No. 19A1051

IN THE
Supreme Court of the United States

COUNTY OF SAN MATEO, ET AL.

Applicants,

v.

PEABODY ENERGY CORPORATION,

Respondent.

On Application for Recall of Mandate and Stay Pending Petition for Certiorari from the United States Court of Appeals for the Eighth Circuit

RESPONSE IN OPPOSITION TO APPLICATION FOR RECALL OF MANDATE AND STAY PENDING PETITION FOR CERTIORARI

Heather Lennox
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114

Jaimie L. Mansfield
John G. Willard
ARMSTRONG TEASDALE, LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, MO 63105

Matthew C. Corcoran
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

Shay Dvoretzky
Counsel of Record
Parker A. Rider-Longmaid
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001-2113
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Respondent

June 18, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

INTRODUCTION

For the fifth time, Applicants San Mateo County, the City of Imperial Beach, and Marin County, California—the Municipalities—request a stay so they can again argue that their demand for massive abatement funding is not a "right to payment" constituting a "claim" under the Bankruptcy Code, 11 U.S.C. § 101(5). The Bankruptcy Court, the District Court, and the Eighth Circuit all correctly rejected that argument, and the Eighth Circuit's decision does not conflict with the decisions of this Court or any other court of appeals. Contrary to the Municipalities' argument, the Second, Third, Fifth, Seventh, and Eighth Circuits all agree on the governing federal standard: an equitable remedy is a dischargeable "claim" under the Bankruptcy Code if the underlying substantive law makes a payment remedy an available alternative. In a three-decades-old opinion, the Sixth Circuit takes a different approach, asking whether the equitable remedy requires expenditure of money as a practical matter. But that approach would make no difference to the outcome here. In short, the Eighth Circuit's factbound, California law–intensive decision implicates no circuit conflict and does not warrant this Court's review. That should end the inquiry. In any event, the Municipalities cannot show a likelihood of prevailing on the merits or irreparable harm either.

The Municipalities have defied the Bankruptcy Court's order to comply with Peabody's confirmed chapter 11 plan of reorganization for two and a half years. Peabody and its many creditors have strong reliance interests in the finality of that plan. This Court should deny the application to recall and stay the mandate.

STATEMENT

A. Legal background

The issue in this case is whether several California public nuisance actions constitute "claims" dischargeable under the Bankruptcy Code. The Code "discharges the debtor from any debt that arose before the date of … confirmation" of a plan of reorganization. 11 U.S.C. § 1141(d)(1)(A). And because "debt" is "liability on a claim," *id.* § 101(12), the Bankruptcy Code provides that all "claims," as defined in § 101(5), are discharged in bankruptcy.

"Congress intended … to adopt the broadest available definition of 'claim'" in the Bankruptcy Code. *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991). The Code defines a "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, secured, or unsecured.

11 U.S.C. § 101(5). A "right to payment," in turn, is "an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003) (citation omitted). And a "breach of performance" encompasses (among other things) "a breach of [a] statute." *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985).

Sections 101(5)(A) and (B) are so expansive that both may apply in any given case. In *Johnson*, for instance, the Supreme Court explained that a mortgage interest is a claim *both* because "the mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property" *and* because, "[a]lternatively, 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." 501 U.S. at 84.

This Court applied these principles in *Kovacs*. There, the Court held that a state court injunction ordering cleanup of a hazardous waste site was a "claim" under the Bankruptcy Code because "the cleanup duty had been reduced to a monetary obligation." 469 U.S. at 276, 282. After the state obtained the cleanup injunction, the Court noted, the state court appointed a receiver with power to use Kovacs' assets "to implement the judgment entry by cleaning up the … site." *Id.* at 276. The Court explained that the Code covers "a judgment for specific performance [that] may be satisfied by an alternative right to payment in the event performance is refused." *Id.* at 280 (citation omitted). And Ohio had sought "an alternative right to payment": "What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs." *Id.* at 282-83. Because "the cleanup order had been converted into an obligation to pay money," it was an obligation "dischargeable in bankruptcy." *Id.* at 283.

B. Factual and procedural background

1. Respondent Peabody Energy Corporation is a coal company. In April 2016, Peabody sought reorganization under chapter 11 of the Bankruptcy Code. *In re Peabody Energy Corp.*, 958 F.3d 717, 720 (8th Cir. 2020). In March 2017, the Bankruptcy Court confirmed the plan, and Peabody emerged the next month as a reorganized entity. *In re Peabody Energy Corp.*, No. 16-42529-399, 2017 WL 4843724, at *1 (Bankr. E.D. Mo. Oct. 24, 2017), *aff'd*, 599 B.R. 610 (E.D. Mo. 2019), *aff'd*, 958 F.3d 717. The plan of reorganization barred claims by governmental entities that had not been brought by October 11, 2016. *Id.* at *5.

