No. 22-0909

IN THE

Supreme Court of the United States

IN RE PENNY LANE INDUSTRIES, INC., DEBTOR,

ELEANOR RIGBY, PETITIONER

V.

PENNY LANE INDUSTRIES, INC., RESPONDENT

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM NUMBER 11
COUNSEL FOR PETITIONER

JANUARY 19, 2023

QUESTIONS PRESENTED

I. Whether a bankruptcy court has the power to permanently and non-consensually deprive third parties of their direct claims against non-debtor entities.

II. Whether, pursuant to 11 U.S.C. § 1192, a corporate debtor proceeding under subchapter V of chapter 11 of the Code can discharge debts for willful and malicious injury.

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The Thirteenth Circuit Court of Appeals' opinion is available at Case No. 21-0803. On direct appeal from the Bankruptcy Court for the District of Moot, the Thirteenth Circuit affirmed the bankruptcy court's ruling in favor of the Debtor, Penny Lane Industries.

STATEMENT OF JURISDICTION

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

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions relevant to the case before the Court are listed below and provided in the Appendices.

U.S. Const. art. I, § 8, cl.4

U.S. Const. art. III, § 1

11 U.S.C. § 105(a)

11 U.S.C. § 523(a)

11 U.S.C. § 524(a)(2)

11 U.S.C. § 524(e)

11 U.S.C. § 524(g)(2)

11 U.S.C. § 524(g)(4)

11 U.S.C. § 524(h)(1)

11 U.S.C. § 1123(a)(5)

11 U.S.C. § 1123(b)(6)

11 U.S.C. § 1129(b)(2)

11 U.S.C. § 1141(d)

11 U.S.C. § 1182

11 U.S.C. § 1191(b)

11 U.S.C. § 1192

11 U.S.C. § 1228(a)(2)

28 U.S.C. § 1334(b)

28 U.S.C. § 157

STATEMENT OF THE CASE

This appeal arises out of the Respondent-Debtor's attempt to discharge otherwise non-dischargeable claims and also out of its attempt to use its chapter 11 plan to resolve non-derivative liability against its non-debtor corporate parent. The bankruptcy proceeding underlying this appeal threatens to jeopardize the integrity of the fundamental principle that bankruptcy discharge is only for the honest debtor who submits himself to the strictures of the Bankruptcy Code.

I. Factual History and Procedural Background

Penny Lane Industries, (the "Debtor"), is a company responsible for manufacturing plastic, glass, and metal food containers. Their manufacturing facility is located in Blackbird, Moot. R. at 4. The Debtor is a wholly owned subsidiary of a well-known cereal and convenience food company, Strawberry Fields Foods, Inc. ("Strawberry Fields").

A tsunami of lawsuits beginning in 2017 resulted in the Debtor filing this subchapter V chapter 11 case in January 2021. *Id.* at 6. These lawsuits assert that the Debtor's willful disposal of industrial chemicals and pollutants on its facility's property has contaminated the Blackbird groundwater supply and caused illness and death throughout Blackbird and its surrounding communities. *Id.* at 5. The allegations set forth in these lawsuits are disputed by the Debtor and Strawberry Fields, and no judicial determination has been made regarding these claims. *Id.* at 6.

A 2013-2017 EPA study, however, showed that tens of thousands of Blackbird residents had been drinking and bathing in water that had toxic contaminants ranging from 250-3000 times the permitted level. *Id.* at 5. This level of exposure is linked to illness, birth defects, or death. *Id.* Petitioner, Ms. Eleanor Rigby ("Ms. Rigby"), is one such unfortunate Blackbird resident.

Ms. Rigby tragically lost her four-year old daughter to leukemia. In 2017, after her daughter's death, Ms. Rigby brought suit against the Debtor and Strawberry Fields asserting that

her daughter's exposure to pollutants dumped by the Debtor caused her to become fatally ill with leukemia. *Id.* In particular, she claimed that the Debtor dumped the pollutants on its property as a cost-saving measure, and that the Debtor's then CEO Maxwell S. Hammer ("Hammer") was made aware of this practice and its potential consequences as early as 2014. *Id.* Additionally, Ms. Rigby claimed that Strawberry Fields is also liable for her daughter's death. *Id.* at 6. Among other theories of liability, she claims Strawberry Fields knew, or should have known, of its subsidiary's misconduct. *Id.* Notably, many of the lawsuits filed against the Debtor named Strawberry Fields as a co-defendant. *Id.*

On January 11, 2021, facing a growing number of lawsuits, the Debtor filed for relief under subchapter V of chapter 11 of the Bankruptcy Code (the "Code"). *Id.* Ms. Rigby filed a $1 million unsecured claim, and nearly 10,000 similar claims asserting damages close to $400 million were filed. *Id.* However, the Debtor had less than $7.5 million in noncontingent liquidated debt, so the parties stipulated that the Debtor was eligible for subchapter V relief. *Id.* The Debtor did not object to Ms. Rigby's claim, so it was deemed allowed under section 502 of the Code. Moreover, the claims resolution process was deferred until after the confirmation of a chapter 11 plan. *Id.*

Strawberry Fields, facing similar mass-tort litigation pressure, did not file for relief under the Code. Nevertheless, the Debtor's chapter 11 plan of reorganization (the "Plan") ultimately provided for the broad release of all claims against its corporate parent, Strawberry Fields, related to the tragedy in Blackbird. *Id.* at 8.

Relevant to this appeal are two disputes between Ms. Rigby and the Debtor concerning the Debtor's bankruptcy. First, Ms. Rigby objected to the confirmation of the Debtor's chapter 11 plan (the "Plan") because the non-consensual release of third-party direct claims against Strawberry Fields are not permissible under applicable bankruptcy and non-bankruptcy law. Second, she filed

an action requesting that the bankruptcy court declare her $1 million claim against the Debtor non-dischargeable under sections 523(a) and 1192(2). The bankruptcy court ruled against her on both issues, and she timely appealed both rulings. *Id.* at 11. The disputes were consolidated in a direct appeal to the Thirteenth Circuit under 28 U.S.C. § 158(d).

A. The Plan Confirmation Dispute

After two months of mediation, stakeholders ultimately negotiated a settlement framework that was incorporated into a chapter 11 plan of reorganization (the "Plan"). During these negotiations, the bankruptcy court granted and extended an injunction halting all actions against Strawberry Fields and others several times. R. at 8.

