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 FOR THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONER

Team 1
Counsel for Petitioner

QUESTIONS PRESENTED

I. Do bankruptcy courts have the authority to approve a reorganization plan under chapter 11 of the Bankruptcy Code when that plan includes non-consensual releases of direct claims held by third parties against non-debtors?

II. Does 11 U.S.C. § 1192(2) prevent a corporate subchapter V debtor from receiving a discharge of debts for willful and malicious injury, as defined by section 523(a), after confirmation of a nonconsensual plan of reorganization?

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The Bankruptcy Court for the District of Moot, the United States District Court for the District of Moot, and the United States Court of Appeals for the Thirteenth Circuit all decided in favor of the Debtor on both issues. The Thirteenth Circuit's decision is available at No. 21-0803 and reprinted at Record 3.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant portion of U.S.C. § 1192 provides:

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—

(2) of the kind specified in section 523(a) of this title.

The relevant portion of U.S.C. § 523(a) provides:

(a) 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—

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

STATEMENT OF FACTS

Facts

Penny Lane Industries, Inc. (the "Debtor") filed for subchapter V bankruptcy on January 11, 2021, facing mounting lawsuits alleging that the corporation's disposal of pollutants led to injuries and deaths of residents in Blackbird, Moot, and its surrounding communities. R. 6. In 2017, Ms. Eleanor Rigby (the "Petitioner") filed suit against the Debtor and its parent company, Strawberry Fields Foods, Inc. ("Strawberry Fields"). *Id.* at 5. The Petitioner asserted that her four-year old daughter developed leukemia and died from exposure to pollutants dumped by the Debtor. *Id.* at 5. The Petitioner has lived in Blackbird for over 40 years, and she alleged that the Debtor disposed of pollutants on its property to save costs, knowing as early as 2014 that the pollutants from the waste had contaminated the water supply used by Blackbird residents. *Id.*

The Petitioner's lawsuit was one of hundreds brought against the Debtor. *Id.* at 6. Her suit, like many of the others filed against the Debtor, named Strawberry Fields as a co-defendant. *Id.* She alleged that because the Debtor is a wholly owned subsidiary of Strawberry Fields, Strawberry Fields knew, or should have known, about the Debtor's misconduct. *Id.*

Subsequently, the Debtor filed for subchapter V chapter 11 bankruptcy, owing less than $2 million to its trade creditors. R. 6. However, the Debtor faces nearly 10,000 unliquidated tort claims asserting almost $400 million of cumulative damages, including an unsecured claim of $1 million filed by the Petitioner against the Debtor. *Id.* Strawberry Fields is not a debtor and has never filed a petition for relief under the Bankruptcy Code (the "Code"). *Id.* The Debtor and Strawberry Fields dispute all claims filed against them, but no court has made a judicial determination regarding any of the claims. *Id.*

Non-dischargeability Action Dispute Procedural History

Shortly after the Debtor petitioned for bankruptcy, the Petitioner commenced an adversary proceeding against the Debtor. R. 7. The Petitioner sought to have the court deem her $1 million claim non-dischargeable pursuant to section 523(a)(6). *Id.* Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." *Id.* In response, the Debtor filed a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim under which relief can be granted; this motion was made applicable to this proceeding by Rule 7012 of the Federal Bankruptcy Procedure. *Id.* In its motion, the Debtor alleged that the non-dischargeability provisions of section 523(a) apply to individuals, not business entities. *Id.*

The Bankruptcy Court for the District of Moot (the "Bankruptcy Court") granted the Debtor's motion to dismiss the adversary proceeding, holding that the section 523(a) exceptions to discharge do not apply in cases where the debtor is a corporation, even if the corporation filed for bankruptcy under subchapter V of chapter 11. R. 7. The Petitioner timely filed a notice of appeal.

Plan Dispute Procedural History

When the present bankruptcy case commenced, the automatic stay set by section 362(a) automatically stayed the commencement or continuation of all non-bankruptcy litigation against the Debtor. R. 8. Litigation against Strawberry Fields and other non-debtors was not automatically stayed, but the Debtor obtained a temporary injunction from the Bankruptcy Court which paused all conducted-related actions against its "current and former officers, directors, employees, and associated entities." *Id.* at 7-8. The Bankruptcy Court has extended the expiration date of this injunction multiple times. *Id.* at 8.

Stakeholders developed a *Plan of Reorganization* (the "Plan"). R. 8. The Plan would establish a creditor trust funded partly with the Debtor's disposable net income for five years and partly with $100 million to be paid by Strawberry Fields. *Id.* This Plan would result in creditors with allowed claims receiving approximately 30-40 cents on the dollar. *Id.*

This Plan came with a cost; Strawberry Fields demanded that it be released from all claims, both estate claims and third-party direct claims. R. 8. Specifically, the Plan releases and discharges "any and all claims" that third parties "have asserted or might assert in the future against Strawberry Fields" to the extent that such claims are "based on or related to the Debtor's pre-petition conduct, its estate or this chapter 11 case." *Id.* The Plan received over 95 percent approval from voting creditors. *Id.* at 9.

The Plan was non-consensual and received two objections. R. 9. The Petitioner objected to the plan, asserting that the non-consensual release of third-party direct claims against Strawberry Fields is impermissible under applicable law, but her class voted affirmatively to approve the Plan. *Id.* The Norwegian Wood Bank (the "Bank"), a secured creditor classified separately from the other creditors under the Plan, also objected, rendering the Plan non-consensual. *Id.* It also alleged that the Plan understated the value of its collateral and thus was not "fair and equitable" as required by sections 1191(b) and 1129(b)(2)(A). *Id.*

Despite the Bank's allegation that the Plan was not fair and equitable, the Bankruptcy Court confirmed the Plan. R. 10. In response to the Petitioner's objection, the Court admitted that non-consensual releases of third-party direct claims, like those granted to Strawberry Fields, are only permitted in extraordinary cases, but it considered this an extraordinary case. *Id.* It reasoned that Strawberry Fields' monetary contribution would result in a meaningful distribution to creditors—more than the creditors would receive if the Debtor was liquidated under chapter

7—and that such widespread approval for the plan made this case extraordinary. *Id.* The Court found "no other reasonably conceivable means to achieve the result accomplished by the Plan," and found its settlements, including the releases, to be both fair and reasonable. *Id.* Overruling both the Bank's and the Petitioner's objections, the Court confirmed the Plan. *Id.* However, the Court seemed remorseful, acknowledging that the proposed distribution to creditors would never adequately compensate victims, like the Petitioner's daughter, for the injuries and deaths the Debtor and Strawberry Fields allegedly caused. *Id.* The Petitioner timely appealed both of the Bankruptcy Court's rulings. The disputes were consolidated and certified for direct appeal pursuant to 28 U.S.C. § 158(d).

