No. 23-5341

IN THE

SUPREME COURT OF THE UNITED STATES

Regina Nachael Howell Foster

Petitioner

Vs.

Areya Holder Aurzada, et AlRespondents

On Petition for a Writ of Certiorari to

The United States Court of Appeal for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

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QUESTIONS PRESENTED FOR REVIEW:

1. Does the 5th Circuit Court of Appeals' memorandum opinion directly conflict with an opinion by other Circuit Court of Appeals and the Supreme Court by negating the following challenges of errors of law to the bankruptcy court's final judgment:

   a. Does the plain text chosen by Congress in 28 USC Sec. 1452 require removal directly to the district court rather than directly to the bankruptcy court?

   b. Does 28 USC Sec. 157(c) prohibit a bankruptcy court from entering a final judgment, on a claim removed from state court, under the "related to" jurisdiction provided by 26 USC Sec, 1332(b)

   c. Does the well plead complaint rule, articulated in *Rivet v. Regions Bank of La*[1]., apply to civil actions removed, under the related jurisdiction, under 28 USC Sec. 1452?

   d. Do the pleaded allegations that the individual removing Defendants acted under the "color of law" of their positions, as Bankruptcy professionals, to violate state law, suffice to invoke the ultra vires" exception to the Barton Doctrine?

   e. Does mandatory abstention require remand back to state court when the sole ground for removal was an assertion of related to matter subject matter jurisdiction?

2. Does the thirty (30) day time from the date of formal service of both citation and complaint as mandated 28 USC 1446(a) apply to the civil case removed under 28 USC Sec. 1452?

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[1] 522 US 470 (1998).

LIST OF PARTIES

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as
follows:

1. Areya Holder, a Texas resident
2. Todd Hoodenpyle, a Texas resident
3. Michele Shirio, a Texas resident
4. Singer Levick, LLC, a Texas Limited Liability Company
5. Carlos Foster, a Texas resident
6. SAI Reed., Inc, A Texas Corporation

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

[X] For cases from federal court:
The opinion of the United States Court of appeals for the Fifth circuit at Appendix A to the petition is unpublished.

The opinion of the United States District Court for the Northen District of Texas at Appendix B to the petition is unpublished.

The opinion of the United States Bankruptcy Court for the Northen District of Texas at Appendix C to the petition is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided my case was January 3, 2023. No motion for rehearing or rehearing en banc was filed. A timely motion to extend time was filed and granted on March 29, 2023, extending the time to file until June 2, 2023. Petitioner files present Petition for Writs of Certiorari the time specified in the order in the March 29, 2023 order granting a 60 day extension. And under 28 U.S.C. section 1254(1).

REASONS TO GRANT REVIEW

The circuits courts are split on the limits of subject matter jurisdiction to hear cases and claim that are "related to" a bankruptcy proceeding. District courts are using the "related to" jurisdiction statutory provision to impermissibly refer issues regarding private rights to non-Article III bankruptcy courts for full adjudication. The expanded application of "related to" jurisdiction has led to the 5th Circuit's conclusion that an anticipated affirmative defense is sufficient to confer "related to" jurisdiction, on a bankruptcy court to adjudicate state law claims to remove a Constitutionally void, fraudulent conveyance, bankruptcy court judgment, from the State property records. The resolution of the issue of "related to" jurisdiction is important to the tens of thousands of Americans that find themselves in both a state divorce proceeding and seeking bankruptcy protection.

The 5th Circuit's holding conflicts with precedent established by this Court, which provides that only cases that seek affirmative relief arising under federal law, in the well pleaded complaint can be removed from state court. While this Court has not expressly ruled on how state courts are to treat a void bankruptcy judgment, this Court has held that there is a claim of right to recover property that has wrongfully been taken by a bankruptcy trustee. In the spirit of comity and federalism, Congress has mandated that federal courts abstain from hearing cases and claims which are related to a prior bankruptcy but cannot be resolved in the claims allowance process. a claim arising under or arising in Title 11.

While this Court has held that Sec. 1447 applies to all civil cases removed under

either Secs. 1331 or 1452, this court has never resolved whether Fed. R. Bank. P. 9027 or 28 USC Sec. 1446 applies to civil cases removed under 28 USC Sec. 1452

STATEMENT OF THE CASE

On or about July 2, 2012, Regina Nachael Howell Foster ("Foster") had filed an individual bankruptcy proceeding styled in re Regina Nachael Howell Foster, and numbered 12-43804-RFN- 7 (The Bankruptcy Proceeding").

Defendants Todd Hoodenpyle and Michelle Shiro, of the defendant law firm Singer Levick, sued Foster's non-filing spouse, Carlos Foster, for fraudulent conveyances, in the matter styled *Areya Holder, Chapter 7 Trustee v. Carlos Foster and 1st Aid Accident and Injury Center, Inc.* and numbered Cause No. 14-04054,

On November 7, 2017, Defendant, Areya Holder, filed the purported final judgment, entered by the bankruptcy court on, a claim of fraudulent conveyance, against the debtor's non-filing spouse, in the matter styled *Areya Holder, Chapter 7 Trustee v. Carlos Foster and 1st Aid Accident and Injury Center, Inc.* and numbered Cause No. 14-04054,in the Tarrant County Texas Count Property Records as D217258279,

On November 7, 2019, Foster filed suit in the 153rd District Court for Tarrant County, Texas, for violations of Tex. Civ. Prac. and Rem. Code § 12.002, Tex. Civ. Prac. and Rem. Code § 134.003(a), conspiracy and quiet title claim are against Areya Holder, Todd Hoodenpyle, Michelle Shiro, and Carlos Foster, individual Texas residents, and Singer Levick, a Texas limited liability company, as respondent superior, and SAI Reed Properties, a Texas corporation.

