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Abstract

Qualified immunity and the bankruptcy discharge serve distinct yet analogous functions: balancing individual protections against broader societal interests. This Article explores how the Supreme Court's decision in Taggart v. Lorenzen established a creditor's equivalent to qualified immunity in bankruptcy by analyzing whether the actions were "objectively reasonable" before imposing sanctions. By comparing these legal principles, this Article identifies critical gaps in actions to enforce the discharge and introduces a parallelism for assessing creditor conduct. This intersection between two traditionally unrelated legal principles also provides a unique perspective for assessing and refining the bankruptcy discharge.

Introduction

Few concepts seem as unrelated as qualified immunity and the discharge injunction in bankruptcy. Yet, the Supreme Court's decision in *Taggart v. Lorenzen* draws a surprising parallel: Creditors, like government officials, may now invoke a defense based on the objective reasonableness of their actions to shield themselves from damages.[2] This Article argues that *Taggart* signals the emergence of a creditor's version of qualified immunity, a principle that balances the fresh start for debtors with fair notice for creditors.

On the one hand, qualified immunity is a judicially created doctrine that generally states government officials must have violated a federal right that was "clearly established" in order to face liability.[3] This doctrine ultimately shields "government officials 'from liability'" unless their actions "violate [a] . . . statutory or constitutional right[]."[4] Courts applying this doctrine must determine whether the government actor's conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[5] Government officials who must pay civil damages violated clearly established rights

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[2] *See* Taggart v. Lorenzen, 587 U.S. 554, 562 (2019) (holding a creditor may be sanctioned "when the creditor violates a discharge order based on an *objectively unreasonable* understanding of the discharge order or the statutes that govern its scope" (emphasis added)).

[3] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[4] *Id.* (quoting *Harlow*, 457 U.S. at 818).

[5] *Id.*

and did not act in an *objectively reasonable* manner.[6] Applying the objective standard of "clearly established" rights to a particular set of facts becomes a pivotal question for courts. Qualified immunity seeks to protect public servants from undue legal harassment in the performance of their duties and raises concerns about the extent of that impunity in the face of wrongdoing.[7] Thus, a general examination of its historical roots and the legal standards governing its application is essential to address the doctrine's use.

On the other hand, "bankruptcy relief ultimately provides hope for the debtor that a new financial life awaits"—a "fresh start."[8] The "fresh start is at the Bankruptcy Code's core and is typically achieved through a discharge order" that relieves a debtor from paying debts incurred before the bankruptcy case.[9] The Bankruptcy Code allows individual, and non-individual,[10] debtors to obtain a discharge.[11] This relief, particularly for individual debtors, represents a profound turning point in the lives of those debtors burdened with overwhelming debt by providing a fresh start to the "honest but unfortunate debtor."[12] A fresh start for the honest but unfortunate debtor is a commonly known and well-established principle in bankruptcy jurisprudence.[13] This fresh start is embodied by the discharge order's injunction that protects the debtor by enjoining

[6] *See Harlow*, 457 U.S. at 818–19 ("Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." (footnote omitted)).

[7] *See id.* at 806.

[8] Bruce v. Citigroup Inc., 75 F.4th 297, 298 (2d Cir. 2023).

[9] *Id.* at 298–99. Section 524 of the Bankruptcy Code provides the basic protections of the discharge. *See* 11 U.S.C. § 524. The provisions of Chapter 5, including Section 524, generally apply in cases under Chapter 7, 11, 12, or 13. *See* 11 U.S.C. § 103(a).

[10] The discharge for non-individual debtors is incredibly powerful and is a primary catalyst for striking and obtaining a deal embodied in a plan under Chapter 11. *See generally* 11 U.S.C. § 1141 (providing the effect of confirmation). Section 524, together with Section 1141, describes the protection the debtor receives from confirmation of a plan: it is often the focal point of any chapter 11 case. *See* Schreiber v. Parness Law Firm, PLLC (I*n re* Nelkin & Nelkin P.C.), 674 B.R. 545, 567 (Bankr. S.D. Tex. 2025) (noting the distinction between the confirmation of a reorganization plan and the effect of a discharge). It should also be noted that in a Chapter 7 proceeding, a corporate (or partnership) debtor does not receive a discharge. *See* 11 U.S.C. § 727(a)(1). Unless otherwise noted, this discussion is confined to the discharge for individual debtors.

[11] *See* 11 U.S.C. § 524. The United States Judicial Conference established Official Forms for bankruptcy cases, including an Official Form to issue a discharge for individuals. *See infra* notes 154–156 and accompanying text. Generally, for debtors under chapter 11, a discharge may be obtained through a confirmed plan. *See* 11 U.S.C. § 1141(d)(1)(A).

[12] Harris v. Viegelahn, 575 U.S. 510, 518 (2015) (quoting Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007)).

[13] *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 176–77 (1819) (Marshall, C.J.) ("Discharge . . . is one of the principal objects in all bankrupt laws . . . and for the benefit of the unfortunate debtor and his family, leaves him to the full enjoyment of whatever his talents and industry may enable him to earn for the future advancement of himself and family."); *see also* Wilson v. Rigby, 909 F.3d 306, 327 (9th Cir. 2018) (Huck, J., dissenting) (noting that a fresh start for the honest but unfortunate debtor is a fundamental bankruptcy principle).

creditors' actions to collect payment of discharged debts.[14] A party that violates the injunction may be held in contempt and sanctioned for their actions if there was "no *objectively reasonable* basis for concluding that the creditor's conduct might be lawful."[15] The discharge in bankruptcy, however, is not merely a financial reset button; it is a meticulously crafted legal mechanism that reflects societal interests and economic imperatives.[16] As such, it warrants a comprehensive exploration of its historical evolution, its legal foundations, the processes involved, and the implications for all stakeholders.

This Article emphasizes that sanctioning violations of the discharge injunction only when there was no "objectively reasonable" basis for the creditor's conduct parallels the doctrine of qualified immunity. Therefore, analyzing violations of the discharge injunction may represent a framework akin to qualified immunity for creditors. This Article analyzes the similarities between qualified immunity and violations of the discharge injunction while recognizing where they diverge; it does so by dividing the discussion into three parts.

Part I provides an overview of the history of qualified immunity, its development, and how the doctrine is currently assessed and applied. Part II delves into the history of the discharge in bankruptcy, tracking its evolution and changes over time, the emergence of the discharge order's injunction, and the injunction's enforcement mechanism. By tracing the historical and doctrinal evolution of these concepts, Part III offers a comparative analysis while drawing attention to the recent Supreme Court decision, *Taggart v. Lorenzen*,[17] which reveals a bankruptcy equivalent of "qualified immunity for creditors" by requiring a bankruptcy court to find a creditor in contempt only if the creditor did not act in an *objectively reasonable* manner, a standard akin to that applied for qualified immunity.[18] This analysis also reveals a framework to assess violations of the discharge injunction under this new paradigm—that is, to show that

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[14] Best v. Nationstar Mortg., LLC (*In re* Best), 540 B.R. 1, 8 (B.A.P. 1st Cir. 2015) ("The discharge injunction 'embodies the fresh start policy of the Bankruptcy Code, by which honest but unfortunate debtors are relieved of personal liability for their discharged debts.'" (quoting Lemieux v. America's Servicing Co. (*In re* Lemieux), 520 B.R. 361, 364 (Bankr. D. Mass. 2014))). In *Taggart*, the Supreme Court noted that the Bankruptcy Code specifies "that a discharge order 'operates as an injunction.'" Taggart v. Lorenzen, 587 U.S. 554, 560 (2019) (quoting 11 U.S.C. § 524(a)(2)). For purposes of this discussion, the discharge order's operation as an injunction will be colloquially referred to at times as either the "discharge order's injunction" or the "discharge injunction."

[15] *Taggart*, 587 U.S. at 560 (emphasis added); *see also* Linda E. Coco, *Civil Contempt Order for Violations of the Bankruptcy Discharge Injunction*, 29 NORTON J. BANKR. L. & PRAC., no. 1, Feb. 2020, at 2 ("The Court, by adopting the 'no fair ground of doubt' standard selected a middle of the road approach that balances the interests of creditors and debtors.").

[16] *See, e.g.*, Guthrie v. PHH Mortg. Corp., 79 F.4th 328, 349 (4th Cir. 2023) (Wynn, J., concurring in part and dissenting in part) ("Congress has attempted to balance the competing aims of giving the debtor a 'fresh start' while protecting creditors' rights to repayment." (quoting Moses v. CashCall, Inc., 781 F.3d 63, 72 (4th Cir. 2015))).

[17] 587 U.S. 554, 560 (2019).

[18] *In re* Ostrander, No. 11-33801, 2022 WL 999680, at *30 (Bankr. N.D. Ohio Apr. 1, 2022).

qualified immunity and violations of the discharge exist in the same form and may be analyzed in a similar fashion.[19]

I. Qualified Immunity

A. History

Following the Civil War, the passage of the Thirteenth,[20] Fourteenth,[21] and Fifteenth[22] Amendments accorded a fundamental right to equality and gave Congress the power to enforce this right by appropriate legislation.[23] At the same time, there was a backlash against any emancipation efforts.[24] What has been described as a "reign of terror" was aided by members of law enforcement who participated in the efforts to prevent the enforcement of any newly enacted legislation.[25] In 1871, Congress passed legislation, which is now codified as 42 U.S.C. § 1983, to address and protect the freedoms granted to those formerly enslaved following the Civil War.[26] Through Section 1983, Congress rejected the proposition that the federal government had no power to intercede when state officials violated the federal constitution and provided a federal remedy for constitutional violations committed by state actors.[27]

Section 1983 remained "virtually untouched since its enactment in 1871" until it resurfaced in *Monroe v. Pape* in 1961.[28] In *Monroe*, the Supreme Court addressed the scope of Section 1983, and held that the actions of police officers who violated constitutional rights were deemed to be acting "'under color of' state law," and noted that the statute was intended to allow civil rights suits in cases where officials acted in a manner unauthorized by state law.[29] Before

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[19] The discussion strives to illuminate the similarities between qualified immunity and violations of the discharge injunction. *Cf. infra* note 265 (recognizing the caselaw addressing a "sequencing issue" under the Fair Credit Reporting Act and an "objectively reasonable" inquiry under the Federal Tort Claims Act). However, *why* the similarities exist is beyond the scope of this discussion because it implicates a broader context of issues and, ultimately, is a question best left for another day. *Cf.* PLATO, THE REPUBLIC 233–39 (Henry Davis, trans., M. Walter Dunne 1901) (describing Plato's Theory of Forms: nonmaterial ideal forms that represent the highest form of reality, to be contrasted with the particulars of the sensible world).

[20] U.S. CONST. amend. XIII, § 1.

[21] U.S. CONST. amend. XIV, § 1.

[22] U.S. CONST. amend. XV, § 1.

[23] *See* U.S. CONST. amend. XIII, §§ 1–2; U.S. CONST. amend. XIV, §§ 1, 5; U.S. CONST. amend. XV, §§ 1–2.

[24] *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 397–99 (S.D. Miss. 2020) (setting forth the history following the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments).

[25] *See id.* at 399 (quoting Baxter v. Bracey 590 U.S. 1011, 1012 (2020)).

[26] *See* 42 U.S.C. § 1983.

[27] *See* Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 711 (2022).

[28] *See id.* at 713; Monroe v. Pape, 365 U.S. 167 (1961).

[29] *See Monroe*, 365 U.S. at 184, 187 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

Monroe, "there [were] very few cases filed under . . . the precursor to Section 1983."[30] Suits in cases where officials acted in a manner unauthorized by state law began to increase following *Monroe*.[31] "With that growth in claims filed came, of course, defenses to those claims."[32] Six years later, "one of the first defenses to arise was that of qualified immunity."[33]

In 1967, the doctrine of qualified immunity made its debut in *Pierson v. Ray*, when the Supreme Court found that officers who acted in good faith were immune from liability.[34] Thus began this judicially created doctrine which balanced "the importance of a damages remedy to protect the rights of citizens" against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[35] The analysis under qualified immunity has undergone several permutations;[36] its current stance is that an officer or other government actor is entitled to qualified immunity when the law was not clearly established at the time of the alleged conduct.[37]

B. Overall Perspective

There is no shortage of criticism as to qualified immunity.[38] This criticism exists in judicial and academic spheres. The judicial criticism includes qualified

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[30] Cathy Bissoon, Benita Y. Pearson & David A. Sanders, *From the KKK to George Floyd: Three Judges Explore Qualified Immunity*, 22 SEDONA CONF. J. 533, 539 (2021).

[31] *See id*.

[32] *Id*.

[33] *Id*.

[34] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

[35] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

[36] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91, 694 (1978) (noting local governments were not persons under the statute; government officials sued in their official capacities were "persons" under the statute; and the deprivation alleged arose from an official policy); Malley v. Briggs, 475 U.S. 335, 344–45 (1986) (adopting an objectively reasonable standard and holding qualified immunity does not apply when no reasonable police officer would believe there was probable cause for the arrest); Anderson v. Creighton, 483 U.S. 635, 641 (1987) (holding that the federal officer was entitled to qualified immunity if the search violates the Fourth Amendment when a reasonable officer could have believed the warrantless search to be lawful given the clearly established law and information possessed by the officer); Saucier v. Katz, 533 U.S. 194, 201 (2001) (directing courts to implement a two part test in assessing qualified immunity: (1) whether a constitutional right was violated; and (2) whether the right was clearly established at the time of the alleged conduct); Pearson v. Callahan, 555 U.S. 223, 236, 244 (2009) (holding *Saucier*'s test discretionary and that there was qualified immunity when there was no violation of clearly established law considering "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken" (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)).

[37] *Pearson*, 555 U.S. at 244.

[38] *See, e.g.*, Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913–14 (2015); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 77–79 (2018); Karen M. Blum, *Qualified Immunity: Time to Change the*

immunity causing "constitutional stagnation" and inherent "perplexity over 'clearly established law.'"[39] The scholarly criticism expresses identical concerns, but some advocate for abolishing qualified immunity in its entirety.[40] Professor Joanna C. Schwartz suggested the elimination of qualified immunity may clarify constitutional law and reduce the costs of litigation, which would ultimately lead to addressing the critical question in any qualified immunity case: "whether government officials exceeded their constitutional authority."[41] But there are also advocates of the doctrine.[42] The advocates defending qualified immunity do so because, among other reasons, it prevents unanticipated financial drains on the public fisc, reduces frivolous suits and sizeable judgments, and encourages government jobs.[43] Recent events heightened attention to this judicially created doctrine.[44] The origins of this doctrine, as mentioned below, explain its original intention.

C. The Modern Doctrine of Qualified Immunity

The origin of the current standard for qualified immunity can be traced back to the Supreme Court's 1982 decision in *Harlow v. Fitzgerald*.[45] In *Harlow*, the Court revised the doctrine of qualified immunity to allow the dismissal of meritless suits that primarily turn on objective factors.[46] "The doctrine of qualified

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Message, 93 NOTRE DAME L. REV. 1887, 1892 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6–8 (2017).

[39] *See, e.g.*, Zadeh v. Robinson, 928 F.3d 457, 479, (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

[40] *See e.g.*, Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316–17 (2020).

[41] *See, e.g.*, *id.*

[42] *See, e.g.*, Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 551 (2020); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1854 (2018).

[43] *See* Schwartz, *supra* note 40, at 315.

