Team 25

No. 22-0909

In The

Supreme Court of the United States

October Term, 2022

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 PETITIONER

TEAM NUMBER 25
COUNSEL FOR PETITIONER

JANUARY 19, 2023

QUESTIONS PRESENTED

1. Whether a bankruptcy court has the authority to approve non-consensual releases of direct claims held by third parties against non-debtor affiliates as part of a chapter 11 plan of reorganization when the plan is proceeding under subchapter V, and the creditors were not paid in full nor given an opportunity to opt-out and retain their claims?

2. Whether, following the confirmation of a non-consensual reorganization plan, a creditor may bring a non-dischargeability claim against a subchapter V corporate debtor under 11 U.S.C. § 1192 to except from discharge debts of the kind specified in 11 U.S.C. § 523(a)?

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The Thirteenth Circuit Court of Appeals' decision is set out in the record. R. at 3–34. Further, the opinion is available at No. 21-0803. Both the Bankruptcy Court for the District of Moot and the Thirteenth Circuit Court of Appeals ruled against Ms. Rigby, subchapter V creditor.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The statutory construction of several provisions of Title 11 of the United States Code are indispensable to the present action. The following sections of the United States Code are relevant to this case:

The relevant portion of 11 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—

The relevant portion of 11 U.S.C. § 524(e) provides:

> (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."

The relevant portion of 11 U.S.C. § 1192(2) 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

STATEMENT OF THE CASE

This appeal arises from the erroneous confirmation of the Debtor's grossly deficient reorganization plan and the wrongful dismissal of Petitioner's non-dischargeable tort claim. The success of Respondent's claim jeopardizes the Bankruptcy Code's integrity by allowing negligent corporate debtors to skirt liability to creditors who have been flagrantly harmed by abusing the small-business allowances made in subchapter V chapter 11.

I. FACTUAL HISTORY

Respondent, Penny Lane Industries, Inc. (the "Debtor") is a plastic, glass, and metal food container manufacturer and a wholly owned subsidiary of Strawberry Fields Foods, Inc. ("Strawberry Fields"). R. at 4. Strawberry Fields is a nationwide food manufacturing company that produces and markets products for several well-known American companies. R. at 4–5. The Debtor owns and operates a manufacturing facility in Blackbird, Moot, and faces numerous allegations of knowingly disposing of harmful and toxic environmental pollutants that contaminated Blackbird's ground water supply. R. at 3. Hundreds of creditors, comprised in large part by residents of Blackbird and neighboring towns, assert scores of tort claims for serious bodily injury and death against the Debtor. R. at 3, 6.

While the Debtor and Strawberry Fields contest their inadequate disposal of deadly chemicals and pollutants, Federal and State studies have confirmed a massive groundwater plume under the city of Blackbird. R. at 5. The United States Environmental Protection Agency and the Centers for Disease Control and Prevention have established toxin levels in Blackbird's groundwater ranging from 250 to 3,000 times the permitted level from 2013 to 2017. R. at 5. Exposure to these toxins has been linked to birth defects, illness, and death; Blackbird residents were bathing in and ingesting these toxins for at least four years. R. at 5.

Petitioner ("Ms. Rigby"), an over 30-year resident of Blackbird, sued the Debtor in 2017, alleging that her four-year-old daughter's death of leukemia was caused by the Debtor's cost-effective pollutant disposal methods, leading to pollutant infiltration of the Liverpool River. R. at 5. Ms. Rigby also alleges that the Debtor's then Chief Executive Officer was aware of the toxins' entry into Blackbird's water supply and the danger to Blackbird's residents. R. at 5. Ms. Rigby attached Strawberry Fields to the suit, alleging that it knew, or should have known, about its subsidiary's misconduct. R. at 5–6. Ms. Rigby filed a $1 million unsecured claim against the Debtor that, to date, has gone unobjected. R. at 6–7.

In the face of a mountain of expensive tort litigation, namely approximately 10,000 claims asserting nearly $400 million in cumulative damages, the Debtor elected to file for bankruptcy under subchapter V chapter 11 as a "small business debtor" on January 11, 2021. R. at 6. The Debtor owes less than 2 million dollars to its trade creditors. R. at 6. Ms. Rigby's $1 million unsecured claim has been deemed allowed under applicable bankruptcy law pending the filing of any objection. R. at 7. Ms. Rigby sought to have her claim deemed non-dischargeable pursuant to sections 523(a) and 1192(2) based on the "willful and malicious injury by the debtor to another entity or to the property of another entity." R. at 7.

Upon the Debtor's bankruptcy filing, all non-bankruptcy litigation against the Debtor was stayed pursuant to section 362(a) and per an injunction sought by the Debtor, all pending litigation against Strawberry Fields was also temporarily stayed. R. at 7–8. Over two months of mediation, several stakeholders negotiated a settlement framework known as "the Plan." R. at 8. The Plan established a creditor trust to be funded by: (a) the Debtor's disposable (net) income for five years, and (b) $100 million to be paid by Strawberry Fields, so long as Strawberry Fields would be broadly released from any and all past and future claims stemming from the Debtor's pre-petition conduct. R. at 8.

The Plan release is non-consensual, binding parties regardless of their participation in the bankruptcy case or their disapproval of the Plan. R. at 8. Further, the Plan's trust establishment will likely yield creditors with a mere 30–40 cents on the dollar. R. at 8. Ms. Rigby notably objected to the Plan, asserting that the non-consensual releases of third-party direct claims against Strawberry Fields are not permissible under applicable bankruptcy and non-bankruptcy law. R. at 9. Ms. Rigby was joined by Norwegian Wood Bank (the "Bank"), who assert an unrelated objection that the confirmation of a non-consensual plan by utilizing subchapter V "cramdown provisions" infringe on their right to a "fair and equitable" chapter 11 plan as required by sections 1191(b) and 1129(b)(2)(A). R. at 9.

II. Procedural History

With regards to Ms. Rigby's non-dischargeability action dispute, the Debtor filed a motion to dismiss for failure to state a claim on which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, incorporated to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. R. at 7. The bankruptcy court granted the Debtor's motion to dismiss, holding that exceptions to discharge in section 523(a) do not apply where the debtor is a corporation, even under the allowances made in subchapter V chapter 11. R. at 7.

With regards to the Plan disputes, the bankruptcy court approved the controversial Plan, citing the unusual nature of the case. R. at 10. Ms. Rigby and the Bank's Plan objections were reluctantly overruled due to the extenuating circumstances. R. at 10–11. Ms. Rigby timely appealed both of the bankruptcy court's rulings and the Thirteenth Circuit likewise affirmed. R. at 11, 23.

STANDARD OF REVIEW

The questions before this Court are based upon statutory interpretation of the Bankruptcy Code codified in Title 11 of the United States Code[1] and are therefore pure issues of law. Accordingly, the standard of review on appeal is de novo. *Pierce v. Underwood*, 487 U.S. 553, 558 (1988).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit incorrectly ruled in favor of the Debtor as to both issues. First holding that bankruptcy courts have the power to order third-party releases and that one was appropriate in the present case. Before holding that subchapter V corporate debtors may receive a full discharge of claims despite section 1192(2)'s text.

I.

There are many reasons why this court should reject the non-consensual third-party release here. Specifically, Petitioner argues that the facts of this case do not warrant the use of the release, and the power to grant the permanent release is not one the bankruptcy court possesses.

