No. 22-0909

# In the Supreme Court of the United States

In re Penny Lane Industries, Inc., DEBTOR,

Eleanor Rigby, PETITIONER

v.

Penny Lane Industries, Inc., RESPONDENT

*ON WRIT OF CERTIORARI BEFORE JUDGMENT*

*TO THE UNITED STATES COURT OF APPEALS*

*FOR THE THIRTEENTH CIRCUIT.*

**BRIEF FOR PETITIONER**

TEAM 51,

COUNSEL FOR PETITIONER

## 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 a chapter 11 plan of reorganization.

2. Whether a corporate debtor proceeding under subchapter V of chapter 11 of the Bankruptcy Code may, pursuant to 11 U.S.C. § 1192, discharge debts of types specified in subparagraphs (1) through (19) of 11 U.S.C. § 523(a).

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## Opinions Below

The Thirteenth Circuit's opinion in this case is unpublished but is attached as Exhibit A to this brief.

## Jurisdiction

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

## Statement of the Case

### I. Factual Background

The Petitioner, Ms. Eleanor Rigby, tragically lost her four-year-old daughter to leukemia. R. at 5. She filed suit against Strawberry Fields Foods, Inc. ("Strawberry Fields"), the parent company of Penny Lane Industries, Inc., currently the Debtor in a Chapter 11 bankruptcy case. R. at 5-6. Debtor has filed under subchapter V of Chapter 11, in order to restructure while dealing with the many claims against both it and Strawberry Fields. R. at 6. Debtor is accused of knowingly dumping pollutants which contaminated local groundwater, potentially causing thousands of injuries across the city of Blackbird. R. at 5-6. Petitioner asserts that Debtor's pollution was the cause of her daughter's death, and Strawberry Fields is potentially liable because it knew or should have known of Debtor's misconduct. R. at 5-6.

Debtor's potential outstanding liability is substantially based around the hundreds of active tort claims. R. at 5. Debtor filed the current subchapter V action in order to restructure around the $400 million in outstanding potential liability. R. at 5. As part of the bankruptcy proceedings, stakeholders negotiated a reorganization plan ("the Plan"), which would create a creditor trust for the benefit of the tort claimants. R. at 8. It is expected that this trust would only pay a fraction of the potential liability of each claimant. R. at 8.

Strawberry Fields agreed to fund the creditor's trust through financial contributions. R. at 8. As part of the Plan, the tort claimant creditors would non-consensually release their claims against Strawberry Fields. R. at 8. Essentially, if the Plan were approved, approximately 10,000 tort claimants would be forced into a non-consensual settlement, their claims against Strawberry Fields extinguished without their input or consent.

## II. Summary of the Argument

The bankruptcy court is not authorized to issue such non-consensual, third-party releases. The language of the Bankruptcy Code, the bankruptcy court's own jurisdiction, and constitutional guarantees of due process do not permit these types of releases.

There are multiple provisions of the Bankruptcy Code which point to the lack of authorization for non-consensual third-party releases. 11 U.S.C. § 524(e) (2022) plainly states that "the discharge of a debt by a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." The plain reading of this provision is that third-party releases are not permitted under the bankruptcy code.

The bankruptcy court's own jurisdiction also stands in the way of issuing these releases. 28 U.S.C. § 1334 (2022) grants district courts jurisdiction both bankruptcies and civil claims that "arise under title 11, or arising in or related to a case under title 11," 28 U.S.C. § 1334(b). While this provision grants bankruptcy courts broad jurisdiction to release claims against the debtor of a bankruptcy action, claims against third parties are not related to the bankruptcy case. Merely contemplating the release of a claim of a creditor against a third party in a bankruptcy case is not sufficient to grant jurisdiction over it. If the reverse were true, bankruptcy courts would have nearly limitless jurisdiction, including the ability to dispose of claims against parties which have not filed for bankruptcy and may not even be eligible for the type of bankruptcy the debtor has filed for.

In addition to the statutory and jurisdictional objections to the third-party releases, Ms. Rigby would be denied due process of law if her claims were to be released without her consent. Involuntary releases are issued without the guarantee of any rights to the plaintiffs. While Strawberry Fields has promised to make contributions to a creditor trust if the Plan is approved, this does not specifically compensate Ms. Rigby, or any individual plaintiff. Ms. Rigby should be permitted to pursue her claim on the merits through the judicial process, and not be forced into a pseudo-settlement based on the promise that she may receive a fraction of what she is entitled to.

Prior to the original presentation of the Plan, Ms. Rigby filed a non-dischargeability action, which asserted that her claim is not dischargeable in bankruptcy under 11 U.S.C. § 523(a) (2022). § 523(a) excepts certain kinds of debt from discharge. § 523(a)(6) specifically excepts debts incurred by "willful and malicious injury by the debtor to another entity or to the property of another entity." Discharges in subchapter V cases are governed by 11 U.S.C. § 1192 (2022), which states that those specific discharges are subject to the § 523(a) exceptions. Debtor argued, and the lower courts agreed, that Petitioner's claim was dischargeable in bankruptcy because § 523(a) does not apply to corporate debtors.

§ 523(a) does apply to such corporate debtors because it applies to certain types of debts and does not specify categories of debtors. See *Cantwell Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021). In addition, the Court has in the past held that when two statutory provisions have a gap in coverage, the more specific provision will control the more general provision. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012). § 1192 governs only subchapter V debtors, so it is the more specific provision, while § 523(a) applies to all chapters of the Bankruptcy Code.

The Court should reverse the lower court and hold that nonconsensual third-party releases are not permitted by the Bankruptcy Code. Releasing claims without compensation or final judgment is a violation of due process, the bankruptcy court's jurisdiction does not extend to claims against third parties, and the Bankruptcy Code specifically states that discharge of a debt by a debtor does not affect a third party's liability. See 11 U.S.C. § 524(e).

The Court should also reverse the lower court and hold that §523(a) exceptions apply to corporate debtors filing under subchapter V of the Bankruptcy Code. The exceptions apply to types of debt, and not categories of debtors. The bankruptcy court's canons of construction state that the more specific provisions govern the general ones. In this case, § 1192(2) governs § 523(a) which means that corporate debtors filing under subchapter V may be excepted from discharge if a 523(a) exception applies. Therefore, Ms. Rigby's tort claim is non-dischargeable.

## Argument

### I. <u>THE BANKRUPTCY COURT DOES NOT HAVE AUTHORITY TO NON-CONSENSUALLY RELEASE MS. RIGBY'S THIRD-PARTY CLAIM AGAINST STRAWBERRY FIELDS, INC., AS PART OF A CHAPTER 11 PLAN OF REORGANIZATION.</u>

Releasing Ms. Rigby's claims against Strawberry Fields, non-consensually, is outside the scope of authority held by the bankruptcy court. As part of the Plan, the Debtor aims to release claims against non-debtors brought by third parties, but doing so without the consent of affected parties is unambiguously prohibited in the Bankruptcy Code. Not only does the plain reading of the Code by which the bankruptcy court abides hold these releases to be prohibited, it is held to be prohibited by multiple U.S. Circuit Court decisions due to persistently raised jurisdictional and constitutional questions regarding the bankruptcy court's authority over these claims.

Under 11 USC § 524, the Bankruptcy Court's authority over parties filing for bankruptcy includes defining what duties and benefits result from a Chapter 11 Plan of Reorganization. Along with describing the duties and benefits, 11 USC § 524(e) states, "discharging 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." As also submitted by the Dissent of the $13^{th}$ Circuit's decision in this case, this provision is a prohibition of non-consensual releases; under a Chapter 11 Plan of Reorganization, discharging a debtor's debt has no effect on liability of other parties. R at 25. Not only has this been strictly applied in previous 5th, 9th, and 10th Circuit court decisions, but as recently as December 2021, the New York District Court held that except for asbestos cases, non-consensual releases are not permitted. *In re Purdue Pharma, L.P.*, 635 B.R. 26, 38 (Bankr. S.D.N.Y. 2021). Noting that Courts have not been successful in providing more support for a prohibition on these releases other than a "federal statutory scheme," *Id*. at 43, the Appellants in *Purdue* relied on additional statutory language to support statutory authority for nonconsensual releases, but as the court held, "sections of the code [relied upon]…do not confer on any court the power to approve the release of non-derivative third-party claims against non-debtors. *Id*. at 90.

*Purdue* is the most recent precedent, and it aims to clarify persistently questioned and contested aspects of non-consensual third-party releases. In addition to the statutory interpretation issue, jurisdictional and constitutional questions arise regarding whether the bankruptcy court's limited jurisdiction can extend to the releasing of claims, and if releasing these claims are constitutional. Supported by many 5th, 9th, and 10th Circuit Court decisions, the court in *Purdue* held that though the bankruptcy court had authority to confirm the debtor's Chapter 11 Plans of Reorganization, incorporating releases into plans of reorganization does not give authority for final approval of these releases. *Id*. at 109.

While circuits still remain split on the issue of non-consensual releases, the language of the Bankruptcy Code gives clear guidance to whether third-party claims against non-debtor entities can be released, and courts as recently as 2021 are continuing to hold that they cannot. Affirming the decision of the 13th Circuit Court in this case would disregard the statutory language and eliminate Ms. Rigby's claim without any direct compensation or finding of liability against Strawberry Fields.

### A. **The language of the Bankruptcy Code unambiguously prohibits the bankruptcy court from approving the non-consensual release of Ms. Rigby's claim against Strawberry Fields.**

The 13th Circuit's decision in Ms. Rigby's case relies heavily on the statutory language of the Bankruptcy Code, holding that in spite of the language in § 524, the Bankruptcy Code permits the approval of these releases through other language. 11 USC § 524 (e) specifically states that other claims brought against non-debtors are not released as a result of Debtor's discharge, and applying other sections of the code creates unnecessary ambiguities and disregards the language in § 524.

We have aimed to adopt the dissent's view of what the Bankruptcy Code states, which is a direct prohibition on non-consensual releases. R. at 25, 11 USC § 524 (e)). Not only is this supported by other Bankruptcy Code language, but sufficient case law and Supreme Court guidance. The Supreme Court in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992), while applying canons of construction to interpret a statute, stated the most important and "cardinal" canon: "courts must presume that a legislature says in a statute what it means and means what it says there." *Id.* at 253-54. While not all disputes over bankruptcy court authority and interpretation of statutory authority are easily resolved, the first step in litigating these disputes is properly reading and interpreting the statute itself.

Chapter 5 of the Bankruptcy Code contains Subchapter II, Debtor's Duties and Benefits. As applied by the Bankruptcy Court in this case, § 524(e) of the Bankruptcy Court explicitly states regarding effects of discharges, "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 guidance from the Supreme Court on how to interpret statutory language, 11 USC § 524 (e)), as mentioned, does not authorize the releasing of Ms. Rigby's claims. Releasing claims against

Strawberry Fields because of a chapter 11 Plan for Reorganization, which is meant to reorganize Debtor and pay its debts, is unambiguously and expressly unauthorized by the Bankruptcy Code.

The Debtor uses additional statutory language to support a release of claims, including Sections 105(a), 1123(a)(5), and 1123(b)(6). R. at 14. Debtor uses this language to support the implementation of the Plan, and subsequent release of claims, by claiming that these additional statutory provisions act as authorizations for third party releases. R. at 14. But, as distinguished and previously described in *In re Purdue*, 635 B.R. 26, 90 (Bankr. S.D.N.Y. 2021), these additional provisions "do not confer on any court the power to approve the release of non-derivative third-party claims against non-debtors.:" Therefore, the Bankruptcy Court in Ms. Rigby's case was not conferred a power to approve the release of claims, as the court's decision admits to the non-derivative nature of the claims against the debtor. (R. at 12. Ms. Rigby's claims are based on the failings of Strawberry Fields, Inc., a non-debtor entity that is not the subject of the discharged granted by the Bankruptcy Court.

