No. 12-60052

In the United States Court of Appeals for the Ninth Circuit

IN RE: IRENE MICHELLE SCHWARTZ-TALLARD,
Debtor.

AMERICA'S SERVICING COMPANY,
Appellant,

v.

IRENE MICHELLE SCHWARTZ-TALLARD,
Appellee.

Appeal from the United States Bankruptcy Appellate Panel of the Ninth Circuit in No. 11-1429, Hon. Kirscher, Pappas, and Dunn

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BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF APPELLEE IRENE MICHELLE SCHWARTZ-TALLARD

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for amicus curiae certifies that the National Association of Consumer Bankruptcy Attorneys is a nongovernmental corporate entity; it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization with a membership of approximately 3,000 consumer bankruptcy attorneys nationwide. Incorporated in 1992, NACBA is the only national association of attorneys organized specifically to protect the rights of consumer bankruptcy debtors.

As part of its mission, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates nationally for consumer debtors on issues that cannot be adequately addressed by its individual members alone. NACBA participates regularly as amicus in significant cases implicating the core rights of consumer bankruptcy debtors. *E.g.*, *Law* v. *Siegel*, 134 S. Ct. 1188 (2014); *Ransom* v. *FIA Card Servs., N.A.*, 562 U.S. 61 (2011); *Hamilton* v. *Lanning*, 560 U.S. 505 (2010); *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260 (2010).

NACBA's membership has a vital interest in the proper disposition of this case. This matter presents the latest in a series dealing with the fallout of *Sternberg* v. *Johnston*, 595 F.3d 937 (9th Cir. 2010). Congress created a powerful remedy in 11 U.S.C. 362(k)(1) to protect debtors and creditors from willful violations of the automatic stay, awarding "actual damages, including costs and attorneys' fees." But *Sternberg* read the statute narrowly, restricting fee awards to efforts to termi-

nate the violation, but not to recover the resulting damages. That decision openly split with the Fifth Circuit, *Young* v. *Repine (In re Repine)*, 536 F.3d 512 (5th Cir. 2008), and has been emphatically rejected by every decision outside this Circuit confronting the question. Its "unnecessarily complicated" application continues to confound the courts and parties, *Snowden* v. *Check Into Cash of Wash. Inc. (In re Snowden)*, 769 F.3d 651, 661 (9th Cir. 2014) (Watford, J., concurring), and this is yet another case forcing this Court to define the outer edges of *Sternberg*'s holding.

There is another way. This matter presents a crucial opportunity to reconsider *Sternberg* before taking it for another round. This Court's precedent is at odds with Section 362(k)'s plain text, undermines its statutory purpose, and generates unnecessary confusion in an area that demands uniformity. The issue has squarely divided the courts, and this Court's minority position has been "sharply criticized" on multiple grounds. *E.g.*, *Duby* v. *United States (In re Duby)*, 451 B.R. 664, 675 (B.A.P. 1st Cir. 2011). *Sternberg* has proved unworkable in practice, which is exactly why panels on this Court continue to struggle with its application.

Sternberg, if allowed to stand, will effectively eliminate the rights of consumer debtors to invoke the fundamental protections that Congress granted in Section 362(k). There are compelling reasons to "question the soundness of *Stern-*

berg's holding," *Snowden*, 769 F.3d at 662 (Watford, J., concurring), and NACBA has a critical interest in presenting those substantial questions.

In accordance with 9th Cir. R. 29-2(a), all parties have consented to the filing of this brief.[1]

RELEVANT STATUTORY PROVISIONS

Section 362(k) of Title 11, United States Code,[2] creates a private right of action for injured parties seeking relief for willful violations of the automatic stay, and provides in full:

> (k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
>
> (2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), no counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, contributed money intended to fund the preparation or submission of this brief.

[2] This provision was originally codified at 11 U.S.C. 362(h) in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333, 352; it was later reenacted and redesignated as 11 U.S.C. 362(k)(1) in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 305(1)(B), 441(1)(A), 119 Stat. 23, 79, 114. This brief refers to both versions as 11 U.S.C. 362(k).

ARGUMENT

I. THE EN BANC COURT SHOULD RECONSIDER *STERNBERG* AND RESOLVE THE CLEAR SPLIT OF AUTHORITY OVER THE PROPER INTERPRETATION OF SECTION 362(k)

The proper construction of Section 362(k) is a recurring question of great importance, and this case presents an ideal opportunity to reconsider *Sternberg*.

As explained below, *Sternberg* creates a direct split with the Fifth Circuit, conflicts with the language and logic of Section 362(k), misreads the American Rule, departs from multiple principles of statutory construction, and creates an unworkable system that frustrates Congress's objectives—all while generating unnecessary litigation in the lower courts and this Court.