The facts here do not fit within the test of any circuit, even the most lenient ones. For example, the creditors were paid in full or given a chance to opt out of the settlement and retain their claim in every prior case where a court actually approved a third-party release for prepetition conduct. The courts believe that if the creditors are paid in full or given a choice to reject the settlement, the deal has inherent fairness. Here, the creditors will only receive an estimated 30-40 cents on the dollar and do not have the chance to opt-out. Objecting creditors are

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq.* Bankruptcy Code sections are identified throughout as "section __."

being forced to surrender their claims and lose their day in court for a fraction of what they could potentially receive. Although the claims are speculative, the decision to settle should be the decision of the plaintiff-creditors, not the bankruptcy court.

Also, many circuits have held that if the third-party release is necessary or important to the reorganization, it can be allowed. In some cases, a debtor and a non-debtor are so closely tied together that a suit against the non-debtor is a suit against the debtor, and effective reorganization requires both entities to be released from claims. This is not the case here. The court below argued that the potential contribution or indemnification rights of Strawberry Fields against the debtor render the release necessary. However, these rights are still highly speculative. More importantly, because the parent-subsidiary relationship arose prepetition, the contribution or indemnification claims would be prepetition unsecured debt to go into the waterfall. Because this is a subchapter V case, the debtor will pay its disposable income into the creditor's pot for the five-years after confirmation, and having another unsecured creditor, such as Strawberry Fields by way of indemnification, will not increase the amount the debtor has to pay at all. It will not affect the reorganization. And again, because this is subchapter V, the absolute priority rule does not apply. The debtor can cramdown objecting creditors and still keep its equity. Thus, the release of Strawberry Fields does not affect the reorganization and is unnecessary.

The court below cited cases as authority to approve a non-consensual third-party release, but these cases are distinguishable. Some of these cases approve third-party exculpation clauses. The clauses exculpate professionals involved in the reorganization, such as attorneys or banks, from liability arising during the bankruptcy case. They do not relate to prepetition conduct. Here, the release is broad and covers prepetition conduct. It is not an exculpation for malpractice, but rather a substantive release of all claims for intentional tort liability. Consequently, it should not be viewed under the same standard as these exculpation clauses.

Additionally, the power to grant the permanent injunction of claims against a non-debtor is not a power the bankruptcy court possesses. The circuit courts have varying tests to determine whether these releases are allowed in a chapter 11 reorganization plan, with some circuits saying they are never allowed. The circuits that do permit them only do so in rare cases. However, this court has held that there is no rare case exception to the Bankruptcy Code and that courts cannot create substantive powers outside the statutory confines set by Congress. That holding reveals that rare cases cannot be used as justification for techniques not within the Code.

Some courts also use the Code's grant of broad equity power to approve these releases. Again, this court has held that equity power does not allow bankruptcy courts to create substantive powers that are not in the Code. The Code specifically describes the effect of discharge, and it makes clear that confirmation of a plan only discharges the debtor. The plan cannot, through the bankruptcy court's equity power, include a provision that is contrary to the specific Code provision and release a non-debtor.

II.

In February 2020, Congress enacted the Small Business Reorganization Act ("SBRA"), creating a new avenue for small business debtors to file for bankruptcy under chapter 11. Congress intended the SBRA to streamline the reorganization process for a small and unique subsection of debtors—small businesses—free of the expensive and costly procedural requirements chapter 11 generally requires of debtors. To achieve this, Congress substantially modeled subchapter V after chapter 12, which had been proven effective in helping family farmers—another small and unique group of debtors chapter 11 failed to adequately protect.

Subchapter V and chapter 12 share many characteristics, while subchapter V and chapter 11 are sharply divided in many areas. One area where subchapter V diverges from the traditional chapter 11 path is the discharge of claims. Chapter 11 traditionally grants complete discharge of claims to corporate debtors; however, Congress intentionally diverted from this system when it wrote subchapter V. The plain text of section 1192 of subchapter V excepts from discharge any debt of the kind specified in section 523(a), making no mention of the type of debtor seeking discharge. The plain text of section 1192(2) unambiguously applies to both corporate and individual debtors. While this is complicated by section 523(a)'s preamble—which states section 523(a) applies to individuals only—it is not dispositive of the issue. Even if this cross-reference creates ambiguity, it can quickly be disposed of using the canons of construction and by looking at the legislative record.

Traditionally, specific statutory provisions govern over their more general counterparts. The same is true here. Section 1192(2) is specific—only applying to subchapter V—while section 523(a) is general—applying to all types of bankruptcy. The legislative history illustrates that Congress intended to model subchapter V off of chapter 12 bankruptcy—making a conscious choice to divert from the general norms of chapter 11 due to its insufficiency regarding small entities. Furthermore, Congress chose to borrow section 1192(2)'s broad language from chapter 12 instead of the readily available narrow language in chapter 11.

Courts have previously interpreted chapter 12's identical language to except the debts listed in 523(a) from discharge when the debtor is a corporation, even against the backdrop of section 523(a)'s contradictory preamble. This Court gives the same effect to identical language. Like subchapter V, chapter 12's text does not refer to the type of debtor. Therefore, this interpretation is in line with the plain meaning of section 1192(2) and the intent of the SBRA's

Congressional sponsors, further signaling that Congress intended corporate subchapter V debtors to be subject to non-dischargeability actions for the debts listed in section 523(a).

Lastly, section 1192(2) only applies in the event of a non-consensual reorganization plan. Unlike chapter 11, subchapter V eliminates the absolute priority rule, allowing confirmation to occur over the objection of unsecured creditors, leaving them little room to contest an unpalatable plan. Suppose the Debtor's interpretation of section 1192(2) is given effect. In that case, it will be able to receive a complete discharge of claims—regardless of its previous bad behavior—while completely nullifying the ability of its unsecured creditors to challenge this result. Because bankruptcy seeks to strike a balance between the rights of debtors and their creditors, this inequitable interpretation cannot stand.

This Court should REVERSE on both issues.

ARGUMENT

I. NON-CONSENSUAL THIRD-PARTY RELEASES ARE NOT APPROPRIATE HERE BECAUSE THE FACTS OF THIS CASE DO NOT WARRANT THE USE OF A NON-CONSENSUAL THIRD-PARTY RELEASE AND THESE RELEASES ARE NOT WITHIN THE POWER OF A BANKRUPTCY COURT.

Bankruptcy courts, as courts of equity, have broad power. *See, e.g.,* 11 U.S.C. § 105(a). This power is not absolute though, as courts are limited to the powers found in the Bankruptcy Code. *Law v. Siegel*, 571 U.S. 415, 421 (2014). With the exception of asbestos cases and section 524(g), the power to grant a non-consensual third-party release is not found anywhere in the Bankruptcy Code. *In re Continental Airlines*, 203 F.3d 203, 211 (3d Cir. 2000). Regardless, the circuit courts are split as to whether this is a power that the bankruptcy courts possess: some say it is not and others say it can be in "rare" and "unusual circumstances." *Compare Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th. 419, 435-38 (5th Cir. 2022) (holding that non-debtor releases and exculpations are barred by § 524(e)) *with In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (allowed in "rare" cases), *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (allowed in "unusual circumstances"), *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989) (allowed when certain creditor protections are present).

The facts of this case, however, do rise to "rare" or "unusual circumstances" under the tests of any circuit court and are lacking the requisite creditor protections. Additionally, the power to grant a non-consensual third-party release is outside the power of the bankruptcy court generally.