[44] *See generally* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1703–04 (2022) (analyzing the view that qualified immunity should be reconsidered in light of current events, such as the death of George Floyd); Katherine Macfarlane, *Section 1983 Dealmaking*, 97 TUL. L. REV. 1, 2–4 (2022) (discussing the "complexities of the settlements" from recent events, like the death of Breonna Taylor, and how these settlements tend to preclude meaningful changes in the law by preventing courts from clearly establishing the right at issue for qualified immunity defenses); Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 121–22 (2021) (noting the proposals for qualified immunity reform); Bissoon, Pearson & Sanders, *supra* note 30, at 581–82 (explaining the introduction of a bill to limit qualified immunity after growing police misconduct).

[45] 457 U.S. 800 (1982).

[46] *See* Wyatt v. Cole, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) (recognizing that reformulation of qualified immunity "was justified by the special policy concerns arising from public officials' exposure to repeated suits" (citing *Harlow*, 457 U.S. at 813–14)); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 584 (7th ed. 2016) ("The Court's concern is more with protecting officers from the additional costs of defending essentially meritless suits than with ensuring that injured

immunity [generally] protects government officials [performing discretionary functions] 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[47] *Harlow* prescribed a two-step analysis.[48] Generally, the government official must have violated the law, and the law must have been "clearly established" such that a reasonable official would have known that their conduct violated the law.[49] In other words, this doctrine shields state and local government employees who perform discretionary functions from suit unless (i) their actions "violated a . . . constitutional right, and [(ii)] that . . . right was 'clearly established' at the time of the challenged conduct."[50] The plaintiff generally holds the burden,[51] and the sequence of the analysis is not a rigid

individuals receive compensation for the wrongs they have suffered."). Qualified immunity originally shielded officials if they acted in "good faith," but the doctrine today has "nothing to do with officers' good faith." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 613 (2021) [hereinafter Schwartz, *Qualified Immunity's Boldest Lie*] (quoting Pierson v. Ray, 386 U.S. 547, 557 (1967)).

[47] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting *Harlow*, 457 U.S. at 818).

[48] *See Harlow*, 457 U.S. at 818. For the avoidance of doubt, clearly established law refers to the law establishing the right.

[49] *See id.* at 818–19.

[50] Egbert v. Boule, 596 U.S. 482, 523 n.5 (2022) (Sotomayor J., concurring in the judgment in part and dissenting in part) (quoting Wood v. Moss, 572 U.S. 744, 757 (2014)); *see, e.g.*, District of Columbia v. Wesby, 583 U.S. 48, 62–63 (2018) ("Under our precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012))). *See generally* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 190–205 (1993) (outlining the structure of analysis for qualified immunity and how courts decide "whether the right allegedly violated was clearly established at the time of the challenged conduct"). Some courts add a third requirement or analyze the inquiry in three parts, while other courts refuse to include an additional prong in the qualified immunity analysis. *Compare* Parker v. Gerrish, 547 F.3d 1, 12 (1st Cir. 2008) ("We assess qualified immunity using a three-part test: '"whether the plaintiff's allegations, if true, establish a constitutional violation," "whether the right was clearly established at the time of the alleged violation," and "whether a reasonable officer, similarly situated, would understand that the challenged conduct violated that established right."'" (quoting Philip v. Cronin, 537 F.3d 26, 34 (1st Cir. 2008))), *and* Tremblay v. McClellan, 350 F.3d 195, 200 (1st Cir. 2003) ("[T]he question would be whether an objectively reasonable officer . . . could have understood that his actions did not violate the Fourth Amendment. This question could be considered to merge the second and third prongs of the immunity analysis." (citing Tower v. Leslie-Brown, 326 F.3d 290, 296 (1st Cir. 2003))), *with* Walczyk v. Rio, 496 F.3d 139, 166–67 (2d Cir. 2007) (Sotomayor, J., concurring) ("Contrary to what our case law might suggest, the Supreme Court does not follow this 'clearly established' inquiry with a second, *ad hoc* inquiry into the reasonableness of the officer's conduct."), *and* Jones v. Wilhelm, 425 F.3d 455, 460–61 (7th Cir. 2005) (rejecting the defendant's argument to append a third prong and reaffirming "that the proper standard for qualified immunity remains a two-part test" under *Saucier v. Katz*, 533 U.S. 194 (2001)). Since courts lack uniformity in adopting this "third prong," the outcome of qualified immunity may differ depending on the circuit. *See generally* E. Lee Whitwell, *How Qualified Is Qualified Immunity: Adding A Third Prong to the Qualified Immunity Analysis*, 43 CAMPBELL L. REV. 403, 408–20 (2021) (examining the third prong of qualified immunity and its treatment by the courts).

[51] *See* Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 142–48 (2012) (examining the circuit split on allocations of the burdens in cases analyzing qualified immunity).

requirement.[52] That is, courts may address these two requirements in either order.[53] However, the flexibility to analyze either requirement has raised concerns,[54] including a stagnation in the law that deprives parties of needed judicial guidance.[55]

Qualified immunity is an "immunity from suit,"[56] and serves as a defense to liability for money damages by preventing a suit from proceeding to judgment.[57] This immunity serves to shield government officials "from undue interference with their duties and from potentially disabling threats of liability,"[58] and "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions" to protect "all but the plainly incompetent or those who knowingly violate the law."[59] Qualified immunity thus balances the need to protect discretionary actions by officials from suit while holding "officials accountable when they exercise [their] power irresponsibly" and violate federal law.[60]

i. The Violation of a Right

First, a court must consider whether the actor's conduct constituted a violation of the plaintiff's rights.[61] For example, if the governmental actor is alleged to have violated the right not to be arrested without probable cause, the court must address the facts and circumstances to determine if the governmental actor had "reasonably trustworthy information . . . sufficient that a prudent person

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[52] *See Pearson*, 555 U.S. at 236 (holding the sequence of analyzing qualified immunity is not mandatory; courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first . . . in the particular case at hand"). *See generally* Paul W. Hughes, *Not A Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 405–14 (2009) (discussing the history of the sequencing doctrine); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 7, 15–23 (2015) (tracing the Supreme Court's jurisprudence on the sequencing dilemma in the qualified immunity context).

[53] *See Pearson*, 555 U.S. at 236; CHEMERINSKY, *supra* note 46, at 586–87.

[54] *See* Nielson & Walker, *supra* note 52, at 23–27 (discussing the objections to the resolution of the *Saucier*-sequencing issue, including (i) law stagnation, (ii) unchanneled discretion, and (iii) an increase of litigation against municipalities).

[55] *See id.* at 23–25.

[56] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis omitted).

[57] *See id.*

[58] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

[59] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); *accord* City of Tahlequah v. Bond, 595 U.S. 9, 12 (2021) ("As we have explained, qualified immunity protects '"all but the plainly incompetent or those who knowingly violate the law."'" (quoting District of Columbia v. Wesby, 583 U.S. 48, 63 (2018))).

[60] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[61] *See id.* at 232; Saucier v. Katz, 533 U.S. 194, 201 (2001); Albright v. Oliver, 510 U.S. 266, 271 (1994).

would believe that the suspect committed or was committing an offense."[62] If there is no constitutional violation, the inquiry ends.[63]

ii. The Clearly Established Standard

Second, a court must determine whether the right was "clearly established" at the time of the alleged violation.[64] Qualified immunity shields officials so long as they have not violated "clearly established law."[65] An official who violated clearly established federal law did not act in an objectively reasonable manner.[66] On the other hand, an official who violated federal law that was not clearly established did act in an objectively reasonable manner.[67] This standard is objective.[68] Thus, to succeed, a plaintiff needs to demonstrate that the defendant's alleged conduct violated clearly established federal law.

The Supreme Court has held that the official must have violated a right that was already "'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[69] This inquiry focuses on whether the law was clearly established to give the official fair notice or sufficient warning that the conduct was unlawful.[70] Thus, the existing law must have made the unlawfulness of the official's conduct apparent.[71]

A plaintiff does not have to show that "the very action in question has previously been held unlawful."[72] Yet the Court has not specifically elucidated how analogous a pre-existing decision must be to place the question of the

[62] *See, e.g.*, Marshall *ex rel.* Gossens v. Teske, 284 F.3d 765, 770 (7th Cir. 2002).

[63] *See Pearson*, 555 U.S. at 232; *Saucier*, 533 U.S. at 201 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.").

[64] *See Pearson*, 555 U.S. at 232; *Saucier*, 533 U.S. at 201.

[65] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[66] *See id.* at 818–19.

[67] *See id.* at 818.

[68] *See id.* at 819; Malley v. Briggs, 475 U.S. 335, 344 (1986); *see also* Ziglar v. Abbasi, 582 U.S. 120, 151 (2017) ("Whether qualified immunity can be invoked turns on the 'objective legal reasonableness' of the official's acts." (quoting *Harlow*, 457 U.S. at 819.)).

[69] Anderson v. Creighton, 483 U.S. 635, 640 (1987); *see also* District of Columbia v. Wesby, 583 U.S. 48, 63–64 (2018) (defining "clearly established" standard). *See generally* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 651–56 (2013) (discussing the standard for determining "clearly established law").

[70] *See Wesby*, 583 U.S. at 63–64; Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) ("[T]he focus is on whether the officer had fair notice that her conduct was unlawful . . . ."); *see also* Marsh v. Butler Cnty., 268 F.3d 1014, 1031–32 & nn.9–10 (11th Cir. 2001) (explaining the requisites for caselaw to give officials fair warning of their conduct's unlawfulness and, thus, constitute clearly established law in a specific jurisdiction as to a particular circumstance).

[71] *See Anderson*, 483 U.S. at 640.

[72] *Id.* (citing Mitchell v. Forsyth, 472 U.S. 511, 535 n. 12 (1985)).

unlawfulness beyond debate.[73] As a practical matter, unless there is a Supreme Court ruling indicating that the law was violated under similar facts, officials are typically entitled to qualified immunity,[74] with few deviations from this standard.[75] Cases often stress that clearly established law must not be defined at a high level of abstraction or generality separate from the facts of the case.[76] A plaintiff will not be able to prevail against a defendant's assertion of qualified immunity without identifying a prior decided case, or perhaps a body of relevant caselaw that holds on sufficiently similar facts that the defendant's conduct violates the Constitution.[77] The "legal principle[s] must have a sufficiently clear foundation in then-existing precedent" and constitute settled law through "'controlling authority' or 'a robust "consensus of cases of persuasive authority."'"[78]

In sum, "clearly established" law generally requires a case on point that would have provided fair notice and clear warning to the government official that made the unlawfulness objectively apparent.[79] The absence of a case on point has led

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[73] *Cf. Wesby*, 583 U.S. at 63–64 (describing that a case precisely on point is not necessary and that unlawfulness can be obvious even without precedent reflecting similar circumstances, but further noting that specificity is important to put an act's unlawfulness in a given circumstance beyond debate); Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) (noting that a case precisely on point is not necessary while maintaining that there still must be clearly established law demonstrating the unlawfulness of particular conduct in a specific context).

[74] *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 70–71 (2016); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1815 (2018) [hereinafter Schwartz, *Case Against Qualified Immunity*].

[75] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 742–44 (2002) (concluding that officers violated clearly established law because several federal circuit court precedents deemed conduct unlawful that was not identical, but closely analogous, to the subsequent officer's conduct at bar, in addition to an agency regulation deeming it unlawful); Kisela v. Hughes, 584 U.S. 100, 113–20 (2018) (Sotomayor, J., dissenting) (parting with the majority for requiring a factually identical case to satisfy the "clearly established" inquiry); *see also* CHEMERINSKY, *supra* note 46, at 595 ("There is an obvious tension between *Hope v. Pelzer*, declaring that there need not be a case on point to overcome qualified immunity, and the subsequent cases, finding qualified immunity based on the lack of a case on point.").

[76] *See, e.g.*, City of Tahlequah v. Bond, 595 U.S. 9, 12 (2021) (per curiam); *Wesby*, 583 U.S. at 63–64 (quoting Plumhoff v. Rickard, 572 U.S. 765, 779 (2014)); White v. Pauly, 580 U.S. 73, 79–80 (2017) (per curiam).

[77] *See Wesby*, 583 U.S. at 63–64; *see, e.g.*, Baxter v. Bracey, 751 F. App'x 869, 870, 872–73 (6th Cir. 2018) (concluding that no case clearly established that, among other things, police could not release a dog on a surrendering suspect who was "raising his hands"). The case prior to *Baxter* only involved a suspect who was not fleeing but "lay[ing] on the ground with his hands out to this side." Campbell v. City of Springboro, 700 F.3d 779, 791 (6th Cir. 2018)).

[78] *Wesby*, 583 U.S. at 63–64 (first quoting Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam); and then quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011)).

[79] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 640 (1987); *see also* Schwartz, *Case Against Qualified Immunity*, *supra* note 74, at 1815 (noting that to be clearly established, prior precedent must have facts "exceedingly similar to those in the instant case[s]" such that the violation is objectively apparent to every reasonable official); Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 46, at 618–22 (explaining that the Supreme Court's requirement of prior analogous precedent is tied to the officer's reliance on court decisions when on the job).

to reversals due to the failure to identify a case where an official acting under similar circumstances was held to have violated the right in question.[80]

iii. What is Not Clearly Established Law?

Although the Court has recognized that the issue of what sources of law can clearly establish a right remains unsettled,[81] it has pointed to some sources that may clearly establish the law.[82] These sources generally include Supreme Court decisions, "controlling authority from the jurisdiction . . . in which the case [is] sitting," and, absent controlling circuit court precedent, "one could look outside the jurisdiction for 'a consensus of persuasive authority.'"[83] Thus, at least two principles can be distilled that do not clearly establish the law.

First, unpublished opinions generally do not clearly establish the law.[84] The circuits that have confronted the issue have held legal principles in nonprecedential opinions are not clearly established for purposes of qualified immunity.[85] Second, if there is a disagreement or split among the circuits, then a government official may be entitled to qualified immunity.[86] In other words, absent binding

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[80] *See, e.g.*, *White*, 580 U.S. at 79–81; *see also* CHEMERINSKY, *supra* note 46, at 592 (stating that recent U.S. Supreme Court decisions have "stressed the absence of cases on point as a basis for dismissing a case based on qualified immunity").

[81] *See Wesby*, 583 U.S. at 66 n.8 ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.").

[82] *See* Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 515 (2008).

[83] *Id.* (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).

[84] *See, e.g.*, Bell v. City of Southfield, 37 F.4th 362, 367–68 (6th Cir. 2022) ("[A] plaintiff cannot point to unpublished decisions . . . . Basic logic tells us at least this much . . . . For a right to be clearly established, 'existing *precedent* must have placed the statutory or constitutional question beyond debate.'" (quoting Rivas-Villegas v. Cortesluna, 595 U.S. 1, 5 (2021) (per curiam))). *See generally* David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIA. L. REV. 45, 63–76 (2010) (examining the varying laws of the federal circuit courts of appeals regarding the use of unpublished opinions in a qualified immunity analysis).

