No. 13-1398

IN THE

Supreme Court of the United States

RICHARD S. FEDDER,

Petitioner,

v.

ADDUS HEALTHCARE, INC., ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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Respondents fail to show that there is not a circuit split on the Questions Presented: (1) whether section 1927 categorically prohibits courts from considering an attorney's ability to pay, and (2) whether section 1927 permits courts to impose sanctions based on subjective bad faith, recklessness, or extreme negligence. Both questions are the subject of deep multi-way splits, which have been acknowledged by the circuits, commentators, and this Court in previously granting certiorari on the Second Question Presented.

Respondents barely contest the importance of these questions, which arise frequently and have severe personal, professional, and economic consequences. The *Amici* compellingly demonstrate that the disparate circuit rules chill zealous advocacy because attorneys and nonprofit legal organizations will not risk financial ruin by pursuing novel public interest cases. Respondents do not dispute that this case is an appropriate vehicle to resolve the divisions.

Instead, Respondents take strident positions on the merits, contending that section 1927 (1) does not require consideration of ability to pay, and (2) permits the imposition of sanctions based on recklessness. Respondents' arguments support the petition because if Respondents are correct, then this Court should grant certiorari to resolve the circuit split by adopting those positions. Respondents' arguments also support reversal because the rules they espouse differ from the standards applied below.

I. This Court Should Decide Whether Section 1927 Categorically Prohibits Consideration Of Ability To Pay

The court below acknowledged that it entrenched a "circuit split" and cited one of a number of recent law review articles that urge this Court to grant certiorari. Pet. App. 36a; Pet. at 11-13. Respondents offer two unpersuasive reasons to ignore the conflict.

1. First, Respondents argue that "there is nothing in the text of § 1927 that requires a court to consider an attorney's ability to pay." BIO at 21-22. Respondents' argument supports certiorari because the First and Third Circuits, and unpublished decisions of the Fourth Circuit, require courts to consider ability to pay. Pet. at 17-19.

Respondents' argument also does not support the decision below. The Seventh Circuit takes the position that courts are *prohibited* from considering ability to pay. Even the circuits that agree with Respondents about the meaning of the statute disagree with that harsh rule.

The Second and Ninth Circuits, for example, hold that the statute provides "substantial leeway" and reason that it is inconsistent with section 1927's deterrence and compensatory purposes to impose sanctions that an attorney cannot pay. *Oliveri v. Thompson*, 803 F.2d 1265, 1267-68 (2d Cir. 1986); *Haynes v. City & County of San Francisco*, 688 F.3d 984, 987-89 (9th Cir. 2012).

The Tenth Circuit also holds that courts are not required to consider ability to pay, but, in conflict with the Second and Ninth Circuits, reasons that it is consistent with section 1927's "victim-centered

approach" to award sanctions even if the attorney is unable to pay. *Hamilton v. Boise Cascade Express*, 519 F. 3d 1197, 1205 (10th Cir. 2008). The Seventh Circuit "agree[s]" with this rationale, but has adopted a more extreme rule. *Shales v. Gen. Chauffeurs, Sales Drivers, & Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009).

Tellingly, Respondents do not defend the actual basis of the decision below, *i.e.*, that Petitioner's inability to pay is "immaterial" and "not relevant" because section 1927 is a "form of an intentional tort." Pet. App. 36a-37a (quoting *Shales*, 557 F.3d at 749). The Seventh Circuit's rule is not based on any textual interpretation of the statute, much less Respondents' interpretation.

2. Respondents' second argument attempts to minimize the circuit split by citing the Second and Ninth Circuits to contend that "even in circuits outside of the Seventh Circuit, district courts are often free to disregard an attorney's ability to pay." BIO at 22. But Respondents do not mention that the First, Third, and Fourth Circuits require consideration of ability to pay. Pet. at 17-19. Thus, even taking Respondents' argument at face value, there is at least an entrenched two-way split on an important question of federal law.

But this Court should not take at face value Respondents' argument that the Seventh Circuit is in agreement with the Second and Ninth Circuits, as it is flatly contrary to those circuits description of their own holdings. The Ninth Circuit unambiguously "reject[ed] the reasoning of [the Seventh Circuit in] *Shales* and adopt[ed] . . . the same rule adopted by the Second Circuit." *Haynes*, 688 F.3d at 988-89.

As these authorities demonstrate, the split is entrenched. The split was acknowledged below and has been widely publicized. Pet. App. 36a; Pet. at 12-13 & 20. This Court's intervention is necessary because multiple courts have acknowledged their disagreement, yet adhered to their positions.

