No. _____

In the
Supreme Court of the United States

SPRING VALLEY PRODUCE, INC.,
PRODUCE EXCHANGE CO., INC.,
FRESH DIRECT, INC., AND
S. ROZA & COMPANY, INC.,
Petitioners,

v.

NATHAN AARON FORREST AND
MARSHA WEIDMAN FORREST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition arises from the collision of two federal statutes, namely Bankruptcy Code (11 U.S.C.) § 523(a)(4) and the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. §§ 499a-499t) (PACA).

PACA regulates the interstate sale of produce, and imposes a trust upon produce and its proceeds for the benefit of produce sellers. 7 U.S.C. § 499e(c)(2). Use of trust assets is restricted, and failure to maintain the trust is unlawful, but the statute does not require trust funds to be segregated from other funds. 7 U.S.C. § 499b(3), (4); 7 C.F.R. § 46.46(b).

Individual debtors who file for chapter 7 bankruptcy can discharge some of their debts. 11 U.S.C. § 727(a). But Bankruptcy Code § 523(a)(4) bars discharge of certain debts incurred "while acting in a fiduciary capacity." In general, the fiduciary-capacity requirement is satisfied by a statutory trust. *Larson v. Bayer (In re Bayer)*, 521 B.R. 491, 506 (Bankr. E.D.Pa. 2014).

The dispute in this case turns on whether a federal statute imposing a nonsegregated trust, like PACA, satisfies the fiduciary-capacity requirement. Federal courts are "hopelessly divided" (*id.* at 509), with circuit courts split four to three.

The question presented is:

May a debtor in bankruptcy discharge liability for unlawfully violating a nonsegregated statutory trust?

PARTIES TO THE PROCEEDING

Spring Valley Produce, Inc., Produce Exchange Co., Inc., Fresh Direct, Inc., and S. Roza & Company, Inc. (collectively, "Spring Valley") are the Petitioners here. They were the appellants before the Eleventh Circuit, and they were the plaintiffs in the adversary proceeding before the bankruptcy court.

Nathan Aaron Forrest and Marsha Weidman Forrest are Respondents here. They were the appellees before the Eleventh Circuit, and they were the defendants in the adversary proceeding before the bankruptcy court. Respondents are also the debtors in the underlying bankruptcy case. Respondents were married when their bankruptcy case commenced.

G.W. Palmer & Co., Inc. was the plaintiff in a similar adversary proceeding against Respondents that was dismissed. G.W. Palmer did not appeal from the bankruptcy court's ruling and is not a party to this petition.

CORPORATE DISCLOSURE STATEMENT

Each Petitioner is a private company with no parent corporation. No publicly held corporation owns 10% or more of the stock of any Petitioner.

RELATED PROCEEDINGS

Spring Valley Produce, Inc. v. Forrest (In re Forrest), No. 21-12133, United States Court of Appeals for the Eleventh Circuit. Opinion entered August 31, 2022.

Spring Valley Produce, Inc. v. Forrest (In re Forrest), No. 21-90014, United States Court of Appeals

for the Eleventh Circuit. Order granting permission for direct appeal entered June 24, 2021.

Spring Valley Produce, Inc. v. Forrest (In re Forrest), Adv. Proc. No. 8:20-ap-00447-RCT, United States Bankruptcy Court for the Middle District of Florida. Memorandum decision entered April 2, 2021.

In re Forrest, No. 8:20-bk-03819-RCT, United States Bankruptcy Court for the Middle District of Florida. Petition for relief filed May 15, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Spring Valley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit (Petition Appendix ("Pet. App.") 1a-32a) is reported at 47 F.4th 1229.

The memorandum decision of the United States Bankruptcy Court for the Middle District of Florida (Pet. App. 40a-66a) is not reported but is available at 2021 WL 1784085.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(I) and 1334. The bankruptcy court certified its decision for direct appeal to the Eleventh Circuit pursuant to 28 U.S.C. § 158(d)(2)(A). Pet. App. 34a-39a. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 158(a)(1), (d)(2)(A). The circuit court's opinion was entered on August 31, 2022. Pet. App. 1a-32a. This petition is filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Bankruptcy Code § 523(a)(4) (2019).

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . . .

2. PACA, 7 U.S.C. § 499e(c)(2) (1995).

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. . . .

3. U.S. Constitution, art. 1, § 8, cl. 4.

The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States. . . .

STATEMENT OF THE CASE

1. Introduction.

The question presented by this petition turns on the meaning of "acting in a fiduciary capacity" under Bankruptcy Code § 523(a)(4). This Court has not addressed this issue since *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934), nearly a century ago. *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993) ("[T]he Supreme Court has not spoken on this issue since the *Davis* case, leaving the lower courts to struggle with the concept of 'technical' trusts.").

And *Davis* provided scant guidance, so "reported case law under § 523(a)(4) is hopelessly divided." *In re Bayer*, 521 B.R. at 509. "It is an understatement to say that the courts are divided on the meaning of 'fiduciary capacity' for purposes of nondischargeability . . . ." *Spinoso v. Heilman (In re Heilman)*, 241 B.R. 137, 152 (Bankr. D. Md. 1999). Four circuits hold that a debtor in bankruptcy may not discharge liability for unlawfully violating a nonsegregated statutory trust, such as a PACA trust; three circuits, including the Eleventh Circuit, hold to the contrary. Without the Court's directions, the split will only worsen.

