No. _____

In The
Supreme Court of the United States

TIMOTHY L. BLIXSETH,

Petitioner,

v.

CREDIT SUISSE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from a bankruptcy involving the Yellowstone Mountain Club in Montana. Neither Petitioner nor Respondent was a debtor in the bankruptcy. Respondent Credit Suisse was a creditor, while Petitioner Timothy L. Blixseth was an equity holder, with significant, independent and personal claims against Credit Suisse based on its pre-bankruptcy misconduct. As part of the Yellowstone Mountain Club's plan of reorganization under Chapter 11 of the Bankruptcy Code, however, the bankruptcy court approved an exculpation clause that barred Blixseth from bringing certain personal claims against Credit Suisse without Blixseth's consent; without providing Blixseth with any compensation for his lost claims; and without providing him with due process. The Ninth Circuit, along with several other circuits, had long held such exculpation clauses to be invalid, beyond the subject matter and personal jurisdiction of the bankruptcy courts, and in contravention of 11 U.S.C. §§ 524(a)(2) and 524(e). When this case made its way to the Ninth Circuit for the second time, however, a three-judge panel did an about-face and upheld the exculpation clause in a published opinion based on a "narrowness" standard not previously recognized by either the Ninth Circuit or any other circuit. The question presented is:

Whether a nonconsensual exculpation clause in a bankruptcy reorganization plan purporting to release non-debtor third parties from claims by other non-debtor parties is invalid.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), Petitioner states that the Parties[1] include:

1. Timothy L. Blixseth, Petitioner
2. Credit Suisse, Respondent
3. Yellowstone Mountain Club, LLC
4. Yellowstone Club Construction Company, LLC
5. Yellowstone Development, LLC
6. Blue Sky Ridge, LLC
7. Cross Harbor Capital Partners, LLC
8. Marc S. Kirschner, Former Trustee of the Yellowstone Club Liquidating Trust
9. Brian A. Glasser, Esq., Trustee of the Yellowstone Club Liquidating Trust

[1] The debtor entities that sought relief in the Montana Bankruptcy Court included the following entities: (i) Yellowstone Mountain Club, LLC; (ii) Yellowstone Development, LLC; (iii) Yellowstone Club Construction Company, LLC; and (iv) Big Sky Ridge, LLC.

STATEMENT OF RELATED CASES

- *In re Yellowstone Mt. Club*, Nos. 08-61570, 08-61571, 08-61572, and 08-61573, U.S. Bankruptcy Court for the District of Montana. Judgment entered June 9, 2009;
- *Blixseth v. Yellowstone Mountain Club, LLC*, No. CV-09-47-BU-SEH, U.S. District Court for the District of Montana. Judgment entered November 10, 2010;
- *In re Yellowstone Mt. Club*, Nos. 08-61570, 08-61571, 08-61572, and 08-61573, U.S. Bankruptcy Court for the District of Montana. Judgment entered September 30, 2011;
- *Blixseth v. Credit Suisse*, No. 11-CV-00065, U.S. District Court for the District of Montana. Judgment entered March 6, 2013;
- *Blixseth v. Credit Suisse*, Nos. 13-35190 and 13-35245, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 1, 2015;
- *Blixseth v. Credit Suisse*, No. 11-CV-BU-65, U.S. District Court for the District of Montana. Dismissal entered March 23, 2016;
- *Blixseth v. Credit Suisse*, No. 16-35304, U.S. Court of Appeals for the Ninth Circuit. Judgment affirming dismissal entered June 11, 2020; and
- *Blixseth v. Credit Suisse*, Case No. 16-35304, U.S. Court of Appeals for the Ninth Circuit. Rehearing denied August 20, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Timothy L. Blixseth ("Petitioner" or "Blixseth") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the United States Bankruptcy Court for the District of Montana (the "Montana Bankruptcy Court") confirming Debtors' Chapter 11 plan is available at 2009 Bankr. LEXIS 1622, 2009 WL 1543789 (Bankr. D. Mont. June 2, 2009). The order of the United States District Court for the District of Montana (the "Montana District Court") reversing and remanding the Montana Bankruptcy Court's confirmation order on the grounds that the plan's exculpation, release of, and permanent injunction against prosecution of Blixseth's direct *in personam* claims against Credit Suisse (the "Exculpation Clause and Permanent Injunction") violates 11 U.S.C. § 524(e) is unreported, but is available at 2010 U.S. Dist. LEXIS 118803, 2010 WL 4371368 (D. Mont. Nov. 2, 2010). The order of the Montana Bankruptcy Court on remand from the Montana District Court upholding the validity of the plan's exculpation and release clause notwithstanding 11 U.S.C. § 524(e) and the Ninth Circuit's prior decisions barring such relief is reported at 460 B.R. 254.

The Montana District Court's order dismissing Blixseth's second appeal of the Montana Bankruptcy

Court's order confirming Debtors' Chapter 11 plan including the prohibited Exculpation Clause and Permanent Injunction is not reported but is available online through the Montana District Court's electronic docket maintained in case number 11-cv-00065-SEH as document number 121. The Ninth Circuit's decision reversing the Montana District Court's order due to Blixseth's alleged lack of standing to appeal the Montana Bankruptcy Court order confirming Debtors' plan is unpublished but is available in the Federal Appendix at 609 F. App'x 390.

The order of the Montana District Court following the second remand and again dismissing Blixseth's appeal as equitably moot is unpublished but is available at 2016 U.S. Dist. LEXIS 163827 (Mar. 23, 2016). The Ninth Circuit's opinion below, reversing the district court as to equitable mootness but affirming on the alternative ground that the exculpation clause was valid, was issued on June 11, 2020, and is reported at 961 F.3d 1074. The Ninth Circuit's decision and order denying Petitioner's Petition for Rehearing *En Banc* was issued on August 20, 2020, and is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion affirming, in relevant part, and reversing the decision of the Montana District Court on the issue of equitable mootness (not raised here by Petitioner) on June 11, 2020. (Appendix 1a).

Petitioner timely filed his Petition for Rehearing En Banc on July 27, 2020, and the Ninth Circuit entered its order denying Petitioner's Petition for Rehearing En Banc on August 20, 2020. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced *infra* at 34a-66a.

STATEMENT

Distilled to its essence, this case is about whether a non-debtor entity can leave a bankruptcy case with a greater bundle of rights as against another non-debtor entity without (i) having sought relief itself under the Bankruptcy Code (ii) absent consent, (iii) without giving any consideration in exchange for the released claims of the affected non-debtor entity, and (iv) notwithstanding the operation of 11 U.S.C. §§ 524(a)(2) and 524(e).

