No. _____

In the
Supreme Court of the United States

SPEECH & LANGUAGE CENTER, LLC AND
CHRYSSOULA MARINOS-ARSENIS,
Petitioners,

v.

HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can parties to a civil settlement agree that the payments required under the agreement are not dischargeable in bankruptcy?

PARTIES TO THE PROCEEDINGS

Petitioners Speech & Language Center, LLC and Chryssoula Marinos-Arsenis were the defendants in the New Jersey Superior Court, the appellants in the New Jersey Superior Court, Appellate Division, and the petitioners in the New Jersey Supreme Court. Respondent Horizon Blue Cross Blue Shield of New Jersey was the plaintiff in the New Jersey Superior Court, the respondent in the New Jersey Superior Court, Appellate Division, and the respondent in the New Jersey Supreme Court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of petitioners' stock.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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Speech & Language Center, LLC and Chryssoula Marinos-Arsenis petition this Court for a writ of certiorari to review the decisions of the New Jersey courts below.

OPINIONS BELOW

The December 9, 2021 Order of the New Jersey Supreme Court is unpublished and appears at Appendix A. The December 16, 2020 decision of the New Jersey Superior Court, Appellate Division, is unpublished and appears at Appendix B. The November 15, 2019 decision of the New Jersey Superior Court is unpublished and appears at Appendix C.

JURISDICTION

The Order dismissing petitioners' appeal was entered by the New Jersey Supreme Court on December 9, 2021. App. A. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257.

STATUTORY PROVISIONS INVOLVED

11 U.S.C.A. § 727(b) provides, "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and

whether or not a claim based on any such debt or liability is allowed under section 502 of this title."

11 U.S.C.A. § 523(c)(1) provides, "Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section."

11 U.S.C.A. § 523(a) enumerates exceptions to discharge but does not identify debts that the debtor has agreed, prepetition, to be nondischargeable in bankruptcy.

STATEMENT OF THE CASE

Chryssoula Marinos-Arsenis is a licensed speech-language pathologist and the principal of Speech & Language Center, LLC, which provides speech-related therapy to patients. Horizon filed suit against Ms. Arsenis and her company in the New Jersey state court, alleging a "scheme to submit false and fraudulent insurance claims" and related claims. Ms. Arsenis vehemently denied any wrongdoing and fought Horizon's accusations for years in the state court below.

Then, on the eve of trial, after intensive and extensive negotiations prompted and supervised by the trial judge, the parties were compelled to settle their dispute. The parties acknowledged an unsigned material term sheet with forthcoming changes expected.

When Horizon's counsel presented a written settlement agreement to defendants, however, a dispute arose. Horizon moved to compel Ms. Arsenis to sign the written settlement agreement that Horizon presented. Ms. Arsenis denied having consented to sign a settlement agreement that acknowledged "fraud" – which was completely contrary to the "no admission of liability" language contained throughout the agreement.

Ultimately, the parties' dispute narrowed to the validity of the following two provisions in Horizon's Settlement Agreement:

- "In the event Ms. Arsenis files for bankruptcy prior to payment in full of the obligation to Horizon set forth in Paragraph 2.0, Ms. Arsenis agrees not to contest the non-dischargeability of any remaining settlement payment obligation owed to Horizon."

- "Ms. Arsenis agrees and intends that the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. 523(a)(2) in the event of a bankruptcy, or in any similar proceeding."

In the state court below, defendants contended that these clauses were void as contrary to supreme federal bankruptcy law and should be stricken as such.

But the New Jersey courts enforced the provisions.

The trial judge ruled that the bankruptcy citation was "always a key component" in the parties' negotiations and that Horizon would not have agreed to settle "unless they were assured that the Defendant

was not able to contest dischargeability." The court compelled defendants to sign Horizon's agreement.

Defendants appealed, but New Jersey's Appellate Division affirmed, though declining to address the validity of the bankruptcy provisions: "Defendant Arsenis's agreement about the debt's non-dischargeability has no significance until she files a bankruptcy petition," the Appellate Division said. "If, at that time – should it ever occur – the parties dispute whether the debt is dischargeable, a bankruptcy court will have to consider whether federal policies and legal principles preclude the enforcement of what defendant Arsenis 'agree[d] and intend[ed]' in executing the settlement agreement about dischargeability. This appeal does not require that we opine on this interesting but unripe issue." Appx. B.