This petition is an ideal vehicle for review as it presents the question in a purely legal form, with a straightforward record and undisputed material facts. A better opportunity to provide such clear guidance is not likely to appear soon.

2. Facts.

The relevant facts are undisputed. Respondents, Nathan and Marsha Forrest, are the owners and officers of Central Market of FL, Inc., which buys and sells produce. Pet. App. 3a.

Petitioners, Spring Valley, collectively sold $261,504.15 worth of produce to Central Market. Pet. App. 3a. Both Petitioners and Central Market were licensed under PACA,[1] and Petitioners properly preserved their rights under the PACA trust by including the required statutory statement on their invoices. Pet. App. 3a.[2]

Upon receipt and acceptance of the produce, Central Market became a PACA trustee of a trust *res* consisting of the produce and all products, proceeds, and receivables arising therefrom. Pet. App. 3a; see also 7 U.S.C. § 499e(c)(2). But Petitioners were never paid

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[1] PACA applies to all persons engaging in sales of perishable agricultural commodities with or without a license, but obtaining a license allowed Respondents to legally trade more than one ton of produce per day in interstate commerce. 7 U.S.C. § 499a(b)(6); 7 C.F.R. § 46.2(x), 46.3(a).

[2] As the invoices note, "[t]he perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received." *E.g.*, Bankr. Ct. Dkt. No. 7-3 (Exhibits to Amended Complaint), at 23-31 (quoting 7 U.S.C. § 499e(c)(4)).

for the quarter-million dollars of produce they delivered. Pet. App. 3a.[3] None of that produce remained by the time Respondents entered bankruptcy.

3. Proceedings.

Respondents filed a joint petition for relief under chapter 7 of the Bankruptcy Code, seeking to discharge certain business debts, including the debt owed to Petitioners. Pet. App. 3a.

Thereafter, Petitioners commenced an adversary proceeding against Respondents by filing a complaint seeking to except their claims from discharge pursuant to Section 523(a)(4). Pet. App. 3a. In particular, Petitioners allege that a PACA trust satisfies the fiduciary-capacity requirement of the statute, and thus those debts are exempt from discharge.

Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which is incorporated in Rule 7012 of the Federal Rules of Bankruptcy Procedure.

Following briefing and a hearing, the bankruptcy court entered its memorandum decision granting the motion to dismiss on April 2, 2021. Pet. App. 40a-66a. The bankruptcy court held that a PACA trust does not

[3] There was eventually a partial distribution to general unsecured creditors in the underlying bankruptcy case, in which Petitioners participated, but it was not sufficient to cover the price of the produce.

satisfy the fiduciary-capacity requirement of Section 523(a)(4), and thus those debts may be discharged.[4]

In the order, the bankruptcy court noted the deep split of authority on this issue, commenting that a majority of courts hold that a PACA trust satisfies the requirements of Section 523(a)(4), while a minority hold that it does not. Pet. App. 42a-43a. The bankruptcy court commented that the matter "raise[s] an issue of great importance that is worthy of certification for direct appeal to the Eleventh Circuit." Pet. App. 43a. "In view of the importance of this issue and the split of authority within this circuit, upon request, this Court will certify this Order for direct appeal pursuant to 28 U.S.C. § 158(d) . . . ." Pet. App. 66a. Petitioners did so request, and the bankruptcy court certified a direct appeal by order entered on May 5, 2021. Pet. App. 35a. On June 24, 2022, the Eleventh Circuit entered its order permitting direct appeal. Pet. App. 33a.

Following briefing and oral argument, the Eleventh Circuit's opinion was entered on August 31,

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[4] The bankruptcy court's decision assumes that Respondents are personally liable for Central Market's obligations to the Petitioners under PACA. Pet. App. 41a-42a, 57a. This assumption is well supported by caselaw. "An individual who is in the position to control the [PACA] trust assets and who does not preserve them for the beneficiaries has breached a fiduciary duty, and is personally liable for that tortious act. This legal framework is to be distinguished from the piercing the veil doctrine. . . . " *Weis-Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 421 (3d Cir. 2005) (*quoting Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 348 (S.D.N.Y. 1993)); *see also Red's Mkt. v. Cape Canaveral Cruise Line, Inc.,* 181 F. Supp. 2d 1339, 1344–45 (M.D. Fla. 2002), *aff'd sub nom. Red's Mkt. v. Cape Canaveral,* 48 F. App'x 328 (11th Cir. 2002).

2022. Pet. App. 1a-32a. First, the court determined that PACA meets many of the traditional definitions of a trust because it (1) creates a trustee, (2) defines a trust *res*, and (3) identifies beneficiaries. Pet. App. 21a-22a. The court also acknowledged that a PACA trustee has "the duty to hold produce in trust until produce sellers are paid." Pet. App. 22a.

However, the court applied a further step of analysis. Pet. App. 12a-19a. Drawing from in-circuit precedent rather than any terms in the statute, the court held "the two most important trust-like duties, and the ones that we have held create a technical trust, are the duty to segregate trust assets" as well as the closely-related "duty to refrain from using trust assets for a non-trust purpose."[5] Pet. App. 18a-19a, 27a, 28a, 32a. The court discussed at length how PACA allows commingling of trust funds and determined that, without a segregation requirement, trusts do not satisfy the fiduciary-capacity requirement of Section 523(a)(4) even if the trust meets the other requirements for fiduciary capacity. *E.g.*, Pet. App. 24a ("[T]he PACA regulations suggest that commingling is permitted. We therefore conclude that PACA does not impose the important trust-like duty to segregate trust assets."). The Eleventh Circuit thus concluded that nonsegregated statutory trusts fall outside of Section 523(a)(4).