A. The facts of this case do not call for a non-consensual third-party release under the tests of any circuit court.

The Courts of Appeal for the Fifth, Ninth, and Tenth Circuits categorically bar non-consensual third-party releases as contrary to section 524(e).[2] *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th. at 436; *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-1402 (9th Cir. 1995); *Landsing Diversified Props. II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990). The Ninth Circuit does allow non-debtor exculpation from liability arising during the bankruptcy proceedings, but also, along with the Third Circuit, distinguishes "exculpation" from "releases."[3] *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1083-1084 (9th Cir. 2020); s*ee also In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000) (holding that, unlike a release, an exculpation clause "does not affect the liability of third parties, but rather sets forth the appropriate standard of liability").

Other circuits decline to categorically bar non-consensual third-party releases but allow them only in "rare" or "unusual circumstances." *See, e.g.*, *Metromedia*, 416 F.3d at 141; *Dow Corning*, 280 F.3d at 658; *accord Continental Airlines*, 203 F.3d at 211 (surveying the different

[2] Interestingly, the Fifth Circuit recently reaffirmed this view in September 2022. *Highland*, 48 F.4th 419.
[3] The Fifth Circuit makes no such distinction, categorically barring non-debtor releases and exculpation clauses. *Highland*, 48 F.4th at 435-36.

treatments from various circuit courts). While these circuits have said that, in certain cases, non-consensual third-party releases could be permissible, no circuit has approved or would approve a release like the one in this case. Here, the creditors were not paid in full or given the chance to opt out and the release was not necessary to the reorganization due to the structure of this specific bankruptcy. Also, cases that appear to support these releases are quite different than the facts here.

1. The creditors here were not paid in full or given a chance to opt out of the settlement and retain their claims.

The circuits that, notwithstanding section 524(e), held that non-consensual third-party releases are permissible, have only done so when the creditors are paid in full or given a chance to opt out and retain their claims. *See, e.g.*, *A.H. Robins*, 880 F.2d at 702 (creditors paid in full and given a chance to opt out); *In re Seaside Engineering and Surveying, Inc.*, 780 F.3d 1070, 1080 (11th Cir. 2015) (creditors paid in full). The Sixth Circuit in *Dow Corning* summarized the cases from their "sister circuits" and created a list of factors that, when present, allow a bankruptcy court to approve a non-consensual third-party release:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Dow Corning, 280 F.3d at 658. Here, the release fails multiple factors. It fails factors (1) and (3) because of the nature of subchapter V bankruptcy and the specific potential indemnification and contribution rights. *See infra* Part I.A.2. It fails factors (5) and (6) because the creditors were not paid in full or given a chance to opt out of the settlement and pursue their claims. The court continues, "in order for the Plan to be approved under the 'unusual circumstances' test, it must ensure an opportunity for those claimants who choose not to settle to recover in full, and this determination must be supported by particularized factual findings." *Id*. at 659; *see also A.H. Robins*, 880 F.2d at 702 (approving a non-consensual third-party release when the creditors were paid in full); *Seaside Engineering*, 780 F.3d 1070, 1080 (11th Cir. 2015) (citing *Dow Corning* factors and approving a non-consensual third-party exculpation when the creditors were paid in full).

Because "fairness" is one of the "hallmarks" of "permissible non-consensual releases," releases that force creditors to release their claims for less than 100 cents on the dollar are inherently impermissible. *Continental Airlines*, 203 F.3d at 214. Here, Ms. Rigby is being forced to trade her daughter's life for an estimated 30–40 cents on the dollar. R. at 5, 8. Many others are in similar situations. R. at 6. This is not payment in full. This is not "fairness." There is no way for her to opt out of the settlement and pursue her claims against Strawberry Fields. Eleanor Rigby might be one of the few lonely people in the five percent minority who did not vote for the plan, but she has already lost her daughter—she should not have to surrender her day in court too. No circuit court, other than the Thirteenth Circuit below, would approve the release on these facts. This court should not approve it either.

2. The release is not necessary to the reorganization because subchapter V bankruptcy debtors are not subjected to the absolute priority rule and any valid claims for contribution or indemnification against the debtor held by Strawberry Fields are prepetition unsecured debt.

The non-consensual third-party release was not "important", "essential", or one of "necessity" in this case. *Metromedia*, 416 F.3d at 141 (releases only allowed when they are "important" to the plan); *Dow Corning*, 280 F.3d at 658 (injunction must be "essential to the reorganization"); *Continental Airlines*, 203 F.3d at 214 (release must be one of "necessity" to be permissible). First, this case is proceeding under subchapter V, so the debtor is not subject to the absolute priority rule of section 1129(b)(2)(B). § 1181(a). In a traditional chapter 11 bankruptcy, the absolute priority rule requires the debtor to pay back all creditors in a certain class in full before creditors of a lower class receive any payment. § 1129(b)(2)(B). If this does not happen, or the impaired creditors do not vote to approve the plan, then the debtor cannot keep its equity since equity is the lowest class in the bankruptcy waterfall. *Id.*; *see also* § 726(a)(6). However, the subchapter V debtor is not subject to the absolute priority rule. § 1181(a).

Instead, to retain its equity, the debtor just has to pay its disposable income into the creditor's pot for three to five years. § 1192. Thus, Strawberry Fields' payment into the creditor's pot does not benefit the actual debtor. If this case was proceeding under traditional chapter 11, then the payment may go a long way to either pay back the creditors in full or secure their vote for the plan. However, since this case is proceeding under subchapter V, the debtor receives the same benefits, with or without Strawberry Fields' payment, so long as it pays its disposable income for the five years pursuant to the settlement agreement. The payment may benefit the creditors and the release definitely benefits Strawberry Fields, but the debtor, the debtor's equity, and the reorganization are left unaffected. This falls far short of the high bar set by even the most lenient circuits' tests.

The court below cites the potential contribution and indemnification rights that Strawberry Fields might have against the debtor for a reason why the release is necessary. R. at 12. This argument also falls short. The Code defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 101(5)(A). Thus, "even contingent and unliquidated debts can constitute claims." *Olin Corp. v. Riverwood Int'l (In re Manville Forest Prods.)*, 209 F.3d 125, 128 (2d Cir. 1999) (holding that claims for indemnification against the debtor are prepetition claims so long as the relationship creating the indemnification right was established prepetition).

In *Olin*, the debtor agreed to contractually indemnify their parent company. *Id*. at 126. The debtor then was taken public and merged with a different company. *Id*. The debtor filed for chapter 11 bankruptcy and the bankruptcy court confirmed a plan discharging the debtor from all unsecured debts that arose preconfirmation. *Id*. at 127. Just four months after the plan was confirmed, the state of Louisiana enacted new environmental legislation for which the debtor and the original indemnified parent company were liable for remediation. *Id*. When the former parent company asserted their indemnification rights, the debtor claimed that the indemnification rights were discharged when the plan was confirmed. *Id*. The former parent company argued that since the liability arose post-confirmation, the indemnification rights were not discharged. *Id*. The Second Circuit held that the indemnification rights were claims within the scope of section 101(5) and that the claims arose when the indemnification rights arose—prepetition. *Id*.