Defendants then petitioned for review by New Jersey's Supreme Court, which granted review and heard oral argument on whether the provisions are void. Following oral argument, however, the court ruled, "It is ORDERED that the within appeal is dismissed. The enforceability of section 3.8 of the settlement agreement- which states that 'the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. § 523(a)(2) in the event of a bankruptcy' - is for the Bankruptcy Court to resolve if a bankruptcy petition is filed." Appx. A.

REASONS FOR GRANTING THE PETITION

The Court should clarify that prepetition settlement agreements providing that a debt will be non-dischargeable, or restricting other rights the Bankruptcy Code grants to debtors, are void as violating supreme federal law.

Some courts have ruled that such prepetition agreements are void as violating the Code and its policy, *see*, *e.g.*, *In re Huang*, 275 F.3d 1173 (9th Cir. 2002); *Matter of Ethridge*, 80 B.R. 581, 586 (Bankr. M.D. Ga. 1987) ("the provisions of the consent judgment which pertain to the waiver of Defendant's right to a discharge are void"); *In re Kriger*, 2 B.R. 19, 23 (Bankr. D. Or. 1979) ("It is a well settled principle that an advance agreement to waive the benefit of a discharge in bankruptcy is wholly void, as against public policy"); *In re Minor*, 115 B.R. 690, 694–96 (D. Colo. 1990) (holding prepetition waiver of discharge of individual debt invalid); *Matter of Bisbach*, 36 B.R. 350, 352 (Bankr. W.D. Wis. 1984) (holding unenforceable prepetition waiver in divorce agreement describing debt as nondischargeable maintenance or support).

Other courts have not voided such agreements, however. In *U.S. Bank, Nat. Ass'n v. Kobernick*, 454 F. App'x 307, 313 (5th Cir. 2011), the Fifth Circuit rejected the argument that the provisions there were "unenforceable because they conflict with the public policy prohibition on penalties stemming from the filing of a bankruptcy petition," distinguishing the Ninth Circuit's ruling in *In re Huang*, 275 F.3d 1173. The Fifth Circuit ruled, "here Defendants did not waive

their right to file a bankruptcy petition." Citing to Fourth Circuit precedent in *F.D.I.C. v. Prince George Corp.*, 58 F.3d 1041 (4th Cir. 1995), the Fifth Circuit said it was valid to enforce the "'clear terms' of a promissory note which stated that the debtor was 'not entitled to escape liability for a deficiency judgment if it 'voluntarily' becomes part of a case, action, suit or proceeding which suspends, reduces or impairs FDIC's rights of recourse to the property'" *citing F.D.I.C.*, 58 F.3d 1041. The Fifth Circuit agreed with the Fourth Circuit's *Prince George* opinion that such provisions do not "prohibit [the debtor] from resorting to bankruptcy" but "merely provide[] that if [the debtor] took certain actions it would forfeit its exemption from liability for any deficiency." "[W]e decline to hold that springing guaranty provisions triggered by the filing of a bankruptcy petition are against public policy," the Fifth Circuit held.

The Eleventh Circuit allowed a prepetition agreement to be enforced via collateral estoppel in *In re Halpern*, 810 F.2d 1061, 1064 (11th Cir. 1987). The court acknowledged that dischargeability questions cannot be predetermined but approved of the bankruptcy court's reliance on a state court consent judgment to conclude there was "issue preclusion" foreclosing the debtor from contesting whether the debt in question was dischargeable. "Applying collateral estoppel in such a manner was expressly approved by the former Fifth Circuit in *Carey Lumber Co. v. Bell*, 615 F.2d 370, 377 (5th Cir. 1980)," the Eleventh Circuit said. "The bankruptcy judge here was presented with state court consent judgments as part of a motion for summary judgment on the claim of nondischargeability ....