[85] *See, e.g.*, Williams v. Hansen, 5 F.4th 1129, 1132–33 (10th Cir. 2021) ("In determining whether the law was clearly established, we have held that we may not rely upon unpublished decisions." (quoting Green v. Post, 574 F.3d 1294, 1305 n.10 (10th Cir. 2009))); Crocker v. Beatty, 995 F.3d 1232, 1241 n.6 (11th Cir. 2021) (noting unpublished decisions and district court cases cannot define clearly established law); Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 899 n.14 (2008) ("To give just one practical example, some courts have said that legal principles stated in nonprecedential opinions are not clearly established for purposes of a government official's claim of qualified immunity." (first citing Bell v. Johnson, 308 F.3d 594, 611 (6th Cir. 2002); and then Sorchini v. City of Covina, 250 F.3d 706, 708–09 (9th Cir. 2001) (per curiam))).

[86] *See, e.g.*, Taylor v. Barkes, 575 U.S. 822, 826 (2015) (per curiam) ("Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue."); *see also* John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1312 (2012) (noting that the Court has supported the argument that if courts disagree on a constitutional

precedent,[87] if the circuits disagree, conflict, or split on the question, then a government official may be entitled to qualified immunity.[88] Thus, immunity may generally be found on the basis of judicial disagreement,[89] unless the Supreme Court has spoken clearly on the law.[90]

II. The Bankruptcy Discharge

A. History

The modification of the relationship between debtors and creditors in the form of a cancellation of debts is an ancient concept.[91] The term "discharge" in bankruptcy proceedings has a historical meaning.[92] The form and the substance of the order that grants a discharge itself are also longstanding.[93] However, the

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question, then the point of law is not clear); Kinports, *supra* note 74, at 70 (suggesting that the U.S. Supreme Court's recent opinions may be interpreted to suggest a "potentially limiting qualifier" that disagreement between the circuits on legal issues indicates the law is not clearly established).

[87] In the absence of controlling authority, most circuits will consider cases from other jurisdictions and whether there is a consensus in the circuit courts, but the Second Circuit and the Eleventh Circuit will not consider cases from sister circuits. *See* Blum, *supra* note 82, at 515.

[88] *See, e.g.*, Baude, *supra* note 38, at 75–77 (reviewing circuit splits as favoring qualified immunity because it suggests the law was not clearly established).

[89] *See* Ziglar v. Abbasi, 582 U.S. 120, 154 (2017) ("When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability." (first citing Wilson v. Layne, 526 U.S. 603, 618 (1999); and then Reichle v. Howards, 566 U.S. 658, 669–70 (2012))).

[90] *See* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 378 (2009) (noting that the Court "would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law . . . and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.").

[91] *See, e.g.*, DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 216 (2014); Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO STATE L.J. 855, 867–70 (2003) (examining Biblical pronouncements on debt relief). For example, around 2400 B.C., King Enmetena of Lagash declared a general debt cancelation and "instituted freedom" for formerly indebted slaves. *See* GRAEBER, *supra*, at 216. Additionally, after Solon, a leader in ancient Greece, was elected to serve as governor of Athens in 594 B.C., among his reforms, which became a foundation of Athenian democracy, was relief from debt "referred to as the *seisachtheia*, or 'the shaking-off of the burdens.'" Mark J. Sundahl, *When Literature Becomes Law: An Example from Ancient Greece*, 12 TEX. WESLEYAN L. REV. 331, 332–33 (2005); *see also* EDWARD ABBOTT PARRY, THE LAW AND THE POOR 29 (1914) (discussing Solon and his reforms). A full account of this history is beyond the scope of this Article, but it should be noted that these ancient reforms *resembling* a discharge do not qualify as relief under a system of bankruptcy. *See* Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 6–7 (1940) (discussing historical measures and methods that suspend or wipe out claims altogether and concluding these measures and methods can scarcely be called bankruptcy).

[92] Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 364 (2006) ("The term 'discharge' historically had a dual meaning; it referred to both release of debts and release of the debtor from prison.").

[93] *See* General Orders and Forms in Bankruptcy, 172 U.S. 653, 720 (1898) (Form No. 59);

effect of a bankruptcy court's discharge order—specifically its operation as an injunction—is in its infancy.[94] The origins of the discharge, its historical use as an affirmative defense, and the evolution of the discharge into an enforcement mechanism, including the injunction against actions to collect a discharged debt, are explored below.

In 1705, the English Parliament introduced the discharge of debts for the benefit of a debtor.[95] The "discharge in bankruptcy" is "[t]he release of a debtor from personal liability for prebankruptcy debts."[96] A debtor who cooperated in the bankruptcy received a "certificate of conformity," which served as "the legal document evidencing the discharge" from all debts.[97] "If a creditor sued to collect a prebankruptcy debt," pleading the certificate of conformity in defense was necessary to give it effect.[98] Eventually, this certificate of conformity was also used to obtain a release from prison.[99] For these reasons, the term "discharge" historically meant a release from prison and a release of debts.[100] A common factor among all American bankruptcy statutes is the presence of some kind of a discharge."[101] The first federal bankruptcy law was passed on April 4, 1800,

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Zavelo v. Reeves, 227 U.S. 625, 631 (1913) ("[A] form of discharge was prescribed (Forms in Bankruptcy, No. 59), by which it is ordered that the bankrupt 'be discharged from all debts and claims which are made provable by said acts against his estate . . . .'"); Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1, 2–3 (1971) (noting the Supreme Court promulgated Official Form No. 59 that would serve as the discharge order under the Bankruptcy Act of 1898, which followed the model under the Bankruptcy Act of 1867); 3 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES 2854 (2d ed. 1915) (providing an example of Official Form No. 59); *see also* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 342, 346–47, 351–52, 359–60, 369 (1991) [hereinafter Tabb, *Historical Evolution*] (discussing the procedures under the English and American systems of bankruptcy required to obtain a discharge). The Bankruptcy Act of 1867 stated the language constituting the order of discharge in the statute itself. *See* Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, 532–33 (1867) *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99, 99.

[94] *See* Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth LLP (*In re* Pavelich), 229 B.R. 777, 781–82 (B.A.P. 9th Cir. 1999); Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 25 (2007) [hereinafter Tabb, *Top Twenty Issues*] ("For the first 265 years in the life of the discharge in Anglo-American jurisprudence, the answer (unfortunately for debtors) was that they had to raise the discharge as an affirmative defense.").

[95] *See* Tabb, *Historical Evolution*, *supra* note 93, at 333–36 (noting the discharge was subject to the "purely involuntary remedy" of bankruptcy and the scope of discharge only applied to traders); *see also* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief,* 76 AM. BANKR. L.J. 461, 505–06 (2002) (providing a historical account of the English ancestry of the bankruptcy discharge).

[96] *Discharge in Bankruptcy*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also Discharge*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("*Bankruptcy*. The release of a debtor from monetary obligations upon adjudication of bankruptcy . . . .").

[97] *See* Tabb, *Historical Evolution*, *supra* note 93, at 342.

[98] *Id.*

[99] Tabb, *Top Twenty Issues*, *supra* note 94, at 25.

[100] *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 364 (2006) (recognizing early English statutes "authorized discharges of persons"); Brubaker, *supra* note 95, at 507–09; *see also* BLACK'S LAW DICTIONARY, *Discharge*, *supra* note 96 ("[T]he release of a prisoner from confinement.").

[101] Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO STATE L.J. 1047, 1047 n.4 (1987).

and paralleled the English system.[102] Although short-lived, the Bankruptcy Act of 1800 provided a discharge upon, among other things, consent by creditors.[103] A debtor entitled to a discharge received a "certificate of discharge," which evidenced the debtor's obtainment of a discharge.[104] As with the English system, if a creditor sued to collect a prebankruptcy debt or a debtor was arrested for failing to pay a prebankruptcy debt, raising the certificate of discharge in defense was necessary.[105]

Subsequent legislation on bankruptcy was enacted in 1841 and 1867.[106] Notable features of these Acts include bankruptcy relief available to non-merchants and the allowance of voluntary bankruptcy.[107] However, the procedural scheme for obtaining and enforcing a discharge remained largely the same.[108] Under these systems, the discharge continued to operate solely as an affirmative defense.[109]

The Bankruptcy Act of 1867, however, set forth the language in the statute itself that must be included on the certificate of discharge.[110] The Bankruptcy

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[102] *See, e.g.*, Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248, 248; *see* Tabb, *Historical Evolution*, *supra* note 93, at 346 (noting, among other features, the discharge was subject to the purely involuntary remedy of bankruptcy and the scope of discharge only applied to traders).

[103] *See* Tabb, *Historical Evolution*, *supra* note 93, at 346–48.

[104] *See id.* at 346–47.

[105] *See id.* at 343, 348.

[106] After the Bankruptcy Act of 1800 was repealed, Congress enacted national bankruptcy policies through the Bankruptcy Act of 1841, the Bankruptcy Act of 1867, and finally, as set forth below, the Bankruptcy Act of 1898. *See* Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614, 614; Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867) *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99, 99; Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 544, *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2682 ("The Bankruptcy Act [of July 1, 1898, ch. 541, 30 Stat. 544, as amended] is repealed.").

[107] *See*, *e.g.*, Tabb, *Historical Evolution*, *supra* note 93, at 349–50, 353–57.

[108] *See id.* at 359–60; Tabb, *Top Twenty Issues*, *supra* note 94, at 25; *see also* Bankruptcy Act of 1867 § 34, 14 Stat. at 533 ("That a discharge . . . may be pleaded . . . as a full and complete bar to all suits . . . ."); Bankruptcy Act of 1841 § 4, 5 Stat. at 443–44 ("[S]uch discharge and certificate . . . shall be and may be pleaded as a full and complete bar to all suits . . . .").

[109] *See* Brubaker, *supra* note 95, at 511–12, 514–15; Benjamin Margulis, Note, *The Bankruptcy Hegemon: Section 524(a) and Its Effect on State and Federal Comity*, 31 CARDOZO L. REV. 905, 910 & n.34 (2010) (first citing Dimock v. Revere Copper Co., 117 U.S. 559, 566 (1886) (interpreting the Bankruptcy Act of 1867); then citing Steward v. Green, 11 Paige Ch. 535, 5 N.Y. Ch. Ann. 225 (N.Y. Ch. 1845) (interpreting the Bankruptcy Act of 1841); and then citing Mechanics' Bank v. Hazard, 9 Johns. 392, 392 (N.Y. Sup. Ct. 1812) (interpreting the Bankruptcy Act of 1800).

[110] Bankruptcy Act of 1867, ch. 176, § 32, 14 Stat. 517, 532–33. The text provided:

> That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows: — District Court of the United States, District of [ ]. Whereas [ ] has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said [ ] be forever

Act of 1867 was the first instance in which the discharge took on a standardized form, going no further than the language in the statute.[111]

The passage of the Bankruptcy Act of 1898 represented a major stride in the development and "evolution of the bankruptcy discharge."[112] For example, the Act eliminated the longstanding requirement of obtaining creditor consent for a discharge.[113] This allowed debtors to file bankruptcy voluntarily and obtain a discharge without creditors' consent.[114]

In other respects, the Bankruptcy Act of 1898 followed prior practice and procedures for obtaining a discharge, but unlike its predecessor, the Bankruptcy Act of 1898 did not specify the form of the discharge by including the language that must be included in the discharge order.[115] Additionally, the Bankruptcy Act of 1898 did not specify "the effect of a discharge once granted."[116] "The Supreme Court cured the first omission [the form of the discharge] by promulgating an Official Form of [the] discharge order," which mirrored the statutory language and followed the model discharge order of the Bankruptcy Act of 1867.[117] The Act also did not address "the effect of a discharge," but the effect was minimal as it "did not . . . lead to a change in practice."[118] "[T]he bankrupt still had the burden of pleading the discharge as an affirmative defense."[119]

"This notion of discharge as [an affirmative] defense was further strengthened when"[120] the initial version of the Federal Rules of Civil Procedure in 1938

> discharged from all debts and claims which by said act are made provable against his estate, and which existed on the [ ] day of [ ], on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at [], in the said district, this [] day of [ ], A.D.

Id. It appears courts were allowed to fill in certain information such as the district, the name of debtor, and the date of the petition and the discharge. *See id*.

[111] *See id*.

[112] Tabb, *Historical Evolution*, *supra* note 93, at 363.

[113] *Id*. at 364.

[114] *See id*. at 364, 369

[115] Countryman, *supra* note 93, at 2; *see* Charles J. Tabb, *History of the Bankruptcy Law in the United States*, 3 AM. BANKR. INST. L. REV. 5, 24 (1995) [hereinafter Tabb, *History of Bankruptcy Law*].

[116] Tabb, *Historical Evolution*, *supra* note 93, at 369.

[117] Countryman, *supra* note 93, at 2; *see also* General Orders and Forms in Bankruptcy, 172 U.S. 653, 720 (1898) (Form No. 59) (providing the bankruptcy form for the discharge).

[118] *See* Tabb, *Historical Evolution*, *supra* note 93, at 369 & n.353. Some states allowed a debtor to apply for a perpetual stay against the enforcement of a judgment barred by a discharge. *See* Countryman, *supra* note 93, at 38 & n.154 (indicating cases in which the court considered granting a stay against collecting a discharged debt). *See generally* M. L. C., Annotation, *Grant of injunction or stay by Federal court to protect discharge in bankruptcy*, 141 A.L.R. 1380 (1942) (discussing circumstances warranting the "grant [of] an injunction or stay to protect a discharge in bankruptcy").

[119] *See* Tabb, *Historical Evolution*, *supra* note 93, at 369 & n.353; *see also* Guthrie v. PHH Mortg. Corp., 79 F.4th 328, 350 (4th Cir. 2023) (Wynn, J., concurring in part and dissenting in part) ("Before 1970, a bankruptcy court's discharge order merely provided the debtor with an affirmative defense if he was later sued by the holder of a discharged debt.").

[120] Margulis, *supra* note 109, at 910 & n.36.

included "discharge in bankruptcy" in the list of affirmative defenses.[121] States eventually included the discharge as an affirmative defense in their statutes or procedural rules as well.[122] Yet the discharge as an affirmative defense had a significant drawback. Because the discharge was an affirmative defense, if the discharge was not pleaded in response, like all affirmative defenses, then it was waived.[123] If the defense was waived, then any challenge in a federal court to a judgment obtained in a state court was barred.[124] As a result, obtaining "post-discharge default judgments against . . . debtors" in state court became a creditor's modus operandi.[125]

In 1967, "representatives of the Administrative Office [of the U.S. Courts] and the National Bankruptcy Conference [testified before Congress about] abuses by small loan companies, including the pursuit" of debtors and the ineffectiveness of the discharge on account of many debtors failing to "plead it as a defense."[126] As a consequence, responsive bills were eventually drafted, and on October 1, 1969, hearings were held on these bills.[127] The hearings focused on, among other things, whether a discharge could be devised to relieve debtors of "the burden of having to appear in a [post-discharge] action to plead the discharge as a defense to dischargeable claims,"[128] to prevent state courts from erroneously "ruling that the claim was nondischargeable."[129] The focus was to give greater effect to the discharge by reducing potential creditor abuse.[130]

It is against this backdrop that the 91st Congress enacted, and the President signed, the 1970 discharge amendments, which amended the Bankruptcy Act of 1898 (as amended).[131] Section 14f was amended to provide that an order of

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[121] FED. R. CIV. P. 8 advisory committee's note to 2010 amendment. The 2010 Amendments to the Federal Rules of Civil Procedure removed "discharge in bankruptcy" from the list of affirmative defenses. *Id*. In a committee note, reasons were listed that explained why it was "confusing to describe discharge as an affirmative defense." *Id*.

[122] *See* Margulis, *supra* note 109, at 910 & n.37 (collecting state statutes and procedural rules).

