No. 19A1051

IN THE
Supreme Court of the United States

COUNTY OF SAN MATEO, ET AL.,

Applicants,

v.

PEABODY ENERGY COMPANY,

Respondent.

On Application for Recall and to Stay Mandate of the United States Court of Appeals for the Eighth Circuit

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REPLY IN SUPPORT OF APPLICATION FOR RECALL OF MANDATE AND STAY PENDING PETITION FOR CERTIORARI

Directed to the Honorable Neil M. Gorsuch,
Associate Justice of the United States
And Circuit Justice for the Eighth Circuit

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TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT:

INTRODUCTION

Applicants County of San Mateo, City of Imperial Beach, and County of Marin ("Government Plaintiffs") submit this reply to Respondent Peabody Energy Corporation's ("Peabody") Response in Opposition to the Application for Recall of Mandate and Stay Pending Petition for Certiorari ("Response" or "Resp."). Government Plaintiffs fully satisfy the requirements for a stay.

Peabody's Response, in its effort to reconcile the clear circuit split concerning the meaning of "right to payment" under 11 U.S.C. § 101(5), misstates the holding and reasoning of the Eighth Circuit's opinion below. The Eighth Circuit's conclusion that Government Plaintiffs' representative nuisance claim gives rise to a "right to payment" rests upon its dubious conclusion that any equitable remedy that could obligate a debtor to pay money is a dischargeable claim "*without regard to who receives the payment*." *In re Peabody Energy Corp.*, 958 F.3d 717, 725 (8th Cir. 2020) (emphasis added).

Nor do the parties materially dispute the relief available to a Government Plaintiff under California representative public nuisance law: All agree that California courts have discretion to order a defendant that created a public nuisance either to abate that nuisance itself or to fund a court-appointed neutral receiver to oversee implementation of the abatement remedy. *See* Appl. at 9–10; Resp. at 6, 9. What the parties dispute is whether that relief would constitute a "right to payment" or an "equitable remedy or breach of performance if such breach gives rise to a right to payment" under Section 101(5)(A) or (B). According to the settled precedents of the Second, Third, Fifth, and Seventh Circuits, it *does* matter "who receives the payment," and those courts would have decided the present case differently under their construction of Section 101(5).

Peabody's assertion that the Eighth Circuit's rule is the same as every other circuit's (except the Sixth Circuit's, which Peabody acknowledges is materially different) is more of a merits argument concerning what Peabody wishes the preferred rule *should* be than an accurate characterization of what any of the cited cases actually held. Each of those cases took a different approach to construing Section 101(5) than the Eighth Circuit did in this case, and the opinion below acknowledged those differences. *See Peabody*, 958 F.3d at 724. Whether Peabody's proposed rule—focusing on whether the underlying cause of action can trigger an order requiring payment to *someone*—is the rule that Congress intended is ultimately for this Court to decide on certiorari. For present purposes, what matters is that none of the cited cases articulate that rule as their basis for decision, and that any such rule would be contrary to both the text and the stated purposes of Section 101(5).

Peabody is thus also wrong in asserting that there is no prospect of reversal by this Court, or that the result in this case would be the same under any conceivable standard. The plain text of Section 101(5) requires reversal, as Government Plaintiffs have already argued and further explain below. Under an ordinary reading, a "right to payment" held by a creditor is a right to *receive* payment. That obvious dictionary reading comports with other usages of "claim," "payment," and "creditor" in the Bankruptcy Code, which repeatedly refers, for example, to "payment . . . to a holder of an allowed claim," "payment to creditors," "payment or transfer made to such a creditor," "failure of a creditor to credit payments *received*." *See* § B, *infra*. And as Government Plaintiffs have noted without any rebuttal from Peabody, the Eighth Circuit's interpretation would render Section 101(5)(B) surplusage. *See* Appl. at 23–24. The counter-textual reading is the one reached by the Eighth Circuit and advocated by Peabody: "right to payment" somehow means "right to obligate the debtor to make a payment to anyone."