Sternberg's holding has been rejected by every out-of-circuit decision to consider this question. It has been rejected by two bankruptcy appellate panels (the First and Sixth). *Duby*, 451 B.R. at 677; *TranSouth Fin. Corp.* v. *Sharon (In re Sharon)*, 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999). It has been rejected by district and bankruptcy courts in the First, Second, Fifth, Sixth, Ninth, and Eleventh Circuits.[3] These courts have declared *Sternberg*'s analysis "unpersuasive," "odd," and

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[3] See, *e.g.*, *Duby*, 451 B.R. at 677; *In re Voll*, 512 B.R. 132, 143-145 (Bankr. N.D.N.Y. 2014); *Burrell* v. *Auto-Pak-USA, Inc. (In re Burrell)*, No. H-12-0450, 2012 U.S. Dist. LEXIS 121323, at *49-*50 (S.D. Tex. Aug. 27, 2012); *Sharon*, 234 B.R. at 688; *Grine* v. *Chambers (In re Grine)*, 439 B.R. 461 (Bankr. N.D.

[Footnote continued on next page]

"simply wrong." *E.g.*, *Duby*, 451 B.R. at 675-677. A "leading bankruptcy treatise," *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012), has flatly rejected *Sternberg* by name. 3 *Collier on Bankruptcy* ¶ 362.12[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (*Collier*).

This conflict has created an untenable division between the Ninth Circuit and other courts.[4] There is a particular need for "uniform[ity]" in bankruptcy cases. U.S. Const., Art. I, § 8, Cl. 4. Yet, under *Sternberg*, violations of the automatic stay now have different effects in different circuits. An injured debtor in California cannot collect fees under Section 362(k) that an identically situated debtor *could*

[Footnote continued from previous page]

Ohio 2010); *Bertuccio* v. *Cal. State Contrs. License Bd. (In re Bertuccio)*, No. 04-56255, 2009 Bankr. LEXIS 3302, at *22-*23 n.7 (Bankr. N.D. Cal. Oct. 15, 2009); *In re Parker*, 515 B.R. 337, 341 (Bankr. M.D. Ala. 2014); see also *Weber* v. *SEFCU (In re Weber)*, 719 F.3d 72, 83 (2d Cir. 2013) (upholding liability "under section 362(k) for Weber's actual damages, costs, and attorney's fees").

[4] *Sternberg* is even inconsistent with this Court's own pre-*Sternberg* decisions. 595 F.3d at 946 n.4 (so acknowledging). On multiple occasions, this Court affirmed awards that included fees for prosecuting Section 362(k) claims, not merely for halting violations of the automatic stay. *Dawson* v. *Wash. Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139, 1152-1153 (9th Cir. 2004); *Havelock* v. *Taxel (In re Pace)*, 67 F.3d 187, 192 (9th Cir. 1995). *Havelock* in particular identified the fee issue explicitly, 67 F.3d at 192 (acknowledging precedent "approving an award of fees that included the cost of prosecuting the action for damages stemming from violation of the automatic stay"), and affirmed the bankruptcy appellate panel, which itself squarely raised and resolved the issue, 159 B.R. 890, 900, 902 (B.A.P. 9th Cir. 1993). At a minimum, these decisions are in tension with *Sternberg*.

collect in Texas, New York, Massachusetts, or Ohio. This situation should not stand without en banc review.

This is a suitable vehicle for revisiting the issue, and possibly one of the few remaining vehicles for revisiting the issue. Debtors typically lack financial resources for protracted litigation. If the en banc Court holds that *Sternberg* bars appellate attorney's fees, few debtors will have the means or incentives to seek or defend damage awards knowing that an initial victory will disappear unless the debtor personally fronts the expense of defending the judgment on multiple rounds of appeal.

Sternberg explained that it did not "lightly" create a split with the Fifth Circuit, but noted that, "[w]ithout more, we are hard-pressed to find this decision persuasive." 595 F.3d at 948 (describing *Repine*). We respectfully submit there is more for the Court to consider. *Sternberg* overlooked material points directly affecting Section 362(k)'s proper construction. Courts after *Sternberg* have exhaustively refuted its analysis on every level—and not a single court has come to *Sternberg*'s defense. Additional consideration is warranted before maintaining a circuit conflict on this important issue. Rather than grapple with the outer limits of a flawed decision, *Sternberg* should be reconsidered and overruled.

II. RECONSIDERATION IS WARRANTED BECAUSE *STERNBERG* WAS WRONGLY DECIDED

Sternberg is inconsistent with Section 362(k)'s plain text, its statutory purpose, and multiple principles of construction, including theories that *Sternberg* neither confronted nor addressed. It invoked the American Rule to construe ambiguities against fees, even though (properly understood) the *opposite* presumption applies in this setting. It rendered Congress's careful work in Section 362(k) effectively meaningless for most of the protected class. Congress reenacted Section 362(k)(1)'s language without change in 2005, against two *decades* of courts construing the same language to permit fees. *Sternberg* had no basis for presuming that Congress intended to *reverse* that practice by leaving the statute as those courts found it.

Sternberg has been overwhelmingly rejected, and experience has revealed its errors. This is a proper vehicle for resolving this crucial question, and reconsideration is warranted.

A. *Sternberg* Misconstrued Section 362(k)'s Plain Text

According to *Sternberg*, Section 362(k) divides attorney's fees into two distinct categories, only one of which is compensable: (i) individuals *may* recover "fees related to enforcing the automatic stay and remedying the stay violation," but (ii) individuals may *not* recover fees for "prosecuting" the damages claim itself. 595 F.3d at 940. *Sternberg* is directly at odds with the statutory text.

