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 to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team P. 31
Counsel for Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

I. A BANKRUPTCY DISCHARGE APPLIES ONLY TO THE DEBTOR. AS SUCH, DOES THE BANKRUPTCY COURT HAVE STATUTORY AND CONSTITUTIONAL AUTHORITY TO PERMANENTLY EXTINGUISH A NON-DEBTOR'S THIRD PARTY DIRECT CLAIMS AGAINST ANOTHER NON-DEBTOR THROUGH A CHAPTER 11 PLAN?

II. SECTION 1192 DISCHARGES DEBTS OF THE KIND SPECIFIED IN SUBPARAGRAPHS (1) THROUGH (19) OF 11 U.S.C § 523(A). TRADITIONALLY, SECTION 523(A) APPLIES ONLY TO INDIVIDUAL DEBTORS, SECTION 1192 DOES NOT SPECIFY THAT A DEBTOR MUST BE AN INDIVIDUAL TO FALL UNDER THE DISCHARGE EXCEPTIONS FOUND IN SECTION 523(A). THEREFORE, DOES SECTION 1192 PROVIDE A DISCHARGE EXCEPTION TO CORPORATE DEBTORS UNDER CHAPTER 11 SUBCHAPTER V?

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The decisions and order of the U.S. Bankruptcy Court for the District of Moot are unreported and therefore are unavailable. The decisions for the U.S. Court of Appeals for the Thirteenth Circuit are also unreported. This decision is set forth in the Decision of the U.S. Court of Appeals for the Thirteenth Circuit in Case No. No. 22-0909, dated March 7, 2022, and is incorporated in the record on appeal (hereinafter "R.").

During the Plan confirmation process of Debtor Penny Lane, Inc., creditor Eleanor Rigby objected to the confirmation of Debtor Penny Lane, Inc.'s Chapter 11 Plan, arguing that bankruptcy courts lack authority to release sweeping nonconsensual third-party direct claims against a non-debtor, Strawberry Fields Food, Inc. (R. at 4). Ms. Rigby also filed a complaint seeking a determination that her tort claim against the Debtor cannot be discharged under § 523(a) and § 1192 of the Bankruptcy Code (the "Code"). *Id.* The bankruptcy court overruled Ms.

Rigby's nonconsensual release objections and dismissed her non-dischargeability actions since the Debtor is a corporate entity. *Id.* Ms. Rigby timely appealed both rulings, and the dispute was certified for direct appeal. The Thirteenth Circuit of Moot affirmed both bankruptcy court rulings. (R. at 11). The Court granted certiorari.

STATEMENT OF JURISDICTION

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

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions and evidentiary rules listed below are relevant to determine the present case.

U.S. Const. art. III; U.S. Const. amend. V; U.S. Const. amend. XIV; U.S. Const. amend. XV.

11 U.S.C §§ 105, 362, 523, 524, 727, 1141, 1123, 1129, 1181, 1183, 1191, 1192, 1228, 1328, 1334.

28 U.S.C § 157

STATEMENT OF THE CASE/FACTS

The Parties. Penny Lane Industries, Inc. (the "Debtor") is a manufacturer of food containers and is a wholly owned subsidiary of Strawberry Fields, not a debtor in this case. (R. at 3). The appellant in this appeal, Eleanor Rigby ("Rigby"), alleges that the Debtor knowingly disposed of industrial chemicals and pollutants which contaminated the area's ground water supply. *Id.*

The Allegations. In 2017, Rigby filed suit against the Debtor and Strawberry Fields asserting that her four-year old daughter died of leukemia caused by exposure to pollutants dumped by the Debtor. (R. at 5). Rigby alleges that Strawberry Fields is also directly liable because it knew, or should have known, of its subsidiary's misconduct. (R. at 6). Hundreds of similar lawsuits filed against the Debtor also name Strawberry Fields as a co-defendant. *Id*.

The Bankruptcy Filing. The Debtor filed chapter 11 subchapter V under the Bankruptcy Code in January 2021. (R. at 6). All claims in this case are disputed, unliquidated tort claims related to the alleged dumping of pollutants. *Id.* There are nearly 10,000 claims asserting cumulative damages of nearly $400 million, including Rigby's claim of $1 million. *Id.* Strawberry Fields is not a debtor in this case and has not itself filed a petition for relief under the Bankruptcy Code. *Id.*

The Non-dischargeability Action Dispute. Shortly after the filing, Rigby commenced adversary proceedings against the Debtor which sought to have her claim deemed non-dischargeable under 11. U.S.C §§ 523(a) and 1192(2). *Id.* Rigby asserted that the amounts allegedly owed to her are non-dischargeable pursuant to § 523(a)(6), which excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." (R. at 7). *See* 11. U.S.C §§ 523(a)(6). The Debtor filed a motion to dismiss the complaint for failure to state a claim on which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7012 of the Federal

Rules of Bankruptcy Procedure. *Id.* The Debtor argued that the non-dischargeability provisions of § 523(a) are not applicable to corporations, and therefore Rigby's claim for willful and malicious injury is dischargeable. *Id.* The bankruptcy court ruled in favor of the Debtor and dismissed the proceeding, holding that the exceptions to discharge in § 523(a) do not apply in a case where the debtor is a corporation, even where such case was filed under subchapter V of chapter 11. *Id.* Ms. Rigby timely filed a notice of appeal. *Id.*

The Injunction against Pending Litigation. While itself protected by the automatic stay, Debtor sought and obtained a temporary injunction from the bankruptcy court halting all actions against the Debtor's "current and former owners, officers, directors, employees and associated entities" related to the alleged conduct of the Debtor. (R. at 8). As a result, all the pending litigation, including litigation against Strawberry Fields, was temporarily stayed. *Id.*

The Plan Dispute. The Plan provides for the establishment of a creditor trust that would be funded with: (a) the Debtor's disposable net income for five years, and (b) $100 million to be paid by Strawberry Fields. *Id.* Strawberry Fields demanded a broad release of "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 release is non-consensual; it binds parties regardless of whether they participated in the bankruptcy case and regardless of whether they voted against the Plan. *Id*.

Objections to the Plan. Notably, Rigby 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). Norwegian Wood Bank ("the Bank") also objected to the Plan. *See* 11 U.S.C. §§ 1122(a), 1123(a). The Bank, a secured creditor, is owed about $3.5 million and holds a first-priority security interest on the Debtor's manufacturing equipment. *Id*.

Confirmation of the Non-Consensual Plan. Unable to satisfy the requirements for confirmation of a consensual plan under § 1191(a), the Debtor sought to confirm the plan non-consensually by utilizing the subchapter V "cramdown provisions" under § 1191(b). (R. at 9). The bankruptcy court confirmed the debtor's non-consensual plan. (R. at 11).

Court Response to Plan Objections. With respect to Rigby's plan objection, the court acknowledged that non-consensual releases of third-party direct claims are permitted only in extraordinary cases. (R. at 10). In the bankruptcy court's view, the present case falls within those "extraordinary cases" and thus the court overruled Rigby's plan objection. *Id*. The court also overruled the objection of the Bank, holding that the Debtor's treatment of the Bank's secured claim complied with the requirements of §§ 1129(b)(2)(A) and 1191. *Id*.

The Subsequent Appeals. Rigby appealed both bankruptcy court's rulings. (R. at 11). The disputes were certified for direct appeal to this court pursuant to 28 U.S.C. § 158(d) and, thereafter, consolidated in this appeal. *Id.*

STANDARD OF REVIEW

The issues addressed on appeal involve questions of law, thus, the standard of review is *de novo. See, e.g., Texas v. Soileau (In re Soileau),* 488 F. 3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

The Bankruptcy Court incorrectly approved the non-consensual releases of direct claims held by third parties against Strawberry Fields and discharged non-dischargeable claims despite 11 U.S.C § 1192 application to corporate debtors. Strawberry fields is trying to capitalize on Penny Lane's bankruptcy filing and take advantage of the benefits of the Bankruptcy system, without filing for bankruptcy themselves. The bankruptcy filing and its subsequent discharge applies solely to Penny Lane and should not be abused by Strawberry Fields by allowing them to rid the company of liability for their alleged willful and malicious injury.

