

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

BRADLEY WESTON TAGGART,)
)
 Petitioner,)
)
 v.) No. 18-489
)
SHELLEY A. LORENZEN,)
)
EXECUTOR OF THE ESTATE OF STUART)
)
BROWN, ET AL.,)
)
 Respondents.)

Pages: 1 through 68
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4 Petitioner,)

5 v.) No. 18-489

6 SHELLEY A. LORENZEN,)

7 EXECUTOR OF THE ESTATE OF STUART)

8 BROWN, ET AL.,)

9 Respondents.)

10 - - - - -

11 Washington, D.C.

12 Wednesday, April 24, 2019

13

14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 11:05 a.m.

17 APPEARANCES:

18 DANIEL L. GEYSER, Dallas, Texas;

19 on behalf of the Petitioner.

20 SOPAN JOSHI, Assistant to the Solicitor General,

21 Department of Justice, Washington, D.C.;

22 for the United States, as amicus curiae, in

23 support of neither party.

24 NICOLE A. SAHARSKY, Washington, D.C.;

25 on behalf of the Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-489, Taggart versus Lorenzen.

Mr. Geysler.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

According to the Ninth Circuit below, a creditor's subjective good faith belief categorically precludes any liability for discharge violations under the code. All sides to this case now agree that the Ninth Circuit was wrong.

There is no per se rule that courts can never provide relief when a creditor violates the discharge in good faith. But Respondents and the government now propose adopting a different kind of per se rule.

This categorical rule would adopt a profoundly atextual qualified-immunity-like defense for the code, declaring that courts can never provide relief so long as a creditor can

1 identify any fair, reasonable ground for
2 violating the discharge.

3 This novel proposal has no foothold in
4 this Court's traditional principles for
5 enforcing injunctions or the cords -- the
6 code's broad equitable authority under Section
7 105.

8 There is no per se rule that excuses
9 subjective or objective mistakes under the
10 code. Section 105 provides broad authority to
11 enforce and restore the statutory discharge,
12 and the code bars all efforts to collect
13 discharged debts, not only unreasonable ones.

14 In taking the opposite position,
15 Respondents and the government ignore the broad
16 authority under Section 105 in the code's
17 overall scheme. They overstate the cost to
18 creditors, and they understate the cost to
19 debtors. And they ignore the foundational
20 importance of the fresh start.

21 A discharge violation imposes real
22 costs on other parties, and there is no basis
23 for allocating the damage caused by the
24 wrongdoer's violation to the protected class.

25 JUSTICE ALITO: But in this case,

1 isn't it the case -- isn't it true that the
2 state court and the bankruptcy court held that
3 Taggart had returned to the fray --

4 MR. GEYSER: They --

5 JUSTICE ALITO: -- and that would --
6 therefore there would not have been a -- a
7 violation of the discharge?

8 MR. GEYSER: If those courts were
9 correct, but they were wrong. Both the state
10 court was reversed the state appellate court
11 and the bankruptcy court was reversed by the
12 federal district court.

13 And I don't think it's enough the fact
14 that they had some judicial decisionmaker say
15 that conduct was permitted. The question is
16 did it actually violate the code? And --

17 JUSTICE ALITO: But isn't it -- what
18 is -- well, what is the justification for
19 holding somebody in contempt for doing
20 something that two state courts have held was
21 not a violation?

22 MR. GEYSER: Well, first, Your
23 Honor --

24 JUSTICE ALITO: Even -- even if those
25 courts turned out to be wrong.

1 MR. GEYSER: Well, even if they --
2 they turn out to be wrong, but I think the --
3 the justification is first, that the fact that
4 someone says that's something's permissible
5 doesn't mean that it doesn't violate the code
6 and that it doesn't impose real costs on the
7 protected class.

8 The -- Section 105 doesn't have any
9 exception for a good faith error or for
10 reasonable error, and the fact that a court
11 might agree, even -- perhaps unreasonably, that
12 that that particular act was permitted doesn't
13 make it so. And if Congress wanted to create
14 that sort of good faith or reasonableness
15 defense, it presumably would have done so. And
16 we know that because they did something similar
17 in Section 362(k).

18 In 362(k), Congress looked at
19 automatic stay violations, they're cut from the
20 same cloth as the discharge, and they said that
21 we're creating a bright-line rule where any
22 violation is automatically subject to mandatory
23 remedies for the full costs of the violation,
24 including attorneys' fees.

25 So the -- there's no reason to think

1 that Congress --

2 JUSTICE SOTOMAYOR: There's a sort of
3 reverse problem. I understand your argument
4 that the other side is permitting an end run
5 around a district court's discretion, if
6 somebody continues in the fray, borrowing a
7 pun. But it might have a good ground of doubt
8 or a reasonable basis, but it really wasn't
9 their motivation. And the district court held
10 that.

11 So that's one extreme. Yours is an
12 extreme too, because you want to impose strict
13 liability on a code provision that doesn't --
14 where an order is not abundantly clear, because
15 it tells you some debts but others are not
16 discharged, and, secondly, in a situation where
17 the code doesn't require a debtor to go back to
18 the bankruptcy court to get clarification on
19 all actions, only on some. And this wasn't one
20 of them.

21 So isn't there something wrong with
22 your formulation of strict liability too?

23 MR. GEYSER: Well, I -- I -- I hope
24 not, Justice Sotomayor.

25 JUSTICE SOTOMAYOR: But assuming --

1 MR. GEYSER: I can --

2 JUSTICE SOTOMAYOR: -- it is --

3 MR. GEYSER: -- try to --

4 JUSTICE SOTOMAYOR: -- assuming I
5 think that the policy grounds are not as
6 compelling as you think.

7 MR. GEYSER: Sure. Well, first --

8 JUSTICE SOTOMAYOR: Then -- then how
9 -- how do I square the belief that this
10 requires more discretion than either of you
11 are --

12 MR. GEYSER: Well --

13 JUSTICE SOTOMAYOR: -- are positing or
14 -- or want?

15 MR. GEYSER: Well, let -- let me make
16 our position very clear, because our position
17 actually embraces the Court's discretion under
18 Section 105. Our position is that if the
19 discharge is violated, then under Section 105,
20 a court may impose a remedial order to remedy
21 the violation. It's in the court's discretion.

22 Now, the thumb on the scale will be in
23 favor of full remedial relief precisely because
24 of the damage to the discharge and the need to
25 restore the benefits of the discharge. That's

1 how you carry out the provisions of the code.

2 It's a necessary and appropriate order.

3 But it is absolutely in the court's
4 discretion. The court can take into account
5 the fact that the creditor had an excellent
6 basis for thinking that this was true, that the
7 creditor sought a determination under Rule
8 4007, which, you're right, isn't mandatory, but
9 it provides a safe harbor for those creditors
10 who are very worried about a genuinely disputed
11 --

12 JUSTICE SOTOMAYOR: The problem with
13 that --

14 MR. GEYSER: -- provision of the code.

15 JUSTICE SOTOMAYOR: -- is you're --
16 you're -- you're putting into the code
17 something that's not required.

18 MR. GEYSER: Oh, but --

19 JUSTICE SOTOMAYOR: That you're
20 basically telling debtors, if you think you're
21 not covered, you can't do what the code permits
22 you to do; you have to go for that safe harbor
23 to be safe.

24 MR. GEYSER: Oh, absolutely not, Your
25 Honor. What -- what we're saying is that if a

1 creditor is concerned, a creditor can go
2 forward and collect a debt right away. And, by
3 the way, the vast majority of debts under the
4 code are absolutely clear.

5 They either clearly fall within the
6 discharge or they clearly fall within one of
7 the exceptions to the discharge. It's really a
8 small category of cases where there's genuine
9 confusion and good arguments on both sides.

10 JUSTICE GORSUCH: Okay, but in those
11 cases -- I'm -- I'm -- I'm still struggling
12 with this for a slightly different reason --
13 not only may a -- a creditor go to a state
14 court to seek clarification in most issues.
15 523, I know, carves out a couple where you got
16 to go to the bankruptcy court. But Congress
17 expressly gave concurrent jurisdiction to the
18 states to do this.

19 And -- so it's not like it's any
20 different of a safe harbor, statutorily, as far
21 as Congress is concerned. They're equally
22 good.

23 MR. GEYSER: Well --

24 JUSTICE GORSUCH: So how do we account
25 for that?

1 MR. GEYSER: Well, I -- I think this
2 is how you account for that, Justice Gorsuch:
3 If a -- if a creditor goes to, say, court and
4 seeks a pure declaratory judgment, they're
5 saying all I want to know is does this debt
6 fall within the discharge, then that would put
7 them on the same footing as Rule 4007.

8 But that's not what most creditors do,
9 and it's not what the Respondents did here.
10 They affirmatively sought to collect the
11 discharged debt.