The judgments contained rather detailed recitations of the findings upon which they were based, findings which closely paralleled the language of ... the Bankruptcy Act. The bankruptcy judge quite properly considered these judgments as evidence in connection with the motion for summary judgment." "The bankruptcy court was correct in determining that no issue of fact existed as to the recitations in the state court judgments. It therefore properly accepted these recitations as true, and correctly found that they required the legal conclusion that the debt owed ... was nondischargeable in bankruptcy. The bankruptcy court in the instant case therefore correctly concluded that collateral estoppel may be applied to foreclose relitigation of certain facts in a dischargeability proceeding," the Eleventh Circuit said. *In re Halpern*, 810 F.2d at 1064–65.

The Fifth Circuit has recognized the uncertainty in this area of law, *see In re Franchise Servs. of N. Am., Inc.*, 891 F.3d 198, 207 (5th Cir. 2018), as revised (June 14, 2018) ("Several courts of appeals—though not this one—have opined that a pre-petition waiver of the benefits of bankruptcy is contrary to federal law and therefore void") (*citing In re Thorpe Insulation Co.*, 671 F.3d 1011, 1026 (9th Cir. 2012) ("This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive"). The Seventh and Second Circuits have addressed the question only in dictum, *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) (stating in *dictum* that "[f]or public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy"); *Fallick v. Kehr*, 369 F.2d 899, 904 (2d

Cir. 1966) (stating in *dictum* that "an advance agreement to waive the benefits of the [Bankruptcy] Act would be void").

The Court should grant Certiorari to clarify this important issue of Bankruptcy law impacting both (1) a debtor's right to seek the fresh start the Code provides, and (2) an individual creditor's right to obtain preference in the payment of its debt via such agreements.

Since the 1970 amendments to the Bankruptcy Code, the issue of nondischargeability has been a matter of federal law governed by the Code. *Brown v. Felsen*, 442 U.S. 127, 129–130, 136, 99 S. Ct. 2205, 2208–2209, 2211, 60 L. Ed. 2d 767 (1979); *Grogan v. Garner*, 498 U.S. 279, 284, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). The 1970 amendments took jurisdiction over certain dischargeability exceptions, including the exceptions for fraud, away from the state courts and vested jurisdiction exclusively in the bankruptcy courts. *Brow*n, 442 U.S. at 135–136; S. Rep. No. 91–1173, pp. 2–3 (1970); H.R. Rep. No. 91–1502, p. 1 (1970), U.S. Code Cong. & Admin. News 1970, p. 4156; *Grogan*, 498 U.S. at 284.

Per this Court's holding in *Brown*, 442 U.S. at 138, res judicata does not apply to confine a bankruptcy court's determination of a dischargeability question. Yet, at the same time, collateral estoppel may apply in dischargeability proceedings, the Court has held, *Grogan*, 498 U.S. at 285. This is causing inconsistent results in lower courts and, through the use of

collateral estoppel, is effectively enforcing such prepetition waiver agreements like the one in this case.

The Court should grant Certiorari to clarify that a provision like in this case – "Ms. Arsenis agrees and intends that the judgment debt will be a non-dischargeable debt, pursuant to 11 U.S.C. 523(a)(2) in the event of a bankruptcy, or in any similar proceeding" – is void as contrary to the Code and should be stricken from prepetition agreements on this ground. 11 U.S.C.A. § 523(c) provides that all nondischargeability claims arising under sections 523(a)(2), (a)(4) and (a)(6) must be determined by a bankruptcy court, which has exclusive jurisdiction over such claims. *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); L. King, 4 *Collier on Bankruptcy*, ¶ 523.26, at 523–111 (15th ed. rev. 1996). 11 U.S.C.A. § 523 enumerates the exceptions to discharge, but does not except from discharge debts that the debtor has agreed, prepetition, will not be dischargeable; Congress did not provide for such an exemption.

A prepetition waiver contravenes these provisions, *cf. In re Miller*, 730 F.3d 198 (3d Cir. 2013) (directing bankruptcy court to proceed with sanction hearings against attorney trying to prevent debtors from obtaining discharge). The Court should clarify that a non-dischargeability agreement between a debtor and creditor reached *during* dischargeability litigation, *in* a bankruptcy action, is enforceable as within the bankruptcy court's jurisdiction. But a prepetition agreement in a non-bankruptcy lawsuit, before bankruptcy is even filed, violates the Code and its policies and should be stricken as void on that ground,

see, *e.g.*, *In re Cole*, 226 B.R. 647, 652–53 (B.A.P. 9th Cir. 1998) ("state court stipulated judgment where the debtor waives his right to discharge is unenforceable as against public policy.")