Thirty-two (32) days after formal service of Process, Areya Holder, Todd Hoodenpyle, Michelle Shiro, and Singer Levick filed a Notice of Removal directly to the bankruptcy court. ("Defendants").

Foster filed a timely Motion to Remand for untimely removal. The Defendants objected.

Foster filed a timely Motion to Remand for Lack of Subject Matter Jurisdiction. The Defendants objected.

The Defendants filed a Motion to Dismiss. Foster objected.

On October 15, 2020, the Bankruptcy Court entered an Order Granting in Part and Denying in Part Foster's Motion to Remand, in which the bankruptcy Court remanded the claims against Carlos Foster and SAI Reed Properties to state court for want of jurisdiction

On October 15, 2020 the Court issued an Order Denying Motion to Remand for removing the case from the Texas state Court thirty-two (32) days after service of citation, together with complaint, as authorized by Tex. R. Civ. P. 106 by a person authorized under Tex. R. Civ. P. 103.

On October 30, 2020, the bankruptcy court entered an order granting a motion to dismiss an order dismissing the Certain Defendants, namely Todd A. Hoodenpyle, Michelle E. Shriro, Areya Holder, And Singer & Levick, P.C.

On October 30, 2020 the bankruptcy Court issued a Memorandum Opinion.

Foster timely appealed to the District Court. On January 18, 2022 the District Court filed a Memorandum Opinion and Order and a Final Judgment.

Foster timely appealed to the 5th Circuit Court of Appeals and the 5th Circuit

issued a memorandum Opinion on January 3, 2023. A timely motion to exted extend time to file Petition in this Court until June 2, 2023

ARGUMENT

IT IS IMPORTANT FOR THIS COURT TO RESOLVE THE CONFLICT REGARDING THE LIMIT TO "RELATED TO" JURISDICTION UNDER 28 USC § 1334(b)

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Federal Court "possess only that power authorized by Constitution and statute." *Id* (Citations omitted). Bankruptcy judges "may hear and enter final judgments in 'all core proceedings arising under title 11, or arising in a case under title 11." *Stern v. Marshall,* 564 U.S. 462, 474, (2011) (Quoting 28 USC § 157(b)(1)). But the "Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim." *Exec. Bens. Ins. Agency v. Arkison,* 573 U.S. 25, 28 (2014) However throughout the Circuits, district court routinely refer bankruptcy related matters to bankruptcy court without Constitutional considerations. If the bankrupt court enters a final judgment in a bankruptcy related matter then when the "Bankruptcy Court's entry of judgment was invalid, the District Court's *de novo* review and entry of its own valid final judgment cured any error." *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25, 40 (2014) This Court has never specifically addressed the important issue of whether, under the notions of Comity, a purported final judgment on a bankruptcy related claim, entered by a federal bankruptcy court, is not corrected by appeal to the district court, and filed in a State's real property records, can be collaterally attacked in a State court proceeding to quiet title, since without jurisdiction , a federal court's "judgments and orders are regarded as nullities... [t]hey are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them." *ELLIOTT ET AL. v. PEIRSOL*

ET AL., 26 US 328, 340-341 (1828)

A BANKRUPTCY COURT'S JURISDICTION CANNOT BE EXPANDED BY JUDICIAL DECREE

District courts are authorized, but not required, to refer to bankruptcy judges cases under title 11, and proceedings arising under title 11, or arising in or related to cases under title 11. 28 U.S.C. § 157(a*). Schulman v. Cal. Water Res. Control Bd. (In re Lazar*), 200 B.R. 358, 366 (Bankr. C.D. Cal. 1996) (each district court is authorized to adopt general order of reference for bankruptcy cases). See *Walls v. Wells Fargo Bank, N.A.*, 255 B.R. 38 (E.D. Cal. 2000) (district court exercising discretion not to refer claims involving FDCPA which might require jury trial). Congress mandated removal of civil cases, under 28 USC § 1452(a), to a district court and courts "must respect the compromise embodied in the words chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

Regardless of the words chosen by Congress, the 5th Circuit held that "[a]lthough 28 U.S.C. § 1452(a) specifies removal to a district court, the Removing Defendants in this case removed directly to the bankruptcy court. A number of circuits have permitted direct removal to the bankruptcy court under § 1452(a) primarily because (1) many district courts have standing orders that automatically transfer bankruptcy cases to bankruptcy court when they are removed to a district court and (2) district courts are an entity of which bankruptcy courts are a unit." *Foster v. Aurzada (In re Foster),* Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *8 (5th Cir. 2023) . But, the subject matter jurisdiction of federal district and bankruptcy courts is "not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S.

375, 377 (1994). (citing *American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6 (1951)). Congress only intended to refer cases to the bankruptcy court that could resolved in the "allowance and disallowance of claims" *Stern v. Marshall,* 564 U.S. 462, 496, 131 S. Ct. 2594, 2616 (2011) (Citations omitted). Outside of the related to jurisdiction confer by 28 USC 1334(/), Congress "says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain,* 503 U. S. 249, 254 (1992). For example, Congress "has granted federal district courts original jurisdiction in civil actions between citizens of different States, between U. S. citizens and foreign citizens, or by foreign states against U. S. citizens." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 US 546, 552 (2005) (Citing 28 USC § 1332). Another "category of cases over which the district courts have original jurisdiction are 'federal question' cases; that is, those cases 'arising under the Constitution, laws, or treaties of the United States.'" *Metropolitan Life Ins. Co. v. Taylor,* 481 US 58, 63 (1987) (quoting 28 U. S. C. § 1331). Congress has also established a system of bankruptcy protection to "grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365, 367 (2007). (Quoting *Grogan v. Garner,* 498 U.S. 279, 286, 287 (1991)). Since the decision in *Northern Pipeline Constr. v. Marathon Oil Pipe Line Co.,* 458 U.S. 50 (1982), lower courts have been divided over the limit of the authority that Congress intended to place on bankruptcy courts, within the framework of the US Constitution and the principles of Comity.

CONGRESS CANNOT GRANT BAMKRUPTY COURTS JURISDICTION TO ADJUDICATE "RELATED TO" CLAIMS

In 1984, returning to a system that had existed prior to the 1978 Act , Congress enacted a "bifurcated scheme by dividing all matters that may be referred to the bankruptcy court into two categories: "core" and "non-core" proceedings." *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25, 33 (2014) (Citing 28 USC § 157) Core proceeding involve the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, [which] must be distinguished from the adjudication of state-created private rights." *Northern Pipeline*, 458 US at 71.. Under 28 U.S.C. § 157(b), Congress has authorized bankruptcy courts to hear all case "arising under" or "arising in" Title 11 core proceeding. But in non-core proceedings, which are related to the amount of money that may be available to the debtor's creditor's, Congress has only authorized bankruptcy courts to "issue proposed findings of fact and conclusions of law, to be sent to the district for determination of a final judgment .by a district court." 28 U.S.C. § 157(c), Fraudulent conveyances are private rights that cannot be adjudicated by a non-article III court because they "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Granfinanciera, SA v. Nordberg*, 492 US 33, 56 (1989).

Under 28 USC § 1334(a), "[e]xcept as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11" The most familiar definition of the statutory "arising under" limitation is Justice Holmes' statement, "[a] suit arises under the law that

creates the cause of action." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 8-9, (1983). (Citing *American Well Works Co. v. Layne & Bowler Co.,* 241 U. S. 257, 260 (1916)). Bankruptcy protection, like copyright protection, trademark protection, or patent protection is a "public right" created by an Act of Congress. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line* Co., 458 US 50, 69 (1982) ("a matter of public rights must at a minimum arise 'between the government and others.'") The "presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.*, 522 US 470, 475 (1998). A "plaintiff is 'the master of the complaint' " *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 US 826, 831 (2002)(quoting *Caterpillar Inc. v. Williams*, 482 US 386, 398-399 (1987)). However, the lower courts of appeal are divided over the legislative intent of Congress when drafting the words "related to" in 28 USC § 1334(b)[2].

Historically Congress has clearly defined the limits on the subject matter jurisdiction of the federal courts, this Court has noted that "Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth." *Celotex Corp. v. Edwards*, 514 US 300, 307-308 (1995) (Internal citations

[2]" Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11" 28 USC Sec. ???

omitted). Matters that are "related to" but not arising in or arising under title 11, include claims to "augment its estate [which] is 'one of private right, that is, of the liability of one individual to another under the law as defined.'" *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50, 71-72 (1982) (quoting *Crowell v. Benson*, 285 US 22 (1932) "'[A]pplying the `relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else" *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195, 2203-2204, 174 L. Ed. 2d 99 (2009).(citation omitted). The division in the lower courts comes when an action is removed to federal court from state court under 28 U.S.C. § 1452 as a matter "related to" a bankruptcy proceeding, pursuant to 28 USC § 1334(b). The 5th Circuit held that since "Foster does not appear to dispute that this case is at least "related to" bankruptcy, and, as described below, this court agrees. Thus, the bankruptcy court had subject matter jurisdiction over the case" *Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *5 (5th Cir. 2023)

However, this Court has held that only "public rights" "may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50, 70 (1982). But the lower courts are split on the question as to the jurisdiction to hear and determine the "private rights" of a litigant that are "related to" the bankruptcy when the private right "is in no way derived from or dependent upon bankruptcy law; [but] it is a state tort action that exists without regard to any bankruptcy proceeding."

Stern v. Marshall, 564 U.S. 462, 499 (2011). In assessing jurisdiction, "courts look to the real parties to the controversy." *Lewis v. Clarke*, 137 S. Ct. 1285, 1295 (2017) (Citation omitted)

A bankruptcy court's subject matter jurisdiction is limited to claims that can be resolved in the "allowance and disallowance of claims" *Stern,*, 564 U.S. at 496. "In non-core proceedings — those that are "not ... core" but are "otherwise related to a case under title 11," 28 USC § 157(c)(1) — final judgment must be entered by the district court." *Exec. Bens. Ins. Agency v. Arkison,* 573 U.S. 25, 26 (2014) (Citing 28 USC § 157(c)(2)).In the instant case, Foster's state-court complaint merely anticipated that the Defendants would argue that a bankruptcy court had subject matter jurisdiction to enter the final judgment in a fraudulent conveyance claim, against the debtor's non-filing spouse. The Texas Defendants caused the final judgment in the fraudulent conveyance to be filed in the Tarrant County Texas Count Property Records, as D217258279, in violation of Tex. Civ. Prac. Rem. Code § 12.002, when the "Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim." *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25, 28 (2014)

CONGRESS DID NOT INTEND TO GRANT DEFENDANTS THE RIGHT TO REMOVE A CASE TO FEDERAL COURT WHEN THE ANTISCIPATED AFFIRMATIVE DEFENSE WAS RELATED TO A PRIOR BANKRUPTCY

The confusion in the lower courts come directly from this Court's holding that ""related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simply proceedings involving the

property of the debtor or the estate." *Celotex Corp. v. Edwards*, 514 US 300, 308 (1995). In adopting the so called '*Pacor Test,* 'the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have expanded the related to jurisdiction of the non-Article III court to include the "private rights" of the debtor because the "outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively" *Celotex Corp. v. Edwards*, 514 US 300, 308 footnote 6 (1995)(quoting *Pacor, Inc.* v. *Higgins,* 743 F. 2d 984, 994 (1984)),

Only the 7th circuit has rejected the putative majorities' all-encompassing jurisdictional standard and application of "related to" jurisdiction by divergently holding that a. "dispute over the meaning or validity of an agreement between the purchaser at a bankruptcy sale and some third party likewise arises under state rather than federal law" *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994). A " bankruptcy court's 'related to' jurisdiction cannot be limitless." *Celotex Corp. v. Edwards*, 514 US 300, 308 (1995). The conflict in the Circuits affect thousands of American who need to seek bankruptcy protection. Allowing the "related to" jurisdiction to subsume private rights would defeat the notion that "[l]itigation instituted by a creditor may not be defeated merely by reason of the fact that he has become a bankrupt" *Meyer v. Fleming,* 327 US 161, 165 (1946) (Citing *Thatcher v. Rockwell,* 105 US 467, 469-470 (1882). In *Rivet v. Regions Bank of La.,* the defendants' affirmative defense was "related to" a bankruptcy proceeding, but this Court held that "claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal." 522 U.S. 470, 478 (1998). However, the 5th Circuit found related

to jurisdiction because Foster's state law claim to remove a void bankruptcy judgment from the Texas state real property records, "could arise only in the context of a bankruptcy case." *Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *6 (5th Cir. 2023).

In *Stern v. Marshall*, this Court tried to retreat from its expansive reading of "related to" jurisdiction, in *Celotex*, by reiterating that "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case." 564 U.S. 462, 499 (2011) In *Stern*, this Court held that the bankruptcy court did not have subject matter jurisdiction over the debtor's private right to sue a creditor on a state law created tort because it could not be resolved in the "claims allowance process." 564 U.S.at 499. However, the lower Circuits continue to be divided on the extent of the "related to" jurisdiction. The 3rd circuit held that the "related to" jurisdiction of 28 USC 1334(b) extended to any claims "if 'the outcome of that proceeding could **conceivably** have any **effect** on the estate being administered in bankruptcy.'" *In re WR Grace & Co.*, 900 F.3d 126, 139 (3d Cir. 2018). (citing *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984), *overruled in part by Things Remembered, Inc. v. Petrarca,* 516 U.S. 124 (1995)) (emphasis in original). The over expansive "related to" jurisdiction has been interpreted so far that a "potential effect on the debtor confers upon th[e] Court original jurisdiction over the Plaintiffs' remaining claims.". *ABF Capital Management v. Askin Capital Management*, 957 F. Supp. 1308, 1332 (S.D.N.Y. 1997). Some courts have so strayed from the holding in *Northern Pipeline* regarding the debtor's private right to augment the estate, which is

related to the bankruptcy, but not subject to adjudication by a non-article III court, one court has held that *Meyer v. Fleming*, 327 U.S. 161 (1946) and *Johnson v. Collier*, 222 U.S. 538 (1912)) are "not good law regarding standing under the Bankruptcy Code". *In re Bailey*, 306 B.R. 391, 393 (Bankr. D.C. 2004). The cases of *Johnson* and *Fleming* stand for the proposition that:

> "If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some States the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability.
>
> *Meyer v. Fleming*, 327 US 161, 166 (1946)
> *(Quoting Johnson v. Collier*, 222 US 538 , 540(1912)(

The "Constitution gives federal courts the power to adjudicate only genuine 'Cases" and "Controversies.'" *California v. Texas*, 141 S. Ct. 2104, 2108 (2021) (Citing Art. III, § 2). To have Constitutional standing a "plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (Citation omitted). Congress has not grant a trustee constitutional standing, rather Congress has only provided that the trustee has "capacity to sue and be sue" 11 U.S.C. § 323(b). The "standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits." *Flast v. Cohen,* 392 US 83, 100 (1968)(*Citations omitted)* "If a dispute is not a proper case or controversy, the courts have no business deciding it, or

expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

"It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. " *Metropolitan Life Ins. Co. v. Taylor, 481 US 58, 63 (1987)*"Congress has not authorized removal based on a defense or anticipated defense federal in character. " *Rivet v. Regions Bank of La.*, 522 US 470, 472 (1998). However, the 5th Circuit held that the well pleaded complaint rule "applies only to federal-question jurisdiction." *Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *8 (5th Cir. 2023). Although *Rivet v. Regions Bank of La.*, 522 US 470, 472 (1998) also involved the impropriety of removal of a state law claim challenging the filing of bankruptcy related records under state law,, the 5th Circuit distinguished Rivets as having been removed under 28 U.S.C 1331, while "Section 1452(a) states that '[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.' "*Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *8 (5th Cir. 2023). But "Congress derives its power to enact a bankrupt law from the Federal Constitution, and the construction of it is a federal question." *Board of Trade of Chicago v. Johnson*, 264 US 1, 10 (1924). Thus, the well-pled complaint rule should apply to cases removed under 28 U.S.C § 1331 or 28 U.S.C § 1452.

"Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 US 1, 27-28 (1983). Foster's state law claims, that were removed from state court under 28 USC § 1452, neither arise under federal law nor involve a substantial question of federal since it is well settled law that "the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim." *Exec. Bens. Ins. Agency v. Arkison,* 573 U.S. 25, 28 (2014). Foster's state law claim alleges that the individual defendants conspired under the color of law to violate Tex. Civ. Prac. Rem. Code § 12.002, by filing a purported fraudulent conveyance, final judgment entered by a bankruptcy court, in connection with an adversary proceeding against the debtor's non-filing spouse, in the matter styled *Areya Holder, Chapter 7 Trustee v. Carlos Foster and 1st Aid Accident and Injury Center, Inc.* and numbered Cause No. 14-04054, in the Tarrant County Texas Count Property Records as D217258279. A "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of [] law" *Kentucky v. Graham,* 473 US 159, 165 (1985).

AN INDIVIDUAL THAT IS ACTING UNDER THE COLOR OF LAW IS ACTING OUTSIDE THE SCOPE OF AUTHORITY GIVEN BY LAW

When a government official acts outside the limits of his or her position then his or her "actions are *ultra vires* his authority and therefore may be made the object of

specific relief." *Larson v. Domestic and Foreign Commerce Corp.*, 337 US 682, 689 (1949). When a ""trustee acts in "the clear absence of all [her] jurisdiction" [] she lose[s] her derived immunity."" *Clements v. Barnes*, 834 SW 2d 45, 46 (Tex. 1992) *(Citing Mullis v. United States Bankr. Ct,* 828 F.2d 1385, 1390 (9th Cir.1987), *cert. denied,* 486 U.S. 1040 (1988)). Reviewing courts should "not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker v. Carr*, 369 US 186, 217 (1962) . This Court has expressly held that "**if, by mistake or wrongfully, the [trustee] takes possession of property belonging to another, such person may bring suit therefor against him personally as *a matter of right*; for in such case the [trustee] would be acting ultra vires**". *Barton v. Barbour*, 104 US 126, 134 (1881). (Emphasis added). This Court explained, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual" *Larson v. Domestic and Foreign Commerce Corp.*, 337 US 682, 689 (1949). Thus, Foster's pure state law claims for violations of Tex. Civ. Prac. and Rem. Code § 12.002, Tex. Civ. Prac. and Rem. Code § 134.003(a), conspiracy and quiet title claim are against Areya Holder, Todd Hoodenpyle, Michelle Shiro, individually, and Singer Levick, as respondent superior..

Although Foster's state law claims alleged that the individual Texas defendants acted under the color of law to violate Tex. Civ. Prac. Rem. Code § 12.002, the 5th Circuit rested its opinion on the fact that the "complaint never includes the phrase 'ultra vires'" *Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *13 (5th Cir. 2023). "Literally translated, the Latin phrase 'ultra vires'

means 'beyond the powers (of),' and as a legal term, the phrase means '[u]nauthorized' or 'beyond the scope of power allowed or granted . . . by law[.]'" *Adamski v. McHugh*, 304 F. Supp. 3d 227, 236 (D.C. 2015). (quoting *Black's Law Dictionary* 1755 (10th ed.2014)). Thus, the magic words "ultra vires" are not necessary to trigger the exception to the Barton Doctrine when it is alleged that a government employee used their position to take or encumbered property in violation of Tex. Civ. Prac. Rem. Code 12.002.

Tex. Civ. Prac. Rem. Code 12.002 prohibits a party from knowingly filing a document from a court without competent subject matter jurisdiction with the intent that the invalid or void judgment would be treated as if it had been rendered by a court of competent jurisdiction. Under Texas Law a person is liable for damages caused by theft and/or theft by deception . See Tex. Civ. Prac. & Rem. Code § 134.003 ("a person who commits theft is liable for the damages resulting from the theft.") The 5th Circuit even acknowledges the exception to the Barton doctrine provides for a private right of recovery "if the trustee wrongfully or mistakenly 'takes possession of property belonging to another[,]' [i]n such a case, the person whose property is taken may bring suit against the trustee personally without seeking leave of the appointing court." *Foster v. Aurzada* (*In re Foster*), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *12 (5th Cir. 2023) (quoting *Barton v. Barbour*, 104 U.S. 126, 134, 26 L. Ed. 672 (1881) . But the 5th Circuit, and the courts below, committed an abuse of discretion in failing to apply the law to the facts. See *Imbler v. Pachtman,* 424 US 409, 436 (1976) ("We simply rely on the ability of federal judges correctly to apply the law to the facts")

Under Texas law:

> A person may not make, present, or use documents or other record with:
>
> a. knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;
>
> b. intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and
>
> c. intent to cause another person to suffer:
> • physical injury; • financial injury; or • mental anguish or emotional distress.
>
> A person who violates Subsection (a) or (a-1) is liable to each injured person for:
>
> a. the greater of:
>
> (A) $10,000; or
>
> (B) the actual damages caused by the violation;
>
> b. court costs;
>
> c. reasonable attorney's fees; and
>
> d. exemplary damages in an amount determined by the court.
>
> TEX. CIV. PRAC. & REM. CODE § 12.002.

It is undisputed that on November 7, 2017, Defendant, Areya Holder, filed the purported final judgment, entered by the bankruptcy court on, a claim of fraudulent conveyance, against the debtor's non-filing spouse, in the matter styled *Areya Holder,*

Chapter 7 Trustee v. Carlos Foster and 1st Aid Accident and Injury Center, Inc. and numbered Cause No. 14-04054,in the Tarrant County Texas Count Property Records as D217258279, It is also undisputed that the purported final judgment was obtained by Defendants Todd Hoodenpyle and Michelle Shiro, of the defendant law firm Singer Levick, in an adversary proceeding against the debtor's non-filing spouse, for fraudulent conveyances, in the matter styled *Areya Holder, Chapter 7 Trustee v. Carlos Foster and 1st Aid Accident and Injury Center, Inc.* and numbered Cause No. 14-04054, This court has held that "[s]ection 157(c)(1)'s procedures apply to the fraudulent conveyance claims . . .which Article III does not permit to be treated as "core" claims under § 157(b)." *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25, 26 (2014). Since 1986, bankruptcy courts have not had subject matter to hear and determine fraudulent conveyance because they "constitute no part of the proceedings in bankruptcy." *Granfinanciera, SA v. Nordberg*, 492 US 33, 56 (1989).

First, a debtor's private divorce claims do not become property of the estate and the federal bankruptcy trustee is not in "privy with a debtor in a divorce"" *In re Erlewine*, 349 F.3d 205, 210 (5th Cir. 2003). Second, a "fraudulent conveyance claim asserts that property that should have been part of the bankruptcy estate and therefore available for distribution to creditors pursuant to Title 11 was improperly removed." *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25, 38 (2014). This Court has explained that "fraudulent conveyance suits were 'quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically

ordered claims to a pro rata share of the bankruptcy res.'" *Stern v. Marshall,* 564 U.S. 462, 492 (2011))Quoting *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)). In a" typical bankruptcy fraudulent conveyance cases, it is the debtor who "removes" property from his estate to prevent its falling into the hands of creditors". *In re Galaz,* 765 F. 3d 426 , 430- (5th Cir.2014). However, the 5th Circuit noted that the "bankruptcy judge's statement that the bankruptcy case proceeded under the belief that these assets were part of the bankruptcy estate and that the Trustee pursued the assets, in part, on behalf of Foster. *"Foster v. Aurzada (In re Foster),* Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *13-14 (5th Cir. 2023). But neither the lower courts nor the 5th Circuit cite any authority to authorize a trustee to seek property for the benefit of a debtor when the controlling precedent in the 5th is that "[t]he ultimate characterization of property as either community or separate is determined by applicable state law, and that determination establishes what interest, if any, the bankruptcy estate has in the property" *In re Robertson,* 203 F. 3d 855, 859 (5th Cir. 2000).

Chapter 7 of the Bankruptcy Code gives an insolvent debtor the opportunity to discharge his debts by liquidating his assets to pay his creditors. 11 U.S.C. §§ 704(a)(1), 726, 727. This Court cannot forget that Congress has left the creation and definition of property interests of a debtor's bankruptcy estate to state law. See *Butner v. United States,* 440 U.S. 48, 54 (1979). ("Property interests are created and defined by state law"). Under bankruptcy law, "the validity of a creditor's claim is determined by rules of state law." *Grogan* v. *Garner,* 498 U.S. 279,283-284 (1991) (*citing Vanston*

Bondholders Protective Comm. v. Green, 329 U. S. 156, 161 (1946)). Federal bankruptcy courts must apply state law to achieve the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power,[but] must be distinguished from the adjudication of state-created private rights." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50 , 71 (1982). Under 11 USC 541(a)(2)(A), in a community property state, all property under the sole, equal, or joint management and control of the debtor becomes part of the bankruptcy estate. In community property states, such as Texas, Congress has provided that the bankruptcy court's subject matter jurisdiction over property under the debtor's non-filing spouse's sole management and control is expressly limited by 11 USC 541(a)(2)(B), to the extent that such property is liable for claims against BOTH the debtor and the debtor's non filing spouse under Texas law, as follows:

> All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
>
> (A) under the ***sole, equal, or joint management*** **and control of the debtor;** or
> (B) **liable for an allowable claim** against the debtor, or for both an allowable claim against the debtor **and** an allowable claim against the debtor's spouse, **to the extent that such interest is so liable.**

11 U.S.C. 541(a)(2) (emphasis added).

Under the plain meaning of 11 U.S.C. 541(a)(2) (B), federal law "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Bess,* 357 U.S. 51, 55 (1958). Although, "federal

district courts and bankruptcy courts have jurisdiction over the property of a title 11 debtor under section 1334(d), this fact alone does not determine what law controls the disposition of the property." *Robinson v. Michigan Consol. Gas Co. Inc.*, 918 F. 2d 579, 588 (6th Cir. 1990).. When a debtor is involved with a state court divorce proceeding, the 5th Circuit has held that:

> Nor can the trustee be considered the Debtor's privy, for two parties are said to be in privity when they share an "identity of interests in the basic legal right that is the subject of litigation." The interests of the Debtor in the divorce proceeding and of the Trustee in the instant case are, however, quite distinct.
>
> *In re Erlewine*, 349 F.3d 205, 210 (5th Cir. 2003).

Under Texas law, "[m]arriage itself does not create joint and several liability." *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 654-655 (Tex. 2013).(Citation omitted). The Texas Supreme Court reiterated the law in Texas regarding community property liability under the plain meaning of the Texas Family Code[3] as follows:

> "(b) Unless both spouses are liable by other rules of law, the community property subject to a spouse's sole management, control, and disposition is not subject to:
> "(1) any liabilities that the other spouse incurred before marriage; or
> "(2) any nontortious liabilities that the other spouse incurs during marriage.
>
> As the Texas Supreme Court has expressly held:
>
> **"[m]arriage itself does not create joint and several liability."** These and other commentators agree that **one spouse's**

[3] Tex. Fam. Code Sec. 3.202*(b)*, expressly provides:

(b) Unless both spouses are personally liable as provided by this subchapter, the community property subject to a spouse's sole management, control, and disposition is not subject to:

(1) any liabilities that the other spouse incurred before marriage; or

(2) any nontortious liabilities that the other spouse incurs during marriage.

> **liability for debts incurred by or for the other is determined by statute.** We agree.
>
> Section 3.201(a) states:
>
> A person is personally liable for the acts of the person's spouse only if:
>
> 1) the spouse acts as an agent for the person; or
>
> (2) the spouse incurs a debt for necessaries as provided by [Section 2.501].
>
> Section 2.501 states:
>
> (a) Each spouse has the duty to support the other spouse.
>
> (b) A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to the spouse to whom support is owed.
>
> Thus, ***one spouse is not liable for the other's debt unless the other incurred it as the one's agent or the one failed to support the other*** and the debt is for necessaries.

Tedder v. Gardner Aldrich, LLP, 421 S.W.3d 651, 654-655 (Tex. 2013). (Emphasis added). (Quoting Texas Family Code Section 3.202)

Put simply, "one spouse is not liable for the other's debt unless the other incurred it as the one's agent or the one failed to support the other and the debt is for necessaries." *Id.* The Texas Supreme Court has held that a husband is not in privity with the wife as follows:

> *neither* spouse may virtually represent the other. The rights of the wife, like the rights of the husband and the rights of any other joint owner, may be affected only by a suit in which the wife is called to answer.
>
> *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 202

(Tex. 1974).(citing former Texas Family Code Sections 5.22 and 4.04, respectively now recodified as Tex. Fam. Code 3.102 and Tex. Fam. Code 1.105)

"`[P]roperty interests are created and defined by state law,' and `[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.'" *Butner v. United States,* 440 U.S. 48, 55 (1979)).The long-standing rule has been that "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." *Butner v. United States,* 440 US 48, 55 (1979) (Citation omitted). Congress has not authorized a bankruptcy court to ignore the limitation imposed by 11 USC § 541(a)(2)(B) and *impermissibly* use a fraudulent conveyance proceeding to equitably expand its subject matter jurisdiction over property under the debtor's non-filing spouse sole management and control, beyond the extent such property was liable for jointly incurred debts, under Texas law. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.'" *Law v. Siegel,* 134 S. Ct. 1188, 1194, 571 U.S., 188 L. Ed. 2d 146 (2014). The "Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim." Exec. Bens. Ins. Agency v. Arkison, 573 U.S. 25, 28 (2014). And a trustee cannot use the filing of a void fraudulent conveyance judgment entered by a bankruptcy court "to ignore nonbankruptcy law." *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection,* 474 U.S. 494, 503 106 S.

Ct. 755, 88 L. Ed. 2d 859 (1986). Tex. Civ. Prac. Rem. Code 12.002 prohibits any person from knowingly filing a document entered by a court without competent subject matter jurisdiction. Under Texas law, "[o]ne holding under a void title cannot claim protection as an innocent purchaser."[*Dept. of Transp. v. API Pipe & Supply*, 397 S.W.3d 162, 168 (Tex. 2013).

CONGRESS INTENED FOR RELATED TO CLAIMS, THAT COULD NOT BE RESOLVED IN THE CLAIMS ALLOWANCE PROCESS, TO BE REMAND BACK TO THE STATE COURT FROM WHICH THEY WERE REMOVED

Under the principals of comity and federalism[4], Congress has allowed federal courts limited exceptions to abstain from hearing pure state law claim[5]s, however Congress has expressly provided for mandatory abstention by federal courts , as follows

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.
>
> 28 USC 1334 (c)(2)

The statute thus states a two-part inquiry. The first question is whether the

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[4] See *Quackenbush v. Allstate Ins. Co.*, 517 US 706, 714 (1996) ("Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism.") (Citations omitted).

[5] Id. at 731("federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary.")

proceeding is based on a state law claim or state law cause or action. The only time a state court complaint can be recharacterized as one "arising under" federal law is when the "law governing the complaint is exclusively federal." *Vaden v. Discover Bank*, 556 U.S. 49, 129 S. Ct. 1262, 1266 173 L. Ed. 2d 206 (2009). (Citations omitted). "Federal jurisdiction cannot be predicated on an actual or anticipated defense, *[]*, or rest upon an actual or anticipated counterclaim," *Id.*. Foster's complaint against the individual Texas Defendants involve pure state las claims of civil conspiracy, theft, quiet title and violations of Tex. Civ. Prac. & Rem. Code § 12.002. The Complaint alleges that the Texas defendants acted under the color of law to file a purported final judgment for fraudulent conveyance against Foster's non-filing spouse. The Complaint alleged that the bankruptcy court's purported final judgment that was filed in the county property records of Tarrant County, Texas, violated Tex. Civ. Prac. Rem. Code Sec 12.002 because "the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim." Exec. Bens. Ins. Agency v. Arkison, 573 U.S. 25, 28 (2014)

However, the 5th Circuit used judicial artifice to turn an action that could not have been commenced in a federal court absent "related-to" into a "core" proceeding. The 5th Circuit held that "to the extent Foster argues that the bankruptcy court should have abstained, mandatory abstention does not apply to core proceedings." *Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *7 (5th Cir. 2023) (Citations omitted), But as the 1st Circuit has held, ""[a] proceeding `will not be considered a core matter, even if it falls within the literal language of § 157(b)(2)(A)

or 157(b)(2)(O), if it is a state law claim that could exist outside of bankruptcy and is not *inextricably bound* to the claims allowance process or a right created by the Bankruptcy Code.'" *In re Sheridan*, 362 F.3d 96, 109 (1st Cir. 2004). This Court has held that" [u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 US 48, 55 (1979). "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible" *Bradley v. Fisher,* 80 US 335, 351-352 (1872). There is no federal interest in in su lating "persons who corruptly conspire with the judge." *Dennis v. Sparks*, 449 US 24, 29 (1980).

The 5th Circuit lost sight of Comity and Federalism, by holding that Foster's state law claims to remove a void judgment, under Tex. Civ, Prac. & Rem. Code 12.002, "could not arise outside of the bankruptcy context. *Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *7 (5th Cir. 2023) Usurpation of jurisdiction is "treason to the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 5 L. Ed. 257, 5 S. Ct. 739 (1821). Absent the related-to jurisdiction under 28 USC § 1334(c)(2), the state law claims, for violations of Tex. Civ. Prac. Rem. Code § 12.002 are asserted by a Texas resident against three(3) individual Texas residents and a Texas corporation, so there is no diversity jurisdiction, under 28 USC § 1332.

IT IS IMPORTANT FOR THIS COURT TO CONFIRM THAT THE GENERAL CIVIL REMOVAL TIMEFRAME SHOULD APPLY TO CIVIL ACTION REMOVED UNDER 28 USC § 1452(a)

The general jurisdictional removal and remand statutes passed by Congress, rather than the procedural rules of bankruptcy, should apply to removals and remand of any civil action "regardless of whether removal was effected pursuant to § 1441(a) or § 1452(a)." *Things Remembered, Inc. v. Petrarca*, 516 US 124, 128 (1995). The deadline set by Congress should apply to "defendants desiring to remove any civil action from a State court." 28 U.S.C 1446(a) (Emphasis added) When faced with interpretating the phrase ""any other term of imprisonment," this Court held that the phrase must be read "as referring to all 'term[s] of imprisonment'" *United States v. Gonzales*, 520 US 1 ,4 (1997). But, as the 11 Circuit observed, "[c]ourts have split on whether 28 U.S.C. § 1446(b) (governing removals generally) or Bankruptcy Rule 9027 provides the appropriate time period for filing a notice of removal in cases related to a bankruptcy proceeding. *Christo v. Padgett, 223 F.3d 1324, 1330 n.6 (11th Cir. 2000 (Citing* Hon. Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!,* 27 Cumb. L.Rev. 1037, 1057-59).

"Section 1447(c) provides two grounds for remand: (1) a defect in removal procedure and (2) lack of subject matter jurisdiction. " *Burks v. Amerada Hess Corp.*, 8 F. 3d 301, 303 (5th Cir. 1993). Rather than applying 30-day time limit from the date of formal service of summons, together with the complaint, as mandated by the general civil removal statute, passed by Congress, in 28 USC § 1446, the 5th Circuit stated that "Federal Rule of Bankruptcy Procedure 9027(a)(3) specifies that the thirty-day period

begins on the day *of receipt." Foster v. Aurzada* (In re Foster), Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *10 (5th Cir. 2023) But, "the filing deadlines in the Bankruptcy Rules are `procedural rules adopted by the Court for the orderly transaction of its business' that are `not jurisdictional.'" *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 2365168 L. Ed. 2d 96 (2007). To the "extent a Rule contradicts a statute, the Rule is invalid." *White v. Boston*, 104 B.R. 951, 954 F 4 (S.D. Ind. 1989). 'The 5th Circuits application of the word receipt conflict with this Courts holding that formal service of process is complete when sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019).

In removed cases, the question of when the defendant is properly served is determined by reference to applicable state law. *Murphy Brothers, Inc. v. Michetti* Pipe Stringing, Inc., 526 US 344, 348. (1999). Tex. R. Civ. P. 106(a) governs methods of service of process. It provides that service may be effected by, among other methods, authorized court official "mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto." Tex. R. Civ. P. 106(a)(2). A "'citation' is directed to the defendant, telling the defendant that he or she has been sued and commanding the defendant to appear and answer the opposing party's claims." *TEXAS NATURAL RES. CONSERV. v. Sierra Club*, 70 S.W.3d 809, 813 (Tex. 2002). When "the summons and complaint are served together, the 30-day period for removal runs at once." *Murphy Bros,* 526 U.S.at 347.

The 5th Circuits mistakenly relies on the proposition that making the starting point of the 30 day period for removal begin when the summons and complaint are actually received would "promot[e] certainty and judicial efficiency' by ensuring a delay in the mail does not deprive a defendant of the opportunity to remove a case *Foster v. Aurzada (In re Foster)*, Nos. 22-10310, 22-10318, 2023 U.S. App. LEXIS 52, at *10 (5th Cir. 2023) (quoting *Chapman v. Powermatic*, Inc., 969 F.2d 160, 164 (5th Cir. 1992)). However, *Chapman* was not addressing removal after formal service of the summons and the complaint *under* 28 USC § 1446(a), rather it was addressing "§ 1446(b) [which] requires that the defendant remove the case, if at all, within 30 days after receipt of an "other paper" from which the defendant may first ascertain that the case is removable." *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992) In addressing a statute that is similar to 28 USC § 1446(a), this Court has approved of "service 'by any form of mail requiring a signed receipt, to be addressed and dispatched ... to the head of the ministry of foreign affairs of the foreign state concerned.'" *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1051 (2019). (quoting § 1608(a)(3)). This Court held that the date of formal service of process is "similar understanding underlies the venerable 'mailbox rule' [a]s first-year law students learn in their course on contracts, there is a presumption that a mailed acceptance of an offer is deemed operative when 'dispatched' if it is 'properly addressed'" *Republic of Sudan*, 139 S. Ct. 1048, 1056 (2019).(Quoting Restatement (Second) of Contracts § 66, p. 161 (1979) (Restatement); *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)).

CONCLUSION AND PRAYER

In the interest of Comity, this petition for a writ of certiorari should be granted.

Respectfully submitted by

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XI. CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was served in accordance with the Federal rules of civil procedure on all counsel of record this 2nd day of June 2023

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