No. 09-1023

IN THE

Supreme Court of the United States

APEX OIL COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES & LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page

INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Macklin Fleming Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy law, federal jurisdiction, domestic and international business reorganizations, commercial transactions, secured transactions, and argument and reason. He began teaching at Yale in 1990 and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author to COLLIER ON BANKRUPTCY, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, No. 08-538 (opinion pending); *Milavetz, Gallop & Milavetz, P.A. v.*

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith.

United States, Nos. 08-1119, 08-1225, 2010 WL 757616 (U.S. Mar. 8, 2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Hamilton v. Lanning*, No. 08-998 (opinion pending); *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *United Student Aid Funds, Inc. v. Espinosa*, No. 08-1134, 2010 WL 1027825 (U.S. Mar. 23, 2010); *Howard Delivery Serv., Inc. v. Zurich Am. Ins., Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law, and has written,

taught, and lectured on the subject of bankruptcy claims, what constitutes a bankruptcy claim, and the consequences and ramifications of categorization of claims. The purpose of this brief is to stress the need for this Court's resolution of a critically important issue of bankruptcy law that has divided the courts: in what circumstances is a debtor's obligation to pay for the remediation of pollution a "claim" under the Bankruptcy Code. In addition, this brief focuses principally on an issue addressed only briefly in the petition: the extent to which the decision of the court below is inconsistent with this Court's prior precedents.

STATEMENT

Debtor Clark Oil & Refining Co. (Clark) filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in 1987. Pet. App. 198a. At the time of Clark's bankruptcy, the United States Environmental Protection Agency ("USEPA") was aware of pollution at Clark's oil refinery. In 1990, Clark's bankruptcy was completed, all "claims" against it were discharged, and Petitioner Apex Oil Company, Inc. (Apex) emerged from the bankruptcy as Clark's corporate successor. Pet. App. 15a, 198a. Nearly fifteen years later, on April 5, 2005, USEPA brought this action against Apex under section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, alleging that releases from Clark's oil refinery posed "imminent

and substantial endangerment" to health or the environment, and seeking, *inter alia*, an injunction requiring Apex to clean up the land. Pet. App. 198a. Apex no longer engages in refining, does not own or control Clark's refinery, and has no ability to clean up the land itself. Rather, to comply with the injunction, Apex would have to spend money to hire another company to do the clean-up. Pet. App. 2a.

After a seventeen-day bench trial, the district court found that Apex was jointly and severally liable for the contamination. Pet. App. 1a. On appeal, the Seventh Circuit affirmed, holding that USEPA's claim to the clean-up injunction was not discharged in bankruptcy, because "discharge must . . . be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant . . . ." Pet. App. 8a.

ARGUMENT

In a chapter 11 proceeding, the Bankruptcy Code permits a bankrupt debtor to reorganize its affairs by proposing and obtaining confirmation of a plan of reorganization. 11 U.S.C. §§ 1121-29. Upon confirmation of the plan of reorganization, with certain statutory exceptions

not relevant here,[2] "the property dealt with by the plan is free and clear of all claims and interests of creditors…" *Id.* § 1141(c). Additionally, except as provided in the plan or the order confirming the plan, "the confirmation of the plan…discharges the debtor from any debt that arose before the date of such confirmation…whether or not…a proof of the claim based on such debt is filed or deemed filed under section 501 of [the Code];…such claim is allowed under section 502 of [the Code]; or…the holder of such claim has accepted the plan…." *Id.* § 1141(d)(1)(A). Accordingly, upon the successful confirmation of the debtor's plan of reorganization, the debtor emerges from bankruptcy newly reorganized and free from the burden of liability for pre-confirmation debts.

The Bankruptcy Code defines the term "debt" as "liability on a claim." 11 U.S.C. § 101(12). The term "claim" is broadly defined as any:

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,

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[2] None of the statutory exceptions to discharge applies here. While the Bankruptcy Code expressly excepts certain debts of individual debtors from discharge and excepts all debts of liquidating corporations, there are no exceptions for corporate debtors that reorganize their operations pursuant to a chapter 11 plan of reorganization. *See id.* §§ 523, 1141(d)(2), 1141(d)(3).

> matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or…right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Id. § 101(5).

In this case, as the district court noted, the Missouri bankruptcy court issued an Order of Confirmation on August 16, 1990, "discharging the consolidated debtors and their estates from any and all claims, debts, and liens arising before the confirmation date." Pet. App. 198a. Accordingly, the determination of whether the Petitioner's environmental remediation obligation was a "claim" and therefore discharged pursuant to the bankruptcy court's Order of Confirmation is vital to the resolution of this case: if the liability is a "claim," it has been discharged. If not, then not.