The Court should affirm rationale like the Ninth Circuit's in *In re Huang*, 275 F.3d 1173, which invalidated a provision very similar to those between Horizon and Ms. Arsenis. There, in a prepetition settlement agreement, the debtor agreed he would not file for bankruptcy protection, and that, if he did, the debt in favor of the bank evidenced by the settlement agreement would not be dischargeable. *Id*. at 1176–77. The Ninth Circuit held, "it is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code." *Id*. at 1177. This conclusion is consistent with the holdings of other lower courts that prepetition waivers of rights under the Bankruptcy Code are unenforceable generally, *see In re Weitzen*, 3 F. Supp. 698 (S.D.N.Y. 1933) ("The agreement to waive the benefit of bankruptcy is unenforceable. To sustain a contractual obligation of this character would frustrate the object of the Bankruptcy Act"); *In re Shady Grove Tech Ctr. Assocs. Ltd. P'ship*, 216 B.R. 386, 390 (Bankr. D. Md.), *supplemented*, 227 B.R. 422 (Bankr. D. Md. 1998) ("[P]rohibitions against the filing of a bankruptcy case are unenforceable, self-executing clauses in pre-petition agreements purporting to provide that no automatic stay arises in a bankruptcy case are contrary to law and hence unenforceable, and ... self-executing clauses in prepetition agreements ... to vacate the automatic stay are likewise unenforceable"); *Matter of Gulf Beach Dev. Corp.*, 48 B.R. 40, 43 (Bankr. M.D. Fla. 1985) (stating in *dictum*

that "the Debtor cannot be precluded from exercising its right to file Bankruptcy and any contractual provision to the contrary is unenforceable as a matter of law"); *In re Tru Block Concrete Prod., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983) ("It is a well settled principal that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy"); *Matter of Schnakenberg*, 195 B.R. 435 (Bankr. D. Neb. 1996) ("I conclude that any attempt by a creditor in a private pre-bankruptcy agreement to opt out of the collective consequences of a debtor's future bankruptcy filing is generally unenforceable. The Bankruptcy Code pre-empts the private right to contract around its essential provisions, such [as] those found in 11 U.S.C. § 362"); *In re Madison*, 184 B.R. 686, 690 (Bankr. E.D. Pa. 1995) (holding that prepetition agreement to waive debtor's right to file further bankruptcies within 180 days from filing of the debtor's last bankruptcy petition unenforceable under public policy); *In re Daniel*, 290 B.R. 914, 919 (Bankr. M.D. Ga. 2003) ("Defendant's agreement not to list her obligations is not enforceable").

It is no answer to postpone the enforceability answer to a bankruptcy court, as the New Jersey appeal courts ruled. The existence of such provisions in civil settlement agreements deters debtors from seeking relief in the first place and thus undermines Congress' chief purpose in enacting the Code. *Gleason v. Thaw*, 236 U.S. 558, 562, 35 S. Ct. 287, 289, 59 L. Ed. 717 (1915). "Enforcement of even an agreement which only temporarily waives such rights would appear sufficient to us to undermine the

Congressionally-expressed public policy underpinning the Bankruptcy Code," *Marden v. Int'l Ass'n of Machinists & Aerospace Workers*, 576 F.2d 576, 580 (5th Cir. 1978); *In re Dawson*, 162 B.R. 329, 333–34 (Bankr. D. Kan. 1993)); *Fallick*, 369 F.2d at 904 ("[T]he Bankruptcy Act expresses a strong legislative desire that deserving debtors be allowed to get a fresh start....[A]n advance agreement to waive the benefits of the Act would be void.") Allowing settlement agreements to contain such provisions, and not having them stricken as Ms. Arsenis asked the New Jersey courts to do below, dissuades a debtor from seeking bankruptcy relief regardless of whether a bankruptcy court ultimately determines the provision is effective or not.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: February 16, 2022