Even if the statutory language permitted third-party releases, the court's ability to do so is not unlimited. In D*eutsche Bank AG v. Metromedia Fiber Network, Inc.* (*In re Metromedia Fiber Network, Inc.*), 416 F. 3d 136, 142-143 (2d Cir. 2005), a landmark decision regarding the non-consensual release of claims as part of reorganization plans, the Second Circuit held that a non-consensual third-party release was not permitted under the statutory language and surrounding circumstances. Discussing the implications of improper interpretation and support for that interpretation, "while 105(a) allows that the court can issue any order, process, or judgement that is necessary or appropriate to carry out the provision of the code, it does not allow the bankruptcy court to create rights that are otherwise unavailable under applicable law." *Metromedia* at 142, citing *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc.* (*In* *re Dairy Mart Convenience Stores, Inc.*), 351 F.3d 86, 92 (2d Cir.2003). The court in *Metromedia* held that while third-party releases could be appropriate in some circumstances, that the releases must be "necessary to the [p]lan." *Metromedia* at 143. The court discussed that merely providing funds to a trust for creditors may not be "necessary" as required, and was not adequate consideration for the release, before affirming the release on mootness grounds.

As *In re Purdue* holds, in addition to other applicable case law, except for asbestos cases under 11 USC § 524(g)), there is no explicit authorization for approval of non-debtor releases. While there are other sections of the Bankruptcy Code that issue additional guidance on orders or actions within the authorization of the Bankruptcy Court, these are not explicit authorizations for a non-consensual third-party release. Without proper authorization from the Bankruptcy Code regarding whether the Bankruptcy Court can issue a decision on its merits, they have no authority to do so. The Plan may be within the authority of the bankruptcy court to hear, offer guidance and suggestion, or submit opinion to, but a broad release of current and future claims is not within the Court's authority to issue final rulings. Even if the Court followed the approach from *Metromedia* and held that non-consensual third-party releases are permissible in some circumstances, the third party merely agreeing to fund a creditor's trust is not an unusual circumstance justifying the approval of a non-consensual release for the third party's benefit.

**B. The bankruptcy court does not have jurisdictional or constitutional authority to release Ms. Rigby's claims.**

If this Court were to hold that non-consensual third-party releases were authorized by statute, there is still a substantial question of whether the Bankruptcy Court has proper jurisdiction to issue approval of the Plan's releases. And regardless of jurisdiction, the bankruptcy court will infringe Ms. Rigby's rights by ruling on a claim without due process in a bankruptcy proceeding where Strawberry Fields is not the debtor. Even if there is statutory authority for Bankruptcy Court to approve a non-consensual release of claims against a non-debtor, the bankruptcy court's authority begins when it has jurisdiction over the matter. The bankruptcy court's jurisdiction stems from the Bankruptcy Code itself; often argued in conjunction with 11 USC § 524(e) is 11 U.S.C. § 105(a) (2022), which gives the bankruptcy court authority to issue orders, processes, or judgements that are necessary or appropriate to carry out the provisions of the Bankruptcy Code. While some jurisdictions hold that a bankruptcy court can attempt to non-consensually release a plaintiff's claims based on the Code, it needs the proper jurisdiction to do so first, which is defined by 28 U.S.C § 1334(2022). With already limited jurisdiction, the bankruptcy court cannot release Ms. Rigby's claims without consent, because it limits her own constitutional right to bring the claims against a non-debtor.

There is sufficient case law showing that the bankruptcy court lacks jurisdiction to non-consensually release claims against third parties. But, as discussed by *In re Combustion Engineering, Inc.*, 391 F. 3d 190 (3d Cir. 2004), federal bankruptcy jurisdiction is defined by 28 U.S.C § 1334(b), which states that district courts have "original and exclusive jurisdiction of all cases under title 11, and original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." This is what is commonly referred to as the "related to" jurisdiction used by many courts. In *Combustion Engineering*, the issue was whether the court exercised this type of jurisdiction over the non-derivative asbestos claims against the non-debtors. The bankruptcy court found its jurisdiction as part of a § 105(a) analysis, based on a "unity of interest." But the court ultimately held that even if § 105(a) provides authority to approve release, it does not provide an independent source of federal subject matter jurisdiction – "related to" jurisdiction must exist independently of any plan provision purporting to involve or enjoin claims against non-debtors. *Id*. at 225. Further described in *In re Digital Impact, Inc.*, 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998)**,** the court found that it lacked jurisdiction to issue a third-party release because it was not related to the bankruptcy. The court held that the disputes between a non-debtor and creditor, interest holder, or anyone bound by confirmation of the plan are not cases that "arise under" Title 11, because neither party were debtors in the bankruptcy. *Id*. at 11.

Strawberry Fields, the non-debtor in this case, demanded a broad release from all claims, including both estate claims and third-party direct claims, without consent of the holders of those claims. R. at 8. Ms. Rigby's claim is against Strawberry Fields, which is not the debtor in the bankruptcy the Plan is meant to restructure. These claims are not related to the bankruptcy at issue in the lower court. The lower Court rests its decision on the on a broad federal bankruptcy jurisdiction, holding that it extends to third-party disputes that affect the estate, and impacts the debtor's restructuring options. This contradicts the Third Circuit's decision in *Combustion Engineering,* as the 13th Circuit admits to Ms. Rigby's claims being non-derivative against Strawberry Fields. R. at 12. The bankruptcy court's jurisdiction has to exist independently of any plan provision purporting to involve or enjoin these claims. See *In re Digital Impact, Inc*. at 14, While the restructuring plan of the Debtor in this case would be affected by the release of Ms. Rigby's claim, the bankruptcy court cannot rely on these affects to establish independent jurisdiction. Further, if proceedings over which the Court has no independent jurisdiction could be metamorphosized into proceedings within the Court's jurisdiction by simply including their release in the proposed plan, this court could acquire infinite jurisdiction." *Id*. at 11. Ms. Rigby's claim against Strawberry Fields cannot be released without proper jurisdiction by the bankruptcy court, which cannot rest in the Plan's implementation of releases.

### 1. "Related to" jurisdiction is not sufficient to show jurisdiction without proper consent of the parties.

Ms. Rigby's claim brought against Strawberry Fields is being released non-consensually despite the lack of independent jurisdiction of the bankruptcy court. As case law has evolved over time, many courts have held that the bankruptcy court's jurisdiction over claims stems directly from consent, regardless of whether specific subject matter or "related to" jurisdiction exists independently.

The United States Supreme Court specifically discusses this issue in *Stern v. Marshall*, 564 U.S. 462, (2011) – which has been widely used and cited among jurisdictional and constitutional arguments for the releases of claims as a result of Title 11 action in Bankruptcy Courts. In *Stern v. Marshall*, the bankruptcy court granted the Petitioner summary judgement on a defamation claim and awarded them millions in damages on a counterclaim. *Id*. at 470-471.The Court ultimately agreed that, with consent of all parties of the proceeding, referring the defamation claim, to the bankruptcy court for final judgement was permissible, rather than leaving it to the District Court as required by the Statute. *Id.* at 471-472.

The 13th Circuit Court holding, which would release Ms. Rigby's tort claim against Strawberry Fields because of Debtor's bankruptcy, relies on *Stern v. Marshall* by defining Ms. Rigby's claim as a "core matter." By defining her tort claim as such, the court is giving the bankruptcy court full jurisdiction to make decisions on claims that are, as described by *Stern*, arising out of, in, or relating to, the actions under Title 11. *Id*. at 473. But, as *Stern* suggests, these matters cannot be submitted to the bankruptcy court to render a final decision, versus the district court, without proper consent of the parties. *Id*. at 471-472. Additionally, the Court in *Stern* declined to define what is considered a personal injury tort in these context(s), because consent was given to the Bankruptcy Court by the opposing party to render a decision on the merits of a counterclaim. *Id*. at 480. For these reasons, the claim the Ms. Rigby brings against Strawberry Fields cannot be ruled upon by the bankruptcy court, and subsequently released, without consent of the parties, regardless of the specificity of the tort claim.

**2. "Related to" matters are not sufficient to show subject matter jurisdiction for bankruptcy court jurisdiction to approve releases as part of plans of reorganization.**

*In re Aegean Marine Petroleum Network, Inc.*, *et al*., 599 B.R. 717 (Bankr. S.D.N.Y. 2019), discusses the matter of in rem jurisdiction over claims brought against a third party. Additionally, the court questioned the idea that a bankruptcy court has broad subject matter jurisdiction over civil proceedings that are related to a bankruptcy case. *Id.* at 723. Giving bankruptcy courts broad subject matter jurisdiction over civil proceedings that are related to the bankruptcy case is useful when there are actual proceedings occurring. However, third-party releases are rarely issued when proceedings are pending, therefore the courts often attempt to exercise subject matter jurisdiction over a party's claim without a proceeding. *Id*. Additionally, the court concluded that exercising control over a debtor's assets or claims against those assets was a valid use of *in rem* jurisdiction. *Id*. But, as the court describes, this is not applicable to issue a ruling that extinguishes one non-debtor's claims against another non-debtor, because though the bankruptcy court may have subject matter jurisdiction over the claims based on the "related to" language of 11 U.S.C. § 157, the court does not have personal jurisdiction over the relevant parties. *Id*. at 723-725. A broad release of any third-party claim, either pending or to be brought in the future, raises a major constitutional question regarding due process, and a claimant's right to recovery.

The court in *Aegean Marine* also raised a number of policy concerns related to the exercising of a bankruptcy court's jurisdiction, especially in cases similar to Ms. Rigby's. The court discusses the "anomalous situation" where the beneficiary of the release, the non-debtor, receives more protection than they would in a bankruptcy case filed on their own behalf. *Id*. at 726. But, as the court mentions, it is inappropriate to discharge these claims through third party releases without full judicial process. *Id*. at 725. The court, in essence, is being asked to give unwritten authority under the statute to release these claims, where the statute itself bars these actions if the non-debtors were debtors filing for their own bankruptcy. *Id.* at 726. This court is in a similar position. If Strawberry Fields were to file its own bankruptcy, it would likely be ineligible for subchapter V based on the amount of current outstanding tort liability from the claims against it. 11 U.S.C. § 1182 (2022). In Chapter 11 reorganizations, creditors are represented by a committee and have input on an approval for the bankruptcy court's plan, and these committees are not created for subchapter V bankruptcies. 11 U.S.C. §1102 (2022). If the Plan is approved, along with the third-party releases, Strawberry Fields would reap benefits it would not be afforded in its own bankruptcy, and Ms. Rigby's claim would essentially be forcefully settled by a judge in a bankruptcy proceeding of an unrelated party.

It is not within the statutory authority of the bankruptcy court to discharge, or release claims, against the non-debtor. This is not only a jurisdictional issue, but a constitutional issue. Petitioner was not allowed the full legal process on her tort claim against Strawberry Fields, and according to the Court in *Aegean Marine*, her claim cannot, therefore, be released without her consent. *Id.* at 730. It is not within the bankruptcy court's jurisdiction, and the approval of the releases is therefore improper.

**3. Ms. Rigby has a constitutional right to bring the claims.**

Regardless of how the Court decides the jurisdictional issue, the releasing of claims without consent infringes upon a constitutionally protected right to assert claims, and a constitutionally protected right to litigate claims.  Non-consensually releasing claims without ruling on the merits would create an inability for Ms. Rigby to recover or continue her tort claim in the future. This would essentially destroy her constitutional right to sue an alleged tortfeasor responsible for a death of a loved one.