[123] *See*, *e.g.*, Pers. Indus. Loan Corp. v. Forgay, 240 F.2d 18, 19 (10th Cir. 1956) ("[A] general discharge in bankruptcy does not wipe out the debt, it only raises a bar to actions thereon in state courts and must be pleaded and, if not pleaded, is waived . . . .").

[124] *Id*.

[125] *See* Margulis, *supra* note 109, at 911.

[126] Countryman, *supra* note 93, at 20–21. Before 1970, creditors often waited until after discharge to file suit on a pre-petition debt because "a bankruptcy court's discharge order merely provided the debtor with an affirmative defense if he was later sued by the holder of a discharged debt." *See* Guthrie v. PHH Mortg. Corp., 79 F.4th 328, 350 (4th Cir. 2023) (Wynn, J., concurring in part and dissenting in part) ("The apparent practice was for a creditor to sue in state court to collect on a discharged debt, and if the debtor, relying on the discharge, failed to respond, a default judgment was entered against him.").

[127] *See* Countryman, *supra* note 93, at 21.

[128] *See* Countryman, *supra* note 93, at 22.

[129] *See* Countryman, *supra* note 93, at 18.

[130] *See* Braun v. Champion Credit Union (*In re* Braun), 141 B.R. 133, 138 (Bankr. N.D. Ohio 1992).

[131] *See* Act of Oct. 19, 1970, Pub. L. No. 91-467, 84 Stat. 990, *superseded by*, Act of Nov. 6,

discharge (1) shall declare any judgment imposing personal liability was null and void, and (2) shall "enjoin all creditors whose debts are discharged" from collecting such debts as personal liabilities.[132] "It is in this area that discharge law and practice after the 1898 act (as amended in 1903) most differed from the approach to discharge today."[133]

With the 1970 amendments, the discharge underwent a major change and broke a longstanding tradition.[134] A discharge was no longer an affirmative defense; instead, a discharge was an absolute defense that protected the debtor the moment it was granted by serving as an injunction prohibiting and enjoining creditors from collecting on discharged debts.[135] The purpose of the provision was to strengthen the discharge protection against collection activities and make it "unnecessary for the [d]ebtor to do anything at all."[136] This change also shifted the burden of compliance to creditors.[137] Debtors were no longer required to prove that the debt was discharged through the affirmative defense.[138] Creditors were required to comply with the discharge order in the first instance.[139]

The 1970 amendments curbed certain lawsuits by creditors.[140] But the amendments had the unintended consequence of forcing creditors to change tactics by turning to informal collection practices and dunning debtors, especially in the form of threatening letters, in order to coerce debtors to make new

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1978, Pub. L. No. 95-598, 92 Stat. 2549, 2549; *Guthrie*, 79 F.4th at 350; Brubaker, *supra* note 95, at 524.

[132] § 3, 84 Stat. at 991. Section 14f stated:

> f. An order of discharge shall—
> (1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision a of section 17 of this Act; (b) debts discharged under paragraph (2) of subdivision c of section 17 of this Act; and (c) debts determined to be discharged under paragraph (3) of subdivision c of section 17 of this Act; and
> (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Id. Congress essentially codified *Local Loan Co. v. Hunt*, which held a bankruptcy court could enjoin creditor action in derogating the discharge by effectively making the discharge order an injunction. Local Loan Co. v. Hunt, 292 U.S. 234, 241, 244 (1934).

[133] Tabb, *Historical Evolution*, *supra* note 93, at 369.

[134] *See* Tabb, *Top Twenty Issues*, *supra* note 94, at 25; *Guthrie*, 79 F.4th at 350.

[135] *See In re Braun*, 141 B.R. at 137–39; Brubaker, *supra* note 95, at 528.

[136] *See In re Braun*, 141 B.R. at 138–39; *Guthrie*, 79 F.4th at 350 ("The change was debtor-protecting, a goal it advanced by actively prohibiting *any* attempt to collect on a discharged debt and by funneling disputes over discharges back into the bankruptcy courts.").

[137] *See* Tabb, *Top Twenty Issues*, *supra* note 94, at 26.

[138] *Id.* at 25.

[139] *Id.* at 26.

[140] *See In re* Thompson, 416 F. Supp. 991, 995 (S.D. Tex. 1976).

promises to repay debts.[141] Although reaffirming discharged debts was generally understood to be proper, ,[142] and the 1970 amendments were directed at legal proceedings to collect a debt, the amendments did not address whether it was permissible to use coercive means to obtain a new promise to repay a debt that would otherwise be discharged—a reaffirmation agreement.[143] Indeed, in 1973, the Commission on the Bankruptcy Laws of the United States "identified the lack of regulation of reaffirmations [of dischargeable debts] as a flaw."[144]

Then, in 1978, Congress enacted the Bankruptcy Reform Act, which repealed the Bankruptcy Act of 1898.[145] The Bankruptcy Code placed the same importance on the notion of the discharge that was established in the 1970s Amendments. The discharge continued to provide that any judgment obtained on a discharged debt was void.[146] However, the Bankruptcy Code expanded the injunction derived from Section 14f.[147] The Bankruptcy Code provided for a

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[141] *See id.* at 996. For example, lenders employed the following questionable tactics to persuade debtors to reaffirm debts:

> First, threatening debtors that they would "damage the debtor's personal or credit reputation [with] letters to an employer, phone calls to friends, and so on." Second, offering debtors new credit. The extension of further credit permitted "the finance company to reduce its bankruptcy losses . . . [and] to evade the usury [sic] laws. Interest on consumer loans is precomputed and discounted, and a reaffirmation added to a new loan allows the lender to charge interest on interest." Third, where the lender held a security interest in the debtor's household and personal goods, representing that such items would be repossessed unless the debtor reaffirmed the underlying debt.

In re Melendez, 224 B.R. 252, 255 n.2 (Bankr. D. Mass. 1998) (alterations in original) (citations omitted).

[142] *See In re Melendez*, 224 B.R. at 254.

[143] *See* Case Comment, *Postdischarge Coercion of Bankrupts by Private Creditors:* Girardier v. Webster College, 91 HARV. L. REV. 1336, 1339–40 (1978).

[144] *See generally In re Melendez*, 224 B.R. at 254–57 (discussing the history leading to the regulation of reaffirmations). In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and report their findings on the existing law. *See* Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468, 468.

[145] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2682.

[146] *Id.* at 2592.

[147] *Id.* Section 524(a)(1)–(2), as originally enacted, provided:

> (a) A discharge in a case under this title—
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . whether or not discharge of such debt is waived;
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived . . . .

Id. A few amendments have been made to this statutory language, but two amendments are worth mentioning. First, Congress amended Section 524(a) "by striking out 'any act' each place it appears and inserting in lieu thereof 'an act.'" Bankruptcy Amendments and Federal Judgeship Act of July 10, 1984, Pub. L. No. 98-353, § 455, 98 Stat. 333, 376; *cf.* 11 U.S.C. § 362(a)(6) (staying "any stronger statutory "injunction against the commencement or continuation of an action . . . to collect, recover[,] or offset any such debt as a personal liability."[148] Section 524(a) built upon the foundations of Section 14f of the Bankruptcy Act.[149] The injunction was to give a stronger effect to the discharge and eliminate any doubt concerning its function as a total prohibition on collection efforts to pressure a debtor in any way to repay a discharged debt.[150] The Bankruptcy Code also enacted stringent limitations for reaffirming a debt to protect debtors from the perceived problems of coercive and deceptive actions by creditors to secure reaffirmation agreements after a discharge had been granted.[151] Thus, section 524(a) and its predecessor clearly express and identify an expansion of the discharge to enjoin "all acts to 'collect, recover, or offset' a debt as a personal liability of the debtor."[152]

The discharge order as an Official Form has remained unchanged as a pure statutory order.[153] The discharge order is a basic declaratory order that plainly

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act to collect"). Second, Section 524(a)(2) "was amended in 1984 to exclude the phrase 'or from property of the debtor.'" *In re* Elmes, 289 B.R. 100, 107 (Bankr. N.D. Ill. 2003). Under the statute, the comma after "or an act" is curious. *See* 11 U.S.C. § 524(a). The comma after "or an act" may serve as an introduction of additional information about the "act" itself, "to collect, recover or offset"—in such a situation, the maxim *noscitur a sociis* may aid an interpretation of the statutory language by illustrating the type of prohibited acts. Thus, under this interpretation, the discharge "operates as an injunction against [three things:] the commencement or continuation of an action[;] the employment of process[;] or an act," specifically, and including (but of course not limited to), one aimed at collecting, recovering, or offsetting a debt. *See* 11 U.S.C. § 524(a)(2). Moreover, the Court has held "[a]n 'act' is '[s]omething done or performed . . . ; a deed'" and "[t]hat which is done," "the exercise of power," "a deed." City of Chi. v. Fulton, 592 U.S. 154, 158 (2021) (quoting BLACK'S LAW DICTIONARY 30 (11th ed. 2019) (alteration in original); WEBSTER'S NEW INTERNATIONAL DICTIONARY 25 (2d ed. 1934).

[148] 11 U.S.C. § 524(a)(2).

[149] Meadows v. Carter Hagler (*In re* Meadows), 428 B.R. 894, 905 (Bankr. N.D. Ga. 2010).

[150] *See id.*

[151] *See In re* Laynas, 345 B.R. 505, 514 (Bankr. E.D. Pa. 2006); Lisa A. Napoli, *Reaffirmation After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Many Questions, Some Answers*, 81 AM. BANKR. L.J. 259, 260 (2007). Reaffirmation agreements, as originally contemplated, "provided that a reaffirmation agreement was enforceable only if it was made before the discharge was granted and not timely rescinded by the debtor." *Id.* at 260. The reaffirmation process made clear that creditors cannot engage in collection activity on discharged debt. *Id.* at 275. Creditors have a myriad of theories to extract payment from debtors. *See, e.g.*, Sterling v. Southlake Nautilus Health & Racquet Club Inc., No. 2:16-CV-384 JVB, 2018 WL 3660058, at *1–2 (N.D. Ind. Aug. 2, 2018) (providing a situation where a state court action resulted in the arrest of the debtor), *aff'd in part, rev'd in part and remanded sub nom*, *In re* Sterling, 933 F.3d 828 (7th Cir. 2019); 4 COLLIER ON BANKRUPTCY ¶ 524.02 (16th ed.) ("In enforcing the injunction, courts have encountered a wide variety of methods used by creditors to attempt to collect discharged debts."); *see also* P. Steven Kratsch & William E. Young, *Criminal Prosecutions and Manipulative Restitution: The Use of State Criminal Courts for Contravention of Debtor Relief*, 1984 ANN. SURV. OF BANKR. L., no. 1984, at 5 (recognizing the "[u]se of state criminal laws to coerce the collection of discharged debts").

[152] *See, e.g.*, Lone Star Sec. & Video, Inc. v. Gurrola (*In re* Gurrola), 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005) (quoting 11 U.S.C. § 524(a)(2)).

[153] Ajasa v. Wells Fargo Bank (*In re* Ajasa), 627 B.R. 6, 23 (Bankr. E.D.N.Y. 2021).

orders "a discharge" is "granted."[154] The Official Form is uniform across the country.[155] The Official Form provides a plain explanation of the discharge, including that the "order means that no one may make any attempt to collect a discharged debt from the debtors personally" and provides examples of what creditors cannot do, such as "[c]reditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally."[156] The Official Form has an important effect because it provides an explanation of the statutory language and essentially restates the terms of the statute.[157]

However, the discharge is a creature of statute whose effect and form do not vary on a case-by-case basis.[158] As an Official Form, the discharge order's embodiment is generally mandatory and cannot be altered.[159] Unlike a typical civil injunction, which is crafted and enforced by a court, the discharge is enforced, but not handcrafted, by the bankruptcy court.[160] The discharge injunction is statutory, arising after a discharge is entered; an injunction is not issued after a court determines one is warranted.[161] As a result, the discharge differs from other injunctions that are closely tailored to the cases that give courts occasion to enter them. The conundrum, of course, is that the discharge order is treated as if the bankruptcy judge crafted the injunction when called upon to *enforce* the injunction.[162]

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[154] *See, e.g.*, U.S. COURTS, ORDER OF DISCHARGE: OFFICIAL FORM 318 (Dec. 2015) https://www.uscourts.gov/sites/default/files/form_b318_0.pdf [https://perma.cc/2L2N-5BTV] (last visited Dec. 24, 2025). The Official Bankruptcy Forms include a discharge for individuals under Chapter 7, Chapter 11, Chapter 12, and Chapter 13. *See* FED. R. BANKR. P. 4007(e) ("A discharge order must conform to the appropriate Official Form.").

[155] *See* FED. R. BANKR. P. 9009 (stating that these forms must be used without alteration, indicating that the forms are uniform across the country).

[156] OFFICIAL FORM 318, *supra* note 154.

[157] *See* Taggart v. Lorenzen, 587 U.S. 554, 557–58 (2019).

[158] *See* Haynes v. Chase Bank USA, N.A. (*In re* Haynes), No. 11-23212 (RDD), 2014 WL 3608891, at *8 (Bankr. S.D.N.Y. July 22, 2014) ("[T]he bankruptcy discharge order is a form, a national form, which is issued in every case when there is, in fact, a discharge. By statute, in [Section] 524(a)(2), it operates as an injunction . . . . It is not a handcrafted order." (citations omitted)).

[159] *See* FED. R. BANKR. P. 9009 ("The Official Forms prescribed by the Judicial Conference of the United States must be used without alteration . . . .").

[160] *See In re Haynes*, 2014 WL 3608891, at *8; FED. R. CIV. P. 65(a) (showing that courts have discretion in issuing a preliminary civil injunction).

[161] *In re Haynes*, 2014 WL 3608891, at *8. ("For the discharge injunction to be granted, the debtor does not have to prove the factors required for an injunction under Federal Rule of Civil Procedure 65.").

[162] *See In re* Rose, 565 B.R. 178, 183 n.12 (Bankr. D. Nev. 2017); Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 966 (11th Cir. 2012). An example of this conundrum is a party filing a suit claiming, first, that a creditor violated the discharge injunction and, second, that the same creditor violated the Fair Debt Collection Practices Act; a court may dismiss the claim that the creditor violated the discharge injunction (because this claim may only be heard by the bankruptcy court) notwithstanding the existence of the claim under the FDCPA. *See, e.g.*, Henry v. Collection Pros., Inc., No. 23-00721, 2024 WL 3028472, at *2–3 (N.D. Ill. June 17, 2024).

