No. 19-1004

IN THE

Supreme Court of the United States

IN RE TUMBLING DICE, INC. *ET AL.*, DEBTORS,

TUMBLING DICE, INC. *ET AL.*, PETITIONER

v.

UNDER MY THUMB, INC., RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

Team #60P

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession.

II. Whether, in a case where a class of claims is proposed to be impaired under a joint, multi-debtor plan, 11 U.S.C. § 1129(a)(10) requires acceptance from at least one impaired class of claims of each debtor or, alternatively, acceptance from one impaired class of claims of any one debtor.

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STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

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STATEMENT OF THE CASE

Tumbling Dice, Inc. and nine affiliated debtors voluntarily and jointly filed for relief under chapter 11. Creditor Under My Thumb objected to the Debtors' Joint Plan of Reorganization (the "Plan") on two grounds, claiming 1) that 11 U.S.C. § 365(c)(1) disallows the Debtor's assumption of the Agreement if applicable non-bankruptcy law excused performance from Under My Thumb and 2) that 11 U.S.C. § 1129(a)(10) requires one impaired class of creditors per debtor to vote in favor of the chapter 11 plan before it may be confirmed. Both the bankruptcy court and the Bankruptcy Appellate Panel for the Thirteenth Circuit ruled in favor of Petitioner, ruling against Under My Thumb's objections and confirming the chapter 11 plan. The United States Court of Appeals for the Thirteenth Circuit reversed those decisions on both objections, holding for Appellant. Petitioner timely filed this appeal, and this Court granted certiorari on the two objections raised by Under My Thumb.

SUMMARY OF THE ARGUMENT

Petitioner respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit. The Thirteenth Circuit erred in holding that Petitioner cannot assume an executory contract when a hypothetical situation may excuse the other party to that contract from rendering performance to—or accepting performance from—anyone but the debtor. Further, the Thirteenth Circuit erred in holding that § 1129(a)(10) requires one impaired creditor for each debtor in a jointly administered, multi-debtor proceeding to vote in favor of the plan in order for that plan to be confirmed.

First, § 365(c)(1) does not prevent the debtor from assuming an executory contract concerning a nonexclusive licensing agreement to which the debtor is the licensee. Adoption of the so-called "hypothetical test" to determine whether an applicable law would excuse the non-bankrupt party to the agreement from performance based on speculation requires federal courts to issue advisory opinions. Adoption of the "actual test," which ensures courts only examine the factual circumstances of the parties and issues before them, is the only logical choice to ensure resolution of a potential constitutional issue. Further, statutory language and legislative history concerning the rights of parties to intellectual property agreements supports a finding that Congress intended for such licensing rights to survive in bankruptcy.

Second, the plain language of 11 U.S.C. § 1129(a)(10) requires "at least one" class of impaired creditors to vote in order for a court to approve a chapter 11 plan. This language applies whether that plan is jointly-administered or not, and does not differentiate between single and multi-debtor proceedings. Despite the later promulgation of Federal Rule of Bankruptcy Procedure 1015, which authorized the joint administration of chapter 11 cases in order to promote efficiency, Congress did not adjust the plain language of 11 U.S.C. § 1129(a)(10) to require one impaired

class per debtor to so vote, as Appellant claims. The words "per debtor" do not appear in 11 U.S.C. § 1129(a)(10), nor are suggested by its broader statutory scheme. Because there is only one plan in this jointly-administered case, only one class of impaired creditors must vote to approve the chapter 11 plan.

Further, adopting the "per plan" approach abides by public policy. Doing so does not violate substantive rights, as it merely abides by the plain text of what is a strictly procedural statute. Myriad provisions of the Bankruptcy Code ensure that substantive rights—and corporate separateness—are not injured by the per plan approach. Indeed, substantive rights are more likely to be harmed under the per debtor approach, as this case shows. This Court should not allow one creditor to hold every impaired creditor hostage based on its own selfish motive, thereby compromising the 55% distribution carefully negotiated under the Plan.

Accordingly, this Court should reverse the decision of the Thirteenth Circuit.

STATEMENT OF THE FACTS

In January 2016, Tumbling Dice, Inc. ("TDI"), and eight of its wholly-owned subsidiaries, including Tumbling Dice Development, Inc. ("Development"), entered chapter 11. (R. at 3.) Prior to filing for bankruptcy protection, Development entered into a contractual arrangement with Respondent, Under My Thumb ("Under My Thumb"), for a nonexclusive license authorizing Development access to the Club Satisfaction software, a software system created to modernize TDI's interactions with its customers. (R. at 4.) The software has proven to be a major source of income for TDI and, subsequently, quite lucrative to Under My Thumb under the terms of the licensing agreement, which called for Development to pay Under My Thumb a monthly fee according to customer spending activity. (R. at 4-5.) Due to the success of the software, Development's assumption of the contract in bankruptcy is essential to TDI's successful reorganization. (*Id.*)