12 JUSTICE GORSUCH: Right. So that --
13 the -- the -- so if I understand your point,
14 the error isn't that they failed to go to the
15 bankruptcy court. The error is that they
16 failed to seek a declaratory judgment, rather
17 than to collect on the debt.

18 MR. GEYSER: Well, no, the -- the
19 error is that they -- they violated the
20 discharge by affirmatively seeking to collect a
21 discharged debt.

22 JUSTICE GORSUCH: Right. They should
23 have sought a declaratory judgment from the
24 state court.

25 MR. GEYSER: If -- if they had done

1 that as -- as opposed to trying to actually
2 collect, then there'd be -- be both legal and
3 practical differences. The legal difference is
4 they wouldn't be taking an act that violates
5 the discharge injunction. They wouldn't be
6 trying to collect a debt. They'd be trying to
7 seek a determination about what their rights
8 are. The --

9 CHIEF JUSTICE ROBERTS: Can't you do
10 that at the same time? You go into the court
11 and say here's the debt that I have, I want to
12 collect it, but first I want to make sure that
13 I -- I can do it. So I'd like a declaration of
14 whether it's dischargeable or not, and if it
15 is, or if it's -- if it's not, then I'd like to
16 go ahead with my suit.

17 It seems to me that the court would
18 like that to be done that way. It's certainly
19 more efficient.

20 MR. GEYSER: Well, I -- I don't think
21 it is more efficient, and half of that would be
22 problematic and half of it wouldn't. The
23 declaratory judgment part wouldn't. The
24 problem is that the second you file an
25 affirmative action in state court, you're

1 imposing a entirely different brand of costs on
2 the debtor. The debtor has to defend the
3 entire action.

4 They can't just show up and say I want
5 to litigate the discharge. They have to defend
6 every element of the creditor's suit.

7 CHIEF JUSTICE ROBERTS: Well, maybe
8 they do. But I would think most state courts
9 judge -- state court judges in that situation
10 would realize, well, we've got to clear up the
11 dischargeability question first and do that.

12 MR. GEYSER: Well, that -- that's not
13 what happened here. And it's, I think, not
14 what will happen in a lot of cases.

15 The -- the ultimate point is that if a
16 creditor is really concerned, then Congress has
17 a clear scheme set out. You can go to Rule
18 4007 and you can seek clarification and
19 guidance.

20 If you don't want to seek that
21 guidance, you don't have to. You can go to
22 state court. But at that point you're imposing
23 extra costs on the debtor. Four -- rule 4 --

24 JUSTICE KAVANAUGH: To back up a
25 minute, the statute says that the order

1 operates as an injunction, and the traditional
2 rules of contempt for injunctions suggests that
3 a reasonable, good faith belief that you
4 weren't violating the order is sufficient.

5 So why shouldn't that just follow
6 squarely from the text referring to operates
7 like an injunction, the traditional rules of
8 injunctions, therefore, your position of strict
9 liability or something close to it doesn't
10 work?

11 MR. GEYSER: Well -- well, no. I
12 think that the traditional rules in injunction
13 -- for injunctions fall squarely on our side.

14 If you look to the Court's decision in
15 McComb, it said specifically if there is
16 uncertainty in the decree, then the burden
17 falls on the person who is supposed so comply
18 with the decree to make sure that their conduct
19 comports with it.

20 And if they violate it, then they --
21 it's -- that's -- that falls on their
22 shoulders. They act at their own risk. And if
23 they're confused about any uncertainty, then
24 they can go and seek clarification from the
25 Court. That's the way it normally works.

1 There is --

2 JUSTICE KAGAN: I -- I found McComb a
3 very confusing case, I have to admit, because
4 sometimes it speaks in your language and
5 sometimes it speaks in Ms. Saharsky's language
6 and what are we to make of that?

7 And I think I'll add on to this. I
8 mean, I guess I was totally stunned that this
9 wasn't clear what standard does apply for civil
10 contempts and that people are citing these
11 100-year-old cases that are opaque.

12 MR. GEYSER: Well, we -- I was a
13 little stunned, too, Your Honor, but I think
14 that what is clear in the bankruptcy context,
15 the overwhelming rule from the majority of
16 jurisdictions is the one that we've set out in
17 our brief.

18 It's that if you are aware of the
19 discharge and you violate it, then you are --
20 you are subject to remedial order under Section
21 105.

22 And if you're concerned about creating
23 a new rule and wading into this morass, the
24 easiest way to resolve it is to look to Section
25 105, which provides independent statutory

1 authority to create any order -- and that's --
2 that's broad language -- that's necessary or
3 appropriate for carrying out the code.

4 Now, the code prohibits collection
5 attempts. It doesn't just prohibit the actual
6 collection of debts. It's the attempt to
7 collect it. And the reason the code does that
8 is it wants to make sure that debtors aren't
9 put to the cost of defending suits that violate
10 the discharge.

11 The only way to restore the benefits
12 under that decree, the benefits that Congress
13 specifically provided debtors to ensure the
14 fresh start is meaningful is to pay back the --
15 the debtor, who did absolutely nothing wrong,
16 who also had a good faith reason to think and
17 an objectively strong reason to think the
18 discharge did apply.

19 JUSTICE KAVANAUGH: To go back to the
20 traditional rule, which you dispute, I
21 understand that, but the fair ground of doubt
22 principle, a lot of lower courts have applied
23 that.

24 And then you think about, well, what's
25 the purpose here? Well, the purpose is

1 contempt, it's a severe sanction. So before
2 someone's found to be liable for such
3 sanctions, you would want some clear intent,
4 and if they had a reasonable, good faith belief
5 that they weren't violating it, that's not
6 usually something that we'd say, tough, and
7 still impose the sanctions.

8 Do you agree with that or how do you
9 deal with the overall purpose of the rule, the
10 fair ground of doubt rule?

11 MR. GEYSER: Well, I -- I think in a
12 couple different ways. The first is the fair
13 ground of doubt rule appears in this -- the
14 Molitor decision from the -- from the 1800s.
15 And my friends respectfully misread it.

16 JUSTICE KAVANAUGH: But it's been
17 applied by a lot of lower courts up to the
18 present, correct?

19 MR. GEYSER: But -- but they've
20 applied it in a way that actually is consistent
21 with our reading.

22 Take the TiVo decision from the
23 Federal Circuit, the en banc Federal Circuit
24 looked at the principles both in McComb and in
25 Molitor and they said that they specifically

1 rejected the proposition that there is a good
2 faith objectively reasonable defense to the
3 actual violation of the injunction.

4 The way -- where they incorporate the
5 fair ground of doubt rule is they say does the
6 injunction actually apply? So it's not a rule
7 that says you can violate an injunction and
8 then you're excused because you had good faith.
9 It's saying we will construe the injunction not
10 to reach your conduct.

11 So that the --

12 JUSTICE KAVANAUGH: Are those really
13 two different things?

14 MR. GEYSER: Well, I -- I think they
15 are two different things, because look at how
16 it would play out here. Here you have a
17 statutory injunction in the Bankruptcy Code,
18 and it -- I don't think Court's in a position
19 to say that the code means different things in
20 different cases.

21 In fact, any ambiguity in the code is
22 construed against an exception to the
23 discharge. The exceptions are supposed to be
24 true exceptions.

25 So any creditor who looks and sees

1 that a debt is sort of marginal, then at that
2 point they're -- they're well on notice that
3 their conduct could be subject to remedial
4 order if they go ahead anyway.

5 And the way that Congress accommodated
6 those concerns is it created their Rule 4007.

7 So it's perfectly fine for the
8 creditor to go and invoke that rule, get the
9 guidance if they want it. They don't have to.
10 Just as there is a Declaratory Judgment Act and
11 not everyone goes and invokes it before they
12 breach a contract or violate a statute.

13 It's entirely optional but it's the
14 way to make sure that if someone does, in fact,
15 go forward and they are not sure what the code
16 means, then they're assuming the risk that they
17 might be wrong.

18 JUSTICE KAVANAUGH: You make it sound
19 easy but there are a lot of states on an amicus
20 brief, a real cross-section of states who say
21 your rule would really hamper them in real
22 world collection efforts.

23 How do you respond to that?

24 MR. GEYSER: Well --

25 JUSTICE KAVANAUGH: Are they just

1 wrong about that?

2 MR. GEYSER: I -- I think -- I think
3 they're wrong and I think the concerns are
4 overstated.

5 First, they -- they don't account for
6 the fact that the rule, again, that we're not
7 proposing something new. It's actually the
8 government and Respondents that are proposing
9 something new. This has been the majority rule
10 in the overwhelming number of jurisdictions
11 nationwide. We haven't seen any concrete
12 showing that this has a material effect on the
13 states.