B. The Standard for Remedying Violations of the Discharge Order's Injunction

The discharge is a court order, and as an order of the court, violators of the injunction in the order can be held in contempt.[163] Bankruptcy courts have characterized the analysis for violating the discharge injunction as a two-step process.[164] First, the court must decide whether the creditor's actions violated the discharge injunction based on elements developed in the caselaw.[165] Second, the court must undertake the "no fair ground of doubt" inquiry under *Taggart* to determine if the creditor had an objectively reasonable basis for concluding that the actions were lawful.[166] The movant alleging civil contempt bears the burden of proving by clear and convincing evidence that the creditor violated the discharge injunction[167] and engaged in actionable contempt.[168] This Section discusses the two-step process: first, violations of the discharge injunction and, second, the contempt mechanism to hold a creditor accountable for its actions.

i. The Violation of the Discharge Injunction

First, a bankruptcy court must consider whether the creditor's conduct constituted a violation.[169]

Under Section 524(a),[170] a discharge order in a bankruptcy case automatically "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." [171] Thus, among other things, "a discharge will be completely effective and will operate as an injunction against the commencement or continuation of an action or the employment of process to collect or recover a debt as a personal liability of the debtor."[172]

As Section 524 "provides the basic protections of the bankruptcy discharge,"[173] it affirms a core tenet of bankruptcy relief "to afford a debtor a 'fresh start' by ensuring that a debtor will not be pressured in any way to repay a debt

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[163] *See, e.g.*, *In re* Distefano, 611 B.R. 100, 102 (Bankr. W.D. Mich. 2019).
[164] *See, e.g.*, *id.*
[165] *See id.*
[166] *See id.*
[167] Bentley v. OneMain Fin. Grp., LLC (*In re* Bentley), No. 19-8026, 2020 WL 3833069, at *4 (B.A.P. 6th Cir. July 8, 2020).
[168] *In re* City of Detroit, 614 B.R. 255, 265–66 (Bankr. E.D. Mich. 2020); *In re* Cantrell, 605 B.R. 841, 853 (Bankr. W.D. Mich. 2019) (citing Glover v. Johnson, 138 F.3d 229, 244 (6th Cir. 1998)).
[169] *In re* Distefano, 611 B.R. 100, 102 (Bankr. W.D. Mich. 2019).
[170] 11 U.S.C. § 524(a).
[171] 11 U.S.C. § 524(a)(2).
[172] 4 COLLIER, *supra* note 151, at ¶ 524.02; *see also* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (confirming that a discharge order operates as an injunction against creditors attempting to collect or recover discharged debts).
[173] 4 COLLIER, *supra* note 151, at ¶ 524.01.

after it has been discharged."[174] Stated differently, "the effect of a discharge is to interpose a permanent prohibition against debt collection rather than to absolve the underlying debt retroactively."[175] The discharge injunction "takes effect with the discharge order."[176] In essence, this means the discharge operates by preventing actions moving forward, rather than retroactively impacting the validity of discharged debts.

The scope of the discharge injunction is broad; it prohibits essentially all legal proceedings and other acts to collect against a debtor—such as voiding pending or future judgments—for a discharged debt.[177] It is not without its limitations, many of which are provided under the Bankruptcy Code's exceptions to discharge.[178] It, in effect, acts as a "permanent extension of the automatic stay,"

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[174] Paglia v. Sky Bank (*In re* Paglia), 302 B.R. 162, 166 (Bankr. W.D. Pa. 2003) (citing Cherry v. Arendall (*In re* Cherry), 247 B.R. 176, 182 (Bankr. E.D. Va. 2000)); *accord* Ragone v. Stefanik & Christie, LLC (*In re* Ragone), No. 20-8013, 2021 WL 1923658, at *4 (B.A.P. 6th Cir. May 13, 2021) (quoting *In re Paglia*, 302 B.R. at 166); *see also* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 390 (2023) ("The Code's discharge provision enjoins creditors from trying to collect debts that have been discharged in a bankruptcy case."); Isaacs v. DBI-ASG Coinvestor Fund, III, LLC (*In re* Isaacs), 895 F.3d 904, 910 (6th Cir. 2018) (stating that the protections under Section 524(a) are automatic once a bankruptcy court enters the discharge order); Canning v. Beneficial Me., Inc. (*In re* Canning), 706 F.3d 64, 69 (1st Cir. 2013) (explaining that the scope of the discharge order's injunction is broad for the purpose of providing the debtor with a fresh start).

[175] 3 WILLIAM L. NORTON III, NORTON BANKR. L. & PRAC. § 58.2 (3d ed. 2025).

[176] Bruce v. Citigroup Inc., 75 F.4th 297, 301–02 (2d Cir. 2023).

[177] *See* Rader v. Carson (*In re* Rader), 488 B.R. 406, 414 (B.A.P. 9th Cir. 2013) (first quoting Ruvacalba v. Munoz (*In re* Munoz), 287 B.R. 546, 533 (B.A.P 9th Cir. 2002); then quoting Garkse v. Arcadia Fin., Ltd. (*In re* Garske), 287 B.R. 537, 542 (B.A.P. 9th Cir. 2002); and then quoting Heilman v. Heilman (*In re* Heilman), 430 B.R. 213, 218 (B.A.P. 9th Cir. 2010)).

[178] *See* 11 U.S.C. § 523(a). For example, certain types of debts listed in section 523(a) of the Bankruptcy Code are excluded from the scope of a Chapter 7 debtor's discharge under section 727(a). *Compare* 11 U.S.C. § 523(a) (listing exceptions to discharge—after the discharge order has been entered—for individual debtors in all chapters), *with* 11 U.S.C. § 727(a) (listing grounds for denying a discharge—e.g., preventing the entry of a discharge order—in a Chapter 7 case). Some of those types of debts are excluded by operation of the statute without a court determination. Some of them, however, are only excluded from discharge if the bankruptcy court so decides. Specifically, those in Sections 523(a)(2), (4) or (6) are within the exclusive jurisdiction of the bankruptcy court to determine as nondischargeable in an action brought within the time frame set forth in Section 523(c) and the Federal Rules of Bankruptcy Procedure. *See* 11 U.S.C. § 523(c); FED. R. BANKR. P. 4007.

Another example of the scope of the discharge injunction arising under Section 524(a)(2) is that only actions seeking to collect the discharged debt "as a personal liability of the debtor" are enjoined. *See* 11 U.S.C. § 524(a)(2). Valid pre-petition liens that are not avoided during the bankruptcy case ride-through it to remain in effect. *See, e.g.*, Long v. Bullard, 117 U.S. 617, 620–21 (1886). Once the automatic stay is no longer in effect, creditors holding valid and un-avoided pre-petition liens are permitted to foreclose on them through *in rem* actions. Johnson v. Home State Bank, 501 U.S. 78, 84–85 (1991). Otherwise, dischargeable debts that a debtor reaffirms through the precise statutory process set forth in sections 524(c) and (d) and related Federal Rules of Bankruptcy Procedure are excepted from the scope of a Chapter 7 discharge. *See* 11 U.S.C §§ 524(c)–(d).

A final example is the limitation on the scope of the discharge by section 524(e), which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).

making permanent much of the relief debtors first obtain when filing their petition for relief with the bankruptcy court.[179]

If a creditor violates the discharge order, then the debtor can move for contempt and claim the discharge order's injunction was violated.[180] To prove a violation, a debtor must generally establish that the creditor (1) "has notice of the debtor's discharge," (2) "intends the actions which constituted the violation,"[181] and (3) "acts in a way that improperly coerces or harasses the debtor."[182] The ultimate "test for whether a creditor's post-discharge conduct violates the discharge injunction is "whether the objective effect of the creditor's action is to pressure a debtor to repay a discharged debt."[183] These elements guide an analysis of the first step.

"Notwithstanding the facial permissibility of a lawsuit or some other action" against a discharged debtor under the elements above, "a violation of [Section] 524(a)(2) may still be found if the debtor proves 'the creditor acted in such a way as to "coerce" or "harass" the debtor improperly,' [in other words], so as to obtain payment of the discharged debt."[184] In turn, "[a]n action is coercive where it is 'tantamount to a threat,' or places the debtor 'between a rock and

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[179] *See* Trinidad v. Empresas Berrios, Inc. (*In re* Trinidad), No. 21-03022, 2022 WL 3363888, at *5 (Bankr. D.P.R. Aug. 12, 2022).

[180] *See, e.g.*, 43A C.J.S. *Injunctions* § 483, Westlaw (database updated Sept. 2025) ("In general, the only questions open for consideration in proceedings for contempt in violating an injunction are whether the court had jurisdiction to award the injunction and whether it has been violated." (footnotes omitted)).

[181] Bates v. CitiMortgage, Inc., 844 F.3d 300, 304 (1st Cir. 2016) (citing Best v. Nationstar Mortg. LLC, 540 B.R. 1, 9 (B.A.P. 1st Cir. 2015)). While it is no longer sufficient post-*Taggart* to hold a creditor in contempt only on the basis of notice of the discharge injunction and an intentional act, see *Orlandi v. Leavitt Fam. Ltd. P'ship* (*In re* Orlandi), 612 B.R. 372, 382 (B.A.P. 6th Cir. 2020) (post-*Taggart* "it is [no longer] sufficient to hold a creditor in civil contempt by finding that 'the creditor was aware of the discharge order and intended the actions that violated the order'" (quoting Taggart v. Lorenzen 587 U.S. 554, 563 (2019)), it is still necessary to make those findings according to some courts. *Cf.* Ragone v. Stefanik & Christie, LLC (*In re* Ragone), No. 20-8013, 2021 WL 1923658, at *8 (B.A.P. 6th Cir. May 13, 2021) (Dales, J., concurring in part and dissenting in part) (cautioning courts against inferring actions, such as "retention of funds garnished in [clear] violation of the discharge [injunction] (but also in ignorance of it) [as] automatically contemptuous").

[182] *Bates*, 844 F.3d at 304 (citing *Best*, 540 B.R. at 9). *Cf.* Mellem v. Mellem (*In re* Mellem), 625 B.R. 172, 178 (B.A.P. 9th Cir. 2021) (characterizing two factors of contemnor's knowledge that (1) discharge injunction applied and that (2) contemnor "intended the actions that violated" the discharge as "movant's threshold burden of going forward."). Some cases formulate the elements differently. *See, e.g.,* Thomas v. City of Phila., 658 B.R. 104, 112 (E.D. Pa. 2024) ("(1) a valid order has been entered; (2) the person to be charged with contempt has actual knowledge of the order; and (3) the person has disobeyed the order.") (quoting *In re Foltz*, 324 B.R. 250, 253 (Bankr. M.D. Pa 2005)).

[183] Lett v. Bank of N.Y. Mellon (*In re* Lett), No. 20-06278-BEM, 2021 WL 4944094, at *8 (Bankr. N.D. Ga., Oct. 22, 2021) (quoting Roth v. Nationstar Mortg., LLC (*In re* Roth), 935 F.3d 1270, 1276 (11th Cir. 2019)) (quoting Roth v. Nationstar Mortg., LLC *(In re* Roth), 935 F.3d 1270, 1276 (11th Cir. 2019)*)*.

[184] Paul v. Iglehart (*In re* Paul), 534 F.3d 1303, 1308 (10th Cir. 2008) (quoting Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 19 (1st Cir. 2006)).

hard place' in which he would lose either way."[185] Indeed, "[a] creditor's actions may be improperly coercive even in exercising legitimate state rights, if the actions impinge upon 'the important federal interest served by the discharge injunction.'"[186]

Facially permissible actions against a discharged debtor tend to require more scrutiny. For example, a debtor may "surrender" collateral under the Bankruptcy Code, which then allows the creditor to exercise its rights under state law.[187] If the secured creditor refuses to repossess the collateral or release the lien unless the debtor pays the discharged loan balance, the creditor's actions could be coercive.[188] This is true because it impinges on the debtor's fresh start despite the facial permissibility of the creditor's entitlement to refuse release of its lien unless and until the outstanding discharged loan balance is paid.[189] Another example is a debtor who receives a discharge but does not reaffirm personal liability for the debt that is secured by real property consisting of their home.[190] In the example where a debtor discharges personal liability on the obligation, such as liability in connection with a mortgage, but remains in their home post-discharge, a debtor may continue to make payments to prevent foreclosure, but if the creditor sends notices of foreclosure with the intention to extract payment personally from the debtor, then a violation of the discharge may be found.[191]

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[185] Lumb v. Cimenian (*In re* Lumb), 401 B.R.1, 7 (B.A.P. 1st Cir. 2009) (first quoting Jamo v. Katahdin Fed. Credit Union (*In re* Jamo), 283 F.3d 392, 402 (1st Cir. 2002); and then quoting Diamond v. Premier Capital, Inc. (*In re* Diamond), 346 F.3d 224, 227–28 (1st Cir. 2003)).

[186] *Id.* (quoting *In re Pratt*, 462 F.3d at 19).

[187] *See In re* Tosi, 546 B.R. 487, 492 (Bankr. D. Mass. 2016) (quoting *In re* Williams, 524 B.R. 514, 518 (Bankr. D. Kan. 2015)). "Surrender" of property in bankruptcy essentially means returning it to the creditor. *See id.* "'Surrender,' though not defined in the Bankruptcy Code, is nonetheless settled and well understood. '"Surrender" means only that the debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral.'" *Id.* (alteration omitted).

[188] *See In re Pratt*, 462 F.3d at 19. In *Pratt*, the debtors financed the purchase of a vehicle through the creditor and granted the creditor a lien on the vehicle. *Id.* at 15. The debtors eventually surrendered the vehicle, received a discharge, and realized the vehicle became inoperable. *Id.* at 16. Before the debtors "could 'junk' the car," state law required the salvage dealers "to obtain a release of the [creditor's] lien." *Id.* The creditor refused "to release its lien unless and until the outstanding loan balance was paid in full." *Id.* The First Circuit held that the creditor's refusal to release the lien was "coercive." *Id.* at 19.

[189] *See id.* ("[E]ven legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction, which is to ensure that debtors receive a 'fresh start' and are not unfairly coerced into repaying discharged prepetition debts.").

[190] *See* 11 U.S.C. § 524(j); Lemieux v. Am.'s Servicing Co. (*In re* Lemieux), 520 B.R. 361, 369 (Bankr. D. Mass. 2014) (recognizing the caselaw holding Section 524(j) allows a debtor to continue to use the property as his or her principal residence post-discharge).

[191] *See e.g.*, *In re Lemieux*, 520 B.R. at 368.

ii. The Civil Contempt Mechanism

Second, a bankruptcy court must then determine whether sanctions are appropriate by asking if there was a "fair ground of doubt" that the discharge applied at the time of the alleged violation.[192] The Bankruptcy Code does not provide an express cause of action for discharge violations.[193] This differs from actions for violations of the automatic stay,[194] which has been noted as an analogous statutory injunction.[195] In other words, there is no private right of action under section 524(a)(2) for violation of the discharge injunction.[196] The lack of an express provision for violations of the discharge injunctions creates an awkwardness that is likely a result of the historical aspect of the discharge as an affirmative defense and not an injunction.[197] Creditors that violate the discharge injunction of section 524(a) are instead subject to contempt of the court that

[192] *See In re* Distefano, 611 B.R. 100, 102 (Bankr. W.D. Mich. 2019) (quoting Taggart v. Lorenzen, 587 U.S. 554, 557 (2019)).

[193] *E.g.*, Reyes v. FCC Nat'l Bank (*In re* Reyes), 238 B.R. 507, 508 (Bankr. D.R.I. 1999) ("[W]e conclude that a proceeding to remedy a violation of the discharge injunction pursuant to 11 U.S.C. § 524(a) must be one for contempt, as there is no express or implied right of action under that Section."); Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 422–23 (6th Cir. 2000) (holding that "§524 does not impliedly create a private right of action").

[194] *See e.g.*, 11 U.S.C. § 362(k).

[195] *See Taggart*, 587 U.S. at 557. In *Taggart*, the Supreme Court addressed these bankruptcy "injunctions" and explained the difference between the automatic stay and the discharge:

> An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." This language, however, differs from the more general language in [Section] 105(a). The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period.