Congress already answered this question, and its command cannot be clearer: As the Ninth Circuit previously recognized, "This court has repeatedly held, *without exception*, that § 524(e) precludes bankruptcy courts from discharging liabilities of non-debtors." *Resorts Int'l v. Lowenschuss (In re Lowenschuss)*,

67 F.3d 1394, 1401 (9th Cir. 1995) (citing multiple Ninth Circuit and lower court opinions spanning 70 years which consistently found releases of non-debtor third parties to be invalid) (emphasis added). On June 11, 2020, however, all that history was unwound when the Ninth Circuit inexplicably went against decades of its own unambiguous authority and upheld the Exculpation Clause and Permanent Injunction.

The Ninth Circuit's opinion added to an already festering and fractious inter-circuit split on this issue of exceptional importance. The Ninth Circuit's decision places its new legal position squarely in conflict with the Fifth and Tenth Circuits, which continue to prohibit nonconsensual third-party releases altogether, and in tension with numerous other circuits, which allow third-party non-debtor exculpation clauses under varying circumstances and assorted tests, none of which the Ninth Circuit applied in *Blixseth*. The Ninth Circuit's decision relegates this problem to a pair of footnotes and adopts a newfound standard of "narrowness" in determining whether to enforce non-debtor third party releases, which language appears nowhere in the Bankruptcy Act or Code, or even in the precedent used by sister circuits.

The Ninth Circuit's decision, if allowed to stand, creates a swamp of contradictory opinions that allow collusive and self-dealing third parties to abuse the bankruptcy process and secure benefits to which (a) they are not entitled and (b) Bankruptcy Courts are without power to confer. The Petition for Certiorari

should be granted, and the Ninth Circuit's decision below should be reversed to provide a state of clarity, uniformity, and correctness by holding that exculpation clauses that release non-debtor third parties are, and remain, invalid as Congress commanded when it enacted 11 U.S.C. §§ 524(a)(2) and 524(e).

A. Statement of Facts

In 2005, Petitioner caused one of the Debtors, Yellowstone Mountain Club, LLC ("YMC") to borrow $375 million from Credit Suisse (the "Loan"). Part of the appeal was the Loan contained non-recourse provisions with respect to YMC's managers and members, including Blixseth. Petitioner, therefore, was not personally obligated to repay the Loan. Without the non-recourse provision, Petitioner would not have caused YMC to incur the debt.

Debtors, including YMC, defaulted on their various debt obligations, including the Loan, and sought bankruptcy protection in the Montana Bankruptcy Court. During their bankruptcy cases, Debtors confirmed a Second Amended Chapter 11 Plan that did not pay Credit Suisse in full (the "Plan"); however, the Plan included the Exculpation Clause and Permanent Injunction that released Credit Suisse from "any act or omission in connection with, relating to or arising out of the Chapter 11 cases."

Separately, Petitioner filed suit, advancing direct *in personam* claims against Credit Suisse for its underwriting and breach of the Loan. *See Blixseth v.*

Cushman & Wakefield of Colo., Inc., No. 12-cv-00393-PAB-KLM, 2013 U.S. Dist. LEXIS 140643, at *32 (D. Colo. Sep. 30, 2013). Among other claims and causes of action, Petitioner claimed Credit Suisse breached the non-recourse provision of the Loan by participating directly with the litigation trust created under Debtors' confirmed plan of reorganization to sue Petitioner *personally* for losses allegedly sustained by the Debtors. This was a clear and unmistakable breach of the non-recourse provisions of the Loan. Credit Suisse moved to dismiss Petitioner's claims in part on the basis that their prosecution was barred by the Exculpation Clause and Permanent Injunction. *Id.* The Colorado District Court dismissed Petitioner's breach of contract claims against Credit Suisse, stating, "Accordingly, the Court finds that the exculpatory clause bars plaintiff's breach of contract claim and will, therefore, dismiss it." *Id.* at *33. The Tenth Circuit affirmed the district court's dismissal of the Petitioner's breach of contract claim. *See Blixseth v. Cushman & Wakefield of Colo., Inc.*, 678 F. App'x 671 (10th Cir. 2017). Despite the clear invalidity of the Exculpation Clause and Permanent Injunction and its dismissal effect on the Petitioner's direct claim against Credit Suisse in the District of Colorado, the Ninth Circuit in its June 11, 2020 order affirmed, allowing the Exculpation Clause and Permanent Injunction to stand.

By approving the Exculpation Clause and Permanent Injunction, the Montana Bankruptcy Court effectively adjudicated Petitioner's direct *in personam* claims against Credit Suisse, something it was without

subject matter jurisdiction to do, in direct contravention of its existing circuit law explicating that it lacked the power to do so under 11 U.S.C. §§ 524(a)(2) and 524(e).

B. Procedural Background

1. First and Second Appeals in the Montana District Court and the Intervening Remand to the Montana Bankruptcy Court.

On November 2, 2010, the Montana District Court entered an order reversing the Montana Bankruptcy Court's order confirming the Plan. The Montana District Court observed, "the language of section 8.4, whatever its intended scope may have been, goes well beyond the limitation of § 524(e). Its approval was plain error." *See Blixseth v. Yellowstone Mt. Club, LLC*, 2010 U.S. Dist. LEXIS 118803, *5 (D. Mont. Nov. 2, 2010) (citation omitted). On remand, the Montana Bankruptcy Court held, contrary to the Montana District Court's prior ruling, that "[t]he exculpation clause in the case *sub judice* is not barred by Ninth Circuit law." *In re Yellowstone Mt. Club, LLC*, 460 B.R. 254, 277 (Bankr. D. Mont. 2011). Once again, Petitioner appealed. Although the issue was not raised by the parties, the Montana District Court dismissed Petitioner's appeal for lack of standing, along with another consolidated appeal simultaneously considered by the Montana District Court. *See*, *e.g. Sumpter v. Yellowstone Mt. Club, LLC*, 2013 U.S. Dist. LEXIS 197009 (D. Mont. Mar. 5, 2013); *see also Blixseth v. Yellowstone Mt. Club,*

LLC, Case No. CV-11-00065-BU-SEH, Dkt. No. 121 (D. Mont. Mar. 6, 2013).