In August 2016, the debtors filed disclosure statements and a draft of the Plan for distribution to creditors. (R. at 7.) Development sought to assume its contract and promised full payment of its obligations to Under My Thumb. (*Id.*) As an unsecured creditor, Under My Thumb initially viewed this arrangement and the Plan favorably. (*Id.*)

However, after becoming aware that Sympathy For The Devil ("SFD"), a private equity firm, planned to inject thirty-five million dollars into the reorganized TDI, thereby garnering a majority share, Under My Thumb changed its tune. (R. at 8.) Under My Thumb's hostility toward SFD was due to the prior activities of one of SFD's subsidiaries, which had attempted to recreate Under My Thumb's software in the past. (*Id.*) This hostility led Under My Thumb to object to the Plan's confirmation, thereby imperiling TDI's successful reorganization.

ARGUMENT

I. A debtor in possession can assume an executory contract without invoking non-bankruptcy law that would excuse performance of the non-debtor under § 365(c)(1).

The United States Bankruptcy Code elucidates multiple restrictions on a trustee acting on behalf of a debtor who wishes to continue a contract executed prior to filing. In most cases, the trustee has the right to assume or reject executory contracts. 11 U.S.C. § 365(a) (2018). As debtor in possession ("DIP"), Petitioner has all the rights and responsibilities of trustee. 11 U.S.C. § 1107. As such, the DIP is free to "provide for the assumption, rejection, or assignment of any executory contract," subject to § 365. 11 U.S.C. § 1123(b)(2). Intellectual property licensing agreements, understood to be executory and subject to § 365, represent a unique contractual arrangement falling under federal copyright and patent law protection. Such protections only permit assignment with the license owner's permission or if the agreement expressly allows it. Development, operating as DIP in conjunction with other Tumbling Dice entities, wishes to assume the nonexclusive software licensing agreement with Under My Thumb in order to continue operating the Club Satisfaction software. This arrangement is essential to its successful reorganization under chapter 11. Under My Thumb refuses to abide by its contractual agreement with Development and has unlawfully stalled the confirmation of the plan.

A DIP can assume an executory contract under § 365(c)(1) even if the other party to the agreement invokes non-bankruptcy law to object for two principal reasons. First, the "actual test" harmonizes provisions in Article III of the Constitution that limit the judiciary to actual cases or controversies with the language of the Code, in contrast to the "hypothetical test," which essentially renders court rulings as advisory opinions. Second, statutory language and legislative history support Congress's intent to have licensing rights survive bankruptcy. Departing from

those expressions of Congressional intent exposes this Court to the possibility of legislative reversal.

Under the Bankruptcy Code, Petitioner has the power to assume or reject an executory contract, such as a nonexclusive licensing agreement, subject to the bankruptcy court's approval. The Thirteenth Circuit has erroneously denied the Petitioner this right by holding that a DIP cannot assume an executory contract if, hypothetically, it could not assign that contract. The "actual test," supported by evidence of Congressional intent, is the only appropriate test.

A. Adoption of the "actual test" is the only logical option to ensure the courts render rulings on cases and controversies actually presented while remaining within constitutional bounds.

The "actual test" is the proper test for courts to apply in situations where a DIP wishes to assume a licensing agreement pertaining to intellectual property. The alternative "hypothetical test" forces courts to examine all conceivable possibilities where "applicable law" could excuse performance from the non-bankrupt license holder, which unconstitutionally renders the courts as mere advisors.

Article III of the Constitution establishes a federal court's power to decide cases and controversies. *See* U.S. CONST. art. III, § 2, cl. 1. For litigants to seek redress in federal courts, "an injury [must] be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). This Court has long recognized that it has no constitutional power to render an advisory opinion concerning the applicability of law or what law would apply to a situation. *See United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947); Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793), *in* 3 Correspondence & Public Papers of John Jay 488–89 (Henry P. Johnston ed. 1891). The issue

"must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952).

Consequently, forcing a court to entertain a claim that "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all'" creates a ripeness issue unfit for judicial decision. *See Texas v. United States*, 523 U.S. 296, 300 (1998). If a potential constitutional issue, such as that set by Congress in adopting a statute that compels the judiciary to render advisory opinions or forces the courts to consider unripe issues, can be resolved on a non-constitutional basis, the courts must do so. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

For example, in *Texas v. United States*, the Court held that a potential conflict arising between a state statute and a federal statute was too speculative and had not yet occurred—making it unfit for judicial consideration. 523 U.S. 296, 302 (1998). There, the petitioner asserted that restrictions on certain states covered under the Voting Rights Act should not apply to a state statute that would implement positions of authority within school districts should districts fail to meet state educational standards. *Id.* at 299. The Court, in affirming the district court's decision to dismiss the case as too speculative and unripe, noted: "the operation of the statute is better grasped when viewed in light of a particular application." *Id.* at 301.