STANDARD OF REVIEW

The questions presented are purely issues of law based on statutory interpretation of the Bankruptcy Code[1]. As such, the appropriate standard of review is *de novo. See, e.g., Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

[1] Specific sections of the Bankruptcy Code are identified herein as "section _." The Bankruptcy Code is sometimes referred to herein as "the Code." Unless otherwise indicated, all statutory citations are to the Bankruptcy Code.

SUMMARY OF THE ARGUMENT

The Petitioner brings this appeal to prevent the Debtor and its parent company from commandeering subchapter V of the Bankruptcy Code to avoid responsibility for the Debtor's and Strawberry Fields' actions. The Petitioner has brought two separate tort actions for the death of her daughter: one against the Debtor and the other against Strawberry Fields. She alleges that the Debtor knowingly disposed of pollutants on its property, and such pollutants made their way into the water supply, causing her daughter's leukemia and eventual death. R. 5. Separately, she alleges that Strawberry Fields, as the parent company of the Debtor, knew or should have known of the Debtor's alleged misconduct. The Petitioner now faces a nonconsensual disposition of her claims against Strawberry Fields and summary dismissal of her claims against the Debtor. By reversing the decision of the Thirteenth Circuit, this Court can ensure that debtors filing for subchapter V bankruptcy do not reap benefits at the cost of unsecured creditors, including those with tort claims like the Petitioner.

Here, the Bankruptcy Court lacked both the constitutional authority and statutory authorization to release the Petitioner's direct claims against Strawberry Fields. Congress created bankruptcy courts through the authority conferred to it by Article I of the Constitution. As Article I courts, bankruptcy courts are necessarily limited in the types of cases they can adjudicate. Their authority is limited compared to the authority of Article III courts, which have jurisdiction over all cases and controversies. When a claimant, like the Petitioner here, brings a claim arising entirely out of state law against a non-debtor, that claimant is entitled to an Article III adjudication. Put plainly, Article I courts cannot serve Article III purposes without the consent of the claimant.

The Bankruptcy Court here overstepped its authority by approving a Plan which necessarily adjudicates the Petitioner's claims without due process. The Plan provided for the release of all claims against Strawberry Fields. stripping the Petitioner of her right to adjudicate these claims in violation of her Fifth Amendment Due Process rights. This Court has previously held that third-party releases confirmed by final order, like in the present case, are barred from subsequent adjudication based on *res judicata* claim preclusion. If a claimant can no longer bring their claim after the final order, the court has effectively stripped the claimant of their right to a day in court. The Thirteenth Circuit's decision to affirm sends that message that, despite Strawberry Fields' status as a non-debtor, and despite the Petitioner's objection to the Plan, she bears its harshest consequences: a mandatory release of the very claims that led the Debtor to file for bankruptcy in the first place.

Constitutional authority aside, the language of the Bankruptcy Code prohibits bankruptcy courts from approving the type of plan in the present case. Bankruptcy courts may only preside over proceedings related to cases arising under chapter 11 of the Code. A claim held by a third party, like the Petitioner, against a non-debtor, like Strawberry Fields, is *not* related to the Debtor's bankruptcy estate. The Petitioner brought state law claims against Strawberry Fields based on its role in the Petitioner's alleged complaint, not because of any role the parent company does or does not play in the Debtor's bankruptcy proceedings. The Code, in fact, specifically prohibits bankruptcy courts from discharging the liabilities of non-debtors in section 524(e).

The Thirteenth Circuit also allowed the Debtor to evade responsibility for its role in the Petitioner's injury. The exceptions in 11 U.S.C. § 523(a) apply to the Debtor, and so it cannot discharge the Petitioner's claims pursuant to 11 U.S.C. § 1192. Section 523(a)(6) excepts from

discharge any debt for "willful and malicious injury by the debtor to another entity or to the property of another entity." These exceptions from dischargeability were created to apply to debtors without regard to whether a debtor is an individual or a corporation.

The language of section 1192 requires that the court grant the "debtor" a discharge of all debts. As defined by the Bankruptcy Code, "debtor" is a "person," but a "person" includes both corporations and individuals. If a corporation, for purposes of the Bankruptcy Code, is a "person," then it is a "debtor" for section 1192 purposes.

If the Debtor is included under section 1192, then the exceptions must apply to the Debtor as well. Section 1192(2) excepts debts "of the kind specified in section 523(a)." This phrase, "of the kind," indicates that Congress excepted from section 1192(2) debts of a specific nature. The phrase makes no indication that the preamble of section 523 must modify the scope of section 1192(2).

Section 1192 targets *debtors*, not individuals, corporations or other entities. If Congress wanted to limit the scope of section 1192(2) to only apply to individual debtors, it would have made its intent clear. The Bankruptcy Code was not written to send debtors and courts on a wild goose chase to find hidden meanings and modifiers. Rather, the plain language controls. The language of section 1192 is not ambiguous. It would be *made* ambiguous if read in a way that limited the section 523(a) exceptions to only apply to individuals simply because section 523 includes the word "individual."

Further, canons of statutory construction support the reading of section 1192(2) and its section 523(a) exceptions as applying to all debtors regardless of status. If a court cannot harmonize two provisions of the Bankruptcy Code, the more specific provision must control over

the more general one. Here, even if the Court finds that these sections conflict, it must recognize that section 1192 is narrower in scope than section 523(a). Section 1192 applies to a specific plan: a subchapter V nonconsensual plan of reorganization. In stark contrast, various provisions throughout the Bankruptcy Code cite section 523(a), including provisions from chapters 7, 12, and 13. Section 1192 is more specific than section 523(a), and so its language should control.

It cannot be overlooked that Congress created subchapter V with the intent of benefitting small businesses. It did not create this subchapter to assist subsidiary companies like the Debtor while also relieving non-debtor parent companies like Strawberry Fields. The Thirteenth Circuit's decision would allow Strawberry Fields to evade litigation by bankrolling the Plan. While some creditors may find comfort knowing that they will be reimbursed under the Plan, the most vulnerable creditors, like the Petitioner, are left without recourse. Strawberry Fields did not declare bankruptcy. It did not suffer bankruptcy's negative effects, and it should not be able to capitalize on its subsidiary's bankruptcy to exploit creditors for its own gain.