In light of this Court's expansive interpretation of the term "claim" in the Bankruptcy Code, the patent need for clarity in this confused area of the law, and the importance of the question presented in light of the *thousands* of facili-

ties identified by USEPA for "corrective action" under RCRA, this Court should grant the petition for writ of certiorari.

A. The Decision Below Departs from this Court's Prior Decisions Regarding a Fundamental Issue of Bankruptcy Law.

This Court has consistently held that the term "claim" has "the broadest available definition," *e.g., FCC v. Nextwave Personal Commc'ns, Inc.*, 537 U.S. 293, 302-03 (2003), and that a "right to payment" is "nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 559 (1990). Under section 101(5)(A), a "right to payment" is defined expansively: "whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A). The same language describes the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment" in section 101(5)(B). *Id.* § 101(5)(B).

In the case most applicable to this dispute, *Ohio v. Kovacs*, this Court held that an environmental remediation injunction was a discharge-

able debt. 469 U.S. 274, 278 (1985). Following various violations of environmental laws, Kovacs signed a stipulation with the State requiring Kovacs and his company, Chem-Dyne Corp., to, among other things, "remove specified wastes from the property." *Id.* at 276. After Kovacs and Chem-Dyne failed to comply with their obligations under the injunction, the State had a court-appointed receiver take possession of the property of the defendants and implement the judgment by cleaning up the property. *Id.*

Following Kovacs' filing of a chapter 11 bankruptcy petition that was ultimately converted to a chapter 7 proceeding, the State argued that his obligations under the stipulation were not dischargeable in bankruptcy because they were not "debts," or liabilities on a "claim," under the Bankruptcy Code. *Id.* at 277. The State argued in relevant part that "Kovacs' breach of his obligation under the injunction did not give rise to a right to payment within the meaning of § 101(4)(B)." *Id.* at 279.

The Court declined to accept the State's argument, noting that "it is apparent that Congress desired a broad definition of a 'claim.'" *Id.* In emphasizing the precise scope of the *Kovacs* decision, the Court explained that its opinion addressed "only the affirmative duty to clean up the site and the duty to pay money to that end." *Id.* at 285. Critically, the Court explained that

the clean-up order itself was equivalent to a right of payment by virtue of the fact that, as the lower court had explained, Kovacs "cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources." *Id.* at 282; *see also id.* at 281 (quoting bankruptcy court) ("There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money.").[3]

Notably, however, the Court also explained that anyone in possession of the property "must comply with the environmental laws of the State of Ohio." *Id.* at 285. While in *Kovacs*, the defendants could no longer engage in ongoing violation of the environmental laws due to their dispossession of the property, the Court in *dicta* essentially supplied a key distinction between ongoing environmental violations and clean-up of

[3] In this regard, it is important to note that the Court did not rest its decision on the fact that Kovacs was also obliged to pay $75,000 to the State pursuant to the injunction, *id.* at 276, an obvious case of a "right to payment." According to the Court, the State "freely concede[d]" that "Kovacs' obligation to pay $75,000 to the State [was] a debt dischargeable in bankruptcy." *Id.* at 279. The issue in *Kovacs* was whether the affirmative obligation to clean up the property that had not yet technically been reduced to a specific right to payment was nevertheless a "debt" on a "claim" within the meaning of the Bankruptcy Code. In light of congressional intent to define the term "claim" broadly, the Court found that it was.

past violations. Apex does not argue, nor could it, that the ongoing obligation to obey environmental laws is a "debt" that can be discharged. On the contrary, Apex stands in a similar position to Kovacs, as it likewise is unable to comply with the affirmative clean-up obligations of past violations "except by paying money or transferring over [its] own financial resources." *Id.* at 282.

More recent decisions reinforce the Court's broad reading of the term "claim." In *Pennsylvania Dep't of Public Welfare v. Davenport*, the Court considered whether "restitution obligations imposed as conditions of probation in state criminal actions" are dischargeable debts. 495 U.S. 552, 555 (1990) (superseded by statute).[4] The State in *Davenport* argued that the "restitution order is not a 'right to payment' because neither the Probation Department nor the victim stands in a traditional creditor-debtor relationship with the criminal offender." *Id.* at 558. The Court rejected that argument, explaining that Congress "chose expansive language" in the definition of both the terms "debt" and "claim" under the Bankruptcy Code. *Id.* The Court specifically

[4] It is important to note that although *Davenport* was superseded by statute, the Court has explicitly stated that the superseding statute did not "disturb[] our general conclusions on the breadth of the definition of 'claim' under the Code." *Johnson v. Home State Bank*, 501 U.S. 78, 83 n. 4 (1991).

noted that the modification of the phrase "right to payment" in the statute "reflects Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt.'" *Id.*