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[5] The duty to segregate and the prohibition against non-trust uses are often treated as a single factor and are frequently used interchangeably. For the sake of simplicity, this petition uses the term "segregation" to refer to both aspects.

REASONS FOR GRANTING THE PETITION

The Court should grant review in this case because: (1) The Eleventh Circuit's opinion deepens a now three-to-four circuit split; (2) the issue affects the nation's multi-billion dollar produce industry; (3) the issue has not been addressed by this Court since 1934, and (4) this petition is an ideal vehicle for providing guidance because the issue is presented in purely legal form without any relevant factual disputes.

It is important to first establish the basic statutory framework. Section 523(a)(4) excepts from discharge debts incurred for "fraud or defalcation[6] while acting in a fiduciary capacity, embezzlement, or larceny. . . ." This case turns solely on the fiduciary-capacity requirement; neither embezzlement nor larceny were alleged.

Nearly two centuries ago, this Court held that the "fiduciary capacity" requirement applies only to "express" or "technical trusts" and not ordinary debtor-creditor relationships. *Chapman v. Forsyth*, (2 How. 202) 43 U.S. 202, 208 (1844). An "express trust" is a trust arising from an actual agreement or declaration,

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[6] Defalcation, a term "that only lawyers and judges could love," means "a failure to produce funds entrusted to a fiduciary." Pet. App. 6a (citations and quotation marks omitted). This Court recently clarified that defalcation requires "knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269 (2013). But as noted, this case does not turn on the definition of defalcation, and the *Bullock* Court did not address the meaning of "acting in a fiduciary capacity."

while a "technical trust" is a trust arising by statute or common law. *In re Bayer*, 521 B.R. at 506.[7]

PACA creates a technical trust. 7 C.F.R. § 46.46. Specifically, PACA imposes a "statutory trust which extends not only to commodities, but also to inventories of food or other products derived from the commodities and receivables or proceeds from the sale of the commodities or products." *Consumers Produce Co. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1378 (3d Cir. 1994); 7 U.S.C. § 499e(c)(2). Use of trust assets is restricted: It is "unlawful" to discard, dump, or destroy any produce without reasonable cause, "to fail or refuse [to] truly and correctly account and make full payment promptly" or "to fail to maintain the trust" in any way. 7 U.S.C. § 499b(3), (4). The buyer who "in any way encumber[s] the funds or render[s] them less freely available to PACA creditors" is in breach of the buyer's fiduciary duty as trustee. *Coosemans Specialties, Inc. v. Gargiulo*, 485 F.3d 701, 706 (2d Cir. 2007), *quoting D.M Rothman & Co. v. Korea Com. Bank of New York*, 411 F.3d 90, 99 (2d Cir. 2005).

PACA establishes a valid trust notwithstanding the lack of any express requirement to segregate trust assets. PACA "permits the commingling of trust assets without defeating the trust." *A & J Produce Corp. v. Bronx Overall Econ. Dev. Corp.*, 542 F.3d 54,

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[7] The prevailing trend is to consider statutory trusts to be a type of technical trust, but some opinions hold that a statute may create an express trust. *Capitol Indemnity Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.)*, 760 F.2d 121, 124 (6th Cir. 1985). This difference in terminology is not important in the context of this petition.

57–58 (2d Cir. 2008), *quoting Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.,* 67 F.3d 1063, 1066–67 (2d Cir. 1995). The U.S. Department of Agriculture (USDA) considers a PACA trust to establish a "fiduciary capacity." *In re Kaplan's Fruit & Produce Co., Inc.*, 44 Agric. Dec. 333, 343 (U.S.D.A. 1985).

A fiduciary relationship "arises whenever the property of one person is placed in charge of another." *Hamby v. St. Paul Mercury Indemn. Co.*, 217 F.2d 78, 80 (4th Cir. 1954). Most opinions hold that a statute creates a fiduciary capacity under Section 523(a)(4) if it (1) creates a trustee, (2) defines a trust *res*, (3) identifies beneficiaries, and (4) imposes fiduciary duties.[8] A handful of jurisdictions apply alternative tests, ranging from requiring only that one party stand in a position of "ascendancy" over another,[9] on one end of the spectrum, to holding that a statute cannot create a fiduciary capacity at all without the express agreement of the parties,[10] on the other extreme.

The Eleventh Circuit's opinion below determined that PACA creates a trustee, defines a trust *res*, and identifies beneficiaries. Pet. App. 21a-22a. The court also commented that a PACA trustee has "the duty to hold produce in trust until produce sellers are paid . . . ." Pet. App. 22a. But the court went on to

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[8] *See, e.g.*, *Long v. Piercy (In re Piercy)*, 21 F.4th 909, 927–28 (6th Cir. 2021); *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001); *Employers Workers' Compensation Assoc. v. Kelley (In re Kelley)*, 215 B.R. 468, 474 (10th Cir. BAP 1997).

[9] *In re Marchiando*, 13 F.3d 1111, 1116 (7th Cir. 1994).