1. *Sternberg*'s initial error is its attempt to divide Section 362(k)'s indivisible language. Congress spoke in absolute terms in authorizing parties to recover "actual damages, *including* * * * *attorneys' fees*." Congress drafted "fees" as a unitary category. Unlike *Sternberg*, Congress did not differentiate between fees incurred for different reasons or restrict recovery to enforcing the stay. It broadly authorized parties to litigate Section 362(k) claims, and textually defined "actual damages" as "*including*" fees. 11 U.S.C. 362(k)(1) (emphasis added). "Had Congress intended to allow fees only to remedy the violation, but not to collect them, it would have provided for attorneys' fees necessary to cause a termination of the violation, and would exclude fees necessary for their recovery." *Parker*, 515 B.R. at 341. Yet nothing in the statute "suggests such a limitation." *Ibid.* Without a textual hook, there is no basis for artificially limiting fees to actions seeking to halt the violation.

Nor are there other hints that certain fees were ineligible for recovery. Section 362(k) has dual purposes: it forces compliance with the automatic stay and provides a remedy for resulting injuries. Congress knew parties would have to litigate to recover damages, and it specifically included fees in those damages. Because fees are essential for either objective, fees are available for either objective. And by speaking "in terms of recovery"—which arises at the *end* of an action—the section "contemplates all action necessary to reduce to judgment the award and to

collect it from the party violating the automatic stay." *Parker*, 515 B.R. at 341. Congress knew that debtors would incur expenses from start to finish, and included fees in the ultimate "recovery." Again, unlike *Sternberg*, Section 362(k)'s focus is not limited to earlier stages designed exclusively to enforce the stay. See *Sharon*, 234 B.R. at 688 (authorizing fees for "the turnover motion and the stay violation and sanctions motion" because each was "necessitated" by the stay's violation).

Accordingly, under its "most natural[]" reading, Section 362(k) "allows a plaintiff to recover attorney's fees incurred both in remedying a violation of the automatic stay and in bringing an action to recover the 'actual damages' caused by that violation." *Snowden*, 769 F.3d at 661 (Watford, J., concurring); accord, *e.g.*, *Repine*, 536 F.3d at 522. *Sternberg*'s contrary reading "contemplates a limitation which has no basis in the text of the statute." *Parker*, 515 B.R. at 342.

2. In reaching the opposite conclusion, *Sternberg* committed a series of interpretive errors. It first found the phrase "actual damages" "ambiguous," but did so by impermissibly truncating the operative language. The key text is not merely "actual damages," but "actual damages, *including costs and attorneys' fees*." While that formulation may produce ambiguity for certain damages (*e.g.*, emotional distress), there is no ambiguity when it comes to the enumerated category—"costs and attorneys' fees." While "the term 'actual damages' can mean different things in different contexts," *FAA* v. *Cooper*, 132 S. Ct. 1441, 1454 (2012), Congress textu-

ally defined this term to include fees. This alone undermines *Sternberg*'s construction.

The panel next invoked a definition of "actual damages" from Black's Law Dictionary, and construed *that* definition instead of the actual text. 595 F.3d at 947 (defining "actual damages" as "'[a]n amount awarded * * * to compensate for a proven injury or loss; damages that repay actual losses'") (quoting Black's Law Dictionary 416 (8th ed. 2004)). Whatever the meaning of a statute limiting damages to "a proven injury or loss," this statute did not use that formulation. If Congress wished to adopt Black's definition, it would have done that, rather than employ the actual language found in Section 362(k).

3. In any event, the Supreme Court has since rejected Black's definition of "actual damages" as "general," "notably circular," and "of little value." *Cooper*, 132 S. Ct. at 1449. Instead, the "precise meaning of the term" turns on its "particular [statutory] context." *Id.* at 1449-1450. Section 362(k) is clear when read in that context.

As *Sternberg* acknowledged, the automatic stay is "'designed to effect an immediate freeze of the status quo.'" 595 F.3d at 948 (quoting *Hillis Motors, Inc.* v. *Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993)). Section 362(k) operates against that backdrop and "freeze[s]" the status quo with "actual damages," including fees. "If the purpose of the automatic stay is, as the Ninth Circuit

recognized, to preserve the status quo, then the mechanism by which stay violations are remedied must necessarily return the debtor to the status quo in order to serve that purpose." *Duby*, 451 B.R. at 677 (citations omitted).

Sternberg's interpretation of "actual damages" undermines that objective. "When applying fee-shifting statutes, 'we have found limits in the large objectives of the relevant Act, which embrace certain equitable considerations.'" *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). The status quo is not restored when a debtor is left short after paying fees—assuming a debtor covering his own fees can pursue his rights at all. The automatic stay's focus on the status quo distinguishes Section 362(k) claims from non-bankruptcy actions; Congress was sensitive to the fundamental purpose of the stay, and it would have intended "actual damages" to be construed in a manner that promotes its specific purpose. Fees are necessary for complete relief and to restore the status quo. *In re Walsh*, 219 B.R. 873, 878 (B.A.P. 9th Cir. 1998). *Sternberg* is wrong that Congress tolerated injured debtors absorbing the costs of a violation. 595 F.3d at 947.