Here, adoption of the "hypothetical test" would require federal courts to consider the applicability of any law that may excuse a party other than the debtor from performance and force courts to conjure hypothetical situations to ascertain whether there could be harm at some indeterminant point in the future. Doing so would undermine Supreme Court precedent. *See Texas*, 523 U.S. at 300. Under hypothetical situations, there could potentially be fact scenarios that would

allow assumption and assignment depending on application of a particular law to conceivable facts. Small tweaks to those hypothetical facts may make assumption and assignment unlawful. The possibilities are endless.

In the present case, federal intellectual property law only allows the assignment of a license to a third party with the license holder's permission or the license agreement expressly authorizes assignment. (R. at 11-12.) The "hypothetical test" would bar the debtor from assuming the licensing agreement if under a hypothetical situation the debtor would be prohibited by applicable law from assigning such license. (R. at 11.) Courts, then, would have to consider the hypothetical possibility that the DIP may attempt to assign the license to a third party after assuming it even though the DIP has not done so, is not planning to do so, and otherwise cannot do so under federal law. Such consideration renders any ruling based on the "hypothetical test" solely an advisory opinion—strictly outside the constitutional authority of federal courts. *See United Pub. Workers of Am. (C.I.O.)*, 330 U.S. at 89.

Although the language of § 365(c)(1) appears unambiguous, it leads to an absurd and—more importantly—unconstitutional result. Accordingly, it cannot be interpreted literally, rendering the conclusion of the Thirteenth Circuit below erroneous. (R. at 12.) If the "actual test" did not exist, the Court would likely be forced to declare the statutory language unconstitutional because it forces courts to be conjurers of fact situations not presented as actual cases or controversies. The "actual test" contrasts the unconstitutional "hypothetical test" as the only logical option for this Court to adopt in order to preserve the constitutionality of the statutes that created and modified § 365(c)(1). According to the constitutional avoidance doctrine, this issue can be resolved by adopting the "actual test" without addressing the constitutionality of the language that directs federal courts to issue advisory opinions. The "actual test" is the only option

that ensures courts examine the factual circumstances of the parties and issues before them while keeping the language of § 365(c)(1) undisturbed.

The "actual test" requires a bankruptcy court to consider whether a DIP actually intends to assign the executory contract to a third party. (R. at 11.) Absent an intent to assign the executory contract, a DIP is free to assume it just like any other executory contract under § 365(a). (*See id.*) A showing of an intent to assign a license, which is prohibited by federal intellectual property law, would constitute a demonstration of impending harm to the rights of the license owner and potentially justify federal court intervention. That is not the case here. The license is critical to a successful reorganization of the DIP, a fact recognized at the outset of this bankruptcy filing by Under My Thumb. (R at 7.) There is no indication that the DIP intends to assign the nonexclusive license as doing so would grossly undermine its anticipated financial performance under the plan. (R. at 5.) In keeping with sound bankruptcy and intellectual property policy, the DIP can achieve a successful reorganization while Under My Thumb's property rights remain unmolested only if the Court adopts the "actual test."

The Thirteenth Circuit's decision to reverse the bankruptcy court's ruling that the DIP can assume the executory contract pertaining to a nonexclusive license under the "actual test" was erroneous. Adopting the "hypothetical test," as the Thirteenth Circuit has, unconstitutionally places courts in the position of providing advisory opinions based on hypothetical situations not present before them.

B. Statutory language and legislative history demonstrate that Congress intended intellectual property licensing rights to survive in bankruptcy.

The statutory language and legislative history support the conclusion that Congress did not intend for § 365 to extinguish intellectual property licensing rights.

The plain language of a statute must be followed unless doing so would "produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). "In such cases, the intention of the drafters, not the strict language, controls." *Id.* "The meaning of statutory language, plain or not, depends on context," which can be derived from other sources, including its history. *See Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993). Courts can also look to the statute's overall purpose to understand the meaning of its language. *See Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350–51 (1943). Finally, if a court erroneously relies on plain language that leads to an undesirable result, Congress may reverse. *See generally Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1664 (2019) (noting that legislative history showed Congressional disapproval of judicial interpretation of § 365(a) by enacting § 365(n)).

