

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
Place: Washington, D.C.
Date: April 24, 2019

HERITAGE REPORTING CORPORATION

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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 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 by 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 particular act was permitted doesn't make
13 it so. And if Congress wanted to create that
14 sort of good faith or reasonableness defense,
15 it presumably would have done so. And we know
16 that because they did something similar in
17 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, borrow --
7 borrowing a pun. But it might have a good
8 ground of doubt or a reasonable basis, but it
9 really wasn't their motivation. And the
10 district court held 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's something wrong
22 with 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. I
15 -- 523, I know, carves out a couple where you
16 got to go to the bankruptcy court. But
17 Congress expressly gave concurrent jurisdiction
18 to the 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 -- the -- so if I understand your
14 point, the error isn't that they failed to go
15 to the bankruptcy court. The error is that
16 they failed to seek a declaratory judgment,
17 rather 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 an entirely different brand of costs
2 on 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 --

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 --

9 MR. GEYSER: Well --

10 JUSTICE KAVANAUGH: -- position of
11 strict liability or something close to it
12 doesn't work?

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

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

22 And if they violate it, then they --
23 it's -- that's -- that falls on their
24 shoulders. They act at their own risk. And if
25 they're confused about any uncertainty, then

1 they can go and seek clarification from the
2 Court. That's the way it normally works.

3 There is --

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

9 And I think I'll add on to this. I
10 mean, I guess I was totally stunned that this
11 wasn't clear what standard does apply for civil
12 contempts and that people are citing these
13 100-year-old cases that are opaque.

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

20 It's that if you're aware of the
21 discharge and you violate it, then you're --
22 you're subject to remedial order under Section
23 105.

24 And if you're concerned about creating
25 a new rule and wading into this morass, the

1 easiest way to resolve it is to look to Section
2 105, which provides independent statutory
3 authority to create any order -- and that's --
4 that's broad language -- that's necessary or
5 appropriate for carrying out the code.

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

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

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

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

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

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

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

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

24 Take the TiVo decision from the
25 Federal Circuit, the en banc Federal Circuit

1 looked at the principles both in McComb and in
2 Molitor and they said that they specifically
3 rejected the proposition that there is a good
4 faith objectively reasonable defense to the
5 actual violation of the injunction.

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

13 So that the --

14 JUSTICE KAVANAUGH: Are those really
15 two different things?

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

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

1 true exceptions.

2 So any creditor who looks and sees
3 that a debt is sort of marginal, then at that
4 point they're -- they're well on notice that
5 their conduct could be subject to remedial
6 order if they go ahead anyway.

7 And the way that Congress accommodated
8 those concerns is it created their Rule 4007.

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

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

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

25 How do you respond to that?

1 MR. GEYSER: Well --

2 JUSTICE KAVANAUGH: Are they just
3 wrong about that?

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

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

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

24 So Congress thought this was
25 sufficiently precise. And it does, in fact,

1 provide clear guidance for the vast majority of
2 debts. We're talking about the very small
3 subset where there's a genuine dispute.

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

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

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

21 And so I -- I think if you look at the
22 -- the -- the concerns that Congress had with
23 the discharge, they understood that debtors
24 exit bankruptcy often still in a fragile
25 economic state. They have their finances a

1 little bit back in order but it's the rare
2 debtor that can go and hire an attorney to
3 resist the discharge, unless they know that the
4 attorney can be compensated at the end of the
5 day if they prove right.

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

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

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

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

1 discharge.

2 So, again, that's -- that's -- it's a
3 very minor issue. It's not the bulk of -- of
4 what this dispute is really about.

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

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

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

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

24 What -- what I want to know is the
25 Court wrote, I guess in a case called

1 California Artificial Stone, this is contempt.
2 And it says contempt is a severe remedy and it
3 should not be resorted to where there is a fair
4 ground of doubt.

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

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

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

19 JUSTICE BREYER: That was before,
20 wasn't it?

21 MR. GEYSER: No, it's -- it's the same
22 case.

23 JUSTICE BREYER: Oh.

24 MR. GEYSER: And if -- the -- the
25 government teases two propositions out of that

1 case. First, they say if judges disagree, then
2 there can't be a finding of contempt. Now,
3 they're wrong on that.