ARGUMENT

I. BANKRUPTCY COURTS HAVE NEITHER THE CONSTITUTIONAL AUTHORITY NOR STATUTORY AUTHORIZATION TO RELEASE A THIRD PARTY'S DIRECT CLAIM AGAINST A NON-DEBTOR IN A PLAN OF REORGANIZATION.

Article I of the Constitution gives Congress the ability to create bankruptcy courts and establish uniform laws concerning bankruptcy. U.S. CONST. art. I, § 8, cl. 4. The word 'bankruptcy' encompasses "the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982). The benefits of relief that come with filing for bankruptcy are necessarily limited by the obligations under the Code. As discussed by the Tenth Circuit, "[o]bviously, it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its

protections; Congress did not intend to extend such benefits to third-party bystanders." *Landsing Diversified Props. v. First Nat'l Bank and Tr. Co.* (*In re W. Real Est. Fund, Inc.*), 922 F.2d 592, 600 (10th Cir. 1990), *modified sub nom. Abel v. West*, 932 F.2d 898 (10th Cir. 1991). Here, the Petitioner holds direct claims against both the Debtor and its parent company Strawberry Fields– both of which the Plan attempts to release. No bankruptcy court may approve a plan of reorganization that includes a release of claims like the latter; bankruptcy courts have no jurisdiction over direct claims held by third parties against non-debtors without consent.

For bankruptcy courts to have jurisdiction, there must be both constitutional authority and statutory authorization, but there is neither concerning the direct claims the Petitioner holds against Strawberry Fields. There is no constitutional authority for a bankruptcy court to adjudicate a claim arising out of state law held by a third party against a non-debtor without consent, and the Bankruptcy Court has violated the Petitioner's right to due process in doing so. Nor is there statutory authorization. Bankruptcy courts 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. § 1334(b). This statutory grant of jurisdiction allows a bankruptcy court to have jurisdiction over proceedings sufficiently related to a bankruptcy case, but it does not provide bankruptcy courts with jurisdiction over claims that exist independent of the bankruptcy process. Nowhere does Congress give bankruptcy courts the ability to adjudicate direct claims held by third parties against non-debtors except for section 524(g), which is not applicable to this case. Therefore, bankruptcy courts may not adjudicate the direct claims the Petitioner holds against Strawberry Fields. The Bankruptcy Court erroneously determined that it had constitutional authority and statutory authorization to approve the Plan despite the Plan including a release of direct claims held by the Petitioner against Strawberry Fields, a non-debtor. The

Thirteenth Circuit's decision to affirm allows Strawberry Fields to reap the benefits of a bankruptcy discharge without bearing the burdens of a debtor filing for bankruptcy.

A. The Bankruptcy Court for the District of Moot lacked the constitutional authority to approve the Plan, because the Plan prevents the Petitioner from pursuing her claims against Strawberry Fields, a non-debtor.

Article I gives Congress the constitutional power to create bankruptcy courts. U.S. CONST. art. 3, § 1. As Article I courts, bankruptcy courts are necessarily limited in what types of claims they may hear and determine. Bankruptcy courts have *in rem* jurisdiction over "a debtor's property and the disposition of that property." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019). Bankruptcy courts do not have the constitutional authority to exercise jurisdiction over claims held by third parties against non-debtors that arise solely out of state law. In the absence of constitutional authority to adjudicate claims held by third party claimants against non-debtors arising out of state law, claimants may consent to having these claims adjudicated by a bankruptcy court. Such consent gives bankruptcy courts the constitutional authority to adjudicate those claims. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015). Without that consent, bankruptcy courts do not have constitutional authority to adjudicate those claims.

1. The Bankruptcy Court exceeded its constitutional authority when it decided claims arising out of state law, unrelated to bankruptcy, without the Petitioner's consent.

Adjudication of direct claims held by third party claimants against non-debtors, such as those held by the Petitioner against Strawberry Fields, is outside of bankruptcy courts' constitutional authority. On several occasions, this Court recognized that "Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication." *Id.* On one such occasion, this Court held

that Congress had exceeded its constitutional authority by enacting the 1974 Bankruptcy Act, which granted bankruptcy courts jurisdiction over all civil proceedings related to bankruptcy cases. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 51 (1982). In the more recent case of *Stern v. Marshall*, this Court again held that Congress had violated Article III by statutorily granting bankruptcy courts' jurisdiction over claims that arose purely out of state common law. 564 U.S. 462, 487 (2011). In *Wellness*, though, this Court held that there is no constitutional violation when parties "*knowingly and voluntarily* consent to adjudication by a bankruptcy judge." 575 U.S. at 669. (emphasis added). But the Petitioner here *did not* knowingly and voluntarily consent to have her claims against Strawberry Fields adjudicated. She has made clear that she wishes for her claims against Strawberry Fields to be adjudicated outside of a bankruptcy court. It necessarily follows from *Wellness* that absent voluntary consent, bankruptcy courts do not have the constitutional authority to adjudicate these claims, arising out of state law, and held by a third party against a non-debtor. Such a result would go beyond bankruptcy courts' jurisdiction.

While bankruptcy courts certainly have the constitutional authority to exercise jurisdiction over claims against the debtor and the debtor's estate, bankruptcy courts do not have the constitutional authority to adjudicate claims arising out of state law that are held by third parties against non-debtors. "Third-party claims that are the subject of the proposed releases… are not claims against the estate or against property of the estate. A bankruptcy court has no *in rem* jurisdiction over such third-party claims." *In re Aegean Marine Petroleum*, 599 B.R. at 723. The Petitioner's claims against Strawberry Fields are necessarily outside of the Bankruptcy Court's constitutional grant of jurisdiction, as they are neither claims against the Debtor's estate nor the property of the Debtor's estates.

2. The Bankruptcy Court's approval of the Plan violates the Petitioner's right to due process.

The Petitioner holds direct claims against Strawberry Fields that the Plan will release without her consent. The non-consensual releases included in the Plan have, in effect, settled the Petitioner's claims against Strawberry Fields without affording her due process. The Fifth Amendment states that no person shall be "deprived of life, liberty or *property* without due process of law." U.S. CONST. amend. V. (emphasis added). These direct claims belong to the third parties forced to release them– they constitute a property interest of the third parties. The dissent in the Thirteenth Circuit correctly noted that "when a court directs that a creditor's claim against a non-debtor be released, it takes away a property interest that belongs to that creditor, without affording the creditor due process." R. 26. This must be true, as bankruptcy courts have acknowledged that as "a general rule," bankruptcy courts have "no power 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*, 599 B.R. at 723. Bankruptcy courts lack jurisdiction over these claims because "third-party claims belong to third parties, not the debtor's estate." *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 672 (E.D. Va. 2022). A cause of action is property protected by due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The claims the Petitioner holds against Strawberry Fields for its role in the death of her daughter are her property.