*Aegean* Marine discusses not just the jurisdictional issues that a bankruptcy court must face in approving a Plan containing non-consensual release(s), but constitutional issues surrounding releases without ruling on the merits of a claim. *Id*. at 725-726.The non-consensual release of claims in this case were binding, without consent from plaintiffs. Citing many Circuit Courts that do not approve non-consensual releases, and Courts that only approve in rare circumstances, the court in *Aegean Marine* continues with a lengthy discussion of history, jurisdiction, and constitutional authority and policy for why these non-consensual releases should not be approved. *Id*. at 721-730. While jurisdiction is a crucial issue for whether bankruptcy courts can issue releases, the court noted that, "even with jurisdiction by bankruptcy court to release claims, litigants have a right to assert claims so long as they meet pleading and Rule 11 standards." *Id*. at 725. The court discusses that imposing these releases infringes upon procedural and substantive rights that claimants would otherwise have. *Id*. at 726. "[T]he Supreme Court has held that two parties cannot, by agreement, dispose of claims that belong to a third party. Instead, a claim that belongs to a third party may only be resolved through litigation on the merits, or on terms to which the third party agrees." *Aegean Marine* at 725, citing *Local No. 93, Intern. Ass'n of Firefighters, AFl-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986).

The Court in *Aegean Marine* ultimately agrees with the decision in *Metromedia*, 416 F. 3d 136 (2d Cir. 2005), holding that non-consensual releases are only permissive in "rare" and "unusual" circumstances, and not to be granted unless barring a claim is important in order to accomplish a particular feature of the restructuring. *Aegean Marine,* 599 B.R. 717, 725 (Bankr.

S.D.N.Y. 2019), And while the releasing of claims is said to benefit the third-party, the court ultimately held, "a nondebtor release is not adequately supported by consideration simply because the nondebtor contributed something to the reorganization and the enjoined creditor took something out." *Metromedia*, 416 F. 3d 136, 143 (2d Cir. 2005). Commenting on its holding and emphasizing that releases are "not a merit badge in return for positive contribution to a restructuring…not a participation trophy…not a gold star for doing a good job…doing positive things in a restricting case – is not enough." *Aegean Marine*, 599 B.R. 717, 727 (Bankr. S.D.N.Y. 2019), By releasing claims of third parties, both courts in *Metromedia* and *Aegean Marine* agree that the bankruptcy courts can occasionally go too far and disregard plaintiff's rights and the court's jurisdiction by issuing third party releases.

As the court discussed in *Aegean Marine*, resolving claims held by third parties almost always requires resolution by ruling on the merits, or in terms which the parties agree. As both the 13th Circuit Court decision and Debtor agree, there was no ruling on the merits of Ms. Rigby's claim, and therefore she has a due process argument against releasing the claim. But ruling on the merits of her claim will not occur without proper due process if the Court allows the Debtor to implement the Plan and release her claim against Strawberry Fields entirely without her consent. As part of the plan, Strawberry Fields, Inc. is to pay over $100 million into the creditor trust, which will then be distributed to creditors with allowed claims to receive an estimated 30-40 cents on the dollar. R. at 8. Barring the $1 million tort claim that Ms. Rigby is bringing against Strawberry Fields is not integral in accomplishing the feature of the restructuring, especially if the non-consensual release of claims includes any future claims as well. This does not fit the standard set by the courts in *Aegean Marine* and *Metromedia*, which require a stronger showing of unusual circumstances to bar the claim, as well as the claim having a substantially detrimental effect on the Debtor's Plan for Reorganization should her claim remain active.

While the lower court in Ms. Rigby's case believes that the monetary contribution made by Strawberry Fields is highly unusual and complex enough to be deemed an extraordinary circumstance (citing that she would be paid more money anyway), these contributions do not afford Ms. Rigby the constitutional protection she is entitled to. R. at 8. The Bankruptcy Code grants no explicit authorization for the non-consensual release of third-party claims, and the court lacks jurisdiction to release Ms. Rigby's tort claim, because her claims are between two non-debtors. Regardless of whether the Bankruptcy court made its decision based on proper jurisdiction, the Constitution affords Ms. Rigby proper due process to have her claims heard and releasing her claim without consent is a violation of those rights.

## II. A CORPORATE DEBTOR SHALL NOT RECEIVE A COMPLETE DISCHARGE OF DEBTS UNDER SUBCHAPTER V OF CHAPTER 11 OF THE BANKRUPTCY CODE.

The Court of Appeals erred in affirming the bankruptcy court's decision to dismiss Ms. Rigby's non-dischargeability action. 11 U.S.C. § 1192(2) (2022) governs the reorganization of small businesses and the discharge of their debts. It provides in pertinent part:

> 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.

11 U.S.C. § 1192. The language of the statute is clear that when a plan is confirmed under 11 U.S.C. § 1191(b), the twenty-one kinds of debts that are excepted from discharge in § 523(a) of the Bankruptcy Code are applicable to discharges granted in cases under subchapter V.

In this case, Ms. Rigby's claims against the Debtor are non-dischargeable under § 523(a)(6) of the Bankruptcy Code which provides that any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is not dischargeable. 11 U.S.C § 523(a)(6). Ms. Rigby alleges that the Debtor knowingly disposed of industrial chemicals and pollutants at its manufacturing facility and in doing so it contaminated the grounds water supply. She asserts that the exposure to the pollutants dumbed by the Debtor gave her four-year-old daughter leukemia which ultimately led to her death.

**A. Section 1192(2) of the Bankruptcy Code incorporates only the list of debts of "kind" in 523(a) and not the "class" of debtors by 523(a).**

The court incorrectly ruled that the discharge exceptions in sections 1192 and 523 of the Bankruptcy Code do not apply to corporate debtors. R. at 7. When filing a Chapter 11 petition, the Debtor chose to proceed under subchapter V, and therefore its discharge of debts is specifically governed by §1192(2) of the Bankruptcy Code. The exceptions in § 523(a) apply to the § 1192(2) discharge provision which implies that the exceptions do apply to corporate debtors. While many of the claims against the Debtors may be dischargeable, Ms. Rigby's claims are not because those claims are based on the Debtor's willful and malicious conduct. 11. U.S.C. § 523(a) (2022).

The Debtor's argument that § 523(a) of the Bankruptcy Code only applies to individuals is flawed. The United States Court of Appeals for the Fourth Circuit has held that the language of § 1192(2) of the Bankruptcy Code excludes from discharge debts of the *kind* listed in 523(a), not the *type* of debtors. *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F. 4th 509, 512 (4th Cir. 2022). They held that if a corporate debtors plan of reorganization is approved, it may be non-dischargeable if one of the § 523(a) exceptions apply. *Id* at 513. The court discussed that treating § 523(a) as defining the class of debtors under § 1192 ran counter to § 1192's language and purpose, and that applying the § 523(a) exceptions to corporate debtors furthered fairness and equity. *Id*.

For example, Cleary Packaging was a corporation that filed for bankruptcy under subchapter V of Chapter 11 as a "small business debtor." *Id*. It sought to discharge a $4.7 million judgment owed to another corporation, Cantwell-Cleary. *Id*. Cantwell-Cleary had obtained the debt for the intentional interference with contracts and tortious interference with business relations. *Id*. They opposed the discharge effort and argued that corporate debtors are not entitled to discharge debts under § 1192(2) when a § 523(a) exception applies. *Id*.

The Fourth Circuit holds that § 1192 provides for the granting of debtors a discharge of all debts, subject to the twenty-one started exceptions. *Id*. § 1182(1) defined the term "debtor" to mean "a person engaged in commercial or business activities" that has debt of no more of $7.5 million. *Id*. at 514; 11 U.S.C § 1182(1) (2022). "Person" is defined under the Bankruptcy Code as both an individual and corporate debtor. 11 U.S.C. §101(41) (2022). Thus, the discharge language in § 1192(2) is to both individual and corporate debtors and to remain subject to the kinds of debt listed in §523(a). *Cleary Packaging*, 36 F. 4th 509, 514 (4th Cir. 2022). The court concluded, based on the text of § 1192, that all subchapter V debtors are subject to the discharge limitations described in § 523(a), not just individual debtors. *Id* at 517. They explain that "to make this distinction between individuals and corporations for how Subchapter V is applied would not only undermine the balance but would also make no sense and indeed would create perverse incentives." *Id*.

Thus, if Ms. Rigby's can prove the Debtor's conduct was tortious, her claims shall be non-dischargeable under the plan pursuant to § 523(a)(6). § 1192(2) excludes discharge debts of the *kind* listed in § 523(a) for the debtor, even though they are a corporation. The § 523(a) exception does not allow the corporate debtor to hide behind the Bankruptcy Code and get away with tortious conduct.

**B. The more specific provision within the Bankruptcy Code, § 1192(2), governs the more general, § 523(a).**

The lower courts erred in ruling that the § 523(a) exceptions do not apply to corporations because they interpreted the statutes in the wrong way. When looking at statutory provisions, the more specific provision will always govern the more general. *Sw. Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc.* (*In re Breezy Farms, Inc.*) 2009 Bankr. LEXIS 1396 (Bankr. M.D. Ga. 2009). In this case, § 1192(2) is the more specific provision because it governs only subchapter V cases while § 523(a) is used as exceptions to all of the Bankruptcy Code. Courts have relied on canons of statutory interpretation to provide guidance on understanding the intention behind a statutory provision. *Morales v. Trans World Airlines, Inc.*, *504* U.S. 374 (1992).

The Supreme Court held in *RadLAX Gateway Hotel, LLC v. Amalgama Bank* that when two statutory provisions have a gap in the language, the more specific controls. 566 U.S. 639 (2012). The Court's reasoning is that "where general and specific authorizations exist side by side, the general/specific canon avoids rendering superfluous a specific provision that is swallowed by the general one." *Id*. at 645. As applied to § 1192(2), the canon provides that the general language of § 523(a) will not govern the specific chapters of the Bankruptcy Code. Therefore because § 1192(2) is applicable to only subchapter V cases and § 523(a) is applicable to all of the bankruptcy chapters, § 1192(a) governs. Regardless of whether the debtor is a corporation or an individual, their claims are non-dischargeable if Ms. Rigby is able to prove her tortious claim under § 523(a)(6).

In *Sw. Ga. Farm Credit, ACA,* a corporate debtor filed a voluntary petition under Chapter 12 of the Bankruptcy Code. 2009 Bankr. LEXIS 1396 (Bankr. M.D. Ga. 2009). The plaintiff-creditor filed a complaint alleging non-dischargeability of certain debts pursuant to § 523(a). Id. The debtor in that case filed a motion to dismiss the claim alleging that a Chapter 12 corporation cannot be excepted from discharge because § 523(a) should only apply to individuals. *Id*. The United States Bankruptcy Court for the Middle District of Georgia denied the motion and held that "although 523(a) applies to only individuals, Congress used it as a shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation." *Id*. Although the two provisions cannot be harmonized, the Chapter 12 provision is more specific because it is only applicable in Chapter 12, while § 523(a) applies regardless of chapter. *Id*.

Notably, the Chapter 12 discharge provision, § 1228, contains substantially the same language as § 1192. § 523(a) applies to all the bankruptcy chapters and its language refers to sections 1228 and 1192 in the same way. § 523(a) states "a discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title, does not discharge…" 11 U.S.C. § 523(a). There are two bankruptcy opinions that have held 523(a) exceptions are applicable to a § 1228 discharge of a corporation. *Sw. Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc.* (*In re Breezy Ridge Farms, Inc.*) 2009 Bankr. LEXIS 1396 (Bankr. M.D. Ga. 2009); *New Venture P'ship v. JRB Consol.* (I*n re JRB Consol., Inc.*), 188 B.R. 373 (Bankr. W.D. Tex. 1995). Those two opinions were announced at the time subchapter V was enacted and courts have recognized that several aspects of subchapter V are premised on the provisions of Chapter 12 of the Bankruptcy Code. *In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020).