The Municipalities did not file any proofs of claim or otherwise participate in the chapter 11 proceedings in any way. Instead, in July 2017, months after Peabody emerged from bankruptcy, the Municipalities sued Peabody and numerous other energy companies for allegedly contributing to global warming. *Peabody*, 958 F.3d at 720. In three complaints, the Municipalities asserted eight different California tort claims, only one of which is relevant here: representative public nuisance claims seeking abatement of the nuisance. *Id.* at 720-21. The defendants removed the suits to the United States District Court for the Northern District of California. *County of San Mateo v. Chevron Corp.*, No. 17-cv-4929, ECF No. 1; *City of Imperial Beach v. Chevron Corp.*, No. 17-cv-4934, ECF No. 1; *County of Marin v. Chevron Corp.*, No. 17-cv-4935, ECF No. 1.

2. a. In October 2017, the Bankruptcy Court held that all of the Municipalities' California claims fall within the discharge and injunction provisions of Peabody's confirmed chapter 11 plan of reorganization. The court therefore ordered the Municipalities to "promptly dismiss [those] Causes of Action with prejudice." *Peabody*, 2017 WL 4843724, at *12. The court reasoned that the Municipalities failed to participate in Peabody's bankruptcy and that all of their causes of action, which concerned alleged prepetition conduct, were discharged "claims" under 11 U.S.C. § 101(5). *Id.*

b. The Municipalities did not comply with the Bankruptcy Court's enforcement order. Instead, they waited more than a month to move for a stay pending appeal to the District Court. 8th Cir. App. (No. 18-3242), Vol. 21, at 9068-87. Following a prompt hearing, the Bankruptcy Court denied a stay. No. 16-42529 (Bankr. E.D. Mo.), ECF No. 3622 (Dec. 8, 2017).

The District Court likewise denied a stay. *Id.* at 5-8. The District Court reasoned that the Municipalities had "not established that they are likely to succeed on the merits of their claim. Nor will [they] suffer irreparable injury unless the stay is granted," because they may seek relief in their California lawsuits under Federal Rule of Civil Procedure 60(b) if the Bankruptcy Court's order is reversed. *Id.*

3. The District Court affirmed the Bankruptcy Court's enforcement order on the merits. *In re Peabody Energy Corp.*, 599 B.R. 610, 612 (E.D. Mo. 2019), *aff'd*, 958 F.3d 717. The District Court held that all of the Municipalities' causes of action are "claims" dischargeable under § 101(5) of the Bankruptcy Code. *Id.* at 613-14.

4. a. The Municipalities appealed to the Eighth Circuit and again sought a stay of the Bankruptcy Court's enforcement order. The Eighth Circuit affirmed and "necessarily also den[ied] the municipalities' request for a stay … pending appeal." *Peabody*, 958 F.3d at 725.

The Eighth Circuit held, as relevant here, that Peabody's chapter 11 plan discharged the Municipalities' representative public nuisance claims. *Id.* at 724-25. The court first explained that a "claim" is a "right to payment" or a "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.* at 724 (quoting 11 U.S.C. § 101(5)). In other words, the court reasoned, "Congress intended to adopt the 'broadest available definition' of the term," *id.* (quoting *Johnson*, 501 U.S. at 83), which "include[s] 'virtually all obligations to pay money,'" *id.* (quoting *In re Flight Transp. Corp. Sec. Litig.*, 874 F.2d 576, 583 (8th Cir. 1999)). The Municipalities' representative public nuisance claims fit the bill, the court concluded, because, "[i]n California, a party who commits a public nuisance can be ordered to pay into a fund, overseen by a receiver, to remedy or eliminate the hazard complained of rather than being ordered to clean up the nuisance themselves." *Id.* (citing *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 569-70 (Cal. Ct. App. 2017)).

The court of appeals rejected the Municipalities' argument that their representative public nuisance causes of action are not "claims" because they seek only abatement of a nuisance and cannot recover damages. *Id.* "'[E]quity often orders payment[s]' that can be discharged in bankruptcy," the court explained, just as it does here. *Id.* (quoting *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009)). And, the court continued, "[i]t does not matter that the municipalities do not request that Peabody be ordered to pay into an abatement fund," because the option for "a

California court [to] order [such relief] is sufficient to make the claim dischargeable." *Id.* (citing *In re Torwico Elecs., Inc.*, 8 F.3d 146, 150 (3d Cir. 1993); *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991)). Such an order "would convert the requirement to abate a nuisance into an 'obligation[] to pay money.'" *Id.* For those reasons, the Eighth Circuit explained, "[t]his case is … unlike other cases that the municipalities point to where the relevant equitable remedy was not convertible into a monetary obligation." *Id.* (distinguishing *Apex Oil*, 579 F.3d at 736 (7th Cir.), and *Torwico*, 8 F.3d at 150 (3d Cir.)).