2. The Ninth Circuit's First Decision

On May 1, 2015, the Ninth Circuit reversed the Montana District Court's finding that Petitioner lacked standing to challenge the Exculpation Clause and Permanent Injunction. *Blixseth v. Yellowstone Mt. Club, LLC*, 609 F. App'x 390, 391-92 (9th Cir. 2015) ("The exculpation clause ***strips Blixseth of identifiable, affirmative legal claims which are property*** . . . Blixseth is therefore directly and adversely affected ***pecuniarily*** by the order confirming the Plan and so has standing to appeal it.") (emphasis added) (internal citations and citations omitted). The Ninth Circuit also held that "Blixseth's appeal as to the exculpation clause is not equitably moot ***because it is apparent that one or more remedies is still available***." *Id.* at 392 (emphasis added). The mandate in Petitioner's first appeal to the Ninth Circuit was issued to the Montana District Court on May 27, 2015.

3. The District Court's Decision on Remand

On March 23, 2016, the Montana District Court issued a new order dismissing Blixseth's appeal of the Exculpation Clause and Permanent Injunction as equitably moot, despite the Ninth Circuit's mandate directly to the contrary. *See Blixseth v. Yellowstone Mt.*

Club, LLC, 2016 U.S. Dist. LEXIS 163827, **4-5 (D. Mont. Mar. 23, 2016).

4. The Ninth Circuit's Second Decision

The Ninth Circuit rejected the Montana District Court's determination that Blixseth's appeal was equitably moot. Nevertheless, the Ninth Circuit affirmed the decision of the Montana District Court, explaining that the Exculpation Clause and Permanent Injunction was narrow in both scope and time. *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1081-82 (9th Cir. 2020). The Ninth Circuit's opinion acknowledged in a footnote that at least two other circuits found exculpation clauses like in *Blixseth* illegal and beyond the scope of the Bankruptcy Code. *Id.* at 1085 n.7 (citing *In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Western Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990)).

The Ninth Circuit departed both from both its own and other circuits' authority. The panel acknowledged *Lowenschuss* and the string of authority preceding and supporting it which served as a categorical bar to approval of plan provisions like the Exculpation Clause and Permanent Injunction. *See* 961 F.3d at 1083-84. (discussing *Lowenschuss*; *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985); and *In re American Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989)).

The Ninth Circuit panel's failed attempt to distinguish its own prior authority created even more confusion among the already conflicted authority among the

circuits. The panel pointed out the cases holding releases of non-debtor third parties are invalid involved "sweeping" releases that were broader than the release here. 961 F.3d at 1083-84. The relative narrowness or breadth of the releases had nothing to do with the reasoning of the Ninth Circuit's prior precedents, however; not one of those decisions mentions the breadth of the release as the reason for its holding. The Ninth Circuit's theretofore unbroken line of authority rested on the premise that "[t]he bankruptcy court has no power to relieve other parties than [the debtor] of their debts or obligations." *Commercial Wholesalers v. Investors Commercial Corp.*, 172 F.2d 800, 801 (9th Cir. 1949) (cited with approval in *Lowenschuss*, 67 F.3d at 1401-02). The Ninth Circuit's precedents consistently relied on the statutory language and the limited power of the bankruptcy court to find discharges of non-debtor third parties invalid. *Lowenschuss*, 67 F.3d at 1401. The Ninth Circuit had previously examined 11 U.S.C. § 524(e) and its predecessor enactments to conclude the bankruptcy court lacks the power to release non-debtor third parties. *See Underhill*, 769 F.2d at 1432 (citations omitted). The Court further observed that "[t]he bankruptcy court can affect only the relationships of debtors and creditor," and concluded the bankruptcy court lacks the power to discharge non-debtors of liabilities they may have to other entities. *Id.* (internal quotation marks and citation omitted). Following *Underhill*, the Ninth Circuit in *American Hardwoods* likewise concluded that "[s]ection 524(e) . . . limits the court's equitable power under section 105

to order the discharge of the liabilities of non-debtors." *American Hardwoods*, 885 F.2d at 626.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Opinion Is in Direct Conflict with Two Other Circuits and Further Exacerbates a Circuit Split

The Ninth Circuit's opinion expressly acknowledged, 961 F.3d at 1085 n.7, it is in direct conflict with at least two other circuits that found third-party exculpation clauses categorically illegal and beyond the scope of the Bankruptcy Code. *See*, *e.g.*, *In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Western Real Estate Fund*, 922 F.2d at 600. As noted above, the opinion likewise conflicts with the Ninth Circuit's own prior authority which had uniformly held third-party exculpation clauses invalid as beyond the scope of the Bankruptcy Code. *See Lowenschuss*, 67 F.3d at 1401; *American Hardwoods*, 885 F.2d at 626. *Underhill*, 769 F.2d at 1432; *Commercial Wholesalers*, 172 F.2d at 801.

Other circuits have allowed such clauses, but under varying standards, none of which tracks the "narrowness" standard set forth by the Ninth Circuit's decision and none of which had ever been previously adopted by the Ninth Circuit. *See Deocampo v. Potts*, 836 F.3d 1134, 1143 (9th Cir. 2016) (rejecting other circuits' authority upholding certain non-debtor third party exculpation clauses). In the Third Circuit, much

relied upon by the panel, the test is whether the release has the "hallmarks of permissible non-consensual releases – fairness, necessity to the reorganization, and specific factual findings to support these conclusions." *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (quoting *In re Continental Airlines*, 203 F.3d 203, 211 (3d Cir. 2000)). In *PWS*, the Third Circuit upheld a limitation of liability as to the creditors' committee and professionals who served the committee in connection with their work in developing the reorganization plan. 228 F.3d at 245-47. The court pointed to the statutory immunity that already protects such individuals and the policy rationale behind it, namely that without such protection, nobody would serve on or provide services to creditors' committees. *Id.* at 246. The Exculpation Clause and Permanent Injunction at issue here went further, however, and unjustifiably protected Credit Suisse, a self-interested and collusive creditor.

In the Second Circuit, the inquiry is stricter; "[a] non-debtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005). The Second Circuit recognizes the problems with immunizing non-debtor third parties. *Id.* at 142 (noting that "a non-debtor release is a device that lends itself to abuse. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code.").

In the Fourth Circuit, there are yet different limits on when releases may be valid, e.g., "where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor." *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 702 (4th Cir. 1989).

In the Sixth Circuit, there must be "unusual circumstances" and the following seven factors must be satisfied for such a release to be upheld:

(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;

(2) The non-debtor has contributed substantial assets to the reorganization;

(3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;

(4) The impacted class, or classes, has overwhelmingly voted to accept the plan;

(5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;

(6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and

(7) The bankruptcy court made a record of specific factual findings that support its conclusions.