Finally, Government Plaintiffs will be irreparably harmed absent a stay, and the equities weigh in their favor. Government Plaintiffs' right to petition for a writ of certiorari and to pursue relief through this Court will be significantly jeopardized if the Eighth Circuit's mandate is not recalled and stayed, as the court-ordered dismissal with prejudice of their underlying California claims could moot Government Plaintiffs' claims against Peabody and, at a minimum, would result in time-consuming and uncertain litigation in the lower federal and state courts if this Court reverses the discharge in bankruptcy of a claim that Government Plaintiffs have been compelled to dismiss with prejudice. The equities and public interest weigh in favor of a stay as well.

REASONS TO GRANT THE STAY

A. There Is A Clear Split of Authority Concerning the Proper Interpretation of 11 U.S.C. § 101(5), and Certiorari on That Basis is Reasonably Likely.

As set forth in the Application, the Eighth Circuit's decision below, along with an earlier decision by the Sixth Circuit, conflicts with opinions from at least four other circuit courts holding that an equitable decree "gives rise to a right to payment" under Section 101(5) only if it can be satisfied through an alternative payment *to the plaintiff*. Peabody's assertion that there is no circuit split and that the Eighth Circuit's decision can somehow be harmonized with the holdings of the Second, Third, Fifth, and Seventh Circuits fails because it ignores what those courts actually wrote as the basis for their decisions. Also unavailing is Peabody's argument that the Sixth Circuit's earlier decision, which came to the same conclusion as the Eighth Circuit, does not establish a circuit split.

The Eighth Circuit held that the Government Plaintiffs' nuisance claims were dischargeable under Section 101(5)(B) because, under California law, "a party who commits a public nuisance can be ordered to pay into a fund . . . to remedy or eliminate the hazard complained of rather than being ordered to clean up the nuisance themselves." Appl. at 4a. The court concluded that it did not make any difference that the Government Plaintiffs "would not receive the proceeds that a court directs to be paid into an abatement fund," reasoning—erroneously—that "a 'claim' includes 'virtually all obligations to pay money,' without regard to who receives the payment." *Id.* at 4a-5a (internal citations omitted).

The Eighth Circuit's holding directly conflicts with *United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009), in which the Seventh Circuit interpreted the "right of payment" language in Section 101(5) as turning on whether there was a payment to the plaintiff. In *Apex Oil*, the issue was whether an injunction issued under the Resource Conservation and Recovery Act ("RCRA") was dischargeable in bankruptcy. The court rejected the debtor's assertion that the substantial cost of complying with a RCRA injunction should be deemed dischargeable as a money claim, concluding that such a construction "does not comport with the language of the Bankruptcy Code—the cost to Apex is not a 'right [*of the plaintiff*] to payment.'" *Apex Oil*, 579 F.3d at 737 (alteration in the original) (emphasis added). The court held that the reason the equitable decree in that case was not dischargeable was because the plaintiff was "not seeking a payment of money and the injunction that it obtained does not entitle it to payment," and the court ultimately concluded that Congress intended discharge under the terms of Section 101(5) to be limited "to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do." *Id.* at 737-38 (emphasis added).

Peabody tries to distinguish *Apex Oil* on the ground that the Seventh Circuit could have reached the same result through a different statutory analysis. Peabody argues that RCRA, unlike the California nuisance claims at issue in this case, does not authorize a court to order the payment of money, even to a third party, to implement a specific performance order. That is not true. RCRA authorizes courts to order a range of remedies, including ordering a defendant to pay money to a third party to fund a remediation project. *See United States v. Prod. Plated Plastics, Inc.*, 61 F.3d 904 (6th Cir. 1995) (affirming district court's decision to appoint receiver, which was to identify the assets of the defendants and liquidate those necessary to achieve RCRA compliance); *Maine People's All. v. HoltraChem Mfg. Co., LLC*, No. 1:00-CV-00069-JAW, 2015 WL 5155573, at *1 (D. Me. Sept. 2, 2015) (ordering the defendant to fund a RCRA abatement project that was to be performed by an independent engineering firm). Regardless of the outer limit of relief available under RCRA, though, the dispositive factor in *Apex Oil* was not the precise form that an order may take under the statute, but whether the creditor plaintiff had the right to receive money *as an alternative* form of relief under the statute. *Apex Oil*, 579 F.3d at 737.