14 The other problem with their
15 submission is they're talking about all of the
16 debts everywhere and all bankruptcies. And,
17 again, the code is very precise. And when
18 Congress said this operates as an injunction,
19 they knew that the -- it would operate as an
20 injunction for the provisions they set out in
21 Section 523 and 524.

22 So Congress thought this was
23 sufficiently precise. And it does, in fact,
24 provide clear guidance for the vast majority of
25 debts. We're talking about the very small

1 subset where there's a genuine dispute.

2 And where there is a genuine dispute,
3 the states haven't said why they can't access
4 Rule 4007. They've suggested that in some
5 cases it might be too expensive, but the only
6 way that a \$350 filing fee for something that
7 is supposed to be streamlined and efficient and
8 economical is actually too expensive is if they
9 have no intent of litigating the issue anyway.

10 And if that's the case, then any time
11 they try to collect even under their own rule,
12 a debtor could say this has been discharged and
13 the state will back down.

14 If they're actually willing to
15 litigate an affirmative seat to collect that
16 debt, they also should be willing to litigate
17 under Rule 4007 and reduce the costs imposed on
18 the debtor and imposed on other parties.

19 And so I -- I think if you look at the
20 -- the -- the concerns that Congress had with
21 the discharge, they understood that debtors
22 exit bankruptcy often still in a fragile
23 economic state. They have their finances a
24 little bit back in order but it's the rare
25 debtor that can go and hire an attorney to

1 resist the discharge, unless they know that the
2 attorney can be compensated at the end of the
3 day if they prove right.

4 JUSTICE KAGAN: Mr. -- Mr. Geysler, the
5 strength of your rule, I would say, is in the
6 realm of compensatory damages, but here there
7 were punitive damages as -- as well, and what
8 justification would there be for that?

9 MR. GEYSER: Well, the -- the -- to be
10 clear, the punitive damages here, it was a
11 \$2,000 award. It's really not the -- the bulk
12 of this -- this debate. And it was imposed for
13 a very specific reason.

14 After the -- the state court award of,
15 you know, \$45,000 or \$50,000 of attorneys' fees
16 was reversed, the Respondents didn't vacate it.
17 They kept it on the books. And it took a
18 specific -- a specific order from the court to
19 go and vacate that.

20 And because the Court had to go
21 through that effort, he imposed a small \$2,000
22 punitive damages, which he said was designed to
23 coerce future compliance with the -- with the
24 discharge.

25 So, again, that's -- that's -- it's a

1 very minor issue. It's not the bulk of -- of
2 what this dispute is really about.

3 I -- I do think when -- when you look
4 at the -- the competing arguments on each side,
5 if the -- we have the two independent grounds.
6 First, that because this operates as an
7 injunction, then under McComb we do think that
8 is the best reading of the court's traditional
9 contempt authority, but also the statutory
10 powers under 105.

11 And while my friends do point out that
12 there are certain exceptions to the discharge
13 that are mandatory, you have to go back to a
14 court in order to prevent those debts from
15 being discharged.

16 There's absolutely nothing that says
17 that 4007 can't be used to provide guidance in
18 cases where --

19 JUSTICE BREYER: It's something they
20 -- they have to buy a lawyer, and it's
21 complicated, 4007.

22 What -- what I want to know is the
23 Court wrote, I guess in a case called
24 California Artificial Stone, this is contempt.
25 And it says contempt is a severe remedy and it

1 should not be resorted to where there is a fair
2 ground of doubt.

3 Well, I understand that. That's what
4 the other side is I think making a point. So
5 if he has a fair ground of doubt, isn't that
6 good enough? I mean, I know they went further
7 in the Ninth Circuit.

8 But, I mean, the government, I think,
9 is saying, yes, fair ground of doubt, fair
10 ground of doubt, you don't have to pay
11 contempt. Well, it seems to be what the courts
12 hold -- held.

13 MR. GEYSER: Well, it -- it's not,
14 Justice Breyer. And -- and if you look at the
15 Molitor decision, that is the foundation --

16 JUSTICE BREYER: That was before,
17 wasn't it?

18 MR. GEYSER: No, it's -- it's the same
19 case.

20 JUSTICE BREYER: Oh.

21 MR. GEYSER: And if -- the -- the
22 government teases two propositions out of that
23 case. First, they say if judges disagree, then
24 there can't be a finding of contempt. Now,
25 they're wrong on that.

1 JUSTICE BREYER: Well, but that would
2 have to be more general. I mean, the -- here
3 what they say is "fair ground of doubt."

4 MR. GEYSER: They -- they do. But
5 what -- what the Court specifically said was
6 not that, if there's fair ground of doubt,
7 contempt's off the table. What they said is
8 that if you're -- that was an infringement
9 suit, so you had an original product that was
10 judged to infringe and was bound by the
11 injunction, and then infringer modified the
12 product. And so then the new dispute is does
13 this modified product fit within that original
14 junction?

15 And what the Court said is the -- the
16 patentee has two options: They can seek
17 contempt under the injunction or they can file
18 a new lawsuit. And the Court said both of
19 those options were available to the patentee,
20 but they advised that it would be most
21 appropriate to file a new suit if there's a
22 fair ground of doubt.

23 That is not a categorical threshold
24 per se rule at all. It actually kept both
25 options open to the patentee. And, again, that

1 involves something very different than what we
2 have here. That involves a judge-made
3 injunction. When a judge crafts the
4 substantive rules on an ad hoc basis to govern
5 specific disputes, it takes it, that process,
6 out of the democratic process. There is
7 greater concern for confusion and
8 arbitrariness.

9 This is a statutory injunction.
10 Congress passed the language for Section 523
11 for the exceptions and 524 for the discharge.
12 So --

13 JUSTICE BREYER: Well, why not -- why
14 not say -- well, what do you think, it says the
15 statute, that the court can grant, "take any
16 action or make any determination necessary or
17 appropriate to enforce or implement the court
18 orders or rules."

19 So why doesn't it -- but that
20 bankruptcy judge have the power to say, well,
21 we think in your case it does, in fact, require
22 considerable damages, as you were on the brink
23 there, and some other case say no, it's just
24 compensatory damages, and some other case say
25 half that. In other words, up to the

1 bankruptcy judge.

2 What do you think of that?

3 MR. GEYSER: Well, the -- it's --
4 again, our position is that the court does have
5 that discretion. We think there should be a
6 heavy thumb on the scale in favor of full
7 remedial relief because that is really what's
8 necessary to carry out the discharge. Any time
9 you buy less than full remedial relief, you're
10 not really enforcing the benefits that the
11 debtor was entitled to under the discharge.

12 It's Respondents and the government
13 that are saying at the threshold, if they can
14 conjure up any fair ground of doubt -- and I'm
15 not even --

16 JUSTICE BREYER: It's not conjure up.
17 They think, look, I'd say if the person wasn't
18 in good faith, say that. Indeed, he had a fair
19 ground of doubt. You know. Maybe there's
20 something special that means he should pay
21 anyway. I wouldn't want to eliminate that, but
22 what?

23 MR. GEYSER: Well, the -- their
24 contention, though, is that the court would not
25 have discretion. Section 105 is a broad

1 equitable remedy, and it -- it confers broad
2 discretion on the bankruptcy court to carry out
3 the code.

4 I think it's unusual to take that
5 flexible remedy and to cut it off as -- in a
6 categorical way any time a party has some
7 reasonable basis for violating the code, even
8 though there was an even more reasonable basis
9 to know that their action would violate the
10 discharge.

11 If I could reserve the balance of my
12 time?

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Joshi.

16 ORAL ARGUMENT OF SOPAN JOSHI
17 FOR THE UNITED STATES, AS AMICUS CURIAE,
18 IN SUPPORT OF NEITHER PARTY

19 MR. JOSHI: Mr. Chief Justice, and may
20 it please the Court:

21 I should first say the ground has
22 somewhat shifted in this case beneath us since
23 the time we filed our brief. Now it appears
24 Petitioner is really not talking about civil
25 contempt, even though that is the question

1 presented on which this Court granted cert.

2 For civil contempt, we think that the
3 text of 524 is what controls. The text of 524
4 says that a discharge order operates as an
5 injunction, and not to borrow Justice
6 Frankfurter's sort of horticultural analogy,
7 but that brings all the old soil with it, the
8 word "injunction."

9 And so the government's position is
10 that the ordinary rules that govern
11 injunctions, injunctive relief, and the
12 discipline for violating injunctive orders in
13 the ordinary civil context apply in the
14 bankruptcy context.

15 Now, the Ninth Circuit below had a
16 bankruptcy-specific rule in which good faith
17 belief, even if unreasonable, could immunize
18 from civil contempt. It appears nobody agrees
19 with that rule anymore, and so I don't need to
20 spend much time on it. But Petitioner's rule
21 also appears to be a bankruptcy-specific rule.