The Eighth Circuit also rejected the Municipalities' argument that it somehow made a difference that the money would be paid into an abatement fund rather than directly to the Municipalities. *Id.* at 724-25. The court of appeals noted the breadth of the definition of "claim." The Eighth Circuit observed, moreover, that in *Kovacs*, "in holding that obligations to pay for environmental cleanup are subject to discharge," this Court "paid little attention to the fact that those payments would go to a receiver." *Id.* at 725 (discussing *Kovacs*, 469 U.S. at 283).

b. Although the Eighth Circuit issued its opinion and judgment on May 6, 2020, the Municipalities waited until May 22, 2020, to move to stay the mandate pending disposition of a cert petition. On May 27, 2020, the court summarily denied the motion and issued its mandate.

Although all three lower courts have denied the Municipalities' stay requests and rejected their merits arguments, the Municipalities *still* have not complied with the Bankruptcy Court's enforcement order.

5. In the meantime, the California federal district court to which the Municipalities' suits were removed remanded the Municipalities' lawsuits to state court, but stayed its order pending appeal to the Ninth Circuit. *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937, 939 (N.D. Cal. 2018); Order, *id.*, No. 17-cv-4929, ECF No. 240 (Apr. 9, 2018).

On May 26, 2020, the Ninth Circuit affirmed the California federal district court's removal order. *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020). On June 8, 2020, the Ninth Circuit extended the time to file a rehearing petition to July 9, 2020. The cases remain before the Ninth Circuit. No rehearing petition has been filed, and the district court's stay of its remand order remains in effect.

REASONS FOR DENYING THE APPLICATION

Stays pending disposition of cert petitions are reserved for "extraordinary cases," *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)), which this case is not.

An applicant seeking recall and stay of the mandate must show (1) a "reasonable probability" that the Court will grant review; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood of "irreparable harm" if a stay is denied. *Id.* "[I]n a close case it may be appropriate to 'balance the equities.'" *Id.*; *accord Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). But a "lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity." *Williams v.*

Zbaraz, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). Thus, "[d]enial of such in-chambers stay applications is the norm." *Conkright*, 556 U.S. at 1402.

There is no reason to depart from that result here. The Municipalities have not come close to making the necessary showings. Most importantly, this case does not implicate any circuit conflict. And even if the Municipalities could make all the required showings, the Court should not exercise its discretion to countenance the Municipalities' continuing delay tactics.

The Municipalities first claim that there is a circuit split about how to determine whether a cause of action is a dischargeable "claim" in bankruptcy. But the Second, Third, Fifth, and Seventh Circuits, together with the Eighth Circuit here, all apply the same test. They reach varying outcomes simply because of differences in the laws governing the underlying causes of action. *See Peabody*, 958 F.3d at 724 (distinguishing *Apex Oil*, 579 F.3d at 736 (7th Cir.), and *Torwico*, 8 F.3d at 150 (3d Cir.)). A thirty-two-year-old Sixth Circuit case takes a different approach, but it would produce the same outcome here. And the Municipalities cite no holding—because there is none—that a "right to payment" somehow loses its status as a "claim" just because the underlying substantive law directs the funds to be paid to a receiver rather than directly to the creditor. This Court rarely grants certiorari to review a circuit court's application of a standard when it implicates no split, and that is especially true when the result turns on an underlying question of state law, as it does here. The Court need not even inquire into the other stay factors.

In any event, the Municipalities cannot show any likelihood that this Court would reverse even if it granted review. The Municipalities do not confront the Bankruptcy Code's text and its expansive definition of the term "claim." They barely make any textual argument at all. Instead, they delve into the minutiae of California law and complain about the consequences they say will follow from the Eighth Circuit's decision. But even if policy disagreement were a reason to ignore statutory text (and it is not), the Municipalities' policy arguments, like their circuit split arguments, are unfounded. In this context, as in many others, the Bankruptcy Code looks to underlying federal or state law for the outcome. Where the underlying law provides for a "right to payment," as it does here, it creates a "claim" in bankruptcy. Neither the Bankruptcy Code nor any authority the Municipalities cite limits that rule to rights to payment payable directly to the creditor, much less to a governmental creditor when the law directs payments to be made to a state court receiver. And this Court's cases confirm that there is no such statutory limit.

The Municipalities' irreparable harm and balance-of-equities arguments also fail. They cannot show irreparable harm, because reversal in this case would allow them to reinstate their California law claims under Federal Rule of Civil Procedure 60(b)(5). Conversely, the Municipalities' ongoing refusal to comply with a Bankruptcy Court order—which has been upheld twice on appeal and that three courts have now refused to stay—should be enough for this Court to decline to exercise its discretion even if the Municipalities could make the required showings on the stay factors.