Additionally, the structure of the Bankruptcy Code supports this interpretation. For example, Chapter 7 discharges are explicitly limited to individuals. 11 U.S.C. § 727(a)(1). As to regular Chapter 11 cases, Congress explicitly distinguished the discharges of individual debtors from the discharge of corporate debtors in § 1141(d). Unlike § 1192 which does not limit the applicability of § 523(a) exceptions to individuals, § 1141(d)(2) makes the exceptions applicable after a consensual confirmation only to an individual. Congress clearly intended to limit the scope of § 1141 to individuals' debtors. Therefore, if Congress intended to limit the scope of § 1192 to individuals, they would have made that intent clear as they did in the traditional Chapter 11 cases. *Cantwell-Cleary Co*., 36 F 4th 509, 516 (4th Cir. 2022).

Thus, Congress intended for corporate debtors under subchapter V to be a kind of class subject to the exceptions under § 523(a) because of the timing of enactment and its similarities to Chapter 12 provisions. The Bankruptcy Code has many conflicting provisions between the chapters, such as the inconsistency between § 1192(2) and § 523(a), but it always allows for the more specific provisions to govern the more general. The Court should reverse the lower court's decision and find that the § 523(a) exceptions do apply to corporate debtors under subchapter V.

**C. The Congressional intention of enacting subchapter V into the Chapter 11 Bankruptcy Code was to protect small business debtors.**

Finally, the lower court's ruling should be reversed because the intention behind enacting subchapter V is aimed at small business debtors and the § 523(a) exceptions must be used to protect creditors. The parties have stipulated that the debtor is a "small business debtor" eligible for relief under subchapter V because it satisfies the requirements set forth in § 1182. § 1182 holds pertinent in part:

> (1) Debtor. The term "debtor"—
> (A) subject to subparagraph (B), means a person engaged in commercial or business activities… that has aggregate noncontingent liquated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,000,000… not less than 50 percent of which arose from the commercial or business activities of the debtor.

11 U.S.C. §1182 (2022). It is important to acknowledge that the debtor in this case is a small business debtor. R. at 6, n5. The entire reasoning for subchapter V is for the reorganization of small businesses. Small businesses are an important economic asset to America and only 20 percent of them usually survive. In 2019, Congress became concerned that Chapter 11 was too expensive for small businesses. They were concerned that the bankruptcy system was punishing entrepreneurship by foreclosing small businesses leaving them with no way to overcome their financial hardships. Therefore, they enacted subchapter V which created an expedited process for the reorganization of small businesses. Small Business Reorganization Act of 2019, H.R. 3311, 116th Cong. §1192 (2019).

There are many differences between a regular Chapter 11 case and a subchapter V Chapter 11 case. In a traditional Chapter 11 case, a written disclosure statement and a plan of reorganization must be filed with the court. 11 U.S.C. § 1121, § 1125. Creditors whose claims are "impaired" must vote on the plan by ballot. 11. U.S.C. § 1126. After the disclosure statement is approved by the court and the ballots are collected, the court will conduct a confirmation hearing to determine whether to confirm the plan. 11 U.S.C. § 1128. The absolute priority rule also applies in traditional cases. The rule provides that existing equity of a debtor may not retain their equity over the objection of a class of unsecured creditors. Under this rule, no class may participate distribution unless all classes with superior priority are paid in full. *In re CRB Partners, LLC*, 2013 Bankr. LEXIS 800 at 11 (Bankr. W.D. Tex. 2013)

In a subchapter V case, the plan of reorganization does not need creditors support and the absolute priority rule is eliminated. 11. U.S. C. § 1191. Instead, as long as a debtor contributes its "disposable income" for a period of three-to-five years, it can confirm a plan, and old equity holders can retain their equity interest. 11 U.S.C. § 1191(c). The elimination of the absolute priority rule is extremely beneficial to small business debtors like the one in this case.

Consequently, for creditors, this allows businesses to abuse the bankruptcy process and get a discharge without having to overcome many obstacles. In response to this concern, Congress enacted § 1192(2) because they recognized that there was a gap in the Bankruptcy Code. They acknowledged that the process was designed for large, complex corporations and did not include adequate protections or safeguards for small businesses. United States Courts, *Chapter 11- Bankruptcy Basics*, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics. Therefore, if Congress wanted to protect against the abuse within the system, they likely intended for the § 523(a) exceptions to apply to corporate/small business debtors as well.

Creditors like Ms. Rigby are left with very few options because of these changes between traditional Chapter 11 and subchapter V cases. Congress enacted subchapter V to create more opportunities. The Bankruptcy Code is designed to create an even playing field between creditors and debtors. The goal of Chapter 11 is to grant debtor relief from burdensome debts while also protecting creditors by requiring the debtor to pay debts. United States Courts, *Chapter 11- Bankruptcy Basics*, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics. Therefore, it is likely Congress did not enact the statute only to benefit debtors but also to protect creditors.

Since subchapter V debtors are able to obtain confirmation of plans easily and reorganize via non-consensual plans, there should be a safeguard put in place to protect creditors, such as the § 523(a) exceptions. For the protection to be beneficial to creditors, the exceptions must apply to corporations as well as individuals.

In this case, the small business debtor benefits by filing for bankruptcy under subchapter V instead of under the traditional bankruptcy rules. The absolute priority rule does not apply, and they do not have to have a consensual plan of reorganization. However, now Ms. Rigby does not have access to as many tools to challenge the confirmation of a plan. More specifically, Mrs. Rigsby should have the opportunity to argue that the amounts owed to her are non-dischargeable pursuant to § 523(a)(6), which excepts from discharge any willful and malicious injury done to her property by the debtor.

If the Court does not find that the exceptions apply to business debtors as well as individuals, small business debtors will be able to get away with not only tortious conduct, but all twenty-one exceptions that are listed in the provision.

## Conclusion

For the foregoing reasons, the Court should vacate the court of appeals' judgment and remand for further proceedings.

Respectfully submitted.

Team 51,

Counsel for Petitioner

# APPENDIX A

St. John's University School of Law

31st Annual
Duberstein Bankruptcy
Moot Court Competition
Saturday, March 4, 2023
through Monday, March 6, 2023

American Bankruptcy Institute

# Competition Problem

## 31st Annual
## Duberstein Bankruptcy
## Moot Court Competition

## March 4, 2023 – March 6, 2023

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.

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

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 a chapter 11 plan of reorganization.

2. Whether a corporate debtor proceeding under subchapter V of chapter 11 of the Bankruptcy Code may, pursuant to 11 U.S.C. § 1192, discharge debts of types specified in subparagraphs (1) through (19) of 11 U.S.C. § 523(a).

Written by Paul R. Hage and G. Ray Warner. Paul Hage is a Partner at Taft, Stettinius & Hollister, LLP in Detroit, Michigan. Ray Warner is a Professor of Law at St. John's University School of Law in Queens, New York. The authors express no opinion on the issues presented herein.

This problem may not be used or reproduced without the consent of the authors for any purpose other than the Duberstein Bankruptcy Moot Court Competition.

Recommended for Full Text Publication

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRTEENTH CIRCUIT**

ELEANOR RIGBY,
APPELLANT,

CASE NO. 21-0803

V.

PENNY LANE INDUSTRIES, INC.,
APPELLEE.

Direct Appeal from the United States
Bankruptcy Court for the District of Moot

Decided: March 7, 2022

Before: Harrison, Lennon and McCartney, Circuit Judges

**OPINION**

**Harrison, Circuit Judge:**

This is a mass tort chapter 11 case. It involves allegations that Penny Lane Industries, Inc. (the "Debtor") knowingly disposed of environmental pollutants on the property of its manufacturing facility located in the City of Blackbird, Moot and, in doing so, contaminated the area's ground water supply. Creditors, consisting primarily of residents of Blackbird and the neighboring communities, assert that they have suffered death and serious injuries due to the alleged conduct of the Debtor.

The Debtor filed this case under subchapter V of chapter 11 of the Bankruptcy Code[1] to deal with a veritable tsunami of litigation related to such allegations. Months of post-petition

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

mediation resulted in the filing by the Debtor of a nearly consensual *Plan of Reorganization* (the "Plan"), which provides for the creation of a creditors' trust that will make a substantial distribution to creditors. Such distribution was funded in large part by the Debtor's corporate parent, Strawberry Fields Foods, Inc. ("Strawberry Fields"). The funds did not come without strings though. In addition to a discharge of all claims against the Debtor, the Plan contemplates broad non-consensual releases of claims held by the Debtor and by third parties against Strawberry Fields.

Given what is at stake, it is not surprising that creditors have strong, albeit differing, opinions about how this case should be resolved. The appellant in this appeal, Eleanor Rigby, filed a complaint seeking a determination that her claim against the Debtor is non-dischargeable pursuant to sections 523(a)(6) and 1192. Ms. Rigby also objected to confirmation of the Plan, arguing that bankruptcy courts do not have authority to release third-party claims against non-debtor entities and, therefore, she should be able to pursue her direct claims against Strawberry Fields notwithstanding any bankruptcy discharge that the Debtor might obtain.

The Bankruptcy Court for the District of Moot dismissed Ms. Rigby's non-dischargeability action, concluding that the provisions of section 523 apply only in cases where the Debtor is an individual. The court also overruled Ms. Rigby's objection to the Plan, holding that it had authority to approve the releases contained therein. Ms. Rigby timely appealed both determinations. Having considered the compelling arguments of the parties, we affirm the bankruptcy court on both issues.

## Factual Background and Procedural History

The Debtor's long and winding road into bankruptcy started years before the commencement of this case. Based in the City of Blackbird, Moot, the Debtor is a manufacturer of plastic, glass and metal food containers. The Debtor is a wholly owned subsidiary of Strawberry

Fields, a company that produces cereal and convenience foods and markets its products under several well-known brands sold in supermarkets throughout the country.

As noted, this case involves allegations that the Debtor knowingly disposed of industrial chemicals and pollutants at its manufacturing facility in Blackbird and, in doing so, contaminated the area's ground water supply. While the source of the contamination has not been conclusively determined, Federal and State authorities have determined that a sizable groundwater plume exists under the community of Blackbird.[2] Studies conducted by the United States Environmental Protection Agency and the Centers for Disease Control and Prevention have shown that, during the years 2013 through 2017, tens of thousands of local residents drank and bathed in water contaminated with toxins at concentrations 250 to 3,000 times the permitted level. Tragically, exposure to such toxins has been linked to sickness, birth defects and even death.

In 2017, Ms. Rigby, a resident of Blackbird since 1982, 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. Ms. Rigby alleged that, for many years, the Debtor disposed of pollutants on its property as a cost saving measure, and that such pollutants made their way into the Liverpool River, which runs along the rear of the Debtor's property. Ms. Rigby further alleged that the Debtor's then Chief Executive Officer, Maxwell S. Hammer ("Hammer"),[3] was aware as early as 2014 that waste that the Debtor was disposing on its property had contaminated the community's water supply and could cause potentially serious injury to local residents. Finally,

[2] A groundwater plume is created when hazardous substances, pollutants or contaminants are present within an aquifer system. A plume of contaminated ground water may be formed when substances are released into ground water from above the surface. The contaminated plume can spread horizontally, vertically, and transversely through the aquifer system by means of infiltration, migration, interaquifer exchange, and interaction with surface water. This movement of contaminants throughout an aquifer usually, but not always, occurs in the direction of ground water flow.

[3] Mr. Hammer retired from the Debtor in 2016 and passed away in 2017.

Ms. Rigby alleges that Strawberry Fields is liable as well because, among other theories, it knew, or should have known, of its subsidiary's alleged misconduct.

