standards are still informed by Congress's specific judgments in "analogous statutes." *Jessner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (Kennedy, J., joined by Roberts, C.J., and Thomas, J.).

1403 (Kennedy, J.). The Ninth Circuit erred by truncating Section 105(a)'s relief while ignoring "Congress' considered judgment of the proper" remedies under its direct analogue. *Ibid.*[5]

4. Finally, unlike the usual default under the American Rule, fees presumptively *are* available for discharge violations: When a party acts in "'willful disobedience of a court order,'" courts must *permit* fees "unless forbidden by Congress," not the other way around. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 258-259 (1975). Yet again, the Ninth Circuit, inexplicably, adopted the *opposite* presumption. A discharge violation is a direct violation of a court order. *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019). If Congress wished to codify the traditional contempt remedy in Section 105(a) while withholding appellate fees, it would have said so expressly. Yet Congress said—nothing. It did not write that change directly into the statutory text or utter one syllable on the topic in the legislative history. There is, in short, no hint that Congress intended to depart from the settled "common-law exception." *Schwartz-Tallard*, 803 F.3d at 1098.

Had this been ordinary civil litigation, the Ninth Circuit would stand on solid ground in presuming that appellate fees (like trial fees) were unavailable; but this is not ordinary litigation. Section 105(a) targets civil remedial

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[5] As the Ninth Circuit itself recognized, its understanding creates "discrepanc[ies]" with multiple Code provisions, leaving debtors "exposed" even where it is obvious that Congress "inten[ded] to award attorney's fees." *Higgins*, 379 F.3d at 709 n.3; see *In re John Richards Homes Building Co., LLC*, 405 B.R. 192, 215-217 (E.D. Mich. 2009), aff'd, 552 F. App'x 401, 408 (6th Cir. 2013) (criticizing the Ninth Circuit's "crucial flaw[s]"). There is no reason to introduce such anomalies when traditional, accepted principles would align the Code with Congress's intent.

contempt for violations of the discharge order, and it authorizes the full panoply of remedies necessary to make injured debtors whole. *Liberis* v. *Craig*, 845 F.2d 326, *5-*8 (6th Cir. 1988) (unpublished). The Ninth Circuit wrongly failed to recognize the bedrock rules in this setting, and further review is warranted to correct its incorrect disposition of this "important" issue (*Del Mission*, 98 F.3d at 1149).

B. The Ninth Circuit's Rationale Is Incompatible With Decisions From Other Courts

The Ninth Circuit's rationale is not only indefensible, but its position is incompatible with decisions from multiple courts.

First, contrary to the Ninth Circuit's position, other courts have expressly found that appellate fees are included in bankruptcy awards for remedial contempt. See, *e.g.*, *Liberis*, 845 F.2d at *6-*8 (authorizing "legal fees and expenses incurred in defending against plaintiffs' unsuccessful appeals of the contempt order to the district court and this court," citing multiple circuits for support); *In re Rodriguez*, 517 B.R. 724, 738-739 (S.D. Tex. 2014) ("This Court respectfully disagrees with courts that have held that appellate fees cannot be awarded under § 105."); see also, *e.g.*, *In re Horne*, 630 F. App'x 908, 912 (11th Cir. 2015) (per curiam) (suggesting courts have discretion to award appellate fees for discharge violations under Section 105); *In re Markus*, No. 19-10096, 2020 WL 4483659, at *17 (S.D.N.Y. Aug. 3, 2020) (affirming authority to award appellate fees).

As these courts explain, "unsuccessful appeals of the civil contempt order force[] the trustee to incur expenses in defending the court's order." *Liberis*, 845 F.2d at *7. Because those "appellate expenses stem[] directly from [the contemnor's] intentional disregard of the initial order of the bankruptcy court," "fees and expenses incurred on

appeal are allowable." *Ibid.*; see also *id.* at *8 ("[s]ubsequent to the finding of civil contempt by the bankruptcy court, the trustee was forced to defend plaintiffs' challenges to the contempt order before the district court and then on appeal before this court"; "the costs associated with these appeals were a direct result of the plaintiffs' initial contumacious conduct," "whether or not the actual contumacious conduct which had given rise to the contempt order had ceased"). Thus, unlike the Ninth Circuit, these courts hold that "[a]wardable attorney fees include those incurred defending a sanction award on appeal." *In re Van Winkle*, 598 B.R. 297, 301-302 (Bankr. D.N.M. 2019) (citing multiple courts); *In re Lopez*, 576 B.R. 84, 96 (Bankr. S.D. Tex. 2017); *Williamson* v. *Recovery Ltd. P'ship*, No. 06-292, 2017 WL 1196147, at *4 (S.D. Ohio Mar. 31, 2017) ("The cost of pursuing a motion for sanctions includes the cost of defending it on appeal.").