This Court should deny the application to recall and stay the mandate.

I. The Court is unlikely to grant review, much less reverse

A. The decision below implicates no circuit conflict

The Municipalities claim that the Eighth Circuit's decision conflicts with decisions of the Second, Third, Fifth, and Seventh Circuits. They are wrong. The parties extensively discussed most of those cases in their briefing before the Eighth Circuit, and the court of appeals correctly distinguished them in its opinion. *Peabody*, 958 F.3d at 724. In brief, the Second, Third, Fifth, Seventh, and Eighth Circuits all agree that an equitable remedy is a "claim" dischargeable in bankruptcy if the underlying substantive law makes a payment remedy an available alternative. *See id.* The varying outcomes in the cases resulted from differences in the underlying laws, not disagreement about the correct interpretation of the Bankruptcy Code. While some underlying laws make monetary relief available as an alternative to specific performance (and thus give rise to "claims"), other laws demand only performance and make no monetary alternative available (and thus do not give rise to "claims"). Although a stale Sixth Circuit case takes a different approach, asking whether an order would require the debtor to spend money as a practical matter, it would not produce a different outcome here.

Further, except for the Eighth Circuit's decision below, none of the cases addresses what the Municipalities view as the critical question in their case: whether it matters that the payment is made to a third party (such as a receiver for an abatement fund) rather than the creditor.

1. As noted, the Eighth Circuit held that the Municipalities' representative public nuisance causes of action are dischargeable "claims" under the Bankruptcy Code because they could be converted into "obligation[s] to pay money." *Peabody*, 958 F.3d at 724. As the court explained, a "claim" includes a "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.* (quoting 11 U.S.C. § 101(5)). That broad definition encompasses "virtually all obligations to pay money." *Id.* The court rejected the Municipalities' argument that it mattered that a receiver would receive the money: California law allows courts to impose "obligations to pay money" all the same. *Id.* (citing *ConAgra*, 227 Cal. Rptr. 3d at 569-70). And, as the Eighth Circuit noted, its decision followed this Court's approach in *Kovacs*. This Court, "in holding that obligations to pay for environmental cleanup are subject to discharge, paid little attention to the fact that those payments would go to a receiver, apparently assuming that did not disqualify the right to payments from being a 'claim.'" *Id.* at 725 (citing *Kovacs*, 469 U.S. at 283).

2. Consistent with the Eighth Circuit's reasoning below, the Seventh Circuit in *Apex Oil* held that an injunction under the Resource Conservation and Recovery Act (RCRA) ordering the debtor to clean up a contaminated site was not a "claim" because the RCRA "does not authorize *any* form of monetary relief." 579 F.3d at 735-36 (emphasis in original). The court distinguished that RCRA injunction from the claim in *Kovacs*. *See id.* at 737. In *Kovacs*, the Seventh Circuit explained, "[t]he receiver … was seeking money rather than an order that the debtor clean up the contaminated site," and "[t]hat was a claim to a 'right to payment.'" *Id.* The Seventh Circuit's decision is consistent with the Eighth Circuit's decision here, and this case would have come out the same way in the Seventh Circuit. Although the RCRA does not authorize monetary relief, California law does.

The Municipalities nonetheless claim that the Seventh Circuit "rejected the defendant's proposed 'arbitrary' distinction 'between injunctions that the defendant can comply with internally and injunctions that it has to hire an independent contractor to achieve compliance with,' because," in their view, "'whether a polluter can clean up his pollution himself or has to hire someone to do it has no relevance to the policy of either the Bankruptcy Code or [RCRA].'" Appl. 12-13 (quoting *Apex Oil*, 579 F.3d at 738). That argument misses the point. The dispositive factor in *Apex Oil* was *the RCRA*, not the Seventh Circuit's interpretation of the Bankruptcy Code. Under the RCRA, an injunction cannot be converted into "*any* form of monetary relief." *Apex Oil*, 579 F.3d at 736. The debtor in *Apex Oil* was merely arguing about the various ways that a specific performance order might affect its finances. *See id.* at 737-39. The court responded that those arguments were irrelevant given that the RCRA created no right to monetary relief whatsoever.

But the Seventh Circuit did *not* hold that the same result would obtain where, as here, the underlying law *does* authorize monetary relief beyond a specific performance order. To the contrary, the court recognized that "equity often orders payment," in which case such "equitable remedies" *are* "dischargeable" claims. *Id.* at 736; *accord Peabody*, 958 F.3d at 724 (quoting *Apex Oil*, 579 F.3d at 736). Although the RCRA happens to provide equitable remedies that do not order payment, here California law *does* authorize a court to order payment—that is, "the claim gives rise to a right to payment … , rather than merely imposing a cost on the defendant." *Apex* Oil, 579 F.3d at 738. There is thus no conflict between this Court's decision here and the Seventh Circuit's decision in *Apex Oil*.

3. The Eighth Circuit's decision here is also consistent with the decision of the Fifth Circuit in *Matter of Davis*, 3 F.3d 113 (5th Cir. 1993). In *Davis*, the Fifth Circuit held that certain equitable remedies to enforce a fraud judgment were not dischargeable "claims" under § 101(5) because, "[u]nder [the] circumstances" of the case, "Texas law does not view the payment of money as an alternative." *Id.* at 116-17. More specifically, (1) a "trust remedy does not have a money damage alternative"; instead, it "is analogous to an injunction preventing … future wrongs"; (2) "the remedy of reformation" is "a prospective remedy imposed 'in order to prevent further inequitable conduct,'" so, again, "[m]oney is not an alternative"; and (3) although forced sale of property may generally be available as "an alternative" to "partition in kind of the property," it was "unavailable given the jury findings in this case." *Id.* at 117. The Fifth Circuit expressly declined to address "the dischargeability" of debts that might arise from the appointment of a receiver. *Id.*

The Fifth Circuit's analysis comports with the Eighth Circuit's here. In *Davis*, no monetary alternative was available as a matter of Texas law for each of the remedies in question. Here, in contrast, a California court *can* convert an abatement injunction into an obligation to make abatement payments. *Peabody*, 958 F.3d at 724. Despite the Municipalities' attempt to characterize *Davis* as requiring "money proceeds that would be transferred *directly to* the plaintiff," Appl. 14, no such requirement (or language) appears in the Fifth Circuit's opinion.

4. The Eighth Circuit's decision is likewise consistent with the decisions of the Third Circuit in *Torwico*, 8 F.3d 146, and the Second Circuit in *Chateaugay*, 944 F.2d 997. Those courts applied the same test the Eighth Circuit applied here and the Seventh Circuit applied in *Apex Oil*, and would reach the same result here.

a. In *Torwico*, the Third Circuit held that an order to "stop or ameliorate ongoing pollution" under New Jersey law was not a "claim" because "the state … neither seeks money nor has a right to payment under the statutory authority asserted or the Order imposed." 8 F.3d at 151. The order obligated the debtor to clean up the waste and provided no option for payment instead. *Id.* at 150-51 & n.6. In addition, the court looked to *Kovacs*, noting that there "the state sought from Kovacs … money to fund the cleanup." *Id.* at 148-49 (discussing *Kovacs*, 469 U.S. at 284-85). Here, unlike *Torwico*, state law provides for an alternative payment option.

b. In *Chateaugay*, the Second Circuit held that an Environmental Protection Agency order was a "claim" in bankruptcy where the EPA had the option to remove the waste itself and sue "to recover the response costs." 944 F.2d at 1008. The court explained that an order "is a 'claim' if the creditor obtaining the order had the option" to "convert[] the injunction into a monetary obligation." *Id.*

5. The Municipalities make a last-ditch effort to show that the Eighth Circuit disagrees with these other courts by using selective quotations (at 12-15) to suggest that it matters that a receiver rather than the Municipalities would receive the payment. But they have not supported that contention with any authority, much less any holding in *Apex Oil*, *Davis*, *Chateaugay*, or *Torwico* (or any other case). That is unsurprising, because none of those decisions draws any such distinction. And the courts in *Apex Oil*, *Chateaugay*, and *Torwico* all explicitly recognized that a *receiver* was seeking money in *Kovacs*. *Apex Oil*, 579 F.3d at 737; *Chateaugay*, 944 F.2d at 1008-09; *Torwico*, 8 F.3d at 148. None of those courts addressed whether the right to payment must be a right to payment of money directly to the creditor.

Indeed, those decisions had no reason to address the identity of the recipient, because when they found no "claim" they relied on the absence of any right to payment *altogether*. Thus, the courts were not choosing their language with precision to address any argument like the one the Municipalities advance here. In *Apex Oil*, the Seventh Circuit reasoned that the RCRA "does not authorize *any* form of monetary relief." 579 F.3d at 736-37. And the Solicitor General recognized in his brief in opposition to certiorari that the Seventh Circuit had *not* decided whether a "right is a dischargeable 'claim' if it confers a 'right to payment' on some *other* entity." Br. for the United States in Opp. 18 n.10, *Apex Oil Co. v. United States*, No. 09-1023, 2010 WL 2709833.

Likewise, in *Davis*, the Fifth Circuit concluded that "Texas law does not view the payment of money as an alternative" to any of the equitable remedies at issue. 3 F.3d at 117. Again, no conflict with the Eighth Circuit's decision there. And the Second and Third Circuits in *Chateaugay* and *Torwico* noted that damages and reimbursement of response costs were unavailable simply as part of their finding that *no* right to payment was available under the statutes at issue. *See* 944 F.2d at 1008-09; 8 F.3d at 149-51. In other words, not one of the four decisions addressed whether an order requiring payment into an abatement fund qualifies as a "right to payment," much less held that it does not, because there was no indication in any of the cases that abatement funds were a possible remedy. But the way these other courts fashioned their rules provides every indication that, had those courts confronted the Municipalities' case, they would have reached the same result.

6. To the extent the Municipalities take issue with the Eighth Circuit's understanding of—or even simply the operation of—California law, this Court is the wrong forum. The Court has long "accord[ed] great deference to the interpretation and application of state law by the courts of appeals." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149-50 (2017) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 484, n.13 (1986)). Thus, the Court has long adhered to the practice of "ordinarily" not accepting and therefore "not review[ing], save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). The centrality (and idiosyncrasy) of California law is yet another reason this Court's review is unwarranted.

7. The Municipalities claim (at 2, 7, 19) that the Eighth Circuit here sided with the Sixth Circuit's decision in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988), splitting with the majority approach. That contention—again—relies on mischaracterizing the Eighth Circuit's decision, which sided with the Second, Third, Fifth, and Seventh Circuits. *Whizco* is an outlier case that the Sixth Circuit has not followed—in more than thirty years—to find a dischargeable "claim." And it wouldn't produce a different outcome here anyway.

In *Whizco*, the Sixth Circuit confronted the dischargeability of injunctive relief to abate violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which "does not allow the Secretary [of the Interior] the alternative remedy of reclaiming the site and demanding payment for the costs incurred." 841 F.2d at 148. The defendant claimed that it was impossible for him to perform the reclamation work himself, so compliance with the injunction would require "hir[ing] others." *Id.* at 149. The Sixth Circuit held that, "to the extent that fulfilling [defendant's equitable] obligation … would force the defendant to spend money, the obligation was a liability on a claim as defined by the Bankruptcy Code." *Id.* at 150-51.

Whizco's approach does not warrant this Court's review. *First*, it would produce no different outcome here. Peabody cannot abate global warming itself (including in California, where it has no operations, *see Peabody*, 2017 WL 4843724, at *4; 8th Cir. App., Vol. 11, at 4369-71). Thus, unsurprisingly, the Municipalities seek to extract massive sums from Peabody. *See Peabody*, 2017 WL 4843724, at *9 ("The Complaints seek damages and the disgorgement of all profits looking backward from the last fifty years" and seek "'to ensure that the Defendants … bear the *costs and burdens* of addressing the foreseeable harm.'"); *see also, e.g.*, 8th Cir. App., Vol. 22, at 9249, 9325, 9360, 9434, 9443, 9451, 9545-46, 9468, 9563. Whether through payments into an abatement fund or to a third party, Peabody's compliance with the injunction sought by the Municipalities "would require the payment of money," satisfying *Whizco*'s test for a dischargeable "claim." 841 F.2d at 150.

Second, "*Whizco* is an outlier and has never been applied by [the Sixth Circuit] outside the individual-debtor context or by any other court of appeals." Br. for the United States in Opposition 20, *Apex Oil*, 2010 WL 2709833. For that reason, the Solicitor General explained that "[f]urther review [was] not warranted" in *Apex Oil*, *id.* at 7, despite—as the Municipalities note here—the Seventh Circuit's rejection there of *Whizco*, *see Apex Oil*, 579 F.3d at 738.

B. The Eighth Circuit's decision is correct, and there is little chance this Court would reverse it even if it were certworthy

Because this case implicates no split, certiorari is unwarranted, and the stay inquiry should end. In any event, the Municipalities' merits argument is unavailing.

1. To begin, the Municipalities barely make any textual argument or engage with this Court's broad interpretation of the term "claim." As discussed, the Eighth Circuit's holding accords with the text of the Bankruptcy Code and Congress' desire "to adopt the 'broadest available definition' of the term" "claim." *Peabody*, 958 F.3d at 724 (quoting *Johnson*, 501 U.S. at 83). Notably, nothing in the text of the relevant provision requires that the "right to payment" be payable to the creditor. *See* 11 U.S.C. § 101(5). To the contrary, this Court's decisions all point against that argument. *See*

Kovacs, 469 U.S. at 276, 283 (irrelevant that money went to receiver); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990) (rejecting argument "that a 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"), *superseded by statute on other grounds as stated in Johnson*, 501 U.S. at 83 n.4; 2 Collier on Bankruptcy ¶ 101.05[3] (Lexis 16th ed. 2020) (*Davenport* makes clear that allegedly "'special' or unique characteristics of [certain] obligations" do not take those obligations "outside the scope of the definition" of "claim"). Imposing such an atextual limitation would narrow the Code's broad definition, contrary to elementary canons of statutory construction and the Code's recognized purpose. *See, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." (cleaned up)).