22 And that's our point of disagreement
23 with Petitioner and that's --

24 CHIEF JUSTICE ROBERTS: Well, it takes
25 into account the -- the deep policy in the

1 Bankruptcy Code to grant relief to the honest
2 debtor. And I just don't see why it's so hard
3 for -- I appreciate that you're representing
4 the largest creditor in the country, but I
5 don't see why it is so hard for a creditor, if
6 he has any doubt, to go in the safe harbor and
7 get a -- get a clean ticket, a clean bill of
8 health, instead of just, you know, going after
9 the newly released debtor who's getting a -- a
10 fresh start, is supposed to get a fresh start,
11 and all of a sudden there are the same people
12 who were, you know, hounding him before.

13 Why is it so hard? If -- if you have
14 -- I -- I think if you have a safe harbor, a
15 pretty strict -- it doesn't have to be strict
16 liability, but a pretty rigorous standard
17 before you can get out of contempt seems to me
18 to make a lot of sense.

19 MR. JOSHI: So a number of responses
20 to that. First of all, I think giving the
21 debtor a fresh start is certainly one of the
22 goals of the Bankruptcy Code, but another goal
23 that's incorporated into the code and rules is
24 to balance creditor and debtor rights.
25 Congress made a judgment certain debts would

1 the not be discharged and that the creditors
2 retain rights to it.

3 So to say the debtor deserves a fresh
4 start somewhat begs the question: A fresh
5 start from what? The debtor does not get a
6 fresh start from a debt that has not been
7 discharged.

8 And so really what you --

9 CHIEF JUSTICE ROBERTS: Right, but the
10 whole point is here is, you know, who -- who
11 bears the risk of -- of the fact that you --
12 there's some doubt about whether a debt is
13 discharged or not?

14 MR. JOSHI: Right.

15 CHIEF JUSTICE ROBERTS: The person who
16 is supposed to get the fresh start or the
17 person who can just quickly jump into the
18 bankruptcy court and say is this dischargeable
19 or not, and -- and to not have to worry about
20 it?

21 MR. JOSHI: So we disagree that it's
22 that quick of a jump. Under Rule 4007 or 7001,
23 you have to file an adversary complaint and it
24 involves all the traditional rules under --
25 under -- under the bankruptcy rules of

1 witnesses, evidence, et cetera.

2 So I don't think it's that quick,
3 but -- but more important, in terms of who
4 bears a risk and the cost, that sounds a lot
5 like sort of compensatory damages, but for
6 better or worse, in this country we follow the
7 American rule.

8 And really as this case exemplifies,
9 what Petitioner really wants are attorneys'
10 fees, but that is not traditionally, under the
11 American rule, a form of make-whole remedial
12 relief. It just isn't. Even though in the
13 real world we all understand that you have to
14 pay your attorney, which is a good thing, but
15 -- and that that's likely to be the -- the bulk
16 of the cost for the debtor who has just emerged
17 from bankruptcy, the fact is it is not a form
18 of make-whole relief.

19 And so, again, the -- we made this
20 point in our brief and -- and I think
21 Petitioner picks up on it a little bit in -- in
22 the reply and today, which is we agree that
23 under Section 105, a bankruptcy court has the
24 authority to -- to give remedial relief that'
25 short of civil contempt.

1 JUSTICE GORSUCH: One of the
2 difficulties, I think, for your side of the
3 case is the decision in McComb, which is rather
4 a hard-line view of civil contempt.

5 It seems to me that one possible
6 answer -- and I just want your thoughts on this
7 -- is that McComb dealt with a situation where
8 you had a rather contumacious party that had
9 already disobeyed several orders. Would you
10 agree the standard there may be a little
11 different than in the first instance?

12 MR. JOSHI: I -- I think that's
13 exactly right. As this Court said in Chambers
14 against Nasco, for example, contumacious,
15 vexatious conduct can always be the basis for
16 attorneys' fees and -- and perhaps even a -- a
17 contempt citation as well.

18 And we believe the bankruptcy courts
19 would retain that kind of power, but that
20 wouldn't --

21 JUSTICE GORSUCH: So to the extent
22 that they were worried about who bears the
23 burden of risk, it may shift over time based on
24 behavior?

25 MR. JOSHI: That is certainly true.

1 It wouldn't be civil contempt, though, for
2 violating the discharge injunction. It might
3 be contempt or other --

4 JUSTICE GORSUCH: Prior.

5 MR. JOSHI: -- kinds of sanctions for
6 other related sorts of litigation misconduct or
7 -- or, you know, contumacious or vexatious
8 conduct.

9 I would also hasten to add that we
10 embrace McComb. We think McComb and Stone
11 Paving are perfectly consistent with each
12 other.

13 Stone Paving says you -- civil
14 contempt is a severe remedy and it shouldn't be
15 imposed where there's a fair ground of doubt
16 about whether the injunction actually prohibits
17 the -- the challenged conduct. Now, we can
18 quibble over the words, but I think the key
19 point of Stone Paving is it's an objective
20 test, purely objective.

21 McComb reinforces that by saying that
22 subjective intent of the putative contemnor
23 also doesn't matter when imposing civil
24 contempt. Those two rules harmonize perfectly
25 and that is essentially the rule that the

1 government sets forth today.

2 JUSTICE KAGAN: Could -- could you
3 explain to me, Mr. Joshi, what the difference
4 is between your rule and the Respondents' rule?
5 And whether it matters?

6 MR. JOSHI: Right. So -- so this is
7 one of those grounds that shifted a little from
8 when we wrote our brief. We think the Ninth
9 Circuit's rule clearly is -- is incorrect.

10 Respondents' rule and our rule may in
11 the vast majority of cases yield the -- the
12 same results, but I think we want to stand
13 behind a purely objective test. If objectively
14 the creditor's position is -- is reasonable,
15 and there is -- you know, there -- there's a
16 basis in law for it, then we would say that's
17 enough.

18 It doesn't matter what the subjective
19 intent is, even the reasonable, subjective,
20 good faith belief is. It's am simply
21 irrelevant to the analysis.

22 JUSTICE GORSUCH: Well, is it
23 irrelevant -- I'm -- is it irrelevant? I mean,
24 can subjective, good faith be some evidence of
25 objective, good behavior and can subjective bad

1 faith be some evidence of objective bad
2 behavior?

3 MR. JOSHI: Yes, and I was about to
4 get to that --

5 JUSTICE GORSUCH: Okay. All right.

6 MR. JOSHI: -- to the exception.

7 JUSTICE GORSUCH: That's all I wanted
8 to hear you say --

9 MR. JOSHI: Thank you for raising it.

10 JUSTICE GORSUCH: -- then Justice
11 Breyer.

12 Oh, good. Well, two birds, one stone.

13 MR. JOSHI: Right. And what I was
14 going to say is that the factors a finder of
15 fact might have to find to find subjective,
16 good faith belief that's reasonable, for
17 example, here's the case law I looked at, here
18 are the treatises I read. Here's what -- you
19 know, what traditional practices in bankruptcy
20 that lead to subjective, good faith, those are
21 probably the same factors, or they overlap
22 substantially, with the factors that would be
23 considered in an objective analysis under --

24 JUSTICE KAGAN: So could I understand
25 that a little bit better? Because the -- your

1 statement in your brief confused me a little
2 bit.

3 But you're saying that the facts that
4 lead to subjective good faith would also be
5 indicators of objective reasonableness.

6 You're not saying, as I understand it,
7 although you do say in your brief, you say in
8 your brief that the belief itself is relevant
9 to objective reasonableness?

10 MR. JOSHI: So the belief might have
11 probative evidentiary value, to the extent it
12 is highly correlated with those facts, which
13 will overlap in the objective analysis, so that
14 may --

15 CHIEF JUSTICE ROBERTS: As long as
16 it's easy to apply.

17 (Laughter.)

18 MR. JOSHI: So, look, I'm -- I'm not
19 going to stand in your way if you want to close
20 the door that I have left open for the -- for
21 the evidentiary value of subjective, good faith
22 belief. We think the test should be objective.

23 And that's because that is the test in
24 the ordinary civil context. And because under
25 the Bankruptcy Code, Congress gave no

1 indication that it wanted to deviate from the
2 traditional rules governing injunctions,
3 injunctive relief and civil contempt to enforce
4 its injunctive orders in the bankruptcy context
5 or at least this bankruptcy context from the
6 ordinary civil context, we think the same rules
7 should apply.

8 JUSTICE KAVANAUGH: So just to be
9 clear on this, "reasonable, good faith belief"
10 is the articulation Respondent has. How would
11 you alter that, just say "reasonable belief"?

