No. 09-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In what circumstances is a debtor's obligation to clean up pollution a "claim" under the Bankruptcy Code?

RULE 29.6 DISCLOSURE

Petitioner's parent company is Apex Holding Co. No publicly held company owns 10% or more of petitioner's stock.

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Petitioner Apex Oil Company, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. A, *infra*) is reported at 579 F.3d 734. The district court's opinions (Apps. B, C, & D *infra*) are reported at No. 05-CV-242-DRH, 2008 WL 2945402 (S.D. Ill. July 28, 2008); No. 05-CV-242-DRH, 2006 WL 2375014 (S.D. Ill. Aug. 15, 2006), and 438 F. Supp. 2d 948 (S.D. Ill, 2006).

JURISDICTION

The Seventh Circuit entered its decision on August 25, 2009. App. 1a, *infra*. The court of appeals denied petitioner's timely petition for rehearing en banc on October 29, 2009. App. E, *infra*. Justice Stevens subsequently extended the time in which to file this petition to and including February 26, 2010. App. No. 09A669. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 101 of the Bankruptcy Code defines "claim" as a:

> (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; or
>
> (B) 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, legal, equitable, secured, or unsecured.

11 U.S.C. § 101(5).

STATEMENT OF THE CASE

Petitioner's corporate predecessor filed a petition for reorganization under chapter 11 of the Bankruptcy Code, obtained an Order from the bankruptcy court discharging all "claims" against it, and emerged as a reorganized entity. Prior to the bankruptcy, the government was aware that the debtor had allowed oil to leach from its own land into others' property, but the government failed to file a proof of claim asserting the debtor's alleged obligation to conduct an environmental clean-up. In the course of the chapter 11 case, the debtor sold various assets (including all of the property involved in the oil operations) to third parties to pay prepetition claims, the bankruptcy court discharged the predecessor's liability on all claims, and petitioner emerged as the reorganized, successor entity. Many years later, the government brought this action seeking to enforce against petitioner the predecessor's obligation to clean up the polluted land into which the oil had leached, none of which the debtor or petitioner had ever controlled. The government estimates the cost of the clean-up at $150 million. The Seventh Circuit, expressly rejecting the holding of the Sixth Circuit, ruled that such a clean-up obligation is not a "claim" subject to payment and discharge under the Bankruptcy Code when the government itself has no right to a

monetary remedy in the event the debtor fails to conduct the clean-up.

1. The filing of a bankruptcy petition triggers the creation of an "estate" comprised of assets of the debtor. 11 U.S.C. § 541 Allowed "claims" are paid from the estate, *see id.* §§ 726, 1123, and the debtor's liability on those claims is discharged regardless whether creditors exercise diligence and file a proof of claim. *Id.* §§ 726, 1141(d)(1)(A). There are certain exceptions to discharge, but a claim for environmental liability is not among them. *See generally id.* § 523.

The Bankruptcy Code expansively defines a "claim," which is subject to payment and discharge, as any "right to payment," as well as any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." *Id.* § 101(5). The term "right to payment" is not defined by the Code, and this Court has repeatedly held that it should be construed capaciously in light of Congress's clear intent to adopt the "broadest available" definition of "claim." *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2002) (citing *Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Pa. Dep't of Pub. Welfare v.* , 495 U.S. 552 (1990); *Ohio v. Kovacs*, 469 U.S. 274 (1985)).

In general, creditors have a strong interest in classifying debts owed to them by corporations as "claims." To be sure, in a chapter 11 reorganization, an obligation that is not a "claim" is not "discharged" but instead continues to bind the reorganized entity after confirmation of the plan. 11 U.S.C.

§ 1141(d)(1)(A) (discharge applies only to debts). But corporations that would be burdened by significant non-dischargeable liabilities, which "pass through" their bankruptcies, frequently cannot develop valid plans of reorganization and instead liquidate. If an obligation is not classified as a "claim" in a liquidation, the debtor will not distribute any of its assets to pay it, and after the entity seeks to exist, the creditor takes nothing. *Id.* § 726.

2. Petitioner Apex Oil Company, Inc. (Apex) is a corporate successor to Clark Oil & Refining Co. (Clark), which owned and operated one of several oil refineries in southern Illinois. Beginning in the 1970s and continuing into the 1980s, federal and state environmental authorities investigated a hydrocarbon plume underneath land separate from the refineries' property, in nearby Hartford, Illinois. Neither Clark nor its successor Apex has ever owned any of this contaminated property.

In 1987, Clark filed a petition for reorganization under chapter 11 of the Bankruptcy Code. At the time, it was settled law that an environmental clean-up obligation was a "claim" in bankruptcy. *See Ohio v. Kovacs*, 469 U.S. 274, 278-79 (1985); *United States v. Whizco* (E.D. Tenn. Jan. 12, 1987) (order), *aff'd*, 841 F.2d 147 (6th Cir. 1988). But although respondent United States Environmental Protection Agency (USEPA) was aware of Clark's alleged role in the hydrocarbon contamination beneath Hartford, and although it filed a claim in the bankruptcy relating to certain other environmental liabilities of Clark, it did not do so with respect to the Hartford plume.

Clark's bankruptcy was completed in 1990. Various assets, including the refinery and all of its related operations, were sold to third parties to pay the claims that had been properly asserted in the bankruptcy proceedings. The bankruptcy court's judgment provided that it "shall, on the Effective Date, discharge and release the Consolidated Debtors and their Estates and all property of the Consolidated Debtors and their Estates, from any and all Claims that the discharge . . . whether or not[] [a] proof of claim based on such Claim or debt is filed or deemed filed." *In re Apex Oil Co.*, No. 87-03804-BKC-BSS (Bankr. E.D. Mo Aug. 10, 1990), Debtors' Confirmed First Amend. Joint Partially Consolidating Plan of Reorganization, 04-301-C at 115-17. *See also* 11 U.S.C. § 1141(d)(1)(A)(i) (confirmation discharges debtor liability on all claims "[e]xcept as otherwise provided for in this subsection, in the plan, or in the order confirming the plan").