The Bankruptcy Court's approval of the Plan denies the Petitioner the opportunity to have those claims adjudicated. The Thirteenth Circuit alleges that the Petitioner's claims against Strawberry Fields are not being adjudicated by approval of the plan; this is simply not true. R. 13. Confirmation of the Plan extinguishes the Petitioner's claims. The Petitioner would not be able to bring the claims against Strawberry Fields in an Article III court. There "really can be no

dispute that the release of a claim 'finally determines' that claim" so that it may no longer "be adjudicated on the merits." *In re Purdue Pharma, L.P.,* 635 B.R. 26, 90 (S.D.N.Y. 2021). The court in *Purdue Pharma* examined this Court's prior opinions, recognizing that this Court "has twice held that non-consensual third-party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim: first in *Stoll v. Gottlieb*, and again in *Travelers Indemnity Co. v. Bailey*." *Purdue Pharma, L.P.*, 635 B.R. at 82 (internal citations omitted). In *Stoll v. Gottlieb,* this Court stated that an adjudication under the reorganization provisions of the Bankruptcy Code is an "effective judgment," and thus *res judicata* principles apply to that judgment. 305 U.S. 165, 171 (1938). In *Travelers Indemnity Co. v. Bailey*, this Court reiterated the necessity of upholding *res judicata* principles in the context of bankruptcy orders. 557 U.S. 137, 155 (2009). The Due Process Clause guarantees that individuals are allowed to choose whether to settle their disputes or to proceed with litigation. "A release, or permanent injunction, contained in a confirmed plan, however, has the effect of a judgment—a judgment against the claimant and in favor of the non-debtor, accomplished without due process." *In re Digital Impact, Inc.*, 223 B.R. 1, 13 (Bankr. N.D. Okla. 1998). Allowing a bankruptcy court to bind the Petitioner to a release of these claims without due process undermines the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846 (1999). Approval of the Plan strips the Petitioner of her property, these claims against Strawberry Fields, without allowing her the opportunity to present these claims before an Article III court.

The Bankruptcy Code provides a structure to fairly deal with bankrupt entities and their creditors, not to eliminate creditors' claims for the sake of convenience. The law should not

operate differently for those with deeper pockets; the benefits of the Bankruptcy Code cannot be bought.

B. Even if the Bankruptcy Court had the constitutional authority to approve the Plan, it lacked the statutory authorization to do so.

The Code does not authorize bankruptcy courts to adjudicate the direct claims held by the Petitioner against Strawberry Fields without the consent of all parties. Strawberry Fields cannot be permitted to, in effect, purchase the Bankruptcy Court's jurisdiction by promising funding to the Debtor's estate. Bankruptcy courts do have jurisdiction over proceedings that are "related to" a case arising under chapter 11. 28 U.S.C. § 1334(b). But a claim held by a third party against a non-debtor is not sufficiently related to the bankruptcy estate of a debtor simply because the non-debtor intends to provide the debtor funds. These claims exist independent of the Debtor filing for bankruptcy. The Petitioner's claims arise out of state law based on the role Strawberry Fields played in the death of the Petitioner's daughter and thus exist independent of the Debtor's bankrupt status. The only impact the Petitioner's claims against Strawberry Fields could *possibly* have on the Debtor's bankruptcy estate would be directly created by Strawberry Fields' own actions. A bankruptcy court does not acquire subject matter jurisdiction "to enjoin claims brought against a third-party non-debtor solely on the basis of that third party's financial contribution to a debtor's estate*." In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008) ("*Manville III*"), *rev'd and remanded on other grounds sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009). A non-debtor like Strawberry Fields should not be able to create jurisdiction for the bankruptcy court by funding the debtor's estate. *In re Purdue Pharma,* 635 B.R. at 90.

There is only one section in the Bankruptcy Code that authorizes bankruptcy courts to approve a re-organization plan that contains a non-consensual release of direct claims by third

parties against non-debtors: section 524(g). No other place in the Code authorizes courts to do so. Section 524(g) states "notwithstanding the provisions of section 524(e)," and the subsection goes on to grant bankruptcy courts the ability to release the aforementioned claims regardless of consent. 11 U.S.C. § 524(g)(4)(A)(ii). This word choice of 'notwithstanding' indicates that without the specific grant of power given in 524(g), the courts would have no power to approve such a plan because of section 524(e). *In re Purdue Pharma*, 635 B.R. at 92. The language of section 524(e) is unambiguous; it broadly prohibits releasing claims held by third parties against non-debtors. Section 524(e) of the Bankruptcy Code states that the "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." Strawberry Fields is not a debtor. The discharge of debts owed by the Debtor to the Petitioner cannot have any effect on Strawberry Fields' liability to the Petitioner. Section 524(g) explicitly restricts its application to debtors fighting asbestos tort claims, and the Debtor in the instant case is not fighting such claims. The language of section 524(g) indicates that Congress meant only to provide authorization in an asbestos context and did not intend to authorize the discharge of such debts in any other contexts. Therefore, the Bankruptcy Court has no statutory power to permit the non-consensual releases described in the Plan.

Numerous courts have correctly concluded that section 524(g) is a carveout limited solely to asbestos cases, necessarily indicating that there is no statutory authorization for doing so in other contexts. The Ninth Circuit expressly held that "§ 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." *In re Lowenschuss*, 67 F.3d 1394, 1401–02 (9th Cir. 1995). The Fifth Circuit echoed this plain logic, acknowledging that "section 524(e) only releases the debtor, not co-liable third parties." *In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009). Even the Third Circuit, which permits these non-consensual releases, acknowledged

that while a bankruptcy court's approval of a plan binds the debtor and the creditors, "it does not follow that a discharge in bankruptcy alters the right of a creditor to collect from third parties. Section 524(e) specifically limits the effect of a discharge." *First Fid. Bank v. McAteer,* 985 F.2d 114 (3d Cir. 1993). Section 1129(a)(11) prohibits confirmation of a plan that does not comply with other applicable provisions of the Code. Thus, the Bankruptcy Court should not have confirmed the Debtor's Plan because it does not comply with section 524(e).