Bankruptcy Courts lack the statutory and constitutional authority to approve nonconsensual third-party releases of direct claims against non-debtors. First, the court cannot override the expressed language in § 524(e) which bars the discharge of non-debtor liability with the sole exception apply to asbestos cases. Second, Bankruptcy Courts lack the constitutional authority to approve nonconsensual third-party releases of direct claims against non-debtors because such claims are non-core and are not subject to final rulings of a bankruptcy judge. Lastly, non-consensual third-party releases of direct claims violate due process rights and are therefore unconstitutional.

Additionally, even if Bankruptcy Courts did have the authority to approve such releases, Rigby's claim would be non-dischargeable under § 1192. Section 1192 states that a debtor will not be discharged under subchapter v of the kinds of debts listed in § 523. Section 1192 applies to corporate debtors, despite § 523 traditionally only applying to individual debtors, because the plain language of § 1192 makes clear reference to the *kinds* of debts with no reference to a specified type of debtor. Additionally, canons of constructions such as the rule against surplusage and presumption of consistent usage makes it clear that Congress intended for § 1192 to apply to all subchapter v debtors and use § 523 solely as a list for the types of debts that are non-dischargeable. Further, legislative history shows congress's clear intent to diverge from traditional chapter 11 rules by enacting a subchapter for specific purposes. Consistently, equitable considerations support this conclusion as Congress recognized the increased intimacy in a small business compared to a large corporation and the need to ensure small businesses remain liable for debts that result from moral wrongdoings.

For these reasons, this Court should reverse the decision of the Thirteenth Circuit, remand for new trial, and allow Ms. Rigby to proceed with her claim.

I. BANKRUPTCY COURTS LACK STATUTORY AND CONSTITUTIONAL AUTHORITY TO APPROVE NONCONSENSUAL THIRD-PARTY RELEASES OF DIRECT CLAIMS AGAINST A NON-DEBTOR AS PART OF A DEBTOR'S CHAPTER 11 PLAN FOR REORGANIZATION

This Court should reverse the Thirteenth Circuit's because the inclusion of non-consensual third party direct claims exceed a bankruptcy court's statutory and constitutional authority and raises grave Due Process concerns. The plan expressly 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." Section 524(e) bars the release of third-party claims because the "discharge of a debt of the debtor does not impact the liability of any other entity on...such debt" 11 U.S.C. § 524(e). Section 524(g)'s narrow exception for asbestos cases does not apply to the facts of this case. Further, no other provisions in the Code, including §§ 105(a), 1123(a)(5), and 1123(b)(6), may be used to permit third party releases because the more specific provision of § 524(e) addresses the issue directly. To abide by the authority of the bankruptcy court and the bankruptcy code, this court should reverse and remand the bankruptcy court order allowing the third party release.

A. The Code does authorize the nonconsensual release of third-party direct claims outside of the asbestos context.

This Court should reverse the lower court's decision because the bankruptcy court lacked statutory authority to approve a non-consensual release of third-party direct claims against Strawberry Fields as part of Penny Lane's chapter 11 plan. The bankruptcy and Circuit court improperly relied on § 105's equitable powers in confirming the plan for reorganization, pursuant to alleged grants of authority found in §§ 1123(a)(5) and 1123(b)(6). *See* 11 U.S.C. §§ 105(a); 1123(a)(5); 1123(b)(6). Under Supreme Court precedent, the "equitable power" contained in § 105 "can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). The Supreme Court has stated on multiple occasions that the equitable powers of 105(a) cannot justify a bankruptcy court's actions that are "inconsistent" with other provisions of the Code. *Law v. Siegel*, 571 U.S. 415, 425 (2014). The Bankruptcy Court in *Siegel* addressed the issue of exemption for reasons not enumerated in the Code pursuant to its alleged equitable powers under 105(a). *Id*. at 416. However, the Court concluded that the Bankruptcy Code is a "comprehensive statement of the rights and procedures applicable in bankruptcy." *In re Purdue Pharma L.P.*, 635 B.R. 26, 95 (S.D.N.Y. 2021) (citing *Siegel*, 571 U.S. at 416).

Additionally, this Court does not recognize a “rare case” justification for deviation from “the balance struck” by the Code. *Czyzewski v. Jevic Holding Corp.,* 580 U.S. 451, 471(2017). The *Czyzewski* Court held that statutory silence did not support deviations from the priority scheme, even if the bankruptcy court believed “creditors would be better off.” *Id.* The Court denied this reasoning, stating that the "importance of the priority system" and its fundamental role in carrying out the purposes of the Code preclude the use of "simply statutory silence" if Congress intended to affect a "major departure." *Id*. At 469. Underlying the holding that there was no "rare case" exception to the priority scheme outlined in the Code was Justice Breyer's concerns that "sufficient reasons" are ill-defined, subjective, and a slippery slope where a "rare case" becomes the rule rather than the exception. *Id*.

1. *Section 524(e) bars the release of nonconsensual third-party direct claims.*

The Bankruptcy Code provides that the “discharge of a debt of the debtor does not impact the liability of any other entity on...such debt.” 11 U.S.C. § 524(e). The Fifth, Ninth, and Tenth Circuits are correct in reading § 524(e) as prohibiting the use of nonconsensual third-party releases of direct claims against non-debtors since such releases functionally serve as un-earned discharges from bankruptcy for solvent non-debtors. *See In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990). The Third Circuit has rejected nonconsensual releases of third-party non-debtors on statutory grounds, as well. *See In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000); *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004).

Only one exception to the statutory prohibition of non-debtor discharge exists, and only addresses asbestos-related mass tort bankruptcy. 11 U.S.C § 524(g). Section 524(g) explicitly states that "notwithstanding 524(e)" certain debts of third parties *can* be discharged and released under a Plan. *Id.* A court "*may* issue...an injunction...to supplement the injunctive effect of a discharge" and "notwithstanding 524(e)" may "bar any action directed against a third party... and is alleged to be directly or indirectly liable for the conduct of" the debtor in certain circumstances. *Id*. Courts have interpreted the addition of § 524(g) as an exception to the rule, since bankruptcy relief is reserved for debtors availing themselves of bankruptcy, and not to any menagerie of solvent non-debtors seeking to reap the benefits of bankruptcy without the attendant requirements of bankruptcy. *See, e.g., Pacific Lumber*, 584 F.3d at 251-53. Further, § 524(g) is a *permissive* exception to non-debtor discharge because even courts that regularly approve nonconsensual third-party releases for non-asbestos cases acknowledge that a bankruptcy court is "never required to issue 524(g) injunctions" since it is "such an extraordinary remedy to a non-debtor third party." *In re Federal-Mogul Global Inc.*, 411 B.R. 148, 167 (D. Del. 2008).

The lower court's assertion that nonconsensual third-party releases are permissible absent an explicit statutory prohibition does not comport with basic principles of statutory construction since statutory silence does not indicate the sweeping authority to discharge a non-debtor's debts through the bankruptcy process. *Czyzewski*, 580 U.S. 451, 471. True, "524(e) says nothing about the authority of the bankruptcy court to release a non-debtor from a creditor's claims." *In re Seaside Eng'g & Surveying*, 780 F.3d 1070, 1078 (11th Cir. 2015). However, the power affecting a debtor's discharge is one of the greatest powers of the bankruptcy court. *Hanover Nat'l Bank v.*

Moyses, 186 U.S. 181 (1902). Since discharge, like priority schemes, are of the utmost importance to the Code, one would "expect more than simple statutory silence" if Congress intended a "major departure" from bankruptcy norms. *Jevics Holdings Corp.*, 580 U.S. at 463. Indeed, the legislative history of the 1994 amendments to the Code indicates that Congress did not intend to except other non-asbestos mass tort bankruptcies from 524(e), stating that the availability of 524(g) *could* "inform" the Committee as to whether to extend such relief beyond the asbestos context. H.R. Rep. No 103-835, at 41 (1994). No extensions have been made in the "twenty-seven years of unbroken silence" after the passage of the amendments. *Purdue*, 635 B.R. at 111.

