No. 23-724

In the

Supreme Court of the United States

WVSV HOLDINGS, L.L.C.,

Petitioner,

v.

10K, L.L.C., LEO BEUS, ANNETTE BEUS, PAUL GILBERT, SUSAN GILBERT, RANDY STOLWORTHY, KARI STOLWORTHY,

Respondents.

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

JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should review the Ninth Circuit's decision that Petitioner's contingent state law tort claims were barred because they were property of the estate that should have been disclosed during the bankruptcy where that decision does not conflict with the decisions of other Circuits.

2. Whether the Court should review the Ninth Circuit's decision that the dismissal of Petitioner's undisclosed tort claim was within the Bankruptcy Court's jurisdiction to interpret and enforce a confirmed plan.

3. Whether the Court should review the Ninth Circuit's decision that the Bankruptcy Court properly applied judicial estoppel to bar Petitioner's undisclosed tort claim.

4. Whether the Court should accept review of an issue that Petitioner did not raise in the Ninth Circuit and involves a fact-bound dispute of little significance beyond the parties to this case.

PARTIES TO THE PROCEEDING

Petitioner WVSV Holdings, L.L.C. ("WVSV") is an Arizona limited liability company.

Respondent 10K, L.L.C. ("10K") is an Arizona limited liability company. Respondent Randy Stolworthy is a member and the manager of 10K. Respondents Leo Beus and Paul Gilbert were, at all relevant times, members of 10K. Mr. Beus passed away on November 14, 2022. Kari Stolworthy, Annette Beus, and Susan Gilbert are the spouses of Messrs. Stolworthy, Beus, and Gilbert.

CORPORATE DISCLOSURE STATEMENT

Respondent 10K is a private limited liability company with no parent corporation. No publicly held company owns 10% or more of the ownership of 10K.

STATEMENT OF RELATED PROCEEDINGS

WVSV Holdings, L.L.C. v. 10K, L.L.C. et al. (In re WVSV Holdings, L.L.C.), No. 21-16874, United States Court of Appeals for the Ninth Circuit. Order denying petition for rehearing entered October 6, 2023.

WVSV Holdings, L.L.C. v. 10K, L.L.C. et al. (In re WVSV Holdings, L.L.C.), Nos. 21-16874 & 21-16952 (consolidated), United States Court of Appeals for the Ninth Circuit. Memorandum entered August 29, 2023.

WVSV Holdings, L.L.C. v. 10K, L.L.C. et al. (In re WVSV Holdings, L.L.C.), CV-20-01927-PHX-JJT, United States District Court for the District of Arizona. Order entered October 19, 2021.

WVSV Holdings, L.L.C. v. 10K, L.L.C. et al. (In re WVSV Holdings, L.L.C.), Case No. 12-bk-10598-MCW, Adv. Pro. No. 20-ap-00060-MCW, United States Bankruptcy Court for the District of Arizona. Order entered September 22, 2020.

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JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

WVSV seeks review of the Ninth Circuit's decision affirming the dismissal of WVSV's lawsuit against Respondents. The Ninth Circuit, the District Court, and the Bankruptcy Court each found that WVSV's claims against its primary creditor, 10K, and certain of 10K's members were barred by judicial estoppel, as the claims were property of the estate that should have been disclosed during WVSV's bankruptcy proceedings instituted in 2012. The Ninth Circuit decision is unpublished. No circuit judge other than the author of the dissent below (the "Dissent") voted to grant WVSV's request for rehearing.

WVSV argues that there is a circuit split as to whether the test for determining property of a bankruptcy estate employed in *Segal v. Rochelle*, 382 U.S. 375, 380 (1966), has been superseded by Section 541 of the Bankruptcy Code of 1978, 11 U.S.C.A. § 541. WVSV further argues that the Ninth Circuit erred in finding that the Bankruptcy Court had jurisdiction to dismiss WVSV's complaint and affirming its application of judicial estoppel. These issues do not warrant this Court's review.

WVSV's circuit split argument is based on the erroneous premise that the Ninth Circuit's reliance on *Segal* conflicts with decisions from other circuits that have supposedly rejected *Segal*. However, WVSV has not identified a conflict between the decision below and analogous cases from other circuits. Instead, WVSV attempts to conjure a circuit split by citing

factually inapposite cases that distinguished *Segal*. No conflict exists among comparable cases on an important matter, and, thus, no circuit split supports this Court's review.

Moreover, WVSV does not identify either a circuit split or an important federal question appropriate for this Court's review relating to 1) the application of Section 541 of the Bankruptcy Code to causes of action; 2) the Bankruptcy Court's exercise of jurisdiction to enforce a confirmed plan; or 3) the Bankruptcy Court's application of judicial estoppel to bar WVSV's undisclosed claims.

Finally, WVSV's Petition is an inappropriate vehicle for evaluating the continued vitality of *Segal*'s "sufficiently rooted" test. WVSV did not oppose the use of that test at any point in the proceedings below; instead, WVSV agreed, and cited authority, that *Segal* applied. Accordingly, the Ninth Circuit has not addressed the "primary" question WVSV raises here for the first time. In addition, the facts underlying this dispute are complex, fact-bound, and unlikely to recur, such that a decision from this Court would not help guide other bankruptcy proceedings. Finally, WVSV's underlying claims are unwinnable on their merits, which becomes clear upon correcting WVSV's multiple misrepresentations and further counsels against review.

WVSV's Petition should be denied.

OPINIONS BELOW

All relevant lower court decisions are included in Petitioner's Appendix ("Pet. App."), with the exception of the United States Bankruptcy Court's Minute Entry and Order granting Respondents' Motion to Dismiss, which are included in Respondents' Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. § 541:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> …
>
> (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

2. 11 U.S.C. § 101(5)(A):

> In this title the following definitions shall apply:
>
> …
>
> (5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;

3. 11 U.S.C. § 1125:

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information;

…

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

There are no constitutional rights at issue in this case.

STATEMENT OF THE CASE

WVSV's Statement of the Case is incomplete and misleading, particularly as to the underlying dispute between 10K and WVSV that led to the litigation WVSV calls the "Prepetition Action."[1] The dispute actually involved two separate lawsuits, referred to as the "2003 Action" and the "2006 Action" in the Arizona appellate court decisions cited below. This Brief will use these terms.

On June 4, 2002, 10K's manager, Phoenix Holdings II, L.L.C. ("PHII") entered 10K into an agreement to sell 10K's only asset, over 13,000 acres of real property (the "Sun Valley Property") to an entity called Breycliffe, L.L.C. (the "Breycliffe Agreement"). *See Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 276 P.3d 11, 16 ¶ 5 (Ariz. App. 2012). The Breycliffe Agreement was

[1] WVSV does not cite the record to support its factual assertions.

entered to settle litigation between 10K (controlled by PHII), Breycliffe, and a third party arising from prior agreements. *Id.*, ¶ 8. A stipulated order signed the same day (the "2002 Judgment") enjoined 10K to comply with the Breycliffe Agreement. *Id.*, ¶ 9.