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

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

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

1 That is not a categorical threshold
2 per se rule at all. It actually kept both
3 options open to the patentee. And, again, that
4 involves something that's very different than
5 what we have here. That involves a judge-made
6 injunction. When a judge crafts the
7 substantive rules on an ad hoc basis to govern
8 specific disputes, it takes it, that process,
9 out of the democratic process. There's greater
10 concern for confusion and arbitrariness.

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

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

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

1 compensatory damages, and some other case say
2 half that. In other words, up to the
3 bankruptcy judge.

4 What do you think of that?

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

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

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

24 MR. GEYSER: Well, the -- their
25 contention, though, is that the court would not

1 have discretion. Section 105 is a broad
2 equitable remedy, and it -- it confers broad
3 discretion on the bankruptcy court to carry out
4 the code.

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

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Joshi.

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

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

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

1 contempt, even though that is the question
2 presented on which this Court granted cert.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, it takes

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

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

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

1 rights. And Congress made a judgment certain
2 debts would the not be discharged and that the
3 creditors retain rights to it.

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

9 And so really what you --

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

15 MR. JOSHI: Right.

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

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

1 -- under -- under the bankruptcy rules of
2 witnesses, evidence, et cetera.

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

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

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

1 short of civil contempt.

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

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

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

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

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

1 MR. JOSHI: That is certainly true.
2 It wouldn't be civil contempt, though, for
3 violating the discharge injunction. It might
4 be contempt or other --

5 JUSTICE GORSUCH: Prior.

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

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

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

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

1 and that is essentially the rule that the
2 government sets forth today.

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

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

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

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

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

1 objective, good behavior and can subjective bad
2 faith be some evidence of objective bad
3 behavior?

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

6 JUSTICE GORSUCH: Okay. All right.

7 MR. JOSHI: -- to the exception.

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

10 MR. JOSHI: Thank you for raising it.

11 JUSTICE GORSUCH: -- then Justice
12 Breyer.

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

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

25 JUSTICE KAGAN: So could I understand

1 that a little bit better? Because the -- your
2 statement in your brief confused me a little
3 bit.

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

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

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

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

18 (Laughter.)

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

24 And that's because that is the test in
25 the ordinary civil context. And because under

1 the Bankruptcy Code, Congress gave no
2 indication that it wanted to deviate from the
3 traditional rules governing injunctions,
4 injunctive relief and civil contempt to enforce
5 its injunctive orders in the bankruptcy context
6 or at least this bankruptcy context from the
7 ordinary civil context, we think the same rules
8 should apply.

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

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

21 Otherwise --

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

1 MR. JOSHI: They may well land in the
2 same place. I think our objection, if you
3 will, is to the word "belief."

4 We just think the subjective
5 beliefs --

6 JUSTICE KAVANAUGH: Okay.

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

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

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

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

16 JUSTICE KAVANAUGH: And why not affirm
17 under your position, rather than vacate?

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

23 But there remains some -- you, of
24 course, have jurisdiction to reach it, but we
25 believe there remains some legal and factual

1 issues to decide. So if you decide that --
2 first of all, no court -- the Ninth Circuit
3 didn't rule on whether they had actually
4 violated the discharge injunction. And you
5 would need to decide that in the first
6 instance.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Ms. Saharsky.

10 ORAL ARGUMENT OF NICOLA A. SAHARSKY

11 ON BEHALF OF THE RESPONDENT

12 MS. SAHARSKY: Mr. Chief Justice and
13 may it please the Court:

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

21 And I think --

22 JUSTICE GINSBURG: Do -- do you --

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

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

1 MS. SAHARSKY: I think the Court
2 should say unreasonable good faith -- or, I'm
3 sorry, reasonable good faith belief, and that's
4 not exactly what the Ninth Circuit said, so we
5 think the Court should go ahead and clarify
6 that, yes.

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

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

20 (Laughter.)

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

1 And that surprised me, coming from creditor's
2 counsel.

3 So help me out with that.

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

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

17 And in California Paving the Court
18 talked about fair ground of doubt, but an
19 additional case --

20 JUSTICE GORSUCH: All right. I will
21 -- I will spot you that our cases may not be
22 entirely clear on this point.

23 (Laughter.)

24 JUSTICE GORSUCH: But I guess I'm
25 wondering, assuming we were writing on a blank

1 slate, would you disagree with the government's
2 test, and, if so, why?