A third-party release of non-debtor claims in a chapter 11 plan functions as the equivalent of a discharge in bankruptcy. Under § 524(a) of the Code, a discharge in bankruptcy "operates as an injunction against the commencement or continuation of an action" or acts to "collect, recover or offset" any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). Yet, a discharge "does not affect the liability of any other entity on, or the property of another entity for, such debt" except for a limited class of circumstances under subsection (a)(3) regarding community property. As the Fifth Circuit has stated, a discharge "does not extinguish the debt itself, but merely releases the debtor from personal liability." *In re Edgeworth*, 933 F.2d 51, 53 (5th Cir. 1993). The legislative history behind the enactment of the Code indicates that the discharge provisions should serve to "ensure that once a debt is discharged" the debtor will no longer be haunted by the prior obligations associated with the debt. S. Rep. No. 95-989, at 80-81 (1978), as reprinted in 1978 U.S.C.C.A.N 5787. As a result, § 524 serves as "a permanent injunction to all actions to collect discharged debts." Michael P. Pitre, *Discharge Under Section 524(a) Does Not Preclude a Suit to Recover from a Debtor's Insurer*, St. John's Bankr. Research Libr. No. 19 (2019) (collecting cases).

The "fresh-start policy is not intended to provide a method" for the non-debtor to "escape its obligations" simply "based on the financial misfortunes" of the debtor. *In re Edgeworth*, 933 F.2d at 54. The nonconsensual third-party waivers confirmed by the Bankruptcy and Circuit court function similarly—Penny Lane's plan "expressly releases and discharges 'any and all claims' that third parties 'have asserted or might assert in the future against Strawberry Fields" insofar as those claims are "based on or related to the Debtor's pre-petition conduct." (R. at 8). By the judge's own admission, the release "discharges" claims against Strawberry Fields, a non-debtor; confirmation of the plan will operate as a permanent injunction by precluding "pursuing claims against Strawberry Fields related to the Debtor's pre-petition conduct" and will "channel" the claims into the trust. (R. 9.) This release applies to estate claims and third-party direct claims that a creditor may pursue against Strawberry Fields, resulting in the functional equivalent of the relief of discharge for Strawberry Fields without any of the necessary procedural hoops or stringent requirements of bankruptcy. (R. at 8)

2. *Sections 105(a), 1123(a)(5), and 1123(b)(6) do not permit third-party releases.*

It is inappropriate to use the generic provisions of 105(a), 1123(a)(5) and 1123(b)(6) to grant third-party releases to non-debtors when a more specific statute, § 524(g), has already addressed the issue. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). It "is a commonplace of statutory construction that the specific governs the general." *Id.* Section 524(g) is a hyper-specific section of the Code added in response to the rising number of asbestos bankruptcies. Where "Congress has enacted a comprehensive scheme" and "deliberately targeted specific problems with specific solutions," those specific provisions better illustrate Congress's intent. *Radlax*, 566 U.S. at 640. To echo Judge McMahon's analysis in *Purdue Pharma*, Congress "deliberately limited a specific solution" by creating the 524(g) exception to the general rule that a debtor's discharge does not operate as a discharge for non-debtors. *See*

Purdue., 635 B.R. 111-112 (S.D.N.Y. 2021). Section 105's "equitable powers" may only apply "within the confines of the code." *Ahlers*, 485 U.S. 197, 206 (1988).

Although § 105(a) gives the court necessary or appropriate power to carry out the provisions of the Code, only one section, not appropriate here, provides that a non-debtor release is appropriate or necessary. *See* 11 U.S.C. § 524(g). Property interests are created and governed by state law in bankruptcy to "prevent a party from receiving a windfall by happenstance of bankruptcy." *Butner v. United States*, 440 U.S. 48, 55-6 (1979). Further, despite how "important" the equitable powers possessed by a bankruptcy court may be, "undefined considerations of equity" do not provide a basis for a rule that would give an individual "rights that are not his 'as a matter of state law." *Id*. Additionally, the court must not "use" its "equitable powers" at the "level of policy choice at which congress itself operated" in drafting the Code. *United States v. Noland*, 517 U.S. 535, 543 (1996). Bankruptcy courts may not act as judicial legislators, but rather follow the law "as written" instead of attempting to achieve "a better policy outcome" which is a job committed to the legislative branch. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, 13-4 (2000). Here, it is evident that the lower court made a policy choice that Congress itself explicitly declined to make during the enactment of 524(g)—that is, the decision to extend the exception to the general rule beyond that of asbestos bankruptcy litigation.

Using § 1123(b)(6) is similarly inappropriate in tandem with § 105(a) because the statement that a "plan" may "include any.... provisions not inconsistent with the applicable provisions of the Code" cannot be used to confer an equitable power to act beyond what the Code contemplates; as one commentator stated "applying these two sections in tandem" essentially grants the court "authority to take any action it deems necessary" for reorganization so long as there is no contrary provision in the Code. Peter Boyle, *Non-debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 Fordham L. Rev. 421, 438 (1992). The court's use of "one catch-all provision to implement another catch-all provision" would result in "bootstrapping." *Id.* Section 1123(a)(5) simply states that all confirmed plans shall contain "adequate means" for implementation; this is a "general grant" akin to § 105(a) and subject to the same bootstrapping analysis. *Id.* Moreover, authority to grant equitable relief under § 105(a) is not met by "implicat[ion]" or mere "consisten[cy] with the policies" of the Code. *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2002).

The purpose of the Code is to "provide a procedure by which *insolvent debtors* can reorder their affairs, make peace with *their* creditors and enjoy" a fresh start. *Grogan v. Garner* 498 U.S. 279, 286 (1991). The Code does not contemplate the use of bankruptcy courts to reorder the affairs of solvent non-debtors, or to marshal the peacemaking efforts of a non-debtor with its own creditors outside of its own bankruptcy. Thus, the lower court should be reversed.

B. Bankruptcy Courts do not have subject matter or Article III jurisdiction to make final determinations regarding nonconsensual third-party releases.

Bankruptcy Courts lack the constitutional authority to approve nonconsensual third-party releases of direct claims against non-debtors because such claims are non-core and are not subject to final rulings of a bankruptcy judge. A bankruptcy court's jurisdiction, although broad, is still "grounded in" and "limited by" statute. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). As a result, the Supreme Court has made clear that bankruptcy courts have "no jurisdiction over proceedings that have no effect on the estate of the debtor." *Id.* at 308, n. 6. District Courts have jurisdiction over cases arising "under," "in," or "related to" a bankruptcy proceeding. 28 U.S.C. § 1334. Bankruptcy courts are granted statutory authority to hear and make final determinations on matters arising "under" or "in" a Chapter 11 case ("core" matters) but may not make final determinations based on "related to" jurisdiction ("non-core matters). *See* 28. U.S.C. 157(a)-(c).

While the Code outlines examples of core proceedings, the Supreme Court makes it clear that statutory authority is not coextensive with constitutional authority to render final judgments.

Stern v. Marshall, 564 U.S. 471, 485 (2011). The test to determine if a proceeding is constitutionally core to the bankruptcy is "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 497. The "content of the proceeding," as opposed to the broad categorization of the proceeding, determines whether the "bankruptcy court has acted within its constitutional authority." *In re Mahwah Bergen Retail Grp, Inc.*, 636 B.R. 641, 669 (E.D.Va. 2022). Bankruptcy courts cannot deprive an individual the final determination of an Article III judge on "any matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 285 (1856) (emphasis added).