[10] *CRL of Maryland, Inc. v. Holmes (In re Holmes)*, 117 B.R. 848, 853 (Bankr. D. Md. 1990).

hold that even a statutory trust like PACA does not create a fiduciary capacity under Section 523(a)(4) because there is no requirement to segregate trust funds. Two other circuits agree, namely the Fifth and Eighth Circuits. However, four circuits—the Sixth, Seventh, Ninth, and Tenth Circuits—have held, to the contrary, that nonsegregated statutory trusts may establish a fiduciary capacity. These two propositions are in direct conflict.

I. The Eleventh Circuit's Decision Deepens a Split of Authorities Among Circuit Courts.

The Court should grant this petition because the Eleventh Circuit's opinion deepens a split of authorities among circuit courts. The opinions of four circuit courts hold that a nonsegregated statutory trust may satisfy Section 523(a)(4). Three circuits hold that nonsegregated trusts may not satisfy Section 523(a)(4). It is undisputed that PACA is an example of a nonsegregated statutory trust.

A. Four Circuits Hold that a Statutory Trust May Satisfy Bankruptcy Code § 523(a)(4) Regardless of Segregation.

Four circuits have expressly determined that nonsegregated statutory trusts may satisfy the fiduciary-capacity requirement under Section 523(a)(4). The Sixth, Seventh, Ninth, and Tenth Circuits each hold that a nonsegregated statutory trust satisfies the fiduciary-capacity requirement. *Stoughton Lumber Co. v. Sveum*, 787 F.3d 1174, 1176 (7th Cir. 2015) (Posner, J.) (finding the fiduciary capacity exception applied under Wisconsin's "Theft by Contractors" Statute,

and explaining "[s]egregation of the trust funds was not required either by the statute or, as far as we're aware, the case law; but while [the defendant] was therefore free to commingle the funds with other moneys, it had to preserve intact the assets of the trust fund for Stoughton."); *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251-53 (6th Cir. 1982) (under Michigan Building Contract Fund Act, "[t]hat the statute does not mandate any particular form or procedures in handling trust funds [does not] undercut[] the validity of the trust . . . . The fact that the trustee is afforded some measure of discretion in handling trust funds does not defeat the trust under [predecessor to Section 523(a)(4)]."); *Woodworking Enterprises, Inc. v. Baird (In re Baird)*, 114 B.R. 198, 204 (9th Cir. BAP 1990) (same under Arizona materialmen's lien statute); *In re Kelley*, 215 B.R. 468, 474 (10th Cir. BAP 1997) (same for insurance premiums held under Oklahoma Third-Party Administrator Act). This contradicts the decision below.

While those decisions deal with other statutes that create nonsegregated trusts, the lower courts in these circuits follow those decisions to hold that a PACA trust satisfies Section 523(a)(4). *N.P. Deoudes, Inc. v. Snyder (In re Snyder)*, 184 B.R. 473, 475 (D. Md. 1995); *Nuchief Sales, Inc. v. Harper (In re Harper)*, 150 B.R. 416, 419 (Bankr. E.D. Tenn. 1993); *In re Yerges*, 512 B.R. 916, 922 (Bankr. W.D. Wis. 2014); *Michael Farms, Inc. v. Lundgren (In re Lundgren)*, 503 B.R. 717, 721 (Bankr. W.D. Wis. 2013); *C.H. Robinnson Worldwide, Inc. v. Alvarado (In re Alvarado)*, 2018 WL 1354512, at *8 (Bankr. C.D. Cal. Mar. 14, 2018); *Tom Lange Co. v. Stout (In re Stout)*, 123 B.R. 412, 414 (Bankr. W.D. Okla. 1990); *Folson*

Farm Corporation v. Casey (In re Casey), 2011 WL 3799243, at *6 (Bankr. D.N.M. Aug. 26, 2011). This is inconsistent with the opinion below.

The opinion below also conflicts with circuit court opinions holding that PACA creates a valid trust that is enforceable notwithstanding other provisions of the Bankruptcy Code, regardless of segregation. *Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 591, 595 (4th Cir. 2010) ("the governing regulations specifically contemplate the comingling of trust assets without defeating the trust. . . . [I]n the event of bankruptcy, trust assets do not even become a part of the bankruptcy estate."); *accord Hiller Cranberry Prod., Inc. v. Koplovsky*, 165 F.3d 1, 5 (1st Cir. 1999);[11] *C & E Enterprises, Inc. v. Milton Poulos, Inc. (In re Milton Poulos, Inc.)*, 94 B.R. 648, 651–52 (Bankr. C.D. Cal. 1988) ("PACA is a valid statutory trust enforceable in bankruptcy proceedings"), *aff'd* 947 F.2d 1351 (9th Cir. 1991); *C.H. Robinson Co. v. Alanco Corp.*, 239 F.3d 483, 487 (2d Cir. 2001) (PACA trust was sufficient to exclude assets from bankruptcy estate notwithstanding lack of segregation); *accord Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 282 (9th Cir. 1997). Such opinions—determining that PACA creates a valid trust under virtually all other provisions of the Bankruptcy Code—cannot be squared with the opinion below.

[11] Petitioners do not count the First and Fourth Circuits as part of the split because of the lack of clear holdings that non-segregated statutory trusts satisfy Section 523(a)(4), although these analyses from these circuits suggest they would probably align themselves with this side of the split.

To summarize, the Sixth, Seventh, Ninth, and Tenth Circuits follow a rule that nonsegregated statutory trusts, such as a PACA trust, may establish a fiduciary capacity under Section 523(a)(4). The Eleventh Circuit's opinion, below, and opinions of the Fifth and Eighth Circuits hold to the contrary.