Petitioner Apex is the successor reorganized business that emerged from Clark's bankruptcy. Apex itself has never had any role with respect to the property or refinery operations that allegedly contributed to the pollution beneath Hartford.

3. a. In early 2003, USEPA commenced a formal review of Clark's role in the Hartford plume, invoking the authority conferred by the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). *See* C.A. S.A. 1071. In September of that year, USEPA sent various companies, including Apex, a notice asserting that they were potentially liable for

the contamination of land in Hartford under several federal environmental statutes.

The only basis for USEPA's assertion of liability was that Apex is Clark's successor and therefore inherited Clark's liability. The polluted property in Hartford addressed by USEPA's demand had never been owned by either Clark or Apex. Further, Apex holds no interest in the equipment and property that is related to the plume.

USEPA stated that if Apex did not voluntarily participate in a clean-up of the site, the government would order it to do so. USEPA further stated that if Apex failed to comply with that order, the government would conduct the clean-up itself and then demand reimbursement from petitioner. *See* App. F, *infra*.

Respondent has estimated the cost to petitioner of complying with this clean-up obligation at $150 million. If it had been known *ex ante* that this gargantuan clean-up liability would pass through the bankruptcy, Clark likely would have been forced to liquidate rather than reorganize.

b. When Apex declined to participate in the remediation of the site, respondent USEPA did not do the work itself and then seek reimbursement. Instead, it filed this suit in federal district court seeking an injunction requiring petitioner to conduct the clean-up. The government did not invoke either of the statutes that it invoked in initiating its formal investigation: the Clean Water Act and CERCLA. Rather, it sought relief under the Resource

Conservation and Recovery Act of 1976 (RCRA), which as applicable here authorizes USEPA to "bring suit" against "any person" who was involved in the "storage" of "hazardous waste," and to request that the district court "order such person to take such . . . action as may be necessary." 42 U.S.C. § 6973(a). USEPA may furthermore "take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment." *Ibid.*

The district court held that USEPA's suit could proceed because Clark's liability under RCRA was not a "claim" subject to payment and discharge under the Bankruptcy Code. App. B, *infra*; *see also* App. C, *infra* (denial of reconsideration). The district court then held a trial, culminating in an extensive order and final judgment requiring petitioner to clean up the Hartford site. App. D, *infra*.

There is no dispute that petitioner (and previously, Clark) could only perform such a clean-up by hiring a third-party contractor; and as noted, Apex has no right itself even to access the polluted property, which neither Clark nor it ever owned. If Apex refuses to comply, USEPA can move to secure the appointment of a receiver to conduct the clean-up at petitioner's expense under Federal Rule of Civil Procedure 70(a), which provides that "the court may order the act to be done – at the disobedient party's expense – by another person appointed by the court."

c. On petitioner's appeal, the Seventh Circuit affirmed. App. A, *infra*. The court of appeals held that "the holder of an equitable" right holds a "claim"

only if it can itself, "in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment instead." *Id.* 2a-3a. The Seventh Circuit believed that its narrow reading of "claim" followed from what it perceived as the "limited right to the discharge of equitable claims." *Id.* 6a.

The court of appeals recognized this Court's holding in *Ohio v. Kovacs*, *supra*, that "an equitable obligation to clean up a contaminated site owned by the debtor" constitutes a dischargeable "claim." *Id.* 6a. But it stated that *Kovacs* could be distinguished on the ground that "a receiver had been appointed" in that case to perform the clean-up, and the receiver "was seeking money rather than an order that the debtor [himself] clean up the contaminated site." *Id.* The Seventh Circuit expressly rejected the holding of *United States v. Whizco*, 841 F.2d 147 (6th Cir. 1988), that under *Kovacs*, *supra*, an environmental clean-up order is a dischargeable "claim" if the order as a "practical" matter requires the debtor to expend money to comply, deeming the Sixth Circuit's ruling inconsistent with "decisions which hold that cost incurred is not equivalent to 'right to payment.'" *Id.* 7a.

The Seventh Circuit held that RCRA liability in particular does not constitute a "claim" under its interpretation of the Bankruptcy Code because (as the court of appeals read RCRA) the government itself cannot "demand, in lieu of action by the defendant that may include the hiring of another firm to perform a clean up ordered by the court, payment of clean-up costs." *Id.* 4a. The court of appeals believed that its construction of RCRA

followed from the holding of *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996), that the statute's similar "citizen suit" provision does not include that remedy, although the court acknowledged the contrary position of the United States that *Meghrig* does not affect its right to cost recovery. App. 4a-5a.

d. Petitioner sought rehearing *en banc* to resolve the acknowledged conflict between the ruling below and the Sixth Circuit's decision in *Whizco*, *supra*, but the Seventh Circuit denied that application. App. E, *infra*.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the decision below conflicts with an uninterrupted line of this Court's precedent that broadly holds equitable obligations to be "claims." Most important, *Ohio v. Kovacs*, 469 U.S. 274, 276-77 (1985), holds that an environmental clean-up order – indistinguishable from the order in this case – is a claim subject to payment and discharge in bankruptcy. The Seventh Circuit's contrary ruling will ironically push corporations into liquidations, in which none of the debtors' assets will be allocated to finance environmental clean-up orders because they are not "claims." Second, as the Seventh Circuit acknowledged, the ruling below squarely conflicts with the precedent of the Sixth Circuit, which reads both the Bankruptcy Code and this Court's precedents to provide that the term "claim" encompasses the debtor's obligation to clean up environmental pollution that (as in this case) can only be satisfied by the debtor's expenditure of

money. There is in fact a three-way circuit conflict, which only this Court can resolve because it arises from irreconcilable readings of this Court's ruling in *Kovacs*, *supra*. That conflict cries out for resolution, given the manifest importance of the question presented. The issue recurs frequently and is essential to determining whether the government asserts environmental clean-up liabilities in bankruptcy, the mechanism by which corporations with potential environmental liabilities reorganize or liquidate, and the resulting allocation of their assets to fund clean-up efforts.