3 MS. SAHARSKY: An objective standard
4 would be fine by us. We just read the
5 government's case as especially because
6 contempt is -- or, I'm sorry, the Court's cases
7 especially because contempt is an equitable
8 remedy to allow for consideration of good faith
9 and bad faith.

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

14 JUSTICE KAVANAUGH: Could you --

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

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

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

1 The second is the International
2 Longshoremen's case that we talked about, which
3 we think is very important because it talks
4 about what it means to be held in contempt and
5 the prerequisites for contempt.

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

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

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

22 The Maness case was about an attorney
23 who counseled his client to invoke the Fifth
24 Amendment with respect to a subpoena. And the
25 Court talked about both good faith, we quote

1 the language in our brief, and it talked about
2 reasonableness.

3 The Watts case, I think, is even more
4 interesting because it was a bankruptcy case.
5 And it had to do with there being a state
6 bankruptcy or -- or a state order about the
7 possession of property. And the lawyer in that
8 case relied on the state court order, and then
9 the federal court held him in contempt.

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

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

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

24 And from the debtor's perspective,
25 it's like this injunction has been violated. I

1 didn't do anything wrong. As between the
2 victim of the violation and the person who,
3 with all the good faith in the world,
4 perpetrated the violation, why shouldn't we
5 look to the person who perpetrated the
6 violation?

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

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

19 It's the -- it's just the regular kind
20 of make whole relief that applies in these
21 circumstances.

22 But what Petitioner is asking for here
23 is to hold us in contempt, which is a serious
24 sanction, and to get attorneys' fees. And I
25 think as the representative from the government

1 made clear, attorneys' fees are not normally
2 considered compensation.

3 In fact, this Court has been crystal
4 clear, because it's gotten opportunities, where
5 people have come to it and said: Look, as an
6 equitable matter, just give us some attorneys'
7 fees. That was the Alyeska case cited in the
8 briefs, also the Baker Botts case.

9 CHIEF JUSTICE ROBERTS: Well, you
10 could be --

11 MS. SAHARSKY: And the Court said --

12 CHIEF JUSTICE ROBERTS: -- you could
13 be sanctioned under contempt through monetary
14 sanction, right?

15 MS. SAHARSKY: If a person meets the
16 standard from -- for contempt, they could face
17 monetary sanctions, including --

18 CHIEF JUSTICE ROBERTS: So it seems to
19 me --

20 MS. SAHARSKY: -- attorneys' fees.

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

1 number.

2 It doesn't mean that he's violating
3 the American rule. It means that he's looking
4 for some basis to judge how much the fine
5 should be.

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

10 And holding us in contempt requires a
11 particular finding that we knew what we were
12 supposed to do and we didn't do it.

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

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

24 CHIEF JUSTICE ROBERTS: Well, one
25 thing --

1 MS. SAHARSKY: And so --

2 CHIEF JUSTICE ROBERTS: -- you didn't
3 do, which you could easily have done, is -- is
4 get -- get a -- a ruling in the -- from the
5 bankruptcy court whether the debt was
6 discharged or not. Why -- I mean, why didn't
7 you do that?

8 MS. SAHARSKY: Well, state --

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

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

20 We're already in state court.
21 Everyone agrees that the state court has
22 concurrent jurisdiction to decide that issue.
23 We had a limited time to bring the attorneys'
24 fees issue --

25 CHIEF JUSTICE ROBERTS: To decide

1 which issue?

2 MS. SAHARSKY: To decide whether that
3 is a discharged debt under the bankruptcy. So
4 I don't know why it would make any sense to
5 have to go to the federal court when we're
6 already in state court, and when it has
7 concurrent jurisdiction to decide the issue,
8 and it decided it in our favor.

9 And I just -- I just want to make sure
10 that the Court understands --

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

13 MS. SAHARSKY: Well, but the -- a -- a
14 couple of -- I think there are a couple of
15 answers to that:

16 First of all, I think there is the
17 answer in terms of what Congress intended and
18 then I think there's a policy answer.

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

24 But then, second, Congress provided
25 for concurrent jurisdiction and it specifically

1 recognized that sometimes there are questions
2 about dischargeability of debts that depend on
3 state law.