Prior to the enactment of Public Law 100-506, which created § 365(n) of the Code, bankruptcy courts interpreted § 365(a) as providing a trustee the discretion, under the business judgment rule, to reject licensing agreements thereby terminating any rights or remedies for the licensee except for money damages. *See Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985), *cert. denied* 475 U.S. 1057 (1986) (overruled by statute). The language of § 365(a) is clear and unambiguous: "Except as provided in … the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). The Fourth Circuit interpreted this language as plainly giving the trustee the blanket right to reject executory contracts—inevitable consequences and all. *See Lubrizol*, 756 F.2d at 1048. In response to the perceived injustice served upon innocent patent licensees to bankrupt licensors, Congress expressed its disapproval and passed a statute that "corrects the perception of some courts that Section 365 was ever intended to be a mechanism for

stripping innocent licensee[s] of rights central to the operations of their ongoing business and stripping the American licensing system of its dependability and flexibility." S. Rep. No. 100-505, at 4 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3203. Section 365(n) of the Code was mirrored principally on the protections provided in § 365(h) to real property licensees. *Id.*

Although the legislative history expressly indicates that the bill did not address debtor licensees, *see id.* at 5, this Court can draw some reasonable inferences, and general principles, as to how the judiciary should interpret nonexclusive license agreements between licensors and licensees regardless of the solvency status of either party. The intent of intellectual property law, in a broad context, is to maximize the incentive for creation of useful and beneficial sciences and arts by providing owners of intellectual property the exclusive right to capitalize on their inventions for a set period of time. *See Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 784-86 (2011). Congress, concerned that licensees' rights would be trampled when licensors entered bankruptcy, rebuked the courts and passed an amendment to the Code creating § 365(n), which granted a nonbankrupt licensee options for continuing to enjoy the benefits of the license that it, through contract, appropriately bargained for. *See* S. Rep. No. 100-505, at 3-4. Congress has demonstrated its intent that such rights must survive in a bankruptcy setting.

In a reversal of the circumstances in *Lubrizol*, the licensor here is the one seeking to arbitrarily sever licensing rights (*see* R. at 8.) that Development, the licensee, has appropriately and contractually bargained for. Development requires access to the license for its reorganization. (R. at 5.) As such it merely seeks to retain the rights that it has already secured according to its executory contract with Under My Thumb. In no way are any rights of a patent or copyright holder denied when the nonexclusive licensee to such an invention, who has appropriately bargained for

such license, enters bankruptcy but wishes to maintain the contractual relationship with the license owner. Nothing has changed for the license owner—not the terms, not the parties, not the royalties—except that the nonexclusive licensee is now understood to be bankrupt. If "the fundamental purpose of reorganization is to prevent a debtor from going into liquidation," *see N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984), then refusing to allow a debtor to assume an executory contract—one that is essential to its reorganization—merely because it is a debtor—flies in the face of the purpose of bankruptcy law and produces an abjectly absurd result. (*See* R. at 22.)

Congress was concerned that the courts construed § 365(a) in such a way as to remove the "dependability and flexibility" of the licensing system by arbitrarily stripping rights from innocent licensees. *See* S. Rep. No. 100-505, at 4. Development is the innocent party here. Allowing a nonbankrupt licensor to refuse to allow a bankrupt licensee to simply reaffirm the rights that the licensee bargained for on the sole justification that the licensee is now bankrupt is just as offensive as the result of *Lubrizol*—it is unjust, unfair, and wrong. Moreover, enabling a licensor to arbitrarily sever licensing rights essential to a debtor's reorganization is akin to sanctioning an execution. The only plan necessary now is for the funeral—the debtor is dead.

According to statutory language and legislative history, licensing rights must survive the filing of bankruptcy by a party to a nonexclusive licensing agreement. The Thirteenth Circuit's holding that such nonexclusive licensing rights can be arbitrarily terminated by the nonbankrupt party goes against Congressional intent and is erroneous.

II. This Court should not disturb the unambiguous meaning of 11 U.S.C. § 1129(a)(10) which requires "at least one" class of impaired claims to vote in favor of a single, jointly-administered plan.

This analysis will first establish that the unambiguous statutory language of 11 U.S.C. § 1129(a)(10) mandates the "per plan" approach such that only one class of impaired creditors must vote to approve a jointly-administered chapter 11 plan. Next, this analysis will explore how the statutory scheme of 11 U.S.C. § 1129(a)(10) supports this conclusion. Finally, this analysis will confirm that, in this joint proceeding, there is only one chapter 11 plan.

A. This Court's principles of construction begin and end with 11 U.S.C. § 1129(a)(10)'s unambiguous statutory text.

In issues of statutory interpretation, "it is well established that when the statute's language is plain, the sole function of the courts…is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotations omitted). Even when facing awkwardness, improper grammar, or perceptibly untoward policy mandates, courts only delve into the fraught realm of statutory interpretation when a statute's plain text is ambiguous. *See Lamie*, 540 U.S. at 534 ("[t]he statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue"); *In re Hansen*, 470 B.R. 535, 543 (Bankr. App. 9th Cir. 2012) ("there is no reason to consult the legislative history unless the statutory text is ambiguous").