B. Three Circuits Courts Hold that a Statutory Trust May Not Satisfy Bankruptcy Code § 523(a)(4) Unless it Requires Segregation.

The Fifth, Eighth, and Eleventh Circuits hold that a nonsegregated statutory trust cannot satisfy the fiduciary-capacity requirement under Section 523(a)(4). The Eleventh Circuit's opinion, below, requires segregation of trust assets as a necessary condition to establishing a fiduciary capacity under Section 523(a)(4). Pet. App. 12a-19a. Similarly, the Fifth and Eighth Circuits hold that a statutory trust must require segregation to satisfy Section 523(a)(4). *Texas Lottery Commission v. Tran (In re Tran)*, 151 F.3d 339, 344–45 (5th Cir. 1998) (statute regulating lottery-ticket proceeds without express segregation requirement does not establish a fiduciary capacity); *Angelle v. Reed (In re Angelle)*, 610 F.2d 1335, 1340 (5th Cir. 1980);[12] *Arvest Mortgage Company v. Nail (In re Nail)*, 680 F.3d 1036, 1041 (8th Cir. 2012) (Arkansas statute imposing trust upon a debtor's payment to an original creditor, to be held in trust for the

[12] One unpublished opinion of the Fifth Circuit upheld summary judgment rendering obligations under a PACA trust nondischargeable pursuant to Section 523(a)(4), although without significant discussion. *Sterling v. First Intermark, Inc.*, 979 F.2d 1534 (5th Cir. 1992) (unpublished table decision).

benefit of any assignee of debt or contract, "imposes no trust-like duties such as segregation"); *Boyle v. Abilene Lumber, Inc. (In re Boyle)*, 819 F.2d 583, 592 (5th Cir. 1987) (officer of corporate contractor not liable for corporate debts under trust fund statute because statute did not require segregation of funds), *superseded by statute on other grounds*, Tex. Prop. Code § 162.031, *as recognized in Ratliff Ready-Mix, L.P. v. Pledger (In re Pledger)*, 592 F. App'x 296, 299-300 (5th Cir. 2015).[13]

To summarize, the Fifth, Eighth, and Eleventh Circuits follow a rule that nonsegregated statutory trusts, including PACA, may not establish a fiduciary capacity under Section 523(a)(4).[14] This is in direct

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[13] The Texas statute was amended and broadened in 1987, but the reasoning in *Boyle* continues to apply. *See, e.g., Coburn Co. of Beaumont v. Nicholas (In re Nicholas)*, 956 F.2d 110, 113 (5th Cir. 1992) (Section 523(a)(4) does not apply where amended statute permits use of funds for non-trust purposes); *In re Tran*, 151 F.3d at 344, 346 (Garza, J., dissenting).

[14] And the problem goes beyond PACA and construction-fund statutes. In fact, federal courts are irreconcilably split on whether a variety of other statutory and common-law trusts satisfy the fiduciary-capacity test in Section 523(a)(4). For example, "[c]ircuits are split regarding whether an attorney, in the context of a standard attorney-client relationship, acts in a 'fiduciary capacity.' " *Richardson v. Douglass (In re Douglass)*, 634 B.R. 1086, 1092 (Bankr. S.D. Fla. 2021). Courts are also split as to whether the fiduciary-capacity requirement is satisfied by "corporate directors, officers and shareholders, general partners, limited partners, and joint venturers, property managers, insurance agents, lottery agents and contractors, subcontractors and homebuilders." *In re Heilman*, 241 B.R. at 152–55 (footnotes and citations omitted); see *In re Piercy*, 21 F.4th at 927 (noting that courts are "evenly split" on whether a general partner stands in

conflict with the Sixth, Seventh, Ninth, and Tenth Circuits, which hold the opposite.

II. The Issue is Important and Deserving of Guidance from This Court.

The issue presented in this petition is important because it impacts the nation's multi-billion dollar produce industry and it involves the collision of two federal statutes. This Court has not addressed the issue in 88 years, and it should do so now.

A. The Issue Affects the Nation's Produce Industry.

The question presented is important to the nation's produce industry. "Perishable agricultural commodities are a multi-billion dollar enterprise in this Circuit as well as nationwide." *S & H Packing & Sales Co. v. Tanimura Distrib., Inc.*, 850 F.3d 446, 460 (9th Cir. 2017) (Melloy, J., concurring), *on reh'g en banc*, 883 F.3d 797 (9th Cir. 2018). Since 2020, gross domestic farm output has ranged from approximately $400 billion to $570 billion per quarter; gross output for 2021 totaled approximately $1.8 trillion. U.S. Bureau of Economic Analysis, *Gross Output by Industry*, (rev. Sept. 29, 2022).[15] In one bankruptcy case alone, "contested PACA trust claims exceeded eleven million dollars." *Fleming Companies, Inc. v. U.S. Dep't of Agric.*, 322 F. Supp. 2d 744, 751 (E.D. Tex. 2004), *aff'd*

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a fiduciary capacity). A decision by this Court on the proper test for fiduciary-capacity could resolve these splits as well.

[15] *Available at* https://tinyurl.com/3amzw68w.

sub nom. Fleming Companies, Inc. v. Dep't of Agric., 164 F. App'x 528 (5th Cir. 2006).[16]

The USDA has determined that breach of a PACA trust impacts "the industry as a whole" and impinges upon fiduciary relationships that are "the basis for virtually every transaction in this multibillion dollar industry . . . ." *In re Kaplan's Fruit & Produce Co., Inc.*, 44 Agric. Dec. at 343. Beyond such direct effects, there are potentially huge knock-on effects as producers will inevitably price in any significant weakening in PACA protections, such as the opinion below, amid already rising produce prices. Hamza Shaban, *Food Prices are Still Rising. Here's How Americans are Coping*. WASH. POST (Aug. 10, 2022).[17] In other words, if the opinion below stands, the impact will be felt from the farm all the way to the price of apples at the grocery store.

B. The Issue Involves Conflicting Applications of Federal Statutes.

The question presented involves the collision of two federal statutes, namely PACA and the Bankruptcy Code, and implicates numerous other federal statutes with similar statutory trust provisions.

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[16] While Section 523(a)(4) allows discharge only for individuals in bankruptcy, not corporations, there is clear personal liability against the controlling individual who fails to maintain a PACA trust. *Weis-Buy*, 411 F.3d at 421. The potential for personal liability—not to mention nondischargeable personal liability—undoubtedly affects how zealously corporate debtors seek to ensure that PACA trust claims are paid in full. In other words, the interaction between PACA and Section 523(a)(4) influences even the largest produce-retail bankruptcies.

[17] *Available at* https://www.washingtonpost.com/business/2022/08/10/food-prices-rising/.

"Whether a relationship is a 'fiduciary' one within the meaning of § 523(a)(4) is a question of federal law." *In re Nail*, 680 F.3d at 1039 (citation omitted); *In re Hemmeter*, 242 F.3d at 1189. Uniformity is particularly important where the interaction of federal statutes is at issue, because two federal courts should have no reason to apply them differently under the same facts. Without this Court's guidance, the present geographical patchwork—where federal statutes are applied in contradictory ways—will persist and grow.

C. Review of the Issue Is Timely.

Guidance on the fiduciary-capacity issue is sorely needed. This Court has not addressed the issue since it decided *Davis v. Aetna* in 1934. "Unfortunately, the Supreme Court has not spoken on this issue since the *Davis* case, leaving the lower courts to struggle with the concept of 'technical' trusts." *Quaif v. Johnson*, 4 F.3d at 953. Since *Davis v. Aetna*, "circuit and bankruptcy courts throughout the country have struggled to apply a consistent framework for determining whether modern legal relationships amount to a fiduciary capacity." Jonathon S. Byington, *Fiduciary Capacity and the Bankruptcy Discharge*, 24 Am. Bankr. Inst. L. Rev. 1, 1 (2016).

In other words, revisiting this issue is timely. It is not hyperbole to observe that "reported case law under § 523(a)(4) is hopelessly divided . . . ." *In re Bayer*, 521 B.R. at 509. If anything, it is an "understatement." *In re Heilman*, 241 B.R. at 152. Without this Court's guidance, these splits will only multiply.

III. The Eleventh Circuit's Opinion is Wrong.

The Eleventh Circuit's holding, that a statutory trust must require segregation of assets to create a fiduciary capacity, is wrong. In particular, the holding is not supported by the text of Section 523(a)(4), it conflicts with analysis of this Court, and it is inconsistent with congressional intent and policy.

A. The Opinion is Not Supported by Statutory Text.

Most basically, the opinion below is not supported by plain statutory language. Congress drafted language that applies broadly to any debts incurred for fraud or defalcation "while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4).[18] PACA creates a statutory trust that imposes fiduciary duties, *e.g.*, *Weis-Buy*, 411 F.3d at 421, and there is nothing in Section 523(a)(4) to suggest that Congress intended to exclude statutory trusts simply because they are not segregated. "That Congress may create a trust through the manifestation of an intent to create a fiduciary relationship is beyond dispute." *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 633 (10th Cir. 1998), *citing Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 460 (1967). "[T]he absence of a requirement that the [trustee] segregate . . . funds is not determinative of whether a trust was intended . . . ." *In re*

[18] To be sure, the text of Section 523(a)(4) refers to debts incurred while acting in any "fiduciary capacity." The text does not limit itself to express and technical trusts, contrary to the holding in *Chapman v. Forsyth*, 43 U.S. at 208. However, resolving the circuit split would not necessarily require the Court to distinguish or overturn *Chapman* because it is well established that PACA creates a technical trust.

Arctic Exp. Inc., 636 F.3d 781, 797 (6th Cir. 2011) (referencing PACA nonsegregated trusts as an example).

By adding a segregation requirement, the Eleventh Circuit impermissibly second guesses Congress' words. Federal courts have "no authority to add a limitation the statute plainly does not contain." *Whitfield v. United States*, 574 U.S. 265, 268-69 (2015). It is true that Section 523 is strictly construed. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) ("exceptions to discharge 'should be confined to those plainly expressed' " in the statute). But a statute cannot be construed more narrowly than its own terms. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) ("[J]ust as we cannot properly *expand* [a statute] beyond what its terms permit . . . we cannot arbitrarily *constrict* it either by adding limitations found nowhere in its terms.") (citation omitted). In enacting nonsegregated trust statutes, such as PACA, Congress expressly creates trusts—with an identifiable *res* and beneficiaries—and imposes trust duties upon the trustee. This is all that is required to satisfy Section 523(a)(4), and any further requirement has no basis in the statute.