While these events were occurring, PHII did not disclose to 10K that Breycliffe was unable to close on the $65 million transaction and PHII had been secretly marketing Breycliffe's interest to third parties and also seeking a substantial profit participation for itself. *Cal X-Tra*, ¶¶ 5, 10. When the 10K members learned that PHII was offering Breycliffe's interest to Conley Wolfswinkel, they objected and instructed PHII that 10K would buy Breycliffe's interest instead. *Id.*, ¶ 11. 10K did not want to do business with Wolfswinkel, a notorious Arizona real estate developer with multiple felony convictions, including for bank fraud, two civil judgments in excess of one billion dollars each against him for fraudulent business activities, and a reputation for using bankruptcy to extract business advantages. *Id.*, ¶ 10. PHII disregarded 10K's instructions, as Wolfswinkel secretly agreed to pay PHII's requested profit participation for bringing him the 10K deal. *Id.*, ¶¶ 11, 13-14.

In May 2003, 10K sued PHII, Breycliffe, and Wolfswinkel's newly-created single purpose entity, WVSV, which had acquired Breycliffe's position in the Breycliffe Agreement (the "2003 Action"). *Cal X-Tra*, ¶ 16. 10K sought damages for WVSV's misconduct that deprived 10K of its sole asset and a declaratory judgment invalidating the Breycliffe Agreement and vacating the 2002 Judgment because PHII breached

its fiduciary duties in entering 10K into the Agreement. *Id.,* ¶ 16 & n.10.

In June 2003, on WVSV's motion, the state court dismissed 10K's declaratory judgment claim as an improper collateral attack on the stipulated 2002 Judgment, and directed 10K to comply with the 2002 Judgment, including closing the sale of the Sun Valley Property (the "2003 Judgments"). *Cal X-Tra*, ¶ 18. The 2003 Judgments were affirmed on appeal in 2005.

In 2006, 10K filed a second lawsuit seeking to set aside the 2003 Judgments based on newly discovered evidence that PHII and Breycliffe had defrauded the court in connection with the 2002 Judgment (the "2006 Action"). *Id.*, ¶ 27. While the 2006 Action was pending, 10K's aiding and abetting breach of fiduciary duty claim against WVSV went to trial in the 2003 Action. *Id.*, ¶¶ 28, 33.[2] In November 2007, the jury found in favor of 10K, and awarded $210 million in compensatory damages and $150 million in punitive damages against WVSV. *Id.*, ¶ 35. However, on WVSV's motion, the court set aside the verdict and granted judgment as a matter of law to WVSV, finding that the 2003 Judgments immunized WVSV against 10K's aiding and abetting claim. The court also conditionally ordered a new trial. *Id.*, ¶ 37.

In 2008, 10K obtained an order in the 2006 Action vacating the 2003 Judgments procured by WVSV based on extrinsic fraud, finding that "to deny [10K] such relief would only serve to exacerbate an extraordinary injustice, namely the opportunity to

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[2] 10K settled with the other defendants prior to trial. *Cal X-Tra,* ¶ 30.

plead and present its case to a judge and jury, respectively." *Cal X-Tra*, ¶ 42. In light of this ruling, the court in the 2003 Action vacated its grant of judgment as a matter of law to WVSV, but upheld its grant of a new trial. *Id.*, ¶ 46. Each ruling in both lawsuits was upheld by the Arizona Court of Appeals in April 2012. *Id.*, ¶ 123.

At that point, 10K's declaratory judgment claim in the 2003 Action was revived, and the parties would proceed to a new trial on both that claim and the aiding and abetting claim. However, in May 2012, WVSV filed its Chapter 11 bankruptcy petition, which stayed proceedings in the state court. [Pet. App. 16a.]

10K was WVSV's primary creditor, filing a proof of claim for, *inter alia*: 1) its secured claim of $45 million for WVSV's purchase of the Sun Valley Property; 2) an unsecured, contingent claim for damages arising from 10K's aiding and abetting claim against WVSV in the 2003 Action; and 3) a contingent claim to recover the Sun Valley Property through the invalidation of the Breycliffe Agreement. [Pet. App. 16a; Ninth Circuit Excerpts of Record ("EOR"), EOR-471.] In November 2013, after obtaining stay relief, 10K filed a Third Amended Complaint in the 2003 Action, seeking damages on its aiding and abetting breach of fiduciary duty claim, and a declaration vacating both the Breycliffe Agreement and the 2002 Judgment that enjoined 10K to perform under that Agreement. [Pet. App. 16a.] At no time before plan confirmation did WVSV, in its bankruptcy schedules, disclosures, proposed plan, or otherwise, identify WVSV's claims against 10K or its members relating to 10K's

declaratory judgment cause of action. [Pet. App. 27a–28a.]

On March 6, 2014, 10K and WVSV reached a settlement with respect to their competing plans of reorganization in WVSV's bankruptcy. [Pet. App. 17a.] As part of the settlement, the parties agreed:

> 10K and WVSV agree that the State Court Litigation, *10K, L.L.C. v. WVSV Holdings, L.L.C., and Conley Wolfswinkel*, Case No. CV2003-008362 [the 2003 Action], including claims against Conley Wolfswinkel, may continue to proceed to conclusion in the State Court, No party's rights, claims or defenses in the State Court Litigation are waived, released, impaired or otherwise affected by the entry or effectuation of this settlement and Plan confirmation. This preservation of claims includes, but is not limited to, WVSV's right (if any) to pursue and 10K's right (if any) to contest a restitution claim for expenditures WVSV alleges it has made. This preservation of claims further includes, but is not limited to, 10K's right (if any) to pursue and WVSV's right (if any) to contest 10K's claim for restorative damages. The purpose of this paragraph is to make explicit that this settlement does not prejudice, but instead preserves, any and all claims that the parties have or may raise in the State Court Litigation.

[EOR-429.] The Settlement Term Sheet was incorporated into the Bankruptcy Court's March 13,

2014 Order Confirming Creditor's First Amended Plan of Reorganization. [EOR-417.]

After plan confirmation, the parties returned to state court for trial in the 2003 Action. In January 2017, after a lengthy bench trial and post-trial proceedings, 10K obtained a $67 million award on its aiding and abetting breach of fiduciary duty claim against WVSV. *See 10K, L.L.C. v. W.V.S.V. Holdings, L.L.C.*, 2018 WL 5904513, ¶¶ 12, 84 (Ariz. App. Nov. 8, 2018). 10K was also awarded attorneys' fees as the successful party in the 2003 Action pursuant to Ariz. Rev. Stat. § 12-341.01(A). *Id.*, ¶ 84.

The state court further found in favor of 10K, in part, on the declaratory judgment claim by vacating the 2002 Judgment based upon extrinsic fraud. *10K,* ¶ 9. However, the court found that PHII's fiduciary duty breaches did not include entering 10K into the Breycliffe Agreement, and thus the court did not invalidate that Agreement. *Id.*, ¶ 68. In November 2018, this judgment was affirmed in its entirety by the Arizona Court of Appeals. *Id.*, ¶ 85. Thus, contrary to WVSV's assertion in its Petition, WVSV did not obtain "a judgment in its favor" in the 2003 Action. WVSV did not fully prevail on even a single claim and was liable to 10K for over $70 million in damages and fees.