In this case, the plain governing language is unambiguous, even when Federal Rule of Bankruptcy Procedure § 102(7) is applied. The relevant parent statute, 11 U.S.C. § 1129 (hereinafter "§ 1129"), lists sixteen requirements that must be met before a court may confirm a chapter 11 plan. At issue is § 1129(a)(10), which requires, "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan [to have] accepted the plan…" 11 U.S.C. § 1129(a)(10). As the majority below correctly notes, 11 U.S.C. § 102(7) provides that, in construing Bankruptcy Code provisions, "the singular includes the plural." (R. at 19.) The

application of this rule results in the following permuted text of § 1129(a)(10): "[i]f…classes of claims are impaired under the plans, at least one of the classes of claims that are impaired under the plans [must have] accepted the plans…." When one reads this pluralized translation, it remains clear: to be confirmed, "at least one" class of claims that is impaired under the plan or plans, as the case may be, must have accepted that plan or plans.

On the above points, the majority and dissent below are largely in accord: both agree that, before any competing policy considerations interfere, the plain text of a statute must be followed. (*See* R. at 21 (majority); R. at 28 (dissent)) Both agree that 11 U.S.C. § 102(7) is relevant in construing the plain text of § 1129(a)(10). (*See* R. at 19 (majority); R. at 28 (dissent)) Somehow, though, through rhetorical sleight of hand, the majority below diverges from the logically following conclusion: if there is one plan, "at least one class[/classes] of claims that is[/are] impaired…[must have] accepted the plan," and if there is more than one plan, "at least one class[/classes] of claims that is[/are] impaired …[must have] accepted the plan[s]." This means that the number of impaired classes that must vote to approve the plan or plans turns on how many plans there are. If there is only one plan, only one impaired class of creditors must vote to accept it; however, if there is more than one plan, one impaired class of creditors *per plan* must vote to accept it.

The only circuit to interpret § 1129(a)(10) agrees. In *Matter of Transwest Resort Properties, Inc. (In re Transwest)*, 881 F.3d 724, 730 (9th Cir. 2018), the United States Court of Appeals for the Ninth Circuit held that "the plain language of section § 1129(a)(10) indicates that Congress intended a 'per plan' approach." Noting that "Congress could have required plan approval from an impaired class for each debtor" if it had chosen, the court refused to "modify the plain language of a statute by interpretation" by writing in the per debtor approach. *Id.* at 729.

Unfortunately, the majority below does. With insufficient explanation, the majority cursorily declares "[b]ased on the statute's plain language…section 1129(a)(10) must be analyzed on a per debtor, not a per plan, basis." (R. at 17.) However, in order for the statute's plain language to support this conclusion, it would need to read as follows: "[i]f a class of claims is impaired under the plan, at least one class of claims *per debtor* that is impaired under the plan [must have] accepted the plan." Because that is not what the statute says, the "per debtor" approach cannot be supported.

B. Section 1129(a)(10)'s statutory scheme supports the per plan approach.

Despite the foregoing, the majority below finds ambiguity in § 1129(a)(10) based on its context within the greater statutory scheme. It is true that, in order to determine whether a statute is ambiguous, courts "reference…the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *In re Hansen*, 470 B.R. 535, 543 (Bankr. App. 9th Cir. 2012) (internal quotations omitted). In evaluating a provision's broader context, courts look toward "the structure and history of the statutory scheme." *In re Gawker Media LLC*, 571 B.R. 612, 624 (Bankr. S.D.N.Y. 2017).

Here, the structure and history of § 1129 confirm the unambiguous nature of § 1129(a)(10). The first version of § 1129(a)(10), promulgated in 1978 under Public Law 95–598, required "[a]t least one class of claims [to have] accepted the plan" for plan confirmation. Pub. L. No. 95–598, 92 Stat 2549 (1978). Federal Rule of Bankruptcy Procedure 1015 (hereinafter "Rule 1015"), which authorizes joint administration of related debtors, was first "adopted by order of the Supreme Court on Apr. 25, 1983… and became effective Aug. 1, 1983." *Federal Rules of Bankruptcy Procedure*, https://uscode.house.gov/view.xhtml?path=/prelim@title11/title11a/node2&edition=prelim (last visited Jan. 19, 2020).

Following this later implementation of Rule 1015, Congress amended § 1129 six times: in 1984, 1986, 1988, 1994, 2005, and 2010. *See generally*, 11 U.S.C. § 1129. The very first amendment, occurring just after the adoption of Rule 1015, adjusted the language of (a)(10) to its present iteration. This means that, despite having the immediate opportunity to amend (a)(10) in light of Rule 1015's authorization of multi-debtor proceedings, Congress did not include the words "per debtor" such that one impaired class of creditors per debtor must vote to approve a jointly-administered plan. Following this initial opportunity, Congress still did not amend (a)(10) in the next five chances that it had to do so—even after the procedural realities of Rule 1015 set in. Through this historical lens of the statutory scheme, it is apparent that Congress did not, has not, and perhaps will not ever endorse the per debtor approach. Indeed, (a)(10) has always only required the vote of "at least one" class of impaired claims for a plan's confirmation—whether that plan is jointly administered or not.