The legislature created section 524(g) to function as an exception to section 524(e)'s broad prohibition. In response to several circuit courts incorrectly interpreting the Code as permitting non-consensual releases of direct claims held by third parties against non-debtors, Congress introduced the Nondebtor Release Prohibition Act of 2021. H.R. 4777, 117th Cong. (2021). This bill, though only introduced, explicitly states that bankruptcy courts do not have the power to approve reorganization plans under chapter 11 if those plans include non-consensual releases of direct claims held by third parties against non-debtors, "except as provided" in section 524(g). *Id.* at 2. The language of this bill suggests that Congress never authorized the non-consensual release of these direct claims outside asbestos cases. *See id.* Congress created section 524(g) as part of the Bankruptcy Reform Act of 1994 in response to the *Johns-Manville* case, in order to provide statutory authorization for the bankruptcy court's opinion in that case. In *Johns-Manville,* the Second Circuit held that these third-party claims held against non-debtors affected the *res* of the bankruptcy estate, and thus the Second Circuit had jurisdiction over those claims, allowing the court to issue an injunction to channel those claims into a trust, thereby releasing both debtor and non-debtor of liability and instead directing third parties to initiate actions against the trust. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90–91 (2d. Cir. 1988). Section 524(g) was a specific carveout of section 524 for asbestos-related claims, created

to address a specific problem arising from *Mansville*: whether bankruptcy courts may exercise jurisdiction over these direct claims held by third parties against non-debtors and enjoin them by channeling them into a trust and releasing the non-debtor of liability. Therefore, it follows that the power would not have existed absent the passage of the subsection.

The Debtor points to section 105(a) of the Code to give the Bankruptcy Court authority to approve the Plan, but this is improper. Section 105(a) cannot be used to extend the Bankruptcy Court's power beyond what the Code prescribes. It follows that section 105(a) cannot be used to permit the authorization of non-consensual releases of direct claims held by third parties against non-debtors, as there is no ability for the courts to do so outside of section 524(g). Section 105(a) states that bankruptcy courts may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." While section 105(a) gives courts the authority to conduct the necessary proceedings in order to carry out their orders, it cannot bestow upon courts new power that the Code does not otherwise authorize. As this Court acknowledged, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014). Section 105(a) does not give bankruptcy courts wide equitable discretion to issue judgments that relieve non-debtors of their liabilities to third parties who hold claims against them; it is critical that "the mechanics of administering the federal bankruptcy laws, no matter how suggestive, do not operate as a private contract to relieve co-debtors of the bankrupt of their liabilities." *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1083 (9th Cir. 2020).

II. THE DISCHARGE EXCEPTIONS LISTED IN SECTION 523(A) APPLY TO ALL SUBCHAPTER V DEBTORS, REGARDLESS OF STATUS, BECAUSE SUBCHAPTER V'S PLAIN LANGUAGE, STATUTORY CONSTRUCTION, CONTEXT, AND CONSEQUENCES INDICATE AN INTENT TO TREAT ALL SUBCHAPTER V DEBTORS EQUALLY.

The Thirteenth Circuit allowed the Debtor to hijack the subchapter V process by affirming the Bankruptcy Court's decision to dismiss Petitioner's non-dischargeability action despite the plain language and congressional intent underlying Subchapter V. R. 22–23. The Thirteenth Circuit refused to analyze section 1192(2)'s plain language, opting instead to rely on chapter 11's broader principles which do not apply in the subchapter V context. *See id.* 19–20. In doing so, the Thirteenth Circuit opened the door for large corporations to abuse subchapter V, and discharge large amounts of mass tort debt in derogation of the plain language and stated purposes of subchapter V.

Congress enacted the Small Business Reorganization Act of 2019 to streamline the reorganization process for small businesses. Small Business Reorganization Act of 2019, H.R. 171, 116th Cong., 1 (2019). The Act created subchapter V, which applies to small business debtors with less than $7,500,000 of aggregate noncontingent liquidated debt. *See* 11 U.S.C. § 1182. As its "principal feature," subchapter V eliminates the absolute priority rule. *See id.* § 1182(a); *see also* H.R. 171 at 4. This departure from the typical chapter 11 scheme allows a bankruptcy court to confirm a plan over the objection of impaired unsecured creditors while allowing the debtor's equity to retain its interest. *See* 11 U.S.C. § 1191(b). The only requirements for confirmation of a nonconsensual plan are that the debtor contributes its disposable income for 3 to 5 years after confirmation, that the plan does not discriminate unfairly, and that the plan is feasible. *Id.* 11 U.S.C. § 1192(c)(2)(A) and (3). Under a nonconsensual subchapter V plan, the unsecured creditors are only entitled to receive the remainder of the debtor's disposable income for 3 to 5 years while the debtor's owners retain their full interests. *Id.*

Subchapter V also contains discharge provisions for a nonconsensual plan that depart from the typical chapter 11 scheme. Section 1192 governs the bankruptcy discharge after a bankruptcy court confirms a nonconsensual plan of reorganization. *Id.* § 1181(c). Section 1192 provides a full discharge upon completion of all payments under the plan with two exceptions. *Id.* § 1192(1)–(2). The first exception allows time for the payments more than 3 years after plan confirmation, and the second exception applies a list of non-dischargeable debts. *Id.* Here, the pertinent exception is the second, which prevents the Bankruptcy Court from discharging "any debt . . . of the kind specified in section 523(a) of this title." *Id.* § 1192(2). Section 523(a) provides that a bankruptcy discharge "does not discharge an individual debtor from any debt" in one of 21 categories. The Petitioner seeks to except from discharge her claim against the Debtor for "willful or malicious injury." R. 6; 11 U.S.C. § 523(a)(6). The Thirteenth Circuit prevented the Petitioner from presenting the merits of her complaint when it relied on section 523(a)'s introductory language to modify specific discharge exceptions found within subchapter V. *See* R. 18.

Since Congress created subchapter V, only two appellate courts–the Fourth and Thirteenth Circuit Courts–have decided whether the discharge exceptions in section 523(a) apply to a corporate subchapter V debtor's discharge under section 1192. The Fourth Circuit determined that the unambiguous language of section 1192 applies the list of discharge exceptions in section 523(a) to all subchapter V debtors regardless of status. *In re Cleary Packaging, LLC*, 36 F.4th 509, 515 (4th Cir. 2022). Additionally, the Fourth Circuit resolved any doubt about the proper interpretation of section 1192(2) by analyzing its language in light of recognized statutory canons of construction and by analyzing the context in which Congress

enacted subchapter V. *Id.* The Fourth Circuit's analysis helps fill the void left by the absence of the absolute priority rule and protects vulnerable creditors like the Petitioner. *Id.* at 517.