I. The Seventh Circuit's Holding That An Environmental Clean-Up Obligation, Absent An Alternative Monetary Remedy, Is Not A "Claim" Cannot Be Reconciled With *Ohio v. Kovacs*.

1. This Court's seminal decision construing the term "claim" under the Bankruptcy Code is *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985). In that case, the debtor had caused considerable pollution at his "Chem Dyne" facility. The government sought relief relating to existing pollution – money damages from the debtor and "an injunction ordering [him] to clean up [the] hazardous waste site," which was polluting a river and its tributaries – as well as a prospective directive commanding the debtor not to pollute in the future. *Id.* at 275. The damage award was clearly dischargeable. *Id.* at 278. Conversely, the debtor's ongoing obligation to follow the state's environmental law by not polluting in the future plainly was not. *Id.* at 285.

The issue before this Court was whether the debtor's remaining obligation – the duty to clean up existing pollution – was a "claim" in bankruptcy. That injunction did not give the government itself any monetary remedy. Thus, when the debtor failed to comply, the government had no power to conduct the clean-up and then pursue cost recovery. Instead, under the state's general statutes governing civil litigation, the state secured an order of the court appointing a receiver (who dispossessed the debtor of the property) to take possession of the respondent's assets and use them to conduct the clean-up. *Id.* at 276-77.

This Court unanimously held that that the debtor's liability under the clean-up injunction was a "claim" and accordingly was discharged in the bankruptcy. Like the lower courts in the case, this Court found "little substance" in the government's assertion "that the cleanup obligation did not give rise to a right to payment that renders the order dischargeable." *Id.* at 280. Although the government *itself* could not demand money from the debtor, this Court concluded that the same party need not hold both the equitable obligation and the "right to payment." This Court adopted the view of the court of appeals in that case that because the debtor would have to make a "payment" to comply, the injunction was a "claim": the debtor thus was not "capable of personally cleaning up the environmental damage he may have caused. . . . He 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 ibid.* (quoting with approval the bankruptcy court's reasoning that the debtor could not "render performance under the affirmative obligation other than by the payment of money"). The conclusion that the debtor's expenditure gave rise to a "right to payment" in that circumstance – even though the debtor made the payment to a party other than the government – could only be avoided by "legerdemain or linguistic gymnastics." *Ibid.* That Court explained that its holding was reinforced by the fact that "Congress desired a broad definition of a 'claim.'" *Id.* at 279.

Justice O'Connor separately concurred "to address the petitioner's concern that the Court's action will impede States in enforcing their environmental laws." *Id.* at 285. The proper course, she explained, was for the government to assert the claim in the bankruptcy proceeding to secure a share of the debtor's assets to contribute to the clean-up. *Id.* at 286. Furthermore, the contrary ruling sought by the government would in reality have "potentially adverse consequences" for environmental enforcement by driving corporations into liquidation because in liquidation "[t]he [government's] only recourse in such a situation may well be its 'claim' to the prebankruptcy assets." *Ibid.*

2. *Kovacs* dictates the conclusion that the RCRA clean-up obligation asserted by USEPA in this case is a "claim" that the government could have asserted in Clark's bankruptcy and that was subsequently discharged through the reorganization. Both cases involve an injunction requiring that the debtor clean up environmental pollution under a statute that (at

least as the Seventh Circuit narrowly construed RCRA) provides the government itself with no monetary remedy. In both, the debtor had no access to the property and either could comply with that injunction by making a significant "payment" to a third-party contractor or (if it defied the injunction) would face a court order directing the completion of the clean-up at the debtor's expense (such as through the appointment of a receiver). *Accord* Lawrence T. Burick & Jennifer L. Maffett, *When is a Claim Not a Claim: Does* Apex Oil *Clarify or Confuse?*, 12 NORTON BANKR. L. ADVISOR 1, 2 (2009) ("[T]he Seventh Circuit did not follow the United States Supreme Court's holding in *Ohio v. Kovacs*.").

Of particular note here, the Solicitor General took care to advise this Court that the issue presented in *Kovacs* was not fact-bound or otherwise limited but instead "extend[ed] beyond state enforcement actions" to cases in which

> the United States seeks to enforce clean-up obligations imposed by federal law, including the Clean Water Act; the Resource Conservation and Recovery Act of 1976; the Comprehensive Environmental Response, Compensation and Liability Act of 1980; the Surface Mining Control and Reclamation Act of 1977; and the Clean Air Act.

Br. of U.S., No. 83-1020, *Ohio v. Kovacs*, *supra*, at 3 (citations omitted). Thus, the United States explained, a ruling sustaining the dischargeability of the clean-up order in *Kovacs* would apply equally to "[a] plethora of federal statutes," specifically

including RCRA, all of which "explicitly authorize[] courts to issue mandatory injunctions to clean up or otherwise abate health, safety, and environmental hazards." *Id.* at 30 & n.20.

3. The *volte face* of the United States regarding the necessary implications of *Kovacs* and the Seventh Circuit's interpretation of "claim" are unsustainable.

a. The court of appeals held that the holder of an equitable right has a "claim" only if it can *itself* "obtain a money judgment." App. 2a-3a. The court thus ruled that USEPA held no claim against Clark because the government could not "demand, in lieu of action by the defendant that may include the hiring of another firm to perform a clean up ordered by the court, payment of clean-up costs." *Id.* 4a. But that is precisely the argument that was presented to, and rejected by, a unanimous Court in *Kovacs*.