Sternberg is at odds with the most natural reading of the statute's unqualified text. By its plain terms, Section 362(k) authorizes full recovery of "actual damages, including costs and attorneys' fees." That is reason enough for overruling *Sternberg*.

B. *Sternberg* Misapplied The American Rule While Ignoring Its Settled Exceptions

1. At its core, *Sternberg*'s logic was driven by the American Rule's presumption that "'parties are to bear their own attorney's fees.'" 595 F.3d at 945-946 (quoting *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994)). *Sternberg* found Section 362(k)'s "actual damages" susceptible to a "narrow[ing]" construction: one permitting fees to "enforc[e] the automatic stay," but not to "prosecut[e]" claims under Section 362(k). *Id.* at 940, 947. According to *Sternberg*, because Congress had not explicitly reversed the default, fees for prosecuting those claims were "[un]available under the American Rule." 595 F.3d at 948.

There *is* a default presumption in this context, but *Sternberg* chose the wrong one. *Sternberg* invoked the American Rule while overlooking its *exceptions*. When a party acts in "'willful disobedience of a court order,'" fees are presumptively *available* "unless forbidden by Congress." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 258-259 (1975). The default is thus exactly the opposite: under this "accepted exception[]," courts must *permit* fees unless Congress says otherwise, not the other way around. *Zambrano* v. *City of Tustin*, 885 F.2d 1473, 1481 & n.25 (9th Cir. 1989).

Section 362(k) claims fit comfortably within this exception. Congress did not enact Section 362(k) against a blank slate. "Before 1984, the courts treated automatic stay violations like contempt of court proceedings, giving the trial court

discretion to award damages and attorneys' fees." *Parker*, 515 B.R. at 343 (citing cases from multiple circuits). In 1984, Congress codified that practice in Section 362(k), making "awards of actual damages and attorneys' fee[s] mandatory," but otherwise "without any indication" of limiting remedies in other ways. *Id.* at 344.[5]

Contrary to *Sternberg*'s view, Section 362(k) actions are thus not "ordinary damages action[s]." 595 F.3d at 948. "In reaching such an interpretation of § 362(k), the Ninth Circuit in *Sternberg* ignored the long history of automatic stay litigation which holds that proceedings to redress a violation of the automatic stay are in the nature of contempt and not stand alone civil actions." *Parker*, 515 B.R. at 345; 3 *Collier* ¶ 362.12[3] ("A violation of the stay is punishable as contempt of court."). In contempt proceedings, "courts have frequently awarded the complaining party his attorneys' fees, notwithstanding the American Rule," leaving *Sternberg*'s use of the Rule "misplaced." *Ibid.*

If Congress wished to codify the traditional contempt remedy while rejecting fee shifting, it would have said so expressly. Yet Congress said—nothing. It did not write that change directly in the statutory text or utter one syllable on the topic

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[5] Congress apparently codified this power to address criticism that courts could not invoke their contempt authority to vindicate Section 362's *statutory* stay, "'as opposed to [a judicial] order.'" *In re Kutumian*, No. 13-14675-B-7, 2014 Bankr. LEXIS 2209, at *28-*29 (Bankr. E.D. Cal. May 15, 2014). Section 362(k) preserves traditional practice while eliminating those concerns.

in the legislative history. Congress does not legislate significant policy changes "in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). "Actual damages"—the hook for *Sternberg*'s view—is a mousehole. The decision to eliminate these fees would mark a dramatic departure from historic practice. Had Congress intended to suddenly restrict fees to terminating stay violations, it knew how to do it. It would not have tucked away such a fundamental shift in the phrase "actual damages" (much less in the official statutory version: "actual damages, including * * * *attorneys' fees*"). See *Fogerty*, 510 U.S. at 534 ("'[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles'").

Sternberg never confronted Section 362(k)'s history or the American Rule's longstanding exception. Nowhere in codifying that tradition did Congress indicate any intent to reverse the common practice of awarding fees. When Congress acts against a long legal backdrop, courts must identify an express statement to presume departures from settled practice. *Fogerty*, 510 U.S. at 534. There was no such departure here, and *Sternberg* erred in holding otherwise.[6]

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[6] *Sternberg*'s reliance (at 946) on a handful of state common-law tort cases is misplaced. These cases do not outline the entire universe of examples where "fees can be part of damages." *Ibid.* "That other courts have dealt with the awarding or non-

[Footnote continued on next page]

2. In any event, Section 362(k) displaced the American Rule to the extent it applied. "Congress can override [the American Rule] with a clear expression of congressional intent to shift fees." *Fulfillment Servs. Inc.* v. *UPS, Inc.*, 528 F.3d 614, 623 (9th Cir. 2008). This legislation was not silent on fees. It explicitly authorized injured parties to recover "attorneys' fees" as "actual damages," just as the Supreme Court has occasionally authorized "admiralty plaintiffs" to recover "counsel fees *as an item of compensatory damages*." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (emphasis added). Thus, "without doubt Congress intended to deviate from the American Rule—hence the existence of the fee-shifting provision." *Ibid.* (so concluding even though the provision's *scope* was "[un]clear"). This fully dislodged the American Rule.