The following year, in *Johnson v. Home State Bank*, the Court further clarified the broad nature of the term "claim" under the Bankruptcy Code. 501 U.S. 78 (1991). The petitioner had given the bank a mortgage to secure promissory notes totaling approximately $470,000. *Id.* at 80. Following the petitioner's default, the bank initiated foreclosure on the petitioner's farm and the petitioner filed for liquidation under chapter 7. *Id.* The bankruptcy court in the petitioner's chapter 7 case discharged the petitioner from personal liability on his promissory notes to the bank, though the bank retained the right to proceed against the petitioner *in rem*. *Id.* Accordingly, the bank subsequently re-initiated foreclosure proceedings, but before a foreclosure sale was scheduled to take place, the petitioner filed for relief under chapter 13 of the Code. *Id.* Following confirmation of the petitioner's chapter 13 plan, which provided for payment of the mortgage as a claim against the petitioner's estate, the bank appealed to the district court arguing that "the Code does not allow a debtor to include in a Chapter 13 plan a mortgage used to secure an obligation for which personal liability has

been discharged in Chapter 7 proceedings." *Id.* at 81.

The Court explained that the relevant inquiry was whether the surviving mortgage interest for which personal liability had been extinguished was nevertheless a "claim" subject to inclusion in a chapter 13 reorganization plan. *Id.* at 83. The Court reiterated its conclusion in *Davenport* that "'right to payment' [means] nothing more nor less than an enforceable obligation," *id.*, stating that it had "no trouble" concluding the remaining mortgage interest was a "claim" under the Code. *Id.* at 84. Discussing both the "right to payment" and the "right to equitable remedy" retained by a mortgage holder, the Court noted that after the debtor's personal obligations have been "extinguished," he still "retains a 'right to payment' in the form of [his] right to the proceeds from the sale of the debtor's property." *Id.* "Alternatively," the Court held, "the creditor's surviving right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation." *Id.* Importantly, the Court held that "*either way*" – that is, *either* as a "right to payment" *or* a "right to an equitable remedy," "there can be no doubt that the surviving mortgage interest corresponds to an 'enforceable obligation' of the debtor," and is therefore a claim. *Id.* (emphasis supplied).

This expansive description of the reach of the term "claim" is consistent with the legislative history the Court has cited when emphasizing the congressional intent to give the term "claim" the "broadest possible" definition. *See, e.g., Davenport*, 495 U.S. at 558 (citing H.R. Rep. No. 95-595, at 309 (describing definition of "claim" as "broadest possible" and noting that the Bankruptcy Code "contemplates that *all* legal obligations of the debtor…will be able to be dealt with in the bankruptcy case") (emphasis supplied)).

Finally, in *FCC v. Nextwave Personal Communications, Inc.*, the Court rejected the Government's argument that certain license obligations to the FCC were not "debts" dischargeable under the Bankruptcy Code. 537 U.S. 293, 302 (2003). The Court reiterated the coextensive nature of the terms "debt" and "claim" under the Code. *Id.* Likewise, the Court explained that it had "said that '[c]laim has the broadest available definition…and…that the plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Id.* at 302-03. *Nextwave* provides yet another example of the Court's steadfast adherence to an expansive interpretation of the terms "debt" and "claim" under the Bankruptcy Code.

These cases demonstrate that the relevant inquiry when determining whether an obligation

of the debtor constitutes a "claim" under the Bankruptcy Code is whether the obligation involves a right to payment of money or an equitable equivalent, such as an equitable right to recover money from the proceeds of the sale of the debtor's property through foreclosure. If so, the obligation is a "debt," and therefore discharged following a chapter 11 confirmation order issued by the bankruptcy court. Yet in the decision below, the Seventh Circuit held that the absence of a specific statutory right to payment under RCRA distinguishes the instant case from the precedents noted above even though its conclusion narrows the scope of the term "claim" in a manner inconsistent with both the equitable equivalent portion of the statutory definition and the thrust of this Court's precedents establishing that the concept is exceedingly broad. *See* Pet. App. 4a.

The Court has eschewed empty formalism in this context, holding that neither a traditional creditor-debtor relationship, nor a particular purpose underlying the order at issue, nor a particular method of enforcement is necessary for an obligation to be considered a "right to payment" within the broad language of the statutory definition. *Davenport*, 495 U.S. at 558-60. For example, the Court has held that a criminal restitution obligation is a debt even if nonpayment results in revocation of probation rather than civil debt collection. *Id.* at 559-60. Likewise, in

Nextwave this Court found that FCC license obligations were debts despite the Government's argument that non-payment might result in revocation of licenses without civil debt collection proceedings. As the Court explained in *Davenport*, the "enforcement mechanism" of the obligation at issue cannot place it outside the Code's definition of "claim" or "debt." *Id.* at 560. The decision below is directly contrary to this analysis.