12 MR. JOSHI: "Reasonable belief" might
13 work or simply adopt the text in California
14 Artificial Stone Paving and say where as an
15 objective matter there's a fair ground of doubt
16 about whether the injunction prohibits the
17 challenged conduct, then civil contempt is
18 unavailable.

19 Otherwise --

20 JUSTICE KAVANAUGH: How is fair ground
21 of doubt different than a reasonable belief
22 that the discharge order did not apply to the
23 conduct?

24 MR. JOSHI: They may well land in the
25 same place. I think our objection, if you

1 will, is to the word "belief."

2 We just think the subjective
3 beliefs --

4 JUSTICE KAVANAUGH: Okay.

5 MR. JOSHI: -- are not something the
6 courts need to or really ought to be probing.

7 JUSTICE KAVANAUGH: So it is
8 reasonable to conclude that the discharge order
9 did not apply to the conduct?

10 MR. JOSHI: I think we wouldn't have a
11 problem with that, with that formulation.

12 Meanwhile, Petitioner's rule, again,
13 in -- in one of the ground shifting, if I --

14 JUSTICE KAVANAUGH: And why not affirm
15 under your position, rather than vacate?

16 MR. JOSHI: So we think there are --
17 this Court's ordinary practice when announcing
18 a new rule is to remand, especially because
19 none of the lower courts have applied the rule
20 we set forth here today.

21 But there remains some -- you, of
22 course, have jurisdiction to reach it, but we
23 believe there remains some legal and factual
24 issues to decide. So if you decide that --
25 first of all, no court -- the Ninth Circuit

1 didn't rule on whether they had actually
2 violated the discharge injunction. And you
3 would need to decide that in the first
4 instance.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Saharsky.

8 ORAL ARGUMENT OF NICOLA A. SAHARSKY
9 ON BEHALF OF THE RESPONDENT

10 MS. SAHARSKY: Mr. Chief Justice and
11 may it please the Court:

12 We acted reasonably and in good faith.
13 Notwithstanding that, we were held in contempt
14 of court, which included attorneys' fees and
15 punitive damages. And that's just wrong in
16 light of the decades of this Court's
17 established precedent on what's required to
18 hold someone in contempt of court.

19 And I think --

20 JUSTICE GINSBURG: Do -- do --

21 MS. SAHARSKY: -- where I'd like --

22 JUSTICE GINSBURG: Do you think the
23 Ninth Circuit's test needs to be modified?

24 MS. SAHARSKY: I think the Court
25 should say unreasonable good faith -- or, I'm

1 sorry, reasonable good faith belief, and that's
2 not exactly what the Ninth Circuit said, so we
3 think the Court should go ahead and clarify
4 that, yes.

5 JUSTICE GORSUCH: I'm a little curious
6 why you haven't adopted the government's
7 standard? I have sat down trying to figure out
8 the Venn diagram of when they don't overlap.

9 And the one -- the one scenario that
10 comes to my mind is what if some creditor had a
11 not well-founded, subjective belief, but he was
12 objectively reasonable, objectively reasonable
13 but bad faith, he didn't do any work, didn't do
14 any due diligence, he just filed, it turned out
15 he was right, objectively reasonable. That
16 happens.

17 (Laughter.)

18 JUSTICE GORSUCH: I would have thought
19 you'd want to protect that creditor. But your
20 test wouldn't, and the government's would. And
21 so your test in that respect, at least, is
22 under-inclusive compared to the government's.
23 And that surprised me, coming from creditor's
24 counsel.

25 So help me out with that.

1 MS. SAHARSKY: Sure. We don't think
2 that there's much daylight at all between our
3 test and the government, particularly in this
4 case, where good faith is undisputed, but I see
5 your question.

6 And frankly we got the consideration
7 of good faith and bad faith from this Court's
8 decisions, because I think there's -- we've
9 talked a lot with about the California
10 Artificial Paving case, but there are other
11 cases where this Court has considered what's
12 appropriate for contempt, the rules that apply
13 to contempt.

14 And in California Paving the Court
15 talked about fair ground of doubt, but an
16 additional case --

17 JUSTICE GORSUCH: All right. I will
18 -- I will spot you that our cases may not be
19 entirely clear on this point.

20 (Laughter.)

21 JUSTICE GORSUCH: But I guess I'm
22 wondering, assuming we were writing on a blank
23 slate, would you disagree with the government's
24 test, and, if so, why?

25 MS. SAHARSKY: An objective standard

1 would be fine by us. We just read the
2 government's case as especially because
3 contempt is -- or, I'm sorry, the court's cases
4 especially because contempt is an equitable
5 remedy to allow for consideration of good faith
6 and bad faith.

7 And certainly there were some
8 questions about if someone were acting purely
9 in bad faith, is that the kind of thing that
10 could be sanctioned.

11 JUSTICE KAVANAUGH: Could you --

12 MS. SAHARSKY: We think the Court has
13 left that open. But if you wanted to use a
14 purely objective test, that would be fine with
15 us.

16 JUSTICE KAVANAUGH: I think you were
17 going to identify a few of the other cases.

18 MS. SAHARSKY: Yes, I actually wanted
19 to point the Court, I think, to four cases that
20 we think are particularly relevant. The first
21 is California Artificial Paving, which has been
22 addressed in great detail.

23 The second is the International
24 Longshoremen's case that we talked about, which
25 we think is very important because it talks

1 about what it means to be held in contempt and
2 the prerequisites for contempt.

3 And the Court said, "Contempt is for a
4 violation of a court order by" -- someone --
5 "by one who fully understands its meaning, but
6 chooses to ignore its mandate. Contempt is
7 when" -- you -- "when the person knows what
8 they are supposed to do, and they refuse to do
9 it."

10 And that's just not a case when there
11 is an objective -- a reasonable, good faith
12 belief. And then the other two cases that I
13 wanted to mention, which we featured in the
14 briefs, are the Watts case and the Maness case.

15 And both were situations in which the
16 Court held that because of a good faith,
17 reasonable belief, the person could not be held
18 in contempt.

19 The Maness case was about an attorney
20 who counseled his client to invoke the Fifth
21 Amendment with respect to a subpoena. And the
22 Court talked about both good faith, we quote
23 the language in our brief, and it talked about
24 reasonableness.

25 The Watts case, I think, is even more

1 interesting because it was a bankruptcy case.
2 And it had to do with there being a state
3 bankruptcy or -- or a state order about the
4 possession of property. And the lawyer in that
5 case relied on the state court order, and then
6 the federal court held him in contempt.

7 And this Court said he relied on the
8 state court order, he had a good faith
9 reasonable belief, he can't be held in
10 contempt. And, frankly, that's the -- pretty
11 much the same thing as this case.

12 JUSTICE KAGAN: Ms. Saharsky, in the
13 universe of cases that we're talking about, we
14 know that the discharge injunction has been
15 violated. We know that the debtor has suffered
16 harm as a result.

17 Now -- now -- now let's give you that
18 there was entirely good faith on the part of
19 the creditor, but we still have a question of:
20 Who should bear the burden of the harm?

21 And from the debtor's perspective,
22 it's like this injunction has been violated. I
23 didn't do anything wrong. As between the
24 victim of the violation and the person who,
25 with all the good faith in the world,

1 perpetrated the violation, why shouldn't we
2 look to the person who perpetrated the
3 violation?

4 MS. SAHARSKY: I think that's a
5 terrific question. It really gets to a point
6 that we haven't explored much today, which is
7 the difference between remedying the violation
8 of a discharge order and the additional and
9 separate sanction of holding someone in
10 contempt.

11 We agree that if someone violates the
12 discharge order, that they have to comply going
13 forward. And if they, say, obtain property
14 under the discharge order, they would return
15 the property.

16 It's the -- it's just the regular kind
17 of make whole relief that applies in these
18 circumstances.

19 But what Petitioner is asking for here
20 is to hold us in contempt, which is a serious
21 sanction, and to get attorneys' fees. And I
22 think as the representative from the government
23 made clear, attorneys' fees are not normally
24 considered compensation.

25 In fact, this Court has been crystal

1 clear, because it's gotten opportunities, where
2 people have come to it and said: Look, as an
3 equitable matter, give us some attorneys' fees.
4 That was the Alyeska case cited in the briefs,
5 also the Baker Botts case.

6 CHIEF JUSTICE ROBERTS: Well, you
7 could be --

8 MS. SAHARSKY: And the Court said --

9 CHIEF JUSTICE ROBERTS: -- you could
10 be sanctioned under contempt through monetary
11 sanction, right?

12 MS. SAHARSKY: If a person meets the
13 standard from -- for contempt, they could face
14 monetary sanctions, including --

15 CHIEF JUSTICE ROBERTS: Well, it seems
16 to me --

17 MS. SAHARSKY: -- attorneys' fees.

18 CHIEF JUSTICE ROBERTS: -- why can't a
19 court say, well, okay, I'm going to fine you
20 because of your contemptuous behavior and, you
21 know, how much should it be? The amount of the
22 attorneys' fees seems to be a pretty reasonable
23 number.