Here, the indemnification and contribution rights arose when the parent-subsidiary relationship leading to those rights arose. This occurred long before the debtor filed for bankruptcy. As the *Olin* court explains, even though Strawberry Fields' potential claims against the debtor are contingent and unliquidated they are still prepetition claims since the parent-subsidiary relationship existed before the debtor filed for bankruptcy. Thus, any potential contribution or indemnification rights that Strawberry Fields could assert against the debtor would be prepetition unsecured debt and go into the bankruptcy waterfall to be discharged when the plan is confirmed. This debt would share in the debtor's five-year disposable income along with the other unsecured creditors.[4] Any of these claims that Strawberry Fields could successfully pursue against the debtor would not increase the amount that the debtor pays at all. It would not affect the reorganization at all. It might reduce the amount the other unsecured creditors would receive, but this too does not affect the debtor or the reorganization.

The purpose of the release is to shield Strawberry Fields from liability. It is not to benefit the debtor or the reorganization. Again, this falls well short of the high bar of "important", "essential", or one of "necessity" to the reorganization. *Metromedia*, 416 F.3d at 141; *Dow Corning*, 280 F.3d at 658; *Continental Airlines*, 203 F.3d at 214. If Strawberry Fields wants a discharge, then it should file for bankruptcy too. Here, the bankruptcy court found that the payout under the confirmed plan would be "substantially greater than what creditors would receive if the Debtor was liquidated under chapter 7." R. at 10. However, this release is effectively a discharge in bankruptcy for Strawberry Fields, a non-debtor. *Metromedia*, 416 F.3d at 142 ("In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity."); *see also Landsing*, 922 F.2d at 600-01 (explaining that a bankruptcy discharge should only discharge the debtor from liability).

[4] It should be noted that these rights are still highly speculative since there is no determination that the debtor is liable to Strawberry Fields or that either of them are liable to the tort creditors.

If Strawberry Fields had filed for bankruptcy, it would be subject to the best interest test and the amount that Strawberry Fields would be liquidated for in chapter 7 would become relevant. *See* § 1129(a)(7). It would also be subject to stringent reporting requirements, and the court would know its financial position. *See* § 521(a). The fact that Strawberry Fields can effectively receive a bankruptcy discharge without being subject to the reporting requirements of section 521(a) or the confirmation requirements of section 1129 is completely against the concept of fairness that even the more lenient circuits require. *See, e.g,*, *Continental Airlines*, 203 F.3d at 214 ("The hallmarks of permissible non-consensual releases" are "fairness, necessity to the reorganization, and specific factual findings to support these conclusions."). This release benefits Strawberry Fields, not the debtor. It is not at all necessary to the reorganization, and this Court should not allow Strawberry Fields to circumvent the requirements of the Code or the tests of even the most lenient circuit courts.

3. Cases that appear to support non-consensual third-party releases are distinguishable.

There are cases where circuit courts have approved non-consensual third-party exculpation clauses in the plan. *See, e.g.*, *Seaside Engineering*, 780 F.3d at 1076 (approving a release of certain parties from negligence "relating to, or arising out of the Chapter 11 Case" when the creditors were also paid in full); *Blixseth*, 961 F.3d at 1085 ("hold[ing] that § 524(e) does not prohibit the Exculpation Clause at issue, because the Clause covers only liabilities arising from the bankruptcy proceedings and not the discharged debt"); *In re Airadigm Communications, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008) (approving exculpation from liability arising out of the bankruptcy reorganization). These exculpations are quite different than the release here. They do not contemplate a broad release of liability for prepetition conduct. Rather, they exculpate the parties participating in the reorganization—executives, attorneys, bankers, advisors, etc.—from liability arising out of the reorganization itself. *Id*. They allow the hired professionals and involved entities to do their jobs during the bankruptcy process without fear of being sued for malpractice or negligence post-confirmation. *Id*.

These clauses are a *res judicata* bar: if the bankruptcy court approves the administrative fees, then the court determined that the individuals or entities who earned the fees did so with due care and were not negligent. The clause just goes to memorialize this finding.

Here, Strawberry Fields is not just being released from conduct arising out of the bankruptcy process. It is being released from "any and all claims … based on or related to the Debtor's pre-petition conduct, its estate or this chapter 11 case." R. at 8. This is not a narrowly tailored exculpation for administrative negligence. It is a fully substantive release for intentional tort liability arising prepetition. "The potential for abuse is heightened when releases afford blanket immunity." *Metromedia*, 416 F.3d at 142 (explaining why "a nondebtor release is a device that lends itself to abuse."). This release offers full blanket immunity and is distinguishable from narrow exculpations. The "potential for abuse" here is high. *See id*. Thus, these cases should be distinguished and not used as authority to approve the release here.

B. A non-consensual third-party release is outside the power of the bankruptcy court because there is no law which grants the court this power and these releases are expressly prohibited by Bankruptcy Code section 524(e).

This Court has held that there is no "rare case" exception to the Bankruptcy Code, and that bankruptcy courts are bound by the statutes enacted by Congress. *Czyzewski v. Jevic Holding*, 580 U.S. 451, 471 (2017). Other than section 524(g), there is no law that grants a court the ability to approve a non-consensual third-party release. *Dow Corning*, 280 F.3d at 656. Additionally, the Code says that "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." § 524(e). Because there is no law that specifically grants this power, there is a law that prohibits it, and there is no room for an exception in a "rare case", the power to grant a non-consensual third-party release is not a power the bankruptcy court possesses.

1. In *Czyzewski v. Jevic Holding*, this Court held that there is no "rare case" exception to the Bankruptcy Code.

The circuit courts that allow non-consensual third-party releases only do so only in "rare cases" or "unusual circumstances." *See, e.g.*, *Metromedia*, 416 F.3d at 141 (holding that the release could be allowed in "rare cases" but declining to approve the release and, instead, dismissing the appeal as equitably moot); *Dow Corning*, 280 F.3d at 658 (holding that the release could be allowed under "unusual circumstances" but remanding because the district court did not make such findings). However, this Court has held that "Congress did not authorize a 'rare case' exception" to the Bankrupctcy Code. *Jevic*, 580 U.S. at 471 (2017) (holding that structured dismissal which violates absolute priority is not permitted).

Jevic was a case of a leveraged buyout gone wrong where the target company ended up in chapter 11 bankruptcy. *Id*. at 458. The lenders for the buyout held a large secured debt. *Id*. The other creditors were (1) former employees who held a priority unsecured debt from a judgment and (2) tax and other general unsecured creditors. *Id*. at 459. As the court noted, the employee judgment holders were entitled to payment ahead of the general unsecured creditors. *Id*.

The parties, over the priority employee creditors' objection, agreed on a structured dismissal settlement where, in pertinent part, the general unsecured creditors would receive payment but the priority employee creditors would receive nothing. *Id*. at 460. The bankruptcy court approved the settlement, holding that structured dismissal gives courts the flexibility to disregard the priority rules in "dire circumstances." *Id*. at 461. The court thought that, without the settlement, there would be no distribution to anyone other than secured creditors, that a chapter 11 plan confirmation was "unattainable", and that these "dire circumstances" allowed the structured dismissal. *Id*.

This Court did not agree and held that the "priority system constitutes a basic underpinning of business bankruptcy law." *Id*. at 464. This Court also held that there is no "rare case" exception to the Code, citing concern about the potential exception turning into a "general rule." *Id*. at 469-71; *see also id*. at 471 (citing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988)) ("explaining that courts cannot deviate from the procedures 'specified by the Code', even when they sincerely 'believ[e] that ... creditors would be better off'").

Under *Jevic*, this Court has precedent that bankruptcy courts cannot deviate from the Code or create new rules in the name of "rare cases." This Court should follow that precedent here and, likewise, hold that "rare" or "unusual circumstances" do not authorize non-consensual third-party releases absent specific statutory authorization such as that found in section 524(g).