In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002).

The Seventh Circuit holds that non-debtor releases must be "appropriate" and essential to the reorganization. *In re Airadigm Comm., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008). The Seventh Circuit also made clear that, absent "unique circumstances," such releases are not "always – or even normally – valid," and "[i]n most instances, releases like the one here will not pass muster under [the *Airadigm*] rule." *In re Ingersoll, Inc.*, 562 F.3d 856, 865 (7th Cir. 2009).

Finally, the Eleventh Circuit expressly adopted the Seventh Circuit's interpretation of § 524(e) finding that "the discharge of the debtor's debt does not itself affect the liability of a third party, but § 524(e) says nothing about the authority of the bankruptcy court to release a non-debtor from a creditor's claims." *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015). The Eleventh Circuit has similarly

found that § 105(a) provides the bankruptcy court sufficient equitable power to grant nonconsensual third-party releases. *In re Munford*, 97 F.3d 449 (11th Cir. 1996). While the Eleventh Circuit adopted the *Dow Corning* test, it advises that such "factors should be considered a nonexclusive list of considerations, and should be applied flexibly, always keeping in mind that such bar orders should be used cautiously and infrequently." *Seaside Eng'g*, 780 F.3d at 1079. Thus, while the Eleventh Circuit adopted the Seventh Circuit's interpretation of § 524(e), it maintained the *unique* circumstances threshold observed by all other *allowing* courts. The Eleventh Circuit similarly adopted from the Fourth Circuit, the disjunctive use of the *Dow Corning* factors as appropriate under the factual circumstances.

No case relied exclusively on the purported "narrowness" of the release as the Ninth Circuit did here. The Ninth Circuit's decision is an outlier even among circuits that allowed exculpation of non-debtors in rare, infrequent, and unusual circumstances. The circuit split on the issue of non-debtor releases that existed prior to the Ninth Circuit's decision in *Blixseth* rested on the spectrum between (i) wholly impermissible, as previously reflected by the decisions of the Fifth, Ninth, and Tenth Circuits, and (ii) extremely rare forms of relief, limited to unique circumstances that should be granted rarely and only infrequently, as reflected by the decisions of the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. The Ninth Circuit's *Blixseth* decision goes well beyond the most

permissive views of non-debtor releases. Indeed, the Ninth Circuit authorized the release and permanently enjoined the prosecution of Blixseth's direct claims, claims over which (as will be explained below) the Montana Bankruptcy Court did not have subject matter jurisdiction to adjudicate. Importantly, Blixseth was never provided anything in the way of compensation for his released claims – all of which was done without his consent. For these reasons and those outlined below, this case and the issues it presents are perfect for this Court to resolve on a final basis.

II. The Ninth Circuit's Opinion Creates an Unworkable Standard Without Subject Matter Jurisdiction

A. The Ninth Circuit's Decision Breaks Sharply with Pre-Code Practice and This Court's Precedents Under the Bankruptcy Act

The Ninth Circuit's *Blixseth* decision breaks sharply from this Court's precedents regarding the permissible uses and limitations of a bankruptcy court's equitable powers under 11 U.S.C. § 105(a), as well as with the established pre-Code practice under the Bankruptcy Act. The Ninth Circuit's decision below must be reversed to reestablish order and certainty in this area of law and to give effect to Congress's intent in 11 U.S.C. §§ 524(a)(2) and 524(e) that permanent injunctive relief is reserved specifically for bankrupt debtors and *not* non-debtor third parties. *See*, *e.g.*, *Lexmark Int'l Inc. v. Static Control Components, Inc.*,

572 U.S. 118, 129 (2014) (recognizing that relief available under a statutory regime extends only to those persons or entities whose interests "fall within the zone of interests of the law invoked[,] and explicitly clarifying that the zone of interest test "applies to all statutorily created causes of action; that it is a 'requirement of general application'; ***and that Congress is presumed to 'legislat[e] against the background of' the zone-of-interests limitation, 'which applies unless it is expressly negated***.'" (emphasis added) (citations omitted); *see also In re American Hardwoods*, 885 F.2d at 626; *In re Lowenschuss*, 67 F.3d at 1402 n.6.

The Ninth Circuit's decision in *Blixseth* discusses at some length the legislative history of 11 U.S.C. § 524(e), as well as the Ninth Circuit's understanding of bankruptcy practice under the Bankruptcy Act of 1898 in support of the panel's conclusion that § 524(e)'s application is cabined solely to the debt subject to discharge under 11 U.S.C. § 524(a) and does not bar the bankruptcy court from permanently enjoining and releasing claims of non-debtors against other non-debtors as part of a bankruptcy case. 961 F.3d at 1083 ("The emphasis on the liability of co-debtors and guarantors, but not creditors or other third parties ***indicates the intended scope of Section 16 and, by extension, § 524(e)***.") (emphasis added). "Like its predecessor provision in the 1898 Bankruptcy Act, § 524(e) prevents a reorganization plan from inappropriately circumscribing a creditor's claims against a debtor's co-debtor or guarantors over the discharged

debt, ***and so does not apply to the Clause before us***." *See id.* (emphasis added). The pre-Code practice under the Bankruptcy Act supports the Petitioner, not the Respondent.

The Ninth Circuit had previously noted in *American Hardwoods*, "Subject matter jurisdiction and power are separate prerequisites to the court's capacity to act." 885 F.2d at 624. In order to glean any interpretive guidance from the legislative history of 11 U.S.C. § 524(e) and bankruptcy practice under that statutory provision's predecessors under the Bankruptcy Act about whether a bankruptcy court has the power to release and permanently enjoin claims of non-debtors against other non-debtors, the subject matter jurisdiction regimes under both the Bankruptcy Act of 1898 and the Bankruptcy Code of 1978 would have to be the same or sufficiently similar to justify drawing a conclusion along the lines of the Ninth Circuit's holding. The Ninth Circuit is profoundly mistaken, however, in predicating its erroneous holding in *Blixseth* on pre-Code practice under the Bankruptcy Act.