This issue arises with remarkable frequency. In addition to this appeal and nine other decisions by the six circuits cited in the petition, *see* Pet. at 14-21, the Sixth Circuit has held that courts may consider ability to pay. *Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624 (6th Cir. 2009) (remanding "with instructions to consider any proof that [the attorney] may wish to present regarding her inability to pay"); *Stephens v. Freeman-McCown*, 1999 U.S. App. LEXIS 26604, *10 (6th Cir. 1999). A survey of recent cases provides ten additional illustrative examples where the amount of sanctions turned on whether the court considered ability to pay – establishing that the Question Presented both arises frequently and is dispositive in a large number of cases.[1]

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[1] *Compare Roth v. Spruell*, 388 Fed. Appx. 830, *12-13 (10th Cir. 2010) (affirming refusal to reduce sanction); *Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 2012 (D.D.C. 2012) (following Seventh and Tenth Circuit precedent); *with Dahiya v. Kramer*, 2014 U.S. Dist. LEXIS 41425, *26 (E.D.N.Y. Mar. 27, 2014) (sanction reduced based on "ability to pay"); *Shank v. Eagle Techs., Inc.*, 2013 U.S. Dist. LEXIS 115454, *4-5 & *37 (D. Md. Aug. 15, 2013); *Hunt v. County of El Dorado*, 2012 U.S. Dist. LEXIS 146902, *11 (E.D. Cal. Oct. 10, 2012);*Wilden v. County of Yuba*, 2012 U.S. Dist. LEXIS 120822, *6-7 (E.D. Cal. Aug. 23, 2012); *Goodman v. Tatton Enters.*, 2012 U.S. Dist. LEXIS 189060, *114-15 (S.D. Fl. June 1, 2012); *Baker v. Chevron U.S.A. Inc.*, 2012 U.S. Dist. LEXIS 94870, *13 (S.D.

Moreover, this case is an ideal vehicle because it involves a purely legal issue. Respondents do not dispute that sanctions were issued without notice or consideration of the fact that they would push Petitioner into bankruptcy. Respondents also do not dispute that this issue is important because harsh sanctions chill zealous advocacy. This Court should grant certiorari to resolve the conflict.

II. This Court Should Decide Whether Section 1927 Requires Subjective Bad Faith, Recklessness, Or Extreme Negligence

This Court previously granted certiorari on the Second Question Presented, in a case that was dismissed before decision, and the conflict has only deepened since that date. *Haynie v. Ross Gear Div. of TRW, Inc.*, 481 U.S. 1003 (1987), *vacated as moot* 482 U.S. 901 (1987). Respondents' three arguments against certiorari are unconvincing.

1. First, Respondents contend that "Petitioners [sic] exaggerate the alleged conflict," *see* BIO at 19, but the conflict is widely acknowledged. *McKenzie v. Norfolk Southern Ry.*, 497 Fed. Appx. 305, 312-13 (4th Cir. Nov. 20, 2012) (recognizing "a split in

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Ohio July 9, 2012); *V.D.B. Pac. B.V. v. Chassman*, 2012 U.S. Dist. LEXIS 29618, *8-9 (S.D.N.Y. Mar. 5, 2012); *Garner v. Cuyahoga County Juvenile Court*, 2010 U.S. Dist. LEXIS 85974, *20-22 (N.D. Ohio Aug. 20, 2010) (finding "partial inability to pay" and reducing sanction by "90%," from "$298,515.40 to "$29,851.54").

authorities" and that "our sister circuits have come to differing conclusions"); Pet. at 12-13, 23 n.4, & 30.

Respondents assert that "the circuits are generally in agreement regarding the minimum level of conduct required to impose sanctions." BIO at 21. But the cases cited by Respondents establish that three circuits require a minimum showing of subjective bad faith and eight circuits expressly reject this requirement. BIO at 20; Pet. at 23-30.

This case presents an ideal vehicle to resolve this conflict. Respondents do not attempt to distinguish cases in which the Second, Third, and Fourth Circuits refused to impose sanctions because counsel's unreasonable pursuit of a frivolous claim was found not to constitute subjective bad faith. Pet. at 24-25. The court of appeals squarely engaged the debate by holding that "subjective bad faith is not necessary" and imposing sanctions for objectively unreasonable conduct. Pet. App. 29a-31a. That is precisely the position that has been rejected in the Second, Third, and Fourth Circuits.

Respondents also ignore that six circuits apply different recklessness standards. The Fifth, Ninth, and Eleventh Circuits consider whether the attorney actually knew of a serious risk. Pet. at 25-27 (citing cases from the Fifth and Eleventh Circuits); *Salstrom v. Citicorp Credit Servs.*, 74 F.3d 183, 184-85 (9th Cir. 1995) (acknowledging split because **"**unlike the Eighth Circuit, we have not interpreted § 1927 to require a finding of objectively unreasonable behavior."); *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1121 (9th Cir. 1991) (reversing sanctions under a "subjective standard" of "reckless conduct" even though claims were an "abuse of the system" and

counsel "should have realized" that the lawsuit "had no content"). The First, Eighth, and Tenth Circuits reject this standard and hold that actual knowledge is irrelevant, so long as the risk is sufficiently obvious. Pet. at 25-28.

Respondents do not dispute that application of the subjective recklessness standard makes a difference to the outcome in this case. The courts below based sanctions on objectively unreasonable conduct. Pet. App. 29a-32a & 35a. They did not consider Petitioner's actual knowledge and deprived him of the opportunity to submit evidence about intent. *Id*. This conflicts with the approach in the Fifth, Ninth, and Eleventh Circuits.

Respondents also acknowledge a further split because at least one circuit, the Sixth Circuit, uses a lower standard that is described as "something more than negligence or incompetence." BIO at 20 (internal citation omitted); Pet. at 28-30.

2. Respondents' second argument is that "the Seventh Circuit's standard is in accord with other circuits" because "a standard requiring either subjective bad faith or recklessness . . . is essentially the standard applied in the Seventh Circuit." BIO at 17-19. But even if Respondents are correct that the Seventh Circuit requires a form of recklessness, this Court should still grant certiorari to resolve the conflict with the circuits that require subjective bad faith and circuits that use different recklessness standards.

Respondents also are incorrect because the Seventh Circuit (like the Sixth) requires only extreme negligence, in conflict with circuits that require

recklessness. Tellingly, Respondents do not cite a single Seventh Circuit decision that required recklessness, and recklessness was neither required nor found below. The district court sanctioned Petitioner because "the Seventh Circuit has concluded" that sanctions are appropriate, *inter alia*, "when an attorney pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." Pet. App. 61a (internal quotations and citations omitted). The court of appeals affirmed. Pet. App. 31a-32a. Lack of due care is the definition of negligence – not recklessness.

The Seventh Circuit has construed section 1927 to require more than "[g]arden variety negligence," *see* Pet. App. 31a, but "the fact that ordinary negligence fails to meet the bad faith test does not mean that extraordinary or extreme negligence also fails." *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184 (7th Cir. 1992). Section 1927 is satisfied by either "reckless or extremely negligent conduct." *Johnson v. Commissioner*, 289 F.3d 452, 456 (7th Cir. 2002) (internal citations omitted); *CEG Holdings, llc v. Lasco Bathware, Inc.*, 2010 U.S. Dist. LEXIS 135689, *5 (S.D. Ind. Dec. 22, 2010) ("That is not to say that only reckless or indifferent behavior on the part of counsel satisfies the bad faith standard. Indeed, 'the bad faith standard of § 1927 has an objective component, and extremely negligent conduct . . . satisfies that standard.'") (quoting

Claiborne v. Wisdom, 414 F.3d 715, 721 (7th Cir. 2005) (internal quotation omitted)).[2]

Seventh Circuit precedent makes clear that recklessness and extreme negligence are not merely synonyms. Respondents acknowledge that "the Seventh Circuit 'has long treated reckless and intentional conduct as similar.'" BIO at 18 (citing Pet. App. 30a) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 & n.20 (7th Cir. 1977)). This treatment reflects an understanding of recklessness that requires subjective knowledge (sometimes referred to as criminal recklessness), *see Sundstrand*, 553 F.2d at 1045 n. 20, and entails a mental element that is not required to establish extreme negligence. *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988) ("'Recklessness' is a proxy for intent; 'gross negligence' is not."). But even recklessness in the sense of disregard of an obvious risk (civil recklessness) is a different and higher standard than extreme negligence – "[g]ross negligence is not recklessness . . . in either the civil or

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[2] District courts follow circuit precedent and do not require recklessness. *See*, *e.g.*, *Rayter v. Crawford Ave. Anesthesia Provider Servs. LLC*, 2013 U.S. Dist. LEXIS 142293, *12-13 (N.D. Ind. Oct. 1, 2013) ("gross negligence"); *Peteet v. Ameritech Servs., Inc.*, 2012 U.S. Dist. LEXIS 155862, * 5 (S.D. Ind. Oct. 31, 2012); *Widmar v. Sun Chem. Corp.*, 2012 U.S. Dist. LEXIS 68087, *2 (N.D. Ill. May 16, 2012); *R & B Group, Inc. v. BCI Burke Co.*, 1999 U.S. Dist. LEXIS 14850, *11 & *18 (N.D. Ill. September 8, 1999); *Khoury v. Cook Assocs.*, 1997 U.S. Dist. LEXIS 13593, *15-16 (N.D. Ill. Sept. 3, 1997); *Mangel v. Loeb Rhoades & Co.*, 1990 U.S. Dist. LEXIS 2671, *4-5 (N.D. Ill. Mar. 9, 1990).

the criminal sense." *Slade v. Bd. of Sch. Dirs. of Milwaukee*, 702 F.3d 1027, 1032 (7th Cir. 2012).