Hundreds of similar lawsuits were subsequently filed against the Debtor by residents of Blackbird and the surrounding communities. Each of these lawsuits asserted damages related to death or injury caused by exposure to pollutants that had contaminated the local water supply. Many of the lawsuits named Strawberry Fields as a co-defendant.

The allegations set forth in these suits are disputed by the Debtor and Strawberry Fields. They assert that any waste dumped on the Debtor's property was disposed of in accordance with the applicable environmental laws and regulations that existed at the time. They deny having any knowledge that such waste allegedly infiltrated the groundwater supply. Finally, they assert that there is insufficient evidence to link the pollutants found in the water supply to any waste disposed by the Debtor, noting that there are dozens of other businesses with manufacturing facilities located upstream along the Liverpool River. No judicial determination has yet been made regarding the claims asserted against the Debtor or Strawberry Fields in any forum.

Facing mounting lawsuits, the Debtor filed this subchapter V chapter 11 case on January 11, 2021.[4] The Debtor owes less than $2 million to its trade creditors. Substantially all of the claims in this case are disputed, unliquidated tort claims related to the alleged dumping of pollutants. In total, nearly 10,000 claims asserting cumulative damages of nearly $400 million were filed.[5] Ms. Rigby filed an unsecured claim against the Debtor in the amount of $1 million.

[4] Strawberry Fields is not a debtor in this case and has not itself filed a petition for relief under the Bankruptcy Code.

[5] Despite the sizable number and amount of claims asserted against the Debtor, the parties have stipulated that the Debtor is a "small business debtor" eligible for relief under subchapter V because its "aggregate noncontingent liquidated" debts were less than $7.5 million on the petition date and because it otherwise satisfies the requirements for a small business debtor set forth in section 1182.

To date, no objection to Ms. Rigby's claim has been filed.[6] Pending the filing of any objection, such claim is deemed allowed under applicable bankruptcy law. *See* 11 U.S.C. § 502.

**A. The Non-dischargeability Action Dispute**

Within weeks of the petition date, Ms. Rigby commenced an adversary proceeding against the Debtor seeking to have her $1 million claim deemed non-dischargeable pursuant to sections 523(a) and 1192(2). In her complaint, Ms. Rigby asserted that the amounts allegedly owed to her are non-dischargeable pursuant to section 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."

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. The Debtor argued that the non-dischargeability provisions of section 523(a) are not applicable to business entities. The bankruptcy court ruled in favor of the Debtor, holding that the exceptions to discharge in section 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. The bankruptcy court granted the Debtor's motion to dismiss the adversary proceeding. Ms. Rigby timely filed a notice of appeal.

**B. The Plan Dispute**

Upon the commencement of this bankruptcy case, the automatic stay set forth in section 362(a) automatically stayed the commencement or continuation of all non-bankruptcy litigation against the Debtor. However, pending litigation against Strawberry Fields and other non-debtors was not automatically stayed. As such, shortly after the petition date, the Debtor sought and obtained a temporary injunction from the bankruptcy court halting all actions against the Debtor's

[6] Under the Plan, the claims resolution process was deferred until post-confirmation.

"current and former owners, officers, directors, employees and associated entities" related to the alleged conduct of the Debtor. As a result, all of the pending litigation, including litigation against Strawberry Fields, was temporarily stayed. The bankruptcy court concluded that such a temporary injunction was appropriate to facilitate negotiation of a global settlement by the Debtor, Strawberry Fields and a number of ad hoc creditor groups in mediation. The expiration date of the injunction has been extended several times while mediated negotiations, and this litigation, continued.

Through over two months of mediation, several stakeholders negotiated a complex settlement framework that was ultimately memorialized in the Plan.[7] 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) far more significantly, $100 million to be paid by Strawberry Fields. It is anticipated that such trust will result in creditors with allowed claims receiving a significant distribution (estimated at 30-40 cents on the dollar).

In exchange for funding the global settlement, Strawberry Fields demanded a broad release from all claims, including both estate claims and third-party direct claims.[8] Relevant to this appeal, 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." The Plan release is non-consensual; it binds parties regardless of whether they participated in the bankruptcy case and regardless of whether they voted in favor of, or against, the Plan. In summary, if the Plan is

[7] Ms. Rigby participated in the mediation process but did not join in the settlement reached therein.

[8] Direct claims are particularized claims that assert that a defendant harmed the claimant directly. Derivative claims, on the other hand, are claims that a debtor's estate could bring against a defendant, which may have indirectly caused harm to claimants. In bankruptcy, derivative claims become assets of the bankruptcy estate, 11 U.S.C. § 541(a), and, thus, cannot be pursued independently by a debtor's shareholders or creditors.

confirmed, parties will be precluded from pursuing claims against Strawberry Fields related to the Debtor's pre-petition conduct. Rather, their claims will be channeled into the creditors' trust.

Undeterred by the releases, the class of unsecured creditors overwhelmingly supported the Plan. Indeed, over 95 percent of the creditors who submitted ballots voted in favor of confirmation of the Plan. Nevertheless, two notable objections to confirmation were filed. First, Ms. 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.

Second, an objection to the Plan was filed by Norwegian Wood Bank (the "Bank"), a secured creditor who was separately classified from other creditors under the Plan. *See* 11 U.S.C. §§ 1122(a), 1123(a). The Bank is owed approximately $3.5 million and holds a first priority security interest on the Debtor's manufacturing equipment. The Bank's claim was bifurcated under the Plan pursuant to section 506(a)(1). The Debtor valued the Bank's collateral at $1.5 million and proposed to grant the Bank an allowed secured claim in that amount, which claim would be secured post-confirmation by a continuing lien on the collateral and would be paid in full over a period of five years. The balance of the Bank's claim, $2 million, would be treated as an unsecured claim, and would be paid *pari passu* from the creditors' trust with other unsecured creditors. The Bank objected to the Plan, arguing that the value of its collateral was understated and, thus, the Plan was not "fair and equitable" as required by sections 1191(b) and 1129(b)(2)(A).[9]

[9] Because the Bank, who was necessarily separately classified under the Plan, voted against the Plan, the Debtor was unable to satisfy the requirements for confirmation of a consensual plan in section 1191(a), which requires satisfaction of various traditional chapter 11 plan confirmation requirements including, but not limited to, section 1129(a)(8) (requiring that each class of impaired claims has accepted the plan). In such cases, a debtor must seek confirmation of a non-consensual plan by utilizing the subchapter V "cramdown provisions" set forth in section 1191(b). That subsection provides, in pertinent part, that a plan can be confirmed notwithstanding the lack of acceptance by each class of impaired claims if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims … that is impaired under, and has not accepted, the plan." For a plan to be "fair and equitable" with respect to a secured claim, such as the Bank's secured claim, it must satisfy the confirmation requirements of section 1129(b)(2)(A).

After a four-day confirmation hearing, the bankruptcy court confirmed the Plan. With respect to Ms. Rigby's plan objection, the court acknowledged that non-consensual releases of third-party direct claims, such as the releases granted to Strawberry Fields, are permitted only in extraordinary cases. In the bankruptcy court's view, the present case fits that bill. The court noted the highly unusual and complex nature of the case, the significant monetary contribution being made by Strawberry Fields which resulted in a meaningful distribution to creditors, and the overwhelming creditor support for the Plan. The court found that the proposed distribution under the Plan is substantially greater than what creditors would receive if the Debtor was liquidated under chapter 7. Regarding the claims against Strawberry Fields, the court made detailed findings about the probability of success and collectability of any judgment that would be obtained. The court found that the $100 million contribution was substantially greater than any likely recovery from Strawberry Fields, representing a premium paid by Strawberry Fields to "buy peace" and avoid the negative publicity and reputational damage of further litigation.

The court found that "there existed no other reasonably conceivable means to achieve the result accomplished by the Plan" and, therefore, the settlements memorialized therein (including the releases) were fair and reasonable. Finally, the court reasoned that the failure to approve the settlement would likely result in complex and protracted litigation, with attendant risk, cost and delay, whereas the mediated settlement reflected in the Plan offered a significant and immediate benefit to creditors. Thus, the court overruled Ms. Rigby's plan objection.

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 sections 1129(b)(2)(A) and 1191.[10]

[10] The Bank did not appeal the bankruptcy court's confirmation order and, thus, the court's determination with respect to the Bank's objection will not be addressed herein.

Having overruled both objections, the bankruptcy court confirmed the Plan, albeit with some apparent reluctance. The court stated that, in her view, the result in this case is "an extremely difficult pill to swallow," because the proposed distribution to creditors, while meaningful, could never compensate victims for the significant pain and suffering associated with the serious injuries, and even deaths, allegedly caused by the conduct of the Debtor and its parent.

Ms. Rigby timely appealed both of the bankruptcy court's rulings.[11] Upon the request of the parties, the disputes were certified for direct appeal to this court pursuant to 28 U.S.C. § 158(d) and, thereafter, consolidated in this appeal.

## Discussion

### I. Legal Standard

The parties do not dispute the facts as set forth herein. Rather, the issues that we address in this appeal involve questions of law. Thus, our review is *de novo*. *See, e.g.*, *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Under a *de novo* standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter. *See, e.g.*, *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

### II. Third-Party Releases May Be Included in Chapter 11 Plans

Chapter 11 is about maximizing the recoveries of creditors and preserving viable businesses. That is exactly what happened here. Ms. Rigby does not challenge the factual findings below, so the court can take as a given that she and all other tort claimants are receiving more under the Plan than they would otherwise be able to recover by prosecuting their claims against the Debtor and Strawberry Fields to conclusion. Beyond the quantum of recovery, the Plan ensures

[11] The parties stipulated to stay the effective date of the Plan pending resolution of these appeals in order to avoid the arguable application of the doctrine of equitable mootness. *See, e.g., Ochadleus v. City of Detroit, Michigan (In re City of Detroit, Michigan)*, 838 F.3d 792 (6th Cir. 2016).

that the claimants will receive compensation promptly, with none of the risk, delay, and expense attendant to pursuing litigation against multiple defendants. Further, the Plan allows the Debtor to continue its manufacturing business, thereby preserving substantial jobs in the local community. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."). The alternative, chapter 7 liquidation, would result in one more closed factory along the banks of the Liverpool River and shutter a major employer in the already economically challenged Blackbird community. Nothing in the Constitution or the Bankruptcy Code precludes such an efficient and beneficial global resolution of a mass tort environmental disaster that leaves all stakeholders, including Ms. Rigby, better off.

Ms. Rigby raises a number of challenges to the bankruptcy court's confirmation order. Several relate to the bankruptcy court's jurisdiction or its authority to issue a final order confirming a plan that resolves Ms. Rigby's claim against Strawberry Fields, a dispute between two non-debtor entities. These are easily disposed of. First, the federal bankruptcy jurisdiction is broad and extends to third-party disputes like this one that affect the estate and impact the debtor's restructuring options. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). While Ms. Rigby's claim against Strawberry Fields is based on its alleged failings and is not solely derivative of her claim against the Debtor, the gravamen of the claims is the Debtor's alleged conduct, for which Strawberry Fields likely would have contribution and indemnification rights against the Debtor. *See SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 340 (2d Cir. 2018).

Additionally, the bankruptcy court had both statutory and constitutional authority to issue a final order confirming a plan with a third-party injunction because such a confirmation order is not only a core matter, but also a fundamental central aspect of this chapter 11 case's adjustment of the debtor creditor relationship under *Stern v. Marshall*, 564 U.S. 462 (2011). *See, e.g., In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019). Finally, Ms. Rigby's jury trial and due process challenges rest on her incorrect assertion that the bankruptcy court adjudicated her claim against Strawberry Fields. The court made no ruling on the merits of her claim, but merely approved the global settlement that channeled the claims and the settlement funds to the creditors' trust. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91-92 (2d Cir. 1988).