In 2019, WVSV moved the Bankruptcy Court to close the bankruptcy, while 10K moved to implement the Confirmed Plan by compelling a sale of the Sun Valley Property to pay the claims against the estate. [Ninth Circuit Supplemental Excerpts of Record ("SER"), SER-4, 8.] The Bankruptcy Court agreed with 10K that the Confirmed Plan should be implemented

with the Sun Valley Property being sold under Bankruptcy Court supervision and remaining creditors of the bankruptcy estate finally paid. [SER-31.] On September 16, 2019, after an evidentiary hearing, the Court entered an Order allowing WVSV 20 months to market and sell the Sun Valley Property, noting that this extended selling period would compensate for the "cloud on title," if any, caused by the 2003 Action. [SER-47–48.]

In January 2020, WVSV filed a new lawsuit against Respondents in state court, alleging, for the first time in the parties' 17-year dispute, that 10K's 2003 declaratory judgment claim seeking to invalidate the Breycliffe Agreement constituted wrongful conduct by 10K and its members that supposedly injured WVSV "since the day [WVSV] closed in July 2003." [EOR-373–413.] In addition to its wrongful initiation of civil proceedings ("WICP") claim, WVSV asserted a tort claim for slander of title, two declaratory judgment claims seeking to extend the time frame for WVSV to complete its payment obligations to 10K, and an aiding and abetting tortious conduct claim against three members of 10K. [EOR-403–412.] These claims were all based on 10K's efforts to invalidate the Breycliffe Agreement beginning in 2003. [*See, e.g.,* EOR-379.]

Respondents timely removed the action to Bankruptcy Court as an adversary proceeding in WVSV's bankruptcy, and then moved to dismiss the Complaint on multiple grounds. [EOR-359; EOR-292.] After additional briefing on jurisdictional issues, the Bankruptcy Court dismissed WVSV's new claims, holding: 1) it had jurisdiction to interpret and enforce

the Confirmed Plan; 2) WVSV's new claims against Respondents arose from pre-petition conduct and constituted property of the estate; and 3) WVSV was barred from pursing the claims post-confirmation because it failed to disclose them during the bankruptcy. [Pet. App. 49a–52a.]

WVSV appealed the dismissal to the District Court. In doing so, it abandoned its slander of title claim, leaving only the WICP, aiding and abetting, and two declaratory judgment claims. In October 2021, the District Court affirmed the Bankruptcy Court's rulings that the claims were property of the estate that should have been disclosed, the Bankruptcy Court had jurisdiction to enforce the terms of the Confirmed Plan, and WVSV was judicially estopped from asserting the claims post-confirmation. [Pet. App. 15a.] WVSV then appealed to the Ninth Circuit.

While the Ninth Circuit appeal was pending, WVSV sold the Sun Valley Property with the Bankruptcy Court's approval in March 2022. [SER-202; SER-283.] At the close of that transaction, $137 million owed to 10K for its claims was fully paid. [SER-208–209.][3]

The sale of the Sun Valley Property mooted WVSV's declaratory judgment claims. Accordingly, the only claims at issue before the Ninth Circuit were the WICP claim against 10K and the aiding and abetting claim against the individual Respondents. [Pet. App. 8a.] In November 2022, the Ninth Circuit

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[3] By that point, 10K had sold its assets, including its bankruptcy claims, to another entity called 2M&H, L.L.C.

affirmed the dismissal of those claims. [Pet. App. 3a.] However, one judge dissented, arguing that because the claims had not fully accrued by the May 2012 petition date, they were not property of the estate. [Pet. App. 9a.] WVSV sought both a panel rehearing and rehearing *en banc*, both of which were denied. [Pet. App. 56a.]

REASONS FOR DENYING THE PETITION

A. There Is No Circuit Split Regarding *Segal* In This Context.

Years ago, this Court held that a claim is property of the bankruptcy estate when it is "sufficiently rooted in the pre-bankruptcy past," even where the claim is "novel or contingent." *Segal v. Rochelle*, 382 U.S. 375, 379-80 (1966). After *Segal*, Congress enacted the Bankruptcy Code of 1978, including Section 541(a), which defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." In doing so, Congress specifically noted that it was following the result in *Segal*. *See In re Barowsky*, 946 F.2d 1516, 1519 (10th Cir. 1991) (*quoting* S.Rep. No. 989, 95th Cong., 2d Sess. 82).

In its Petition, WVSV attempts to invoke this Court's discretionary review pursuant to Supreme Court Rule 10(a), which identifies as a relevant consideration that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." WVSV identifies as the "primary question" an alleged "circuit split" regarding whether *Segal*'s test for determining whether a claim

constitutes property of the estate has been superseded by Section 541(a)(1) of the Bankruptcy Code. [Pet., pp. 3–4.] However, the Ninth Circuit's decision does not conflict with the other decisions WVSV cites. WVSV's further argument that only accrued causes of action constitute property of the estate is erroneous and does not provide a valid basis for review.

1. The Cases WVSV Cites For The Supposed Circuit Split Are Inapplicable.

WVSV cites one case from each of the Second, Fourth, Seventh, Ninth, and Tenth Circuits as continuing to apply *Segal*'s sufficiently rooted test, one case from each of the Fifth, Eighth, and Eleventh Circuits as supposedly rejecting *Segal*, and one case from the Sixth Circuit as having "modified" the test. These cases do not create or reflect a circuit split on an important matter relevant to this case.[4]

Each decision WVSV cites from the Fifth, Eighth, and Eleventh Circuits (the alleged "reject *Segal*" circuits) addressed payments debtors received under farming relief acts passed by Congress after their bankruptcy petitions were filed. In *In re Burgess*, 438 F.3d 493 (5th Cir. 2006), the debtor filed a Chapter 7 bankruptcy petition in August 2002 and was discharged from bankruptcy in December 2002. *Id.* at 495. The debtor later obtained compensation for crop losses sustained in 2001 under legislation enacted in February 2003. *Id.* In *In re Vote*, 276 F.3d 1024, 1026 (8th Cir. 2002), the debtor obtained relief payments for pre-petition crop failures based on legislation passed

[4] WVSV's failure to mention the First or Third Circuits indicates that they do not assist its circuit split argument.

one month after he filed his Chapter 7 bankruptcy petition in September 1999. In *In re Bracewell*, 454 F.3d 1234, 1236–37 (11th Cir. 2006), the debtor filed for bankruptcy in 2002 and obtained relief payments in 2004 under legislation passed in 2003. Each court held that the relief payments were not part of the bankruptcy estate because the legislation creating the right to relief did not exist when the bankruptcy petitions were filed. There was nothing for the debtors to disclose in their bankruptcy filings. *Burgess*, 438 F.3d at 498; *Vote*, 276 F.3d at 1026–27; *Bracewell*, 454 F.3d at 1237.

The "Important matter" actually addressed in each of these cases was whether relief payments obtained under post-petition legislation based on pre-petition losses are part of the bankruptcy estate. All circuits agree on this issue. In *In re Schmitz*, 270 F.3d 1254, 1257 (9th Cir. 2001), the Ninth Circuit cited the Eighth Circuit Bankruptcy Appellate Panel's decision in *Vote* to support its decision that rights arising from fishing management regulations published after the bankruptcy petition was filed were not property of the bankruptcy estate. The Eighth Circuit's affirmance in *Vote*, in turn, cited the *Schmitz* decision. *See Vote*, 276 F.3d at 1027 ("A recent decision from the Ninth Circuit supports our interpretation of § 541(a)(1).") (*citing Schmitz*).