It was established law under the Bankruptcy Act that the referee in bankruptcy did not have subject matter jurisdiction to enjoin permanently a state court lawsuit between non-debtor entities. *See Callaway v. Benton*, 336 U.S. 132, 134-36 (1949); *see also Ralph Brubaker, Non-debtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 Am. Bankr. L.J. 1, *1 (1998). This Court so held notwithstanding the contention that entry of the permanent injunction

enjoining continued prosecution of a state court lawsuit between competing factions of non-debtor entities with interests in the debtor entity undergoing reorganization was important to the success of the debtor's reorganization efforts. *See Callaway*, 336 U.S. at 136-41. Absent the existence of subject matter jurisdiction to even entertain the issuance of permanent injunctive relief in favor of non-debtor entities, it is difficult to see how any interpretive guidance can be gleaned in support of the power of a bankruptcy court under the Bankruptcy Code to issue permanent injunctive relief in favor of non-debtor entities. Indeed, § 105(c) embodies this Court's rule announced in *Callaway* by directing and limiting subject matter jurisdictional analyses to applicable provisions of the Judicial Code, and not to the alleged or asserted necessity of a particular injunction.

As this Court's authorities made clear, "When Congress amends the bankruptcy laws, it does not write 'on a clean slate.' Furthermore, this Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *See Dewsnup v. Timm*, 502 U.S. 410, 419 (1992); *see also Kelly v. Robinson*, 479 U.S. 36, 43-53 (1986); *Midlantic Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). The fact that the referee in bankruptcy lacked subject matter jurisdiction to even entertain a request to enter a permanent injunction in favor of a non-debtor entity and against another non-debtor entity, to say nothing about

the nonexistent power to do so, speaks volumes about how sharply the Ninth Circuit's *Blixseth* decision breaks with pre-Code practice absent any statutory authorization for such a marked departure in the Bankruptcy Code.

Again, the pre-Code practice and the interpretive guidance that can be gleaned from it in terms of the matter at bar all weigh heavily in Petitioner's favor, notwithstanding the Ninth Circuit's reconceptualization of the relevant pre-Code practice to give the impression that it has long been the case that non-debtor releases backed by permanent injunctions in bankruptcy cases were somehow permissible or even common practice. That was simply not the case on both counts. The interpretive guidance in Petitioner's favor explains why Congress felt compelled to enact 11 U.S.C. § 524(g) in 1994 notwithstanding the fact that large bankruptcies filed to manage the liability for the manufacturing and use of asbestos had already been in the federal bankruptcy courts for well over a decade. *See In re Lowenschuss*, 67 F.3d at 1402 n.6; *see also Manville Corp. v. Equity Security Holders Comm. (In re Johns-Manville Corp.)*, 801 F.2d 60, 64 (2d Cir. 1986). The Ninth Circuit's decision should, therefore, be reversed based on the very pre-Code practice the Ninth Circuit invoked in support of its erroneous holding and to wipe the slate clean of yet another decision that cannot be justified under the current version of the Bankruptcy Code.

B. The Ninth Circuit's Decision Breaks with Congress's Judgment

The Ninth Circuit's reasoning in upholding the non-debtor release and permanent injunction against Petitioner's claims against Credit Suisse here begins by noting the release is "narrow in both scope and time." *See Blixseth*, 961 F.3d at 1081 (internal quotation marks and citation omitted). The Ninth Circuit then proceeded to make two critical errors in its reasoning that led it to erroneously affirm the decision of the Montana District Court.

First, by characterizing the relief sought in such a manner, the Ninth Circuit failed to grasp the most critical dimension of the relief sought by Credit Suisse: namely, the *duration* of the relief it sought in the Montana Bankruptcy Court. The non-debtor release Credit Suisse received was backed by a permanent injunction, not a temporary stay. *See id.* The relief Credit Suisse obtained was extraordinary because it did so without having to submit itself to that bankruptcy court's jurisdiction as a debtor.

The Ninth Circuit's failure to grasp the gravity of the request embodied in Credit Suisse's non-debtor release through the Plan's exculpation clause, in turn, led the Ninth Circuit to begin its analysis on an errant track, asking first whether 11 U.S.C. § 524(e) barred the relief sought by Credit Suisse rather than whether the Bankruptcy Court possessed the power to grant such relief in the first place. *See id.* Had the Ninth Circuit followed the mode of analysis employed in its prior

decision in *American Hardwoods*, Petitioner respectfully submits the Ninth Circuit's analysis would not have suffered from the analytical problems and shortcomings identified herein and would have reached the correct result – striking down the non-debtor release issued in favor of Credit Suisse.

As the Ninth Circuit observed in *American Hardwoods*, in order for the Montana Bankruptcy Court to issue such relief in favor of Credit Suisse, that court had to address two fundamental questions: (1) whether the Montana Bankruptcy Court had subject matter jurisdiction over Petitioner's claims (at most, such jurisdiction would be limited to so-called "related-to" jurisdiction under 28 U.S.C. § 1334(b), in which case the Montana Bankruptcy Court could not enter a final judgment without Petitioner's consent under 28 U.S.C. § 157(c)(1) and with respect to which the Montana Bankruptcy Court would be obliged to make findings regarding the degree to which Petitioner's claims were related to Yellowstone's bankruptcy proceedings) and (2) whether the Montana Bankruptcy Court possessed the power to issue such relief in favor of Credit Suisse.

Staying with the issue of the Montana Bankruptcy Court's power to act in line with Credit Suisse's requested relief and with an eye toward the permanent duration of the relief requested (a permanent injunction in favor of a non-debtor entity), a release in favor of a non-debtor backed by a permanent injunction is functionally indistinguishable from a discharge in bankruptcy under 11 U.S.C. § 524(a). *See American Hardwoods*, 885 F.2d at 625-26 ("Section 524(e),

therefore, limits the court's equitable power under section 105 to order the discharge of the liabilities of nondebtors. . . ."). Thus, it was previously clear under the Ninth Circuit's own governing precedents that the Montana Bankruptcy Court could not discharge Petitioner's claims against Credit Suisse.

The Ninth Circuit fell prey to a semantic game by Credit Suisse: namely, that it sought a permanent injunction rather than a discharge under 11 U.S.C. § 524(a)(2). Consistent with Congress's command in 11 U.S.C. § 105(a), the Ninth Circuit in *American Hardwoods* had previously rejected precisely such a distinction, specifically: "We find American's semantic distinction between a permanent injunction and a discharge unpersuasive. . . . ***The permanent injunction requested by American falls squarely within the definition of a discharge under section 524(a)(2). American requests 'an injunction against . . . an action . . . to collect a debt.***" *See id.* at 626 (emphasis added) (alteration in original). Had the Ninth Circuit focused sharply, as it did in *American Hardwoods*, not on the alleged limited scope and period of time for which Credit Suisse sought relief as the Ninth Circuit did in error, but on the actual substance of the relief being sought by Credit Suisse and the duration of such relief as against Petitioner – a permanent injunction – it would not have reached the erroneous conclusion it reached in its decision.