1. *Bankruptcy Courts lack subject matter jurisdiction over third-party direct claims.*

The third-party direct claims that Ms. Rigby and other potential future plaintiffs have or may have against Strawberry Fields do not arise under, arise in, or relate to the bankruptcy case at bar. It is undisputed that derivative claims are assets of a bankruptcy estate. However, the release at issue also bars "any and all" direct claims that a third party has or might assert against Strawberry Fields, a non-debtor, insofar as the claims "relate" to the Debtor's pre-petition conduct regardless of its relation to the bankruptcy itself. A claim is "related to" bankruptcy when it either involves estate property or has an effect on the estate. *Celotex*, 514 U.S. at 307. However, under *Celotex*, not every action tangentially related to bankruptcy becomes jurisdictionally related. *Id.* Even under the expansive test cited by the lower court, the third-party direct claims being released do not have "any conceivable effect" on the bankruptcy estate. *See SPV OSUS Ltd. v. UBS*, 882 F.3d 333, 339-40 (2d Cir. 2018).

Financial contributions to the bankruptcy estate does not create "related to" jurisdiction under the "conceivable effects" test. *See In re Johns-Manville Corp. v. Chubb Ins.*, 600 F.3d 135 (2d Cir. 2010). In *Manville IV*, plaintiffs sought to directly recover from the debtor's "insurer for the insurer's own independent wrongdoing." *Id.* at 65. The claim being pursued was those of the third party, not Manville, and the actions did not impact the estate. *Id.* The court held that a bankruptcy court cannot "enjoin claims brought against a third-party non-debtor solely on the basis" of third-party "financial contribution" to the debtor's estate. *Id.* at 66. To hold otherwise would mean that subject matter jurisdiction "over any non-debtor third party" could be manufactured by conditioning a plan upon the contribution of third parties. *Id.* (citing *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228 (3d Cir. 2004)).

Not even a "common nucleus of operative facts" involving the debtor will confer jurisdiction if the third-party claims implicate an independent legal duty on the non-debtor. *Id.* at 67; *See also In re Zale Corp*., 62 F.3d 746 (5th Cir. 1995). Similarly, the Fifth Circuit holds that "shared facts between third-party action and a debtor-creditor conflict" do not suffice to confer "related to" jurisdiction over third-party non-debtor tort claims. *Zale*, 62 F.3d at 753-754. The appropriate question is whether there was jurisdiction "over an attempt to enjoin actions between" the two non-debtor parties in the third-party action. *Id* at 755. In *Zale*, a settlement fund created from insurance proceeds in exchange for funding enjoined a creditor from suing the insurer for "actions relating to the settlement." *Id*. at 749-750. The creditor brought independent tort claims which were held to be outside the bounds of the bankruptcy court's jurisdiction because neither party was a debtor and the "property at issue" did not belong to the estate. *Id.* at 756-57.

The third-party release in the case at bar is like that in *Mahwah Bergen Retail Group*. 636 B.R. 641 (E.D. Va. 2022). The reach of the provision is almost unlimited; it shields Strawberry Fields from "every conceivable claim" dating "back to time immemorial" if the claim bears some attenuated link to the Debtor's pre-petition conduct. *Id.* at 656. Under the language of the release for Strawberry Fields, claims entirely unrelated to the bankruptcy itself and Debtor's own mass tort liability would be barred. (R. 8). This could include, as Judge Novak in the Eastern District of

Virginia noted, negligent hiring claims, breach of contract claims, criminal acts, ad infinitum. *Id.* at 670. Here, this would extend the release to include environmental liability, personal injury cases both related and unrelated to the chemical spills, gross negligence claims, and so on. It would include claims by yet unborn plaintiffs who may have a claim years after Penny Lane is discharged. As Judge Novak astutely observed, such broad release of claims is not "even related, much less integral" to the "restructuring of the debtor-creditor relationship" as to confer jurisdiction to the bankruptcy court. *Id*. In *Mahwah Bergen*, even the potential to "deplete assets and resources of the estate" through litigation was not sufficiently "related to" the bankruptcy proceeding or its potential impact on the estate to confer jurisdiction. *Id*. at 678-79.

It defies logic to conclude that third-party independent causes of action, unrelated to the Debtor's estate, transform into issues "related to" a debtor's bankruptcy by conditioning a plan upon the release of such claims. Since the bankruptcy court failed to establish any "conceivable" impact on the bankruptcy estate beyond mere financial contributions or shared facts in independent tort actions, this Court should reverse.

2. *Even if jurisdiction is established, final adjudication by a bankruptcy court is unconstitutional in light of Stern v. Marshall.*

Contrary to the lower court's assertion, the mere fact that plan confirmation is statutorily "core" does not signify that bankruptcy courts are constitutionally authorized to render final judgments that the court otherwise does not have the power to render judgments upon. While plan confirmation is squarely a "core" proceeding by statute, the nonconsensual third-party releases contained in the Plan are not "core" claims subject to final rulings by a bankruptcy judge. *Stern v. Marshall*, 564 U.S. 471, 485 (2011). The test to determine if a proceeding is constitutionally core to the bankruptcy is "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id*. at 497. These "core" and "non-core" determinations must be analyzed on a claim-by-claim basis, not by the context of the proceeding brought before the bankruptcy court. *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 33 (2014).

Stern counsels that, absent consent, bankruptcy courts lack the constitutional power to enter final judgment on claims that only "relate to" a title 11 case, but do not arise "in" or "under" the Chapter 11 case. 564 U.S. at 485. Specifically in the context of a counterclaim between a debtor and a creditor, it was held that claims that existed "prior to" and "independent of" a debtor's bankruptcy case are *not* transformed into a core proceeding by virtue of the claim being asserted in the "context" of a core "bankruptcy proceeding." *In re Purdue Pharma, L.P.*, 635 B.R. at 80 (citing *Stern v. Marshall*, 564 U.S. 462 (2011)). The mere fact that a claim may have "some bearing on a bankruptcy case" does not confer a bankruptcy court with the authority to adjudicate claims that are committed to an Article III court. *Id*.

As a result, the lower court's contention that confirmation orders are a "core matter" is inapposite to the determination of whether the bankruptcy court had authority to render a final judgment within the confines of its non-Article III powers. (R. 12). Looking to the context of a proceeding is insufficient to ensure that bankruptcy courts do not run afoul of Article III of the Constitution; it must analyze *each claim* presented. *Arkison*, 573 U.S. at 33. There is no dispute that confirmation orders are "core" under the statute, nor that plan confirmation is "integral" to the restructuring of the debtor-creditor relationship. *See In re Millenium Lab Holdings II, LLC,* 945 F.3d 126 (3d Cir. 2019). Plan confirmation restructures the creditor-debtor relationship; but the claims at issue are not between the creditor and debtor here.

Here, the claims are myriad and sweeping, including claims at best only tangentially related to a pre-petition relationship with the Debtor. These claims include, but are not limited to, tort and contract claims which are grounded in state law. *Stern* involved the impermissible adjudication of a state law counterclaim by a bankruptcy court; the Court held that while counterclaims fell within "core" jurisdiction by statute, the *content* of the claim was not adjudicable by the bankruptcy court as it would "exist without regard to any bankruptcy proceeding." *Stern*, 564 U.S. at 194. Both the potential and actual claims released against Strawberry Fields ostensibly include state law claims that would exist prior to, and independent of, Penny Lane's bankruptcy. Both plan confirmation and the counterclaims brought by the estate against a creditor are "bankruptcy proceedings." 28 U.S.C. § 157(b). As in Stern, the claim's content would exist outside of a bankruptcy proceeding and would not necessarily be resolved through the claim's adjustment process. As a result, bankruptcy courts have no constitutional authority, absent consent, to issue final determinations on such claims.