Ms. Rigby does not ask us to measure the proposed injunction against any of the oft-stated standards of appropriateness, exceptionalness or necessity.[12] Her challenge, and the question before us today, is more fundamental. She asserts that, outside of the asbestos context, non-consensual releases of third-party claims can never be included in a chapter 11 plan. We disagree.

Although our circuit has not yet had an occasion to address this issue, almost every other circuit has, and the clear majority permit third-party releases in a chapter 11 plan in appropriate, narrow circumstances. *See, e.g., Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141 (2d. Cir. 2005)[13]; *In re Millennium Lab Holdings II, LLC*, 945 F.3d at 133-40; *In re Dow Corning Corp.*, 280 F.3d 648, 656-58 (6th Cir. 2002); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070, 1076-79 (11th Cir. 2015).

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[12] The dissent focuses on hypotheticals that could arise only if the "exceptional circumstances" requirement were disregarded. It ignores the most common and appropriate use of the global settlement mechanism, to pool all available insurance proceeds for equitable distribution through a chapter 11 plan, an approach the dissent's *per se* rule would prohibit. We are not required to victimize innocent claimants a second time by relegating them to the wastefully expensive, untimely, and unfair resolutions that would otherwise occur in a multiplicity of separate actions against the insurers where the available proceeds would be exhausted by the earliest judgments, leaving nothing for later-litigated or later-arising claims.

[13] We note that, as of this writing, this issue is again before the Second Circuit in the pending appeal from the order confirming a plan that included a third-party injunction. *See In re Purdue Pharma, L.P.*, No. 22-110-bk *et al*. (2d Cir. *appeal docketed* Jan. 18, 2022).

The essence of chapter 11 is its flexibility. Designed to apply to the entire spectrum of businesses and to address the wide range of business and financial problems they might face; chapter 11 does not shoehorn debtors into a single rigid restructuring model but instead leaves the plan design up to the debtor and its creditors. Can a chapter 11 plan include a provision like the global settlement provisions in this case that channel both the assets of third parties and the claims against them into a creditors' trust? One would expect the answer to be found in the section of the Bankruptcy Code that specifies which provisions must or can be included in a plan -- and it is. In addition to listing several common provisions that are permitted in plans, section 1123(b) states that "a plan may … include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Statutory authority for including any imaginable provision in a plan could not be clearer. Only two limitations apply. The first, appropriateness, goes to the standard applied to global settlement provisions and is not at issue here. Thus, the only restriction on the type of provision permitted is that it not be inconsistent with other Bankruptcy Code provisions, a point we will address shortly.

Further authority for the global settlement included in the Plan comes from the section 1123(a)(5) requirement that a plan "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Since the global settlement feature is permitted in the Plan, section 1123(a)(5) not only authorizes, but requires, the inclusion of provisions such as the releases and the channeling injunction that are crucial to securing the Strawberry Fields contribution that is necessary for the Plan's implementation. Further statutory authority for such provisions comes from section 105(a), which authorizes the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Thus, bankruptcy courts have broad equitable powers to approve settlements containing releases and injunctions, such as the global settlement here. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) ("[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.").

Against these clear grants of broad statutory authority, Ms. Rigby cites no provision of the Bankruptcy Code that prohibits releases or channeling injunctions or is incompatible with them. She relies on section 524(e), but that section is merely a savings clause clarifying that the debtor's discharge does not *by itself* discharge claims of others. "524(e) says nothing about the authority of the bankruptcy court to release a nondebtor from a creditor's claims." *Seaside Eng'g*, 780 F.3d at 1078. Had Congress meant to limit the powers of bankruptcy courts, it would have done so clearly. *Airadigm Comm's., Inc. v. F.C.C. (In re Airadigm Comm's., Inc.)*, 519 F.3d 640, 656 (7th Cir. 2008). Ms. Rigby's reading of section 524(e) is also inconsistent with section 524 as a whole. Section 524(g), which sets forth special rules for third-party releases in plans involving asbestos liabilities, is not an exception to section 524(e) but instead imposes additional requirements on asbestos-related releases. Further both section 524(h), which applies to already confirmed asbestos plans, and the statute's legislative history negate any argument that the addition of asbestos-specific provisions infers that third-party injunctions were not previously permissible.[14]

## III. The Section 523(a) Exceptions to Discharge Apply Only to Individual Debtors

We also reject Ms. Rigby's assertion that corporate debtors do not receive a complete discharge in subchapter V under a non-consensual plan. Humans and corporations are treated very differently under the Bankruptcy Code. Nowhere is that distinction clearer than in the Bankruptcy Code's discharge provisions. The justification for discharge, its effect and its implications are very different for humans than for artificial entities.

[14] The House Report specifically states, "[T]he special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization." H.R. Rep. No. 103-834 (1994). The dissent conveniently ignores this express rejection of its concocted conclusion that Congress "believed" it was creating an exception to section 524(e).

To understand how discharge works in the Bankruptcy Code, it is, perhaps, best to start by looking at chapter 7's discharge provisions. No debts of a corporation are discharged in a chapter 7 case, but most debts of an individual are. *See* 11 U.S.C. § 727(a)(1). Although broad, the individual's chapter 7 discharge is not complete. Various categories of debt are excepted from the discharge under section 523(a). This section excludes from discharge debts arising from the debtor's bad acts and, thus, reflects the traditional human-focused justification for the discharge – to "relieve the *honest debtor* from the weight of oppressive indebtedness." *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 550 (1915) (emphasis added).[15] At least seven of the categories can only apply to humans. *See, e.g.*, 11 U.S.C. §§ 523(a)(5), (15) (domestic support obligations and marital property settlements). These differences reflect fundamental differences between humans and corporations. A corporation is merely an aggregation of assets and needs no discharge following its liquidation in chapter 7. A human lives on and needs a fresh start, but unlike a corporation, has moral agency and should remain responsible for some past conduct.

Conversely, the focus of chapter 11 is reorganization – continuation of the business and the restructuring of its debt. While chapter 11 can be used by individual debtors, the discharge considerations for individuals do not change in chapter 11 and neither does the scope of their discharge. *See* 11 U.S.C. § 1141(d)(2). For corporations, the situation is reversed, and a virtually complete discharge is granted. 11 U.S.C. § 1141. This is driven not by the human-focused fresh start policy but, rather, by the realities of corporate reorganization. In enacting the Bankruptcy Code, Congress rejected prior law and made a carefully considered decision to grant corporations a complete discharge in chapter 11. *See* Ralph Brubaker, *Taking Exception to the New Corporate*

[15] Other moral failings of the individual debtor might lead to a complete denial of discharge. *See* 11 U.S.C. §§ 727(a)(2), (3), (4), (5), (6), (7), (12).

*Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757, 764–66 (2005). This is because viable corporations simply could not be restructured under the prior law if significant non-dischargeable debts remained after confirmation waiting to strike a death blow as soon as the reorganized company emerged from bankruptcy.[16] Further, unlike the case of a human debtor, where an exception to discharge prevents the individual from escaping responsibility for their moral agency, discharge exceptions in corporate cases simply shift the burden onto other innocent creditors – essentially prioritizing the non-dischargeable claim over all others. Only once has Congress deviated from the complete corporate discharge principle, and then only after 8 years of consideration. *See* 11 U.S.C. § 1141(a)(6). Further, Congress expressed that intent in clear and unmistakable language - "confirmation of a plan does not discharge a debtor *that is a corporation* from any debt [with specified characteristics]." *Id.* (emphasis added).

Against this backdrop, Ms. Rigby asks us to conclude that ambiguous cross-references in the recently enacted section 1192(2) and in section 523(a) demonstrate that Congress intended to reject a half century of settled doctrine and silently add approximately two dozen new categories of non-dischargeable debts for chapter 11 debtors in subchapter V cases.[17] The referenced statutory provisions simply cannot bear that weight.

Statutory construction is arduous work. As faithful agents of the legislature, the courts' fundamental objective is to determine and carry out the intent of Congress. Where the statutory language is susceptible of only one reasonable reading, our task is done. Unfortunately, the

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[16] A liquidating corporate chapter 11 does not present this problem so no discharge is available. 11 U.S.C. § 1141(d)(3).

[17] For an overview of subchapter V of the Bankruptcy Code, *see generally*, Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* (2020) (updated 2022), *available at* https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

relationship between sections 1192(2) and 523(a) is not clear[18] and the text supports two reasonable readings that lead to opposite conclusions. The reported opinions on both sides of this question rely primarily on a textualist or plain language approach. Most courts have ruled that the exceptions to discharge in section 523(a) apply only to individual debtors. *See Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); *Catt v. RTECH Fabrications, LLC (In re RTECH Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021). Stripped to the core, each view rests on a single term. Cases favoring the Debtor's position rely upon the term "individual debtor" in the introductory clause of section 523(a); while Ms. Rigby's position is based on the word "debt" in section 1192(2). The Debtor's reading is the better one.

The essence of Ms. Rigby's argument is that the section 1192(2) phrase "any debt … of the kind specified in section 523(a)" incorporates only the specific subcategories listed in the 21 subsections and does not incorporate the introductory language limiting section 523 to individual debtors. This leap of logic is based on the false premise that "kind" of debt limits the focus to only the legal or factual basis of the claim and excludes consideration of other factors such as the type of debtor. "Kind" means sharing "common traits," MERRIAM-WEBSTER DICTIONARY (online ed.), and those traits can include the nature of the entity owing the debt. For example, one kind of debt

[18] As the Fourth Circuit acknowledged in *Cantwell-Cleary Co. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509, 512 (4th Cir. 2022), "the question is a close one."

is consumer debt, which is defined in the Bankruptcy Code using two common traits – the nature of the debtor as an individual and the purpose of the obligation. 11 U.S.C. § 101(8). The kind of debt specified in section 523(a) also has two common traits -- the debtor must be an individual and the obligation must arise out of circumstances specified in one of the subsections. The requirement that the debtor be an individual can be removed only by severing the section's introductory clause from the detailed subsections and that is exactly what Congress did in the only exception to chapter 11's complete discharge of corporate debtors, section 1141(d)(6).[19] Our reading also gives meaning to every term of both sections 523(a) and 1192(2), *see Duncan v. Walker*, 533 U.S. 167, 174 (2002) ("It is [the court's] duty to give effect, if possible, to every clause and word of a statute."), whereas Ms. Rigby's interpretation renders the cross reference to section 1192 in section 523(a) mere surplusage.

Ms. Rigby, and the dissent, also rely on two chapter 12 cases interpreting similar language in section 1228(a)(2). *Southwest Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *New Venture P'ship v. JRB Consol. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). We find those cases unpersuasive for several reasons and note that even the court that decided *In re JRB Consol, Inc.* rejects Ms. Rigby's reading of it. *See In re GFS Indus., LLC*, 2022 WL 16858009 at *6-7. First and foremost, those opinions add nothing to the analysis because they rely on the same misreading of "kind" as Ms. Rigby's primary argument. Even if correctly decided, the inference that similar terms have identical meanings in different chapters of the Bankruptcy Code is a weak one. *See*

[19] Congress knows how to limit the scope of the corporate debtor chapter 11 discharge and did so using clear and unmistakable language in section 1141(d)(6). *See FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly").