24 It doesn't mean that he's violating
25 the American rule. It means that he's looking

1 for some basis to judge how much the fine
2 should be.

3 MS. SAHARSKY: I agree with that. I
4 think it's just the difference between
5 remedying an order violation and holding us in
6 contempt.

7 And holding us in contempt requires a
8 particular finding that we knew what we were
9 supposed to do and we didn't do it.

10 And in this case, particularly we went
11 to a state court and got an order in our favor,
12 we -- we did not meet that standard. So we
13 completely agree that we have to comply that --
14 with the -- with the discharge order going
15 forward.

16 What we're saying is that the
17 prerequisite that this Court has said out in
18 cases like International Longshoreman,
19 California Artificial Paving, and the others
20 that I mentioned, just hasn't been met.

21 CHIEF JUSTICE ROBERTS: Well, one
22 thing --

23 MS. SAHARSKY: And so --

24 CHIEF JUSTICE ROBERTS: -- you didn't
25 do, which you could easily have done, is -- is

1 get -- get a -- a ruling in the -- from the
2 bankruptcy court whether the debt was
3 discharged or not. I mean, why didn't you do
4 that?

5 MS. SAHARSKY: Well, state --

6 CHIEF JUSTICE ROBERTS: Because -- and
7 you guessed wrong on whether it was. So why
8 didn't you go ahead and just get an order in
9 advance?

10 MS. SAHARSKY: So we -- we were in
11 state court, as -- as the court knows from the
12 briefs. There was already a business dispute.
13 And the question that arose, which was the one
14 about the -- the effect of the discharge order
15 was whether we could get an award of attorneys'
16 fees based on our contract.

17 We're already in state court.
18 Everyone agrees that the state court has
19 concurrent jurisdiction to decide that issue.
20 We had a limited time to bring the attorney's
21 fees issue --

22 CHIEF JUSTICE ROBERTS: To decide
23 which issue?

24 MS. SAHARSKY: To decide whether that
25 is a discharged debt under the bankruptcy. So

1 I don't know why it would make any sense to
2 have to go to the federal court when we're
3 already in state court, and when it has
4 concurrent jurisdiction to decide the issue,
5 and it decided it in our favor.

6 And I just -- I just want to make sure
7 that the Court understands --

8 CHIEF JUSTICE ROBERTS: Well, the
9 sense is it's a safe harbor.

10 MS. SAHARSKY: Well, but the -- a -- a
11 couple of -- I think there are a couple of
12 answers to that:

13 First of all, I think there is the
14 answer in terms of what Congress intended and
15 then I think there is a policy answer.

16 So in terms of what Congress intended,
17 as we have discussed, Congress did not require
18 advance determinations. It -- it anticipated
19 that these questions would be litigated in
20 collection actions.

21 But then, second, Congress provided
22 for concurrent jurisdiction and it specifically
23 recognized that sometimes there are questions
24 about dischargeability of debts that depend on
25 state law.

1 And this is a point that the state's
2 amicus brief, I think, makes very well about
3 how there can be state law questions about
4 community property and other things that
5 actually some of these exceptions to discharge
6 aren't clear.

7 But just moving beyond that, because I
8 think you're asking about the policy rationale
9 behind this, I think we need to think about, if
10 Congress were making a decision about this,
11 what interest it would consider because it's
12 always when it's putting together bankruptcy
13 provisions trying to -- trying to balance the
14 various interests.

15 First of all, we start with the
16 interest of debtors. Now, I think it's
17 undisputed that if there were a 4007 proceeding
18 the debtors would have to pay their -- their
19 own attorneys' fees.

20 Petitioner has not disputed that. So
21 the debtor is not any better off. In fact,
22 debtors have to pay their own attorneys' fees
23 in all of Chapter 7 proceedings, unless the
24 attorney was appointed by the trustee. That's
25 the Court's decision from about 15 years ago in

1 Lamie versus U.S. Trustee.

2 So if we're just looking at helping
3 the debtor, going to a 4007 proceeding does not
4 make the debtor better off in terms of
5 attorneys' fees because he has to pay those
6 attorneys' fees.

7 So then we look at the interests of
8 the creditors. Does it help or hurt the
9 creditors? Well, the states and the federal
10 government are coming in and telling you that
11 that's going to seriously chill creditors to
12 have to go through that procedure, and not --
13 to chill them from collecting on debts that
14 they legitimately --

15 CHIEF JUSTICE ROBERTS: Well, it's not
16 so much --

17 MS. SAHARSKY: -- can collect.

18 CHIEF JUSTICE ROBERTS: -- it's not so
19 much the procedure. It's -- it's the standard.
20 The -- the standard that the Petitioners are
21 asking for certainly benefits debtors, whether
22 it's consistent with the general policy of the
23 fresh start or not is another story, but it's
24 -- and the existence of the safe harbor, I
25 would say, would -- makes the rigorous standard

1 more acceptable.

2 MS. SAHARSKY: Right. And putting
3 aside the arguments that we've already
4 discussed about why Congress didn't want that
5 and why we should do what Congress wants,
6 because this is a statutory interpretation case
7 just getting back --

8 CHIEF JUSTICE ROBERTS: Well, I think
9 --

10 MS. SAHARSKY: -- to the policy --

11 CHIEF JUSTICE ROBERTS: -- we should
12 do what Congress wants.

13 MS. SAHARSKY: We're --

14 CHIEF JUSTICE ROBERTS: It's just a
15 question of what they want.

16 MS. SAHARSKY: Right. Right. Right.
17 And I -- I just want to -- to get back to -- to
18 the -- the first part of your question, which
19 is to say that this would help debtors.

20 I just want the Court to really think
21 about how is this helping debtors to have this
22 4007 proceeding? It would provide an answer
23 about the dischargeability of the debt but it
24 would not make the debtor any better off
25 because he is paying his own attorneys' fees.

1 And then if you look at the harms to
2 creditors, those harms are significant in terms
3 of the chilling of creditors and the states
4 have discussed that in their amicus brief. And
5 the federal government is here to tell you
6 that.

7 And then I think you should also
8 consider --

9 CHIEF JUSTICE ROBERTS: Well, yes, it
10 does --

11 MS. SAHARSKY: -- the interests of the
12 courts who are going to be burdened by these
13 procedures in a way that Congress didn't
14 intend.

15 CHIEF JUSTICE ROBERTS: Yeah, it -- it
16 does have some chilling effect on creditors,
17 and it doesn't surprise me that creditors don't
18 like that.

19 But that chilling effect makes them --
20 since allowing the creditors to proceed on
21 debts that may or may not be dischargeable, it
22 seems to me perfectly reasonable to have them
23 bear the risk, make -- have them make a careful
24 choice.

25 MS. SAHARSKY: I understand that. And

1 I think that the difference in terms of bearing
2 the risk is the difference between compensation
3 and the additional sanction of -- of contempt.

4 We agree that they bear the risk and
5 that if they guess wrong they have to comply
6 with the discharge order and there has to be
7 make-whole relief in terms of compliance going
8 forward and in terms of giving back any
9 property or money that was gotten from the
10 debtor.

11 But what Petitioner is asking for here
12 is contempt. The question presented is about
13 contempt. We were under an order of contempt.
14 And that's a serious personal stigmatizing
15 sanction. This Court has said that in multiple
16 cases, the seriousness of contempt. That's not
17 one case.

18 JUSTICE KAGAN: If --

19 MS. SAHARSKY: It's many cases.

20 JUSTICE KAGAN: As -- as I understand
21 it, and tell me if I'm wrong, but in the
22 automatic stay context, under, what is it,
23 362(k) or something?

24 MS. SAHARSKY: Correct.

25 JUSTICE KAGAN: There when -- if -- if

1 there is a violation of the automatic stay, and
2 there was, you know, an -- sort of an
3 intentional act that resulted in that
4 violation, the violator would be on the hook
5 for any damages that resulted, irrespective of
6 the reasonableness of his -- of -- of his
7 beliefs.

8 Do you understand that to work that
9 way? And, if you do, why shouldn't we have the
10 exact same rule in the two contexts?

11 In other words, why shouldn't we say
12 if you violate the automatic stay, if you
13 violate the discharge injunction, you should be
14 treated exactly the same way, under the same
15 standard, with respect to the costs that you
16 impose?

17 MS. SAHARSKY: Right. I think there
18 are really two reasons: There is different,
19 different textual bases in terms of how
20 Congress addressed this and then there are
21 different policies underlying it.