Moreover, plan confirmation resulting in the extinguishment of a claim is a final ruling. *See Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009). The lower court cites *MacArthur Co. v. Johns-Manville Corporation* for the proposition that a channeling injunction was not a "ruling on the merits" of Ms. Rigby's claim, and that channeling claims into a settlement trust funded by the Debtor's insurance policies did not "extinguish" the claim. 837 F.2d 89, 91-92 (2d Cir. 1988). However, the lower court failed to acknowledge the limitations of *Manville I* to third party derivative liability, not direct claims against a non-debtor third party. *Id.* The lower court also ignores the Supreme Court, which unequivocally held that channeling injunctions are a "final judgment." *Travelers*, 557 U.S. at 155. The Supreme Court held that final orders made by a bankruptcy court become "final on direct review" regardless of whether the bankruptcy court exceeded its "jurisdiction or statutory authority." *Id*. Indeed, when a "bankruptcy court, applying bankruptcy law" confirms a "Plan" which "dispose[s]" of a third-party non-debtor's liability on claims, it serves as a "final judgment on the merits" of those claims. *See Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987).

C. Non-Consensual Third-Party releases of direct claims violate Due Process.

The nonconsensual release of third-party claims against Strawberry Fields deprives individuals with direct claims of property without due process of law. Due process, at minimum, requires both "notice and opportunity for hearing appropriate to the nature of the case" before a "deprivation of life, liberty or property." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). These rights are outlined in both the Fifth and Fourteenth amendments, and the requirements for due process remain the same under both. *See* U.S. Const. Amend. V; U.S. Const. Amend. XIV; *see also Malinski v. New York*, 324 U.S. 401, 415 (1945). A cause of action is "property protected" by Due Process. *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988). Yet, the process of plan confirmation does not require the consent of every individual creditor, so consenting creditors can unilaterally strip the minority of otherwise available direct claims against a non-debtor third party. Dorothy Coco, *Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law*, 88 Fordham L. Rev. 231, 248 (2019). In analogous situations outside of bankruptcy plan confirmation in the class action process, the Court is clear that lack of notice and opt-out provisions violate due process in both state and federal court. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The non-consensual third-party release provisions in the Penny Lane plan do not provide adequate notice, opportunity for a hearing, nor the ability to opt-out of the Plan. By the lower court's own admission, the Plan releases and extinguishes all direct claims against Strawberry Fields, even those ostensibly belonging to unborn claimants, as well as for injuries yet known. The Plan binds nonconsenting and objecting creditors without the opportunity to be removed from the plan or otherwise vindicate their rights in court. Finally, the lower court recognized that the release and permanent injunction did not rule "on the merits" of the direct claims; instead, the release and injunction served to ensure that no court—state, Article III, or bankruptcy, will be able to hear the released claims.

II. SECTION 1192 EXCEPTS FROM DISCHARGE ANY DEBTS OF THE KIND SPECIFIED IN SECTION 523(A) FOR SUBCHAPTER V REGARDLESS OF THE TYPE OF DEBTOR.

Under a subchapter V chapter 11 bankruptcy proceeding, a corporate debtor may not discharge debts of the kind specified in subparagraphs (1) through (19) of 11 U.S.C. § 523(a) because the canons of construction for statutory interpretation, legislative history, and equitable considerations prove congressional intent to allow dischargeability exceptions for debts in chapter 11 subchapter V. *See* 11 U.S.C. § 1192.

Traditionally, chapter 11 focuses on reorganization by restructuring debts to allow insolvent businesses to survive post-bankruptcy. *See* 11 U.S.C. § 1141(d)(2). Under a traditional chapter 11, the Bankruptcy Code grants corporations a complete discharge to protect viable corporations from the liability of non-dischargeable debts post-bankruptcy. *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L Rev. 757, 764-766 (2005); *see* 11 U.S.C. §1141(a). The traditional chapter 11 plan must comply with the priority rules found in the Bankruptcy Code to pay each class of creditors in order of priority. *See* 11 U.S.C § 507. The absolute priority rule in traditional chapter 11 requires higher priority dissenting creditors to be paid in full before junior dissenting creditors receive payment. *See* 11 U.S.C § 1129(b)(2). A plan that fails this requirement cannot be confirmed by the Bankruptcy Court. *See* 11 U.S.C § 1129(b)(1). As a result, corporate debtors will lose their interest in the company unless the plan pays dissenting creditors in full. *See* 11 U.S.C § 1129(c). Due to small businesses struggling to effectively reorganize, Congress passed subchapter V under chapter 11 in 2019 to increase protection and benefits for small businesses not originally available in the traditional chapter 11 bankruptcy. *See Cantwell-Cleary Co. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC)*, 36 F.4th 509, 514 (4th Cir. 2022); *In re Lapeer Aviation, Inc.,* No. 21-31500-JDA, 2022 WL 1110072, at *1 (Bankr. E.D. Mich. Apr. 13, 2022).

In enacting subchapter V, Congress eliminated the absolute priority rule for petitioners filing under the subchapter. *See* 11 U.S.C. §§ 1191(b)-(c). Congress further deviated from traditional chapter 11 by distinguishing that confirmation of a non-consensual plan under subchapter V relies on § 1192(2) to govern discharge rather than § 1141(d)(2). 11 U.S.C. § 1181(a); *see In re Cleary Packaging, LLC)*, 36 F. 4th 509, 512 (4th Cir. 2022). Section 1192 requires the court to grant the debtor a discharge once the debtor has made all payments due within the first three to five years of the plan. 11 U.S.C. § 1192(2). The absence of the absolute priority rule in subchapter V allows small business debtors to retain their equity in the company, despite the dissenting class of creditors not being paid in full. *See* 11 U.S.C. §1191(c). Discharge under § 1192(2) pertains to all debts as provided under the plan **except** for *any debt*: (1) on which the last payment is due after the first three to five years of the plan; or (2) *of the kind* specified in § 523(a) of this title. *Id.* (emphasis added). Section 523(a) enumerates twenty-one debts that are excepted from discharge with an introductory section at applies the discharge in standard bankruptcies to only individual debtors. *See* 11 U.S.C. § 523. Section 1192(2)'s reference to § 523(a) does not make a distinction between a corporate and individual debtor as it pertains to subchapter V.

A. Statutory Interpretations support Section 1192 application to Corporate Debtors.

To resolve ambiguities in the code, courts may rely on canons of construction to interpret congressional intent and uncover correct interpretations. *See, e.g., Lena v. Pena*, 518 U.S. 187, 211 (1996). As demonstrated below, to the extent that there is confusion between the interpretation of § 523(a) and 1192, various canons of constructions make plain that § 1192(a) excepts any debt of the kind specified in § 523(a), regardless of the type of debtor.

1. *<u>The Plain Meaning of Section 1192 disregards the type of debtor.</u>*

As the Supreme Court has specified, when interpreting any provision, we must "begin where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). When "the statute's language is plain," as is the language in our case, the singular duty of the courts is "to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

Section 1192(2) plainly reads that once a plan is confirmed under this provision, "the court shall grant the debtor a discharge of all debts . . . except any (2) of the kind specified in § 523(a)." The meaning of § 1192(2) is clear. The court will discharge all debts, with exceptions for the *kind* of debts specified in § 523(a). Section 523(a)'s sole function in § 1192(2) is to act as shorthand. Section 1192(2) does not call on the totality of § 523(a), but intentionally narrows the provision to include on the kind of debts it lists.

If Congress intended to include § 523(a)'s application to only individual debtors, Congress could have plainly listed § 523(a) without the need to narrow its scope. The respondent ignores the plain language of the text by imposing the consideration of the type of debtor into the statute when the plain language makes no mention of such evaluation. The plain language does not read "except for debtors of the kind" nor does it make a single mention to a specific type of debtor required.

If Congress intended to limit the scope of § 1192, it would have followed similar language as found in traditional Chapter 11 discharge § 1141(d)(2) which distinguishes the scope of discharge between individual and corporate debtors. § 1141(d)(2) plainly reads, "A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharged under § 523 of this title." § 1141(d)(2) leaves no room for inquiry whether the provision does or does not apply to individuals. If § 1192 was intended to apply only to individual debtors, then Congress would have made that specification, like it did in the very same chapter under § 1141(d)(2).