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

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

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

23 Petitioner has not disputed that. So
24 the debtor is not any better off. In fact,
25 debtors have to pay their own attorneys' fees

1 in all of Chapter 7 proceedings, unless the
2 attorney was appointed by the trustee. That's
3 the Court's decision from about 15 years ago in
4 Lamie versus U.S. Trustee.

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

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

18 CHIEF JUSTICE ROBERTS: Well, it's not
19 so much --

20 MS. SAHARSKY: -- can collect.

21 CHIEF JUSTICE ROBERTS: -- it's not so
22 much the procedure. It's -- it's the standard.
23 The -- the standard that the Petitioners are
24 asking for certainly benefits debtors, whether
25 it's consistent with the general policy of the

1 fresh start or not is another story, but it's
2 -- and the existence of the safe harbor, I
3 would say, would -- makes the rigorous standard
4 more acceptable.

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

11 CHIEF JUSTICE ROBERTS: Well, I think
12 --

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

14 CHIEF JUSTICE ROBERTS: -- we should
15 do what Congress wants.

16 MS. SAHARSKY: We're --

17 CHIEF JUSTICE ROBERTS: It's just a
18 question of what they want.

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

23 I just want the Court to really think
24 about how is this helping debtors to have this
25 4007 proceeding? It would provide an answer

1 about the dischargeability of the debt but it
2 would not make the debtor any better off
3 because he's paying his own attorneys' fees.

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

10 And then I think you should also
11 consider --

12 CHIEF JUSTICE ROBERTS: Well, yes, it
13 does --

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

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

22 But that chilling effect makes them --
23 since allowing the creditors to proceed on
24 debts that may or may not be dischargeable, it
25 seems to me perfectly reasonable to have them

1 bear the risk, make -- have them make a careful
2 choice.

3 MS. SAHARSKY: I understand that. And
4 I think that the difference in terms of bearing
5 the risk is the difference between compensation
6 and the additional sanction of -- of contempt.

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

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

21 JUSTICE KAGAN: If --

22 MS. SAHARSKY: It's many cases.

23 JUSTICE KAGAN: As -- as I understand
24 it, and tell me if I'm wrong, but in the
25 automatic stay context, under, what is it,

1 362(k) or something?

2 MS. SAHARSKY: Correct.

3 JUSTICE KAGAN: There when -- if -- if
4 there is a violation of the automatic stay, and
5 there was, you know, an -- sort of an
6 intentional act that resulted in that
7 violation, the violator would be on the hook
8 for any damages that resulted, irrespective of
9 the reasonableness of his -- of -- of his
10 beliefs.

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

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

20 MS. SAHARSKY: Right. I think there
21 are really two reasons: There is different --
22 different textual bases in terms of how
23 Congress addressed this and then there are
24 different policies underlying it.

25 So in terms of the different textual

1 bases, in our situation we're talking about the
2 Court's necessary and appropriate authority to
3 enforce something that operates as an
4 injunction, and that pulls in the contempt
5 principles that we've talked about.

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

12 It wanted to make sure that there
13 would be payment of these fees so it put that
14 language in there.

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

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

1 But I think this case really
2 illustrates why in the context of a discharge
3 order questions will arise and that contempt is
4 just not appropriate if someone has a
5 reasonable belief or good faith reasonable
6 belief that the discharge order doesn't apply
7 to them.

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

17 And we asked the court to decide that
18 issue. And Petitioner agreed that the court
19 had jurisdiction under concurrent jurisdiction
20 to decide that issue.

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

1 for violating the discharge order just for
2 asking the court to resolve that open legal
3 question.

4 That just can't be contempt and we
5 think that that really shows the need for the
6 kind of rule that we in the government have
7 been discussing.

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

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

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

24 And the order to show cause says come
25 to the court and give me your reasons. Explain

1 to me what you did.

2 And then the party comes in and says,
3 well, we can't -- we can't actually follow the
4 order, or we didn't think the order applied to
5 us. And the court listens to the reasons from
6 the person and basically decides whether they
7 are good reasons or not.

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

14 JUSTICE SOTOMAYOR: When do you think
15 that a reason could not be objectively -- an
16 objective ground that could be still
17 reasonable?

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

23 You're suggesting that your
24 formulation might not get that person off.

25 So -- but the reverse, what could be a

1 reasonable good faith belief if objectively a
2 ground is not -- if objectively there's no fair
3 ground of doubt?