In *Apex Oil,* as here, the plaintiff could not receive payment as an alternative to equitable enforcement. That is why the Seventh Circuit held that its RCRA cause of action was not a "claim," even though the defendant debtor would inevitably have to spend a considerable sum of money to comply with the court's remedial order. The Eighth Circuit, by contrast, held that Government Plaintiffs' public nuisance cause of action *was* a claim, because it concluded that Section 101(5) makes dischargeable all obligations that require a payment of money, regardless of who receives the payment or for what purpose the payment is required. Pet. at 4a-5a. The outcome of this case would thus have been different in the Seventh Circuit.

The Eighth Circuit's decision is also inconsistent with the Second Circuit's decision construing Section 101(5) in *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991). There, the court held that an EPA order to clean up a site to prevent future contamination was not a dischargeable claim because CERCLA did not allow the EPA to accept payment from a responsible party "as an alternative to continued pollution." *Id.* Accordingly, if an EPA order, "no matter how phrased, requires [the debtor] to take any action that ends or ameliorates current pollution, such an order is not a 'claim.'" *Id.* By contrast, under the Eighth Circuit's interpretation of Section 101(5), it would matter a great deal how the EPA phrased an order to a responsible party to end or remediate ongoing pollution. If, for example, an order directed a responsible party to fund an independent contractor to perform a contamination cleanup, that order would be dischargeable under the Eighth Circuit's holding that a claim encompasses all obligations to pay money, no matter the recipient. The exact opposite result would be required in the Second Circuit.

For similar reasons, the Eighth Circuit's opinion conflicts with the Fifth Circuit's decision in *Matter of Davis*, 3 F.3d 113 (5th Cir. 1993). In that case, the debtor argued that the equitable remedies of resulting trust, partition in kind, deed reformation, appointment of receiver, and dissolution of a partnership were dischargeable in bankruptcy, because his failure to perform his obligations under those remedies would support an award of money damages. *Id.* at 116. The court disagreed, holding that "[t]he ability of a debtor to choose between performance and damages in some cases is not the same as a debtor's liability for money damages for failing to satisfy an equitable obligation." *Id.* Accordingly, in the Fifth Circuit an equitable order is not made dischargeable by the fact that a debtor can elect not to comply with an injunctive order and to become liable to pay money damages instead. That holding cannot be squared with the Eighth Circuit's ruling, which holds that the Government Plaintiffs' nuisance claims were dischargeable merely because the California courts (although not the Government Plaintiffs themselves) had the option of ordering Peabody to accomplish the required abatement by funding a court-appointed receiver to implement the abatement on Peabody's behalf. Appl. at 4a.

Peabody's effort to distinguish the Third Circuit's holding in *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3rd Cir. 1993) also fails. Under California law, a public nuisance claim by a government plaintiff on behalf of the People can be remedied only by an equitable order of abatement; this is identical to the law at issue in *Torwico*, where the State of New Jersey sought an order to abate "an ongoing nuisance in direct violation of state environmental laws." *Id.* At 150. Like the State of New Jersey in *Torwico*, the Government Plaintiffs here have a "right to force the debtor to comply with applicable environmental laws by remedying an existing hazard." *Id*. However, they have no right to require any payment to the People of California, any more than the State of New Jersey in *Torwico* had a right to demand payment to itself or to its residents. The fact that compliance may require certain expenditures does not mean that the plaintiff-creditor has a "right to payment" within the meaning of Section 101(5). *Id.* at 150 (because the agency could not "force the debtor to pay money *to the state*," its nuisance abatement action did not create a dischargeable claim) (emphasis added). *Torwico* is indistinguishable from this case, and it would have been decided differently in the Eighth Circuit.