Burgess and *Bracewell* also cited *Schmitz* to support their decisions. *See Burgess*, 438 F.3d at 502; *Bracewell*, 454 F.3d at 1238. In fact, *Bracewell* noted that "the circuits that have considered the issue are in agreement that no legal or equitable interest exists

until assistance legislation becomes law[.]" 454 F.3d at 1239 (collecting cases).

The Ninth Circuit's decision that WVSV's tort causes of action were property of the bankruptcy estate is inapposite to the post-petition legislation issues decided in *Burgess*, *Vote*, and *Bracewell*. WVSV sought to pursue a cause of action based on alleged conduct that it repeatedly admitted occurred years before WVSV's 2012 petition. WVSV contended that 10K maliciously filed a meritless claim against WVSV in 2003, which immediately harmed WVSV. The cases WVSV now cites from other circuits did not address a scenario remotely similar to the one here. The Ninth Circuit's unpublished decision does not reflect (or create) a circuit split on an important matter.

WVSV argues, however, that a circuit split exists because the Fifth, Eighth, and Eleventh Circuits have "rejected" *Segal*'s sufficiently rooted test, while the Ninth and other Circuits continue to apply it. This contention fails. First, only the Fifth and Eleventh Circuits have actually suggested that the test no longer applies. *Burgess*, 438 F.3d at 498–99 ("*Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code."); *Bracewell*, 454 F.3d at 1242 ("The § 541(a)(1) definition, with its explicit temporal limitation, controls our analysis rather than *Segal*'s test.").

Moreover, *Burgess* and *Bracewell* may not be controlling even within their own circuits. Subsequent decisions have cited *Segal*'s sufficiently rooted test in analyzing property of the estate. *See, e.g., In re TMT Procurement Corp.*, 764 F.3d 512, 525 n.52 (5th Cir.

2014) (citing *Segal* and the sufficiently rooted test); *Calderon v. U.S. Bank Nat'l Ass'n As Tr. for SG Mortg. Sec. Tr. 2006-fre2 Asset Backed Certificates Series 2006-fre2*, 860 F. App'x 686, 687 (11th Cir. 2021) (*citing In re Alvarez*, 224 F.3d 1273, 1276–79 (11th Cir. 2000), for the proposition that a debtor's legal malpractice claim was "sufficiently rooted in his pre-bankruptcy past" and properly considered property of the bankruptcy estate).

The Eighth Circuit in *Vote* did not hold that *Segal* should no longer be followed, but only that it did not apply in the circumstances before it. *See Vote*, 276 F.3d at 1026–27 (holding that while *Segal* involved a "readily discernable legal interest at the time of filing," the debtor had no interest in the payments until Congress passed the legislation post-petition). Eighth Circuit courts continue to apply the sufficiently rooted test. *See Longaker v. Boston Sci. Corp.*, 715 F.3d 658, 662 (8th Cir. 2013) (analogizing the guaranteed payments at issue to severance payments previously determined by bankruptcy court to have been "sufficiently rooted" in debtor's pre-petition past and therefore part of its bankruptcy estate). Indeed, the Eighth Circuit's decision in *Fix v. First State Bank of Roscoe*, 559 F.3d 803 (8th Cir. 2009), is consistent with the Ninth Circuit's decision here. *Fix* considered whether five causes of action belonged to the debtor's bankruptcy estate, and found four to have "sufficient roots" in the debtor's "pre-bankruptcy activities to be considered property of the bankruptcy estate" even though the claims did not accrue until after the bankruptcy petition was filed. *Id.* at 809.

Significantly, *Burgess* and *Bracewell*, like *Vote*, also distinguished the fact of *Segal*, such that the sufficiently rooted test did not control. *See Burgess*, 438 F.3d at 499 ("*Segal* is distinguishable because the debtor did have a prepetition legal interest in that case."); *Bracewell*, 454 F.3d at 1241 (finding *Segal* to be "readily distinguishable").

WVSV further contends that the Sixth Circuit modified the *Segal* test in *In re Underhill*, 579 F. App'x 480 (6th Cir. 2014) (unpublished), by requiring an evaluation of whether pre-petition injury exists. [Pet., p. 13.] However, WVSV fails to explain how this supposed modification reflects a relevant circuit split. Further, courts in the Sixth Circuit continue to apply the sufficiently rooted test. *E.g., In re Shelbyville Rd. Shoppes, L.L.C.*, 775 F.3d 789, 796 (6th Cir. 2015) (holding that bankruptcy trustee "cannot point to any activity 'sufficiently rooted in the pre-bankruptcy past'" to justify inclusion of disputed funds in the bankruptcy estate).[5]

In sum, the decision below did not create or reflect a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" that warrants this Court's attention. *See Layne & Bowler Corp. v. W. Well Works,* 261 U.S. 387, 393 (1923).

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[5] *Underhill* is consistent with the decision below. WVSV explicitly alleged in its Complaint that it sustained injury from Respondents' conduct as soon as 10K's complaint was filed in 2003, years before WVSV filed its bankruptcy petition. [See EOR-379.]

2. The Circuits Uniformly Apply Section 541 Of The Bankruptcy Code.

WVSV's argument that *Segal* has been "superseded by statute" does not support the existence of a circuit split. *In re Goff*, 706 F.2d 574 (5th Cir. 1983), did not hold, as WVSV suggests, that the *Segal* test was "made superfluous" by Section 541 of the Bankruptcy Code. It merely observed that the "enactment of the Bankruptcy Code undertook to obviate th[e] analytical conundrum" recognized by the *Segal* court. *Id.* at 578. Whether Congress codified *Segal* or simply enacted legislation consistent with its analysis is irrelevant here because WVSV has identified no inconsistency between the result under *Segal* and the result under Section 541.

Moreover, WVSV does not contend that the Ninth Circuit, or any other court, relied on *Segal* without regard to Section 541 of the Bankruptcy Code. Courts uniformly cite Section 541 in determining whether a cause of action is property of a bankruptcy estate, including in every case WVSV cites for its circuit split argument. *See Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008) ("Our analysis begins with 11 U.S.C. § 541(a)(1), which defines the bankruptcy estate[.]"); *In re Shearin*, 224 F.3d 346, 351 (4th Cir. 2000) ("[T]he construction of § 541(a)(6) instructs our decision today."); *In re Meyers*, 616 F.3d 626, 628 (7th Cir. 2010) (citing and quoting 11 U.S.C. § 541(a)(1)); *In re Ryerson*, 739 F.2d 1423, 1425 (9th Cir. 1984) (citing and quoting 11 U.S.C. § 541(a)(1)); *In re Barowsky*, 946 F.2d at 1518 & n.2 (citing and quoting 11 U.S.C. § 541); *Burgess*, 438 F.3d at 496 ("Thus, the scope of § 541 is broad: that section brings

into the estate all of the debtor's legal and equitable interests 'wherever located and by whomever held.'") (*quoting* 11 U.S.C. § 541(a)(1)); *Vote*, 276 F.3d at 1026 (*citing* 11 U.S.C. § 541 in framing the question as "whether Vote had a legal or equitable interest in the payments at the time he filed his petition"); *Bracewell*, 454 F.3d at 1244 (citing "the critically important words of § 541(a)(1), not until after 'as of the commencement of the case.'").

Here, too, the Ninth Circuit cited Section 541 as controlling. [*See* Pet. App. 6a (noting that under Section 541, the WICP claim should have been disclosed on WVSV's bankruptcy schedules).] The fact that some courts apply *Segal* to guide their analysis under Section 541 and other courts elect not to do so is not a sign of a material or relevant circuit split, and does not demonstrate inconsistency in courts' interpretations of Section 541.

WVSV supports its argument by mischaracterizing the Dissent as "in actuality" arguing "unintentionally that property interests are now governed by § 541(a) without reference to *Segal*[.]" [Pet., p. 15.] The Dissent's analysis, however, turned on its position that a debtor has no interest in a cause of action that has not accrued under applicable state law when a bankruptcy petition is filed. [*See* Pet. App. 9a ("[U]nder Arizona law, WVSV did not have any cause of action prior to January 2019.").] The Dissent did not contend that *Segal* no longer applies, but rather that the Majority misapplied *Segal* by finding that WVSV had a contingent interest in a cause of action that had not yet accrued. [Pet. App. 11a.] The Dissent supported its position by citing other cases in which

bankruptcy courts omitted unaccrued claims from the bankruptcy estate based on state law, and distinguished the case on which Respondents relied because WICP claims were viewed differently in that state. [Pet. App. 11a–12a.]

The Majority held that whether a contingent cause of action is property of the estate involves the intersection of state and federal law. [Pet. App. 5a.] While it agreed that property interests are defined by state law, it held that the definition of property of the estate in Section 541 "has been broadly construed to encompass a debtor's contingent interest …, even if that interest is reliant on future contingencies that have not occurred as of the filing date." [*Id.* (*quoting Anderson v. Rainsdon (In re Anderson)*, 572 B.R. 743, 747 (B.A.P. 9th Cir. 2017)).] Applying that standard, the Majority found WVSV's contingent claims to be property of the estate that WVSV should have disclosed. [Pet. App. 6a.] This result is consistent with both the language of Section 541 and the interpretation of Section 541 in the other cases cited above.

3. WVSV's "Accrual" Argument Is Unsupported.

WVSV next tries to justify this Court's review by arguing the merits of its claim: "Because a WICP claim requires a successful resolution on the merits—something that did not occur until years after the Confirmed Plan and Settlement Order—Petitioner's claims arose postconfirmation and were not property of the bankruptcy estate." [Pet., p. 16.] WVSV asks this Court to correct a purportedly erroneous ruling by

the Ninth Circuit, which is not an appropriate basis for review. *See* Supreme Court Rule 10.

WVSV's argument is also wrong. Section 541 does not automatically omit causes of action from the bankruptcy estate unless they have accrued. Instead, Section 541 includes causes of action in which the debtor has a "legal or equitable interest" at the time of filing. Courts determine whether the debtor holds such an interest, which "frequently entails complex analyses involving a number of legal elements and a variety of facts." *In re Chesnut*, 422 F.3d 298, 303 (5th Cir. 2005). The fact-laden nature of the analysis counsels against granting review.

Moreover, as this Court has recognized, "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (citations omitted). While the Dissent below disagreed with the Majority's conclusion, that disagreement was based on the Dissent's interpretation of Arizona law as not creating an interest in a cause of action that has not accrued. [*See* Pet. App. 8a (Dissent citing *Nataros v. Superior Ct. of Maricopa Cnty.*, 557 P.2d 1055, 1057 (Ariz. 1976), for the test for determining accrual of a WICP cause of action).] This Court "does not sit to review" questions of state law. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

WVSV further contends that the Majority's decision "encourages the assertion of disfavored claims that might never come into existence." [Pet., p. 18.] It warns that "any debtor that is involved in

defending existing or pending litigation that it believes lacks merit must list a potential WICP/malicious prosecution claim in its schedules." [*Id.*] However, a lawsuit's lack of merit does not give rise to a WICP claim. Under Arizona law, a WICP plaintiff must show, beyond successful termination of the underlying suit, that the litigation was motivated by malice, begun without probable cause, and caused harm to the plaintiff. *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1318–19 (Ariz. 1988). WVSV specifically alleged that these elements existed as far back as 2003:

> 15. … WVSV believes that 10K's rescission claims were fabricated and without merit. The evidence will show that 10K strategically devised a plan to wrongfully deprive WVSV of its rightful ownership of the Sun Valley Property.
>
> 76. The 10K members fabricated their claims that the 2002 Breycliffe Agreement was invalid only after losing out on their attempt to purchase the Breycliffe interest for themselves.
>
> 109. The wrongful pursuit by 10K to invalidate the 2002 Breycliffe Agreement and subsequent WVSV/Breycliffe Agreement prevented WVSV from selling the Sun Valley Property since the day it closed in July 2003.
>
> 115. 10K's false, fabricated and malicious attempt to invalidate the 2002 Agreements through its claim for a

> declaratory judgment severely damaged WVSV by preventing WVSV, the rightful owner of the Sun Valley Property, from selling the property for nearly 16 years, …'
>
> 142. But for Defendants' wrongful claim for a declaratory judgment, the Court found in its October 10, 2016 Ruling that the Sun Valley Property could have been sold in 2005 for a net total income of $222,903,543.00.

[EOR-379, EOR-392, EOR-401, EOR-402, EOR-407.]

In narrow circumstances such as these, where the debtor contends that these elements exist pre-bankruptcy and the debtor intends to file suit if it ultimately prevails, it is consistent with Section 541 to require the debtor to disclose the potential claim as estate property on its bankruptcy schedules for full consideration by the bankruptcy court and the creditors.

WVSV's hyperbolic arguments about the effect of the Ninth Circuit's decision on potential breach of contract and legal malpractice claims are meritless and unsupported. The decision does not require debtors to disclose, let alone "assert," breach of contract claims where no breach has yet happened, or legal malpractice claims where no negligence or harm has yet occurred. Here, based on WVSV's own allegations, the alleged misconduct and damages occurred long before WVSV filed its bankruptcy petition. The Ninth Circuit's conclusion in this particular situation that WVSV had a legal or

equitable interest in the claims before they had accrued was well within the broad scope of Section 541 ("all legal or equitable interests").

B. The Bankruptcy Court's Exercise Of Its Jurisdiction Does Not Involve "Constitutional Considerations."

WVSV contends, but never develops, that the Ninth Circuit erred by affirming the Bankruptcy Court's exercise of jurisdiction to dismiss WVSV's Complaint. [Pet., p. 21.] The Ninth Circuit (with the Dissent's agreement) ruled that the issue of whether WVSV's WICP claim was property of the estate that should have been disclosed raised "a 'substantial question of bankruptcy law' that 'requir[es] interpretation of the confirmed plan" and a determination of what constitutes 'property' under the Bankruptcy Code." [Pet. App. 4a (*quoting Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 762 (9th Cir. 2022)); *see also* Pet. App. 7a.] Thus, the Bankruptcy Court had jurisdiction to decide these limited issues.

Upon determining that the claims were estate property, the Bankruptcy Court appropriately enforced the terms of the Confirmed Plan by dismissing WVSV's Complaint. The Confirmation Order provided that the Bankruptcy Court would have continuing jurisdiction to address disputes, including adversary proceedings or other litigation, "between 10K and/or its members, on the one hand, and the Debtor and/or Conley Wolfswinkel, on the other" to the extent those disputes "relate to interpretation or enforcement of the 10K Plan or this Confirmation Order." [EOR-422.] WVSV's lawsuit asserting claims

post-confirmation that should have been disclosed pre-confirmation necessarily involved interpretation and enforcement of the Confirmed Plan and Confirmation Order. The Bankruptcy Court's exercise of its jurisdiction was consistent both with the Confirmed Plan and applicable law. *See In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (holding that bankruptcy courts have post-confirmation jurisdiction over matters with a "close nexus" to the bankruptcy proceedings, including issues affecting "the interpretation, implementation, consummation, execution, or administration of the confirmed plan").

WVSV erroneously contends that the Bankruptcy Court contradicted itself by dismissing the Complaint after finding it lacked jurisdiction over the claims WVSV sought to assert. However, the Bankruptcy Court held only that it did not have jurisdiction to decide the merits of WVSV's state law claims. [Pet. App. 49a ("I finally conclude that this court does not have jurisdiction over anything that was or should have been part of the state court litigation.").] The dismissal of WVSV's claims was not based on their lack of merit, but rather WVSV's failure to disclose them during the bankruptcy proceedings, which implicated implementation of the Confirmed Plan. [Pet. App. 52a–53a.]

WVSV offers no analysis or authority for its contention that the Bankruptcy Court's exercise of jurisdiction "implicates constitutional considerations." [Pet., p. 22.] "The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). As no constitutional rights are at

issue here, WVSV's argument does not provide a legitimate basis for review by this Court.

C. The Bankruptcy Court's Discretionary Application Of Judicial Estoppel Does Not Warrant This Court's Review.

WVSV asks the Court to review what it describes as the Ninth Circuit's "incorrect" conclusion that the Bankruptcy Court did not abuse its discretion by ruling that WVSV was judicially estopped from pursuing its undisclosed claims. [Pet., p. 22.] However, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10.

Judicial estoppel applied here. The doctrine ensures the "orderly administration of justice and regard for the dignity of judicial proceedings," and precludes "a litigant playing fast and loose with the courts." *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (citations and quotations omitted). "In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). A debtor is estopped from pursuing a claim not disclosed in the bankruptcy action where the debtor "has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to

identify the cause of action as a contingent asset." *Hamilton*, 270 F.3d at 784.

WVSV knew about its contingent claims, but chose not to disclose them. In its 2012 disclosure statement accompanying its proposed plan of reorganization, WVSV specifically stated that it was listing a claim for restitution against 10K as a "preserved claim" to be asserted if 10K prevailed on its declaratory judgment claim and regained control over the Sun Valley Property (contingencies that had not yet occurred). Thus, WVSV clearly understood that a contingent claim that had not yet matured was property of the estate that needed to be disclosed. Section 101(5) of the Bankruptcy Code defines a "claim" to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

Despite understanding its obligation to disclose contingent but unaccrued claims, WVSV did not disclose that if 10K lost on its declaratory judgment claim, WVSV intended to sue 10K and its members for $300 million in damages that WVSV alleges it began suffering in 2003. Through its disclosures, WVSV demonstrated that it knew it had a contingent interest in a restitution claim if 10K prevailed. WVSV also knew it had a contingent interest in tort claims if 10K did not prevail. Its decision to conceal these potential claims fully supports the Bankruptcy Court's application of judicial estoppel.

Based on WVSV's actual disclosures, the only claim WVSV indicated it might assert against 10K was a

contingent claim for restitution of WVSV's property-related expenditures if 10K prevailed on its declaratory judgment claim and got the Property back. Relying on WVSV's representations that it did not have additional claims, 10K agreed to the settlement and plan of reorganization with WVSV. The Bankruptcy Court accepted WVSV's representations as to its estate property in confirming the Plan, which incorporated the parties' settlement.

WVSV's failure to disclose its claims against 10K and its members deprived 10K of the opportunity to make an informed judgment on settlement and the plan of reorganization based upon a complete picture of the bankruptcy estate. The integrity of the bankruptcy system depends on full and honest disclosure by a debtor of all its assets. *In re Coastal Plains*, *Inc.*, 179 F.3d 197, 208 (5th Cir. 1999). 10K would never have entered the settlement and agreed to a bankruptcy plan that left 10K exposed to a new lawsuit by WVSV, let alone one seeking $300 million. The goal of the Confirmed Plan was that the parties would fully resolve their disputes in state court, including the contingent restitution claim WVSV had disclosed, then return to the bankruptcy court so that the Confirmed Plan could be implemented. WVSV subverted that goal for its own benefit, which is the essence of "a litigant playing fast and loose with the courts." *Hamilton*, 270 F.3d at 782.

These facts defeat WVSV's contention that it "did not take an inconsistent position in the bankruptcy proceedings, let alone actually obtain judicial relief resulting from that position." [Pet., p. 26.] By disclosing its contingent claim for restitution and

nothing else, WVSV represented to 10K and the Bankruptcy Court that the unmatured restitution claim was the entirety of the relief WVSV might seek following conclusion of the state court proceedings. 10K agreed to a settlement based on that representation and the Bankruptcy Court accepted it by incorporating the settlement into the Confirmed Plan. WVSV's later initiation of a new lawsuit is wholly inconsistent with its prior representation. Judicial estoppel was properly applied. *See Hamilton*, 270 F.3d at 784 (holding that a debtor is estopped from pursuing a claim not disclosed in the bankruptcy action where the debtor "has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset").

WVSV's Complaint defeats its further assertion that because 10K filed its Third Amended Complaint in November 2013, "[i]n 2012 Petitioner could not have disclosed a claim for wrongful institution of civil proceedings against Respondents for the pursuit of a wrongful claim that Respondents had not even asserted yet." [Pet., p. 23.] WVSV's Complaint is entirely based on 10K's filing of its declaratory judgment claim in 2003, and specifically alleges that WVSV's harm began at that time and continued through the conclusion of the 2003 Action. [*E.g.,* EOR-401 ("As soon as 10K made its claim for a declaratory judgment to invalidate the 2002 Breycliffe Agreement beginning with its First Amended Complaint in 2003, the title to the Sun Valley Property was clouded."); EOR-402 ("The cloud on the Sun Valley Property's

title affected WVSV's ability to either market or sell the Property anywhere near or at its full market value at any time during the litigation.").][6] Moreover, as the District Court noted, in November 2013, the bankruptcy plan had not yet been confirmed. WVSV had ample opportunity and the obligation to amend its disclosures to include its new claims. [Pet. App. 27a–28a ("The debtor's duty to disclose potential claims as assets continues after it files its schedules through the duration of the bankruptcy proceeding.").]

WVSV next contends that it "disclosed its *potential* claims against Respondents as best it could with the information it had at the time." [Pet., p. 24 (emphasis in original).] WVSV relies on Section 8.9 of the Confirmed Plan, as well as its disclosure statements, each of which contains language that purports to preserve unidentified claims against Respondents.

Generalized preservation language is insufficient and preserves nothing. A Chapter 11 debtor is obligated to provide "adequate information" in its disclosures, defined as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, … that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan[.]" 11 U.S.C. § 1125(a)(1), (b). Neither 10K nor the Bankruptcy Court could make an informed judgment about WVSV's unidentified claims. *See D &*

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[6] WVSV also knew once the Arizona Court of Appeals issued its opinion in April 2012, before WVSV filed its bankruptcy petition, that 10K's declaratory judgment claim to invalidate the 2002 Agreement was revived.