American Hardwoods correctly recognized any injunctive relief that could issue from a Bankruptcy Court which was permanent in duration and nature

was committed solely by Congressional judgment to discharging bankruptcy debtors by way of the discharge injunction in 11 U.S.C. § 524(a)(2). When the strictures of the discharge injunction are read in tandem with 11 U.S.C. § 524(e), it becomes clear that permanent injunctive relief under the Bankruptcy Code is not available to non-debtors to extricate themselves from potential claims and liability to other non-debtor entities. The provisions of 11 U.S.C. § 524 occupied the field and displaced any potential application of 11 U.S.C. § 105. *See id.* ("We therefore conclude that the specific provisions of section 524 ***displace the court's equitable powers under section 105 to order the permanent relief sought by American***." (emphasis added)). The Ninth Circuit, therefore, lacked the power to issue permanent injunctive relief in favor of non-debtor Credit Suisse that permanently enjoined Petitioner from pursuing his claims against them.

The Ninth Circuit's focus on the "narrowness" of the release misconstrues the law. The narrowness or breadth of a release of liability does not change the analysis. Since the court lacks the power to discharge the liabilities of a non-debtor, it makes no difference whether the extent of the discharge is narrow or broad.

The Ninth Circuit identified two statutory bases which it claims authorized the issuance of permanent injunctive relief in favor of Credit Suisse: 11 U.S.C. §§ 105(a) and 1123. First, by its terms, 11 U.S.C. § 105(a) provides in relevant part, "The Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. *See*

11 U.S.C. § 105(a). This Court's precedents have made clear that whatever equitable powers are vested in bankruptcy courts, they cannot be used to contradict Congress's express commands set forth in the Bankruptcy Code. *See*, *e.g., Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). More specifically with respect to 11 U.S.C. § 105(a), this Court held relatively recently in a unanimous decision that a bankruptcy court acting pursuant to 11 U.S.C. § 105(a) "may not contravene specific statutory provisions." *Law v. Siegel*, 571 U.S. 415, 421 (2014). "It is hornbook law that § 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code' . . . Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action the Code prohibits." *See id.* (emphasis added).

As explained above and as the Ninth Circuit correctly observed in *American Hardwoods*, the Bankruptcy Code already provides permanent injunctive relief to bankrupt debtors in the discharge injunction under 11 U.S.C. § 524(a)(2). By operation of 11 U.S.C. §§ 524(a)(2) and 524(e) in tandem, permanent injunctive relief is available solely to bankrupt debtors. Bankruptcy courts lack the power in the way of express statutory authorization to release claims of non-debtor third parties against other non-debtors. This Court's holding in *Lexmark* makes explicit the statutory zone-of-interests concept as a background principle of generally applicable law against which Congress is presumed to have legislated, unless the principle is

expressly disclaimed in the statutory enactment by Congress. *See Lexmark*, 572 U.S. at 129. Here, the zone-of-interests with respect to the class of beneficiaries who may avail themselves of permanent injunctive relief under the Bankruptcy Code is delineated by reference to 11 U.S.C. § 524. And, by operation of 11 U.S.C. §§ 524(a)(2) and 524(e), permanent injunctive relief under the Bankruptcy Code is limited by Congressional judgment to bankrupt debtors, not non-debtor third parties. To hold otherwise, as the Ninth Circuit did, is to create an entirely new class of beneficiaries who may avail themselves of permanent injunctive relief from the claims of other non-debtors without subjecting themselves to the strictures of the Bankruptcy Code by seeking relief under Chapter 11 as Congress intended.

The Ninth Circuit's reasoning under 11 U.S.C. § 1123(b)(6) fares no better. That statutory provision permits a plan to include any provisions that are not inconsistent with other provisions of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(6). For the reasons above, inclusion of a permanent injunction in a Chapter 11 plan in favor of a non-debtor that purports to release a non-debtor from claims or potential liability at the hands of another non-debtor is inconsistent with the provisions of 11 U.S.C. §§ 524(a)(2) and 524(e). Reliance on this statutory basis as a means of conferring power on the Montana Bankruptcy Court to permanently enjoin Petitioner's claims against Credit Suisse is similarly misplaced.

The U.S. Constitution vests the power to enact bankruptcy laws exclusively in the hands of Congress. *See* Art. I, § 8, cl. 4. This Court has long recognized Congress's power under the Bankruptcy Clause is plenary and exclusive. *See*, *e.g.*, *Kalb v. Feuerstein*, 308 U.S. 433, 438-39 (1940). It is for Congress, not the lower courts, to make judgments that are legislative in character – by defining which entities are encompassed within the zone of interests created under the Bankruptcy Code's provisions pursuant to which permanent injunctive relief can issue validly – and to carefully balance competing interests as Congress did in passing 11 U.S.C. § 524(g). To hold otherwise is to allow the courts to usurp Congress's plenary and exclusive power in this area. Where this leads, inevitably, is to the promulgation of judicial standards that are unworkable, internally inconsistent, lend themselves to abuse, or some combination thereof. Petitioner respectfully submits that the Petition should be granted, and the decision of the Ninth Circuit should be reversed.

C. The Ninth Circuit's Opinion Sets Forth an Unworkable Standard in an Area of Bankruptcy Law That Is Already Rife with Abuse

The Ninth Circuit's decision below displaces the careful Congressional judgments embodied in 11 U.S.C. §§ 524(a)(2), 524(e), and 524(g) with a test that is so unworkable in practice that it leads to internal inconsistencies and contradictions within the Ninth

Circuit's opinion itself. To begin, the Ninth Circuit reasoned that the issuance of a permanent injunction against Mr. Blixseth's prosecution of his claims against Credit Suisse was "narrow in both scope and time." *See Blixseth*, 961 F.3d at 1081. Again, the permanent duration of the relief is what is at issue and what is normatively significant for these purposes. In any event, the Ninth Circuit goes on to assure Petitioner that the Plan's exculpation and release of Credit Suisse:

> It does not affect obligations relating to the claims filed by creditors and discharged through the bankruptcy proceedings, ***as it exclusively exculpates actions that occurred during the bankruptcy proceeding, not before***. And, during that time period, ***the Clause's release applies only to negligence claims***; it does not release parties from willful misconduct or gross negligence.

See id. (emphasis added).