*Dewsnup v. Timm*, 502 U.S. 410 (1992) (rejecting the argument that the same term necessarily has the same meaning in the same section).[20]

Such transplantation is particularly inappropriate here for three reasons. Unlike chapter 11, chapter 12 does not distinguish an individual debtor from a corporate debtor. *United States v. Hawker Beechcraft, Inc. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 430-31 (S.D.N.Y. 2014). Further, chapter 12's coverage of corporations is limited to a very narrow class of family-owned farming corporations, 11 U.S.C. § 101(18), where there is often little practical distinction between the farmer and the corporation so that subjecting both to identical discharge rules makes sense. While subchapter V of chapter 11 includes similar owner-operator corporations, it also covers most other non-publicly traded corporations, like the Debtor, where such considerations do not apply. *See In re GFS Indus., LLC*, 2022 WL 16858009 at *7. Most importantly, however, is that the similar section 1228(a)(2) language did not originate with chapter 12. Instead, it was borrowed from chapter 13. *See* 11 U.S.C. § 1328. Chapter 13 does not apply to corporations, 11 U.S.C. § 109(e), so the suggestion that Congress used that language to extend the individual discharge exceptions to corporations is nonsensical – especially when Congress used very different language in chapter 11 when it did intend to achieve that goal.

While the textural analysis and linguistic cannons of construction favor our interpretation, two substantive cannons of construction tip the balance decidedly in favor of a broad corporate discharge. The first is the presumption that Congress does not make a fundamental change in settled law without clearly signaling that intention. As the Supreme Court stated in *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001), "Congress ... does not alter the fundamental

[20] Two trial court level decisions in the unique chapter 12 context hardly constitute the type of longstanding and well-established judicial interpretation necessary to raise any presumption regarding Congress use of similar language in a very different chapter of the Bankruptcy Code. *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1762 (2018) (interpreting section 523).

details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See also Penn. Pub. Welfare Dep't. v. Davenport*, 495 U.S. 552, 563 (1990) ("We will not read the Bankruptcy Code to erode past ... practice absent a clear indication that Congress intended such a departure"). The ambiguous language of section 1192(2), which is contradicted by the cross reference in section 523(a), is insufficient to rebut that presumption. Nor is there any indication in the legislative history that Congress intended such a radical change; indeed, the House Report suggests no change was intended. *See* H.R. Rep. No. 116-171, at 8 (2019).

The Bankruptcy Code's overarching goal of providing a fresh start gives rise to a strong presumption against exceptions to discharge. *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). Thus, discharge exceptions must be strictly construed to give maximum effect to the rehabilitative policy of bankruptcy. While neither presumption overrides a clear statutory command, both provide the guidance we need in a close case like this.

While couched as a linguistic analysis, our sister circuit's disagreement with our approach in *Cleary* is driven by perceived equitable concerns. *See In re Cleary Packaging LLC*, 36 F.4th at 514 & 517-18. Subchapter V eliminates the absolute priority rule, which had been a major impediment to the reorganization of corporate debtors. Under that rule, the owner of a corporation could not retain its ownership under a chapter 11 plan unless all classes of creditors were paid in full (which is rarely possible) or voted to accept the plan. Subchapter V replaced the absolute priority rule with a requirement that the debtor must pay into the plan all of its "disposable income" for a period of years if any class of creditors rejects the plan. 11 U.S.C. §§ 1191(b), (c)(2). Thus, under such a non-consensual subchapter V corporate debtor's plan, the owner can retain its ownership interest in the corporation without paying creditors in full and over their objection.

With no support whatsoever, *Cleary* concludes that Congress eliminated the complete corporate discharge under non-consensual subchapter V plans to "provide an additional layer of fairness and equity to creditors to balance against the altered priority that favors the debtor." *In re Cleary Packaging LLC*, 36 F.4th at 517. *Cleary's* balance construct is not only purely speculative; it is naïvely erroneous. Such a balance would exist only if the creditor that is owed an otherwise nondischargeable debt also controlled whether the plan was consensual; but that is not how subchapter V works. Whether a plan is consensual or non-consensual turns on class voting, and not the actions of a specific creditor. 11 U.S.C. § 1126. The supposed protection and balance is illusory because the holder of an otherwise non-dischargeable claim may be outvoted by other creditors in their class who do not hold non-dischargeable claims. Or, as in this case, Ms. Rigby's debt suddenly becomes nondischargeable by happenstance of a completely unrelated class's (here, the Bank's) rejection of the plan.

Finally, a discharge exception does not promote fairness in the corporate non-consensual subchapter V context. Indeed, the opposite is true. If Ms. Rigby's debt is not discharged, then it must be paid in full by the Debtor after it emerges from bankruptcy. That expense reduces, dollar for dollar, the funds available to pay other identical tort claimants. Contrary to fundamental principles of bankruptcy law, Ms. Rigby will receive a higher distribution than other similarly situated creditors. *Howard Delivers Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("The Bankruptcy Code aims, in the main, to secure equal distribution among creditors."). And, if the non-dischargeable claims are large enough, the plan will not be confirmable,[21] and the debtor will be liquidated to the detriment of all stakeholders. These problems were solved by Congress

[21] All chapter 11 plans must be feasible. 11 U.S.C. § 1129(a)(11). An even higher standard applies to non-consensual subchapter V plans. 11 U.S.C. § 1191(c)(3)(A) (requiring that "the debtor will be able to make all payments under the plan").

back in 1978 when it provided for a complete corporate discharge in chapter 11. We will not unsolve them.

## Conclusion

For the reasons set forth herein, we AFFIRM the decisions of the bankruptcy court below.

**McCartney, Circuit Judge, dissenting:**

With due respect to my colleagues, their rulings today are contrary to both the statutory text and sound bankruptcy policy. Accordingly, I must dissent.

### I. Non-consensual Third-Party Releases Are Not Permitted by Bankruptcy Law

The majority's opinion approving non-consensual third-party releases ignores the plain text of the Bankruptcy Code and tramples on the constitutional rights of Ms. Rigby. Because the settlement incorporated into the Plan puts a significant amount of money in creditors' pockets and allows the Debtor to continue to operate, the majority says: "Let it Be." But the job of a court is not to pick and choose outcomes that it may believe are desirable. Rather, it is to follow the law as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("[C]ourts do not sit to assess the relative merits of different approaches to various bankruptcy problems. Achieving a better policy outcome … is a task for Congress, not the courts.").

The "great unsettled question" in chapter 11 today is whether a bankruptcy court – or any court – is authorized to grant non-consensual third-party releases. *See, e.g., In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021). In recent years, litigation regarding the permissibility of non-consensual third-party releases has brought bankruptcy law to the front pages of the national newspapers, particularly in mass tort cases involving Purdue Pharmaceutical, USA Gymnastics, Boy Scouts of America and the Catholic dioceses.[22] Such releases have come under increased scrutiny because of the perception that they have become far too commonplace and have been improperly utilized by bad actors. *Id.*; *see also Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641 (E.D. Va. 2022).

While the majority is correct that such releases have been approved by a number of our sister circuits in so-called rare[23] cases where exceptional circumstances exist,[24] such releases are largely prohibited in the Fifth, Ninth and Tenth Circuits. *See Bank of N.Y. Trust Co. v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-02 (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). I would join these circuits in prohibiting the practice.

As with all bankruptcy disputes, my analysis begins with the language of the Bankruptcy Code. *See U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judiciary inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). Section 524(e), which deals with the discharge of

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[22] In some cases, third-party releases are *consensual*, and creditors affirmatively "opt in" or "opt out" to granting such releases in the chapter 11 plan. I take no issue with such practice. The dispute in this case, however, involves the *non-consensual* release of third-party claims.

[23] There is no principled basis for a "rare case" rule. Either authority for non-consensual third-party releases exists under the statute, or it does not. Indeed, the Supreme Court recently held that there is no "rare case" rule in bankruptcy that allows a court to trump the Bankruptcy Code. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 986 (2017).

[24] It is fair to question whether bankruptcy courts have adhered to the "exceptional circumstances" requirement for these releases. Plans releasing non-debtors from third-party claims are no rarity. Indeed, such releases are now commonplace in chapter 11 cases, both large and small, and particularly so in the mass tort context. As one court recently noted, "When every case is unique, none is unique." *See In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021).

debts in bankruptcy, provides 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." 11 U.S.C. § 524(e). In my view, section 524(e) expressly and unambiguously prohibits the release of any person or entity by the bankruptcy court where that person or entity is not itself the subject of a bankruptcy discharge. Sound bankruptcy policy supports this reading of the statute. Bankruptcy, and the discharge provided therein, exists to help troubled debtors. To obtain a discharge in bankruptcy, debtors are required to disclose their assets and subject themselves to a rigorous and transparent process dictated by the Bankruptcy Code. Non-consensual third-party releases are, I submit, the functional equivalent of a debtor discharge. They permit non-debtors to obtain the benefits of bankruptcy without bearing its corresponding responsibilities and burdens.

There is, of course, a statutory exception to section 524(e) in section 524(g). But that exception, by its plain terms, only applies in asbestos cases. *See* 11 U.S.C. § 524(g). In such cases, section 524(g) permits releases and channeling injunctions protecting non-debtors where the legal requirements of section 524(g)(2)(B) are met. Section 524(g) was enacted in 1994 in the wake of the *Johns-Manville* asbestos bankruptcy cases. It is not applicable in the present case. If anything, the fact that Congress authorized third-party releases and channeling trusts in the asbestos context nearly thirty years ago but has not extended such remedies to other types of cases suggests that Congress did not intend for such remedies to be available in such cases. *See, e.g., In re Lowenschuss*, 67 F.3d at 1401-2. Moreover, the language of section 524(g)(4)(A)(ii) ("Notwithstanding the provisions of section 524(e)…") plainly indicates that Congress believed that section 524(g) was creating an exception to what would otherwise be the applicable rule of law. Such language suggests that that the type of injunction Congress was authorizing in section 524(g) would be barred by section 524(e) in the absence of the statute.

The majority disagrees, concluding that section 524(e) does not prohibit non-consensual third-party releases. Moreover, it states that sections 105(a), 1123(a)(5) and 1123(b)(6) provide statutory authority for such releases. But it goes too far to say that the above-referenced general statutory provisions authorize a bankruptcy court to approve these releases. Section 105(a) simply states that a court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). It is well-settled that section 105(a) does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 92 (2d Cir. 2003) (citations omitted). Rather, section 105(a) merely authorizes a court to issue orders that implement remedies provided elsewhere in the Bankruptcy Code.

Sections 1123(a)(5) and (b)(6) likewise do not authorize the releases at issue. Section 1123(a)(5) provides that a plan shall "provide adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). Section 1123(b)(6) states that a plan may include any "appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). These provisions merely state that the components of a plan set forth in section 1123 are not exclusive; they do not create any substantive rights or confer any special powers. Certainly, they cannot reasonably be interpreted as permitting a bankruptcy court to take jurisdiction over, and release, claims that do not belong to the debtors in violation of a litigant's constitutional rights.

Indeed, there are significant due process and jurisdictional concerns associated with non-consensual third-party releases. When a court directs that a creditor's claim against a non-debtor be released, it takes away a property interest that belongs to that creditor, without affording the creditor due process. In addition to violating fundamental principles of constitutional law, this practice is contrary to the generally understood limitations on judicial power. A court generally may not force parties to forego claims and may not dictate settlement terms. Rather, the judicial power is limited to adjudicating claims brought before a court by the parties on the merits. This is true, even though the release of the third-party claim might help achieve an important bankruptcy objective, such as maximizing the return to creditors or allowing a business to reorganize.

Non-consensual third-party releases raise jurisdictional concerns as well. Bankruptcy courts have *in rem* jurisdiction over a debtor's property. They also have jurisdiction over "cases and proceedings" that "arise under" the Bankruptcy Code, or that "arise in" or are "related to" bankruptcy cases. 28 U.S.C. § 1334. Direct claims held by creditors against non-debtors, such as the claims against Strawberry Fields, do not fall within the scope of these jurisdictional grants. Such claims do not impact the bankruptcy estate. They do not appear to be related – much less integral - to the restructuring of the debtor-creditor relationship. *See Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. at 670.