The Eighth Circuit is not the only appellate court to depart from the reasoning of the Second, Third, Fifth, and Seventh Circuits. As set forth in the Application, the Sixth Circuit joins the Eighth Circuit on the other side of the circuit split. In *United States v. Whizco, Inc.*, 841 F.2d 147, 150 (6th Cir. 1988), where the Sixth Circuit held that a mine cleanup injunction was dischargeable because the defendant did "not have the physical capacity to reclaim the mine site himself and [thus] would have to hire others to perform the work for him." Peabody's assertion that the Eighth Circuit's approach would not produce a different outcome in this case is thus plainly mistaken. Peabody does not dispute that, under the test set forth in *Whizco*, the Government Plaintiffs' action for public nuisance would be deemed a dischargeable claim. In contrast, as explained above, Plaintiffs' claims would *not* be dischargeable under the reasoning of the Second, Third, Fifth, and Seventh Circuits because Government Plaintiffs' cause of action for public nuisance does not permit them to obtain a money judgment or otherwise recover any payment of money for themselves from Peabody.

Peabody asserts that *Whizco* is an outlier that has no ongoing impact. However, since it was decided, *Whizco*'s holding regarding the dischargeability of equitable claims has been repeatedly cited by a number of district courts. *See*, *e.g.*, *In re Daniels*, 130 B.R. 239, 241 (E.D. Ky. 1991) (holding that reclamation obligations constituted dischargeable claims under *Whizco* "to the extent they required the expenditure of money"); *In re Witt*, 473 B.R. 284, 294 n.9 (Bankr. N.D. Ind. 2012) (finding that, under *Whizco*, "if compliance with an obligation to clean-up contaminated property requires the debtor to spend money—as opposed to doing the job itself—the obligation is dischargeable").

The split of authority among the circuits interpreting 11 U.S.C. § 101(5) is real and pressing and warrants certiorari review.

B. There Is a Fair Prospect of Reversal on Textual Grounds.

Peabody's argument that there is no textual basis in the Bankruptcy Code to reverse the Eighth Circuit's decision here is also wrong.

Contrary to Peabody's assertions, the Government Plaintiffs have made a straightforward argument that "the plain text of the U.S. Bankruptcy Code supports the majority of circuits' interpretation of Section 101(5)(B)." Appl. at 23; *see also id.* at 23–24. Stated simply, under a familiar, everyday reading, the words "right to payment" in Sections 101(5)(A) and (B) refer to any right held by the creditor to receive compensation. The Seventh Circuit has given those provisions that same "natural reading." *Apex Oil,* 579 F.3d at 736. It would be thoroughly unnatural, by contrast, to construe the phrase "right to payment" as the Eighth Circuit has here, to mean a right held by a creditor that could force the debtor "to pay money," "without regard to who receives the payment." *Peabody,* 958 F.3d at 724, 725.

Simple textual analysis requires this conclusion. First, dictionary definitions establish that a creditor's right to payment is a right to be paid. Merriam-Webster Unabridged Dictionary's first definition of "payment" is "the act of paying or giving compensation," offering synonyms that include "compensation" and "remuneration."[1] The New Oxford American Dictionary's first definition likewise defines "payment" as "the action or process of paying someone or something, *or of being paid*."[2] Few would interpret the statement "I have a right to payment of wages" as meaning "I have a right to have my employer pay my wages to someone else"; its ordinary meaning is "*I* have a right to be paid [compensated] by my employer."

Second, in the context of 11 U.S.C. § 101 and the Bankruptcy Code as a whole, the phrase "right to payment" unquestionably requires the plain meaning construction adopted by the Seventh Circuit. As noted, "claim" means "right to payment, whether . . . legal [or] equitable," or "right to an equitable remedy . . . if such breach gives rise to a right to payment . . . ." 11 U.S.C. §§ 101(5)(A), (B). The term "creditor" is defined to mean an "entity that has a [prepetition] claim against the debtor," an "entity that has a claim against the estate [of specified types]," or an "entity that has a community claim." *Id.* at §§ 101(1)(A)–(C). The "right" that a

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[1] *Payment*, Merriam-Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/payment (last visited June 19, 2020).