Pursuant to the Plan, a creditor trust is to be established and funded with: (a) the Debtor's net income for five years, and (b) a one-time $100 million contribution by Strawberry Fields. *Id.* The trust is anticipated to pay creditors with allowed claims 30-40 cents on the dollar, and over 95% of unsecured creditors who submitted ballots voted for the Plan. *Id.* In exchange for its one-time contribution, the Plan channels all claims against Strawberry Fields into the trust and permanently precludes any and all past, present, and future victims from pursuing their direct claims against Strawberry Fields for their role in the Blackbird tragedy. *Id.* at 8. Ms. Rigby objected to the Plan for this reason, alleging that a release of this type was illegal and out of the bankruptcy court's power to grant as part of a chapter 11 plan. *Id.* at 9. Norwegian Wood Bank (the "Bank") also objected to the Plan, arguing that the Plan did not meet the cramdown provisions prescribed by sections 1191(b) and 1129(b)(2)(A) of the Code. *Id.*

After a four-day confirmation hearing, the bankruptcy court reluctantly confirmed the Plan, reasoning the releases were necessary under the circumstances of the case. *Id.* at 11. The court's reluctance stemmed from the fact that the proposed distribution could never compensate the

victims for the significant pain and suffering associated with the death and injury allegedly caused by the conduct of the Debtor and Strawberry Fields. *Id.*

B. The Non-dischargeability Dispute

In regards to her $1 million claim against the Debtor, Ms. Rigby argued it should be deemed non-dischargeable pursuant to sections 523(a) and 1192(2). Section 523(a)(6) excludes from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." R. at 7.

In response, the Debtor moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. This rule is made applicable to the bankruptcy case by Rule 7012 of the Federal Rules of Bankruptcy Procedure. Further, the Debtor argued that the provisions of 523(a) regarding non-dischargeability do not apply to business entities. The bankruptcy court granted the motion to dismiss, holding that the section 523 discharge exceptions only apply if the debtor is an individual. And granted the motion to dismiss. *Id.*

SUMMARY OF ARGUMENT

I. Bankruptcy courts cannot order the non-consensual release of third-party direct claims against non-debtors.

It is beyond the authority of bankruptcy courts to non-consensually release direct claims held by third-parties against non-debtors because: (1) section 524(e) of the Code categorically prohibits such releases outside of asbestos cases; (2) such releases are outside of the equitable powers conferred by sections 105(a), 1123(b)(6), and 1123(a)(5); (3) bankruptcy courts do not have subject matter jurisdiction over third-party direct claims, and could not constitutionally exercise such jurisdiction even if it did exist; and (4) the non-consensual nature of such releases offend due process.

Section 524(e) plainly states that the "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt." 11 U.S.C. § 524(e). Section 524(g) is an exception to section 524(e) that applies only to asbestos cases. Here, this is not an asbestos case, and the confirmation of the Debtor's Plan discharges all claims against Strawberry Fields related to the Debtor's tortious conduct. Accordingly, the confirmation of the Plan necessarily affects the liability of another entity, directly violating section 524(e).

Respondent will argue that section 524(e) merely explains the effect of a debtor's discharge, or that it says nothing about the court's authority to grant such non-consensual third-party releases. But even if this Court accepts that argument, such releases are nevertheless not authorized anywhere in the Code. Respondent will cite sections 105(a), 1123(b)(6), and 1123(a)(5) as appropriate statutory authorization, but these sections do nothing but confer on bankruptcy courts a general authority to carry out other provisions of the Code. They do not create any substantive rights or remedies that are not found elsewhere in the Code. Accordingly, because there existed no right, in bankruptcy law or outside of it, for the Debtor and some of its creditors to extinguish Ms. Rigby's direct claims against Strawberry Fields, the bankruptcy court acted outside of its statutory authority by confirming the Debtor's Plan containing the non-debtor releases.

The bankruptcy court further lacked jurisdictional and constitutional power to order the Strawberry Field releases. Regardless of any indemnification or contribution rights the Debtor may have against Strawberry Fields, the direct claims held by Ms. Rigby and others do not belong to the Debtor's estate. Therefore, they do not fall under the bankruptcy court's limited *in rem* jurisdiction over the Debtor's property. Furthermore, the Plan releases lawsuits that have not even been filed yet, thus these future disputes cannot possibly fall under the bankruptcy court's

jurisdiction over "cases and proceedings" . . . "related to" bankruptcy cases. *See* 28 U.S.C. §§ 1334(b), 157. And as it relates to suits that have already been filed, Congress has made clear that the district courts have the sole authority to resolve personal injury tort cases and wrongful death claims. *See* 28 U.S.C. § 157(b)(5).

Even if "related to" jurisdiction did exist over these claims, the bankruptcy court still lacked the constitutional authority to resolve these third-party direct claims. These third-party claims are non-core matters that could not be resolved in the claims allowance process. Therefore, under *Stern v. Marshall*, the bankruptcy court lacked the constitutional authority to issue a binding order on these claims without the consent of the parties. 564 U.S. 462, 494 (2011). Ms. Rigby fervently objected to the bankruptcy court's adjudication of her claim. The bankruptcy court exceeded its constitutional power by ignoring her objection and entering a binding order extinguishing her claim.

Finally, the non-consensual releases in this case offend due process because they deprived Ms. Rigby and others of their property without granting them their day in court. Due process in this case required, at a minimum, the opportunity to opt out of the settlement agreement individually pursue one's direct claim against Strawberry Fields. This is settled law in the context of class actions; this Court should not allow Strawberry Fields to use its subsidiary's bankruptcy as a backdoor to avoid due process requirements.

II. Subchapter V corporate debtors cannot discharge section 523(a) debts.

Section 1192 of the Bankruptcy Code was added under Subchapter V in 2005. The section does not differentiate between a corporate and individual debtor and instead mandates that in the event of a non-consensual plan, the court shall grant a discharge of all debts unless the debt falls under any of the exceptions "of the kind specified in section 523(a) of [title 11]." 11 U.S.C. §

1192(2). Respondent will argue that this provision in section 1192 does not apply to corporate debtors because of the use of the word "individual" in the preamble of section 523. *See* 11 U.S.C. § 523 (A discharge under section 727, 1141, 1192, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt . . . .").

This argument cannot trump Congress's clear intent to shorthand the long and inclusive list of discharge exceptions included in section 523(a) and apply them to all debtors under subchapter V. The use of the phrase "of the kind" in section 1992 makes the congressional intent to shorthand evident. Congress did not cross-reference the entirety of section 523 in section 1992. Instead, it specifically precluded all subchapter V debtors from discharging the *kinds* of debts included in section 523(a). This is evidenced through an analysis of the entire subchapter. For example, Congress included a definition for the term "debtor" in subchapter V that includes small business debtors. 11 U.S.C. § 1182(1). This definition applies to all of subchapter V, including the phrase "the court shall grant the *debtor* a discharge of all debts . . . except any debt of the kind specified in section 523(a)" in section 1992. The Thirteenth Circuit's decision relied on the erroneous assumption that Congress made this distinction only to later fail to make it clear that small business debtors were then excluded from a provision of that subchapter that includes the already defined term.