2. The Municipalities nonetheless claim that "there is at least a reasonable prospect of reversal … given the potentially damaging implications of this Court's ruling to environmental compliance cases and to the broad range of consumer protection and other cases." Appl. 21. But that argument, beyond departing from textual analysis, is little more than a general broadside on the Bankruptcy Code's promise of a fresh start. It is also directed at the wrong target, because, as explained above, whether the representative public nuisance cause of action is a dischargeable claim turns ultimately on California law. If California wants environmental obligations to pass through bankruptcy, it can model its laws on statutes, like the RCRA, that provide for no monetary relief whatsoever. But California law is what it is, not what the Municipalities want it to be.

3. The Municipalities again fall back on selective quotation, arguing that the United States opposed certiorari in *Apex Oil* by arguing that the obligation was not a dischargeable claim because "neither RCRA nor the relevant district court order allows petitioner to pay money *to the government* in lieu of carrying out the required cleanup." Appl. 22 (Municipalities' emphasis; quoting Br. for the United States in Opp. 13, *Apex Oil*, 2010 WL 2709833). As the court in *Apex Oil* explained, however, the RCRA provides for *no* monetary relief, and the government's choice of wording (or even its cert-stage litigating position) does not imply any requirement that a payment go to the creditor for there to be a "claim." 579 F.3d at 737.

4. Ultimately, the Municipalities' argument fails on its own terms. As even *they* explain it, their argument supports the Eighth Circuit's conclusion here that their representative public nuisance causes of action are dischargeable "claims." For example, the Municipalities claim that "an equitable remedy is dischargeable" if "the holder of an equitable claim can, in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment." Appl. 23. That is the case here: If a California court found that the Municipalities were entitled to relief, and Peabody would not or could not abate the nuisance itself, then the court could order abatement payments—"a money judgment." *See, e.g.*, *ConAgra*, 227 Cal. Rptr. 3d at 570 (order may require defendants to abate a nuisance *either by paying into a fund dedicated to that* *abatement purpose* or by undertaking the abatement themselves" (emphasis in original; quoting *County of Santa Clara v. Superior Court*, 235 P.3d 21, 34 (Cal. 2010)).[1] Similarly, the Municipalities say that "a dischargeable claim exists when under state law 'a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused.'" Appl. 24 (quoting H.R. Rep. No. 95-595, at 549 (1977)). Precisely so. Peabody would prevail even under the arguments the Municipalities advance.

II. The Municipalities cannot show irreparable injury or any other reason warranting recall and a stay of the mandate

The Municipalities have not shown that this case is certworthy, so the Court's inquiry should end there. But the Municipalities' other arguments are no better.

A. The Municipalities cannot show that they will be irreparably harmed if the mandate is not recalled and stayed

The Municipalities claim that they need a stay because if they "comply with the bankruptcy court's order and dismiss their claims against [Peabody] in the California action, [they] will have forfeited the very causes of action against [Peabody] they seek to preserve by pursuing certiorari." Appl. 25. That concern is illusory. The Municipalities would not "forfeit" their actions by complying with a binding court order, and compliance would not moot any cert petition.

[1] The California Supreme Court has recognized that public entities may entice outside counsel to prosecute representative public nuisance actions by offering some portion of a defendant's "potential exposure." *County of Santa Clara*, 235 P.3d at 34.

Instead, this case presents a classic example of the role of Federal Rule of Civil Procedure 60(b)(5): "[W]here Party A prevails on the merits in court 1, and subsequently uses that decision to execute judgment against Party B in court 2," "Rule 60(b)(5) enables Party B to set aside the judgment in court 2 if it prevails in an appeal of court 1's decision. Thus, the rule plainly contemplates that the entry of judgment in court 2 will not bar appeal of the judgment in court 1 where the judgement in court 2 is based upon the judgment in court 1." *Livera v. First Nat'l State Bank of N.J.*, 879 F.2d 1186, 1190 (3d Cir. 1989). That "possibility of effectual relief" means that the case would not become moot—and anyway, "uncertainty does not typically render cases moot." *Chafin v. Chafin*, 568 U.S. 165, 175, 180 (2013).

The Municipalities' other arguments are riddled with errors too.