In *Kovacs*, this Court specifically found that the debtor's clean-up obligation was a "claim" notwithstanding the State's accurate "insistence that it had no right to, and was not attempting to enforce, an alternative right to payment." 469 U.S. at 282. Instead, the State could only request an appointment of a receiver. The Solicitor General similarly urged this Court to decide *Kovacs* based on an asserted distinction "between a dischargeable right to payment for breach of performance and a non-dischargeable right to enforce an injunction that entails the expenditure of money." Br. of U.S., *Ohio v. Kovacs*, *supra*, at 9. The United States explained that "neither the clean-up order nor the order imposing the receivership gave the State a money

judgment with respect to cleaning up the Chem-Dyne premises," *id.* at 7, and furthermore that "the Ohio statutes authorizing the clean-up injunction did not provide the State with an alternative basis to a money payment," *id.* at 30. This Court, however, found that fact to be irrelevant and deemed the injunction to be a "claim" notwithstanding the government's inability itself to pursue a money judgment. The same conclusion follows in this case.

b. There similarly is no merit to the Seventh Circuit's second asserted factual distinction: that *Kovacs* involved "a receiver" who "was seeking money rather than an order that the debtor clean up the contaminated site." App. 6a. Preliminarily, that reasoning flatly contradicts the Seventh Circuit's own holding that a "claim" exists only when the holder of an equitable obligation itself has an alternative monetary remedy. In *Kovacs*, the government was owed the equitable obligation (the right to the clean-up) whereas the receiver had a right to the monetary remedy (the right to spend the debtor's assets to conduct the clean-up).

Further, the Court's ruling in *Kovacs* did not depend on the role of the receiver in that case. *Kovacs* held that the government's right to the "*injunction*" – not merely the financial obligation to the receiver – was a dischargeable "claim." 469 U.S. at 275, 279 (emphasis added); *see also, e.g.*, *id.* at 277 (state sought "a declaration that Kovacs' obligation under the [injunction] to clean up the Chem-Dyne site was not dischargeable in bankruptcy"). It reached that conclusion for a reason unrelated to the receiver: the debtor could not perform on the

injunction without spending money. *Id.* at 282. *Accord* Tr. of Oral Argument, No. 83-1020, *Ohio v. Kovacs* 21-22 (argument of Assistant to the Solicitor General: "I don't think the appointment of the receiver makes any difference[]" because "it doesn't change the fact that Kovacs is under an obligation to clean up").

But assuming *arguendo* that the role of the receiver is relevant, the Seventh Circuit's decision errs by failing to account for the fact that Federal Rule of Civil Procedure 70(a) would authorize USEPA to secure the appointment of a receiver to perform the clean-up "at [petitioner's] expense," just as in *Kovacs*. Thus, in *United States v. Guam*, No. 02-000222, 2008 U.S. Dist. LEXIS 23459, at *14 (D. Guam Mar. 17, 2008), the district court relied on Rule 70 to appoint a receiver to enforce Guam's compliance with a clean-up injunction under the Clean Water Act. *See id.* at *14. Similarly, in *United States v. Prod. Plated Plastics, Inc.*, after the defendant failed to comply with a RCRA clean-up injunction, the government successfully moved under Rule 70 for the appointment of a receiver to "identify the assets of the Defendants and liquidate those necessary to provide funding to achieve RCRA compliance." Nos. 93-2055/93-2618, 1995 U.S. App. LEXIS 20539, at *18 (6th Cir. July 19, 1995), *cert. denied*, 517 U.S. 1133 (1996). The Sixth Circuit found that abundant authority established "that the district court was well within its discretionary authority to appoint a trustee/receiver to secure [the defendant's] compliance with the court's injunction." 1995 U.S. App. LEXIS 20539, at *19.

To be sure, in *Kovacs*, a receiver had already been appointed by the time the case reached this Court. But the Seventh Circuit's elevation of that fact to dispositive significance draws no support from *Kovacs*, and it cannot be reconciled with the text of the Bankruptcy Code. The only relevant practical consequence of the appointment in *Kovacs* was to dispossess the debtor of access to the polluted property; but that fact already exists in this case, in which neither Clark nor Apex has ever owned the Hartford land that is the subject of USEPA's order.

Moreover, the State's "claim" existed in *Kovacs* independent of the debtor's obligation to the receiver – and that "claim" arose before the receiver's appointment – because the Bankruptcy Code deems an equitable right to be a "claim" so long as it is the type of right that, if breached, would "*give[] rise* to a right to payment." 11 U.S.C. § 101(5) (emphasis added). More particularly, a claim exists "whether or not such right is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." *Ibid.* An equitable obligation is thus not deprived of its status as a "claim" by the fact that it has not yet been (and may never be) converted into a present obligation that the debtor pay money.

The Seventh Circuit's contrary assertion that the appointment of a receiver was essential to the existence of a claim in *Kovacs* reduces to the contention that the debtor in that case was entitled to discharge because it *violated* a court injunction, resulting in the appointment of a receiver prior to the conclusion of the bankruptcy, whereas petitioner

retains a liability that the government estimates at $150 million because it did not violate an injunction. Such a rule would encourage debtors to flout court orders and provide the government with an incentive to abstain from its duty to police environmental clean-ups in the hope of waiting out eventual bankruptcy proceedings. That makes no sense, and Congress cannot have intended either the Bankruptcy Code or the federal environmental laws to encourage such lawless behavior.[1]

c. The Seventh Circuit addressed the text of the Bankruptcy Code only in passing. The court held that a claim did not arise from the cost of the clean-up obligation under "the language of the Bankruptcy Code—the cost to Apex is not a 'right [of the plaintiff] to payment.'" *Id.* 5a (bracketed insertion in original). But the bracketed phrase – "[of the plaintiff]" – which is the heart of the court's reasoning, does *not* appear in the statute. The Code does not in fact require that the payment be owed to the "plaintiff" instead of some other party; in *Kovacs*, that right was held by the receiver. 11 U.S.C. § 101(5).