2. *The Canon Against Surplusage provides that the intentional use of "kind" in Section 1192(d)(2) emphasizes Congressional intent to give meaning to the types of debts enumerated in Section 523(a).*

If § 1192(2) was not intended to focus on the "kind" of debts listed in § 523(a), then the inclusion of "kind specified" in the body of the text would be mere surplusage. Under the canon of statutory construction against surplusages, courts should "lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69, 174 (2012) (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 58 (1868*)).

If Congress's intention in enacting § 1192(2) was to limit the non-dischargeablity to individual debtors in subchapter V, Congress would have simply included § 523(a) without any modifications. However, that is not the language Congress used in the text. Logically by including the "kind specified" language Congress is intentionally using § 523 as a tool for listing kinds of debt. "Kind" means "a specific or recognized variety," MERRIAM-WEBSTER DICTIONARY (online ed.), thus in the context of § 1192 Congress has recognized the variety of debts it intends on limiting dischargeability.

Some courts have argued that inclusion of § 1192 to the § 523 preamble indicates that Congress intended to apply the discharge exceptions only to individual debtors under subchapter V. *See, e.g., In re Satellite Restaurants Inc. Crabcake Factory USA*, 626 B.R. 871, 876 (Bankr. D. Md. 2021). However, this argument is flawed for several reasons. First, the inclusion of § 1192 to § 523's preamble was a "conforming amendment," thus Congress would not have intended to make such a radical change to the application of the provision through such a small addition. *See*

H.R. Rep. No. 171, 116th Cong., 1st Sess. 1 (2019)*; Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) ("Congress does not make 'radical--but entirely implicit--change [s]' through 'technical and conforming amendments"')(citation omitted). Second, inclusion of § 1192 in the preamble is essential, since the absence of the provision amongst the other provisions would likely lead to some confusion of whether § 523 applies at all. Especially considering the five other provisions included in the text, § 1192 absence would have led some to doubt whether § 523 inclusion in § 1192 was intentional.

Finally, § 523's inclusion of other provisions could also be considered surplusage. For example, §§ 727, 1328(b), and 1141 all include limiting exceptions for the type of debtor that the provision can apply against and thus the inclusion of the preamble specifying which individual debtors is repetitive and unnecessary. Section 1192 only joins these other provisions in this cross reference, despite its repetitive nature.

3. *The presumption of consistent usage supports corporate non-dischargability as seen in Section 1228.*

Section 1192(2) mirrors the language found in § 1228, which governs discharges in chapter 12, and § 1329, which governs discharged in Chapter 13. Sections 1228(a)(2) and 1328(c)(2) reads "except any debt— of a kind specified in Section 523(a)." The only difference in language between §§ 1228(a)(2) and 1328(c)(2) to § 1192(2) is that the former refers to debts "of **a** kind specified in § 523(a) of this title," while the latter refers to debts "of **the** kind specified in § 523(a) of this title." (Emphasis added.) It has long been held that § 523(a) applies to both individuals and corporations in chapter 12. *In re JRB Consol., Inc.,* 188 B.R. 373 (Bankr. W.D. Tex. 1995). There is no need to make this distinction for chapter 13 since chapter 13 is exclusively limited to individual debtors. Thus, considering the application of § 1228, if Congress wished for § 1192 to apply to only individual debtors, and stray from the chapter 12 application of the code, then it would not have mirrored the language of § 1228. It is appropriate to use § 1228 as a guideline for interpreting §

1192(2) since "identical 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 Services, Inc.*, 551 U.S. 224, 232 (2007)).

Additionally, chapter 12 and subchapter V hold similar equitable concerns which supports why Congress would adopt chapter 12's language into subchapter V. Chapter 12 applies to fishermen and family farmers who, like small business owners, operate somewhere between an individual and a corporation. Chapter 12 and subchapter V recognize the need to protect these types of debtors and do so by not enforcing the absolute priority rule, not allowing creditors to propose competing plans, and allowing debtors to confirm a plan even if it rejected by their debtors. Sharing these terms, it would only be logical that these similarities would carry through into their respective non-dischargability provision and be intended to have similar application.

4. Section 1192 Governs Due to the Provision's Specificity.

Compared to § 523(a), which applies to all chapters of the code, § 1192 is more specific since it only applies to small businesses who file under Subchapter V. Thus, in interpreting the ambiguity surrounding non-dischargeable claims the more specific provision should govern.

This interpretation is "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992) (quoting *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). "If the two provisions may not be harmonized, then the more specific will control over the general." *Universal Am. Mortg. Co. v. Bateman* (*In re Bateman*), 331 F.3d 821, 825 (11th Cir.2003) (citations omitted).

Section 1192(a) governs nonconsensual plan confirmations in a chapter 11 subchapter V. Compared to § 523, which is a general provision for all chapters of non-dischargeable claims, § 1192(a) is a more specified provision that applies only in specific categories. Under the canon of specificality, § 1192(a) would govern over § 523. The Debtor argues that this is not the case since

§ 1192(a) and § 523 can be harmonized if § 1192(a) is read to apply only to individuals. However, this would be a misunderstanding of the provisions, due to all the reasons cited above, and a flawed effort to narrow § 1192(a) scope to only individuals when the body of the text makes no reference to do so.

5. The Doctrine Against Absurdity favors Section 523(a) application to corporate debtors.

The Debtor's interpretation of § 1192(2) is flawed because it incentivizes corporate debtors to pursue non-consensual plans, since doing so will allow debtors to discharge all claims with the additional benefit of not having to satisfy the absolute priority rule as they would in a normal chapter 11 under a subchapter V.

If a court confirms a consensual plan, a corporate debtor will receive a discharge but will be held to the non-dischargeability provision of § 1141(d)(6). Section 1141(d)(6) makes certain corporate debts non-dischargeability such as debts for customs duties for which the debtor made a fraudulent return. §1141(d)(6)(B). However, if a court confirms a non-consensual plan, § 1141 will not apply and will be replaced by § 1192. See 11 U.S.C. § 1181(d)(c). If § 1192 is falsely interpreted to apply only to individuals, corporate debtors will be allowed to discharge morally questionable debts such as tax fraud or in our present case, willful and malicious injury. Considering this, parties with debts that would otherwise be dischargeable through a consensual plan will likely be incentivized to confirm a nonconsensual plan instead. It is highly unlikely that Congress intended for this absurd result which is a product of an alternative reading of § 1192.

Additionally, interpreting § 523(a)'s preamble to exclude the application of corporate debts leads to absurd results when viewed considering it lists § 1141(d)(6) as one of the applicable provisions. § 1141(d)(6) reads that in a traditional Chapter 11, corporate debtors will not be discharged of the kind specified in § 523(a). If § 523(a)'s preamble was read to apply strictly to individuals, it would lead to absurd, conflicting results in its application with § 1146(d)(6).

B. **Limited legislative history combined with previously interpreted language in similar bankruptcy codes illustrate deliberate congressional intent to apply 11 U.S.C. § 523(a) to corporate debtors under subchapter V.**

Congress's choice to use language found in both chapters 12 and 13 of the Code, along with its decision to eliminate the absolute priority rule under subchapter V, is sufficient proof of congressional intent to apply exceptions to discharge in § 523(a) to corporate debtors. The legislative history and policy considerations surrounding small businesses in subchapter V is analogous to the concerns surrounding chapter 12 debtors. The purposeful use of language previously interpreted by the Court supports the conclusion that Congress intended the Court to apply § 523(a) to both corporate and individual debtors under subchapter V. The exclusion of debts listed in § 523(a) reflects the primary policy concern of discharge to "relieve the *honest* debtor from the weight of oppressive indebtedness" while exempting from discharge debts arising out of the debtor's bad acts. *See* 11 U.S.C. § 523(a)(6) ("willful and malicious injury by the debtor to another entity."); *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 550 (1915).

As established in prior Supreme Court decisions, Congress is presumed to have knowledge of existing legislation and judicial interpretations when passing new legislation. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The Code encourages debtors to establish consensual plans with creditors under a traditional chapter 11 bankruptcy. *See* 11 U.S.C. § 1126. An important policy concern of the Code is balancing both the debtor and the creditor's interests. *In re Cleary Packaging LLC*, 36 F.4th at 517. Creditors depend on the court to provide protection against bad acts by the debtor and to ensure equitable treatment in plan confirmation. *Id.*

Although some courts have held that exceptions to discharge in § 523(a) only apply to individual debtors, other Circuits have interpreted § 1192(2)'s reference to § 523(a) as applying the discharge exceptions found in § 523(a) to corporate debtors in the context of subchapter V. *See*

In re Cleary Packaging LLC, 36 F.4th at 509; *contra In re Rtech Fabrications, LLC*, 635 B.R. 559, 564 (Bankr. D. Idaho 2021); *In re Lapeer Aviation, Inc.*, 2022 WL 1110072, at *2. Although there is a debate surrounding the issue at bar, it is evident from the language of § 1192 in the context of the limited legislative history concerning the issue at bar that Congress intended subchapter V to be treated differently from a traditional chapter 11. This conclusion is further supported by Congress's departure from the language found in traditional chapter 11 through its use of distinctive language which originated elsewhere in the Code, specifically in chapter 12 and chapter 13.

1. *Congress's departure from traditional chapter 11 rules shows congressional intent that subchapter V be treated differently from a traditional chapter 11 in allowing exceptions to discharge under Section 523(a).*

Congress intended to alter the way the Bankruptcy Court treats small business debtors because of the substantial deviations from traditional chapter 11 bankruptcies found in subchapter V. Section 1141(d) governs traditional chapter 11 discharges and explicitly declares § 523(a) exceptions as only applicable to individual debtors in a consensual plan; however, Congress changed the governing section of subchapter V discharge to § 1192(2), where the language found in § 1141(d) limiting the application of § 523(a) to individual debtors is notably absent. *See* 11 U.S.C. §§1141, 1192.

Passage of law that deviates substantially from established law is sufficient evidence of Congress's intent to change the substantive law without requiring Congress to explicitly state the abrogation. *See Whitman v. Am. Trucking Ass'ns., Inc.,* 531 U.S. 457, 468 (2001); *see also Penn. Pub. Welfare Dep't. v. Davenport,* 495 U.S. 552, 563 (1990). In *Penn*, the mere enactment of § 523(a)(7) evidenced a "clear indication" to abrogate pre-Code rulings and supported the assertion of congressional intent to change the laws surrounding § 523(a)(7). *Penn. Pub. Welfare Dep't,* 495 U.S. at 563. On the other hand, in *Whitman*, the court did not find sufficient evidence of congressional intent to allow a government agency to exercise powers that did not appear in the statute because Congress does not put "elephants in mouseholes" when passing substantive changes to established law. *See Whitman*, 531 U.S. at 468.

The Bankruptcy Court erred in dismissing Rigby's claim that § 523(a) applies to corporate debtors in a subchapter V context because Congress's elimination of the absolute priority rule from subchapter V is a material and deliberate deviation from the Code for traditional chapter 11, thus allowing for § 523(a) exemptions from discharge to apply to subchapter V filings. Similar to findings by the court in *Pennsylvania Public Welfare* that enactment of § 523(a)(7) evidenced "clear indication" to change pre-Code rulings, the very passage of subchapter V sufficiently evidences that congress did not hide "an elephant in a mousehole," but rather explicitly changed the law by creating subchapter V. Unlike *Whitman*, where the statute lacked reference to the agency's authority, the reference to § 523(a) in § 1192 explicitly reads the "kinds...of debts" to be excepted from discharge in a subchapter V, there is no doubt that Congress referenced § 523(a).

Congress did not "hide an elephant in a mousehole," as the majority suggests, because Congress' very approval and passage of subsection V is sufficient evidence that Congress intended to change the Code surrounding small business bankruptcies. (R. at 21). Correctly asserted by the court in *In re Cleary, Inc.*, Congress passed subchapter V to satisfy the unmet needs and concerns surrounding reorganization of small businesses. In passing subchapter V, Congress did not include the same pertinent language found in § 1141(d) that expressly limits the application of § 523(a) to individual debtors only; instead, Congress utilized the same language found in chapter 12 § 1228 in subchapter V § 1192. Congress's purposeful change in subchapter V mirrors the language found in chapter 12, subjecting § 1192 to follow the judicial interpretations of § 1228.

2. *<u>Congress's use of previously interpreted language across various Bankruptcy Code supports that Congress intended the Court to apply the same interpretation of the language despite any differences between the Codes.</u>*

Congress' use of the same language found in relevant contexts of other Sections of the Bankruptcy Code signal the bankruptcy court to apply the interpretations derived from that language in the same manner, despite other differences between the codes. Congress is presumed to understand that substantially similar language found across different codes may be interpreted similarly. *See Hall v. United States*, 566 U.S. 506 (2012). At the time of subchapter V's passage, two chapter 12 cases interpreted the language in § 1228 to mean the *"kinds*" of debts listed in § 523(a) and held the exemptions to discharge to apply equally to both individual and corporate debtors. *See In re Breezy Ridge Farms,* 2009 WL 1514671, at *2; *In re JRB Consol.,* 188 B.R. at 374. The substantive change to chapter 11 discharge rules under subchapter V and the knowledge Congress had of judicial interpretations of the language of § 1192 confirms that Congress did not hide an "elephant in a mousehole," but rather signaled to the bankruptcy court to follow the previously established judicial interpretations and exempt from discharge the debts listed in § 523(a) for corporate debtors.

Courts routinely rely on interpretation of language from other Bankruptcy Code provisions when that language has been previously analyzed by the court. *In re Breezy Ridge Farms,* 2009 WL 1514671, *2; *In re JRB Consol.,* 188 B.R. at 374. For example, in *In re Breezy Ridge Farms, Inc.*, the court interpreted § 1228(a)(2) in a chapter 12 discharge for farmers in the same manner as § 1328 in chapter 13 discharge for individual debtors because of congress' intentional use of nearly identical language in both chapters, despite the differences between the types of eligible debtors in both chapters. *In re Breezy Ridge Farms,* 2009 WL 1514671, *2. In *In re JRB Consol., Inc.*, the court differentiated between *traditional* chapter 11 and chapter 12 discharges because §§ 1141(d)(2)-(3) explicitly prohibits discharge of *individual debtors* from debts listed in § 523(a), while § 1228(a) which merely states the *debtor* gets a discharge "except for the debts of the kind specified in § 523(a)," and does not contain a separate, specific section referring to individual debtors. *In re JRB Consol.*, 188 B.R. at 374. The court held that the inclusive language of § 1228(a) stating discharge of debts "of the kind specified in § 523(a)" was broader than the traditional chapter 11 § 1141(d)(6) language and broadly included "individuals, partnerships, and corporations." *Id.* The court also held that the broad language in § 1228(a) appeared "consistent with the intent of Congress" by providing special treatment for debtors in chapter 12. *Id.*

Congress's choice to incorporate chapter 12 language into subchapter V, its knowledge of judicial interpretation of that language to include individuals *and* corporations, along with the similar policy concerns surrounding the special treatment of both chapter 12 and subchapter V debtors is evidence of Congress's intension that provisions surrounding discharge in both chapters be interpreted the same. As the majority pointed out, *In re JRB* distinguishes between a traditional chapter 11 and a chapter 12 in that they involve different types of debtors; however, the court did **not** distinguish between a subchapter V debtor and a chapter 12 debtor.