Ignoring this reality, the majority rests its hat on supposed ambiguity born from § 1129's statutory scheme. Quoting § 1129(a)(1), the majority notes that "a confirmable plan must comply with the applicable provisions of the Bankruptcy Code." (R. at 19.) The majority translates this to mean that each *debtor* must abide by all provisions of the Bankruptcy Code—despite that § 1129(a)(1) clearly requires "a confirmable *plan[/plans]*" to so comply. (*See* R. at 19.) This misinterpretation of § 1129(a)(1) reflects the majority's continuous conflation of the word "plan" with the word "debtor." Next, the majority cites § 1129(a)(3), which requires that "the plan [be] proposed in good faith and not by any means forbidden by law." Again, this reference to "the plan" in the singular form cannot be used to substitute "each debtor's plan" into the statute. Such substitution would confound the often single-plan administration of Rule 1015. Finally, the majority references § 1129(a)(8), which requires that "each class of claims…has [either] accepted

the plan[] or [is] [un]impaired under the plan." Remarkably, the majority continues to insist that § 1129's consistent reference to "the plan/plans" somehow incorporates the unwritten words "the debtor's['] plan[/plans]" when it claims that "[t]hese sections illustrate a consistent principle of application: all *debtors* must satisfy each of the confirmation requirements of section 1129(a) absent substantive consolidation." (R. at 19.) (emphasis added)

The majority's continued substitution of phantom text is unwarranted by the statutory scheme and the scheme's history, which uniformly reference "plan"—not debtor—compliance. As many courts have held, "if the statutory language is unambiguous and the statutory scheme is coherent and consistent, then the court must cease its inquiry, and simply enforce the statute as written." *In re Flashcom, Inc.*, 361 B.R. 519, 523 (Bankr. C.D. Cal. 2007) (internal quotations omitted). Accordingly, it is clear that it is the plan or plans that must be in compliance under § 1129, not each debtor in a jointly administered proceeding.

C. There is only one chapter 11 plan in this jointly administered proceeding.

To determine how many impaired classes of creditors must vote to approve the Debtors' Plan, one must determine how many plans there are. The majority below believes that "[b]ecause the Debtors were not substantively consolidated, the Plan actually consists of ten different plans, one for each of the Debtors," (R. at 19.) while the dissent believes there is only one Plan. (*See generally* R. at 30) ("Here, the per plan approach becomes even more compelling because all but one of the Debtors' impaired classes accepted *the* Plan") (emphasis added).

Here, there are multiple, related debtors seeking operation under a jointly administered plan as permitted by Rule 1015(b). Accordingly, to determine whether there are ten plans or one, one must look at the mechanics and purposes of Rule 1015. According to Rule 1015's Advisory Committee Notes, "[j]oint administration…may include combining the estates by using a single

docket for the matters occurring in the administration, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other purely administrative matters that may aid in expediting the cases and rendering the process less costly." Fed. R. Bankr. P. 1015. This permissive "may" means that each jointly administered case differs. In order to clarify its general nature, practitioners often compare joint administration to substantive consolidation. As one court notes, "[j]oint administration contemplated under…Rule 1015(b) is creation of procedural convenience to avoid duplication of efforts regarding related debtors, but estates of each debtor remain separate, as opposed to substantive consolidation of cases which results in debtors being treated as one entity and individual estates combined to create single pool out of which claims of all creditors can be paid." *See In re Steury*, 94 B.R. 553, 18 Bankr. Ct. Dec. (LRP) 1304 (Bankr. N.D. Ind. 1988).

Perhaps this potential separateness—of entity identities, estates, and creditor claim pools—is what caused the majority below to conclude that, here, there are ten different plans. However, while many things remain separate in joint administration, such "administration of a case will normally mean that there is only one meeting of creditors under section 341(a), one discharge hearing, if a discharge hearing is necessary and, in chapters 11, 12 and 13, one confirmation hearing for the debtors involved in the joint administration." 2 Collier on Bankruptcy P 302.02 (16th ed. 2019). The singular reference to these terms—"discharge hearing" and "confirmation hearing"—indicates the presence of one bankruptcy plan. Indeed, "when the joint debtors file *a* chapter 11 or chapter 13 plan…*[t]he* plan ties the success of each debtor's case to the other and if problems arise for one debtor they will affect both." *Id.* (emphasis added); *see, e.g.*, *In re Roberts*, 279 F.3d 91, 94 (1st Cir. 2002) (one debtor's failure to pay tax obligations affected dismissal of joint plan).

Thus, while the majority below claims there are ten plans, such conclusion would confound the procedurally consolidatory nature of joint administration. Ten plans would require ten discharge hearings (in joint chapter 7 or 13 cases)—and ten confirmation hearings—of which there will not be. Indeed, the majority itself acknowledges that "*[t]he* Plan [in this case] was *a* joint plan, meaning that *one plan* was filed on behalf of all of the Debtors." (R. at 7) (emphasis added). And here, "at least one" class of impaired claims has voted to accept that Plan—satisfying the unambiguous requirement of 1129(a)(10).