Id. at 564–65 (quoting 11 U.S.C. § 362(k)(1)). *But cf.* Windstream Holdings, Inc. v. Charter Commc'ns Operating, LLC (*In re* Windstream Holdings, Inc.), 105 F.4th 488, 495–99 (2d Cir. 2024) (applying *Taggart* to violations of the automatic stay and then holding that there was a "fair ground of doubt" that the automatic stay was violated).

[196] *See, e.g.*, Joubert v. ABN AMRO Mortg. Grp., Inc. (*In re* Joubert), 411 F.3d 452, 455–56 (3d Cir. 2005); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002); Cox v. Zale Del., Inc., 239 F.3d 910, 917 (7th Cir. 2001); Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421–22 (6th Cir. 2000).

[197] *See generally* Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77, 137–48 (2003) (exploring the right of action to remedy violations of the discharge).

issued the discharge order.[198] Thus, the enforcement mechanism available to debtors is traditional contempt proceedings for violating a court order.[199]

Courts were split on what exactly constituted actionable contempt.[200] In *Taggart v. Lorenzen*,[201] the Supreme Court resolved this split and clarified the standard for determining whether a creditor's actions are in contempt of the discharge injunction.[202] Calling upon "the old soil" of traditional civil contempt principles,[203] the Court unanimously adopted an objective standard for holding a creditor in contempt of the discharge, holding that a bankruptcy "court may hold a creditor in civil contempt for violating a discharge order where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order."[204] In turn, "no fair ground of doubt" arises "when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order."[205] With contempt as a "potent weapon,"[206] the Court noted that "[t]his standard reflects the fact that civil contempt is a 'severe remedy,' and that principles of 'basic fairness requir[e] that those enjoined receive explicit notice' of 'what conduct is outlawed' before being held in civil contempt."[207] By adopting this standard, the Court chose "a middle of the road approach that [intends to] balance the interests of creditors and debtors."[208]

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[198] *See, e.g.*, 11 U.S.C. §§ 524, 105(a); *Taggart*, 587 U.S. at 560; *In re* Sterling, 933 F.3d 828, 832 (7th Cir. 2019) ("When a party violates a bankruptcy court's order by pursuing a discharged debt, the debtor can ask that the court hold that party in contempt." (citing Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004))); *In re* Craytor, 650 B.R. 470, 483–84 (Bankr. D.N.J. 2023); Lohmeyer v. Alvin's Jewelers (*In re* Lohmeyer), 365 B.R. 746, 749 (Bankr. N.D. Ohio 2007); 4 COLLIER *supra* note 151, at ¶ 524.02 ("Therefore, a violation of the injunction may be sanctioned as contempt of court.").

[199] *E.g.*, Fauser v. Green Tree Servicing, LLC (*In re* Fauser), 545 B.R. 907, 912 (Bankr. S.D. Tex. 2016) ("Though the injunction is statutory in nature, its effect is equivalent to that of a court order. Accordingly, the consequences for violating the discharge injunction are identical to the consequences attendant to violating a court order, namely, civil contempt." (citing *In re* Sandburg Fin. Corp., 446 B.R. 793, 803 (S.D. Tex) *aff'd sub nom In re* Am. Rice, Inc., 448 Fed. App'x 415 (5th Cir. 2011))); 4 COLLIER, *supra* note 151, at ¶ 524.02(2)(c) (explaining that civil contempt is the normal sanction for violations of the discharge injunction); *see also Pertuso*, 233 F.3d at 421("[T]he traditional remedy for violation of an injunction lies in contempt proceedings. . . .").

[200] *See, e.g.*, IRS v. Murphy, 892 F.3d 29, 37 (1st Cir. 2018) (recognize the caselaw "continued to apply the generally accepted definition of 'willful violation' and rejected good faith defenses").

[201] 587 U.S. 554 (2019).

[202] *See id.* at 560.

[203] *Id.*

[204] *Id.* at 565.

[205] *Id.* at 557, 560.

[206] *Id.* at 560 (quoting Int'l Longshoremen Ass'n v. Phil. Marine Trade Ass'n, 389 U.S. 64, 76 (1967)).

[207] *Id.* at 561 (first quoting Cal. Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885); and then quoting Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (per curiam)).

[208] Coco, *supra* note 15, at 2.

In sum, the discharge injunction contempt analysis continues to be a two-step process.[209] First, the court must decide whether the creditor's actions violated the discharge.[210] Second, the court must undertake the *Taggart* "no fair ground of doubt" inquiry as to the violations and determine if there was "no objectively reasonable basis for concluding that the creditor's conduct" constituting the violation was lawful.[211]

III. A Comparative Analysis

Although qualified immunity and violations of the discharge injunction differ, both share some similarities. One substantial similarity is the "clearly established" standard for qualified immunity and the "no fair ground of doubt" standard for violations of the discharge injunction because both center on an inquiry of *objectively reasonable* conduct based on fair and explicit notice before the actor is held accountable.[212]

This Article now addresses and discusses the similarities and differences between qualified immunity and violations of the discharge injunction. First, the purpose of qualified immunity and the bankruptcy discharge are addressed. Second, the inquiries are compared, including the objectively reasonable inquiry underlying qualified immunity and violations of the bankruptcy discharge. Finally, procedural aspects, including the burden allocation, are examined. This comparison ultimately establishes a framework for analyzing violations of the discharge injunction under *Taggart*. Further, this comparison will also illustrate the nexus between violations of the discharge injunction and qualified immunity.

A. Purpose

The purpose of qualified immunity is generally two-fold. The doctrine of qualified immunity balances the importance of a damages remedy to protect a citizen's rights against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[213] The general purpose of qualified immunity is to place responsibility for civil judgments on individuals in their individual capacity

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[209] *E.g., In re* Distefano, 611 B.R. 100, 102 (Bankr. W.D. Mich. 2019) ("The task is two-fold: first, the court must decide whether [the creditor] violated the discharge by sending an equivocal demand letter . . . and second, (assuming a violation) whether there was any objectively reasonable basis for believing that the letter did not violate the discharge."); *In re* Dewitt, 644 B.R. 385, 399 (Bankr. S.D. Ohio 2022).

[210] *In re Distefano*, 611 B.R. at 102.

[211] *See id.* (quoting Taggart v. Lorenzen, 587 U.S. 554, 560 (2019)).

[212] *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); *Taggart*, 587 U.S. at 560.

[213] *Harlow*, 457 U.S. at 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

unless the violation of the right was not objectively reasonable, thus allowing the dismissal of lawsuits without merit.[214]

Before addressing the specific purpose of the discharge, the broad purpose of the bankruptcy system must be considered. Bankruptcy laws modify the relationship between a debtor and its creditors, but creditors often hold vastly divergent interests that must be balanced against each other.[215] Bankruptcy generally aims to provide a fresh start to the debtor and to facilitate a fair and orderly repayment of claims to all creditors from a debtor's assets.[216] Specifically for individual debtors, the purpose of providing a debtor a fresh start is "to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'"[217] On the one hand, the fresh start embodied in the discharge clearly benefits the debtor by "eliminat[ing] any doubt concerning the effect[s] of the discharge as a total prohibition on debt collection efforts."[218] On the other hand, bankruptcy also aims "to secure a prompt and effectual administration and settlement of the estate of all bankrupts[, if any,] within a limited period."[219] The prompt and effectual administration and settlement of the bankruptcy case puts all parties on the same page by first halting all collection actions through the automatic stay and then by requiring that all distributions to creditors adhere to the Bankruptcy Code's priority scheme.[220]

The Bankruptcy Code also provides a host of tools that settle disputes regarding estate property and the potential survival of particular debts or security interests, such as determining whether or not a debt is reaffirmed, discharged, or secured by a valid lien.[221] As such, the "inherent conflict between the twin goals of bankruptcy—appropriate relief for those in trouble and equitable treatment for their creditors—ensures that [bankruptcy law itself] always will be an area of contention."[222]

As for the discharge injunction itself, its purpose is to prohibit a creditor's collection efforts post-bankruptcy unless the discharge does not clearly apply to

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[214] *See id.* at 814.

[215] *See* Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) ("[It's] the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.").

[216] *See id.*

[217] Lines v. Frederick, 400 U.S. 18, 19 (1970) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244–45 (1934)).

[218] *See* H.R. Rep. No. 95-595, at 365 (1977).

[219] *See* Katchen v. Landy, 382 U.S. 323, 328 (1966) (quoting *Ex Parte* City Bank of New Orleans, 44 U.S. 292, 312 (1845)).

[220] *See, e.g.*, 11 U.S.C. §§ 362, 726.

[221] *See, e.g.*,, 11 U.S.C. §§ 523(a), 524(a).

[222] NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 78 (1997).

the creditor's debt and its collection efforts.[223] The scope of the injunction under Section 524(a)(2) thus depends upon the policies underlying whether certain debts survive bankruptcy, e.g., liens and non-dischargeable debts, expressed throughout the Bankruptcy Code. In other words, the discharge injunction under Section 524(a)(2) and the strictures on its enforcement balance the policies expressed in the Bankruptcy Code, considered as a whole, against the prohibition of "an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor."[224]

Both qualified immunity and violations of the discharge injunction balance competing purposes. Qualified immunity balances protecting a citizen's rights against protecting government officials performing discretionary functions.[225] Remedying violations of the discharge order's injunction has a multitude of purposes but generally requires balancing the complete prohibition on debt collection efforts against a creditor's right to avoid punishment for collection efforts that were not clearly or objectively prohibited.[226]

B. Elements

i. Violation

Qualified immunity and violations of the discharge order's injunction both use a two-prong test. Following the Court's decision in *Harlow*, courts apply qualified immunity using a two-prong test.[227] Similarly, post-*Taggart*, bankruptcy courts have continued to characterize the analysis for violations of the discharge as a two-step process.[228]

Under a qualified immunity analysis, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; [and] second, assuming the violation is established, the question [is] whether the right was clearly established" so that a reasonable official would understand that what he was doing violates that right.[229] Some courts reformulate the two-prong test by

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[223] *See* 11 U.S.C. § 524.

[224] 11 U.S.C. § 524(a)(2).

[225] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

[226] Woods v. SunTrust Bank, 81 So. 3d 357, 365 (Ala. Civ. App. 2011) (quoting Housh v. Peth, 135 N.E.2d 440, 449 (Ohio 1955), *aff'd*, 133 N.E.2d 340 (Ohio 1956)).

[227] *See* Pearson v. Callahan, 555 U.S. 223, 232–36 (2009) (explaining the two prongs of the qualified immunity test); Saucier v. Katz, 533 U.S. 194, 200 (2001) ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question [is] whether the right was clearly established . . . .").

[228] *See, e.g.*, *In re* Distefano, 611 B.R. 100, 102 (Bankr. W.D. Mich. 2019) ("The task is twofold: first, the court must decide whether Bridgecrest violated the discharge by sending an equivocal demand letter to the Debtor . . . and second, (assuming a violation) whether there was any objectively reasonable basis for believing that the letter did not violate the discharge.").

[229] *Saucier*, 533 U.S. at 200.

stating a defendant will only be held liable if his or her actions were "objectively unreasonable in [view] of clearly established [law]."[230] Other courts add a third prong that essentially examines whether the violation was objectively unreasonable in light of clearly established law.[231] Regardless, qualified immunity is an objective standard.[232]

Likewise, analyzing a violation of the discharge order's injunction is twofold: First, the inquiry is whether the creditor's act violated the discharge order's injunction; and "second, (assuming a violation) whether there was any objectively reasonable basis" for the creditor to believe the act did not violate the discharge.[233] Notably, the first question determines "whether the objective effect of the creditor's action [was] to pressure a debtor to repay a discharged debt."[234] So the standard is also objective for discharge violations.

The first element of qualified immunity can be fact-intensive like the first element for finding a violation of the discharge order's injunction. Under qualified immunity, the first element requires an allegation or evidence of a deprivation of a federal right and that the defendant acted under state law and was personally involved in the conduct that forms the basis of the claim.[235] In a similar fashion, to prove that a discharge violation occurred, a debtor must generally show that an offending creditor "(1) has notice of debtor's discharge . . . ; (2) intends the actions which constituted the violation; and (3) acts in a way that improperly coerces or harasses debtor."[236] The first element's essential

[230] Robertson v. Lucas, 753 F.3d 606, 615 n.4 (6th Cir. 2014) (quoting Feathers v. Aey, 319 F.3d 843, 848 (6th Cir. 2003)).

[231] *See, e.g.*, Wilson v. City of Bos., 421 F.3d 45, 53 n.10, 57–58 (1st Cir. 2005).

[232] Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

[233] *See In re Distefano*, 611 B.R. at 102.

[234] Roth v. Nationstar Mortg., LLC (*In re* Roth), 935 F.3d 1270, 1276 (11th Cir. 2019) (quoting Green Point Credit, LLC v. McLean (*In re* McLean), 794 F.3d 1313, 1322 (11th Cir. 2015)).

[235] Whitwell, *supra* note 50, at 406 ("As to the first prong, a plaintiff must plead . . . that the defendant was personally involved in the conduct that forms the basis of his complaint. The plaintiff must also show that the defendant's conduct constituted a violation of the plaintiff's constitutional or other federal right." (citations omitted)). "For example, if a plaintiff alleges that [an official] violated [plaintiff's] First Amendment rights by arresting him for videotaping the officer during a traffic stop, the plaintiff must plead (or submit record evidence at the summary judgment stage to show) that such conduct amounts to a violation of the First Amendment and that it was in fact the defendant officer who committed the act." *Id*.

[236] Bates v. CitiMortgage, Inc., 844 F.3d 300, 304 (1st Cir. 2016) (quoting Best v. Nationstar Mortg. LLC, 540 B.R. 1, 9 (B.A.P. 1st Cir. 2015)). Some bankruptcy courts do not analyze whether the creditor acted in such a way as to "coerce" or "harass" the debtor improperly. *See, e.g.*, Mellem v. Mellem (*In re* Mellem), 625 B.R. 172, 178 (B.A.P. 9th Cir. 2021) ("The moving party still must show at the outset that the alleged contemnor: (1) knew the discharge injunction applied; and (2) intended the actions that violated the injunction." (citing Ocwen Loan Servicing, LLC v. Marino (*In re* Marino), 577 B.R. 772, 782–83 (B.A.P. 9th Cir. 2017))). As mentioned above, a violation may still be found if the debtor proves the creditor acted in such a way to coerce or harass the debtor improperly to obtain payment of the discharged debt. Lumb v. Cimenian (*In re* Lumb), 401 B.R. 1, 6 (B.A.P. 1st Cir. 2009). *But see Bates*, 844 F.3d at 304 (noting the elements a debtor must prove for a violation of the injunction are three-fold: "(1) [creditor] has notice of the debtor's

requirement is a showing of a creditor's act to collect on a debt, i.e., force payment, that has been discharged—an objective determination of whether the creditor's action "pressured a debtor to repay a discharged debt."[237] At bottom, like qualified immunity, the first element of the analysis for a violation of the discharge injunction may be fact-intensive.

ii. Objective Reasonableness

The second element of qualified immunity parallels the second element for a violation of the discharge order's injunction. Under the qualified immunity analysis, assuming a plaintiff can assert a violation of a constitutional right, the next step requires a plaintiff to prove that the federal law regarding this right was clearly established at the time of the challenged conduct.[238] This "clearly established" inquiry means it must have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted.[239] This is an objective standard,[240] which analyzes whether an official acted in an "objectively reasonable" manner.[241] Generally, a right is not clearly established if set forth in unpublished nonprecedential opinions,[242] or if circuits disagree, conflict, or split

discharge; (2) intends the actions which constituted the violation; and (3) acts in a way that improperly coerces or harasses the debtor" (alteration omitted) (quoting *Best*, 540 B.R. at 9)). Importantly, coercion or harassment must be contextualized against the facial permissibility of a creditor's acts. In other words, if the creditor files a lawsuit, but the suit is meritless and was filed for the purpose of collecting a debt, such an act could be viewed as being tantamount to a threat. *See, e.g.*, Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 19 (1st Cir. 2006) ("[E]ven legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction . . . ."). Or, as in *Pratt*, the creditor's actions were objectively coercive under the circumstances where the creditor refused to release the lien on a car that the debtors had "surrendered" until the debtors paid the loan balance in full, as allowed under state law. *Id.* at 16, 20. Thus, in *Pratt*, the refusal to release the lien, despite validly surrendering the car under the statutory provisions of the Code, was an improper act. *Id.* at 20; *see supra* note 188.

[237] *See* Roth v. Nationstar Mortg., LLC (*In re* Roth), 935 F.3d 1270, 1276 (11th Cir. 2019) (quoting *In re McLean*, 794 F. 3d at 1322).

[238] Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982)).

[239] Saucier v. Katz, 533 U.S. 194, 201–02 (2001) (quoting *Anderson*, 483 U.S. at 640).

[240] *Anderson*, 483 U.S. at 641 ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law . . . .").

[241] Malley v. Briggs, 475 U.S. 335, 341 (1986) ("Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an *objectively reasonable manner*." (emphasis added)).

[242] *See supra* notes 84–85 and accompanying text.

on the question.[243] However, if applicable binding precedent sets forth the right,[244] then the law is generally considered clearly established.[245]

So an official who violated clearly established federal law did not act in an objectively reasonable manner, while an official who violated federal law, but not clearly established federal law, acted in an objectively reasonable manner. Additionally, this test is described as a "fair warning" standard; if federal law was clearly established, then the official is on notice that violating the federal law may result in liability.[246] As mentioned above, binding precedent with analogous facts generally determines whether the federal law prohibiting the conduct was clearly established.[247]

Similarly, the second element for remedying a violation of the discharge order's injunction is an objective standard. A creditor may be held in contempt for violating the discharge order's injunction "when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order."[248] In other words, a creditor may be held in contempt "where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order."[249] The Supreme Court noted that this objective standard is necessarily based on "principles of 'basic fairness'" that "'require[e] explicit notice' of 'what conduct is outlawed' before being held in civil contempt."[250] A creditor's explicit notice of what conduct is outlawed is like the "fair warning" standard for purposes of determining whether the law was clearly established under qualified immunity. Thus, a creditor's conduct was objectively unreasonable if there was no fair ground of doubt as to the unlawfulness of the creditor's conduct under the discharge order, while a creditor whose conduct violated the discharge order, but there was a fair ground of doubt as to whether the creditor's act was unlawful, acted in an objectively reasonable manner.

Correspondingly, determining whether there is a fair ground of doubt for violations of the discharge may be like determining whether the law was clearly established for qualified immunity. Moreover, like qualified immunity, some bankruptcy courts have only relied on binding precedent, finding that

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[243] *See supra* notes 86–90 and accompanying text.

[244] Depending on the circuit, "applicable binding precedent" may be Supreme Court precedent or binding precedent from a prior panel in the applicable circuit.

[245] *See, e.g.*, Taylor v. Barkes, 575 U.S. 822, 826 (2015) (per curiam).

[246] *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002); *see also* Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992) ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." (citing Anderson v. Creighton, 483 U.S. 635, 639–40 (1987); and then citing Gooden v. Howard County, 954 F.2d 960, 968 (4th Cir. 1992) (en banc))).

[247] *See* White v. Pauly, 580 U.S. 73, 78–79 (2017) (per curiam) (quoting Mullenix v. Luna, 577 U.S. 7, 11–12 (2015)); Hearring v. Sliwowski, 712 F.3d 275, 280 (6th Cir. 2013) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

[248] Taggart v. Lorenzen, 587 U.S. 554, 560 (2019).

[249] *Id.* at 565.

[250] *Id.* at 561 (alteration in original) (quoting Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (per curiam)).

unpublished nonprecedential opinions do not provide an objectively reasonable basis that a creditor's conduct was outlawed.[251] Similarly, bankruptcy courts have held a fair ground of doubt exists when there is a split of authority, indicating that the law was not clearly established.[252] This is identical to the "clearly established" inquiry for qualified immunity since disagreements, conflicts, or splits of authority do not clearly establish the law.[253] Thus, statutory provisions of the Bankruptcy Code that are the subject of disagreement and create splits in authority may provide a fair ground of doubt as to the lawfulness of a creditor's conduct.[254]

In addition to the Bankruptcy Code's statutory provisions creating a fair ground of doubt, non-bankruptcy law may also provide a fair ground of doubt. Unlike qualified immunity, which relies on federal law, parties may need to rely on non-bankruptcy law, such as lien enforcement under state law, to determine whether there was a fair ground of doubt as to the lawfulness of a creditor's actions.[255] Conflicting state law precedent may create a fair ground of doubt. And unanswered questions under non-bankruptcy law, e.g., state law, may also provide a fair ground of doubt as to the lawfulness of a creditor's conduct.[256]

In short, the objective standard under *Taggart* can be expected to generate litigation between debtors and creditors in determining whether contempt is appropriate.[257] Like qualified immunity, "[t]he issue to be resolved under this

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[251] *See In re* Blanco, 649 B.R. 571, 580 (Bankr. E.D. Wash. 2023); *cf. In re* Scherman, No. 21-20542, 2023 WL 4280098, at *4 (Bankr. E.D. Ky. May 24, 2023) ("In fact, Creditor's nonprecedential opinions from outside the Sixth Circuit do not provide an objectively reasonable basis to conclude its actions were lawful."); *see also In re* Crawford, 653 B.R. 627, 631 (Bankr. S.D. Ohio 2023) (recognizing creditor's argument that civil contempt is not available because there is a fair ground of doubt creditor's "conduct was wrongful based on [caselaw] holding private student loans [are] nondischargeable").

[252] *See, e.g.*, *In re Scherman*, 2023 WL 4280098, at *4; Orlandi v. Leavitt Fam. Ltd. P'ship (*In re* Orlandi), 612 B.R. 372, 382–83 (B.A.P. 6th Cir. 2020).

[253] *See supra* notes 81–90 and accompanying text (describing the "clearly established" inquiry for qualified immunity).

[254] *See* Taggart v. Lorenzen, 587 U.S. 554, 562 (2019) (noting that the statutes governing the scope of the discharge order may determine whether there was no fair ground of doubt).

[255] *Cf. In re* Beard-Williams, 626 B.R. 830, 839 (Bankr. C.D. Cal. 2021) ("Creditors had an objectively reasonable basis for concluding that the [p]roperty was not [post-petition]-acquired community property protected by the discharge [order's] injunction . . . .").

[256] *Cf.* Pratt v. Gen. Motors Acceptance Corp., 462 F.3d 14, 16, 20 (1st Cir. 2006) (reversing bankruptcy court's determination that state law unqualifiedly entitled the creditor to refuse to release a lien and the refusal to release the lien would not be a violation of the discharge order's injunction).

[257] *Compare* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854–59 (2010) (describing some of the issues to litigate under "clearly established" law), *with* Coco, *supra* note 15, at 10 ("[T]he Court's new objective standard for bankruptcy cases can be expected to generate litigation between a discharged debtor and a creditor seeking payment of a discharged debt over whether a civil contempt order should be issued pursuant to the Court's new standard."). A bankruptcy court can award attorney's fees as a sanction to compensate the complainant for losses stemming from the defendant's noncompliance with an injunction. *See* Law Offices of

standard will be whether under the facts of the particular case there was 'no objectively reasonable basis for concluding that the [actor's] conduct might be lawful,' or whether there was 'no fair ground of doubt as to whether the discharge order barred the [actor's] conduct'"[258] by resorting to applicable precedent or other law.[259] At bottom, fair notice underlies qualified immunity and contempt for violations of the discharge injunction.

iii. Sequencing

The sequencing issue resolved under qualified immunity should also produce a similar outcome for violations of the discharge injunction. The standard for remedying violations of the discharge order's injunction is unlikely to raise a sequencing issue as it did, for a time, in a qualified immunity analysis. After *Saucier*, a qualified immunity determination required a sequential two-step analysis by first determining whether a violation of a constitutional right has been alleged before proceeding to the second inquiry of asking "whether the right was clearly established."[260] *Saucier* was eventually overruled.[261] The sequence of the analysis is not an inflexible requirement.[262] Instead, an analysis of either prong is left to judicial discretion.[263] Similarly, it appears that a strict two-step sequence should not be mandatory for violations of the discharge order's injunction.[264] That is, determining whether a creditor violated the discharge order's injunction before turning to whether there was an objectively reasonable basis for concluding that the creditor's conduct was lawful should not be required. A bankruptcy court should be able to proceed directly to the second inquiry without raising a sequencing issue akin to the sequencing dilemma courts faced in qualified immunity cases.[265] Failure at either of the two steps

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Francis J. Reilley, Esq. v. Selene Fin., L.P. (*In re* DiBattista), 33 F.4th 698, 703 (2d Cir. 2022). It is worth noting that a prevailing plaintiff in a section 1983 claim can recover attorney's fees from a losing defendant. *See* 42 U.S.C. § 1988(b).

[258] Coco, *supra* note 15, at 10 (alteration omitted).

[259] *In re* Crawford, 653 B.R. 627, 631 (Bankr. S.D. Ohio 2023).

[260] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

[261] *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

[262] *See id.* at 234–36.

[263] *See id.*

[264] *See, e.g.*, Zellner v. Lutz (*In re* Zellner), No. 15-01286, 2020 WL 1181337, at *9 (Bankr. M.D. Pa. Mar. 11, 2020) ("Because no violation of the discharge injunction occurred, the Court need not undergo a *Taggart* 'no fair ground of doubt' analysis.").

[265] *Cf.* Persinger v. Sw. Credit Sys., L.P., 20 F.4th 1184, 1195 (7th Cir. 2021) (recognizing a "sequencing issue" under the Fair Credit Reporting Act "akin to the sequencing dilemma courts face in qualified immunity cases" (citing Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 70 (2007))); Hajdusek v. United States, 895 F.3d 146, 149–50, 152–53 (1st Cir. 2018) (conducting the "familiar analytic framework" of first "identify[ing] the conduct that allegedly caused the harm," and, second, asking whether the discretionary function exception under the Federal Tort Claims Act applies, which includes analyzing whether the decision was "objectively reasonable" (quoting Shansky v. United States, 164 F.3d 688, 690–91 (1st Cir. 1999))).

defeats a claim to hold a creditor in contempt regardless of the order of operations used.

Yet this flexibility may cause some concerns. Commentators have criticized qualified immunity's sequencing discretion, arguing that skipping the first step—whether a violation occurred—stagnates the law and deprives parties of needed judicial guidance.[266] Bankruptcy courts may face similar criticism if they bypass this first step and proceed directly to deciding whether the creditor had an objectively reasonable basis for concluding their conduct was lawful. If bankruptcy courts routinely exercise this discretion, critics may argue that judges are merely "clear[ing] their dockets" instead of resolving the "difficult [bankruptcy] issues" that need to be decided to clarify unsettled law, even though the difficult issues "may be the ones that need to be decided in order to provide guidance in areas of uncertainty."[267] In short, the discretion allowing judges to skip the first step of the analysis may prevent the law from developing. If courts avoid the first step and proceed directly to the second step by analyzing whether there was an objectively reasonable basis for concluding that the creditor's conduct might be lawful, then the law never becomes clearly established—and creditors may always be able to argue that there was a fair ground of doubt as to whether the discharge order barred the creditor's conduct.

C. Procedure

One difference, by nature, is the posture of the inquiry. Qualified immunity is an affirmative defense that a defendant must plead.[268] Qualified immunity should generally be decided at the earliest possible stage in the litigation because it is viewed as an immunity from suit.[269] Whereas a claim in the bankruptcy court that the discharge order's injunction has been violated must be asserted by a debtor in the first instance.[270]

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[266] *See supra* notes 38–44 and accompanying text.

[267] *Cf.* Nielson & Walker, *supra* note 52, at 23–25 (quoting Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 Sup. Ct. Rev. 139, 171) (discussing a common criticism of qualified immunity).

[268] Gomez v. Toledo, 446 U.S. 635, 640 (1980); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

[269] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (citing *Harlow*, 457 U.S. at 818).

[270] *See, e.g.*, Ricketts v. Bank of Am. Corp. (*In re* Ricketts), No. 13-1022-BAH, 2013 WL 6858941, at *10 (Bankr. D.N.H. Dec. 23, 2013) ("The Court finds that the Debtor has met her burden to plead sufficient facts that, when taken favorably, support a claim for relief for violation of the discharge injunction that is plausible on its fact."). Contempt may be a "contested matter" in the main bankruptcy case or an "adversary proceeding." *See* FED. R. BANKR. P. 9014; Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 452 (2004). An "adversary proceeding" has similarities to a traditional civil trial. *See Hood*, 541 U.S. at 452 (noting that "this 'adversary proceeding' has some similarities to a traditional civil trial . . . ."). Unlike adversary proceedings, contested matters are a residual category with no definition. *See* Bullard v. Blue Hills Bank, 575 U.S. 496, 505 (2015)

A potential similarity, however, is the party that holds the burden. Generally,[271] once qualified immunity is properly raised, the burden of proof ordinarily shifts to the plaintiff to show that the defendant violated a specific right and that the right was clearly established at the time of the conduct at issue.[272] Likewise, a debtor has the burden of proving that the creditor committed a sanctionable violation of the discharge order and should thus be held in contempt.[273] So the party seeking to hold the violator accountable for their conduct generally holds the burden in both contexts.

However, to some extent, the standard, or *quantum*, of proof differs when determining whether qualified immunity applies and whether a creditor should be held in contempt for violating the discharge order's injunction. The "clearly established" element under qualified immunity is a question of law; whether a violation occurred is a question of fact.[274] The party opposing qualified

(recognizing that "contested matters" are virtually "'endless' and cover[ ] all sorts of minor disagreements") (citing 10A COLLIER, *supra* note 151, at ¶ 9014.01). Because an adversary proceeding provides more procedural protections than a contested matter, "courts routinely hear contempt actions brought as adversary proceedings." Motichko v. Premium Asset Recovery Corp. (*In re* Motichko), 395 B.R. 25, 32 (Bankr. N.D. Ohio 2008).

[271] One commentator has recognized that the circuits are in a disarray as to which party bears the burden of proof on the major steps in a qualified immunity inquiry; and there is commentary that the defendant should bear that burden. *See* Duvall, *supra* note 51, at 142–48, 166 (examining the allocation of the burdens in cases examining qualified immunity). For purposes of this discussion, it is presumed that the defendant will bear the burden that they are entitled to assert qualified immunity, and the plaintiff bears the burden of showing that the defendant acted in an objectively unreasonable manner, i.e., that the law was "clearly established."

[272] *See, e.g.*, Rogers v. Jarrett, 63 F.4th 971, 975 (5th Cir. 2023) ("We have explained before that plaintiffs bear the 'burden' to 'demonstrate the inapplicability of the defense.'" (quoting McClendon v. City of Columbia, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam))); Myrick v. Fulton Cnty., 69 F.4th 1277, 1297 (11th Cir. 2023) ("The defendant asserting the qualified immunity defense bears the initial burden of showing that he or she was acting within his or her discretionary authority. After the defendant makes this showing, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." (footnote omitted) (first citing Piazza v. Jefferson Cnty., 923 F.3d 947, 951 (11th Cir. 2019); and then Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002))); Hicks v. Feeney, 850 F.2d 152, 159 (3d Cir. 1988); Williams v. Maurer, 9 F.4th 416, 430 (6th Cir. 2021) ("Once raised, the plaintiff bears the burden of showing that a defendant is not entitled to qualified immunity." (quoting Bletz v. Gribble, 641 F.3d 743, 750 (6th Cir. 2011))); Roska v. Sneddon, 437 F.3d 964, 971 (10th Cir. 2006) ("To overcome a qualified immunity defense, a plaintiff must first establish a violation of a constitutional or statutory right and then show that the right was clearly established." (citing Garramone v. Romo, 94 F.3d 1446, 1449 (10th Cir. 1996))). *But see* Vasquez v. Maloney, 990 F.3d 232, 238 n.5 (2d Cir. 2021) ("'Because qualified immunity is an affirmative defense,' however, at the summary judgment stage 'the defendants bear the burden of showing that the challenged act was objectively reasonable in light of the law existing at that time.'" (quoting Tellier v. Fields, 280 F.3d 69, 84 (2d Cir. 2000))).

[273] *In re* City of Detroit, 614 B.R. 255, 265–66 (Bankr. E.D. Mich. 2020); *In re* Cantrell, 605 B.R. 841, 853 (Bankr. W.D. Mich. 2019) (citing Glover v. Johnson, 138 F.3d 229, 244 (6th Cir. 1998)).

[274] *See* Elder v. Holloway, 510 U.S. 510, 516 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'"); Crawford-El

immunity generally bears the burden of convincing the court that qualified immunity does not apply, which necessarily entails convincing the court that the conduct was not objectively reasonable because the law was clearly established.[275] In contrast, for violations of the discharge order's injunction, the moving party must generally prove the required elements of a violation of the injunction—meaning the creditor (1) had notice of the discharge; (2) intended the acts constituting the violation; and (3) acted improperly to collect a discharged debt—by clear and convincing evidence.[276] *Taggart* did not address the quantum of proof—how much factual evidence—the moving party must adduce to survive a sufficiency of the evidence challenge.[277] The clear and convincing standard likely still applies for proving civil contempt.[278]

That said, the burden, if any, of demonstrating there was a fair ground of doubt as to whether the order barred the creditor's conduct—that is, proving there was no objectively reasonable basis for concluding that the creditor's conduct might be lawful—may be subject to debate after *Taggart*.[279] If the party seeking to rectify the creditor's wrongful acts must demonstrate that there was no objectively reasonable basis for concluding the conduct was lawful, then this demonstration may be similar to qualified immunity.[280] For example, some bankruptcy courts have noted whether the moving party had met their burden of proving there was no fair ground of doubt by clear and convincing evidence.[281] Other bankruptcy courts appear to address whether there was "no fair

v. Britton, 523 U.S. 574, 589 (1998) ("The court's clear and convincing evidence requirement applies to the plaintiff's showing of improper intent (a pure issue of fact), not to the separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question.'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))).

[275] *See, e.g.*, Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988) ("The plaintiff carries the burden of convincing the court that the law was clearly established." (citing Lutz v. Weld Cnty. School Dist., 784 F.2d 340, 342–43 (10th Cir. 1986))).

[276] *See* Wagabaza v. Beveridge (*In re* Wagabaza), 582 B.R. 486, 505 (Bankr. C.D. Cal. 2018) ("[T]he Ninth Circuit made a definitive statement to clarify the finding necessary for contempt for violation of the discharge injunction: the movant must establish by clear and convincing evidence that the contemnee was aware of the discharge injunction and that it applied to its claims." (citing Zilong, Inc. v. Corning (*In re* Zilog, Inc.), 450 F.3d 996, 1009–10 (9th Cir. 2006))); *In re* Sterling, 933 F.3d 828, 832 (7th Cir. 2019) ("Sterling, as the debtor, had the burden of proving the defendants' contempt by clear and convincing evidence." (quoting *In re* City of Detroit, 614 at 265)).

[277] *See* Taggart v. Lorenzen, 587 U.S. 554 (2019).

[278] *See In re* City of Detroit, 614 at 265–66 (In regards to showing "that (1) the party violated a definite and specific order of the court; ... [and] (2) the party did so with knowledge of the court's order," the movant "must prove them by clear and convincing evidence.")

[279] *See id*. (noting the moving party has the burden to prove a violation of a court order with "knowledge of the court's order" but refusing to address whether the moving party has the burden of proving there was no fair ground of doubt by clear and convincing evidence).

[280] In the qualified immunity context, it has been suggested that the defendant should bear the burden of proving that their conduct was objectively reasonable. *See* Duvall, *supra* note 51, at 166–67 (examining the allocation of the burdens in cases examining qualified immunity).

[281] *See, e.g.*, *In re* Freeman, No. 11-bk-34162, 2020 WL 7483141, at *5 (Bankr. C.D. Cal. Sept. 4, 2020) ("This Bankruptcy Court concludes that Debtor has not met his burden to show,

ground of doubt"—without identifying who must convince the court on this inquiry—but address this inquiry only after the moving party has shown a violation of a discharge order by clear and convincing evidence.[282] In other words, analyzing contempt for a violation of the discharge injunction, may resemble qualified immunity because the debtor will likely need to convince the court that there was "no fair ground of doubt."[283] However, placing this onus on the debtor, in some circumstances, may be viewed as a relic of the discharge serving as an affirmative defense, which defies Congressional intent.[284] That is, requiring the debtor to both *identify* a factually similar case or cases, and then to *convince the courts* (starting with the bankruptcy court) that it is sufficiently similar, as explained below, may be seen as relegating the discharge back to an affirmative defense. It also presents similar challenges to the party holding the burden in qualified immunity.[285]

First, consider the example of a factual issue when there is no dispute that the creditor did not have an objectively reasonable basis, i.e., "no fair ground of doubt," for concluding the debt was not discharged.[286] The debtor would have the burden of proving the creditor had notice of the discharge, intended the actions constituting the violation, and acted in a way to improperly coerce the debtor.[287] These elements generally must be proven by clear and convincing

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by clear and convincing evidence on an 'objective' basis, that there was no 'fair ground of doubt' that the discharge injunction applied to bar Nationstar from enforcing what it thought were its surviving post-discharge lien rights." (quoting *Taggart*, 587 U.S. at 565)); *In re* Beard-Williams, 626 B.R. 830, 839 (Bankr. C.D. Cal. 2021).

[282] *See, e.g.*, *In re* Bronson, No. 20-30704-11, 2022 WL 3637566, at *4 (Bankr. D. Or. Aug. 23, 2022) ("To establish a basis for civil contempt, the moving party has the burden to show by clear and convincing evidence that the alleged contemnor has violated a specific and definite order of the court. There must also be no fair ground of doubt as to whether the order confirming plan barred the creditor's conduct." (first citing Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1190–91 (9th Cir. 2003); and then citing *Taggart*, 587 U.S. at 556)); Santangelo v. Clarvit (*In re* Santangelo), 643 B.R. 481, 487 (Bankr. M.D. Ala. 2022) ("If the court determines a violation occurred, the court then determines whether there was an 'objectively reasonable basis for concluding that the creditor's conduct might be lawful.' Ultimately, Plaintiff bears the burden of proving a discharge violation by clear and convincing evidence." (first quoting *Taggart*, 587 U.S. at 557; and then citing *In re* McLean, 794 F.3d 1313, 1326 (11th Cir. 2015))); *In re* Eichor, 689 F. Supp. 3d 438, 446 (S.D. Tex. 2023) ("The bankruptcy debtor (or other moving party) must prove 'at least' the first two elements by clear and convincing evidence.").

[283] *See, e.g.*, Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988) ("The plaintiff carries the burden of convincing the court that the law was clearly established." (citing Lutz v. Weld Cnty. Sch. Dist., 784 F.2d 340, 342–43 (10th Cir. 1986))).

[284] *See supra* notes 95–136 and accompanying text.

[285] The same problems associated with qualified immunity appear to exist if the debtor has the burden of establishing there was no objectively reasonable basis for concluding the debt was discharged, such as forcing the plaintiff to "prove more to . . . prevail on their claim." *See* Duvall, *supra* note 51, at 167.

[286] A primordial example is an unsecured creditor demanding payment of a discharged debt despite being properly listed and scheduled in the debtor's bankruptcy schedules and matrix.

[287] *See* Bates v. CitiMortgage, Inc., 844 F.3d 300, 304 (1st Cir. 2016) (quoting Best v. Nationstar Mortg. LLC, 540 B.R. 1, 9 (B.A.P 1st Cir. 2015)).

evidence.[288] However, the debtor does not have to attempt to persuade the court that the debt was discharged; that is, that there was no objectively reasonable basis for concluding the acts were lawful and satisfying the "no fair ground of doubt" standard, because the law clearly established the debt was discharged.

Second, consider a legal inquiry—whether there was an objectively reasonable basis—in contrast to a factual inquiry. For example, if an unsecured creditor demanded payment after the entry of the discharge order because the unsecured creditor claimed the debt was statutorily excepted from discharge, then the contempt inquiry creates difficulties. If there is a split of authority on the applicable statutory exception from discharge, then the debtor loses.[289] A split in authority or a lack of binding precedent—meaning the law was not clearly established—on the extinguishment of the debt, and thus the right to collect on that debt, may provide a creditor with an objectively reasonable basis for concluding its conduct was lawful.[290] In this context, the creditor, not the debtor, should have the burden of proving the conduct was objectively reasonable because it restyles or reframes the discharge into an affirmative defense by having the debtor essentially prove the debt was discharged.[291] If a debtor has to appear and argue that a statute, such as an exception under section 523(a),[292] governing the scope of the discharge left "no fair ground of doubt" that the debt was discharged, then it essentially forces debtors to appear in a post-discharge action to plead the discharge as a defense and persuade the court the discharge applies to the debt.

In sum, the greatest similarity between qualified immunity and violations of the discharge order's injunction is the second inquiry. This second inquiry for qualified immunity, the clearly established inquiry, is strikingly like the no fair ground of doubt standard in bankruptcy. Both examine whether the conduct was objectively reasonable.[293] However, there are some differences, by nature of

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[288] *See, e.g.*, Wagabaza v. Beveridge (In re Wagabaza), 582 B.R. 486, 505–06 (Bankr. C.D. Cal. 2018) (citing Zilong, Inc. v. Corning (*In re* Zilog, Inc.), 450 F.3d 996, 1009–10 (9th Cir. 2006)).

[289] *See In re* Scherman, No. 21-20542, 2023 WL 4280098, at *4 (Bankr. E.D. Ky. May 24, 2023).

[290] *See id.*

[291] For example, if there is an arguable basis for concluding the debt was not discharged, such as an absence of authority, the debtor may have the burden of proving the creditor violated the discharge injunction and also proving the inverse of the creditor's case that the debt was excepted from discharge by disproving the necessary elements. *Cf.* Duvall, *supra* note 51, at 167 (analyzing the considerations and consequences when the party bears the burden of proof for qualified immunity). In a sense, this shifts the burden to the debtor to prove the debt was discharged. *Cf.* Grogan v. Garner, 498 U.S. 279, 287–91 (1991) (holding the creditor claiming non-dischargeability bears the burden of proving, by a preponderance of the evidence, that the debt is excepted from discharge).

[292] Jurisdiction may be exercised by either the state court or the bankruptcy court or other non-bankruptcy court for most dischargeability determinations. *See* 11 U.S.C. § 523(c); FED. R. BANKR. P. 4007 advisory committee's notes. The "bankruptcy court has exclusive jurisdiction of most dischargeability determinations under subsections 523(a)(2), (4) and (6)." 4 COLLIER, *supra* note 151, at ¶ 523.03. Therefore, a creditor could carefully file a complaint in state court seeking dischargeability of a debt without challenging the discharge order.

[293] *See supra* notes 238–250 and accompanying text.

being distinct inquiries turning on different bodies of law, between discharge violations and qualified immunity as well, such as the standard of proof.[294] Nonetheless, the two-step analytical framework for analyzing qualified immunity provides a structure in instances of discharge injunction violations. After recognizing the differences, such as their respective purposes and burdens, the analytical framework for qualified immunity may serve as a blueprint for determining whether a creditor should be held in contempt for violating the discharge order's injunction.

Conclusion

The discharge in bankruptcy and qualified immunity, while vastly different in the context of their application, embody essential aspects of the legal system. The discharge offers a fresh start to the honest and unfortunate debtor.[295] On the other hand, qualified immunity balances the need to protect discretionary actions by officials while holding officials accountable when they exercise their power irresponsibly and violate federal law.[296]

However, a comparative analysis reveals that the discharge and qualified immunity share more in common than merely serving as mechanisms by which the law seeks to harmonize individual protections with broader societal interests. Both rely on an objective standard that analyzes whether a party's actions were unreasonable and in violation of the law.[297] Both also rely on the principle of explicit notice. Qualified immunity is partly derived from principles of notice and fair warning.[298] Likewise, the discharge requires that those enjoined receive explicit notice of what conduct is outlawed before being held in contempt.[299] These underlying principles may have already led to the development of a discharge standard similar to qualified immunity, such as requiring a case on point before a creditor is held in contempt. Post-*Taggart*, a debtor will need to point to cases that succeed on the first inquiry (that a violation occurred) but may nonetheless fail on the second inquiry (that the law was clearly established) because a debtor seeking to hold a creditor in contempt will have difficulty establishing the creditor acted in an objectively unreasonable manner under the discharge order or the statutes that govern its scope if the law was not clearly established. If this is the case, then *Taggart* may "represent[] the bankruptcy version of qualified immunity for creditors."[300]

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[294] *See supra* notes 274–278 and accompanying text.
[295] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
[296] Pearson v. Callahan, 555 U.S. 223, 231 (2009).
[297] *See supra* notes 238–250 and accompanying text.
[298] *See* Schwartz, *Case Against Qualified Immunity*, *supra* note 74, at 1815.
[299] *See* Taggart v. Lorenzen, 587 U.S. 554, 561 (2019) (quoting Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (per curiam)).
[300] *In re* Ostrander, No. 11-33801, 2022 WL 999680, at *30 (Bankr. N.D. Ohio Apr. 1, 2022).

Commentators have addressed the difficulties under qualified immunity.[301] It is imperative to consider the role, scope, and limitations of the discharge injunction in contrast to qualified immunity. Properly situating enforcement of the discharge builds on a bankruptcy system that is not only responsive to the discharge order's injunction providing a debtor with a fresh start but also one that truly embodies the principles designed to strike a delicate balance between protecting the interests of both debtors and creditors. Failure to consider the unique nature of the discharge, and the relative infancy of the discharge order's injunction, may result in difficulties like those associated with qualified immunity.

[301] *See, e.g.*, Williams, *supra* note 86, at 1303–04. *See generally* Schwartz, *supra* note 41, at 606–12 (discussing issues that arise under the current qualified immunity doctrine).