2. There is no law which gives a bankruptcy court the power to grant a non-consensual third-party release.

The Bankruptcy Code does not specifically authorize a court to grant a release and permanent injunction of claims against non-debtors. *Continental Airlines*, 203 F.3d at 211; *see also Dow Corning*, 280 F.3d at 656 ("The Bankruptcy Code does not explicitly prohibit or authorize a bankruptcy court to enjoin a non-consenting creditor's claims against a non-debtor to facilitate a reorganization plan."); *Metromedia*, 416 F.3d at 142 ("the only explicit authorization in the Code for nondebtor releases is 11 U.S.C. § 524(g), which authorizes releases in asbestos cases when specified conditions are satisfied.").

The Code provides courts "some equitable powers to adjust rights between creditors." *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 24–25 (2000) (holding that "that bankruptcy does not alter the burden [of proof on a tax claim] imposed by the substantive law."). The court below cited sections 105(a) and 1123(b)(6), which do give bankruptcy courts broad equity power to issue orders or include provisions in plans without specific statutory authority. This Court, however, has placed specific limits on such powers. *See Raleigh*, 530 U.S. 24-25 ("Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides."); *Ahlers*, 485 U.S. at 206 ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

The Bankruptcy Code is a comprehensive, technical scheme, and bankruptcy practice is Code-driven. This Court has said so: "The Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Siegel*, 571 U.S. 415, 424 (2014). If Congress wanted to give courts the power to release non-debtors over the creditors' objections, then it would have specifically granted that power. Certainly, that is what it did for the asbestos cases, *see* § 524(g), but made a choice not to extend it any further. It also placed in section 524(g) a "host of conditions that must be satisfied" before the injunction can be issued. *In re Purdue Pharma, L.P.*, 2021 U.S. Dist. LEXIS 242236, 166 (S.D.N.Y. 2021) (vacating the bankruptcy court's order permitting the non-consensual release of Purdue's shareholders). Congress did not grant that power for the release here, and its silence on this matter speaks volumes. It is improper for bankruptcy courts to create substantive powers without specific statutory authority. *See Siegel*, 571 U.S. at 427 (holding that a court cannot sanction a debtor by seizing its exempt property. "[I]t is not for courts to alter the balance struck by the statute."); *Jevic*, 580 U.S. 471 (citing *Ahlers*, 485 U.S. at 207) ("courts cannot deviate from the procedures 'specified by the Code', even when they sincerely 'believ[e] that ... creditors would be better off'"). Non-consensual third-party releases have wide and permanent consequences. They necessarily affect the balance of rights between debtors, creditors, and third parties. This balance was created by Congress and substantive changes to this balance should come from Congress too.

Additionally, courts should be wary of making the mass tort settlement process too quick, cheap, or predictable for the tortfeasors, their shareholders, and their related parties. If the settlement process becomes too easy and clean, these parties will be encouraged to merely pencil in the probable cost of settlement as just another line on the income statement—and often as a cost that is outweighed by the potential benefits, making intentional torts a profitable venture. This leads to an environment where the effects on society, and the actual people hurt in the process, take a back seat to the cost-benefit analysis. It also gives the individuals who run or own the entities a chance to use the veil of entity separateness to prospectively protect or hide assets from the reach of the bankruptcy court and walk away with a broad release from all liability. *See Purdue Pharma*, 2021 U.S. Dist. LEXIS 242236, 74-86 (discussing how Purdue's shareholders transferred billions from the company to themselves personally—and stored it in places outside the reach of U.S. courts—prior to the bankruptcy filing). Because these global releases have wide-reaching societal effects, they should only be allowed with specific statutory authority—something that is lacking here.

3. Non-consensual third-party releases are barred by section 524(e).

The 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." § 524(e). The Fifth, Ninth, and Tenth Circuits hold that section 524(e) bars the release of non-debtors from liability for prepetition conduct. *Highland Capital*, 48 F.4th. at 436 (striking the non-debtor exculpated parties from the plan); *Lowenschuss*, 67 F.3d at 1401-1402 (affirming district court's holding that the global release is invalid);[5] *Landsing*, 922 F.2d at 600 (vacating permanent injunction and explaining that "Congress did not intend to extend such benefits to third-party bystanders."). Other circuits have held that section 524(e) only describes the effect of discharge and does not limit the court's power to permanently enjoin claims against non-debtors. *See, e.g.*, *Dow Corning*, 280 F.3d at 658. This is not the interpretation that Congress intended.

In the asbestos exception, Congress wrote: "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 . . . ." § 524(g)(4)(A)(ii). The word "notwithstanding" is defined as "despite", and the word "despite" is defined as "in spite of." *See Notwithstanding,* MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 808 (9th ed. 1985). Thus, the reading of section 524(g)(4)(A)(ii) could start as "in spite of the provisions of section 524(e)…" or "despite the provisions of section 524(e). . . ." This shows that section 524(e) is broader than it may seem to some courts. It also indicates that, while drafting section 524(g), Congress believed section 524(e) prohibited non-consensual third-party releases and desired to carve out a narrow exception for asbestos cases. The House Judiciary Committee Report also makes clear Congress' intent in passing section 524(g) to give judges this authority in the asbestos application:

> The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works *in the asbestos area* may help the Committee judge whether the concept should be extended into other areas.

Purdue Pharma, 2021 U.S. Dist. LEXIS 242236, 172-73 (citing Vol. E., Collier on Bankruptcy, at App. Pt. 9-78 (reprinting legislative history pertaining to the 1994 Code

[5] Note again the Ninth Circuit's distinction between release and exculpation. *Blixseth*, 961 F.3d at 1083-84.

amendments) (emphasis added). P.L. 111 was not incorporated into the Bankruptcy Code.). In the report, the Committee plainly states that they are looking to determine if section 524(g) is effective and whether courts should have the power to issue non-consensual third-party releases in other types of cases. This shows that, prior to section 524(g), courts did not have this power, and now, courts only have this power in the asbestos area.

II. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT THE DEBTS OF A KIND EXCEPTED FROM DISCHARGE IN 11 U.S.C. § 523(A) DO NOT APPLY TO A SUBCHAPTER V CORPORATE DEBTOR SEEKING A DISCHARGE UNDER 11 U.S.C. § 1192 FOLLOWING THE CONFIRMATION OF A NON-CONSENSUAL REORGANIZATION PLAN.

The United States Bankruptcy Code generally allows debtors to discharge certain kinds of debt, releasing them from liability. *See* §§ 727, 1141, 1192, 1228(a), 1328(b). Subchapter V differentiates discharge procedures depending on if the reorganization plan was consensual or non-consensual. *See* § 1181. When a plan is non-consensual, section 1192 governs discharge. *See* § 1181(c). It states:

> 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 …, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title … except any debt—
>
> * * *
>
> (2) of the kind specified in section 523(a) of this title.
>
> § 1192.

Section 1192(2) pays no regard to whether the debtor is a corporation or an individual. Conversely, section 523(a)'s preamble—which cross-references every discharge provision within the Code—explicitly provides that: "A discharge under section 727, 1141, 1192, 1228(a), or 1328(b) of this title does not discharge an individual from any debt . . . ." § 523(a). Following confirmation of a non-consensual plan, courts are split on whether—under section 1192(2)—

debts of the kind specified in section 523(a) are excepted from discharge when the debtor is a corporation rather than an individual.