22 So in terms of the different textual
23 bases, in our situation we're talking about the
24 Court's necessary and appropriate authority to
25 enforce something that operates as an

1 injunction, and that pulls in the contempt
2 principles that we've talked about.

3 The fact that Congress was so specific
4 when it wanted to allow this payment of
5 attorneys' fees in the three -- in the -- in
6 the context of Section 362(k), we actually show
7 -- we think shows that it's different from this
8 case because Congress used different language.

9 It wanted to make sure that there
10 would be payment of these fees so it put that
11 language in there.

12 And then, second, we think that there
13 is a significant policy reason to distinguish
14 between the two. The automatic stay is entered
15 at the beginning of the case. It's automatic.
16 It's temporary. It benefits all of the
17 parties.

18 And so we think that reasonably it
19 could be the case that Congress would decide
20 that that would be -- that there would be a
21 more hard and fast rule in that context than in
22 this context.

23 But I think this case really
24 illustrates why in the context of a discharge
25 order questions will arise and that contempt is

1 just not appropriate if someone has a
2 reasonable belief or good faith reasonable
3 belief that the discharge order doesn't apply
4 to them.

5 In particular, in this case, just to
6 make sure that it's clear, all we did was go to
7 a state court where we were already in
8 proceedings and be forthright with that state
9 court about the fact that there had been a
10 bankruptcy discharge and that we had a
11 contractual right to attorneys' fees and that
12 we weren't sure whether we could get the
13 attorneys' fees under that contract.

14 And we asked the court to decide that
15 issue. And Petitioner agreed that the court
16 had jurisdiction under concurrent jurisdiction
17 to decide that issue.

18 And so it just seems to me that it
19 can't be the case that you can hold someone in
20 contempt of court, which is this very serious
21 thing, for asking a court whether the discharge
22 order applies to it, it's contempt of court for
23 violating the discharge order just for asking
24 the court to resolve that open legal question.

25 That just can't be contempt and we

1 think that that really shows the need for the
2 kind of rule that we in the government have
3 been discussing.

4 JUSTICE KAVANAUGH: Just to follow up
5 on Justice Gorsuch's question from earlier, it
6 sounded like you don't object to an objective
7 standard, but you had rolled in good faith
8 based on some of our cases; is that accurate?

9 MS. SAHARSKY: Yes. And I think, you
10 know, it's -- it's helpful just to think about
11 the position that courts are in in the normal
12 civil contempt context, and what they do when
13 they're faced with a request for contempt.

14 So someone files a motion for
15 contempt, and what the court typically does and
16 what this Court has done in the cases we cited,
17 or in the case -- the cases that came to this
18 Court, that courts also did, was enter an order
19 to show cause. Okay?

20 And the order to show cause says come
21 to the court and give me your reasons. Explain
22 to me what you did.

23 And then the party comes in and says,
24 well, we can't -- we can't actually follow the
25 order, or we didn't think the order applied to

1 us. And the court listens to the reasons from
2 the person and basically decides whether they
3 are good reasons or not.

4 And so when we're talking about a good
5 faith objective belief or just an objectively
6 reasonable belief, it's just the court
7 listening to the reasons and it's deciding that
8 they are good enough that you shouldn't impose
9 the various very serious sanctions --

10 JUSTICE SOTOMAYOR: When do you think
11 that a reason could not be objectively -- an
12 objective ground that could be still
13 reasonable?

14 Meaning, I understand your answer to
15 Justice Gorsuch, which is that somebody doesn't
16 do research and just says I don't want to pay,
17 I'm just going to do this. And it turns out
18 later that a -- a ground could exist.

19 You're suggesting that your
20 formulation might not get that person off.

21 So -- but the reverse, what could be a
22 reasonable good faith belief if objectively a
23 ground is not -- if objectively there's no fair
24 ground of doubt?

25 MS. SAHARSKY: Well, if I'm

1 understanding the question, you know, I think
2 there's a -- there is a spectrum really of
3 reasonableness. And the case that seems to me
4 like it is per se reasonable is if you go to a
5 court and ask it to resolve the issue in your
6 favor and it says you win, which is what
7 happened in this case.

8 But imagine also that there's circuit
9 precedent that applies --

10 JUSTICE SOTOMAYOR: Well, that might
11 --

12 MS. SAHARSKY: -- to your case, do
13 you also --

14 JUSTICE SOTOMAYOR: -- get you up to
15 that proceeding, but how about if the court's
16 decision is so flawed that you decide to fight
17 the appeal on it and don't concede that they
18 were wrong?

19 MS. SAHARSKY: Well, in this case, you
20 know, we're -- we're consistent -- our position
21 is consistent with what the state court and the
22 bankruptcy court did. So it's supportive of us
23 and not a -- a fighting situation, but, you
24 know, to answer your question more generally,
25 contempt is an equitable remedy and it's one

1 where the courts did, you know, what I was
2 suggesting to Justice -- do, what I was
3 suggesting to Justice Kavanaugh, which is
4 really just consider like is your reason a good
5 one or not? You know, tell me your reasons.

6 And those could be a variety of
7 reasons. It could be reliance on precedent.
8 It could be reliance on something a state or
9 federal administrative agency told you. You
10 know, there -- there are a variety of potential
11 reasons.

12 But, you know, really the point we're
13 trying to make is that because contempt is such
14 a big deal and such a serious, stigmatizing
15 sanction, that you need to leave the door open.
16 And this is the kind of -- this question about,
17 you know, when is contempt appropriate, that's
18 something that the district courts and now the
19 bankruptcy courts are fairly familiar with
20 deciding.

21 JUSTICE KAVANAUGH: Because -- because
22 your standard is slightly different or more
23 than slightly than the Ninth Circuit's, why
24 shouldn't we vacate rather than affirm as the
25 Solicitor General suggests?

1 MS. SAHARSKY: Sure. Well, three --
2 three answers, really. First of all, the Court
3 certainly has the power to go ahead and set out
4 the correct rule and then apply it. It's done
5 that recently, for example, in the Air and
6 Liquid Systems case.

7 So then the question is: Is that
8 appropriate in this case? And the answer we
9 think is yes because under any standard like
10 our standard or the government's standards, we
11 think it's pretty clear that reliance on a
12 state court order is one that would be
13 considered reasonable. And there's no dispute
14 at all about good faith in this case.

15 And that's what the Ninth Circuit said
16 that we did, and the bankruptcy panel,
17 appellate panel. They said that we relied on
18 the state court order. Under California
19 Paving, that's like pretty much per se good
20 faith.

21 And just the third thing, you know
22 bankruptcy -- bankruptcy proceedings are
23 supposed to be quick and efficient and let
24 people move on with their lives. And this
25 contempt proceeding has been going on since

1 2011. I think it's fair to say everyone wants
2 to move on with their lives, you know,
3 particularly the spouse of the deceased
4 attorney in this case, who hasn't been able to
5 close her husband's estate even though he
6 passed away in 2013.

7 And so this does seem like the case
8 where it would make sense for the Court to just
9 go ahead and apply the rule. I understand, of
10 course, that this is a court of review, not
11 first view, but there's not really work left
12 here for the lower courts to do, and so we
13 would greatly appreciate it if you could
14 affirm.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Geyser, three minutes remaining.

18 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

19 ON BEHALF OF THE PETITIONER

20 MR. GEYSER: Thank you, Mr. Chief
21 Justice.

22 First, for the American rule, Congress
23 did not think that these fees were fees as
24 fees; they were fees as damages. If you look
25 at 362(k), it specifically says that courts can

1 award actual damages, including attorneys'
2 fees, because they understood that this
3 context, the fees constitute the actual harm.

4 If you look to Rule 4007, this
5 definitely will help debtors. This is an
6 efficient, streamlined, economical proceeding
7 before an expert bankruptcy judge. It imposes
8 far fewer costs on the debtor than litigating
9 in state court before state judges who aren't
10 as familiar with these questions.

11 My friend suggested that the
12 Respondents in this case relied on a state
13 court order saying they could collect fees.
14 That's not true.

15 They filed an affirmative fee petition
16 seeking the fees. It was the culmination of
17 the entire litigation in this -- in the trial
18 court where the state court finally made a
19 determination, which was clearly incorrect.

20 We've outlined in our reply brief why
21 they're clearly incorrect, both legally and
22 factually, in this case. So we'd encourage the
23 court to look at that, although I do think it
24 makes more sense to send it back down to the
25 Ninth Circuit if you adopt an objectively

1 reasonable standard, which I hope you won't
2 because it would obliterate the -- the fresh
3 start.

4 This is -- an objectively reasonable
5 standard is telling any creditor that if they
6 can come up with a reasonable basis for
7 collecting, they should absolutely go forward
8 and collect. They -- you either will have the
9 debtor acquiescing, they'll throw up their
10 hands because they don't have the funds to
11 resist, or the debtor will end up resisting,
12 and the creditor knows it's a no-cost
13 proposition if they lose.