[2] *Payment*, New Oxford Am. Dictionary, https://www.oxfordreference.com/view/10.1093/acref/9780195392883.001.0001/m_en_us1276225 (last visited June 19, 2020) (emphasis added).

creditor "has" under a normal reading is to be paid, i.e., to receive compensation. Unsurprisingly, other provisions of the Bankruptcy Code repeatedly refer to payments on claims be "made to [a] creditor" or "received by" the holder of a claim, and do so in general provisions concerning all bankruptcies as well as the specific context of Chapter 11 restructuring plans.[3] And as Government Plaintiffs have already pointed out without rebuttal by Peabody, Section 101(5)(B) would be nothing more than surplusage if every equitable decree that required a defendant to spend money constituted a "right to payment" under Section 101(5)(A). *See* Appl. at

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[3] *See, e.g.*: "A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. *<u>Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim</u>* on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, *<u>such holder may not receive any additional payment or transfer from the estate</u>* on account of such holder's allowed claim until *<u>the holder of such reconsidered and allowed claim receives payment on account of such claim</u>* proportionate in value to that already received by such other holder. This subsection does not alter or modify the *<u>trustee's right to recover from a creditor any excess payment or transfer made to such creditor</u>*." 11 U.S.C. § 502(j) (emphasis added);

"The willful *<u>failure of a creditor to credit payments received</u>* under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or *<u>the creditor has not received payments required to be made</u>* under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor." *Id.* § 524(i) (emphasis added);

"Notwithstanding any otherwise applicable nonbankruptcy law, a [Chapter 11 reorganization] plan shall . . . in a case in which the debtor is an individual, provide for the *<u>payment to creditors</u>* under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan." *Id.* § 1123(a)(8) (emphasis added).

23. Standing on its own and in context, the plain meaning of a "right to payment" under Sections 101(5)(A) and 101(5)(B) is a right to receive payment.

The *Apex Oil* court relied on this very same plain meaning analysis, although without resort to dictionaries or statutory context: "The natural reading of [Section 101(5)(B)] is that if the holder of an equitable claim can, in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment instead, the claim is dischargeable." 579 F.3d at 736. Contrary to Peabody's assertions, that common sense, contextual reading does not unduly constrict the broad definition of "claim" or defeat the Bankruptcy Code's overall purpose of providing debtors a fresh start. Rather, the ruling of the Eighth Circuit here would mean "every equitable claim is dischargeable in bankruptcy unless there is a specific exception in the Code," which is "inconsistent with the Code's creation in 11 U.S.C. § 101(5)(B) of only a limited right to the discharge of equitable claims." *See id.* at 737.

The cases illustrating Section 101(5)'s breadth are not inconsistent with this plain reading construction. In *Johnson v. Home State Bank*, the Court determined that when an individual debtor's personal liability under a mortgage is discharged in a Chapter 7 bankruptcy, a mortgage lien held by the bank against the mortgaged property is still a "claim" because "[e]ven after [the] debtor's personal obligations have been extinguished, the mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property." 501 U.S. 78, 84 (1991). As the Seventh Circuit in *Apex Oil* explained, *Johnson* presented "a straightforward case of an equitable claim that gives rise to a right of payment to the claimant—namely, . . . the right to payment of [the debtor's] debt out of the proceeds of a sale of property pursuant to a decree (the equitable remedy) that the property be sold." 579 F.3d at 738. It made no difference in *Johnson* that the creditor bank had no *in personam* claim against the debtor; rather, the bank retained the "claim" under Section 101(5) because it had a right to *receive payment* out of the bankruptcy assets.

The same is true of the other cases Peabody cites for the general proposition that "claim" and "debt" are defined broadly—this Court's opinions have involved circumstances where, absent discharge, the creditor would have a right to *receive* payment from the debtor, directly or indirectly. *See F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 302–304 (2003) (requirement of "full and timely payment" of "license obligations *to* the [Federal Communications] Commission" is a dischargeable claim under Section 101(5)(A) notwithstanding that obligations originated from "regulatory condition" attendant to broadcasting license) (emphasis added); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 556 (1990) (restitution requirement of probation sentence in welfare fraud case constituted dischargeable claim where debtor was required to make "restitution payments to the county probation department, *which in turn would forward the payments to the Pennsylvania Department of Public Welfare, the victim of the Davenports' fraud*") (emphasis added). The situation here, as the Eighth Circuit itself recognized, is different. Under California law, a defendant in a representative nuisance action may be ordered by the trial court to abate a public nuisance directly or to fund a court-appointed receiver to implement the abatement. The representative nuisance plaintiff, however, has neither a right to compensation nor even a right to demand one implementation option rather than the other—all it can demand is abatement.