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

12 But imagine also that there's circuit
13 precedent that applies --

14 JUSTICE SOTOMAYOR: Well, that -- that
15 might --

16 MS. SAHARSKY: -- to your case, do you
17 also --

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

23 MS. SAHARSKY: Well, in this case, you
24 know, we're -- we're consistent -- our position
25 is consistent with what the state court and the

1 bankruptcy court did. So it's supportive of us
2 and not a -- a fighting situation, but, you
3 know, to answer your question more generally,
4 contempt is an equitable remedy and it's one
5 where the courts did, you know, what I was
6 suggesting to Justice -- do, what I was
7 suggesting to Justice Kavanaugh, which is
8 really just consider like is your reason a good
9 one or not? You know, tell me your reasons.

10 And those could be a variety of
11 reasons. It could be reliance on precedent.
12 It could be reliance on something a state or
13 federal administrative agency told you. You
14 know, there -- there are a variety of potential
15 reasons.

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

24 JUSTICE KAVANAUGH: Because --

25 MS. SAHARSKY: -- deciding.

1 JUSTICE KAVANAUGH: Because your
2 standard is slightly different or more than
3 slightly than the Ninth Circuit's, why
4 shouldn't we vacate rather than affirm as the
5 Solicitor General suggests?

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

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

20 And that's what the Ninth Circuit said
21 that we did, and the bankruptcy panel --
22 appellate panel. They said that we relied on
23 the state court order. Under California
24 Paving, that's like pretty much per se good
25 faith.

1 And just the third thing, you know
2 bankruptcy -- bankruptcy proceedings are
3 supposed to be quick and efficient and let
4 people move on with their lives. And this
5 contempt proceeding has been going on since
6 2011. I think it's fair to say everyone wants
7 to move on with their lives, you know,
8 particularly the spouse of the deceased
9 attorney in this case, who hasn't been able to
10 close her husband's estate even though he
11 passed away in 2013.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Geysler, three minutes remaining.

23 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

24 ON BEHALF OF THE PETITIONER

25 MR. GEYSER: Thank you, Mr. Chief

1 Justice.

2 First, for the American rule, Congress
3 did not think that these fees were fees as
4 fees; they were fees as damages. If you looked
5 at 362(k), it specifically says that courts can
6 award actual damages, including attorneys'
7 fees, because they understood that this
8 context, the fees constitute the actual harm.

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

16 My friend suggested that the
17 Respondents in this case relied on a state
18 court order saying they could collect fees.
19 That's not true.

20 They filed an affirmative fee petition
21 seeking the fees. It was the culmination of
22 the entire litigation in this -- in the trial
23 court where the state court finally made a
24 determination, which was clearly incorrect.

25 We've outlined in our reply brief why

1 they're clearly incorrect, both legally and
2 factually, in this case. So we'd encourage the
3 court to look at that, although I do think it
4 makes more sense to send it back down to the
5 Ninth Circuit if you adopt an objectively
6 reasonable standard, which I hope you won't
7 because it would obliterate the -- the fresh
8 start.

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

19 In terms of balancing debtor and
20 creditor rights, Congress did balance debtor
21 and creditor rights. They did it in the code
22 by creating 19 specific exceptions to the
23 discharge, but when they did impose the
24 discharge for everything else, they meant
25 courts to take it seriously, which is why they

1 created an injunction to protect the discharge.

2 In terms of chilling, the effect on
3 the creditors, I think we've already explained
4 why this won't chill any creditor who's
5 legitimately trying to collect a claim. The
6 Rule 4007 proceeding is far more efficient both
7 for the debtor and for the creditor, and
8 there's no reason they can't access that safe
9 harbor, if they really do have any doubts about
10 their rights.

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

25 One way to carry out the discharge is

1 to make sure that when a creditor's conduct
2 violates the discharge, imposes the exact costs
3 that Congress said debtors were entitled to
4 avoid, the only way to carry out the discharge
5 is, in fact, to enforce the code by reimbursing
6 the debtor.

7 It certainly doesn't make any sense to
8 tag the innocent victim, who also had a
9 reasonable good faith belief that the discharge
10 did apply and was correct with the costs of the
11 creditor's mistake.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

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

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