K Properties Crystal Lake v. Mut. Life Ins. Co. of New York, 112 F.3d 257, 261 (7th Cir. 1997) ("A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan.").

Each element of judicial estoppel is satisfied. The Bankruptcy Court did not abuse its discretion in ruling that the doctrine barred WVSV from bringing the claims it failed to disclose in its bankruptcy proceedings. *See Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992) (affirming summary judgment based on judicial estoppel where "enough was known to require notification of the existence of the asset to the bankruptcy court").

D. WVSV's Petition Is Not An Appropriate Vehicle To Address The Issues It Identifies.

Even if WVSV's assertions of a "circuit split," a lack of jurisdiction, or the non-applicability of judicial estoppel were plausible, this case is not an appropriate vehicle for Supreme Court review.

1. WVSV Did Not Raise Below The Issues Identified In Its Petition.

WVSV did not argue to any court below that *Segal* has been superseded by Section 541 and should not be applied. Instead, WVSV either ignored 10K's and the courts' citations to *Segal*, or affirmatively argued that *Segal*'s sufficiently rooted test supported WVSV's position. WVSV's failure to raise, develop and

preserve these issues counsels strongly against a grant of certiorari. This Court "is one of final review, 'not of first view.'" *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (Scalia, J.) (*quoting Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)).

10K cited *Segal* to the Bankruptcy Court in a brief filed June 12, 2020 addressing the Court's jurisdiction, arguing that "[t]he key inquiry is whether the claims and rights are 'sufficiently rooted in the prebankruptcy past.'" [EOR-165 (*citing Segal*, 382 U.S. at 380).] WVSV's response brief did not mention *Segal* or the sufficiently rooted test. [*See* EOR-145–159.] During oral argument before the Bankruptcy Court, 10K again cited the sufficiently rooted test [EOR-104–05], and WVSV again ignored it.

WVSV appealed the Bankruptcy Court's dismissal of WVSV's Complaint to the District Court. There, WVSV argued that its claims did not constitute property of the estate. However, WVSV did not cite Section 541 or contend that the *Segal* test had been superseded. 10K cited Section 541 and *Segal* in its Answering Brief to assert that the undisclosed claims were property of the bankruptcy estate. [District Court Answering Brief (Dkt. 22), p. 21.] In its Reply, WVSV ignored these authorities.

The District Court affirmed the dismissal of WVSV's Complaint, citing both Section 541 and *Segal*. [EOR-7.] In its First Brief to the Ninth Circuit, WVSV did not argue that the District Court erred in relying on *Segal*. In fact, WVSV did not mention Section 541 or *Segal*'s sufficiently rooted test at all, despite the District Court's reliance on them. After 10K cited

these authorities in its Second Brief [Dkt. 24, pp. 23–24], WVSV responded with the exact opposite position from what it now argues in its Petition. WVSV argued that "to determine whether a claim for malicious prosecution is part of the bankruptcy estate, one must examine whether it is sufficiently rooted in pre-petition conduct." [Third Brief on Cross-Appeal (Dkt. 36), p. 16]. WVSV then cited *In re Jenkins*, 410 B.R. 182 (W.D.Va. 2008), for the proposition that a WICP claim "was not rooted sufficiently in pre-petition conduct as neither the right to bring the claim nor the possibility that such a claim might shortly arise was in existence 'at the commencement' of Plaintiff's bankruptcy case within the meaning of §541." [*Id.*, p. 18.]

Thus, prior to filing its Petition here, WVSV did not argue that *Segal* had been superseded by Section 541 and did not cite the authorities on which it now relies. Instead, WVSV acknowledged *Segal* and the sufficiently rooted test applied and argued that it tipped in WVSV's favor. Because WVSV raised its "superseded" and "circuit split" arguments for the first time in its Petition, the Petition should be denied. *See, e.g., United States v. Williams*, 504 U.S. 36, 41 (1992) (describing the "traditional rule" precluding certiorari where "the question presented was not pressed or passed upon below" (cleaned up)); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below…. We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.").

This case also does not present the "exceptional circumstances" that would support review of WVSV's assertions despite its failure to raise them below. This Court generally considers forfeited issues only in the limited circumstance where substantial constitutional concerns are implicated. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 772 (2008) (accepting review based on the "gravity of the separation-of-powers issues raised by these cases"). WVSV has not identified any, let alone substantial, constitutional concerns.

2. The Unique Circumstances Here Are Not Widely Applicable To Other Bankruptcy Cases.

The issues underlying WVSV's Petition are fact-bound and complex. This dispute arises from a litigation process that began in 2003, involved two lawsuits, two lengthy trials, three decisions by the Arizona Court of Appeals, and did not conclude until 2019. In its bankruptcy, WVSV concealed potential causes of action arising from conduct occurring nine years earlier to secure a specific advantage: the Bankruptcy Court and 10K's agreement to a Confirmed Plan that omitted WVSV's claims.[7] These unique circumstances are not likely to recur and are specific to this case. A ruling from the Court on the

[7] In its Complaint, WVSV sought lost profits, the profits WVSV could have earned by selling the Sun Valley Property in the absence of 10K's declaratory judgment claim. [EOR-402–407.] This further confirms that any damages awarded on WVSV's tort claims would have been property of the estate, which under 11 U.S.C. § 541(a)(6) includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." (Emphasis added).

issues raised here would not have wide application to bankruptcy cases as a whole. *See Layne*, 261 U.S. at 393 ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties[.]").

3. WVSV's WICP Claim Will Fail On The Merits.

WVSV's Petition is also an inappropriate vehicle for this Court's review because WVSV's WICP claim is profoundly flawed. To demonstrate the "favorable termination" element of a WICP claim, WVSV must have prevailed in the 2003 Action as a whole. *See, e.g., Lane v. Bell*, 20 Cal. App. 5th 61, 76 (2018) ("[W]e agree with the trial court that the Lanes cannot establish the essential element of favorable termination because the entire underlying action was not terminated in the Lanes' favor."); *Black v. Green Harbour Homeowners' Ass'n, Inc.*, 37 A.D.3d 1013, 1014 (2007) (dismissing malicious prosecution claim because "the litigation did not terminate entirely in plaintiffs' favor, and the record in the underlying matter shows that defendants had probable cause to assert some of their causes of action, including those alleging fraud"). Moreover, the termination of the prior lawsuit must "indicate[] in some fashion that the accused is innocent of wrongdoing" to be considered favorable. *Frey v. Stoneman*, 722 P.2d 274, 278 (Ariz. 1986).