3. *Sternberg*, finally, overstated the Rule's strength. It does not impose a "magic words" requirement or demand unmistakable clarity. Cf. *Cooper*, 132 S. Ct. at 1448. It simply resolves ambiguities after applying ordinary canons of construction: "It is a tool for interpreting the law, and we have never held that it dis-

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[Footnote continued from previous page]

awarding of attorney fees in litigation under other statutes and theories of law has nothing to do with the violation of the automatic stay in a bankruptcy case, and none of these cases have any relevance to the question of a proper interpretation of § 362(k)." *Parker*, 515 B.R. at 345-346; see also *Duby*, 451 B.R. at 675 ("'This court does not find * * * the guidance of Tennessee, California or Colorado state common law to inform the intent of Congress in § 362(k).'").

places the other traditional tools of statutory construction." *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008) (discussing sovereign-immunity canon).[7]

As established below (*infra*, Part II.C), *Sternberg*'s interpretation cannot survive multiple interpretive principles. Because a proper statutory analysis leaves no ambiguity to construe, "[t]here is no need for us to resort" to the American Rule. *Richlin*, 553 U.S. at 590.

C. *Sternberg* Cannot Survive Under Multiple Canons Of Construction, Including Critical Principles That *Sternberg* Overlooked

Sternberg cannot be squared with multiple principles of construction, each undercutting its disposition.

1. *Sternberg* fails under basic principles of legislative ratification. See *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998).

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[7] *Sternberg* suggests it would be a "bold" or "radical" departure to allow fees for prosecuting the entirety of a Section 362(k) claim. 595 F.3d at 948. Yet *Sternberg* relied upon language discussing a purported shift to the *British Rule*—a system where the *loser* on either side pays. See *Fogerty*, 510 U.S. at 533-534. It would indeed be a "bold" departure to insist that a debtor cover the creditor's fees. But there is nothing unusual about the type of ordinary fee-shifting employed in Section 362(k). Fee awards are common in the contempt setting and common for remedial claims—where, as here, parties seek small sums in promoting fundamental legislative policies. See *J.R. Cousin Indus., Inc.* v. *Menard, Inc.*, 127 F.3d 580, 583 (7th Cir. 1997). The only bold departure in this case was *Sternberg*'s *abandonment* of a decades-long practice of awarding fees for remedying stay violations. See *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 48 (1991) ("'we do not lightly assume that Congress has intended to depart from established principles'").

Before 1984, courts routinely awarded fees in litigating contempt actions for stay violations. Congress codified that practice in Section 362(h), and "Section 362(h) stood undisturbed from its enactment in 1984, until 2005, when Congress amended this provision, redesignating it § 362(k)(1) and adding (k)(2)." *Parker*, 515 B.R. at 344. Throughout this period, courts routinely awarded fees for prosecuting claims under Section 362(k), and, unlike *Sternberg*, those fees were never limited to activities necessary to halt a violation. *Ibid.*

Had Congress worried that courts misunderstood what it meant by including "attorneys' fees" in "actual damages," Congress was fully capable of altering that language with its 2005 amendments. Yet Congress reenacted the same language without any relevant change—against two *decades* of courts routinely construing Section 362(k)'s language the same way. See 3 *Collier* ¶ 362.12[3] (describing amendments). There was no hint in the text or legislative history that Congress intended to depart from that settled practice. *E.g.*, *Parker*, 515 B.R. at 344.

This legislative inaction is dispositive: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (citing circuit and district-court authority). *Sternberg* erred in rejecting the very interpretation that Congress left intact:

> If in 2005 Congress thought that established case law and such fee awards misconstrued the plain meaning of its statute, and improperly

> penalized creditors for actions in disregard of § 362(a), it had the opportunity to fix the problem by amending § [362(k)] to remove any ambiguity in and the misconception by many courts of its expressed intent. It did not.

Grine, 439 B.R. at 470.

2. "The Supreme Court has unfailingly counseled that fee-shifting provisions can only be understood in light of the goals and objectives of the underlying legislation." *Fulfillment Servs.*, 528 F.3d at 623. *Sternberg* satisfies none of those goals and objectives.

i. At its core, *Sternberg* reasoned that Congress's "goals" were advanced by frustrating the ability to pursue Section 362(k) claims. 595 F.3d at 947-948. It reasoned that debtors should not be permitted to pursue creditors (using the stay as a "sword," not a "shield"), and declared that additional litigation "attenuated from the actual bankruptcy" was inconsistent with the stay's goals. *Id.* at 948. In short, Congress did not intend to promote "[m]ore litigation" when authorizing Section 362(k)'s private remedy—reason enough to render that remedy less attractive.