Peabody also argues that the Government Plaintiffs' representative public nuisance cause of action would constitute a "claim" under any interpretation of Section 101(5), because "if Peabody would not or could not abate the nuisance itself, then the court could order abatement payments" into an abatement fund. Resp. at 21. But that argument simply begs the question; whether an equitable obligation to abate a nuisance is a "claim" under Section 101(5) when *a court* could in its discretion order the defendant to pay into an independently administered fund and none of the proceeds of the fund could under any circumstances be recovered by the plaintiff. The answer is "no" for all the reasons presented, and there is at least a "fair prospect" of reversal.

C. Because of the Irreparable Harm That Government Plaintiffs Will Suffer Absent Recall and Because the Weight of Equities Are in Government Plaintiffs' Favor, the Court Should Grant Government Plaintiffs' Application.

Peabody responds to Government Plaintiffs' irreparable harm argument by contending that Government Plaintiffs' compliance with the lower court's order compelling dismissal with prejudice *may* be reversible in the discretion of a state or federal trial court, and that Government Plaintiffs' underlying claims against Peabody therefore *may* be preserved even in the absence of a stay. But Peabody does not dispute that the procedural rules it cites confer no *rights* upon a party in Government Plaintiffs' position or that substantial uncertainty exists in this case—

which the requested stay would completely eliminate—about *which* court or courts in the remanded California cases would have authority to grant relief from any dismissal with prejudice and when that authority could be exercised.

Even if the contingent possibility of relief under Federal Rule of Civil Procedure 60 were enough to overcome mootness (and neither Peabody nor Government Plaintiffs have found a case so holding), the harm threatened to Government Plaintiffs here from the mandate issuing without a stay is "both certain and great; . . . actual and not theoretical." *See Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). Peabody's reliance on *Livera v. First National State Bank of New Jersey*, 879 F.2d 1186, 1190–91 (3d Cir. 1989), is misplaced, as that case applies Rule 60(b)(5) in a common claim preclusion context.[4] *Livera* does not address the issue here, that absent the relief sought, Government Plaintiffs face irreparable harm because "an actual controversy must be extant at all stages of review" to supply jurisdiction consistent with Article III of the Constitution. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

The balance of equities, even as Peabody presents it, must weigh the Bankruptcy Code's interest in finality against the sharp circuit conflict regarding

[4] *Livera*, 879 F.2d at 1190–91 ("Party A prevails on the merits in court 1, and subsequently uses that decision to execute judgment against Party B in court 2. Rule 60(b)(5) enables Party B to set aside the judgment in court 2 if it prevails in an appeal of court 1's decision.")

the scope of dischargeable obligations in bankruptcy.[5] As Peabody acknowledges, all proceedings are currently stayed in the California cases (meaning that it is not even clear when a dismissal with prejudice could be filed and acted upon, or by which court). Peabody also does not contest that its litigation obligations in those California cases have been *de minimi*s in recent months and that those cases will likely remain stayed at least until the Ninth Circuit decides the pending rehearing petition and this Court considers and decides the California case defendants' likely petition for writ of certiorari. Given the public interest of enabling the Court to resolve the question raised by Government Plaintiffs' anticipated petition, the balance of equities tilts sharply in Government Plaintiffs' direction.

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[5] Far from dilatory, Government Plaintiffs have sought a stay at each step to protect their interests.

CONCLUSION

For the foregoing reasons, Government Plaintiffs respectfully request that this Court recall the mandate of the Eighth Circuit and stay the judgment pending its consideration of Government Plaintiffs' timely Petition for Writ of Certiorari.

Dated: June 19, 2020

Respectfully submitted,

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