The highlighted limitations in the Ninth Circuit's decision would ordinarily lead one to believe the Plan's exculpation clause is limited to breaches of duty sounding in tort, not contract. *See id.* The exclusive and sole application to negligence claims in the body of the Ninth Circuit's opinion would ordinarily not admit any another result. And yet, the Ninth Circuit's decision includes the seeds of internal inconsistency. In footnote five (5), the Ninth Circuit at least arguably addressed the potential application of the Plan's exculpation clause which released Petitioner's ***breach of contract*** claims against Credit Suisse and pending before the

Colorado District Court. *See id.* at 1084 n.5.[2] The Ninth Circuit did not clearly delineate its position or standard for the approval of plan releases, and this does not bode well as a forecast that the Ninth Circuit's newfound standard can be applied predictably and uniformly by lower courts in a way that does not lend itself readily to abuse. Dispatches from other circuits in the form of lower courts opinions decrying the steady stream of abuse in this area of law are not encouraging.

For instance, the United States Bankruptcy Court for the Southern District of New York recently observed that the practice of seeking nonconsensual releases of non-debtors in Chapter 11 plans had been reduced essentially to boilerplate text included in all Chapter 11 plans. *See In re Aegean Marine Petroleum Network, Inc*., 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) ("Almost every proposed plan I receive includes proposed releases . . . the proposed releases are usually as broad as possible in scope"). There, Judge Wiles likened the penchant for parties to seek such extraordinary relief as something akin to handing out a "participation trophy," "a merit badge" or "a gold star for doing a good job." *See id.* at 726-27. After carefully explaining the myriad issues of procedural due process, subject matter jurisdiction, and substantive issues raised by such relief under the Bankruptcy Code, the *Aegean Marine*

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[2] Petitioner expressly reserves the right to seek relief before the Colorado District Court under FED. R. CIV. P. 60(b)(5) and does not intend the foregoing discussion to constitute any waiver of his rights.

court then summarized its concerns by lamenting that, "In substance, this amounts to a suggestion that I should give releases unless I can think of a good reason not to." *Id.* at 728. These observations were echoed recently by the United States Bankruptcy Court for the Northern District of Ohio. *In re Firstenergy Sols. Corp.*, 606 B.R. 720, 733 (Bankr. N.D. Ohio 2019).

Petitioner respectfully submits it is not surprising the lower courts which are finding the practice with respect to the issuance of non-debtor releases rife with abuse are those courts seated in circuits in which the practice is permitted. Making matters worse, the Ninth Circuit's most recent standard is equally unworkable. The Ninth Circuit's *Blixseth* opinion assures Petitioner the non-debtor release and permanent injunction through the Plan's exculpation clause is limited to negligence claims sounding in tort; but, then in an about face, the Ninth Circuit at least arguably intimates that the application of the exculpation clause to his breach of contract claims brought against Credit Suisse may also be valid. If the newly found "narrowness" standard is incapable of consistent application in the very opinion in which it is enunciated, then allowing the application of this standard in lower courts raises the prospect of allowing lenders to escape liability for breaches of contract by leveraging bankruptcy cases to extract a release of liability backed by a permanent injunction for simply participating in a Chapter 11 bankruptcy. In case this Court believes this concern is academic or far-fetched, the lower courts in which such relief is regularly sought are already being

presented with such arguments. *See In re Millennium Lab Holdings, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (noting the prospect that "the bankruptcy courts' powers would be essentially limitless and that an 'integral to the restructuring' rule would mean that bankruptcy courts could approve releases ***simply because reorganization financers demand them***, which could lead to gamesmanship. ***This argument is not without force.***") (emphasis added).

III. The Ramifications of The Ninth Circuit's Newly Announced "Narrowness" Standard Are Profound and Far-Reaching and Include Potential Issues of Constitutional Significance

Prior to its most recent decision in *Blixseth*, the Ninth Circuit's views on non-debtor releases were best summarized by the following categorical statement, "[The Ninth Circuit] has repeatedly held, *without exception*, that § 524(e) precludes bankruptcy courts from discharging liabilities of non-debtors." *In re Lowenschuss*, 67 F.3d at 1401 (emphasis added). *Lowenschuss*, in turn, cited as support for its absolute bar on such relief an unbroken line of authorities dating back to at least the 1940's. *See id.* at 1401-02 (internal citations omitted). But what was commonly and repeatedly understood to represent a categorical bar to such relief was substantially diminished in *Blixseth* when the Ninth Circuit observed, "We have interpreted [§ 524(e)] *generally* to prohibit a bankruptcy court from discharging the debt of a non-debtor." 961 F.3d at 1082

(citation omitted). The Ninth Circuit completed its 180-degree turn when it stated, "We conclude, however, that § 524(e) does not bar a narrow exculpation clause of the kind here at issue – that is, one focused on actions of various participants in the Plan approval process and relating only to that process." *See id.*

Such a drastic about face raises serious constitutional issues under the Fifth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution provides in relevant part that, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Blixseth's litigation claims against Credit Suisse constitute cognizable property interests within the protection of the Fifth Amendment. *See*, *e.g.*, 11 U.S.C. § 541(a)(1); *see also United States v. Whiting Pools*, 462 U.S. 198, 205 n.9 (1983) (defining property of the bankruptcy estate to include causes of action). As this Court has long observed, Congress's power to legislate under the Bankruptcy Clause of the U.S. Constitution, Art. I, § 8, cl. 4, is circumscribed by the strictures of the Fifth Amendment's Takings Clause. *See*, *e.g., United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1983) ("The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.") (citation omitted); *see also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935). The non-debtor release and permanent injunction against Blixseth's prosecution of direct litigation claims he held against Credit Suisse reduced the value of his claims to zero.

The Ninth Circuit's newly announced law on the issue of non-debtor releases to deprive Blixseth of *in personam* direct claims he held against Credit Suisse, another non-debtor entity, cannot be viewed as anything other than a judicial taking in violation of the Fifth Amendment. *See*, *e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion) ("If a court declares that what was once an established right of private property no longer exists, it has taken that property."). The Ninth Circuit's abrupt reversal of its position on the availability and legality of non-debtor releases backed by permanent injunctions had the net effect of taking Blixseth's direct claims against Credit Suisse, another non-debtor entity, for a private, not a public purpose, and without even putting on the pretense of offering Blixseth anything by way of compensation for the direct *in personam* claims that were taken from him. It is unjust and unconscionable that Credit Suisse left the Yellowstone Club's Chapter 11 bankruptcy case with a greater bundle of rights vis-à-vis Blixseth than it possessed at the start of that bankruptcy case, despite the fact that Credit Suisse itself never filed bankruptcy. But this inherent unfairness of issuing non-debtor releases backed by permanent injunctions under the Ninth Circuit's recently announced "narrowness" test is just the tip of the iceberg.

First, bankruptcy courts are often asked to permanently enjoin claims of non-debtors against other non-debtors without ever determining whether they have subject matter jurisdiction to release non-debtor

claims. *See In re Aegean Marine*, 599 B.R. at 723 (noting in connection with requests to exercise so-called "related to" jurisdiction under 28 U.S.C. § 1334(b) that bankruptcy courts are often called upon to issue such permanent injunctions barring prosecution of non-debtor *in personam* claims against other non-debtors when there does not already exist a "proceeding" whose relatedness to the bankruptcy case at hand can be assessed.").

Here, the Montana Bankruptcy Court permanently enjoined Blixseth's claims against Credit Suisse before he could file suit. Blixseth sued Credit Suisse in 2012, years after confirmation of Yellowstone's Chapter 11 bankruptcy plan. The Montana Bankruptcy Court's prospective grant of permanent injunctive relief barring prosecution of Blixseth's direct *in personam* claims against Credit Suisse without his consent effectively nullifies this Court's recent line of cases delineating the proper division of authority to adjudicate certain non-core matters. *See*, *e.g.*, *Wellness Int'l Network, Ltd. v. Shariff*, 575 U.S. 665 (2015); *see also Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25 (2014); *Stern v. Marshall*, 564 U.S. 462 (2011). Despite the fact that Blixseth's direct *in personam* claims against Credit Suisse included breach of contract claims against another non-debtor, the very type of claims that the Montana Bankruptcy Court could not directly adjudicate on a final basis without Blixseth's consent, Blixseth's claims were effectively adjudicated and resolved against him through the entry of a permanent injunction in favor of Credit Suisse. *See*, *e.g.*, *Stern*, 564 U.S.

at 493; *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment) (noting that breach of contract claims were tried to common law courts in 1789, and Congress lacked the authority to assign the adjudication of such claims to courts that lacked the protections of Article III).

Next, in addition to the subject matter jurisdiction defects in prospectively releasing by way of permanent injunction claims over which the Montana Bankruptcy Court did not have jurisdiction, the Montana Bankruptcy Court also lacked *in personam* jurisdiction over Blixseth. As part of the plan confirmation process, Blixseth was served only with notice, not with the requisite formal process necessary for the Montana Bankruptcy Court to obtain personal jurisdiction over Blixseth to adjudicate his direct *in personam* claims. *See In re Aegean Marine*, 599 B.R. at 723 ("But we are not talking here about a disposition of the Debtors' own assets, or of the resolution of claims over which we have *in rem* jurisdiction. Instead we are talking about issuing a ruling that extinguishes one non-debtor's claims against another non-debtor."). Because the Montana Bankruptcy Court did not have *in rem* jurisdiction over Blixseth's direct *in personam* claims, mere notice was not sufficient for purposes of that court obtaining jurisdiction over Blixseth's person to adjudicate such claims. And yet, Blixseth's direct *in personam* claims against Credit Suisse were permanently enjoined.

More pernicious still was the fact that the release of, and permanent injunction against, Blixseth's direct

in personam claims against Credit Suisse was forced on him through settlement terms dictated by third parties. *See id.* at 724. Such a result violates this Court's prohibition on lower courts forcing parties to settle or release their claims. *See United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964). This Court's case law also disapproves of efforts of two parties to bargain away the rights and/or defenses of a third party. *See Local 93, Int'l Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). All of these violations of non-debtor rights and legitimate expectations, moreover, routinely occur when non-debtor releases are granted by bankruptcy courts without the benefit of the additional substantive safeguards and procedural protections imposed by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure in the adjustment of the debtor/creditor relationship. *See In re Aegean Marine*, 599 B.R. at 724. Indeed, in some instances, a bankruptcy court's grant of a non-debtor release will exceed even the forms of relief made available to the debtor that is under bankruptcy protection. *See id.* For instance, a debtor's insiders may be able to obtain a non-debtor release permanently enjoining the prosecution of securities fraud claims against them when, if they sought bankruptcy relief themselves, such claims would be exempted from discharge by operation of 11 U.S.C. § 523(a)(19).

These policy implications arise nearly every time a non-debtor release is sought on behalf of a non-debtor third party. If the practice is allowed to continue unabated, more and more unwitting parties will find

their *in personam* direct claims against non-debtor parties enjoined from prosecution as a result of a court order issued from a bankruptcy court that often could not have adjudicated such claims in the first place. The continuance of this practice will erode the public's confidence in our system of justice and the representative institutions upon which it depends.

Petitioner respectfully submits that allowing the Ninth Circuit's decision to stand threatens to throw the credit markets into disarray if breach of contract claims based upon bargained for non-recourse provisions in loan documents can essentially be breached with impunity by lenders, so long as such lenders can be released from liability under a Chapter 11 plan. As the decisions in *Aegean Marine* and *Firstenergy* demonstrate, federal courts are poorly situated and ill-equipped to make sensitive legislative judgments like those embodied in 11 U.S.C. §§ 524(a)(2), 524(e), and 524(g).

IV. This Case Presents a Timely and Appropriate Vehicle for the Court to Address the Important Issue of the Validity of Non-Debtor Releases in Bankruptcy Plans

The circuit split in this area has festered long enough. While the circuits can sometimes be left to test out and develop the law in a coherent way, in this case, they failed to do so. Almost all of the circuits have made their views known, and they are in hopeless disarray. The issue will not get any more ripe but will

continue to rot. The time has come for this Court to say what the law is in this area. This case presents the perfect opportunity to bring consistency and constitutionality to this troubled area of the law.

Moreover, the case is well presented for this Court's review. The Ninth Circuit's opinion is published and unequivocally announces a rule of law that is inconsistent with every other circuit to have addressed the issue. The Ninth Circuit's unworkable standard spotlights the dire practical and constitutional ramifications of allowing non-debtors to immunize themselves and third-party claimants to lose their valuable property rights in an Article I court that lacks jurisdiction and does not provide necessary due process protections.

Finally, the Ninth Circuit's decision ends the litigation in this case. While the court could have remanded the issue to the district court, the Ninth Circuit elected to reach the merits. The issue is purely one of law, and there are no pertinent factual disputes. In short, this case is perfectly set up for the Court's review, and the time for that review is now.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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January 2021