With respect to PACA in particular, there is nothing in the statute that supports limiting PACA trusts in bankruptcy. "PACA is to be construed liberally in favor of sellers," and "it should therefore receive the benefit of the doubt . . . ." *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 671 (7th Cir. 2002). By invoking the law of trusts, Congress intended to place the interests of PACA trust beneficiaries over the trustee's own interests in every context, including bankruptcy. *E.g., In re Arctic Exp.*

Inc., 636 F.3d at 792–93 (citing PACA as one of "numerous examples of statutory trusts, many of which leave no doubt as to Congress's intent to create a trust through explicit use of that term in the language of a statute"); *c.f. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) (In ERISA, "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."). "[T]he Bankruptcy Code . . . was created by Congress and it is within Congress' province to create exceptions to the principle. Congress has done so, for certain statutory trusts arising under federal law." *In re W.L. Bradley Co., Inc.*, 75 B.R. 505, 513 (Bankr. E.D. Pa. 1987).

Congress drafted PACA to apply as broadly as possible, and there is no statutory language to suggest that Congress intended to exclude PACA trusts from Section 523(a)(4).

B. The Opinion Is at Odds With a Decision of This Court.

The Eleventh Circuit's opinion also conflicts with the analysis of a decision of this Court, namely *Begier v. I.R.S.*, 496 U.S. 53 (1990). In *Begier*, the Court held that segregation of trust assets is not a prerequisite to the creation of a statutory trust. *Begier,* 496 U.S. at 62. Specifically, the Court analyzed a nonsegregated "floating" trust created under a tax-withholding statute, namely Internal Revenue Code (26 U.S.C.) § 7501(a). The issue was whether the statute creates a trust for the purposes of Bankruptcy Code § 541(d),

which excludes from the bankruptcy estate the beneficial interests in any property to which the debtor holds bare legal title. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.10 (1983). The Court concluded that the statutory trust was valid regardless of segregation and that it was sufficient to exclude trust assets from the trustee's bankruptcy estate. *Begier*, 496 U.S. at 67.

The opinion below cannot be squared with *Begier*. The question under both Bankruptcy Code §§ 523(a)(4) and 541(d) is whether the statute creates a genuine trust in substance, regardless of labels. The division of ownership rights between beneficial interests and bare legal title is the "*sine qua non*"[19] and "classic definition"[20] of a trust. *Begier* held that a nonsegregated statutory trust may possess this key feature, and therefore it may be a true trust. The opinion below holds, to the contrary, that a nonsegregated statutory trust is not sufficiently "trust-like" to truly be a trust. These two propositions are incompatible.

C. The Opinion is Inconsistent with Congressional Intent and Policy.

The opinion below is also inconsistent with legislative intent and policy. One goal of the Bankruptcy Code is to provide a fresh start only to the honest but unfortunate debtor. "[I]n the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the [Bankruptcy Code] limits the opportunity for a completely unencumbered new

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[19] *In re Barnes*, 264 B.R. 415, 432 (Bankr. E.D. Mich. 2001).

[20] *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 n.2 (3d Cir. 1994).

beginning to the 'honest but unfortunate debtor.' " *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991). Under the circumstances, the fresh-start policy is outweighed by concerns for creditor protection. "The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts . . . . Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." *Id.* at 287. These are "categories of nondischargeable debts that Congress has deemed should survive bankruptcy." *Giaimo v. DeTrano (In re DeTrano)*, 326 F.3d 319, 322 (2d Cir. 2003) (Sotomayor, J.).

A debtor who unlawfully violates a statutory nonsegregated trust is not an honest but unfortunate debtor. "Bankruptcy is both a creditor's remedy and a debtor's right. . . . When the bankrupt is a trustee and the creditor a beneficiary of the trust, the balance has been deemed to incline against discharge. . . . [A]buse of that trust is considered a serious wrong." *In re Marchiando*, 13 F.3d at 1115 (Posner, J.). In particular, violation of the fiduciary duties imposed under a PACA trust such as a failure to account, "is considered the most serious violation of the PACA . . . ." *In re Kaplan's Fruit & Produce Co., Inc.*, 44 Agric. Dec. at 343. Accordingly, a debtor who unlawfully violates a trust fits squarely within the text and purpose of Section 523(a)(4).

Nothing in the history of Section 523(a)(4) excludes nonsegregated statutory trusts. The theme of the statute, through all of its iterations, is to bar discharge of liability for misusing assets held in trust for

another. Each iteration has broadened the statute by eliminating enumerated examples of fiduciaries in favor of the general term "fiduciary capacity."[21] By omitting the enumerated examples, "Congress . . . must have intended to extend the class coming within the meaning of 'fiduciary capacity' " with "the purpose of enlarging the number of persons" coming within the statute. *Bloemecke v. Applegate*, 271 F. 595, 598-99 (3d Cir. 1921). There is nothing in this history to suggest that Congress intended to require segregation.