The Seventh Circuit's extreme negligence standard is not only a lower standard than recklessness on its face, but it frequently slides into an even lower standard of ordinary negligence because the line separating extreme and ordinary negligence is "indistinct and unusually invisible." *Archie*, 847 F.2d at 1219; *In re Andros*, 2000 Bankr. LEXIS 1765, *18-19 (Bankr. W.D. Wisc. Dec. 14, 2000) (section 1927 jurisprudence "shows that the line of demarcation between extreme and ordinary negligence is sometimes blurry").

Respondents' arguments below are a perfect illustration of how the low Seventh Circuit standard enables parties to seek sanctions in the absence of recklessness. Respondents argued on appeal that sanctions were appropriate because Petitioner acted with either "'reckless indifference' or 'negligent inattention.'" *See* Fedder v. Addus Healthcare, Inc., et al., Brief of Respondents, Seventh Circuit Case No. 12-2694, Dkt. 23, at 46. Respondents quoted Seventh Circuit precedent that "'negligent inattention' is a sufficient predicate for imposing sanctions under Section 1927." *Id*. at 45 (quoting *Hill v. Norfolk and W. Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987)).

But irrespective of the precise contours of the Seventh Circuit's rule, it implicates an entrenched multi-way conflict over the appropriate standard for imposing sanctions. This issue arises frequently. The court below cited twelve prior cases from the Seventh Circuit alone. Pet. App. 28a-32a. The petition and brief in opposition cited 32 conflicting decisions from ten other circuits. Inconsistent results

will continue unabated unless this Court grants certiorari.[3]

3. Respondents' final argument is that Petitioner acted recklessly and "it is clear" that recklessness satisfies section 1927. BIO at 23. Respondents appear to concede that Petitioner's conduct would not satisfy a criminal recklessness standard because they argue only that a "reasonable attorney" would have acted differently and never suggest that Petitioner knew the risks. *Id*. Respondents' endorsement of a looser recklessness standard actually supports certiorari, so that this Court can clarify the appropriate recklessness test and harmonize the circuits.

Respondents also misstate the facts in arguing that Petitioner was reckless. Respondents rely on *dicta* to argue that sanctions were imposed for other reasons in addition to the pursuit of the section 1981 and 1983 claims.[4] Not so. The sanctions were

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[3] Respondents also do not dispute that this petition fairly presents a third circuit split because sanctions were imposed for filing a frivolous complaint, in conflict with at least five other circuits. Pet. at 29 n. 5.

[4] Respondents contend that Petitioner misrepresented two affidavits, *see* BIO at 15, but the district court did not mention the affidavits in its decision. Even if the court of appeals correctly characterized Petitioner's appellate argument as a misrepresentation, rather than an incorrect inference, this is *dicta* because the court of appeals could not affirm the district court based on conduct that occurred on appeal. Respondents also contend that Tate failed to file an adequate complaint, *see* BIO at 11, but the district court mentioned this only in a footnote explaining why it did not grant the motion to dismiss. Pet. App. 56a-58a. Respondents contend that Petitioner

granted based on Respondents' section 1988 motion, which concerned frivolous claims rather than misconduct by counsel. Pet. App. 33a, 35a, 59a-60a, & 64a-68a. Moreover, the Seventh Circuit held that Petitioner received sufficient notice of the sanctions, which were imposed *sua sponte*, because "the *basis* for the sanctions" and the section 1988 fees was the same, and Petitioner "had the opportunity" to respond to the section 1988 motion and address the "core point" that the "claims against the Addus defendants were *frivolous*." *Id*. at 34a-35a.

Respondents' argument that the recklessness standard is correct also supports reversal because, as discussed above, the courts below never required recklessness. As the *Amici* attest, such loose standards have widespread ramifications because they deter counsel from pursuing meritorious cases in the early stages – before the facts are known and the law established. Whatever the ultimate view of Petitioner's conduct, there is no realistic dispute that this case is an appropriate vehicle for resolving the circuit split over the proper legal test to be employed in issuing sanctions.

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voluntarily withdrew Title VII and ADA claims and failed to respond to a motion, *see* BIO at 11-12, but these were not the basis of the sanctions and they did not multiply the proceedings.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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