Further, section 523 applies broadly across the Code, while section 1192 applies specifically to subchapter V. Where two provisions cannot be harmonized, the more specific provision controls. Here, that is section 1192. Notably, two Chapter 12 bankruptcy court cases addressing the exact same problem adopt Ms. Rigby's interpretation of the conflicting provisions. *See, e.g.*, *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *New Venture P'ship v. JRB Consol.* (*In re JRB Consol., Inc.*), 188 B.R. 373 (Bankr. W.D. Tex. 1995). The

Thirteenth Circuit's lack of acknowledgment of these cases is unwarranted because of the mirrored language in Chapter 12. Chapter 12 also uses the language "the court shall grant the debtor a discharge" and cross-references section 523(a) with the language "of the kind". 11 U.S.C. § 1228. Both cases explicitly state that this cross-reference is meant to shorthand the list in section 523.

Furthermore, including corporate debtors in section 1992 best aligns with the bankruptcy policy of only granting discharge to the honest but unfortunate debtor. The Thirteenth Circuit's interpretation lends itself to creating an imbalance in the system that gives corporate debtors a pervasive incentive to pursue non-consensual plans that allow them to discharge otherwise non-dischargeable debts. Due to the abrogation of the absolute priority rule, the restriction against creditors so that they cannot propose competing plans, and the newly granted ability of the subchapter V debtor to confirm a plan without a vote by creditors, the decision of the Thirteenth Circuit would disrupt the careful and clear balance between debtors and creditors and make the relationship between the two in bankruptcy cases inequitable.

ARGUMENT

I. BANKRUPTCY COURTS MAY NOT APPROVE A CHAPTER 11 PLAN OF REORGANIZATION THAT CONTAINS NON-CONSENSUAL THIRD-PARTY RELEASES.

This case represents another example of a solvent third party facing mass tort litigation exposure exploiting the chapter 11 process and grifting the benefits of bankruptcy without incurring the associated costs. These third parties accomplish their grift through an illegal mechanism called a non-debtor release.[1]

Non-debtor releases are a permanent discharge of liability that a confirmed chapter 11 plan of reorganization grants to parties that have not filed for bankruptcy themselves. Lindsey Simon,

[1] This mechanism is also referred to as a third-party release.

Bankruptcy Grifters, 131 Yale L.J. 1154, 1169 (2022). Non-debtor releases like those in this case eliminate all past, present, and future claims against a non-debtor regarding a particular mass tort. The consent of creditors with such claims is not required; non-debtor releases bind parties regardless of whether they participated in the bankruptcy and regardless of whether they objected to the chapter 11 plan. *Id.*

As the sections below explain, this Court should end this unauthorized grift on the bankruptcy system by solvent non-debtors. These permanent non-consensual third-party releases are beyond bankruptcy courts' power to grant and violate claimants' Fifth Amendment due process rights. Therefore, this Court should find that the Thirteenth Circuit erred when it held that the bankruptcy court had the authority to approve the debtor's chapter 11 plan that deprived Ms. Rigby of her claims against Strawberry Fields.

A. BANKRUPTCY COURTS DO NOT HAVE STATUTORY AUTHORITY TO GRANT NON-CONSENSUAL THIRD-PARTY RELEASES THAT DO NOT RELATE TO ASBESTOS CASES.

Section 524 categorically prohibits courts from approving chapter 11 plans containing non-consensual third-party releases in non-asbestos cases. *See In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009).

But if section 524(e) does not expressly bar the non-consensual release of third-party direct claims against non-debtors, such releases are nevertheless outside of any statutory or equitable power granted to bankruptcy courts under sections 105(a), 1123(a)(5), and 1123(b)(6). *See In re Purdue Pharma, L.P.*, 635 B.R. 26, 106 (S.D.N.Y. 2021) (holding that "[n]one of [these sections] creates any substantive right . . . [or any] sort of residual authority that authorizes" bankruptcy courts to order the non-consensual release of third-party direct claims against non-debtors).

1. Section 524(e) prohibits non-consensual third-party releases in all cases except for those related to asbestos injury.

The task of assessing statutory authority begins where all such inquiries must begin: with the text of the statute. *See Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). This Court has made clear that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank,* 503 U.S. at 253-54.

In this case, this Court need not look further than section 524 of the Code. Section 524(a)(2) provides that a discharge under the Code operates as a permanent injunction against actions related to the "personal liability of the *debtor*." 11 U.S.C. § 524(a)(2) (emphasis added). Section 524(e) states that the "discharge of a debt of the debtor *does not affect the liability of any other entity* on . . . such debt." *Id.* § 524(e) (emphasis added). Therefore, without specific authorization elsewhere in the Code, the operation of sections 524(a)(2) and 524(e) in tandem categorically prohibit non-consensual third-party releases. *See In re Highland Cap. Mgmt., L.P.*, 48 F.4d 419, 436 (5th Cir. 2022) ("[Section] 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code.").

Examining the Code, such express authority can be found in only one place: section 524(g). Turning to section 524(g), it is clear that it applies "s*olely* and *exclusively*" to cases involving injuries related to asbestos. *In re Purdue Pharma, L.P.,* 635 B.R. at 91 (citing 11 U.S.C. § 524(g)(2)(B)(i)(I)) (emphasis added). Additionally, the first line of subsection 524(g)(4)(A)(ii) suggests Congress understood that non-debtor releases were prohibited in all other contexts by section 524(e): "*Notwithstanding the provisions of section 524(e)*, such an injunction may bar any action directed against a third party . . . who is . . . alleged to be directly or indirectly liable for the

conduct of, claims against, or demands on the debtor." 11 U.S.C. § 524(g)(4)(A)(ii) (emphasis added).

Furthermore, Congress's intention that non-debtor releases be limited to asbestos cases is evident in its deliberate articulation of the numerous requirements and restrictions on its application. *See, e.g.,* 11 U.S.C. §§ 524(g)(2)(B)(i)(II-IV), (g)(4)(A). It is "familiar law that a specific statute controls over a general one." *Bulova Watch Co. v. U.S.*, 365 U.S. 753, 868 (1961). And the Code is a "comprehensive scheme" that targets "specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Therefore, had Congress intended to extend such extraordinary relief to non-debtor entities, it would not have remained silent. Rather, it would have done one of two things: 1) implemented section 524(g) without limiting its application to asbestos cases or 2) structured section 524(h) to grandfather in all previous "fair and equitable" non-debtor releases, not just the ones confirmed in asbestos bankruptcies. *See* 11 U.S.C. § 524(h)(1)(A) (deeming prior asbestos non-debtor releases statutorily compliant if, among other requirements, the court determined they were "fair and equitable" at the time the plan was confirmed). Congress did neither when it enacted sections 524(g) and 524(h) in 1994, and has not done so by amendment in the 29 years since.