This Court should reverse the Thirteenth Circuit's decision in this case and hold that the debts of a kind listed in section 523(a) are excepted from discharge across the board, regardless of the subchapter V debtor's identity.

A. Section 1192(2) does not make a distinction between corporate and individual debtors, supporting the conclusion that the non-dischargeable debts of the kind listed in 523(a) apply to both equally.

Statutory interpretation begins with the plain language of the statute. *See United States v. Ron Pair Entrs., Inc.*, 489 U.S. 235, 241 (1989). Courts give effect to the text's plain and natural meaning. *See id.* When the statute fails to define a term, this Court generally looks to the term's dictionary meaning. *See City of Chicago v. Fulton*, 141 S. Ct. 585, 590 (2021) (using the dictionary definition to define a term in the Bankruptcy Code). When the meaning is clear, courts may only glean meaning from what the text actually says, not what Congress may have intended to say. *See In re Lucarelli*, 517 B.R. 42, 49 (Bankr. D. Conn. 2014).

1. The plain meaning of section 1192(2) unambiguously encompasses only the debts referenced by section 523(a), not the kinds of debtors mentioned in its preamble.

The Fourth Circuit—the only other appellate court to rule on the present issue—reached its holding based on section 1192(2)'s plain meaning. *See Cleary*, 36 F.4th 509, 515 (4th Cir. 2022) (holding that under section 1192, the discharge exceptions found in section 523(a) apply to both corporate and individual debtors in subchapter V cases proceeding under a non-consensual plan). As a preliminary matter, the Fourth Circuit determined that the use of the term "debtors" in section 1192(2) was—by statutory definition—inclusive of both corporate and individual debtors; therefore, 1192(2)'s discharge provision applies to both types of debtors. *See id.* at 514–

15 ("For . . . Subchapter V, the term 'debtor' was defined . . .[as] a *person* engaged in commercial or business activities . . . 'Person' is in turn defined to include both individuals and corporation.") (citing §§ 101(9)(A), 1182(1) (2020)) (internal quotations omitted).

Addressing the issue of exceptions, the Fourth Circuit found section 1192(2)'s use of "debt" decisive because it lends itself only to the *kinds of debt* specified in section 523(a); rather than encompassing the *kinds of debtors* referenced by 523(a)'s preamble. *See Cleary*, 36 F.4th at 515. Merriam-Websters Dictionary defines "kind" as "a group united by common traits or interests," like a category, and "a specific or recognized variety." *See Kind*, MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 661 (9th ed. 1985). By modifying the term "debt," "kind" refers to the specific group of twenty-one types of debt found in section 523(a)—limiting the meaning of section 1192(2)'s cross-reference to these debts—not the group of debtors referenced in 523(a)'s preamble. *See Cleary*, 36 F.4th at 515.

Moreover, the complete idiom phrase "of the kind" is defined as "like or similar to what has been said." *See of the kind*, CAMBRIDGE DICTIONARY (online ed.) (giving the example of: "You said I was fat" "I didn't say anything of the kind!"). Using this framework, "debt" is section 1192(2)'s previous statement; therefore, "of the kind" references what has already been stated—debt—not what section 1192(2) left *unstated*— the type of debtor. The natural reading of section 1192(2) incorporates only debt "of the kind," rather than *debtors* of the kind.

The plain text of section 1192(2) does not differentiate between corporate and individual debtors. Because the text's meaning is clear, the appropriate level of judicial inquiry ends here. However, should this Court find the text ambiguous, both the canons of statutory interpretation and the legislative history support Ms. Rigby's reading of section 1192(2).

2. Even if the plain meaning of section 1192(2) is ambiguous, it controls over section 523(a) due to being the more specific statutory provision.

Alternatively, if the plain meaning is ambiguous, courts then look to the relevant canons of statutory interpretation and congressional intent. *See Lucarelli*, 517 B.R. at 49. One such canon instructs that—where there is tension between Code provisions—the specific governs over the general. *See In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 306 (3d Cir. 2010). A statute is ambiguous if courts may reasonably interpret its meaning in more than one way. *See Lucarelli*, 517 B.R. at 49.

Here, the canons of statutory interpretation may be disposed of quickly, as the interesting inquiry is into the legislative record of the Small Business Reorganization Act and the intent behind it. Section 523(a) applies widely throughout the Bankruptcy Code and references all the discharge provisions within its preamble, not just section 1192. *See Cleary*, 36 F.4th at 515. Conversely, section 1192 applies only to subchapter V cases, without affecting the Code as a whole. *See cf. In re Breezy Ridge Farms, Inc.*, No. 08-12038-JDW, 2009 WL 1514671, *3 (Bankr. M.D. Ga. May 29, 2009) (finding that section 1228(a) governed over section 523(a) because it is applicable only to chapter 12 while section 523 applies to the entire Code). Therefore, where perceived tension exists between section 523(a)'s preamble and section 1192(2), section 1192(2) must control as the more specific provision.

3. The SBRA's legislative record supports the conclusion that Congress intended that corporate debtors be subject to the debts excepted from discharge in section 523(a).

As stated by the late Chief Justice Marshall: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *See United States v. Fisher*, 6 U.S. 358, 386 (1805). This Court looks to statements made during committee hearings to ascertain congressional intent. *See e.g., Cnty. of Maui v. Hawaii Wildlife Fund*, 140

S. Ct. 1462, 1471–72 (2020). Moreover, this Court has previously afforded substantial weight to statements made by the statute's sponsors regarding its purposes and the intent behind it. *See Fed. Energy Admin. v. Algonquin SNG, Inc*, 426 U.S. 548, 564 (1976) ("[A] statement of one of the legislation's sponsors, . . deserves to be accorded substantial weight in interpreting the statute.").

On June 25, 2019, Congress conducted a hearing regarding the SBRA. *Oversight of Bankruptcy Law and Legislative Proposals: Hearing before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter *Hearings*]. Chapter 11 had long proven itself ineffective for small business reorganization; therefore, Congress turned to a statute that was successful in helping a similar category of debtors reorganize—chapter 12. *See id.* at 5 (opening statement of former Rep. Doug Collins, original co-sponsor, Ranking Member, H. Judiciary Comm.).

Because of chapter 12's success in aiding family farmers' reorganization, Congress "weav[ed] terms modeled [after chapter 12] into chapter 11 for the general use in small business cases." *See id; see also id.* at 3 (opening statement of Rep. Sensenbrenner, Ranking Member, H. Subcomm. on Antitrust, Com., & Admin. L.) ("Modeled on the Chapter 12 small farm bankruptcy provisions that have proven successful, the [SBRA] is a genuine promise to help the bankruptcy code better serve American business in the 21st Century.").

Consequently, chapter 12 and subchapter V share many similarities, while chapter 11 and subchapter V depart from one another in several key areas. First, subchapter V borrows from chapter 12 and eliminates the absolute priority rule—an action that has no parallels in traditional chapter 11 proceedings. *See* § 1225(b). Further, under subchapter V only the debtor may propose a plan; once again, this is borrowed from chapter 12 and has no corollary in traditional chapter 11 proceedings. *Compare* § 1221(b); *with* § 1189(a). Finally—as noted by Judge McCartney's favorable dissenting opinion—Congress borrowed the language of section 1192(2) from chapter 12's section 1228(a). *See* R. at 33.