III. Following the plain text of 11 U.S.C. § 1129(a)(10) does not violate public policy.

It is not the duty of this Court to weigh policy considerations in cases where, as here, the statutory text is clear. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 967 (2017) ("we cannot overrule Congress's judgment based on our own policy views"). However, even if this Court finds the text of § 1129(a)(10) ambiguous, policy considerations support the adoption of the per plan approach. This analysis will first explain how the per plan approach does not violate substantive rights of corporate law. Next, this analysis will explain the numerous additional safeguards embedded in the Code that protect the substantive rights of creditors in joint administration. Finally, this analysis will explain how the per debtor approach violates public policy.

A. Unlike substantive consolidation, joint administration is a strictly procedural tool that does not violate long-entrenched substantive rights of corporate law.

The majority below believes that adopting the "per plan" approach in jointly-administered, multi-debtor cases "bypass[es] the necessarily rigorous requirements for substantive consolidation…ignores corporate separateness and allows an impaired class of claims for one debtor to speak for the creditors of another." (R. at 20.) Accordingly, the majority believes the per plan approach "is contrary to long established principles of American corporate law." *Id.*

To better explore these concerns, it is helpful to examine the mechanics and functions of joint administration. Under Rule 1015, cases in the same court may be jointly administered if they either a) involve the same debtor or b) involve two or more related debtors. “Related debtors” for this purpose includes spouses, a partnership and its general partners, or a debtor and an affiliate. Fed. R. Bankr. P. 1015. Accordingly, multiple estates will not be jointly administered if they are of completely separate and unrelated persons, and unrelated creditors will not be granted leverage over each other through the operation of a single bankruptcy plan.

To further protect against the cross-contamination of separate parties’ substantive rights, Rule 1015 provides: “[p]rior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest.” Further, provisions (c) of Rule 1015 provides “[w]hen an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay.” Fed. R. Bankr. P. 1015. These instructions function in two key ways to ameliorate the majority’s concerns.

First, they reiterate the strictly procedural nature of Rule 1015. Administrative rules like Rule 1015 are designed solely to promote efficiency—a coveted and necessary attribute in bankruptcy. As one commentator notes, joint administration, “merely serves as a tool of convenience that helps expedite cases and lower administrative costs. The estates of each debtor remain separate and distinct, and creditors are able to reach only the assets of the specific debtor with which they have a claim.” Suzanne T. Brindise, *Choosing the “Per Debtor” Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 NW. U. L. REV. 1355, 1358 (2014).

What the majority below is concerned with is substantive consolidation, which, by contrast, "*does* substantively abridge the requirements of the Bankruptcy Code and, more importantly, the rights of the parties involved." *Id.* at 1366 (emphasis added). Unlike joint administration, "substantive consolidation is not provided for in the Bankruptcy Code, but is…a federal common law construct that emanates from equity. It allows a bankruptcy court to combine the estates of multiple debtors—each of which are separate legal entities—to pool the debtors' assets, and to force each debtor's creditors to become creditors in the consolidated estate." *Id.* Accordingly, the majority's concerns regarding creditor rights in substantively consolidated cases is valid—but should not be imputed to a strictly procedural mechanism like joint administration. The per plan approach merely abides by the plainly procedural nature of Rule 1015—requiring one impaired class of creditors to vote in favor of the jointly administered plan. This does not offend creditors' rights like combining the estates of separate legal entities, pooling the debtors' assets, and forcing each debtor's creditors to become creditors in the consolidated estate might. It merely allows a jointly administered case to proceed quickly, smoothly, and efficiently by facilitating the expedited approval of the consolidated plan.

Secondly, the instructions in Rule 1015 serve as backup protection for creditor rights should the procedural efficiency born from joint administration threaten substantive rights. Specifically, courts must consider "potential conflicts of interest" and "protect[] the rights of parties under the Code" before allowing cases to proceed jointly. Fed. R. Bankr. P. 1015. This means that courts must consider how such conflicts and rights will be affected by impaired voting toward the confirmation of a single bankruptcy plan *before* a jointly administered case is approved. In other words, a case will not be jointly administered if substantive rights are affected. *Accord In re N.S. Garrott & Sons*, 63 B.R. 189, 191 (Bankr. E.D. Ark. 1986) ("[w]hether or not a case is

jointly administered has nothing to do with the rights creditors have against each estate, nor the rights and liabilities of one estate to the other").

To be clear, it is substantive consolidation—not joint administration—that poses controversial policy issues regarding the violation of corporate separateness. Joint administration is strictly for administrative convenience and the per plan approach aims to achieve the same. Because there is only one plan in this case, it makes little procedural sense to hold ten different impaired creditor votes.