Despite the Fourth Circuit's reasoning, the Thirteenth Circuit opted to declare section 1192 ambiguous without analysis. R. 21 The Thirteenth Circuit applied presumptions instead of utilizing the canons of statutory construction to find that the general introductory language of section 523(a) modified section 1192(2) to limit the discharge exceptions to individual subchapter V debtors. R. 21. The Thirteenth Circuit's reasoning should not prevail because it abrogates the plain language and congressional intent for section 1192 and provides an opportunity for large corporations to abuse the subchapter V process.

A. Section 1192(2)'s plain language applies discharge exceptions from section 523(a) to all subchapter V debtors regardless of corporate or individual status.

Without analysis, the Thirteenth Circuit skipped the step of deciding whether section 1192(2) is susceptible to more than one reasonable interpretation. R. 20. This Court has mandated that when lower courts interpret the Code they must begin with the "language of the statute itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). When a statute is susceptible to only one reasonable interpretation, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The Thirteenth Circuit did not take this critical step. *See* R. 20.

If the Thirteenth Circuit had taken this critical step in the analysis, it would have found that section 1192 applies to all subchapter V debtors equally both in granting a discharge and applying discharge exceptions. *See In re Cleary*, 36 F.4th at 515. Section 1192 grants "debtors" a discharge of "debts." Section 1192(2) then restricts the "kind" of "debt" that the Bankruptcy Court may discharge under section 1192 but says nothing that would alter section 1192's equal

application to all subchapter V debtors. Thus, the Thirteenth Circuit erred in skipping the first step in the statutory interpretation analysis that this Court has mandated.

1. Section 1192 provides an equal discharge for all subchapter V debtors regardless of whether the debtor is a corporation or individual.

Section 1192 begins by granting a discharge to any subchapter V debtor after confirmation of a nonconsensual plan. After a subchapter V debtor completes all payments under a nonconsensual plan, section 1192 mandates that the "court shall grant the *debtor* a discharge of all debts" upon the debtor's completion of payments due under the plan. (emphasis added). The Code defines "debtor" as a "*person* . . . concerning which a case under this title has been commenced." 11 U.S.C. § 101(13) (emphasis added). "Person" includes both individuals and corporations. *Id.* § 101(41). Section 1192 only references the "debtor" meaning the plain language indicates an intent to grant all subchapter V debtors an equal discharge.

Even courts that disagree with the Petitioner's ultimate position concede that the plain language of section 1192 begins by granting an equal discharge to both corporate and individual debtors. *See Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC),* No. 22-50403-cag, Adv. No. 22-05052-cag, 2022 WL 16858009, at *3 (Bankr. W.D. Tex. Nov. 10, 2022). Thus, section 1192 on its face applies to all subchapter V debtors equally, and it is "difficult to conceive" that another section of the Bankruptcy Code would modify its plain terms with regard to its discharge exceptions. *In re Cleary,* 36 F.4th at 517–18.

2. Section 1192(2) also applies equal discharge exceptions to all subchapter V debtors regardless of whether the debtor is a corporation or individual.

Just as section 1192 governs a subchapter V bankruptcy discharge, it also governs what Congress intended to *exclude* from the subchapter V discharge. After granting a broad discharge in its introductory paragraph, section 1192(2) limits the subchapter V discharge by excepting "any debt . . . *of the kind* specified in section 523(a) of this title." (emphasis added). Section

523(a) states, "a discharge under section . . . 1192 . . . does not discharge an individual debtor" from any of the 21 enumerated kinds of debt. *Id.* § 523(a)(1)–(19). The plain language of section 1192(2) indicates that Congress intended to apply the same list of discharge exceptions to all subchapter V debtors, and the reference to section 523(a) "is a shorthand to avoid listing all 21 types of debts." *In re Cleary*, 36 F.4th at 515.

The Thirteenth Circuit refused to analyze the plain language of section 1192(2), instead opting to assume that section 523(a) not only provides the list of debts excepted from discharge but also does the added work of limiting those exceptions to individuals. R. 20. The Thirteenth Circuit's analysis ignores the fact that Congress excepted from the discharge "any *debt . . . of the kind* specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). The Code defines "debt" as "liability on a claim." 11 U.S.C. § 101(12). "Kind" has an ordinary meaning of a "group united by common traits." *Kind*, Merriam-Webster Dictionary (online ed. 2023). Therefore, the ordinary meaning of section 1192(2) is that the section excepts from discharge any liability on a claim of the sort common to section 523(a). *See id.*

The Thirteenth Circuit's conclusion also ignores the fact that Congress defined section 1192(2)'s scope in the introductory paragraph by referring to the "debtor" three times instead of selectively applying the statute to corporations or individuals. 11 U.S.C. § 1192 ("plan of the debtor . . . completion by the debtor . . . court shall grant the debtor a discharge"). In fact, Congress did not distinguish between individual and corporate debtors anywhere in subchapter V. *See id.* 1182 *et seq.* Instead, Congress went to great lengths to eliminate any distinction between individual and corporate debtors by eliminating provisions that only apply to individual debtors in favor of provisions that apply to all small business debtors. *See e.g.*, 1181(a) (rendering inapplicable section 1123(a)(8) and 1129(a)(15), both of which only apply to

individuals). Despite the Thirteenth Circuit's best efforts to say otherwise, Congress did not discontinue this theme in section 1192. The whole section, by its terms, applies to all subchapter V debtors, and its exceptions from discharge allow Petitioner to bring a non-dischargeability action against the Debtor. *See id.* § 1192(2).

B. The proper canons of statutory construction, context, and consequences flowing from subchapter V indicate an intent to apply discharge exceptions to corporate debtors.

In its analysis, the Thirteenth Circuit disregarded established canons of statutory construction in favor of cobbling together its own canons to allow section 523(a)'s preamble to alter the meaning and application of section 1192(2). R. 20–21. Courts should not elevate self-serving presumptions over the rules that this Court has crafted for determining congressional intent. Instead, courts should confine their analysis to commonsense rules which this Court has aptly applied for decades.

Specifically, courts construing the Bankruptcy Code should allow the specific provisions within different chapter to govern, not provisions of general applicability. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 647 (2012). Courts should also interpret similar provisions of the Code to have a similar application absent clear intent for a disparate application. *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1723 (2017). A proper application of the statutory canons of construction indicates a congressional intent to protect vulnerable creditors against culpable debtors. *See In re Cleary*, 36 F.4th at 517.

1. The Thirteenth Circuit's alleged canons of construction ignore the fundamental changes in subchapter V and stretch this Court's precedent too far.

The Thirteenth Circuit observed that Congress does not "hide elephants in mouseholes," but it failed to consider the elephant Congress placed in the subchapter V room by eliminating the absolute priority rule and traditional distinctions between individual and corporate debtors. R.

20–21; *see* 11 U.S.C. § 1181(a). Prior to subchapter V's enactment, this Court had criticized the absolute priority rule because it prevents a business from reorganizing where the reorganization requires continued management by the prepetition owners. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 205 (1988). Congress eliminated the absolute priority rule in subchapter V, which is a fundamental rule of fairness and equity that predates the current version of the Code. *See* 11 U.S.C. § 1181(a); *Bank of Am. Nat'l Tr. and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999). By eliminating the absolute priority rule, Congress signaled a fundamental change in bankruptcy law, and it is intuitive that Congress would also include a protection for especially vulnerable creditors, like the Petitioner, after providing such a substantial benefit to small business debtors. *See In re Cleary*, 36 F.4th at 517.

While the Thirteenth Circuit recognized that Congress conscientiously distinguishes between corporations and individuals in traditional chapter 11 cases, it failed to recognize that subchapter V eliminates all such distinctions. Section 1181 eliminates the applicability of sections 1123(a)(8) and 1129(a)(15). Section 1123(a)(8) requires an individual chapter 11 debtor to provide post-commencement and future income to creditors. Subchapter V eliminates this requirement and requires all subchapter V debtors to provide post-commencement and future income to execute a plan of confirmation. *Id.* § 1190(2). Subchapter V eliminates the applicability of section 1129(a)(15) which governs cramdown for an individual debtor confirming a nonconsensual plan in chapter 11. *Id.* § 1191(b). In section 1129(a)(15)'s place, subchapter V uses simplified cramdown provisions that apply equally to all subchapter V debtors regardless of whether they are corporations or individuals. *See In re GFS Indus.*, 2022 WL 16858009, at *3.

Subchapter V's focus on small business debtors, paired with the elimination of the absolute priority rule, signal fundamental changes in the reorganization process. *See* H.R.171 at 4. The Thirteenth Circuit's claim that Congress has not signaled fundamental change is wrong and threatens to undermine the new balance Congress has struck to provide a unique reorganization process for small businesses while maintaining fairness for creditors. *See In re Cleary*, 36 F.4th at 517.

In its analysis, the Thirteenth Circuit also pointed to the lack of legislative history on the issue. R. 21. However, as this Court has stated, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). In confounding the language of a statute that plainly applies to all subchapter V "debtors," the Thirteenth Circuit has errantly pursued "the theory of the dog that did not bark." *See id.*; *see also* 11 U.S.C § 1192.

The Thirteenth Circuit also interpreted this Court's precedent as creating a presumption against exceptions to discharge. R. 21. The Thirteenth Circuit relied on this Court's decision in *Kawaauhau v. Greiger* to state that the "overarching goal of providing a fresh start gives rise to a strong presumption against exceptions to discharge." *Id.* In *Kawaauhau*, this Court held "that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." 523 U.S. 57, 64 (1998). In reaching this conclusion, this Court cited the "'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" *Id.* at 62. This Court did not create a new presumption to govern the interpretation of the Bankruptcy Code. Rather, it stated the established rule that the plain language of the statute should control.

See id. Here, that statute is section 1192 in which Congress confined its focus to small business debtors in drafting both discharge provisions and exceptions. 11 U.S.C. § 1192(2).

2. Section 1192's more specific focus on small business debtors governs the scope of subchapter V's discharge exceptions.

In applying two erroneous presumptions, the Thirteenth Circuit failed to allow the specific provisions of section 1192 to govern over 523(a)'s more general provisions. R. 21. Instead, the Thirteenth Circuit allowed introductory language from a statute of general applicability to frustrate the comprehensive scheme for small business reorganization that Congress enacted in subchapter V. *Id.* The Thirteenth Circuit's analysis is backward. Section 1192 should dictate the scope of discharge exceptions in subchapter V, not section 523(a). *In re Cleary*, 36 F.4th at 515.

When two provisions of the Bankruptcy Code cannot be harmonized, the more specific provision controls over the more general one. *Sw. Ga. Farm Credit, Aca v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, No. 08-12038-JDW, Adv. No. 09-1011, 2009 WL 1514671, at *2 (Bankr. M.D. Ga. May 29, 2009). This Court has characterized the general/specific canon as "a strong indication of statutory meaning." *RadLAX Gateway Hotel*, 566 U.S. at 647. This Court recognized "[w]hat counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*." *Id.* Here, the scope of sections 1192 and 523 indicate that section 1192's application to every type of subchapter V "debtor" governs over section 523(a)'s preamble. Section 1192 only applies to a subchapter V nonconsensual plan of reorganization. *Id.* § 1181(c). Section 523 applies to several provisions across the Code operating in several different chapters. *See id.* § 523(a) (the section contains an administrative list of all discharge provisions which invoke a part or all of section 523). Thus, section 1192 is more specific in scope.

Nevertheless, the Thirteenth Circuit read the broader section 523(a) to modify the application of section 1192's discharge exceptions because of section 523(a)'s cross reference back to section 1192. R. 21. The Thirteenth Circuit justified its position with the rule against superfluities because its reading allegedly "gives meaning to every term of both sections 523(a) and 1192(2)." *Id.* 19. However, section 1192 could also be read as limiting the incorporation of section 523(a) to only the debts "of the kind" listed in section 523(a). *See In re Cleary*, 36 F.4th at 517. The inferences to be drawn between the sections are at least equal, and the general/specific canon of construction resolves the problem by giving precedence to the more specific language of section 1192 and applying the discharge exceptions to all subchapter V debtors equally. *See RadLAX Gateway Hotel*, 566 U.S. at 647.

This Court has recognized that the "rule against superfluities" is not absolute. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). This is apparent in section 523(a)'s cross reference to section 727, even though section 727 by its terms only applies to individuals. 11 U.S.C. § 727(a)(1). Section 523(a) already contained superfluous provisions prior to the enactment of section 1192. *See id.* This Court has acknowledged that where "words consist simply of a numerical cross-reference," the canon allowing the rejection of surplus words "has particular force." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Thus, section 523(a) is what Congress indicated in its report on subchapter V–a conforming amendment that serves a purely administrative purpose. H.R. 171 at 9.

3. Section 1192(2) tracks nearly identical language in Chapter 12 which applies the list of discharge exceptions in section 523(a) to all debtors regardless of status.

The Thirteenth Circuit also rejected Petitioner's comparison between section 1192 and an almost identical section 1228. R. 20. Section 1228(2) states, "except any debt . . . of *a* kind specified in section 523(a) of this title" and section 1192(2) states, "except any debt . . . of *the*

kind specified in section 523(a) of this title." (emphasis added). The Thirteenth Circuit erred in its reasoning because the two sections are functionally identical, and a changed article does not justify imputing different meanings on substantially similar verbiage. *See Henson*, 137 S.Ct. at 1723. Nevertheless, the Thirteenth Circuit claimed that subchapter V's placement in chapter 11 and chapter 12's narrower application justified a different result. R. 20. However, this argument ignores the fact that Congress borrowed terms from chapter 12 to provide a unique reorganization process for small business debtors. *Hearing on Oversight of Bankr. L. & Legis. Proposals Before the Subcomm. on Antitrust, Com. and Admin. L. House Comm. on the Judiciary*, 116th Cong. 5 (2016) (testimony of American Bankruptcy Institute by Robert J. Keach, ABI Past President and Co-chair) ("The SBRA could address many of the difficulties experienced by small business debtors, in large measure by applying the terms found in Chapter 12.").

The Thirteenth Circuit relied on *In re GFS Industries*, which attempted to harmonize the Debtor's reasoning with earlier decisions interpreting section 1228(2)'s language. R. 19. Like the court in *In re GFS Industries*, the Thirteenth Circuit emphasized the difference between chapter 11 and chapter 12 without giving proper weight to the specific changes that Congress made in subchapter V that mirror its predecessor chapter 12. *See* R. 20; *see also* 2022 WL 16858009, at *6. Indeed, while the court in *In re JRB Consolidated* mentioned the differences between chapter 11 and 12, it also supported its ultimate conclusion with other persuasive analysis that should apply to subchapter V. *New Venture P'ship v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995).

The reasoning in *In re JRB Consolidated* provides a framework for analyzing and applying the plain language of section 1192(2). The bankruptcy court correctly began with the

plain language of 1228(2) and recognized that the statute requires the court to grant a discharge to "the debtor" and that the discharge exceptions apply to "*debt . . . of the kind* specified in § 523(a)." 188 B.R. at 374. Next, the court acknowledged that section 1228(2) is more specific than section 523(a) because section 1228(2) only applies to chapter 12, while section 523(a) applies to multiple chapters in the Code. *Id.* It is here that the court discussed the differences between chapter 11 and 12 but it did so only to point out that chapter 11 specifically indicates within the operative statute that section 523(a) only applies to individuals. *Id.* The court inferred from the lack of restrictive language in chapter 12 that "it would not be unexpected that Congress may provide for some different treatment of these debtors." *Id.* The court correctly interpreted the more specific provision of section 1228 to control the scope of application and determined that it "would be a stretch to fit the § 523(a) language into § 1228 and redefine what it meant by the term "debtor." *Id.*

Congress knew about this interpretation of section 1228(2) when it drafted those provisions into subchapter V. Courts "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). "[I]dentical words and phrases within the same statute should normally be given the same meaning." *Hall v. United States*, 566 U.S. 506, 519 (2012) (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)). The court's analysis in *In re JRB Consolidated* is grounded in the statutory language and reasonable inferences drawn from the construction of the statute, as opposed to the Thirteenth Circuit's dismissal of subchapter V as just another part of chapter 11. *See* 188 B.R. at 374. Courts should avoid creating conflict between two statutory provisions absent express congressional intent to create it. *See Hall*, 566 U.S. at 519. Therefore, this Court should interpret

section 1192(2) to apply the discharge exceptions to corporate debtors in accordance with the reasonable construction and case law emanating from section 1192(2)'s language.

4. Applying discharge exceptions to corporate subchapter V debtors avoids incentivizing a nonconsensual plan of reorganization.

The Thirteenth Circuit's errant interpretation will create the anomalous result of encouraging the subchapter V debtor to cramdown a nonconsensual plan instead of negotiating a consensual plan. Except for specifically eliminated provisions, the traditional chapter 11 requirements apply when a bankruptcy court confirms a subchapter V consensual plan. 11 U.S.C. § 1191(a). The traditional chapter 11 requirements except certain debts listed in 523(a) from a corporate debtor's discharge. *Id.* § 1141(d)(6). These discharge exceptions include certain debts owed to a governmental unit and debts for tax fraud and willful evasion of taxes or customs. *Id.* § 1141(d)(6)(A)–(B). However, when a bankruptcy court confirms a nonconsensual subchapter V plan, the traditional chapter 11 requirements do not apply. *Id.* § 1181(c). Instead, section 1192 governs the bankruptcy court's discharge of debts. *Id.* Section 1192 requires the bankruptcy court to grant a discharge after all payments under the plan. *Id.* § 1192. Section 1192 then excepts from discharge any payment after 3 years and debts "of the kind specified in section 523(a)." *Id.* § 1192(1)–(2).

Under the Thirteenth Circuit's interpretation, a corporate subchapter V debtor would not be able to discharge debts for tax fraud and evasion in a consensual plan but would be able to do so after confirmation of a nonconsensual plan. The Thirteenth Circuit predicates its analysis on its optimistic assertion that corporations, unlike humans, do not have moral agency. R. 16. While most business entities may follow the rules, the recent trend of mass tort bankruptcy cases indicates that some of America's largest corporations are capable of invidious evils. *See e.g., In re Purdue Pharma*, 635 B.R. 26. These evils have the potential to affect the lives of many

vulnerable individuals, like the Petitioner, absent proper protection. The Thirteenth Circuit's scheme provides no protection, and further would allow corporations to go further and defraud the government via subchapter V. As this Court has recognized, "[t]he ultimate weapon of enforcement available to the Congress would, of course, be the 'power of the purse.'" *U.S. v. Richardson*, 418 U.S. 166, 178 n.11 (1974). Congress would not debilitate its own ability to collect taxes, nor would it remove historical creditor protections without ensuring the safety of especially vulnerable populations. Therefore, section 1192(2) applies the list of discharge exceptions in section 523(a) to corporate subchapter V debtors, and Petitioner has the right to pursue her non-dischargeability action against the Debtor.

CONCLUSION

For the reasons listed above, this Court should find in favor of the Petitioner, Ms. Eleanor Rigby, and reverse the decision of the Court of Appeals for the Thirteenth Circuit.