Moreover, if Congress's intent was for section 1192(2) to apply only to individuals, it could have borrowed language from within chapter 11, rather than borrowing it from elsewhere. *See* § 1141(d)(2) ("[A] discharge under this chapter does not discharge a debtor *who is an individual* from any debt excepted from discharge under §523 of this title.") (emphasis added). The congressional choice not to distinguish between individual and corporate debtors in section 1192's text is particularly instructive in light of the fact that Congress consistently chose to do so throughout the rest of chapter 11. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 256 (1994) ("The absence of comparable language in the [subsequent law] cannot realistically be attributed to oversight or unawareness of the. . .issue."); *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 338 (1994) (internal citation omitted) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotation marks omitted); *In re Guerrero*, 540 B.R. 270, 278 (Bankr. S.D. Tex. 2015) ("Where Congress knows how to say something, courts will presume that Congress would say it for the same effect elsewhere, and Congress's choice not to is instructive.").

Congress acts intentionally and purposefully when it decides to include language in one section of a statute, but subsequently omits the same from another section of the same or a similar act. *See BFP v. Resol. Trust Corp.*, 511 U.S. 531, 537 (1994). Combined with the legislative record—indicating that Congress made an express choice to model subchapter V after chapter 12—this supports the conclusion that the language "debt of the kind" in section 1192(2) is intended to apply equally to both corporate and individual debtors. *See* R. at 32–33 (McCartney J., dissenting). If Congress intended section 1192(2)'s exceptions to apply only to individuals, it had an opportunity to draft the text accordingly. *See* R. at 31 (McCartney J., dissenting).

Instead, Congress chose to borrow language from chapter 12 omitting this distinction, consistent with the statement of Representative Collins that the SBRA was modeled off of chapter 12 and intended to replicate chapter 12's success regarding small entity reorganization. *Hearings, supra*, pg 26 at 5–6. The statutory structure of the Bankruptcy Code only strengthens this conclusion. *See generally Hall v. United States*, 566 U.S. 506, 516 (2012) (relying on statutory structure of chapter 13 to aid in interpreting identical provisions of chapter 12 since chapter 12 is modeled after chapter 13). Therefore, when confronted with novel and challenging issues of subchapter V interpretation, the legislative record counsels that courts should consider applicable precedent from chapter 12. *See cf.* Amber N. Morris, *Small Business Debt in the Age of Covid-19*, 29 AM. BANKR. INST. L. REV. 131, 168 (2021).

B. Courts have held that the non-dischargeable debts listed in section 523(a) apply to corporate debtors seeking discharge under section 1228(a), which contains language identical to that of section 1192(2).

Courts should give the same meaning to identical words and phrases used in different parts of the same or similar statute. *Hall*, 566 U.S. at 519. Historically, this Court has been hesitant to create conflict between two closely related statutory provisions absent evidence of congressional intent to the contrary. *See id.*; *Bank of America, N.A. v. Caulkett*, 575 U.S. 790, 796 (2015) ("We are generally reluctant to give the 'same words a different meaning' when construing statutes. . . .") (citation omitted). It is a well-settled rule of statutory construction—in the context of bankruptcy cases—that "words repeated in different parts of the same statute generally have the same meaning." *See Siegel*, 571 U.S. at 422. When Congress drafts new legislation that incorporates sections of prior law, it is presumed to have knowledge of the judicial interpretations of the incorporated sections. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

Congress substantially modeled subchapter V on comparable provisions of chapter 12. *See In re Trepentin*, 617 B.R. 841, 847–48 (Bankr. D. Md. 2020). Congress found that chapter 11 was poorly suited for small business reorganization; however, chapter 12 was successful in aiding family farmers—a group with similar traits of small business debtors. Therefore, Congress "weav[ed] terms modeled [after chapter 12] into chapter 11 for the general use in small business cases." *See id.* Because of this courts have applied chapter 12 precedent to subchapter V cases when the language used was identical. *See In re Trepetin*, 617 B.R. at 847.

Chapter 12 has already been used to resolve subchapter V ambiguity. *See In re Trepetin*, 617 B.R. at 847. In *Trepetin* a subchapter V debtor sought a filing extension under sections 1188 and 1189 of chapter 11, which limit extensions "to circumstances for which the debtor should not justly be held accountable," without explaining the mechanics of its application. *See id*; §§ 1188, 1189. However, the court found that Congress borrowed this language from section 1221 of chapter 12. *See id.* at 848 ("Section 1221 provides that. . .the court may extend such a period if the need . . . is attributable *to circumstances for which the debtor should not justly be held accountable.*"). Other courts previously articulated a standard for how section 1221 should operate and what was required to receive an extension. *Id.* Because this standard aligned with the plain meaning of sections 1188 and 1189, the court gave it effect, despite it coming from chapter 12 jurisprudence. *See id.* at 848–49.

Likewise, the relevant text of section 1192(2) is identical to section 1228(a) of chapter 12. *Compare* § 1192(2) ("[T]he court shall grant the debtor a discharge of all debts . . . except any debt . . . *of the kind specified in section 523(a) of this title*.") (emphasis added); *with* § 1228(a) ("[T]he court shall grant the debtor a discharge of all debts . . . except any debt . . . *of the kind specified in section 523(a) of this title.*") (emphasis added). Section 1228(a) is also cross-referenced by section 523(a)'s preamble. *See* § 523(a).

In 2009, the Bankruptcy Court for the Middle District of Georgia held that corporations did not receive a full discharge under section 1228(a) and were subject to the debts of the kind listed in section 523(a). *See In re Breezy Ridge Farms, Inc.*, No. 08-12038-JDW, 2009 WL 1514671, at *3. Reaching this conclusion, the court reasoned that section 523(a) does not define the scope of discharge under the individual chapters, it only limits the existing parameters created by each chapter. *See id.* at *1. An example comes from section 1141(d)(6)(A) of chapter 11, which provides that corporations are not discharged from any debt "*of the kind* specified in paragraph (2)(A) or (2)(B) of section 523(a)." *Id.* at *2; § 1141(d)(6)(A). Therefore, Congress already applied parts of section 523(a) to chapter 11 corporate debtors using the same language—of the kind—found in sections 1228(a) and 1192(2). *See id.* Ultimately, the court determined that Congress used section 523(a) as a "shorthand to define the scope of discharge" for all debtors proceeding under chapter 12—irrespective of section 523(a)'s preamble excluding corporate debtors. *Id.*

Around ten years earlier, the Bankruptcy Court for the Western District of Texas held that section 523(a)'s exceptions applied to both individual and corporate debtors by its reference in section 1228. *See In re JRB Consol., Inc.*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995). Interestingly, to reach this conclusion, the court compared section 1228's language to that of section 1141(d)—chapter 11's traditional discharge provision. *See id.* at 374. Section 1141(d) contains two exceptions to discharge, one explicitly aimed at corporations and one at individuals. *See id.* Conversely, section 1228(a) does not expressly limit its application to either category of debtor—remaining broad and inclusive of all debtors. *See id.* By only referencing "debts of the kind specified in section 523(a)"—rather than particular types of debtors—only the type of debt listed in section 523(a) is incorporated, irrespective of 523(a)'s preamble cross-reference. *See id.*

The Fourth Circuit in *Cleary* found the holdings in both *Breezy Ridge* and *JRB Consolidated* dispositive in its interpretation of section 1192(2)'s identical language. *See Cleary* 36 F.4th at 516. In fact, the Fourth Circuit indicated that it would defy rationality to give differing interpretations to the same language in the same statute because Congress frequently recycles language throughout the Bankruptcy Code. *See cf. id.* at 517.