WVSV did not obtain a favorable termination of the 2003 Action. 10K, not WVSV, prevailed by obtaining a

judgment of nearly $72 million based on WVSV's tortious conduct and partial relief on 10K's declaratory judgment claim (vacatur of the 2002 Judgment). The state court further determined that 10K was the successful party and awarded 10K attorneys' fees. That the state court did not find for 10K on one portion of its declaratory judgment claim does not satisfy the favorable termination requirement for WVSV. Accordingly, even if WVSV were able to obtain relief in this Court, its claims will fail on the merits and its Petition is a poor candidate for review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 17, 2024

APPENDIX

APPENDIX

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APPENDIX 1

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Case Number: 2:12-BK-10598-MCW

[Filed September 15, 2020]

Minute Entry

Hearing Information:

Debtor:	WVSV HOLDINGS, LLC
Case Number:	2:12-BK-10598-MCW **Chapter:** 11
Date / Time / Room:	TUESDAY, SEPTEMBER 15, 2020 10:30 AM TELEPHONIC HRGS
Bankruptcy Judge:	MADELEINE C. WANSLEE
Courtroom Clerk:	RENEE BRYANT
Reporter / ECR:	N/A

Matters:

1) CONTINUED STATUS HEARING
   R / M #: 632 / 0

2) **ADV: 2-20-00060**
   WVSV HOLDINGS, LLC vs KARI STOLWORTHY & LEO R. BEUS & 10K

L.L.C. & PAUL GILBERT & RANDY STOLWORTHY & ANNETTE BEUS & SUSAN GILBERT
ORAL ARGUMENT ON JURISDICTION AND CLAIM PRECLUSION REGARDING WVSV'S NEW LITIGATION CLAIMS (PURSUANT TO THE COURT'S MAY 20, 2020 MINUTE ENTRY)
R / M #: 32 / 0

Appearances:

DANIEL GARFIELD DOWD, ATTORNEY FOR 10K L.L.C
MICHAEL W. CARMEL, ATTORNEY FOR WVSV HOLDINGS, LLC
DAVID JEFFREY HINDMAN, ATTORNEY FOR 10K L.L.C.
FLORENCE M. BRUEMMER, ATTORNEY FOR WVSV HOLDINGS, LLC
DENNIS I. WILENCHIK, ATTORNEY FOR LEO R. BEUS, PAUL GILBERT, RANDY STOLWORTHY, ANNETTE BEUS, SUSAN

Proceedings:

1

Mr. Carmel discusses the status report that he filed with the Court. He states a motion to seek an extension of deadline previously set may be filed.

Mr. Hindman argues his position. He states they are in the dark on the marketing and sale process.

He states 10k has been asking WSV to meet. He states the status report filed by Mr. Carmel does not provide details. Mr. Hindman states the debtor is not cooperating and asks for the Court to assist. He wants to know the progress made and how the property is being marketed.

Court: The Court asks 10k to provide their written questions to Mr. Carmel a week from today. Mr. Carmel is asked to provide his written response in two weeks. The Court is not ordering these as hard deadlines.

Mr. Carmel responds. He has concerns about 10k meeting with Mr. Nathan. He argues his position. Mr. Carmel states the debtor has incentive to sell the property. Mr. Carmel supports a dialogue that he can facilitate.

Court: The Court asks 10k to provide their written questions to Mr. Carmel in a week from today. Mr. Carmel is asked to provide his written response in two weeks. The Court is not ordering these as hard deadlines.

Mr. Carmel states his concerns. He understands the Court's request and will commit to responding.

Mr. Hindman states 10k will be happy to provide the written questions.

Mr. Carmel has no further updates in respect to the administrative case.

Mr. Hindman agrees.

2

Mr. Dowd notes the two matters before the Court. He argues his position on jurisdiction. Mr. Dowd argues his position on the non-wrongful institution claims, slander of title and two declaratory claims. He requests that the Court accept jurisdiction over all new claims. He asks that the Court dismiss the non-wrongful institution claims, slander, and declaratory judgment. Mr. Dowd asks that the Court allow 10k to proceed with the motion to dismiss, wrongful institution and aiding and abetting claims.

Ms. Bruemmer argues her position. She discusses supplemental jurisdiction. She argues the claims are post-confirmation.

Mr. Wilenchik argues his position on disclosure. He states all disputes should have been resolved in state court.
He
argues his position on the separation of claims. Mr. Wilenchik states the appropriate place to litigate is in this Court. He states sanctions should be ordered for failure to disclose.

The Court asks Ms. Bruemmer about the sale of the property.

Ms. Bruemmer answers the Court's questions on how the sale will be impacted. She believes the sale would go forward; proceeds would not need to be held.

Mr Carmel discusses the settlement agreement.

Mr. Wilenchik responds to the comments made by Mr. Carmel.

Mr. Dowd provides the names of the parties in the settlement agreement. He argues his position jurisdiction.

A RECESS IS AFFORDED BY THE COURT.

THE COURT GOES BACK ON RECORD.

COURT: FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE STATED ON THE RECORD. IT IS ORDERED GRANTING 10K'S MOTION TO DISMISS. THE CLAIMS ASSERTED BY WVSV BASED ON THE ACTIONS OF 10K AND THE MEMBERS OF 10K PRE-PETITION ARE DISMISSED WITH PREJUDICE. THE COURT DIRECTS MR. DOWD TO PREPARE AND UPLOAD A FORM OF ORDER.

APPENDIX 2

SO ORDERED.

Dated: September 22, 2020

/s/
Madeleine C. Wanslee,
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

Chapter 11 Proceeding

Case No.: 2:12-bk-10598-MCW

Adversary Case No. 2:20-ap-00060-MCW

In re:	)
WVSV HOLDINGS, L.L.C.,	)
Debtor.	)
	)
WVSV HOLDINGS, LLC,	)
Plaintiff,	)
vs.	)
	)
10K, LLC; LEO BEUS & ANNETTE BEUS; PAUL GILBERT & SUSAN GILBERT; RANDY STOLWORTHY & KARI STOLWORTHY,	)
Defendants.	)
	)

ORDER DISMISSING COMPLAINT WITH PREJUDICE

Defendants 10K, LLC ("10K"), Leo and Annette Beus, Paul and Susan Gilbert, and Randy and Kari Stolworthy ("Individual Defendants") filed *Defendants' Motion to Dismiss Debtor WVSV Holdings, LLC's Complaint* ("Motion to Dismiss") (ADE 5). Plaintiff WVSV Holdings, LLC ("WVSV") filed a *Response to Defendants' Motion to Dismiss Debtor WVSV Holdings, LLC's Complaint* (ADE 16). 10K filed a Reply in support of the Motion to Dismiss (ADE 22), which was joined by the Individual Defendants (ADE 23). The matter initially came on for hearing on May 20, 2020. At the hearing, the Court continued oral argument and requested additional briefing from the parties.

10K filed *Defendant 10K, LLC's Opening Brief on Jurisdiction and Claim Preclusion Regarding WVSV's New Litigation Claims (Pursuant to the Court's May 20, 2020 Minute Entry)* (ADE 35), which was joined by the Individual Defendants (ADE 34). WVSV filed *Plaintiff's Response Brief on Jurisdiction* (ADE 37). 10K filed *Defendant 10K, LLC's Reply Brief on Jurisdiction and Claim Preclusion Regarding WVSV's New Litigation Claims (Pursuant to the Court's May 20, 2020 Minute Entry)* (ADE 39), which was joined by the Individual Defendants (ADE 40).

The matter came on for hearing on September 15, 2020. Upon consideration of the filings of the parties, the entire record of the case, and the oral arguments of counsel at the hearing, and for the reasons stated by the Court on the record at the hearing; and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. Granting the Defendants' Motion to Dismiss; and,

2. Dismissing WVSV's Complaint in its entirety with prejudice.

DATED AND SIGNED ABOVE