The common law of trusts also supports inclusion of statutory nonsegregated trusts under Section 523(a)(4)'s fiduciary-capacity requirement. Like other statutory trusts, "[t]he trust created by PACA is governed by general principles of trust law." *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 615 (2d Cir. 1998); *Sunkist Growers*, 104 F.3d at

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[21] The Bankruptcy Act of 1841 denied discharge to anyone "owing debts, that shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity . . . ." 5 Stat. 441 (1841). Section 33 of the Bankruptcy Act of 1867 excepted from discharge any "debt created by the fraud or embezzlement of the bankrupt, by his defalcation as a public officer, or while acting in any fiduciary character." 14 Stat. 517 (1867). Section 17(a)(4) of the Bankruptcy Act of 1898 denied discharge for debts that "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." 30 Stat. 544 (1898). Under its current iteration, Section 523(a)(4) denies discharge for any debt for "defalcation while acting in a fiduciary capacity . . . ."

282. General trust principles do not condition the validity of a trust on segregation.[22] In other words, there is no basis in common law to graft a segregation requirement onto Section 523(a)(4), and there is no indication that Congress intended to depart from common law in this regard.

The legislative goals behind PACA support excepting PACA trust obligations from discharge. "PACA was enacted in 1930 to promote fair trading practices in the marketing of perishable agricultural commodities . . . ." *Consumers Produce*, 16 F.3d at 1377. "[T]he goal of the Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). In 1984, Congress amended PACA and

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[22] "Segregation is not required as long as the portion of a fund or of fungible items can be ascertained from the expressed or implied terms of the disposition." Restatement (Third) of Trusts § 40, comment b (2003). In fact, depending on the terms of the trust, "[t]he trustee may . . . combine two or more trusts into a single trust, if doing so does not adversely affect the rights of any beneficiary or the accomplishment of the trust purposes" without invalidating the trust. Restatement (Third) of Trusts § 68 (2003). Although trustees ordinarily have a general duty to segregate trust assets, "[t]he terms of a trust may permit trust property to be mingled or jointly held with the trustee's own property. The terms of the trust may expressly so provide or the character of the trust and trust property may . . . make commingling proper by implication" and may authorize a trustee to hold trust assets "without designating the particular trust, or even without indicating that the property is held in trust at all." Restatement (Third) of Trusts § 84, comment e (2007); *In re Casey*, 2011 WL 3799243, at *5 (applying Restatement and comments; holding that nonsegregated PACA trust satisfies Section 523(a)(4)).

introduced the PACA trust, in part, to remedy problems created by spiking bankruptcies among buyers. *JSG Trading Corp. v. Tray–Wrap, Inc.*, 917 F.2d 75, 77–78 (2d Cir.1990); 49 Fed. Reg. 45,735, 45,737 (Nov. 20, 1984). Honoring PACA trusts in bankruptcy supports these goals.

There is no indication that Congress intended for PACA trusts not to apply in bankruptcy. "It must be remembered that PACA was not enacted to protect those in Debtor's shoes, but rather to prevent the chaos and disruption in the flow of perishable agricultural commodities sure to result from an industry-wide proliferation of unpaid obligations." *In re Fresh Approach, Inc.*, 51 B.R. 412, 420 (Bankr. N.D. Tex. 1985). In fact, legislative history suggests that PACA is intended to be an exception from the Bankruptcy Code's "fresh start" policy.

When the bill that created today's Bankruptcy Code was being discussed, Congressman Foley, chair of the House Agriculture Committee, successfully argued that PACA should be excepted from Bankruptcy Code (11 U.S.C.) § 525, which would have prevented revocation of PACA licenses on the basis of the licensee's bankruptcy. Mr. Foley began: "The Committee on Agriculture has no quarrel with the 'fresh-start' philosophy underlying [the bankruptcy bill]." 95th Cong., 1st Sess., Vol. 19, pp. H 11761 (October 28, 1977) [123 Cong. Rec. 35,672 (1977)]. "However, that philosophy is not new . . . . Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodi-

ties Act . . . ." *Id.* Accordingly, "the extent of encroachment of [PACA] upon the goals of the Bankruptcy Act cannot be regarded as unconscionable or excessive. . . . We cannot lightly infer that Congress intended to exempt bankrupts from being subject to these provisions of [PACA] . . . ." *Zwick*, 373 F.2d at 117. Indeed, the text, intent, and legislative history of PACA indicate that it should apply in bankruptcy.

IV. The Deepening Circuit Split Implicates Congress' Constitutional Mandate To Establish Uniform Bankruptcy Laws.

Because PACA is a uniform federal statute, the split of authorities makes the outcome of applying Section 523(a)(4) depend solely on geography. Accordingly, the deepening split of authorities implicates Congress' constitutional mandate to establish uniform laws on bankruptcy. "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." U.S. Const. art. 1, § 8, cl. 4. In other words, if Congress exercises its power to enact bankruptcy laws, they must be uniform throughout the United States.

To be sure, Petitioners do not argue that Bankruptcy Code § 523(a)(4) is unconstitutional, but its inconsistent application to PACA trusts across regions frustrates Congress' proper exercise of its authority. If the circuit split persists, then producers will be subject to dramatically different outcomes based only upon geographical happenstance.

V. This Petition is an Ideal Vehicle for Resolving the Circuit Split.

This petition is an ideal vehicle for resolving the circuit split. The Eleventh Circuit's opinion is based on simple and clear holdings. This is due, in part, to the fact that the opinion arises in the context of dismissal under Rule 12(b)(6). As a consequence, the issue is presented in a purely legal form. Moreover, there are no disputed facts that impact the issue. Finally, the issue involves only questions of federal law. Accordingly, this matter is ideally situated for resolution by a clear legal analysis that will provide a much-needed guide to federal courts.

CONCLUSION

In light of the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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