USEPA's argument that an equitable right cannot be a claim unless it is reducible to money must be viewed against the backdrop of the injunction at issue in this case. Here, the injunction is not one to "stop-ongoing-pollution" in the sense of requiring the debtor to cease ongoing activities that cause pollution. It would make sense to conclude that such a "stop-ongoing-pollution" injunction is one for which the government could not accept money as an alternative to compliance with the injunction, and that such an injunction would not be a claim and would not be dischargeable in bankruptcy – surely debtors cannot use the discharge in bankruptcy as an excuse to generate new pollution illegally. This case, however, involves a "clean-it-up" injunction involving pollution that has already occurred, which is something quite different. A "clean-it-up" injunction of this kind is one that is routinely satisfied by expending money to rectify what has already been done – regardless

of whether the government is willing to take the funds and do the work itself. Accordingly, it is properly a claim.

At bottom, Apex is unable to access the property and conduct the clean-up itself, so it must pay a third party to do it (much as Kovacs would have had to pay someone to perform the clean-up). The *identity* of the payee is not the point; the point is that in order to effectuate compliance with the injunction, Apex *has to* expend money with respect to pollution that Clark caused at a site Apex neither owns nor controls. Further, an obligation of this kind that was known at the time of Clark's bankruptcy is one that USEPA should have presented as part of Clark's bankruptcy proceeding. Having failed to do so, USEPA should not be able to saddle Apex with a debilitating financial obligation of this magnitude.

B. The Dispute at Issue Has Divided the Courts of Appeals.

As the Petitioner has already explained in detail, there is substantial disagreement among the courts of appeals regarding "whether a cleanup obligation imposed under a statute that does not provide an alternative right to payment is a claim." Pet. 29; *compare, e.g., In re Torwico Elecs.*, 8 F.3d 146 (3d Cir. 1993) *with United States v. Whizco*, 841 F.2d 147 (1988). The

Court's intervention is warranted to resolve this disagreement.

C. The Decision Below Impedes Successful Reorganizations.

As explained in the legislative history accompanying the Bankruptcy Code, "[t]he purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 95-595, at 220 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. As the House Report further explains, "assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap," and "[i]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." *Id.* In order to achieve reorganization, of course, an insolvent debtor must typically be able to restructure its debts, shedding those that are unmanageable. As Congress recognized, "[i]f the business can extend or reduce its debts, it often can be returned to a viable state." *Id.* Obviously, excluding large debt obligations from the reorganization process is likely to be antithetical to the reorganization goal: if a debtor cannot restructure an unmanageable obligation, the debtor likely cannot reorganize.

In crafting the provisions of the current chapter 11 of the Bankruptcy Code, Congress recognized that one of the chief problems of the corporate reorganization procedures of the former chapter XI of the Bankruptcy Act of 1898 was that they did not permit the adjustment of certain categories of obligations, such as secured debt. *Id.* at 222. Congress addressed this deficiency by making the chapter 11 process more inclusive, rejecting, for example, an amendment that would have limited the debtor's discharge by excluding from its scope certain priority taxes. *See* S. 2266, 95th Cong. §§ 523(a)(1)(A), (D), 1141(d)(2)(B) (1978). As explained in the legislative history:[5] "It is necessary for a corporation or partnership undergoing reorganization to be able to present its creditors with a fixed list of liabilities upon which the creditors or third parties can make intelligent decisions. *Retaining an exception for discharge with respect to nondischargeable taxes would leave an undesirable uncertainty surrounding reorganizations that is unacceptable*." 124 Cong. Rec. S17421 (daily ed. Oct. 6, 1978) (statement of explanation by Sen. DeConcini) (emphasis supplied)

The decision below conflicts with Congress' effort to broaden the categories of obligations

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[5] *See Kovacs*, 469 U.S. at 280 n. 8 (relying on statement of Sen. DeConcini as part of legislative history to explain the term "claim" as defined under the Bankruptcy Code).

that a debtor may adjust and discharge in bankruptcy. Leaving multi-million dollar liabilities (such as the estimated $150 million clean-up bill at issue here) untouched by the bankruptcy process will often sink a company newly emerging from chapter 11, defeating the effort to achieve a "fresh start" and "be returned to a viable state." *See* H.R. Rep. No. 95-595, at 220 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. Companies faced with such a prospect will often be forced to liquidate rather than reorganize, which, in turn, will tend to frustrate, rather than ameliorate, clean-up efforts. *E.g., Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring) ("Because the [liquidating] corporation usually ceases to exist, it has no post-bankruptcy earnings that could be utilized by the State to fulfill the cleanup order. The State's only recourse in such a situation may well be its 'claim' to the prebankruptcy assets).

CONCLUSION

For the foregoing reasons, as well as those offered by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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