Even if "related to" jurisdiction does exist, the Supreme Court recently taught us in *Stern v. Marshall*, 564 U.S. 462, 471-72 (2011), that, in the absence of consent, a bankruptcy court does not have constitutional authority to render a final decision in a dispute involving a pure state law tort claim that was not necessarily resolved in determining a claim against the estate and did not stem from the bankruptcy itself.[25] Relying on the Third Circuit's opinion in *In re Millennium Lab Holdings II, LLC*, the majority's answer to this problem is that the bankruptcy court had constitutional authority to approve the releases because such releases were incorporated into a plan of reorganization. But nothing in *Stern* suggests that a party otherwise entitled to have a matter

[25] For a thoughtful discussion of the issues addressed in *Stern v. Marshall*, *see* Richard Lieb, *The Supreme Court, in Stern v. Marshall, by Applying Article II of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders*, 20 J. Bankr. L. & Prac. 4 Art. 1 (2011).

adjudicated by an Article III court forfeits that constitutional right if the matter is disposed of as part of a plan. If that were the case, parties could manufacture a bankruptcy court's *Stern* authority simply by inserting the resolution of otherwise non-core matters into a plan.

In this case, and in most chapter 11 cases where non-consensual third-party release provisions contained in chapter 11 plans have been approved, the court does not have jurisdiction, much less constitutional authority, to adjudicate the released claims because, by their very nature, such claims involve a state law dispute between two non-debtors. It strains credibility to hold that a bankruptcy court can compel a release with respect to a claim (thereby extinguishing the claim) when it could not have rendered a decision on the merits of such claim. *See, e.g., In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 723-27 (Bankr. S.D.N.Y. 2019).

The overarching theme of the majority's opinion is one of equity; the releases contained in the Plan are permissible because the settlement maximizes the recoveries of creditors and preserves the Debtors' business and corresponding jobs. But equitable principles, to the extent they still exist in bankruptcy at all, *see Law v. Siegel*, 571 U.S. 415, 421 (2014), cut both ways here. In this case, if confirmation of the Plan is allowed, Strawberry Fields, who has never filed for bankruptcy, will get the equivalent of a discharge of any liabilities related to the tragedy that occurred in Blackbird. It will get the benefits of bankruptcy without having to subject itself to the bankruptcy process. The Plan's release of Strawberry Fields will bind all claimants, regardless of their consent, and Strawberry Fields will get to walk away from the crises that it allegedly helped create. Conversely, plaintiffs, such as Ms. Rigby who asserts very serious claims against Strawberry Fields related to the death of her child, will be denied their opportunity to have their day in court, and the justice (win or lose) that derives therefrom. This outcome is decidedly not equitable. Nor, in my judgment, is it tolerable in our legal system. Accordingly, I respectfully dissent.

## II. The Discharge Exceptions Apply to Corporate Debtors in Subchapter V Cases

In addition to objecting to the Plan's non-consensual release of her direct claims against Strawberry Fields, Ms. Rigby opposes the effort of the Debtor to discharge her claims against it under the Plan. She asserts that her claim is non-dischargeable pursuant to section 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."[26] The bankruptcy court dismissed Ms. Rigby's non-dischargeability action, holding that the non-dischargeability provisions of section 523(a) are not applicable to corporate (in contrast to individual) debtors. While that may be true in traditional chapter 11 cases, cases filed under subchapter V are different.

When it filed its chapter 11 petition, the Debtor voluntarily elected to proceed under subchapter V, which was enacted in 2019 to help make it easier for small business debtors to reorganize in bankruptcy. There are a number of benefits to subchapter V for debtors. Notably, the "absolute priority rule," which generally provides that existing equity of a debtor may not retain their equity interest over the objection of a class of unsecured creditors unless the unsecured class is paid in full, is not applicable in subchapter V cases. As long as a subchapter V debtor contributes its "disposable income" for a period of three to five years, it can confirm a plan, and old equity holders, such as Strawberry Fields, can retain their equity interest. *See* 11 U.S.C. § 1191(c).

Section 1141(d) governs discharge in a traditional chapter 11 case. Except for subsection (d)(5), all of that section remains applicable in subchapter V cases when the court confirms a consensual plan under section 1191(a). *See* 11 U.S.C. § 1181(a). Thus, section 1141(d)(2), which clarifies that a chapter 11 discharge does not discharge an individual debtor from any debt of the

[26] The merits of Ms. Rigby's asserted non-dischargeability action are not before the Court. Rather, the only issue before the Court is whether Ms. Rigby should be permitted to pursue a non-dischargeability action at all under section 523(a)(6) against this subchapter V corporate debtor.

type set forth in section 523, is applicable in subchapter V cases when plan confirmation is consensual. *See* 11 U.S.C. § 1141(d)(2).

Conversely, where confirmation of the plan is achieved through a cramdown (*i.e.* through section 1191(b)), the statute makes clear that section 1141(d) does not govern discharge. Rather, section 1181(c) establishes a "Special Rule for Discharge" in such cases and clarifies that section 1192, not section 1141(d), governs discharge. Section 1192 provides, in pertinent part:

> 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.

11 U.S.C. § 1192. The upshot of this language is that, where a non-consensual confirmation occurs under section 1191(b), the twenty-one *kinds* of debt that are excepted from discharge in section 523(a) are excepted from the subchapter V debtor's discharge. Unlike section 1141(d)(2), which makes the section 523(a) exceptions applicable after a consensual confirmation only to an individual, section 1192(2) does not limit the applicability of such exceptions to individuals.

In today's opinion, the majority concludes that the language of section 523(a) leads to a different conclusion. Specifically, the majority points to the introductory language to that section, which states that a discharge under five Bankruptcy Code provisions (sections 727, 1141, 1192, 1228(a), 1228(b), and 1328(b)), including section 1192, does not discharge "an individual debtor" from the type of debts listed in section 523(a). 11 U.S.C. § 523(a). The majority infers that, because section 1192 is specifically referenced in the introductory language of section 523(a), section 1192(2)'s exception to discharge for debts "of a kind specified in section 523(a)" must apply only to individual debtors.

The problem with the majority's view is that the statutory language of section 1192(2), which applies to both individual and corporate debtors, incorporates only the list of debts (debts "of the kind specified in section 523(a)"), and not the entirety of section 523(a). More specifically, section 1192(2) excludes from discharge debts of the kind listed in section 523(a) regardless of the type of debtor, whether individual or corporate. If Congress intended to limit the scope of section 1192 to individual debtors, one would think it would have stated as much in section 1192 itself, as it did in the traditional chapter 11 discharge section, section 1141. *See* 11 U.S.C. §§ 1141(d)(2), (6) (distinguishing the scope of the discharge between individual and corporate debtors).

Notably, the only other court of appeals that has addressed this issue held that subchapter V corporate debtors can be subject to non-dischargeability claims where, as here, confirmation of their plan was achieved through cramdown. In *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), the Fourth Circuit interpreted the statutory language as follows:

> In short, while § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) — *i.e.*, both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a).

*Id.* at 515 (emphasis in original).

To the extent there is any tension between sections 1192 and 523(a), the cannons of statutory interpretation provide guidance to the correct result. *See, e.g., Lena v. Pena*, 518 U.S. 187, 211 (1996) ("[Courts] appropriately rely on canons of construction as tie breakers to help us discern Congress' intent when its message is not entirely clear."). One such cannon dictates that more specific statutory provisions should govern over more general ones. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general…."). Here, to the extent there is any inconsistency between section 1192 and section 523(a), the more specific provision (section 1192, which applies only in subchapter V cases) should be given precedence over the more general provision (section 523(a), which is applicable, to some extent, in most bankruptcy cases).

The majority's interpretation of section 1192(2) bizarrely incentivizes corporate debtors to pursue non-consensual plans, instead of consensual ones. If the court confirms a consensual plan under section 1191(a), a corporate debtor receives a traditional section 1141 discharge of all debts, subject to section 1141(d)(6) which prevents corporate debtors from discharging debts owed to governmental units arising under the False Claims Act, for filing fraudulent tax returns, and for attempting to evade taxes. *See* 11 U.S.C. § 1141(d)(6). But, if a court confirms a non-consensual plan, then section 1141(d) "shall not apply, except as provided in section 1192." 11 U.S.C. § 1181(c). Under the majority's interpretation, none of the discharge exceptions apply to corporations. The net result, under the majority's interpretation, is that a corporate debtor in subchapter V with debts falling within the scope of section 1141(d)(6) cannot discharge those debts by securing support for a consensual plan, but it can discharge them by persuading the court to confirm a non-consensual plan. Such an absurd result could not have been intended by Congress.

The majority points to the lack of legislative history, stating that if Congress intended to provide for a substantially different chapter 11 corporate discharge in subchapter V cases, then there surely would be some reference to that change in the legislative history. While not wholly without merit, the problem with this argument is that Congress seems to have intended to make the subchapter V cramdown discharge the same as the discharge in chapter 12 (a different chapter of the Bankruptcy Code applicable to family farmers and fishermen).[27] Notably, the chapter 12 discharge provision, section 1228, contains substantially the same language as section 1192, and the prefatory language of section 523(a) refers to section 1228 and section 1192 in the same way.

The Supreme Court has repeatedly reminded us that, when enacting legislation, Congress is presumed to be aware of existing law. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984) ("Congress is presumed to be aware of judicial interpretations of a statute."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation."). At the time of the enactment of subchapter V, the only two published bankruptcy opinions addressing section 1228 had both held that the section 523(a) exceptions are applicable to a section 1228 discharge of a corporation. *See S.W. Ga. Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *New Venture P'ship. v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). In such cases, as here, the corporate debtors contended that the section 523(a) exceptions to the chapter 12 discharge did not apply to them because section 523(a) states that it only excepts debts of an individual. Both courts ruled that the section 523(a) exceptions applied to the chapter 12 discharge of a corporation. In *In re Breezy Ridge Farms, Inc.*, the court reasoned:

> Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.

*In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671, at *2 (Bankr. M.D. Ga. 2009). Given this chapter 12 caselaw, which existed in 2019 when subchapter V was enacted, I assume that Congress

[27] Courts have recognized that several aspects of subchapter V are premised on the provisions of chapter 12 of the Bankruptcy Code. *See, e.g., In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020).

understood and intended that substantially similar language contained in subchapter V would be interpreted similarly. *See Hall v. United States*, 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

Finally, there is also a policy reason for excepting the kinds of debts specified in section 523(a) from discharges obtained by corporate subchapter V debtors via cramdown. As noted, subchapter V is extremely beneficial to a corporate debtor in that it allows the debtor's existing ownership to confirm a chapter 11 plan without strict adherence to the "absolute priority rule." Creditors need not be paid in full in order for old equity (in this case Strawberry Fields) to retain its ownership interest. Consequently, creditors (such as Ms. Rigby) are afforded fewer tools to challenge confirmation of a plan. The tradeoff is that although a subchapter V debtor (whether individual or corporate) may be able to obtain confirmation of its plan and reorganize over the objection of a dissenting creditor, it will not be able to discharge section 523(a) debts owed to that creditor.

In the end, the better interpretation of the statutory text is that section 1192(2) provides discharges to subchapter V debtors, both individuals and corporations, in cramdown cases except with respect to the kinds of debts listed in section 523(a). This result is fair, as well. The Debtor, and only the Debtor, elected to take advantage of the provisions of subchapter V. In doing so, it must accept the corresponding burdens, including the narrower scope of the discharge. Accordingly, I would reverse the bankruptcy court and hold that Ms. Rigby is entitled to seek to have her claim against the Debtor deemed non-dischargeable pursuant to section 523(a)(6).