First, the Municipalities suggest that they are entitled to a stay unless Peabody can identify a case "in which Rule 60(b)(5) has been applied to relieve a plaintiff from a voluntary dismissal with prejudice, as the bankruptcy court order would require here." Appl. 26. But Peabody does not need to find a case that is precisely analogous in all particulars. *The Municipalities* bear the burden of showing irreparable harm to support *their* request for *extraordinary relief*. They have not identified a single authority barring their resort to Rule 60(b)(5). And their logic does not make sense anyway. Court-ordered dismissal is not "voluntary."

Second, the Municipalities claim that "there is no California provision comparable to Rule 60 that Government Plaintiffs could pursue in state court." Appl. 26. But this case remains pending before the Ninth Circuit. Although the Ninth Circuit has affirmed the district court's remand order, the defendants' rehearing petition isn't due until July 9, 2020. If the Municipalities comply with the Bankruptcy Court's order, they will do so *in federal court*, where Rule 60(b)(5) applies. They cannot complain that they need a stay delaying their obligation to dismiss their claims because, if that obligation is delayed until they are again before the California courts, dismissal will be irreversible in light of California procedure. Even if that's true, a stay is supposed to *prevent* irreparable harm, not *cause* it.

The Municipalities have not established that proposition of California law anyway. Years into this litigation, they still have not shown that California courts refuse litigants relief from a judgment later undermined by reversal of a related case on appeal. They do not bother to explain (at 26) why California Civil Procedure Code § 473(b) has not been or cannot be interpreted to reach situations like this one, whether under the term "mistake" or otherwise. *See also, e.g.*, *Ryan v. Rosenfeld*, 395 P.3d 689, 690 (Cal. 2017) ("Section 663 of the Code of Civil Procedure allows an aggrieved party in a civil case to move the trial court to vacate its final judgment.").

Third, the Municipalities complain that they may lose "their right to obtain an appellate decision" here absent a stay. Appl. 27. But the Municipalities have no right to this Court's review, and their case is not certworthy anyway.

B. This is not a close case, but the equities do not favor recall and a stay anyway

The Municipalities also contend (at 27) that the equities weigh in favor of recall and a stay. But this is not a "close case," so there is no need to "balance the equities and weigh the relative harms." *Hollingsworth*, 558 U.S. at 190. Regardless, the Municipalities' argument is flawed for several reasons.

First, Peabody has continued to incur costs defending against the California action in the Ninth Circuit appeal, and defense costs will skyrocket if and when the cases are remanded to state court, as the Ninth Circuit ordered. To the extent the Municipalities contend that Peabody likely will not incur additional costs "given the litigation's slow and limited pace to date," Appl. 27, they confirm *Peabody's point* that they can still dismiss their suits in federal court, thus preserving later resort to Rule 60(b)(5) even once the cases are remanded to state court. *Supra* pp. 22-24. The Municipalities cannot have it both ways.

Second, a stay would *harm* the public interest by undermining the Bankruptcy Code's interest in finality and Peabody's creditors' reliance on the confirmed chapter 11 plan of reorganization. A principal purpose of bankruptcy is to give the debtor a "fresh start," *e.g.*, *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018). The process is effective because the discharge operates against all creditors—even those, like the Municipalities, who choose not to participate. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). Yet the Municipalities want to circumvent the orderly distribution of assets during the bankruptcy and cut in line before the other creditors. Many parties beyond Peabody have an interest in making sure that does not happen. *See In re Peabody Energy Corp.*, 933 F.3d 918, 927 (8th Cir. 2019) (stating, in decision upholding Peabody's chapter 11 plan, that "[t]he plan garnered tremendous consensus—all twenty classes of creditors voted overwhelmingly to approve the plan and approximately 95% of the Debtors' unsecured creditors agreed to participate in" a successful multilateral settlement agreement).

Finally, rule-of-law principles also counsel strongly against a stay here. The Municipalities have played "heads I win, tails you lose" for more than two years. Even though the Eighth Circuit, the District Court, and the Bankruptcy Court have all declined to stay the Bankruptcy Court's order, the Municipalities still refuse to comply with it. Showing no sense of urgency at all, they asked the Eighth Circuit for the maximum possible time—150 days—just to decide *whether* a cert "petition will be filed." Mot. 21, No. 19-1767 (8th Cir. May 22, 2020). The Municipalities do not deserve even more time to flout the Bankruptcy Court's two-and-a-half-year-old command.

CONCLUSION

The Application for Recall of Mandate and Stay Pending Petition for Certiorari should be denied.

Dated: June 18, 2020

Respectfully submitted,

/s/ Shay Dvoretzky

Shay Dvoretzky
Counsel of Record
Parker A. Rider-Longmaid
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001-2113
(202) 879-3939
sdvoretzky@jonesday.com

Matthew C. Corcoran
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215

Heather Lennox
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114

Jaimie L. Mansfield
John G. Willard
ARMSTRONG TEASDALE, LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, MO 63105

Counsel for Respondent