The case at bar does not concern asbestos related injury, so it fails to meet the requirements of section 524(g). Thus, by releasing Strawberry Fields (a non-debtor entity) from all claims related to its bankrupt subsidiary's pre-petition conduct, this chapter 11 plan *necessarily* "affects the liability of [another] entity" in explicit violation of section 524(e). 11 U.S.C. § 524(e); *see also In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1059 (5th Cir. 2012) (citing *In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995)) ("Section 524 prohibits the discharge of debts of nondebtors."); *In re*

Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 625-26 (9th Cir. 1989); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600-01 (10th Cir. 1990).

In sum, by operation of section 524 alone, the releases granted to Strawberry Fields were prohibited by the Code.

2. Non-consensual third-party releases are not otherwise authorized by the Code.

Some courts distinguish the applicability of section 524(e) by the kind of third-party debt being discharged. *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082-84 (9th Cir. 2020). Other courts hold that section 524(e) does not prohibit non-debtor discharge at all because the statute "says nothing about the authority of the bankruptcy courts to release a nondebtor from a creditor's claims." *In re Seaside Eng'g & Surveying*, 780 F.3d 1070, 1078 (11th Cir. 2015).

Whether section 524(e) categorically bars all non-debtor relief or not, there still is no explicit authorization in the Code or elsewhere empowering bankruptcy courts to order the non-consensual discharge of direct claims held by third-parties against other third-parties. Nevertheless, solvent non-debtors have often successfully extracted beneficial provisions and concepts out of section 524(g), lodged them into a chapter 11 plan, and convinced a bankruptcy court to bless the Frankenstein creation pursuant to its equitable powers under sections like 105(a), 1123(b)(6), 1123(a)(5). In doing so, these courts disregard this Court's precedent that an exercise of equitable power "that takes place at the legislative level of consideration" is "tantamount to a legislative act and therefore" is "beyond the scope of judicial authority." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996); *accord Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) (courts "do not sit to assess the relative merits of different approaches to various bankruptcy problems. Achieving a better policy outcome . . . is a task for Congress, not the courts."). At its core, this judicial creation

of an entirely new class of beneficiaries who can receive a discharge through bankruptcy without subjecting themselves to the strictures of the Bankruptcy Code is a clear usurpation of Congress's exclusive power to enact bankruptcy laws. *See* U.S. Const. art. I, § 8, cl. 4 ("Congress shall have Power . . . [t]o establish uniform Laws on the subject of Bankruptcies.").

Therefore, even if this Court finds that there is a lack of explicit statutory prohibition on the practice, it should still hold that non-consensual third-party releases are outside of any equitable powers the bankruptcy courts may have under sections 105(a), 1123(b)(6), and 1123(a)(5). Section 105(a) states that the "court may issue any order . . . necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §§ 105(a). Section 1123(b)(6) is substantively analogous to section 105(a); it provides that "a plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title." *Id.* at § 1123(b)(6). Lastly, section 1123(a)(5) simply requires a chapter 11 plan to "provide adequate means for the plan's implementation." *Id.* at § 1123(a)(5).

The Thirteenth circuit cited these three sections as "clear grants of broad statutory authority," R. at 15, but all these sections confer on the bankruptcy courts is a general power "to enter orders that carry out other, substantive provisions." *In re Purdue Pharma, L.P.*, 635 B.R. at 107 ("None of them creates any substantive right; neither do they create some sort of residual authority that authorizes the action taken by the Bankruptcy Court.").

Jurisdictions that have allowed non-consensual third-party releases have reasoned that they are sometimes justified by rare and unique circumstances or by a necessity to achieve effective reorganization. *See Nat'l Heritage Found., Inc. v. Highbourne Found., Inc.*, 760 F.3d 344, 350 (4th Cir. 2014) (holding circumstances of case insufficiently unique to justify non-debtor release); *In re Seaside Eng'g & Surveying*, 780 F.3d at 1078 (holding such releases "should be reserved for

those unusual cases in which such an order is necessary for the success of the reorganization"). But, as already held by this Court, there is no "rare case" exception that allows bankruptcy courts to deviate from the Code and make federal common law in the name of equity. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 471 (2017); *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988) (explaining that courts cannot deviate from the Code even when they sincerely "believ[e] that . . . creditors would be better off."). Bankruptcy courts must respect the substantive rights created by state and federal nonbankruptcy law, except to the extent those rights are specifically modified by the Bankruptcy Code. *See Butner v. United States*, 440 U.S. 48, 54-55 (1979)

Indeed, any equitable power granted to the bankruptcy courts cannot be used as a blank slate on which to write laws; it must be used within the "confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014) (quoting *Norwest Bank Worthington*, 485 U.S. at 206.) Put differently, section 105(a) power must be used to preserve a right found elsewhere in the Code; it must be "linked to another specific Bankruptcy Code provision." *In re Myryang*, 232 F.2d 1116, 1125 (9th Cir. 2000); *see also Noonan v. Sec'y of Health and Human Servs.*, 124 F.3d 22, 28 (1st Cir. 1997) ("Section 105 itself is not a source of new substantive rights."). As the Second Circuit has explained, section 105(a) does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc* 351 F.3d 86, 92 (2d Cir. 2003). Further, any "power that a judge enjoys under [section] 105 must derive ultimately from some other provision of the Bankruptcy Code*." In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d. Cir. 2005) (quoting Douglas G. Baird, Elements of Bankruptcy 6 (3d ed. 2001)).

Section 1123(b)(6) cannot be the other provision to which section 105(a) links to and derives power from to grant non-consensual third-party releases. As Judge McMahon explained when she overruled the confirmation of the Sackler releases, section 1123(b)(6) is "substantively analogous to section 105(a)." *In re Purdue Pharma, L.P.*, 635 B.R. at 106. Accordingly, if section 105(a) "does not confer any substantive authority on the bankruptcy court . . . then [section 1123(b)(6)] can in no way be read to do so." *Id.*

Section 1123(a)(5) fares no better as a substantive companion to section 105(a). Nothing in section 1123(a)(5) authorizes a by-any-means-necessary approach to ensuring funding for a chapter 11 plan. *See In re Purdue Pharma, L.P.*, 635 B.R. at 109. The mere fact that the $100M contribution by Strawberry Fields is being used to fund implementation of the debtor's plan does not give the bankruptcy court statutory authority to enter an otherwise impermissible release order in exchange for that funding. *See id.* ("Section 1123(a)(5) does not authorize a court to give its imprimatur to something the Bankruptcy Code does not otherwise authorize, simply because doing so would ensure funding for a plan.").

Finally, even if this Court finds the statutory question close, there are policy reasons for putting an end to non-consensual third-party releases. The judicially created standards for approval of non-debtor releases are insufficient to gatekeep such extraordinary relief. The reality is that, by simply stating "I will not contribute anything to a settlement without a non-consensual non-debtor release," solvent non-debtors can easily produce the evidence necessary to satisfy the operative legal rule gatekeeping the relief they seek. As notable bankruptcy scholar Ralph Brubaker explains:

> "Necessary to successful reorganization" is a negotiating position proffered by a nondebtor who will directly benefit from that which it insists is essential to any settlement deal. By positively inviting the nondebtor to manufacture the "evidence" necessary for approval, through its negotiating behavior, this standard

> virtually guarantees that approval will not and cannot be limited to "rare" and "unusual" cases, which the growing prevalence of the bankruptcy grifter phenomenon vividly illustrates.

Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. Forum (Feb. 28 2022).

Recent cases validate Brubaker's concerns. *See, e.g.*, *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726 (S.D.N.Y. 2019) ("Almost every plan I receive includes proposed [non-debtor] releases."); *In re Purdue Pharma, L.P.*, 635 B.R. at 37 ("[w]hen every case is unique, none is unique."). The Eleventh Circuit has even dropped the pretense that necessary to successful reorganization actually has anything to do with the success of the reorganized entity. In *In re Centro Group, LLC*, the court explained that the purpose of non-debtor releases is "*not* to ensure success for a reorganized entity . . . but is instead to *facilitate a settlement agreement*." No. 21-11364, 2021 WL 5158001 at *3 (11th Cir. Nov. 5, 2021) (emphasis added).

Simply put, nonconsensual third-party releases are not about saving a debtor's business or any other bankruptcy policy objective. In mass tort bankruptcies, they are simply an extra-statutory mechanism used to resolve the mass tort liability of solvent non-debtors. This resulting ad hoc system does not align with the basic tenet that bankruptcy is intended "to free the debtor of his personal obligations *while ensuring that no one else reaps a similar benefit*." *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (emphasis added).

B. THE BANKRUPTCY COURT'S NON-CONSENSUAL RELEASE OF THIRD-PARTY DIRECT CLAIMS FAILS ON JURISDICTIONAL AND CONSTITUTIONAL GROUNDS.

Lack of statutory power in the Code is but one of several problems with bankruptcy courts ordering the non-consensual release of direct claims held by third-parties against other third-parties. Bankruptcy courts also lack the subject matter jurisdiction to release third-party direct

claims against non-debtors. Additionally, even if "related to" jurisdiction did exist over such claims, ordering their release would be a constitutionally defunct use of the limited power vested in Article I courts like the bankruptcy courts. Finally, the non-consensual release of third-party direct claims against non-debtors is a violation of the claimant's Fifth Amendment due process rights.

1. Bankruptcy courts do not have subject matter jurisdiction over third-party direct claims.

Bankruptcy courts have limited jurisdiction – it is *in rem* and is limited only to the debtor's property. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006). Direct claims held by creditors against non-debtors, like those extinguished in this case, do not fall under the subject matter jurisdiction of the bankruptcy courts. These claims belong to third parties, not the debtor's estate. *See Patterson v. Mahwah Bergen Retail Grp.*, 636 B.R. 641, 672 (E.D. Va. 2022). The bankruptcy courts have no authority to "say what happens to property that belongs to a third party, even if that third party is a creditor or otherwise is a party in interest." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. at 723 (citing *Callaway v. Benton*, 336 U.S. 132, 136-41 (1949)).

Moreover, bankruptcy courts have jurisdiction over "cases and proceedings" that "arise under" the Code, or that "arise in" or are "related to" bankruptcy cases. 28 U.S.C. §§ 1334(b), 157. But the releases in this case extinguish all future claims against Strawberry Fields – thus releasing claims that do not yet constitute any pending civil proceeding. *See Patterson*, 636 B.R. at 672. Therefore, bankruptcy courts cannot possibly have subject matter jurisdiction over a proceeding that does not yet exist. And as it relates to already pending third-party direct claims against Strawberry Fields, the bankruptcy court would still not have the power to non-consensually release those claims. This is true for several reasons.

First, Congress has made explicitly clear that the district courts, not the bankruptcy courts, have the sole authority to resolve personal injury tort cases and wrongful death claims. *See* 28 U.S.C. § 157(b)(5) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."). Bankruptcy courts cannot skate around this command by attempting to distinguish chapter 11 plan releases from final judgments. Once the chapter 11 Plan becomes final, the third-party releases therein preclude subsequent third-parties from bringing their tort claims against Strawberry Fields. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009). Consequently, the releases have the effect of a judgment – one against "the claimant and in favor of the non-debtor, accomplished without due process." *In re Digital Impact, Inc.*, 223 B.R. 1, 12, 13 n.6 (Bankr. N.D. Okla. 1998).

Second, it was established law under the Bankruptcy Act that the referee in bankruptcy did not have subject matter jurisdiction to permanently enjoin a state court lawsuit between non-debtor entities. *See Callaway v. Benton*, 336 U.S. 132, 134-36 (1949).[2] Even though *Callaway* arose under the 1898 Act, Congressional silence on the issue ensures *Callaway*'s continued validity. This Court has made clear that, when Congress passes bankruptcy laws, courts should not read those laws to "erode past bankruptcy practices absent a clear indication that Congress intended such a departure . . . ." *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998).

Third, had these claims properly been sent to the district court, it would not have been able to do what the bankruptcy court did here – force a party to forgo its right to trial just because some

[2] For a thorough discussion on the continuing validity of *Callaway*, see Ralph Brubaker, *Non-debtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 Am. Bankr. L.J. 1, *1 (1998).

form of substantive relief is already available. *See United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964) (holding district court erred by entering consent decree without consent of government because government sought item of relief to which evidence presented at trial may have shown it was entitled to).

2. Bankruptcy courts lack constitutional authority under *Stern* to release the claims against Strawberry Fields.

Fourth and finally, even if the direct claims against Strawberry Fields fell under the bankruptcy court's "related to" jurisdiction, the bankruptcy court still lacked the constitutional authority to resolve the third-party direct claims in this case. These claims are non-core matters,[3] and bankruptcy courts cannot constitutionally enter final judgment or issue binding orders on non-core matters without the consent of the parties. *See Stern v. Marshall*, 564 U.S. 462, 494 (2011).

The Constitution vests the "judicial Power of the United States" in Article III courts. U.S. Const. art. III, § 1. Bankruptcy courts are not Article III courts; they are Article I courts created pursuant to Congress's power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. This distinction is critical because it limits the jurisdictional power Congress can constitutionally confer on the bankruptcy courts. As held by this Court, Congress cannot "vest in a non-Article III court the power to . . . issue binding orders in a traditional contract action arising under state law, without consent of the litigants[;] *[s]ubstitute 'tort' for 'contract,' and that statement directly covers this case*." *Stern v. Marshall*, 564 U.S. 462, 494 (2011) (emphasis added) (citations omitted).

Accordingly, the Thirteenth Circuit made the same mistake as the Third Circuit when it read *Stern* to allow bankruptcy courts to confirm plans containing non-debtor releases simply

[3] Cases that "arise under" or "arise in" a title 11 matter are known as "core" bankruptcy proceedings, while "related to" proceedings are non-core. 28 U.S.C. § 157(b)(1)-(2)(C).

because the releases are "integral to the restructuring of the debtor-creditor relationship." R. at 12-13 (citing *In re Millenium Lab Holdings II, LLC.*, 945 F.3d 126, 129 (3rd Cir. 2019)). Without the consent of all parties, these courts erroneously lumped non-core matters (state law tort claims held by third-parties against non-debtors) in with a core function of bankruptcy courts (confirming reorganization plans) and concluded that bankruptcy courts had the authority under *Stern* to issue binding orders extinguishing these non-core claims. *See* 28 U.S.C. § 157(b)(2)(L) (listing "confirmation of plans" as a core-proceeding). This Court in *Stern* did not say that a bankruptcy court could dispose of a non-core proceeding so long as it was "integral to the restructuring of the debtor-creditor relationship." *In re Purdue Pharma, L.P.*, 635 B.R. at 80 (explaining that the counterclaim in *Stern* was technically a core-proceeding and was certainly integral to that restructuring but nevertheless was outside of the power of the bankruptcy court to resolve).

Instead, *Stern* explicitly provides that Congress cannot "bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case" *Stern*, 564 U.S. at 499. Rather, *Stern* provides that the correct constitutional question is "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* The third-party direct claims at issue here neither stem from the debtor's bankruptcy nor can they be resolved in the claims allowance process. These claims are "made of the stuff of the traditional actions at common law," thus the "responsibility for deciding [them] rests with Article III judges in Article III courts." *Id.* at 484. If Congress could confer judicial power on entities outside Article III, then Article III "could neither serve its purpose in the system of checks and balances [among the branches of the Federal Government] nor preserve the integrity of judicial decision-making." *Id.*

Put plainly, "[n]othing in *Stern* or any other case suggests that a party otherwise entitled to have a matter adjudicated by an Article III court forfeits that constitutional right if the matter is

disposed of as part of a plan of reorganization in bankruptcy." *In re Purdue Pharma, L.P.*, 635 B.R. at 80. If this was not the case, "then parties could manufacture a bankruptcy court's *Stern* authority simply by inserting the resolution of some otherwise non-core matter into a plan." *Id*; *see also In re Midway Gold US, Inc.*, 575 B.R. 475, 519 (Bankr. D. Colo. 2017) ("If proceedings over which the Court has no independent jurisdiction could be metamorphosized into proceedings within the Court's jurisdiction by simply including their release in a proposed plan, this [Bankruptcy] Court could acquire infinite jurisdiction.") (citations omitted).

Not only is this the correct interpretation, but it is also notable that this "integral to the restructuring" constitutional rule proposed by the Thirteenth Circuit mirrors the "necessary for successful reorganization" statutory standard in pro-release jurisdictions. Both have the same policy defect: integral/necessary to the restructuring/reorganization inevitably comes to actually mean integral/necessary to reaching a settlement agreement. *See* discussion *supra* pp. 7-8. Therefore, just like the proposed statutory standard, solvent non-debtors can easily produce the evidence necessary to satisfy the operative legal rule gatekeeping the relief they seek. *Id.*

3. Non-consensual third-party releases violate claimants' due process rights.

Due process can be added to the list of constitutional shortcomings related to non-consensual third-party releases. These releases offend due process for two reasons: First, such non-consensual releases are granted without an opportunity for an adjudication of the creditors' claims against non-debtors. Second, the releases are non-consensual deprivations of property.

At the core of due process is notice and the opportunity for an adjudication of a claim on its merits. It is deeply rooted in the idea of due process that everyone should have his own day in court, that is why this Court has noted that a "voluntary settlement . . . cannot possibly settle, voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement."

Martin v. Wilks, 490 U.S. 755, 761–62, 768 (1989). Similarly, two parties cannot, by agreement, extinguish claims that belong to a third party – a third party claim can only be resolved by the third-party's consent or litigation on the merits. *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). The confirmation order for a plan with a nonconsensual non-debtor release effectuates the forced release of creditors' direct claims against non-debtors without any such opportunity for individual litigation on the merits. Further, due process rights are not subject to a majority vote – the percentage of creditors supporting a non-debtor release is irrelevant. Any arguments to the contrary are especially unpersuasive where, as here, the debtor's plan is cramming non-debtor relief down third-party claimant's throats under the reduced subchapter V standard. *See* 11 U.S.C. § 1191(b).

There is no doubt that a cause of action is a piece of property protected by due process. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). This Court has made clear that in the context of a monetary damages class action under Federal Rule of Civil Procedure Rule 23(b)(3), due process requires, at a minimum, the opportunity to opt out of a class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) ("In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process."). For mass tort cases with class action potential, bankruptcy cannot operate as a back door for solvent non-debtors to avoid both the requirements of a chapter 11 debtor and the due process requirements that govern class actions. Regardless of a plan's approval under the Code, due process requires that those who reject the plan must have an opportunity to opt out of the non-debtor releases. *See In Re SunEdison, Inc.*, 576 B.R. 453, 455 (Bankr. S.D.N.Y. 2017). In short, due process requires that Ms. Rigby have the opportunity to pursue her claims against Strawberry Fields even if the

other 95% of creditors in her class decide to accept the settlement agreement contained in the debtor's chapter 11 plan.

II. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT THE SECTION 523(A) EXCEPTIONS TO DISCHARGE APPLY ONLY TO INDIVIDUAL DEBTORS.

Ms. Rigby alleges that the Debtor knowingly engaged in misconduct that resulted in the death of her four-year-old daughter from exposure to pollutants. Due to this allegation, the amounts allegedly owed to her should be deemed non-dischargeable pursuant to § 1192 and § 523(a)(6). Section 1192 mandates that the bankruptcy court grant the debtor a discharge in the event of a nonconsensual plan, except for any debt "of the kind specified in section 523(a) of [title 11]." 11 U.S.C. § 1192. This provision cross-references § 523(a) and in the case of Ms. Rigby, she alleges that discharge should be excepted under § 523(a)(6). Under § 523(a)(6), an owed debt is excepted from discharge if the debt is owed "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The Thirteenth Circuit affirmed the bankruptcy court's decision to dismiss the adversary proceeding on grounds that the Section 523(a) exceptions to discharge apply only to individual debtors. (R. 23) Both the bankruptcy court and the Thirteenth Circuit decisions rely on the preamble paragraph of Section 523 which states that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b) or 1328(b) of this title does not discharge an *individual debtor* from any debt …"). 11 U.S.C. § 523(a) (emphasis added).

The Thirteenth Circuit decision relied on two main points of contention: the Congressional intent behind the use of the word "kind" and what is equitable. Ms. Rigby's interpretation of the cross-reference between § 523(a) and § 1192 is the most cohesive and equitable interpretation of Congressional intent. Therefore, Ms. Rigby is entitled to seek to have her claim against the Debtor deemed non-dischargeable pursuant to § 523(a)(6) because the proper interpretation of the

statutory text is that § 1992 provides discharges to subchapter V debtors, both individual and corporate, in cramdown cases except with respect to the kinds of debts listed in section 523(a).

A. THE THIRTEENTH CIRCUIT INCORRECTLY INTERPRETED THE CONGRESSIONAL INTENT IN CROSS-REFERENCING SECTION 523(A).

The main point of contention in deciphering the congressional intent in cross-referencing section 523(a) is whether Congress intended to include the entirety of the provision in the cross-reference or if Congress only intended to include the list of discharge exceptions in the cross-reference. When the phrase "of the kind" is considered contextually, the Congressional intent was to include the list of exceptions, not to use the cross-reference to implicitly exclude corporate debtors. The language of section 1192 explicitly states that the court will discharge all debts except any debt "of the kind specified in section 523(a)." 11 U.S.C. § 1192. This language insinuates that there is a "kind" specified in section 523(a) that need be cross-referenced. The Thirteenth Circuit decided that the "kind" is the individual debtor but that interpretation does not mesh cohesively with the language throughout title 11.

1. The term "debtor" is explicitly defined for subchapter V.

The Thirteenth Circuit states in its majority opinion that there is no indication in the legislative history that Congress intended such a radical change" as to apply the discharge exceptions of Section 523(a) to corporate debtors. R. 21. This statement ignores the definition of the term "debtor" given in Section 1182 of Subchapter V. Congress has made the effort to make it clear what entities are included in the use of the term "debtor" in Subchapter V.

Section 1992 includes the term "debtor" multiple times, including in the integral statement that "the court shall grant the *debtor* a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this tile and provided for in the plan". 11 U.S.C. § 1192 (emphasis added). A central consideration in this decision is what is considered

a debtor that is subject to the exceptions of section 523(a). Congress answers this question in Section 1182 of Subchapter V when it is stated that the term "debtor" always "means a small business debtor" in Subchapter V. 11 U.S.C. § 1182. Congress also uses the term "debtor" with no specification for individuals or corporate when the new section is introduced and explained in the house report. H.R. Rep. No. 116-171, at 8 (2019). For Congress to include small business debtors in their definition of the term "debtor" only to continue into Subchapter V and implicitly exclude that very same type of debtors from discharge exceptions would be a grave oversight that does not seem to be present.

The Bankruptcy Court in the Western District of Texas addressed this discrepancy in a chapter 12 case about the same term. Section 1228(a) uses the term "debtor" which has been defined for Chapter 12 so it is unlikely that it is meant to be redefined for the purposes of Section 523(a). *New Venture P'ship v. JRB Consol.* (*In re JRB Consol., Inc*.), 188 B.R. 373 (Bankr. W.D. Tex. 1995) ("Section 1228(a) uses the term debtor without restriction, has its own definition of debtor which is to be used for all purposes in all sections of Chapter 12 and this court believes that the term "of a kind" does not incorporate the limiting definition found in the introductory paragraph of § 523(a)"). The court denied the Debtor's Motion to Dismiss.

2. The general rule for statutory construction belies congressional intent for the term "kind" to be considered the same throughout the title.

The Thirteenth Circuit relies on the Supreme Court's majority opinion in *Dewsnup v. Timm* to decide that the rule for statutory construction is that the same word does not have to have the same meaning in the same title. *Dewsnup v. Timm,* 502 U.S. 410 (1992). Although the Supreme Court did state this as a rule, there is significantly more evidence of the Supreme Court deciding that "identical words used in different parts of the same act are intended to have the same meaning". *Dewsnup v. Timm*, 502 U.S. 410 (1992) (Scalia, J., dissenting) (quoting *Sullivan v.*

Stroop, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)))). Though Congress followed a separate path in deciding the *Dewsnup* case, the general rule remains the same.

The bankruptcy court in *In re Breezy Ridge Farms, Inc.* states that even though Section 523 seems to apply solely to individuals, the two provisions can exist harmoniously because when two provisions create ambiguity, the more specific provision controls. *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009) (quoting *Universal Am. Mortg. Co. v. Bateman* (*In re Bateman*), 331 F..3d 821, 825 (11th Cir. 2003)) ("Provisions within a statute are read to be consistent whenever possible. If the two provisions may not be harmonized, then the more specific will control over the general.") The majority states that the more specific provision is §1228 because it is more specific because it applies only in chapter 12 while § 523(a) applies regardless of chapter. *Id.* at *2.

3. The Thirteenth Circuit did not consider the phrase "of the kind" contextually.

The Thirteenth Circuit defines the word "kind" in their majority opinion as sharing "common traits". R. 18. The majority opinion relies on this definition to decide that "kind" is used in reference to the individual debtors sharing the common trait of being individual debtors which would mean that the phrase "of the kind" does not include corporate debtors. This definition of "kind" is only one of the few used by Merriam-Webster. "Kind" can also be defined as the "fundamental nature or quality" of a thing. *Merriam-Webster*. This definition aligns significantly more with the interpretation of the term "kind" as referring to the list of types of debt because that accounts for the nature of the debt.

The Thirteenth Circuit states that Ms. Rigby's interpretation of Section 1192 results in the cross-reference to section 523(a) as "mere surplusage" but this is an incorrect assertion of where Ms. Rigby's interpretation leads. Ms. Rigby's interpretation of the cross-reference to 523(a) serves a specific purpose that makes the cross-reference more cohesive. The most sensical interpretation within the context of the title is that Congress intended to shorthand the long and inclusive list of types of debt that are excepted from discharge in section 523(a). *In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. 2022); *See In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009) ("Congress has used [the cross-reference] as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals.")

Much of the language in chapter 12 mirrors that of chapter 11. Under section 1228, "the court shall grant the debtor a discharge of all debts provided for by the plan … except any debt … of the kind specified in section 523(a)[.]" 11 U.S.C. § 1228(a). The Thirteenth Circuit rejects Ms. Rigby's use of two Chapter 12 cases that interpret this very similar language in section 1228(a)(2) as including both corporate and individual debtors. The rejection was unwarranted considering that the essence of the Debtor's arguments in these cases is essentially the same. The debtor in these cases argues that since §523(a) introduces itself with the language "A discharge under … this title does not discharge an individual debtor from any debt …" with a list of types of debts that are excepted from discharge, the provision is limited to individual debtors. 11 U.S.C. § 523(a). Ms. Rigby first cited *In re Breezy Ridge Farms*, a chapter 12 case where the debtor argued that section 523(a) does not apply to their case because a corporate chapter 12 debtor cannot be excepted from discharge. *Southwest Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc.* (*In re Breezy Ridge Farms, Inc.*), 2009 WL 1514671 (Bankr. M.D. Ga. 2009). The bankruptcy court rejected this argument and explicitly stated that "the exclusion of § 523(a) type debts applies

equally to corporations and to individuals." *Id.* at *2. This interpretation of the language of chapter 12 is directly relevant to the discourse about the mirrored language in chapter 11.

The Thirteenth Circuit also rejects Ms. Rigby's use of *In re JRB Consol., Inc.* because the court stated that the majority opinion actually disagrees with Ms. Rigby's interpretation of the word "kind" in context but this is not an accurate analysis of the majority opinion in this case. *New Venture P'ship v. JRB Consol.* (*In re JRB Consol., Inc*.), 188 B.R. 373 (Bankr. W.D. Tex. 1995). The majority opinion states that:

> The meaning of the word debtor in Chapter 12 is not unclear. The wording in §1228(a)(2) describing "debts of the kind" specified in § 523(a) does not naturally lend itself to also incorporate the meaning "for debtors of the kind" referenced in § 523(a). Debts of the kind easily seems to be limited to the subparagraphs of § 523(a) which identify the types of debts which are eligible to be excepted from discharge.

This interpretation does not contradict Ms. Rigby's argument. *Id.* at 374. The bankruptcy court in this case decided that, contextually, the interpretation that makes the most sense is Ms. Rigby's. *Id.* Chapter 11 also makes the meaning of the word "debtor" clear and Congress also does not seem to want an implicit incorporation of the phrase "debtors of the kind" when they include "debtors of the kind" in the cross-reference.

B. THE MORE EQUITABLE SOLUTION IS TO ALLOW THE COURT TO GRANT DISCHARGE TO BOTH INDIVIDUAL AND CORPORATE DEBTORS.

Subchapter V was enacted because Congress determined that a debtor who has obtained the votes of creditors necessary for confirmation of a plan in a traditional chapter 11 case should not need to comply with the absolute priority rule and, instead, should be entitled to a traditional chapter 11 corporate discharge. 11 U.S.C. § 1129(b). Under the previously applicable absolute priority rule, a class of unsecured creditors that voted to reject a chapter 11 plan must be paid in full before any other class could receive property under a plan of organization. 11 U.S.C. § 1129(b)(2)(B)(ii). The New Subchapter V requirements allow the court to confirm a plan over

objections if "all projected disposable income of the debtor … will be applied to the plan." William L. Norton II. & James B. Bailey, The Pros and Cons of the Small Business Reorganization Act of 2019, 36 EMORY BANKR. DEV. J. 383 (2020). With the abrogation of the absolute priority rule, creditors now have fewer tools to challenge the confirmation of a plan. The fair tradeoff for this new weight on that creditor is that a subchapter V debtor should not able to discharge section 523(a) debts owed to that creditor. *In re Cleary Packaging, LLC,* 36 F.4th 509 (2022). Subchapter V debtors will not be able to discharge section 523(a) debts owed to that creditor even if the debtor (whether individual or corporate) obtains confirmation of the plan and are able to reorganize over the objection of a dissenting creditor.

The intent of Congress would not have been to incentivize corporate debtors to pursue non-consensual plans, which is the net result of the Thirteenth Circuit's decision. *In re Cleary Packaging, LLC*, 36 F.4th 509, 517 (2022) (Scalia, J., dissenting) ("The net result, under the majority's interpretation, is that a corporate debtor in subchapter V with debts falling within the scope of section 1441(d)(6) cannot discharge those debts by securing support for a consensual plan, but it can discharge them by persuading the court to confirm a non-consensual plan."). This decision would disrupt the careful balance created between debtors and creditors.

Through proper analysis of the language of Subchapter V leads to the conclusion that the dischargeability exceptions provided in § 523(a) are applicable to both individual and corporate debtors. Congress would not intend to incentivize non-consensual plans by allowing discharge to corporate debtors solely through confirming a non-consensual plan. Congress clearly defines the term "debtor" and there is evidence of the use of the phrase "of the kind" in Chapter 12 and the interpretation of the term aligns with the shorthand interpretation. Thus, in order to maintain

equity, Ms. Rigby is entitled to seek to have her claim against Strawberry Fields deemed non-dischargeable pursuant to § 523(a)(6).

CONCLUSION

This Court should reverse the decision of Thirteenth Circuit. The bankruptcy court exceeded its statutory, jurisdictional, and constitutional power when it confirmed the Debtor's Plan containing the non-consensual release of all direct claims against Strawberry Fields. Bankruptcy discharge is meant for the honest debtor alone. This principle also relates to the non-dischargeability issue, as the appropriate interpretation of the cross-reference between sections 523 and 1192 is the one that does not allow debtors to discharge debts that result from willful and malicious injury simply because they are organized as corporations. For these reasons and all others articulated in this Brief, we ask this Court to REVERSE.

APPENDIX

U.S. Const. art. I, § 8 cl. 4

The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States[.]

U.S. Const. art. III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

11 U.S.C. § 105(a)

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 523(a)(6)

(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor any debt –

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C. § 524(a)(2)

(a) A discharge in a case under this title—

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524(e)

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11 U.S.C. § 524(g)(2)

(2)

(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i)the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—
(aa) each such debtor;
(bb) the parent corporation of each such debtor; or
(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to

paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

11 U.S.C. § 524(g)(4)

(4)

(A)

(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—
(i)as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and
(ii)the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

11 U.S.C. § 1123(a)(5)

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(5) provide adequate means for the plan's implementation . . . .

11 U.S.C. § 1123(b)(6)

(b) Subject to subsection (a) of this section, a plan may—

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

11 U.S.C. § 1129(b)(2)(B)(ii)

(a) -

(1) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(B) With respect to a class of unsecured claims—

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

11 U.S.C. § 1141(d)(6)

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt –

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar statute; or

(B) for a tax or customs duty with respect to which the debtor –

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

11 U.S.C. § 1182(1) – Definitions

In this subchapter:

(1) Debtor. The term "debtor" means a small business debtor.

11 U.S.C. § 1191(b)

(b) Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1192 – Discharge

If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

(1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or
(2) of the kind specified in section 523(a) of this title.

11 U.S.C. § 1228(a) – Discharge

(b) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan, allowed under section 503 of this title, or disallowed under section 502 of this title, except any debt –

(1) Provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) Of a kind specified in section 523(a) of this title, except as provided in section 1232(c).

28 U.S.C. § 1334(b)

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 157

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;
(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)

(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.