This reasoning is upside down. Congress did not craft a private right of action hoping that no one would use it. If Congress wished to cut back on a debtor's ability to seek relief, it would have done exactly that. It would have limited damages actions to a subset of claims (based on the nature of the violation), or it would have imposed a simple "amount-in-controversy" requirement to weed out insignificant disputes. But Congress instead spoke categorically: it crafted a right of action

compelling relief for "*any*" willful violation of the automatic stay. 11 U.S.C. 362(k)(1). Congress meant what it said. Congress does not authorize litigation to *avoid* litigation. There is no evidence that it wished to artificially constrict its own cause of action by making it infeasible to use: "Absent any evidence to the contrary, we do not conclude that Congress established a private remedy and simultaneously created a unique and formidable barrier to its attainment." *Owner-Operator Indep. Drivers Ass'n, Inc.* v. *New Prime, Inc.*, 398 F.3d 1067, 1071 (8th Cir. 2005); see also *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989) ("we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short").[8]

ii. *Sternberg* improperly undermines Section 362(k)'s remedies, contrary to the Code's purpose. Fees are essential to restore the status quo and deter stay violations, two central policy objectives. See also *supra*, Part II.A.

Without fees, the cost of Section 362(k) litigation is insurmountable for most debtors. If a violator refuses to provide relief, litigation expenses will often exceed expected recovery. That dynamic impairs Section 362(k)'s private remedy. Creditors wishing to avoid damages need only mount an aggressive defense, forcing ra-

[8] Nor is *Sternberg* rightly concerned about excessive litigation. Courts are always able to refuse *unreasonable* fee requests, and creditors always have the option to settle legitimate claims. There is no reason that fee-shifting should distort the normal course of litigation under Section 362(k).

tional debtors to abandon their statutory rights. *Parker*, 515 B.R. at 348. "[T]his rule would often harm the other creditors of the estate because the debtor, who likely lacks the means to fund litigation in the first place, would be forced to choose between suffering a loss as a result of the stay violation or incurring a loss attempting to remedy it." *Duby*, 451 B.R. at 677.

Sternberg's restriction on fees, especially for claims "arising from conduct which violates the most fundamental protection offered by the Bankruptcy Code, is incompatible with its spirit and purpose." *Ibid. Sternberg* fails "to interpret the fee statute in light of the statutory provisions it was designed to effectuate." *Sullivan*, 490 U.S. at 889.

iii. *Sternberg* further undermines the stay's financial and non-financial goals. 595 F.3d at 947-948 (describing those goals but not engaging their individual elements).

A debtor cannot "put [her] finances back in order" if she is left out of pocket after remedying a stay violation; nothing in Section 362(k) suggests Congress wanted debtors to absorb the costs of creditor wrongdoing. Nor are creditors better off if a debtor is forced to shoulder the expense of enforcing her statutory rights; refusing fee-shifting dilutes the debtor's ultimate recovery, which itself limits her resources for satisfying creditors (assuming she pursues her claim at all). Nor is remedial litigation inconsistent with the stay's "breathing spell": if Congress felt

Section 362(k) was too disruptive, it would not have *codified* these remedies. Finally, fee-shifting is indispensable to make Section 362(k) effective—and thus an effective *deterrent*. *Voll*, 512 B.R. at 143. Without fees, debtors will be forced to abandon valid claims. If violators do not fear a suit, they will not perceive a deterrent to violating the stay: "*Sternberg*['s] holding that the right to fees under § 362(k) stops at the courthouse door gives creditors free shots at continuing prepetition collection activity with little practical fear of financial accountability for their actions and hence little incentive to stop it." *Grine*, 439 B.R. at 470-471.

This is why courts have identified *Sternberg* as "weaken[ing] substantially the effectiveness of the automatic stay": "What good is it to be entitled to damages and attorneys' fees for a violation of the automatic stay if it costs a debtor much more in unrecoverable attorneys' fees to recover such damages and recoverable attorneys' fees? In many, if not most, cases that will likely be the situation." *Bertuccio*, 2009 Bankr. LEXIS 3302, at *22-*23 n.7.

iv. *Sternberg* effectively eliminates statutory relief for a broad swath of debtors. The protected class is financially vulnerable. They cannot always (or often) afford hourly fees and cannot entice a contingency arrangement for "minor" damages. But what may seem "minor" to some is not minor to many debtors. A stay violation can devastate a debtor's ability to recover and reorganize its financ-

es. A small remedial award can mean the difference between debtors buying food and clothes for their families or struggling to meet basic needs.

Congress was distinctly aware of these issues when enacting the Code. *Dawson*, 390 F.3d at 1148. It understood that debtors were at risk of exploitation, and demanded that the process treat them with civility and respect. "The fee shifting provision in § 362 serves to protect rights belonging to persons in difficult circumstances * * * ." *Grine*, 439 B.R. at 470-471. Section 362(k)'s proper construction advances statutory objectives by protecting the debtor class from abuse. *Sternberg* does not and should be overruled.

3. A debtor pursuing Section 362(k) relief acts as a "private attorney general," and Congress's express fee provision is consistent with that function. *Sternberg* wrongly discounts this dynamic.

Section 362(k) claims bear all the hallmarks of "private attorney general" litigation. They involve small claims that cannot be realistically pursued at the debtor's expense. See *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). And they advance the fundamental public interest in vindicating the automatic stay. See *Martin*, 546 U.S. at 137.

The automatic stay protects *both* creditors and debtors. When one creditor violates the stay, it threatens all creditors' interest in the estate. Debtors thus pursue Section 362(k) relief for themselves and innocent creditors alike. Without the in-

centive to seek relief, a debtor could acquiesce in the violation and leave others to fend for themselves—generating the very race for assets that the stay is designed to avoid. Section 362(k) is an essential tool in preserving the broader legislative aims undergirding this "fundamental" policy.

In the same tradition of other public-interest statutes, Congress authorized fees to "encourage attorneys to bring enforcement actions and to 'promote citizen enforcement of important federal policies.'" 3 *Collier* ¶ 362.12[3]. Those objectives are frustrated, however, "if debtors in bankruptcy, having significant constraints on their ability to pay for legal representation, are not able to recover attorneys' fees for their entire representation in a stay enforcement proceeding." *Ibid.*

4. *Sternberg* is unsound in principle and unworkable in practice. In construing fee statutes, courts are instructed to avoid interpretations that "'spawn a second litigation of significant dimension.'" *Hardisty* v. *Astrue*, 592 F.3d 1072, 1078 (9th Cir. 2010). *Sternberg* fosters satellite litigation on *two* fronts and fails as "'a formula for 'ready administrability.'" *Ibid.*

First, *Sternberg* invites a needless, "highly factbound inquiry" over allocating fees. *Ibid.* Parties are forced to tease out those fees attributable to enforcing the stay but not attributable to seeking damages. These issues often are interrelated and can arise in a single proceeding at the same time. *E.g.*, *Kutumian*, 2014 Bankr. LEXIS 2209, at *13-*14. This makes calculating fees "unnecessarily complicat-

ed," and invites an "odd," "impractical (and inevitably somewhat arbitrary)," "resource-consuming exercise" that "is sure to invite further litigation." *Snowden*, 769 F.3d at 661-662 (Watford, J., concurring). None of this is required under a proper reading of Section 362(k). Cf. *Indep. Fed. of Flight Attendants* v. *Zipes*, 491 U.S. 754, 766 (1989) ("making fees turn upon [a] distinction" that is "quite difficult to separate" "violate[s] our admonition that 'a request for attorney's fees should not result in a second major litigation'").

Second, this Court and lower courts continue to struggle with *Sternberg*'s application. Its "brightline" has proven difficult to draw in multiple contexts. It split the three-judge panel in this case, split the lower courts in another appeal (*Snowden*), and will predictably generate further confusion as parties attempt to shoehorn fees into competing categories. Congress wrote a statute that awards "attorneys' fees" as an indivisible whole. That straightforward interpretation would eliminate these satellite disputes altogether.[9]

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[9] *Sternberg*'s flaws are amply illustrated in this very case. Fee availability can determine whether a party surrenders her rights or pursues her claims. Litigants cannot properly be asked to predict a panel's disposition of a waiver defense before knowing whether fees are available on appeal. Contra slip op. 25 (Wallace, J., dissenting). A proper construction of Section 362(k) avoids this problem. See *Legal Voice* v. *Stormans Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014) ("Generally, a party that is entitled to an award of attorneys' fees in the district court is also entitled to an award of attorneys' fees on appeal.").

D. *Sternberg* Is Incompatible With This Court's Treatment Of Parallel Fee Provisions In The Bankruptcy Code

Sternberg cannot be squared with this Court's cases addressing related provisions of the Bankruptcy Code. In indistinguishable contexts, this Court permits fees for pursuing damages or other fee awards ("fees on fees"). Employing the same logic and reasoning, *Sternberg* should come out the other way.

First, under 11 U.S.C. 303(i), this Court authorized fees for seeking damages and fees incurred in resisting involuntary bankruptcy petitions. *Orange Blossom L.P.* v. *IBT Int'l, Inc. (In re S. Cal. Sunbelt Developers, Inc.)*, 608 F.3d 456, 460 (9th Cir. 2010). The Court found that "fees incurred litigating claims for *attorney's fees* * * * are plainly recoverable." *Id.* at 463. "'This is so because it would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee.'" *Ibid.* And the Court likewise found recoverable "fees incurred litigating claims for *damages*": treating the "'case as an inclusive whole,'" if "the debtor is eligible for an award of fees, * * * the fee award presumptively encompasses all aspects of the § 303 action, including proceedings on [damages] claims under § 303(i)(2)." *Ibid.*; see also *id.* at 464 ("'Preparation for and attendance at the hearing on attorney's fees, costs and damages are also * * * occasioned as a result of an Involuntary Petition. As such, they are compensable under § 303(i).'") (quoting *In re Advance Press & Litho, Inc.*, 46 B.R. 700, 703 (Bankr. D. Colo. 1984)).

This difference in treatment is untenable. Under Section 362(k), like Section 303(i), fee awards are equally "dilute[d]" by refusing to compensate for time spent prosecuting the claim. Under Section 362(k), like Section 303(i), the same "[p]reparation for and attendance at the hearing on attorney's fees, costs and damages" is "occasioned" by stay violations. *Orange Blossom* had to distinguish *Sternberg* using what another court described as "hyper-technical legal gymnastics." *Grine*, 439 B.R. at 470. An appropriate construction of § 362(k), by contrast, aligns this Court's construction of Sections 303(i) and 362(k), avoiding inconsistency.[10]

Second, under 11 U.S.C. 330(a), this Court held that "time devoted to the preparation and presentation of attorneys' fee applications" was compensable. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 656 (9th Cir. 1985). Congress's decision to award fees includes the right to *defend* the fee award: one cannot recover all authorized fees when awards are diluted in fee-related litigation. *Id.* at 660. Thus,

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[10] *Sternberg* introduces impossible anomalies into the statutory scheme. Under this Court's cases, *corporate* debtors use 11 U.S.C. 105(a) to remedy stay violations *with* fees, while *individual* debtors are limited to Section 362(k) *without* fees. See *Snowden*, 769 F.3d at 661; *Rediger Inv. Corp.* v. *H Granados Comm'cns, Inc. (In re H Granados Comm'cns, Inc.)*, 503 B.R. 726, 733-735 (B.A.P. 9th Cir. 2013). It is perplexing to assume that the same Congress that codified Section 362(k)'s powerful remedies—even authorizing punitive damages—would weaken the essential enforcement mechanism for individuals (human beings) alone. This tension disappears with a proper construction of Section 362(k).

"[s]tatutory fee award provisions should be read as authorizing compensation for time spent litigating fee awards." *Ibid.*

This holding is again in tension with *Sternberg*. Under Section 362(k), like Section 330(a), there is the same reason to understand the grant of fees to include fees for *pursuing* those fees. A proper construction of Section 362(k) is consistent with *Nucorp* but inconsistent with *Sternberg*.[11]

III. ASC'S ARTICLE III CONCERNS ARE INSUBSTANTIAL AND UNWORTHY OF REVIEW

In its rehearing petition, but not in its merits briefing, ASC asserts that Section 362(k) is unconstitutional to the extent it authorizes bankruptcy courts to assess fees incurred in an Article III appeal. See Pet. 11-16. This Article III challenge is wholly insubstantial.

A. This case is a poor vehicle for addressing this issue. It is not apparent where this challenge was preserved below or on appeal. Constitutional objections are subject to ordinary principles of waiver and forfeiture, and the lack of a "'timely assertion'" may have forfeited this challenge. *United States* v. *Olano*, 507 U.S. 725, 731 (1993).

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[11] The Supreme Court granted certiorari this Term to resolve a split under Section 330(a) between this Circuit and the Fifth Circuit. See *Baker Botts, L.L.P.* v. *ASARCO, L.L.C.*, No. 14-103 (pet. granted Oct. 2, 2014).

Even if preserved, this issue was not adequately developed or addressed below. It is suboptimal to confront it for the first time at the en banc stage. Any serious consideration is best deferred to a future case where the issue is sufficiently presented.

B. This issue warrants no serious consideration. ASC is incorrect that Article I courts are "stand[ing] in judgment" of Article III decisions. Pet. 11. The bankruptcy court does not sit in "review" of any Article III disposition. It does not assess the merits of the decision or the correctness of the judgment. It simply performs an *accounting* function, under Section 362(k), based on the outcome of the appeal. That outcome is independently determined by the Article III tribunal, and it is taken as given on remand. Nothing in this sequence remotely infringes upon any power vested exclusively in Article III. See, *e.g.*, *Boise Cascade Corp.* v. *United States*, 296 F.3d 1339, 1344 (Fed. Cir. 2002).

ASC's theory also proves too much. Suppose a creditor violates the automatic stay by initiating separate litigation against the debtor in federal court. Even under *Sternberg*, bankruptcy courts are permitted to award fees based on efforts to terminate that federal action. No one seriously objects that Congress lacks constitutional authority to delegate this task to the Article I tribunal. If this "review" of an Article III lawsuit does not offend the Constitution, why would the identical "review" of an Article III appeal cross the line? These situations are materially indis-

tinguishable for constitutional purposes. Nothing in either scenario interferes with the judiciary's "power, not merely to rule on cases, but to *decide* them." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995).

Under a proper construction, Section 362(k) does not require bankruptcy courts to "scrutinize the actions of another tribunal." *Boise Cascade*, 296 F.3d at 1344. It presents no serious constitutional question.

C. Contrary to ASC's contention, this case presents no genuine issue under *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). To safeguard the automatic stay, Section 362(k) authorizes a "federal claim[] under bankruptcy law" targeting conduct interfering directly with the bankruptcy proceeding. 131 S.Ct. at 2611. This is far afield from "a state tort action that exists without regard to any bankruptcy proceeding" and is not "derived from or dependent upon bankruptcy law." *Id.* at 2618; see also *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality op.) (distinguishing "the adjudication of state-created private rights" from actions at "the core of the federal bankruptcy power"). *Stern* does not stand in the way of construing Section 362(k) to mean what it says everywhere outside this Circuit.

CONCLUSION

The Court should overrule *Sternberg* and hold that all fees incurred prosecuting Section 362(k) claims are compensable as actual damages.

Respectfully submitted.

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I hereby certify that on January 23, 2015, an electronic copy of the foregoing Amicus Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit, using the appellate CM/ECF system. I further certify that all parties in the case are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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