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[1] Nor can the Seventh Circuit's ruling draw support from this Court's statement in *Kovacs*, 469 U.S. at 284, that it was not deciding "what the legal consequences would have been had Kovacs filed a bankruptcy petition before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee." As the accompanying footnote explains, *id.* at 284 n.12, the Court was thereby leaving open questions related to the power of a bankruptcy trustee to "abandon" polluted property, which are not presented in this case and which the Court subsequently resolved in *Midlantic National Bank v. New Jersey Department of Environmental Protection* 474 U.S. 494, 502 (1986).

The Seventh Circuit's overly simplistic analysis of the statutory text thus failed to recognize that in defining "claim" Congress distinguished a creditor's right to a "remedy" from the distinct right to "payment" from the debtor. In this regard, the Code defines a "right to an equitable *remedy* for breach of performance" to be a "claim" in the event that "such breach gives rise to a right to *payment*." 11 U.S.C. § 101(5) (emphases added). A "remedy" generally connotes relief that is owed to the particular party holding the obligation, *e.g.*, BLACK'S LAW DICTIONARY 1320 (8th ed. 1999) ("[t]he means of enforcing a right or preventing or redressing a wrong"); in this case, USEPA holds the entitlement to the "equitable remedy" of the environmental clean-up. The distinct phrase "right to payment," by contrast, is more naturally read to broadly refer to any monetary obligation owed by the debtor. It does not require that the right to payment be held in every instance by the same creditor who holds the equitable obligation. There is moreover a strong presumption that two distinct terms in the same statutory provision – here, "remedy" and "payment" – mean different things. *See United States v. Bean*, 537 U.S. 71, 76 n.4 (2002). If the Seventh Circuit were correct that Congress intended "claim" to encompass only circumstances in which the creditor *itself* is entitled to complementary equitable and monetary "remedies," the Code would instead define a "claim" as "an equitable remedy for breach of performance for which there is an alternative monetary remedy."

Properly understood, the role of the definition of "claim" is not (as the Seventh Circuit thought) to

narrowly limit discharge to the circumstance in which money will be paid directly to the same party that holds the equitable right (here, USEPA) rather than a third party (such as a contractor), but instead to broadly sweep burdens on the debtor's estate into the scope of the bankruptcy. An equitable obligation is a "claim" (and thus is subject to discharge) if it is capable of being monetized such that it could be invoked as a basis to deplete a debtor's estate. *See* 11 U.S.C. § 101(5)(B). As a matter of both the statutory text and the policy embodied by the Bankruptcy Code, it makes no difference whether the "equitable" and "monetary" rights are held by one party or two – the drain on the debtor's assets is the same. A narrower conception of the right to discharge would fail to provide the debtor with the "fresh start" that is essential to the Code's functioning.

The debtor's clean-up obligation (which this Court held to be dischargeable in *Kovacs*) contrasts with its ongoing obligation not to pollute (which the Court held was not dischargeable). At the time of the bankruptcy, the state had a legal right (backed by the power to seize the debtor's assets) to require the debtor in *Kovacs* to expend money to remedy prepetition pollution. Such an obligation, which would deplete the debtor's estate or burden its successor – no less than the damage award that *Kovacs* deemed to be dischargeable, 469 U.S. at 278 – easily fits within the archetypal model of a "claim" that is properly resolved through the bankruptcy process. By contrast, the prospective injunction that the debtor "not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of

such conditions," *id.* at 285, amounted to no more than a particularized application of the ordinary obligation that the debtor not violate the law in the future, with which the debtor (like every other citizen) must comply if it continues to own contaminated property after the reorganization.

The illogic of the court of appeals' contrary ruling – that dischargeability in bankruptcy depends on whether the holder of the equitable "remedy" is the same party that holds the right to "payment" – is illustrated by the divergent status that the Seventh Circuit's analysis assigns to clean-up obligations under various federal environmental laws. USEPA's asserted authority for initially addressing the Hartford plume was not RCRA, but the Clean Water Act of 1972, 33 U.S.C. § 1251-1376, and CERCLA, 42 U.S.C. §§ 9601-9675, both of which contain express authorizations for cost recovery from responsible parties. 33 U.S.C. § 1321(f); 42 U.S.C. § 9607(a). USEPA specifically stated that, if petitioner did not comply voluntarily, the government would pay for the clean-up and pursue reimbursement. *See* App. F, *infra*. As USEPA's on-scene coordinator later testified, USEPA was advising Apex: "If you don't do it, the government is going to do it, and we're going to come back and get the money from you." C.A. S.A. 1068.

But USEPA did not follow through on its threat to conduct the clean-up and seek reimbursement, which would have vividly illustrated that the clean-up obligation was discharged in Clark's bankruptcy under this Court's decision in *Kovacs*. Instead it brought this suit, and drafted its complaint to omit

any reference to the Clean Water Act and CERCLA, in apparent recognition of the fact that petitioner's liability under those statutes had been discharged as well.

USEPA sued petitioner under RCRA only, which does not include an explicit reimbursement provision. As such, this suit is no more than a transparent attempt to twist the terms of the Bankruptcy Code to avoid the statutorily mandated effect of Clark's discharge. Even the district court did not doubt petitioner's submission that the government's request for an injunction under RCRA merely "consists of a repackaged claim for damages that could have been asserted in the original bankruptcy proceedings." App. 210a n.7.

There simply is no logical basis to conclude that Congress intended to discharge a right to reimbursement for clean-ups conducted by the government, and furthermore to discharge any clean-up obligation imposed under the Clean Water Act and CERCLA, but not to discharge the clean-up responsibility imposed under the parallel provisions of RCRA, which fulfills the same statutory purpose and imposes the identical burden on Clark's estate. The fact that the debtor's payment will go to the government in one scenario but to a third-party contractor or receiver in the other makes no difference in determining whether it is logically subject to discharge. Nor can sound bankruptcy policy permit the government to pick and choose among remedies for the identical conduct in a transparent effort to evade the Code's core discharge provisions.