14 In terms of balancing debtor and
15 creditor rights, Congress did balance debtor
16 and creditor rights. They did it in the code
17 by creating 19 specific exceptions to the
18 discharge, but when they did impose the
19 discharge for everything else, they meant
20 courts to take it seriously, which is why they
21 created an injunction to protect the discharge.

22 In terms of chilling, the effect on
23 the creditors, I think we've already explained
24 why this won't chill any creditor who's
25 legitimately trying to collect a claim. The

1 Rule 4007 proceeding is far more efficient both
2 for debtor and for the creditor, and there's no
3 reason they can't access that safe harbor, if
4 they really do have any doubts about their
5 rights.

6 A final point is that not all contempt
7 orders are created equal. First, this isn't
8 really even contempt. This is a statutory
9 remedial order under Section 105. Everyone can
10 distinguish pretty readily as a matter of
11 common sense between a contempt order entered
12 for bad faith conduct and one saying that you
13 violated the code, you might have done it
14 innocently, you might have done it in good
15 faith, but we know from McComb, courts have the
16 authority to enforce that. We know from 105,
17 courts have the power to enter any order
18 necessary or appropriate to carry out the
19 provisions of the code.

20 One way to carry out the discharge is
21 to make sure that when a creditor's conduct
22 violates the discharge, imposes the exact costs
23 that Congress said debtors were entitled to
24 avoid, the only way to carry out the discharge
25 is, in fact, to enforce the code by reimbursing

1 the debtor.

2 It certainly doesn't make any sense to
3 tag the innocent victim, who also had a
4 reasonable good faith belief that the discharge
5 did apply and was correct with the costs of the
6 creditor's mistake.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 11:59 a.m., the case
11 was submitted.)

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| <p>arguments [3] 10:9 23:4 53:3 arise [1] 57:25 arose [1] 49:13 around [1] 7:5 articulation [1] 38:10 artificial [5] 23:24 38:14 42:10 43:21 48:19 as [44] 3:25 6:20 8:5,6 10:20,21 11:7 12:1,1 14:1 19:10 20:18,19 22:7,7 23:6 26:22 28:5,17 29:4 32:8 33:13,17 37:6,15,15 38:14 43:2 45:11,16,23 46:22 47:2 49:11,11 50:17 55:20,20 56:25 62:24 64:23,24 65:10 67:10 aside [1] 53:3 ask [1] 61:5 asked [1] 58:14 asking [6] 46:19 51:8 52:21 55:11 58:21,23 assuming [4] 7:25 8:4 19:16 42:22 at [25] 6:18 12:10 13:22 14:22 17:24 18:15 19:1 21:19 22:2 23:4 24:14 25:24 27:13 36:17 38:5 41:21 42:2 52:2,7 54:1 57:15 63:14 64:25 65:23 68:10 atextual [1] 3:23 attempt [1] 16:6 attempts [1] 16:5 attorney [6] 21:25 22:2 32:14 44:19 51:24 64:4 attorneys' [20] 6:24 22:15 32:9 33:16 40:14 46:21,23 47:3,17,22 49:15 51:19,22 52:5,6 53:25 57:5 58:11,13 65:1 attorney's [1] 49:20 authority [8] 4:6,10,16 16:1 23:9 32:24 56:24 67:16 automatic [6] 6:19 55:22 56:1,12 57:14,15 automatically [1] 6:22 available [1] 25:19 avoid [1] 67:24</p> | <p>award [4] 22:11,14 49:15 65:1 aware [1] 15:18 away [2] 10:2 64:6</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back [11] 7:17 13:24 16:14,19 21:13,24 23:13 53:7,17 55:8 65:24 bad [7] 35:25 36:1 41:13 42:7 43:6,9 67:12 baker [1] 47:5 balance [4] 28:11 30:24 51:13 66:15 balancing [1] 66:14 banc [1] 17:23 bankruptcies [1] 20:16 bankruptcy [35] 5:2,11 7:18 10:16 11:15 15:14 18:17 21:22 26:20 27:1 28:2 29:14 30:1,22 31:18,25 32:17,23 33:18 36:19 37:25 38:4,5 45:1,3 49:2,25 51:12 58:10 61:22 62:19 63:16,22,22 65:7 bankruptcy-specific [2] 29:16,21 bars [1] 4:12 based [3] 33:23 49:16 59:8 bases [2] 56:19,23 basically [2] 9:20 60:2 basis [10] 4:22 7:8 9:6 26:4 28:7,8 33:15 35:16 48:1 66:6 be [79] 5:25 6:2 8:22 9:23 12:2,2,4,5,6,18,21 17:2 18:23 19:3,17 21:5,7,16 22:2,8,9 23:17 24:1,11,24 25:2,20 27:5 29:21 30:15 31:1 32:15 33:10,15 34:1,3,14 35:24 36:1,22 37:4,22 38:8 39:6 40:23 42:18 43:1,10,14 44:1,17 45:9 47:7,10,21,22 48:2 50:19 51:3 54:12,21 55:6 56:4,13 57:10,19,20,20 58:8,19,25 60:11,12,21 62:6,7,8 63:12,23 bear [3] 45:20 54:23 55:4 bearing [1] 55:1</p> | <p>bears [3] 31:11 32:4 33:22 because [37] 6:16 7:12,14 8:16,23 15:3 18:8,15 22:20 23:6 27:7 36:25 37:23,24 39:18 42:8 43:2,4,25 44:16 45:1 47:1,20 49:6 51:7,11 52:5 53:6,25 57:8 62:13,21,21 63:9 65:2 66:2,10 been [14] 5:6 17:16 20:9 21:12 31:6 43:21 45:14,22 46:25 48:20 58:9 59:3 63:25 64:4 before [7] 17:1 19:11 24:16 30:12,17 65:7,9 beginning [1] 57:15 begs [1] 31:4 behalf [3] 3:8 40:9 64:19 behavior [4] 33:24 35:25 36:2 47:20 behind [2] 35:13 51:9 being [2] 23:15 45:2 belief [26] 3:12 8:9 14:3 17:4 29:17 35:20 36:16 37:8,10,22 38:9,11,12,21 39:1 41:1,11 44:12,17 45:9 58:2,3 60:5,6,22 68:4 beliefs [2] 39:3 56:7 believe [2] 33:18 39:23 below [2] 3:11 29:15 beneath [1] 28:22 benefits [6] 8:25 16:11,12 27:10 52:21 57:16 best [1] 23:8 better [5] 32:6 36:25 51:21 52:4 53:24 between [8] 35:4 42:2 45:23 46:7 48:4 55:2 57:14 67:11 beyond [1] 51:7 big [1] 62:14 bill [1] 30:7 birds [1] 36:12 bit [4] 21:24 32:21 36:25 37:2 blank [1] 42:22 books [1] 22:17 borrow [1] 29:5 borrowing [1] 7:6</p> | <p>both [10] 5:9 10:9 12:2 17:24 25:18,24 44:15,22 65:21 67:1 botts [1] 47:5 bound [1] 25:10 brand [1] 13:1 breach [1] 19:12 breyer [8] 23:19 24:14,16,20 25:1 26:13 27:16 36:11 brief [12] 15:17 19:20 28:23 32:20 35:8 37:1,7,8 44:23 51:2 54:4 65:20 briefs [3] 44:14 47:4 49:12 bright-line [1] 6:21 bring [1] 49:20 brings [1] 29:7 brink [1] 26:22 broad [6] 4:6,10,15 16:2 27:25 28:1 bulk [3] 22:11 23:1 32:15 burden [3] 14:16 33:23 45:20 burdened [1] 54:12 business [1] 49:12 but [81] 3:19 4:25 5:9,17 6:2 7:7,8,15,25 9:3,8,18 10:10,16 11:8 12:12 13:8,22 15:13 16:21 17:16,19,19 19:13,19 21:5,24 22:6 23:9 24:8 25:1,4,20 26:19 27:21 29:7,20 30:4,16,22 31:9 32:3,3,5,10,14 33:19 34:18 35:12 37:3 39:21,22 41:11,13,19 42:4,10,15,21 43:13 44:5 45:19 46:19 50:10,21 51:7 52:23 53:23 54:19 55:11,21 57:23 59:7 60:21 61:8,15,23 62:12 64:11 66:18 67:15 buy [2] 23:20 27:9 by [14] 4:23 5:11 10:2 11:20 17:17 25:10 34:21 43:1 44:4,5 51:24 54:12 66:17 67:25</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c [1] 3:1 california [7] 23:24 38:13 42:9,14 43:21 48:19 63:18</p> |
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