Here, the Court is not asked to apply the broad language of chapter 12 to the narrow exceptions under § 1141, rather the Court should look to the limited legislative history, the context of the Section at issue, and deduce from previous Legislative decisions and court interpretations that § 523(a) *is* applicable to subchapter V corporate debtors. The majority also contends that the language in chapter 12 cannot apply to subchapter V debtors because chapter 12 derives much of its language and interpretation from chapter 13, which prohibits corporations from filing under that section. However, subchapter V also mirrors provisions found in chapter 13, such as the plan payment in the amount of the debtor's monthly disposable income instead of traditional chapter 11's absolute priority rule. 11 U.S.C. §§1192, 1328. In addition, a trustee is appointed in every subchapter V case, with the trustee having a similar role to a chapter 13 trustee. 11 U.S.C.

§1183(a). If Congress wanted to ensure § 523(a) only applied to individuals in subchapter V, Congress would have avoided using language previously interpreted by the court to include corporations.

Although other circuits have interpreted the language in subchapter V to not include the exceptions to discharge in § 523(a), many of the cases cited by the majority rely on case law that the Fourth Circuit overturned. (R. at 8). Further, the courts also rely on the court's comparisons between traditional chapter 11 and chapter 12 in *In re JSB, Inc.* when concluding that § 523(a) does not apply to subsection V corporate debtors. For example, the court relies on *In re Satellite Restaurants,* which relies on *In re JSB, Inc.* to support their conclusion that the language used in § 1192 and § 1228 is different because of Congress's treatment of traditional chapter 11 debtors; However, the case at bar concerns § 1192 and § 1228 as it relates to subchapter V debtors – the court's reliance is flawed as this is a subchapter clearly set apart by Congress for special treatment outside of the normal considerations of a traditional chapter 11. (R. at 18). Other cases relied on by the majority also fail to account that the main case in support of their conclusions, *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging LLC),* 630 B.R. 466 (Bankr. D. Md. 2021), was reversed by the Fourth Circuit to follow the interpretation we are asking the court to apply today. (R. at 18). Further, the discharge of all debts under subchapter V is contrary to public policy and the policy of the Bankruptcy Code to protect not only debtors but the interest of the creditors as well. Under other Circuit's interpretation of the code, the debtor under subchapter v is encouraged to seek out a non-consensual, cram-down plan from the court without regard to the cram-down's effect on the creditors. This result is contrary to one of the code's primary policy considerations of protecting creditor's interests.

The Bankruptcy Court erred in dismissing Rigby's claim regarding the exemptions of discharges under § 526(a) to Penny Lane's subchapter V filing because the similarities between subchapter V, chapter 12, and chapter 13 indicate congressional intent to treat subchapter V small business debtors differently from the corporations in traditional chapter 11 due to the similar policy concerns surrounding protecting both subchapter V and chapter 12 debtors. Furthermore, the use of virtually identical language in subchapter v from chapter 12 and chapter 13 combined with the assumption that Congress is aware of all applicable laws passed indicates that Congress was aware of the substantive changes it was making by passing subchapter V and intended for the discharge exceptions under 523(a) to apply to subchapter V debtors, despite the limitations on traditional Chapter 11 exemptions to discharge.

C. Equitable considerations support the non-dischargability of corporate debtors under Section 1192.

1. Policy reasons behind bankruptcy discharges support the non-dischargability for corporate debtors for debts listed under Section 523(a).

Discharges are intended to give a "honest but unfortunate debtor … a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Loc. Loan Co. v. Hunt,* 292 U.S. 234, 54 (1934). Similar to the congressional intent behind the creation of Chapter 7, Subchapter V is intended to help small businesses reorganize and retain equity despite not paying back all creditors due to their class as a small business.

While Congress intended to release debtors of certain debts, Congress also recognized that in specific circumstances, certain debts should not be dischargeable. Section 523(a) is a response to keep debtors responsible for their moral agency and prohibits kinds of debts that touch on one's moral compass (e.g., failure to pay domestic support obligations and for willful and malicious injury). Section 523(a) provision traditionally applies only to individuals, since corporations are made up of multiple, distant agents and therefore it is often not feasible to hold all agents liable for moral wrongdoings. Subchapter V and Chapter 12 introduce a middle ground for evaluating debtors since although they might have similar debts to a corporation, they are much more tightly held by their owners and can be implicated in non-moral wrongdoings. Recognizing the intimate relationship between an owner and their small business, Congress intended for § 523 to apply to small businesses despite their status as a corporation. Failure to hold these small business debtors liable for their morally wrong debts may lead to a continuation of such conduct, such committing acts that are willfully and malicious.

Additionally, small business debtors are aware of the benefits inherent to filing a Subchapter V compared to a traditional Chapter 11, including allowing equity holders to keep their equity despite debtors not paying their creditors back in full. This benefit however must come with the tradeoff, specifically that debts specified in § 523(a) are non-dischargeable. The net result of this tradeoff is that Subchapter V debtors still get to retain equity post-bankruptcy, like Chapter 13, however small business debtors do not get to discharge all debts as they would under a traditional Chapter 11.

2. <u>Non-dischargeability deters repeated wrongdoings.</u>

As discussed below, Congress intentionally enacted § 523 to ensure debtors are held liable for their morally wrong debts. Abandoning this provision and failing to hold small businesses accountable could lead to a repetition of these moral wrongdoings.

Here, failing to hold Strawberry Fields liable will increase the likelihood that their alleged wrongdoing will continue. Considering the hurt they have allegedly already done to the Blackbird community; this type of continued behavior will be catastrophic if not put to an end. One way to deter this behavior is to make debts that are a result of the debtor's bad acts, such as the kind found in § 523(a)(6), non-dischargeable.

While the Debtor may argue that this burden is too large for small business debtors, it is unfair for innocent creditors to have no judicial relief to the harm caused by the Debtor. By refusing to discharge these debts, the Court will reinforce the intent of Congress and the important policy considerations surrounding the balancing of debtors *and* creditors' interests.

3. *Fairness requires non-dischargability of § 523(a) for both subchapter V individual and corporate debtors.*

The court of appeals has argued that not discharging subchapter V debts listed in § 523(a) does not promote fairness as it creates a disadvantage for other creditors by allowing Rigby to get repaid in full while creditors would not be paid in full. However, it is unfair to rob creditors, like Rigby, with non-dischargeable claims of their day in court. This is especially true since Rigby did not consent to the plan and considering that the Penny Lane voluntarily elected to not pay back their debtors in full under subchapter V. Requiring small business debtors to be held accountable for their § 523(a) debts, regardless of whether they are an individual or a corporation, is the only fair opinion. This is made even more true considering the limited list of non-dischargeable debts included in § 523(a) and the broad release of the remaining debts which will provide them with their "fresh start."

CONCLUSION

Strawberry Fields is attempting to take advantage of the bankruptcy system by piggybacking off Penny Lane's filing and using the Plan to rid themselves of all liability for their alleged willful and malicious injury. Strawberry Fields is a third-party non-debtor and as such, should not get the benefit of discharge that is reserved for those who have gone through the arduous process of bankruptcy.

Not only does the question of Strawberry Field's liability have no place in Penny Lane's plan, but it also stretches the bankruptcy court beyond its authority. Bankruptcy courts do not have the constitutional or statutory authority to approve non-consensual third-party releases of direct claims. The Code bars the discharge of non-debtor liabilities except for the narrow exception of asbestos cases. Additionally, such a discharge is a violation of Rigby's Due Process Rights.

Even if such a broad waiver of third-party liability was acceptable in the Plan, Rigby's claim is non-dischargeable under § 1192. The Code explicitly provides that subchapter V non-consensual plans may not discharge debts of the kind specified in § 523. The debtor is attempting to read ambiguity into the Code by misreading § 1192 to only apply to individual debtors, despite the language and context of § 1192 making no evaluation of the type of debtor. Further, legislative history and equitable considerations recognize the uniqueness of small businesses in subchapter V and the importance of holding them accountable by not allowing them to discharge of the kinds of debts listed in § 523(a). Accordingly, this Court should reverse the Thirteenth Circuit's erroneous holding, remand the case for new trial and allow Rigby to proceed with her claim.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court reverse the decision of the Thirteenth Circuit

Respectfully Submitted,

Team P. 31
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