Here, the debtor points to the fact that the same court that decided *JRB Consolidated* refused to extend its holding to section 1192(2); however, this was based on an erroneous reading of its prior opinion. *See generally* R. at 19 ("We find those cases unpersuasive…and note that even the court that decided *In re JRB Consol, Inc*, rejects Ms. Rigby's reading of it."); *In re GFS Indus., LLC*, No. 22-50403-CAG, 2022 WL 16858009 at *6–7 (Bankr. W.D. Tex. Nov. 10, 2022) (rejecting the notion that its holding in the present case conflicts with *JRB Consolidated*). The court in *GFS Industries* distinguishes its contrary opinion on two points: (1) the 1995 opinion relied upon the differences between chapter 11's narrow discharge and chapter 12's broad discharge; and (2) the unique nature of chapter 12 bankruptcy. *See In re GFS Indus., LLC*, No. 22-50403-CAG, 2022 WL 16858009 at *6–7. However, both of these arguments are in error.

As to the first point, section 1141(d)'s narrow discharge language predates the enactment of subchapter V, and section 1181(c) explicitly states that section 1141(d) is inapplicable to non-consensual subchapter V cases. *See* 11 U.S.C. § 1181(c) ("If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply. . . ."). Furthermore, the comparison drawn by Judge Kelly was intended to show how section 523 operates differently and independently within each chapter of bankruptcy—not limited by the terms of its preamble.

As to the second point—like chapter 12—subchapter V is special and applies only to a small and unique group of debtors with specific problems. *See* Michael C. Blackmon, *Revising the Debt Limit for "Small Business Debtors:" The Legislative Half-Measure of the Small Business Reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339, 353–54 (2020) (explaining the problems of applying chapter 11 to small business debtors due to their unique concerns). Like chapter 12, subchapter V debtors must satisfy a stringent definition to qualify for relief that includes a requirement that 50% of the debtor's debt must originate from operating the small business. *See id.* at 351; *compare* § 101(18) (defining "family farmer" as an "individual. . .engaged in a farming operation whose aggregate debts. . .not less than 50 percent of whose aggregate noncontingent, liquidated debts. . .arise out of a farming operation. . ."); *with* § 101(51D)(A) (defining "Small business debtor" as "a person engaged in commercial or business activities. . .that has aggregate noncontingent liquidated secured and unsecured debts. . .not less than 50 percent of which arose from the commercial or business activities of the debtor.").

Furthermore, both chapter 12 and subchapter V were previously enacted with very small debt limits to keep the class of debtors narrow. *See* Blackmon, *supra* pg. 32 at 353–54 ("The 'family farmers' debt limit was originally $4.4 million. The 'small business debtor's' debt limit was set at roughly $2.7 million."). Nobody could have anticipated that the COVID-19 pandemic would require an increase of subchapter V's limit, nor does the COVID debt increase negate the fact that subchapter V is aimed at a narrow and unique group of debtors. *See* William L. Norton, *The Pros and Cons of the Small Business Reorganization Act of 2019*, 36 EMORY BANKR. DEV. J. 383, 386 (2020).

Finally, a major purpose of the SBRA was to streamline the costly and lengthy process of chapter 11 bankruptcy for small business debtors. *See* Morris, *supra* pg. 28 at 167–68. One way to achieve this is by applying precedent from chapter 12 cases where novel issues of statutory interpretation have previously been resolved. *See id.* This makes litigation faster and cheaper for small business debtors and promotes judicial efficiency. *See id.*

C. Because subchapter V eliminates the absolute priority rule when the plan is confirmed under cramdown proceedings it would be inequitable to allow corporate debtors a full discharge of claims and frustrates the concepts underlying bankruptcy law.

Bankruptcy law is an equitable component of federal law. *See* Blackmon, *supra* pg. 32 at 340. Since the founding of this Nation, bankruptcy has been a central feature of the U.S. economic system. U.S. CONST. art. 1, §8, cl.4. As a result, the United States has one of the most stable lending environments in the world. *See* Blackmon, *supra* pg. 32 at 340. However, this stability derives from its equity. *See id.*

Prior to the SBRA, small business debtors who filed under chapter 11 were the debtors most likely to suffer an unsuccessful reorganization. *See* Morris, *supra* pg. 28 at 167. The chapter 11 process was entirely too costly and time consuming for most small business debtors, forcing many to enter into liquidation under chapter 7. *See id.* at 168. The policy goals of the SBRA were simple—to alleviate the effect of chapter 11's lengthy and expensive procedural burdens, which overwhelmed many small business debtors—setting them up for failure. *See Hearings, supra*, pg 26 at 19 (statement of Rep. Ben Cline, co-sponsor of the SBRA).

The National Bankruptcy Conference—the original champion of subchapter V—intended for subchapter V to be balanced, benefitting debtors and creditors alike. *See id.* at 114 (statement of the Honorable Judge Small, on behalf of the National Bankruptcy Conference). However, the resulting legislation was far from balanced as Congress gave small business debtors a large windfall. *See cf.* Norton, *supra* pg.32–33 at 383–88 (2020) (outlining subchapter V's numerous Debtor benefits).

This is exemplified by its elimination of the absolute priority rule. *See cf., id.* at 384 ("The most significant advantage for debtors in Subchapter V is the elimination of the absolute priority rule."). When a reorganization plan is nonconsensual the absolute priority rule requires that the dissenting class of unsecured creditors are paid in full before any junior class receives a payout under the plan. *See id.* The effect of this rule is that if a class of unsecured creditors votes to reject the plan and are not paid in full, equity holders' shares in the company are cancelled. *See id.* However, under subchapter V, the court may confirm a plan over the objection of dissenting unsecured creditors *and* equity holders may retain their shares as long as the debtor's disposable income is paid out through the plan. *See id.* at 385 (emphasis added).

Therefore, to achieve the balance intended by the National Bankruptcy Conference—and bankruptcy law itself—there must be a trade-off for creditors when the plan is non-consensual. R. at 34 (McCartney J., dissenting). This trade-off is narrower discharge exceptions for debtors who confirmed a plan via cramdown proceedings. R. at 34 (McCartney J., dissenting). Courts avoid interpretations that let debtors take advantage of their creditors—and without this trade-off, subchapter V would provide a proverbial get-out-of-jail-free card to a debtor engaged in bad behavior. *See Gray v. Union Joint Stock Land Bank,* 105 F.2d 275, 277 (6th Cir.), *rev'd on other grounds,* 308 U.S. 523, 60 S. Ct. 291, 84 L. Ed. 443 (1939).

Penny Lane Industries engaged in bad behavior and Ms. Rigby was powerless to stop it. Now she is left paying the cost of that behavior and once again has no remedy to stop it. That cannot be what Congress intended, nor is it what the founders intended. By excepting the list of debts found in section 523(a) for corporate debtors, innocent creditors like Ms. Rigby remain protected, and debtors engaged in bad behavior, like Penny Lane, cannot outrun their consequences.

CONCLUSION

The duty of bankruptcy courts is to ensure equitable distribution to all creditors. This Court should not extend the power of bankruptcy courts to allow non-consensual third-party releases or fully discharge bad-acting corporate debtors from all claims against them. Doing so would frustrate the underlying principles of bankruptcy law. For these reasons, we ask that this Court REVERSE the judgment of the Thirteenth Circuit Court of Appeals.