Second, this position is consistent with general contempt principles applied in other courts, which permit appellate fees as part of remedial contempt for enforcing injunctions. See, *e.g.*, *Weitzman* v. *Stein*, 98 F.3d 717, 719-721 (2d Cir. 1996); *Schauffler* v. *United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. Of U.S.*, 246 F.2d 867, 870 (3d Cir. 1957) (permitting "as a penalty the expenses incurred in defending the propriety of the original imposition in an appeal court"); *Ohr* v. *Latino Express, Inc.*, No. 11-2383, 2015 WL 13000252, at *3 (N.D. Ill. May 28, 2015) ("Because Respondents contested the validity of the Contempt Order on appeal, the Director needed to expend additional resources defending the order before the appellate court."). According to these courts, appellate fees are appropriate because they are "'caused by'" the initial violation—"none of this would have been necessary if [the contemnor] had respected the

[court's] order." *Weitzman*, 98 F.3d at 720. That same logic applies squarely in the bankruptcy context.[6]

The Ninth Circuit's disposition is inconsistent with these decisions, and the resulting confusion will persist until this Court intervenes.

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

1. The question presented is of great legal and practical importance.

a. First and foremost, the Ninth Circuit's decision threatens to frustrate the Code's objectives. A "primary purpose[]" of bankruptcy is granting a fresh start—to "'relieve the honest debtor from the weight of oppressive indebtedness.'" *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The Code's discharge is essential to that fresh start. The discharge is so fundamental that its protections are recognized as the "crown jewel of [bankruptcy] legislation." F. Regis Noel, *A History of the Bankruptcy Law* 200 (1919). It is the main tool that protects debtors as they rebuild from financial misfortune and avoid the financial stress that drove them into bankruptcy.

The Ninth Circuit's rule debilitates these core protections. Under the circuit's holding, the cost of correcting a violation comes out of the debtor's pocket. Yet without fees, the cost of discharge litigation is insurmountable for most debtors. If violators refuse to provide relief, litigation expenses will often exceed the expected recovery. "[T]he debtor, who likely lacks the means to fund litigation in the first place, would be forced to choose between suffering a loss as a result of the [discharge] violation or

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[6] Because discharge orders operate as an injunction, and injunctions are enforced using civil contempt, it is appropriate to ask how these courts fashioned appropriate remedies under "traditional principles of equity practice." *Taggart*, 139 S. Ct. at 1801.

incurring a loss attempting to remedy it." *In re Duby*, 451 B.R. 664, 677 (B.A.P. 1st Cir. 2011). And any creditor wishing to avoid damages need only mount an aggressive defense, forcing rational debtors to abandon their statutory rights. *In re Parker*, 515 B.R. 337, 348 (Bankr. M.D. Ala. 2014). In short, "[w]hat good is it to be entitled to damages and attorneys' fees for a violation of the [discharge] if it costs a debtor much more in unrecoverable attorneys' fees to recover such damages and recoverable attorneys' fees? In many, if not most, cases that will likely be the situation." *In re Bertuccio*, No. 04-5524, 2009 WL 3380605, at *7 n.7 (Bankr. N.D. Cal. Oct. 15, 2009).

That predictable dynamic impairs the discharge as a meaningful remedy. Debtors are a sensitive class. They often emerge from bankruptcy in a fragile economic state. The loss of even a few hundred dollars can mean the difference between buying food and clothes for their families or struggling to meet basic needs. Fee availability can determine whether a debtor surrenders her rights or pursues her claims. *Jove*, 92 F.3d at 1555-1556 (violations "cause[] actual and necessary extra expense," and the "burden" must not "be shifted to [the debtor]"). The Ninth Circuit itself recognized the importance of fees in an analogous context (*Schwartz-Tallard*, 803 F.3d at 1100), but refused to adopt the same rule in this indistinguishable setting. The practical importance of that mistake is difficult to overstate.

b. Review is also essential to ensure the Code's effective administration. There is an overriding (even *constitutional*) importance of achieving national "uniform[ity]" in the bankruptcy context. U.S. Const. Art. I, § 8, cl. 4. For that reason, this Court routinely grants review to resolve even shallow conflicts over the interpretation or application of the Bankruptcy Code. See, *e.g.*, *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Baker Botts*

L.L.P. v. *ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015) (1-1 split); *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (1-1 split); *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014) (1-1 split). The Ninth Circuit badly misread a key bankruptcy provision in a manner that departs from the practice of other courts—and now threatens to disrupt the Code's administration in the nation's largest circuit. A debtor's rights under the Code should not be determined by geography. Given the constitutional and practical interests in clarity and uniformity, the division here is particularly intolerable.

It is also unclear when the Court will find another opportunity to correct the Ninth Circuit's mistake. Bankruptcy appeals rarely reach the circuit level, despite raising important and recurring issues. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010) ("The nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation."). Few litigants find enough at stake to litigate in bankruptcy court and continue all the way through the appellate process. This is the unusual case where the question is directly presented at this advanced stage.

2. This case is also a perfect vehicle for deciding the question presented. The dispute turns on a pure question of law. The answer is binary: either appellate fees are permitted or they are not. It was squarely raised and resolved at the BAP and the Ninth Circuit; each treated existing Ninth Circuit precedent as dispositive, and the Ninth Circuit's position is entrenched. There are no factual or procedural impediments to resolving that question here.

The Ninth Circuit's decision is incorrect on every level, and it has been rejected by multiple courts. The discharge is the Code's foundational feature, but it means little if debtors have no realistic way to enforce it. The issue is important and recurring, and this is the rare opportunity to correct a vital mistake on a critical question of bankruptcy law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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