4. This case also illustrates the wisdom of Justice O'Connor's recognition in *Kovacs* that interpreting the term "claim" to exclude clean-up obligations threatens to undermine, rather than enhance, environmental enforcement. 469 U.S. at 286. The government is cutting off its own nose to spite its face in this case. Had it been known at the time of Clark's bankruptcy proceedings that (contrary to then-extant precedent) a reorganization would not resolve its clean-up liability, the company likely would have been forced to liquidate, and none of Clark's assets would have been applied to contribute to the clean-up because USEPA would not have held a "claim." 11 U.S.C. § 726.

When an "environmental obligation can pass through the reorganization and can impose a significant burden on the reorganized company, the classification of environmental obligations can play a key role in determining whether to proceed under a chapter 11 reorganization or a chapter 7 liquidation." COLLIER ON BANKRUPTCY, Monograph: *Environmental Issues in Bankruptcy Cases* (Collier Monograph) § 3(1) (2009). Although Clark's own chapter 11 reorganization is now concluded – creating the prospect that USEPA will benefit from its gambit in this isolated instance – the legal rule announced in this case will control the many other bankruptcies that will regularly arise in the future in which corporations will generally find that the resulting liability leaves them with no option other than to liquidate their operations. The government will literally take nothing when the "perverse" reading of the statute adopted below is applied "in the ordinary

cases in which the polluter is a corporation." Douglas G. Baird & Thomas H. Jackson, Kovacs *and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1203-04 (1984). *Accord* Kathryn R. Heidt, *Undermining Bankruptcy Law and Policy:* Torwico Electronics, Inc. v. New Jersey Department of Environmental Protection, 56 U. PITT. L. REV. 627, 648 (1995) ("[I]n a corporate Chapter 7 case, the holding that the obligation is not a claim will come back to haunt the government because the government's only chance at recovery is to hold a claim in the bankruptcy process.").

5. At bottom, USEPA's position in this case amounts to an attempt to exclude at least some environmental liabilities from discharge under the Bankruptcy Code, notwithstanding this Court's unanimous decision in *Kovacs*, *supra*. But Congress has provided only a narrow list of "[e]xceptions to discharge," 11 U.S.C. § 523 (title), such as for tax debts, money acquired by fraud, and damages arising from "willful and malicious injury by the debtor." "Environmental liabilities enjoy no special treatment under the Bankruptcy Code, so environmental debts, like any other debt, can be discharged." Robert McNeal, *The Dischargeability of Environmental Liabilities in Bankruptcy*, 6 TULANE ENVTL. L.J. 61, 62 (1992).

The Seventh Circuit's contrary ruling that a RCRA clean-up obligation is not dischargeable conflicts with this Court's precedents. This Court has consistently rejected efforts to effectively expand the carefully drawn list of exceptions to discharge through the back door of excluding various

obligations to the government from the definition of "claim." Thus, in *Kovacs*, the Solicitor General argued that "[t]he Code does not shield wrongdoers from all consequences of their actions; there is no fundamental or inalienable right to obtain a discharge in bankruptcy at the expense of the legislatively declared right of the public to be safe from environmental pollution." Br. of U.S., *Ohio v. Kovacs*, at 13. This Court, however, found the Bankruptcy Code to be dispositive and deemed the debtor's clean-up obligation to be dischargeable. And whereas the Seventh Circuit rested the decision below on what it conceived as the "limited right to the discharge of equitable claims," App. 5a, this Court reached the opposite result because of what it understood to be the "broad definition of a 'claim,'" *Kovacs*, 479 U.S. at 279. *See also FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2002) (holding that a federal regulatory requirement that a licensee make timely payments on its license is a "claim" in light of Congress's determination to adopt the "broadest available" definition of "claim"); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) ("Congress intended . . . to adopt the broadest available definition of 'claim'"); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990) (holding that restitution obligations to the government are dischargeable "claims" even when they cannot be "enforce[d] . . . in civil proceedings").

6. Finally, and in all events, USEPA can in fact conduct a clean-up and then secure cost recovery for itself under RCRA. The government correctly maintains that this authority survives the holding of

Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996), that cost recovery is not available under RCRA's citizen suit provision, because that ruling "does not address a restitution action by the United States." USEPA, *Guidance on the Use of Section 7003 of RCRA* 22-23 (Oct. 1997), *reproduced in* App. H, *infra*. In *Meghrig*, the Solicitor General took the position that, although the two subdivisions of RCRA are similar, "the federal government's remedy is broader than the citizen's remedy," so that the parallels between the two do not overcome the "familiar principle that public agencies and municipalities may recover the costs of abating public nuisances." Br. of U.S., No. 95-83, *Meghrig v. KFC W., Inc.*, *supra*, at 28 (citing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204-05 (1967)).

Despite having consistently advanced this position in every other context, the government in this litigation has thus far refused to discuss its right to RCRA cost recovery. The reason is obvious: USEPA hopes to maintain *both* its ability under RCRA to demand reimbursement and its position that a clean-up order is not a "claim" in bankruptcy. But the Seventh Circuit's decision demonstrates that those two assertions are irreconcilable, and the government cannot reasonably keep up its studied silence in the wake of the ruling below. In ruling that cost recovery is not available under RCRA, the Seventh Circuit explicitly rejected the contrary holding of *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749-50 (8th Cir. 1986), which had found a right to reimbursement based on *Mitchell v. Robert De Mario*

Jewelry, Inc., 361 U.S. 288 (1960), and *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). *See* App. 4a-5a. Although this Court decided *Meghrig* after the Eighth Circuit's decision in *Northeastern Pharmaceutical*, this Court notably did not call into question is prior rulings in *Mitchell* and *Porter*. In any event, there is no justification for the Solicitor General to refuse to take any position on this vital legal question governing the ongoing enforcement of the environmental laws encompassed within the question presented, which also controls petitioner's own liability to the government in this case on remand if the Seventh Circuit's judgment stands.

The Solicitor General must now address the vitality of that Office's prior position, as well as USEPA's post-*Meghrig* administrative guidance and prior litigation stance. In these circumstances, silence amounts to a confession of error. If the government does reverse its position and acquiesce in the ruling below, it will thereby narrow significantly its asserted enforcement authority in the much more common, *non*-bankruptcy context in which it enforces RCRA. *See, e.g.*, *Northeastern Pharm.*, *supra*. But if the government instead maintains that it actually does have the right to "demand . . . payment of clean-up costs" under RCRA, *contra* App. 4a-5a, then it inevitably must acknowledge that the Seventh Circuit's contrary rationale in holding that a RCRA clean-up obligation is not a "claim" is fundamentally flawed.

II. The Ruling Below Avowedly Conflicts With The Precedent Of The Sixth Circuit.

1. Certiorari is also warranted to resolve the three-way conflict among the circuits presented by this case. There is a "disagreement among the appellate courts regarding whether a cleanup obligation imposed under a statute that does not provide an alternative right to payment is a claim," which is the subject of "sharp contrast and confusion among the circuits." Heidt, *supra*, 56 U. PITT. L. REV. at 642. The authors of the leading treatise on bankruptcy law, *Collier on Bankruptcy,* recently concurred that there is "considerable confusion in the federal courts as to when mandatory injunctions create dischargeable claims." Collier Monograph, *supra*, § 6(1)(b). *Accord id.* § 6 (describing conflict between Second and Sixth Circuits); Burick & Maffett, *supra*, 12 NORTON BANKR. L. ADVISOR 1 (Dec. 2009) (commenting on the clashing decisions, and the consequent "continuing policy conundrum"); Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy*, 12 AM. BANKR. INST. L. REV. 331, 420 (2004) (observing that the case law is a "morass" and urging this Court to "step up to the plate" and clear up the confusion); McNeal, *supra*, 6 TULANE ENVTL. L.J. at 67 ("In the wake of *Ohio v. Kovacs*, two different approaches have surfaced for determining the dischargeability of environmental injunctions.").

a. The Seventh Circuit held in this case that a claim arises only when the government itself has the right to demand that the debtor pay the government

directly for the costs of the clean-up. Under that view, the fact that the debtor can only comply with a clean-up order by making substantial monetary payments, and also faces the prospect that the government will secure the appointment of a receiver to use the debtor's assets to perform the clean-up, are all irrelevant.

b. The Second and Third Circuits read the definition of "claim" still more narrowly than even that. *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991); *In re Torwico Elecs.*, 8 F.3d 146 (3d Cir. 1993) (adopting *Chateaugay*), *cert. denied*, 511 U.S. 1046 (1994). Under their precedent, if the order relates to waste that contributes to "current pollution" – which will be true of "most environmental injunctions," *Chateaugay*, 944 F.2d at 1008 – it is categorically not a "claim." In the limited instances in which the order relates to waste that is not creating pollution, it may be a dischargeable claim, but only if the government can seek cost recovery as an alternative remedy:

> An injunction that does no more than impose an obligation entirely as an alternative to a payment right is dischargeable. Thus, if EPA directs [the debtor] to remove some wastes that are not currently causing pollution, and if EPA could have itself incurred the costs of removing such wastes and then sued [the debtor] to recover the response costs, such an order is a "claim" under the Code. On the other hand, if the order, no matter how phrased, requires [the debtor] to take any

> action that ends or ameliorates current pollution, such an order is not a "claim."

Ibid. On the facts of this case, the Second and Third Circuits would hold that petitioner's RCRA clean-up obligation does not constitute a "claim," without regard to the government's ability to secure cost recovery, because USEPA seeks to require petitioner to clean up oil in the soil, which is causing current pollution.

c. The rulings of the Second, Third, and Seventh Circuits all conflict with the Sixth Circuit's holding in *United States v. Whizco*, 841 F.2d 147 (1988), that an environmental clean-up order constitutes a "claim" so long as the debtor must pay money to comply. In that case, the United States sought an injunction requiring the debtor to clean up an abandoned coal mine, which he could do only by hiring a contractor. The applicable environmental statute (the Surface Mining Control and Reclamation Act of 1977) authorized the government to "institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order," 30 U.S.C. § 1271, but did not provide "the alternative remedy of reclaiming the site and demanding payment for the costs incurred," *Whizco*, 841 F.2d at 148.

The Sixth Circuit recognized that the case before it varied slightly from the facts of *Kovacs*, in which the government "had converted its equitable remedy, a right to require the respondent to clean up the waste disposal site, into a right to payment of money by means of receivership." *Id.* at 150. But the court

of appeals deemed that distinction to be irrelevant because, entirely independent of the receiver, the debtor still "would have to hire others to perform the work for him. This would require the expenditure of money. Thus, although the terms of the injunction would not require the payment of money, to the extent that the injunction were to be effective, it would." *Ibid.* "Thus, when we look at the *substance* of what the [United States] seeks, rather than the *form* of the relief sought, we see that the [United States] is really seeking payment." *Ibid.* (emphases added).

As the Seventh Circuit acknowledged, App. 7a, the decision below squarely conflicts with the Sixth Circuit's ruling in *Whizco*, under which the clean-up order issued in this case would be deemed a "claim" in bankruptcy. In both cases, the government lacks the option of seeking cost recovery directly (at least as the Seventh Circuit construed RCRA) and seeks to enforce a clean-up order with which the debtor in "substance" can comply, *Whizco*, 841 F.2d at 150, only by expending money. As noted, in *Kovacs*, the Solicitor General recognized that the Supreme Court's decision would control the dischargeability of clean-up orders under both RCRA (at issue in this case) and the Surface Mining Control and Reclamation Act (at issue in *Whizco*). Yet the two courts of appeals reached diametrically opposing results on indistinguishable facts.

2. This Court's intervention is required to resolve the circuit split. Both the Sixth and Seventh Circuits denied petitions for rehearing en banc asking the courts to reconsider their positions. App. E, *infra*;

United States v. Whizco, No. 87-5317 (June 22, 1988) (order). No subsequent development would persuade the Sixth Circuit to reverse course and adopt the Seventh Circuit's position, given (i) that the Sixth Circuit's reading of *Ohio v. Kovacs*, *supra*, is correct, and furthermore (ii) that this Court's post-*Kovacs* jurisprudence strongly reinforces the breadth of the term "claim." *See* Part I, *supra*. There accordingly is no reasonable prospect that the courts of appeals will independently reach a uniform interpretation on this critical question of federal law.

Still further, the three-way conflict among the circuits arises from irreconcilable understandings of *Kovacs*, *supra*; only this Court can decide which is correct. The Seventh Circuit rejected the holding of *Whizco* on the ground that "cost incurred is not equivalent to 'right to payment.'" *Id.* 7a. But that reasoning cannot be reconciled with *Kovacs*, in which this Court held that the injunction was a dischargeable claim precisely because the debtor could comply only by spending money to hire a contractor. 469 U.S. at 283.

The Second Circuit rested its categorical ruling that an order relating to "current pollution" is not a "claim" on the fact that this Court in *Kovacs* held that the debtor's *prospective* duty not to pollute was not discharged because "a person or firm in possession of a site 'may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.'" *Chateaugay*, 944 F.2d at 1008-09 (quoting 469 U.S. at 285). Here too, the Sixth Circuit correctly refused to narrow the meaning of "claim" so dramatically. This Court held that the injunction to

"clean up the Chem-Dyne site" in *Kovacs* *was* a dischargeable "claim," 469 U.S. at 277, and that injunction unquestionably *was* directed at current pollution: it required the debtor to ameliorate "approximately 850,000 gallons of liquid wastes and 4,000 barrels of solid and semi-solid sludges," which were leaking the "carcinogenic pesticides endrin, dieldrin, and heptaclor" into "the Great Miami River and its tributary, *polluting* the water, killing fish and wildlife, and destroying natural resources." Br. of U.S., No. 83-1020, *Ohio v. Kovacs*, *supra*, at 5 (emphasis added). As this Court explained, "the ground itself remains permeated with toxic materials that must be removed if further pollution of the public waters is to be avoided." 469 U.S. at 278. By contrast, as discussed above, the debtor's distinct ongoing obligation not to pollute in the future was not a claim because it represented the ordinary obligation to follow the law, as opposed to a dischargeable burden on the debtor's estate.

For its part, the Third Circuit equally misreads this Court's precedent when it reasons that, "[u]nder *Kovacs*, what the state cannot do is force the debtor to pay money to the state; at that point, the state is no longer acting in its role as regulator, it is acting as a creditor." *Torwico*, 8 F.3d at 150. That reasoning "seemingly departed from [this] Court's decision in *Kovacs*," Collier Monograph, *supra*, § 6(1)(b), in which the "state" in reality had *no* right to seek cost recovery. Instead, the court had appointed a receiver – not a state official – to conduct the clean-up at the debtor's expense. Because USEPA has the same right in this case under Rule 70(a), *Kovacs* dictates

the conclusion that the clean-up obligation is a dischargeable "claim." *See also id.* ("the Third Circuit's decision in *Torwico* is in apparent conflict with the Supreme Court's own holding in *Kovacs* and with the decision of the Sixth Circuit in *United States v. Whizco, Inc.*"). The Third Circuit's decision has accordingly been justly criticized because it "denies individual debtors a fresh start and denies business debtors the ability to reorganize" in conflict with "fundamental policies of bankruptcy law." Heidt, *supra*, 56 U. PITT. L. REV. at 628.

3. The acknowledged conflict in the circuits is untenable and requires this Court's intervention. The question presented controls the financial responsibility for a significant number of environmental clean-ups around the nation. Under RCRA alone, USEPA has identified 6500 facilities requiring "corrective action." Hundreds of additional sites are subject to clean-up orders under other federal environmental statutes, including CERCLA.

The importance of the question presented is significantly amplified by the prospect that many corporations with environmental liabilities will be driven into bankruptcy as a result of the current economic crisis. *See, e.g.*, Leonard P. Goldberger, *SOFA Question 17 and the Day of Reckoning for Environmental Remediation Claims*, 9 AM. BANKR. J. 42, 43 (2009) (characterizing the ruling below as "significant," and observing that the dischargeability of clean-up orders will "have important implications in all of the chapter 11 cases involving environmental liabilities that will necessarily be filed as a result of the current economic situation"). "Unfortunately,

despite the economic importance of the *many hundreds of cases* involving this question, the federal courts have failed to provide a clear answer." David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unasked Questions*, 13 VA. ENVTL. L.J. 185, 186 (1994) (emphasis added).[2]

It is furthermore essential that this Court resolve the conflict sooner rather than later. The government, corporations bearing clean-up obligations, and the third parties who may acquire the assets of those corporations in a bankruptcy reorganization all require guidance on the circumstances in which environmental liabilities are dischargeable claims or instead pass through bankruptcy.

In sum, certiorari should be granted to resolve the three-way circuit split squarely presented by this case, which arises directly from conflicting interpretations of this Court's precedent.

[2] For examples of cases in which the question presented is currently pending, *see, e.g.*, *In re Lyondell Chemical Co.*, No. 09-10023 (filed Jan. 6, 2009) (Bankr. S.D.N.Y.); *In re Chemtura Corp.*, Case No. 09-11233 (REG) (filed Mar. 18, 2009) (Bankr. S.D.N.Y.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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