B. Numerous additional safeguards within the Code prevent Rule 1015 from violating substantive rights.

In addition to the safeguards embedded in Rule 1015, there exist numerous other protections throughout the Code that prevent joint administration from adversely affecting the substantive rights of parties or threatening corporate separateness. To explore these safeguards, it is helpful to examine them in the context of the procedural truth at the heart of the majority's concern: Rule 1015's facilitation of one bankruptcy plan that serves multiple joined debtors. This prevents the need for multiple confirmation hearings, and, as here, allows for a pro rata distribution to multiple debtors' creditors from the assets of the related debtors.

The presence of one plan does not affect the substantive rights of creditors when it comes to voting because the plan itself is born from negotiations involving various stakeholders to the proceedings, including creditors, debtors, and lenders. The plan therefore represents a deal that has been reached, and other provisions of the Code create additional safeguards to ensure that plan's reasonableness. For example, the plan must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts have interpreted this to mean that "there [must] exist[] a reasonable likelihood that [the] plan will achieve [a] result consistent with objectives and purposes of Bankruptcy Code," and requires "a reasonable assurance of

commercial viability." *In re GAC Storage El Monte*, *LLC*, 489 B.R. 747 (Bankr. N.D. Ill. 2013). Further, 11 U.S.C. § 1129(a)(5) ensures that a plan proponent's corporate insider arrangement "is consistent with the interests of creditors and equity security holders and with public policy," 11 U.S.C. § 1129 (a)(11) ensures that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization," and 11 U.S.C. § 1129 (a)(1)&(2) ensure that both the plan and the proponent of the plan comply with "the applicable provisions of [the Code]." In other words, there are numerous grounds under which a substantively prejudiced creditor can object to—or under which a court may refuse—a plan's confirmation.

To be sure, impaired creditor voting is an important bargaining chip in bankruptcy. However, abiding by the per plan approach does little to diminish a creditor's substantive rights under a jointly-administered plan. The plan must already abide by fifteen requirements under 11 U.S.C. § 1129—in addition to § 1129(a)(10)'s impaired creditor vote. These ensure an unfair plan will not govern multiple, related debtors and their creditors, and helps explain why Congress has not amended § 1129(a)(10) to clearly accommodate the per debtor approach. If ten impaired creditor votes were required in this joint proceeding, § 1129's requirements would morph from protective to unreasonably burdensome, compromising the debtor's—and the Code's—key goal in chapter 11: the confirmation of a workable plan.

C. Following the "per debtor" approach permits creditors with circumspect motives to unduly influence the bankruptcy proceeding.

As the majority below notes, "[f]or chapter 11 debtors who hope to emerge from bankruptcy, the ultimate goal is confirmation of a plan of reorganization." (R. at 15.) The facts of this case present an excellent example of how adopting the per debtor approach can derail this critical goal of reorganization, and allow a single creditor possessing ulterior motives to hold all of the debtors and creditors under a joint proceeding hostage.

In this case, all but one of the Debtors' impaired creditors voted to accept the heavily-negotiated joint plan. The one defecting creditor, Under My Thumb, only objected to the plan's confirmation upon learning that a private equity group, whose portfolio of companies include a direct competitor, would gain voting shares of the reorganized holding company. Accordingly, in order to protect its sole, subjective interests, Under My Thumb objected to a plan that otherwise was deemed fair by all other adversely affected creditors. This tactic reeks of bad faith and is precisely the type of activity that the Code seeks to thwart. It is ruinous to the careful negotiations that the debtors, creditors, and lenders conducted in order to propose a working plan. By forcing these negotiations to resume, it threatens the critical, money saving efficiency of joint administration. It violates utilitarianism by allowing one party to hold many consenting parties hostage. It functions as a technical excuse to reject the Plan when so many other substantive objections could have been raised, had the Plan actually been prejudicial to Under My Thumb's interests. Finally, it causes precisely the result so feared by the majority below: threatening the substantive rights of parties (e.g., the unsecured creditors' right to a 55% distribution) by elevating one party to an unwarranted position of control and extraordinary leverage.

This Court should not allow Under My Thumb to prevail. If ever there was a case to quell the per debtor approach once and for all, it is this one. Public policy, and the very principles upon which the Code rests, compels it.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the Thirteenth Circuit.

APPENDIX

Article III, §2, cl. 1 of the United States Constitution: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

Public Law 95–598, 92 Stat 2549 (1978): "(10) At least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class."

Federal Rule of Bankruptcy Procedure 1015: "Consolidation or Joint Administration of Cases Pending in Same Court (a) Cases involving same debtor If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases. (b) Cases involving two or more related debtors If a joint petition or two or more petitions are pending in the same court by or against (1) spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of spouses shall, if one

spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2). (c) Expediting and protective orders When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay."