No. 20-___

IN THE

Supreme Court of the United States

PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY TEXAS,

Petitioner,

v.

SHERWIN ALUMINA COMPANY, LLC AND SHERWIN PIPELINE, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Port of Corpus Christi Authority of Nueces County, Texas (the "Port Authority"), an arm of the State of Texas, owned an easement for roadway access over a portion of one of the debtors' property. In confirming the debtors' plan for reorganization, the Bankruptcy Court purported to divest the Port Authority of that property interest without the Port Authority's consent and without consideration.

A Fifth Circuit panel held that the Bankruptcy Court's *in rem* jurisdiction over the debtors' property allowed it to extinguish the Port Authority's property interest burdening that *res* without implicating the Port Authority's sovereign immunity. The court en banc denied rehearing by an 8 to 8 vote.

The interplay between the Bankruptcy Code and state sovereign immunity has provoked sharp disagreement in the Court's two latest cases: *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (5-4); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (7-2). Justice Thomas dissented in both.

The Question Presented is: whether a bankruptcy court's *in rem* jurisdiction over a debtor's property allows it to exercise *in rem* jurisdiction over the separate property of an arm of the State without that entity's consent and without violating the Port Authority's sovereign immunity?

RULE 29.6 STATEMENT

The Port Authority is an arm of the State of Texas.

RELATED PROCEEDINGS

United States Bankruptcy Court (S.D. Tex.)

In re Sherwin Alumina Co., LLC, et al., No. 16-20012 (bankruptcy reorganization proceeding).

In the Matter of Sherwin Alumina Co., LLC, et al. (Port of Corpus Christ Authority of Nueces County, Texas v. Sherwin Alumina Co., LLC, et al., No. 17-02031 (adversary proceeding) (judgment entered October 24, 2017).

United States District Court (S.D. Tex.)

Port of Corpus Christi Authority v. Sherwin Alumina Co., No. 2:17:cv-347 (judgment entered May 31, 2018).

United States Court of Appeals (5th Cir.)

In the Matter of Sherwin Alumina Co., LLC, et al. (Port of Corpus Christ Authority of Nueces County, Texas v. Sherwin Alumina Co., LLC, et al., No. 18-40557 (judgment entered February 27, 2020).

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OPINIONS BELOW

The superseding opinion of the United States Court of Appeals for the Fifth Circuit is reported at 952 F.3d 229. App. 23a. The superseded panel opinion is reported at 932 F.3d 404. App. 12a. The opinion of the United States District Court for the Southern District of Texas is not reported and is not available online; it appears at App. 5a. The opinion of the United States Bankruptcy Court for the Southern District of Texas is not reported and is not available online; it appears at App. 1a.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this petition pursuant to 28 U.S.C. § 1254(1), in that the petition seeks review of a final judgment of a federal circuit court. The Fifth Circuit denied rehearing and entered judgment on February 27, 2020. On March 20, 2020, this Court entered its order extending the deadline for petition for certiorari to 150 days after denial of rehearing. This petition is therefore timely.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I Section 8 of the Constitution provides, in pertinent part, that Congress has the power "To establish . . . uniform Laws on the subjects of Bankruptcies throughout the United States."

The Eleventh Amendment to the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

INTRODUCTION

The court below held that the Bankruptcy Court's *in rem* jurisdiction over the ***debtors'*** property also gave it *in rem* jurisdiction over the ***Port Authority's*** separate property interest, notwithstanding the Port Authority's sovereign immunity, in a case to which the Port Authority was not even a party. That literally unprecedented holding goes far beyond any exception to sovereign immunity that this Court has ever contemplated. It is a profound insult to the dignity of the sovereign states.

It is uncontested that the Port Authority is an arm of the State of Texas and hence entitled to the State's sovereign immunity, including that of the Eleventh Amendment. *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied,* 517 U.S. 1203 (1996). It is equally uncontested that, under Texas law, an easement owner "has a property right in these easements." *Houston Lighting & Power Co. v. State*, 925 S.W.2d 312, 315 (Tex. App. 1996). The Fifth Circuit's opinion acknowledges as much. App. 29a.

Despite the Port Authority's immunity, the Fifth Circuit held that the Bankruptcy Court's *in rem* jurisdiction over the debtor's property also extended to the Port Authority's property, in a bankruptcy proceeding in which the Port Authority was not a creditor and filed no claim. A "bankruptcy court's exercise of *in rem* jurisdiction over the debtor's estate can extinguish the state's interest burdening that *res* without implicating the Eleventh Amendment." App. 30a, *citing Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

This holding is unprecedented. *Hood* held that a bankruptcy court's *in rem* jurisdiction gave it power to reject a State's claim ***against the property of the estate***. Neither *Hood* nor any other opinion of this Court has held that a bankruptcy court could divest a State of ***its own property*** interest without the State's consent. This Court has on many occasions held that Congress cannot use its Article I powers to abrogate a State's sovereign immunity.

Moreover, the debtor accomplished this unconstitutional appropriation of the Port Authority's property literally in the dead of night. The first "notice" that the Port Authority had of that appropriation was buried in the middle of a 333-page proposed order confirming the plan of reorganization, filed after midnight on the day of the confirmation hearing.

Finally, the issue is of sufficient importance to warrant immediate review. The sovereignty of the States, and their accompanying immunity from private lawsuits, is at the heart of the delicate compromises that make up our federal system and the Constitution. This Court has held that, even after ratification of the Constitution, the States are entitled to the dignity of a sovereign state. Divesting the State of its property without its consent, without even compensation, is an affront to that dignity well worthy of this Court's attention.

STATEMENT OF THE CASE

In 1998, the Port Authority purchased approximately 1100 acres of shoreline property and an accompanying easement for roadway access to the property. The easement, created in 1928, gave the Port Authority roadway access over one of the debtors' property. The road, known as La Quinta Road, was

the only access to the Port Authority's shoreline property. In 2013, the parties modified the existing easement and recorded the modification.

The debtors filed their original disclosure statement and plan of reorganization in January 2016. The debtors amended those documents four different times. Neither the original documents nor any of the subsequent modifications referred to the Port Authority's easement directly or indirectly.

The debtors scheduled a confirmation hearing for 9:00 a.m. on February 17, 2017. At 12:13 in the morning of February 17, 2017, debtors filed a proposed confirmation order which, for the first time, proposed to divest the Port Authority of its easement. Buried on page 44 of a 333-page document was a definition of permitted encumbrances that included easements "recorded prior to July 1, 2009." The only easement recorded after that date was the Port Authority's 2013 modified easement on LaQuinta Road.

Obviously, the Port Authority had no meaningful opportunity to review a document filed in the middle of the night less than nine hours before the confirmation hearing. Debtors made no effort to inform the Port Authority of the proposed divestment of its easement. To the contrary, debtors' counsel told the Bankruptcy Court that any modifications were not material, and strongly implied that all entities whose interests were affected had had the opportunity to review and approve the newly-filed confirmation order.

The Bankruptcy Court confirmed the plan on the same day as the hearing. Thereafter, debtor sold its interest in the property to a third party. After the time to appeal the confirmation order had run, and after the

third-party sale closed, the assignee of the land encompassing the LaQuinta Road informed the Port Authority that the confirmation order had divested the Port Authority of its easement.

The Port Authority filed an adversary complaint alleging three causes of action: that the Bankruptcy Court lacked jurisdiction over the Port Authority's property pursuant to the Eleventh Amendment; that divestment of the Port Authority's easement was fraudulent; and that the "notice" given to the Port Authority violated due process. The Bankruptcy Court granted the debtors' motion to dismiss the first two counts and denied it with respect to due process. In doing so, the Bankruptcy Court held that it had "*in rem* jurisdiction to adjudicate the property interest of the Port." App. 3a. It cited no authority in support of that proposition.

The Port Authority appealed to the United States District Court for the Southern District of Texas. That Court affirmed, finding that, "under the *in rem* exception, a bankruptcy court's 'exercise of its *in rem* jurisdiction ***to discharge a debt*** does not infringe state sovereignty.'" App. 8a, *quoting Hood* (emphasis added). The District Court did not explain how that jurisdiction extended to elimination of a separate property interest owned by a State.

The Port Authority appealed to the Fifth Circuit. On August 6, 2019, the panel issued an order unanimously affirming the judgment. Citing *Hood*, the panel held that "a bankruptcy court's exercise of *in rem* jurisdiction over the debtor's estate can extinguish the state's interest burdening that *res* without implicating the Eleventh Amendment." App. 18a.

On August 20, 2019, the Port Authority filed a petition for rehearing *en banc*. The petition pointed out that *Hood* involved a ***claim*** by the State against property of the debtor – a *res* clearly within the bankruptcy court's *in rem* jurisdiction. The petition also argued that this Court had never held that a bankruptcy court's *in rem* jurisdiction over the debtor's property extended to *in rem* jurisdiction over a separate property interest owned by a State.

On February 27, 2020, the Fifth Circuit denied the petition by an equally divided vote of 8 to 8. Judge Edith Jones and the seven other dissenting judges correctly observed that, "[f]or the first time," the Bankruptcy Court had divested the Port of its property interest "without payment of any kind" and "without the Port's consent." App. 36a. This timely petition followed.

The Bankruptcy Court had jurisdiction of this case pursuant to 28 U.S.C. § 1334, in that this case is an adversary proceeding against debtors. The District Court had jurisdiction pursuant to 28 U.S.C. § 158(a), in that the Port Authority sought to appeal an adverse ruling by the Bankruptcy Court. The Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 in that the Port Authority sought to appeal a final adverse judgment by the District Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FIFTH CIRCUIT PANEL'S OPINION DIRECTLY CONTRADICTS THIS COURT'S HOLDINGS IN *TREASURE SALVORS*, *FISKE* AND *NEW YORK*.

The Court has repeatedly held that, as a general rule, Congress may not use its Article I powers to abrogate a State's sovereign immunity from private suit. "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996).[1] *Seminole Tribe* overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the only case in which the Court had held that Congress could generally use its Article I powers to override a state's sovereign immunity. 517 U.S. at 66.

Since *Seminole Tribe*, the Court has repeatedly held that, in general, "Congress may not abrogate state sovereign immunity pursuant to its Article I powers." *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 636 (1999). *Accord*, *Kimel v. Florida Board of Regents*, 528 U.S. 62, 78 (2000) ("Congress lacks power under Article I to abrogate the States' sovereign immunity"); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) (same); *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) ("this Court has consistently made clear that federal jurisdiction over suits against

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[1] In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Court retreated somewhat from this holding.

unconsenting States was not contemplated by the Constitution") (internal punctuation omitted).

Earlier this year, the Court unanimously reiterated its holding that "each State is a sovereign entity in our federal system" and that "it is inherent in the nature of sovereignty not to be amenable to a suit absent consent." *Allen v. Cooper*, 140 S.Ct. 994, 1000 (2020) (internal punctuation omitted). *Allen* also reaffirmed the general rule that "Congress could not abrogate state sovereign immunity under Article I." *Id.* at 1002 (internal punctuation omitted).

Contrary to the panel's assumption, there is no such thing as a general "*in rem* exception" to a government's sovereign immunity. In *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), an officer of Nordic Village embezzled corporate funds and used them to pay his private tax debt to the federal government. The trustee sued the government to recover the stolen property.

The trustee argued that the "bankruptcy court's in rem jurisdiction overrides sovereign immunity." 503 U.S. at 38. By a 7-2 vote, the Court rejected the argument: "we have never applied an in rem exception to the sovereign-immunity bar against monetary recovery." *Id.*

In *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), Treasure Salvors salvaged artifacts from a sunken Spanish galleon under a contract with the State. The contract assumed that the State owned the artifacts and required Treasure Salvors to deliver most of them to the State. In subsequent litigation between Treasure Salvors and the United States, in which Florida participated, the Court held that Treasure Salvors owned the artifacts. Treasure

Salvors invoked admiralty *in rem* jurisdiction against Florida, seeking a judgment that it rather than Florida owned the artifacts.

The plurality opinion held that the District Court "did not have power . . . to adjudicate the State's interest in the property without the State's consent." 458 U.S. at 682. The dissent agreed that a federal court cannot "adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent." *Id.* at 703 (White, J., dissenting).

In *Missouri v. Fiske*, 290 U.S. 18 (1933), a woman's heirs litigated to final judgment in federal court their interest in property held in trust. The State of Missouri filed pleadings in state probate court seeking to overturn the result of that judgment. The heirs argued that the federal court had taken jurisdiction of the *res* and asked it to enjoin the State from prosecuting its probate court claims.

The Eighth Circuit held that the District Court could issue such an injunction to protect its judgment, but this Court reversed based on the State's sovereign immunity:

> The exercise of the judicial power cannot be protected by judicial action which the Constitution specifically provides is beyond the judicial power. Thus, when it appears that a state is an indispensable party to enable a federal court to grant relief sought by private parties, and the state has not consented to be sued, the court will refuse to take jurisdiction. . . .
>
> The fact that a suit in federal court ***is in rem, or quasi in rem, furnishes no ground for***

> ***the issue of process against a nonconsenting state***.

290 U.S. at 28 (emphasis added).

In *In re State of New York*, 256 U.S. 503 (1921), the District Court issued admiralty "process in rem" against a tugboat owned by the State of New York and used for public purposes. 256 U.S. at 509. This Court issued a writ of prohibition against the exercise of such jurisdiction:

> To permit a creditor to seize and sell [public assets] to collect his debt would be to permit him in some degree to destroy the government itself. . . .
>
> . . . .
>
> The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt property of a state used and employed for public and governmental purposes.

Id. at 510.[2] *Accord*, *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 489 (1987) ("Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent . . . because of the fundamental rule of which

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[2] While *Treasure Salvors* and *New York* invoked admiralty *in rem* jurisdiction, the Court has relied on admiralty cases in determining the extent of bankruptcy jurisdiction. *Hood*, 541 U.S. at 451 ("no reason why the exercise of the federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction"); *Katz*, 546 U.S. at 362 ("citing admiralty and bankruptcy cases").

the [Eleventh] Amendment is but an exemplification"); *In re PennEast Pipeline Co.*, 938 F.3d 96, 110 (3rd Cir. 2019) ("general rule is a federal court cannot summon a State before it in a private action seeking to divest the State of a property interest . . . [a]nd the Supreme Court has consistently recognized that sovereigns can assert their immunity in *in rem* proceedings in which they own property").

The two cases on which the Fifth Circuit superseding opinion relied – *Hood* and *Katz* – are readily distinguishable. *Hood* held that a bankruptcy court may discharge a debt owed to a state without infringing on the Eleventh Amendment. The Court reasoned that a bankruptcy court has "exclusive jurisdiction over a debtor's property," such that a claim against that property is an "*in rem* proceeding." 541 U.S. at 447.

Such a holding makes sense. The Bankruptcy Code defines a "claim" as a "right to payment" whether disputed or not. 11 U.S.C. § 101(5). When a state asserts a "claim," therefore, it seeks to obtain some portion of the debtor's assets. Because those assets are part of the *res* over which the bankruptcy court has jurisdiction, it logically has jurisdiction over the claim and hence may discharge it.

Hood cautioned, however, that the exercise of "in *rem* jurisdiction to discharge a debt does not infringe state sovereignty" only "when the bankruptcy court's jurisdiction over the res is unquestioned." 541 U.S. at 448. Here, the Port Authority's property interest – the easement – was not a part of the debtors' *res*. It therefore could not be subject to the bankruptcy court's *in rem* jurisdiction.

The superseding opinion held that the Port Authority's "easement is like Tennessee's debt claim against Pamela Hood's estate," in that each interest "burden[s] the bankruptcy *res*." App. 30a. But they burden that *res* in fundamentally different ways. The claim in *Hood* sought to extract money from the debtor's remaining assets, thereby impairing the rights of other creditors.

By contrast, the Port Authority merely seeks to retain a property interest previously granted to the Port Authority and never owned in any way by the debtors. That interest is a road easement, used by the Port Authority, to allow the public to gain access to the Port Authority's shoreline property. That easement is precisely the kind of interest that *New York* holds cannot be divested without the Port Authority's consent. *Hood* emphasized that not "every exercise of a bankruptcy court's *in rem* jurisdiction" can avoid a State's sovereign immunity. 541 U.S. at 451 n.5

The panel also cited *Katz* for the proposition that the Bankruptcy Clause authorizes "limited subordination of state sovereign immunity." App. 16a, 28a. *Katz* held that bankruptcy courts have the power to "avoid preferential transfers and to recover the transferred property." 546 U.S. at 372. The Court offered two reasons for this conclusion, neither of which has the slightest application here.

First, a turnover order is "ancillary to and in furtherance of the court's *in rem* jurisdiction." 546 U.S. at 372. A preference is "best understood as that property that would have been part of the estate" but for the transfer. *Id.* n.10. So there is a reasonably close connection between the property subject to the preference and the bankruptcy court's *in rem* jurisdiction over the debtor's property.

An easement is very different. The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666, 673 (1999). *Accord*, *Marcus Cable Assocs., LP v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). In granting an easement, the owner relinquishes that right, at least in part. *Id.* A property interest in existence for almost a century, and owned by a State when the bankruptcy petition is filed, could never have been part of the debtors' bankruptcy estate. Asserting *in rem* jurisdiction over such an interest cannot possibly fit within the "limited subordination of state sovereign immunity in the bankruptcy arena" that *Katz* finds. 546 U.S. at 363.

Second, and more importantly, *Katz* relied on history. The ability to avoid preferential transfers "has been a core aspect of the administration of bankrupt estates since at least the 18th century." 546 U.S. at 372. Thus, in ratifying the Bankruptcy Clause, the States "acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy estate." *Id.* at 378.

There is no similar history permitting bankruptcy courts to exercise jurisdiction over easements or other property interests owned by a State as its separate property. While *Katz* retreated somewhat from *Seminole Tribe*, 546 U.S. at 363, the Court has not retreated from *Treasure Salvors*. It has never held that a federal court can divest a State of its admitted ownership in property.

On the contrary, as Judge Jones asserted in her dissent, this case is the first and only time a court has so held. App. 35a. In *Katz*, the Court was careful to note that not "every law labelled a 'bankruptcy law' could . . . properly impinge upon state sovereign immunity." 546 U.S. at 378 n.15. *Katz* identified three core bankruptcy *in rem* functions:

A. The "exercise of exclusive jurisdiction over all of the debtor's property";

B. The "equitable distribution of that property among the debtor's creditors"; and

C. The "ultimate discharge that gives the debtor a 'fresh start.'"

Id. at 363-64. Divesting a State of its separate property interest has nothing to do with any of those core functions.

To be sure, *Allen* did restate *Katz'* holding that States agreed in the plan of the convention "not to assert any sovereign immunity defense in bankruptcy proceedings." 140 S.Ct. at 1003 (internal punctuation omitted). But *Katz* also made clear that the "scope of this consent was limited" to "proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." 546 U.S. at 378. As previously explained, the Bankruptcy Court could never have had *in rem* jurisdiction over the Port Authority's easement. Nothing in *Allen* suggests that the Court meant to extend *Katz* to give bankruptcy courts *in rem* jurisdiction over the property of a State.

The general rule – restated many times by this Court – is that Congress cannot use Article I powers to avoid a state's sovereign immunity. The exception to that general rule invoked by the panel goes well

beyond any exception that this Court has ever found. For this reason alone, the Court should grant the petition. *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 219 (1967) (granting petition "to consider whether this holding conflicts with our decisions"); *Wilson v. Schnettler*, 365 U.S. 381, 383 (1961) (granting petition to "consider petitioner's claim that the judgment is repugnant to controlling rules and decisions of this Court").

II. THE COURT SHOULD GRANT THE WRIT BECAUSE OF THE CENTRAL ROLE THE STATES' SOVEREIGN IMMUNITY PLAYS IN THE CONSTITUTION.

On numerous occasions, this Court has recognized that the importance of an issue warrants review even in the absence of a circuit split. *E.g.*, *Reading Co. v. Brown*, 391 U.S. 471, 475 (1968) (granting certiorari "because the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court"). In *Missouri v. Jenkins*, 515 U.S. 70 (1995), the District Court ordered the "most ambitious and expensive remedial program in the history of school desegregation," 515 U.S. at 78, including a unique, district-wide salary increase. The Court granted certiorari "[b]ecause of the importance of the issues." *Id.* at 83. *Accord*, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255 (1981) (same); *Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961) (granting petition "because it presented novel questions as to the interplay of state and maritime law").

On several occasions, the Court has granted review of important issues even when there is no possibility of a circuit split. In *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955), the Court determined whether the Virgin Islands legislature had authority

to allow destination divorces. The "obvious importance of the issue" warranted review, 349 U.S. at 4, even though only the Third Circuit had appellate jurisdiction over the Virgin Islands and had already definitively answered the question.

In *United States v. Mitchell*, 463 U.S. 206 (1983), members of an Indian tribe sought to recover for alleged breach of fiduciary duty by the United States. The Court of Claims held that it had jurisdiction of those claims. This Court allowed review because of the "issues of substantial importance concerning the liability of the United States," 463 U.S. at 211, even though a circuit split was impossible. *Accord*, *United States v. Testan*, 424 U.S. 392, 397 (1976) (reviewing Court of Claims ruling "because of the importance of the issue").

Claims of immunity from suit are prominent among the kinds of issues sufficiently important to warrant such review, and for good reason. Immunity protects the defendant "not simply from liability, but also from standing trial." *Johnson v. Jones*, 515 U.S. 304, 312 (1995).

In *Clinton v. Jones*, 520 U.S. 681 (1997), for example, respondent urged the Court to deny review of the President's immunity claim because there was no circuit split and his petition was supported by no precedent. The Court nonetheless granted review because of the importance of the "potential impact of the precedent established by the Court of Appeals." 520 U.S. at 689-90.

In *Nixon v, Fitzgerald*, 457 U.S. 731 (1982), a whistleblower lost his job with the Air Force after testifying before Congress. "As the Court has not ruled on the scope of immunity available to a President of the

United States, we granted certiorari to decide this important issue." 457 U.S. at 741.

Similarly, the Court has held that cases invoking sovereign immunity present grounds for review despite the absence of a circuit split. In *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573 (1946), plaintiff sued to recover taxes it claimed that Utah had improperly assessed against it. The copper company prevailed in the district court but the Tenth Circuit reversed, holding that the relevant Utah statute did not waive the state's sovereign immunity from suit in federal court with sufficient clarity. "On account of the importance of the issues, we granted certiorari." 327 U.S 575. *Accord*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 264 (1997) ("important, preliminary question whether the Eleventh Amendment bars a federal court from hearing the Tribe's claim"); *Mitchell*, 463 U.S. at 211 (issue of federal government's waiver of sovereign immunity); *Ex parte Republic of Peru*, 318 U.S. 578, 586 (1943) (in case involving foreign state, "unless the sovereign immunity has been waived – the case is of such public importance and exceptional character" as to warrant mandamus).

The Port Authority respectfully submits that the panel decision qualifies as just such a question of exceptional importance that warrants a grant. A State's sovereign immunity from suit without its consent lies at the heart of the delicate compromises reflected in our federal system and the Constitution. It is more than a matter of comity; it is an inherent aspect of a State's sovereignty. It "goes to the core of our national government's constitutional design and therefore must be carefully guarded." *PennEast*, 938 F.3d at 108.

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Com'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). In ratifying the Constitution, the States surrendered some parts of their sovereignty. *Franchise Tax Board of California v. Hyatt*, 139 S.Ct. 1485, 1497 (2019). But that surrender was based on the "fundamental principle of *equal* sovereignty among the States." *Id.* (emphasis original).

For the most part, therefore, the States "entered the Union with their sovereignty intact." *South Carolina*, 535 U.S. at 751. An "integral component of that residuary and inviolable sovereignty . . . retained by the States is their immunity from private suits." *Id.* at 751-52 (internal punctuation omitted). *Accord*, *Hyatt*, 139 S.Ct. at 1493 ("States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"). State sovereign immunity is a "fundamental rule" of which the Eleventh Amendment is "but an exemplification." *In re State of New York*, 256 U.S. 490, 497 (1921).

Contrary to popular belief, this is not just a matter of protecting the States' treasuries. Rather, the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *South Carolina*, 535 U.S. at 760. Its "central purpose is to accord the States the respect owed them as joint sovereigns." *Id.* at 765. After ratification of the Constitution, the States "retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999).

Even when Congress unquestionably has the authority to abrogate the States' sovereign immunity under the Fourteenth Amendment, the Court has

emphasized that such action "upsets the fundamental constitutional balance between the Federal Government and the States." *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989). It places "a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine." *Id.* (internal punctuation omitted). *Accord*, *Railroad Com'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941) ("[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies").

The superseding opinion emphasized that the Bankruptcy Court's jurisdiction was *in rem* rather than *in personam*. App. 29a. The premise of that holding is that the Bankruptcy Court did have *in rem* jurisdiction over the Port Authority's property, a proposition wholly unsupported by any of the panel's authorities and directly contrary to *Fiske*, *New York*, and *Nordic Village*.

The superseding opinion also emphasized that the Bankruptcy Court "did not award affirmative relief nor deploy coercive judicial process against the Port." App. 29a. The opinion did not explain why that made any difference. An "adverse judgment in rem directly affects the property owner by divesting him of his rights in the property." *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977). And the "judicial seizure of the property" of a State "may be regarded as an affront to its dignity." *Republic of the Philippines v. Pimental*, 553 U.S. 851, 866 (2008) (internal punctuation omitted). *Accord*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 700 (1976) (same).

Hood itself makes clear that "the real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and plead-

ing." 541 U.S. at 454. Rather, the "essential nature ***and effect*** of the proceeding" control. *Id.* (emphasis added). The essential nature and effect of the Bankruptcy Court's order divesting the Port Authority of its easement is identical to what a lawsuit to accomplish that end would entail.

The Bankruptcy Court may not have entered a judgment for money damages against the Port Authority; it just took the Port Authority's property – a right of way essential to access to its shoreline property – without either consent or compensation. When the Port Authority exercises its powers of eminent domain, it at least must pay fair compensation. Here, the Bankruptcy Court has transferred public property to a private entity with no compensation at all – a truly bizarre result that demands correction by this Court.

The notion that a bankruptcy court's jurisdiction over the estate's property extends to an entirely separate property interest owned by a State is not only illogical and unprecedented; it has potentially serious consequences. As a general rule, "the interest acquired by a condemnor" under Texas Property Code § 21.045 "does not include the fee simple title to real property." As a result, the "estate usually acquired in land by condemnation proceedings is an easement." 32 Tex. Jur. 3d Eminent Domain § 107. Most Texas roads, therefore, rest on easements rather than fee title. *Harlingen Irrigation Dist. v. Caprock Communications Corp.,* 49 S.W.2d 520, 525 (Tex. App. 2001).

Moreover, the acquisition of a road easement also conveys the right to common carriers and utility companies to use the State's road easement for pipelines, sewers, communications systems, and other utilities that serve the public interest. *Harlingen*, 49 S.W.3d at 527. Under the superseding opinion, a

bankruptcy court would have plenary jurisdiction to cancel the State's road easement and all other sub-easements on a debtor's property. That would force not only the State to relocate the road, but would require common carriers and utilities to relocate their pipelines, sewers and communication systems at considerable expense and disruption, or to condemn those easements anew. A greater insult to the sovereignty of the State would be hard to imagine.

Finally, the opinion has serious implications for a number of future bankruptcy cases. States and state agencies are "among the most frequent" repeat "players in the bankruptcy business" – *i.e.*, those "whose interests are implicated in case after case." "Hood's In Rem Exception to State Sovereign Immunity," *Bankruptcy Law Letter* (July 2004). The Fifth Circuit's opinion exposes the property of all of them to uncompensated and involuntary taking.

CONCLUSION

For these reasons, the Port Authority respectfully prays that the Court grant its petition for certiorari.

Respectfully submitted,

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July 17, 2020

APPENDIX

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

[Filed October 24, 2017]

Chapter 11
Case No. 16-20012 (DRJ)
(Jointly Administered)
Adv. No. 17-02031

In re: SHERWIN ALUMINA COMPANY, LLC, *et al.,*[1]

Debtors.

PORT OF CORPUS CHRISTI AUTHORITY
OF NUECES COUNTY, TEXAS,

Plaintiff,

v.

SHERWIN ALUMINA COMPANY, LLC, *et al.,*

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART SHERWIN ALUMINA COMPANY, LLC'S MOTION TO DISMISS ADVERSARY COMPLAINT

(Docket No. 11)

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[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal identification number, are: Sherwin Alumina Company, LLC (2376); and Sherwin Pipeline, Inc. (9047). The service address for Sherwin Alumina Company, LLC is Alan J. Carr, Plan Administrator, c/o Drivetrain LLC, 630 Third Avenue, 21st Floor, New York, NY 10017.

On October 11, 2017, the Court held a hearing on the Motion to Dismiss the Adversary Complaint (the "Motion") [Mt. No. 11] filed by Sherwin Alumina Company, LLC, *et al.* ("Sherwin"). After considering the Motion, the response filed by Plaintiff Port of Corpus Christi Authority of Nueces County, Texas (the "Port"), Sherwin's Reply in Support of the Motion, and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

A. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334.

B. The contested matter is a core proceeding pursuant to 28 U.S.C. § 157.

C. The Court has the requisite authority to enter a final order with respect to the Motion.[2]

D. The parties do not dispute the standard for a Motion to Dismiss under Bankruptcy Rule 7012.

E. Pursuant to Bankruptcy Rule 7012, dismissal is appropriate where plaintiff fails to state a claim for which relief can be granted.

F. For the purposes of the Motion only, all allegations are taken as true and presumed in favor of Plaintiff.

G. Plaintiff has failed to state a claim under 11 U.S.C. § 1144 under FED. R. CIV. P. 9(b) or FED. R. CIV. P. 8.

H. As a matter of law, there is no evidence that the Confirmation Order was procured by fraud.

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[2] To the extent that the Court lacks authority to enter a final order in this matter, these findings of fact and conclusions of law should be construed as a recommendation of findings of fact and conclusions of law to the appropriate Article III Court.

I. There is no evidence, no argument, and no fact, that would justify repleading Count One seeking revocation of the Confirmation Order under § 1144.

J. Plaintiff has failed to state a claim under the Eleventh Amendment of the Constitution of the United States.

K. This Court has *in rem* jurisdiction to adjudicate the property interest of the Port at issue here.

L. There is no evidence, no argument, and no fact, that would justify repleading Count Two.

Based on the foregoing, and for reasons set forth orally and on the record at trial pursuant to FED. R. BANKR. P. 7052,

IT IS ORDERED ADJUDGED AND DECREED:

1. Plaintiff has failed to state a claim for revocation of the Confirmation Order under 11 U.S.C. § 1144. It would be futile to allow an amendment to the Complaint because there are no facts that could be plead that would support a claim under 11 U.S.C. §1144. Count I is dismissed with prejudice.

2. Plaintiff has failed to state a claim for violation of the Eleventh Amendment to the Constitution of the United States. It would be futile to allow an amendment to the Complaint because there are no facts that could be plead that would support a claim for Eleventh Amendment immunity. Count II is dismissed with prejudice.

3. The Motion is denied as to Count III without prejudice.

Signed: October 24, 2017.

/s/ David R. Jones
DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

Order submitted by:

Joshua A. Sussberg
Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022

Order approved as to form only:
/s/ Lynn Hamilton Butler (w/ permission)
Lynn Hamilton Butler
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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

[Filed May 30, 2018]

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Civil No. 2:17-CV-347

———

PORT OF CORPUS CHRISTI AUTHORITY,

Appellant,

vs.

SHERWIN ALUMINA COMPANY, LLC,

Appellee.

———

ORDER

The Court has considered the above-captioned bankruptcy appeal. For the reasons below, the Court AFFIRMS the bankruptcy court's decision on each issue presented.

I. Background

This case comes to the Court on an interlocutory appeal from the bankruptcy court. Appellant/Plaintiff Port of Corpus Christi Authority ("the Port") appeals the bankruptcy court's October 24, 2017, order granting in part and denying in part the motion to dismiss filed by Defendant/Debtor/Appellee Sherwin Alumina Company, LLC ("Sherwin Alumina"). The Court determines that oral argument is unnecessary in this case because the facts and legal arguments have been adequately presented and the decision process would

not be significantly aided by oral argument. *See* FED. BANK. R. 8019.

The Port alleges the following. On December 10, 2013, the Port obtained from Sherwin Alumina a road easement appurtenant along La Quinta Road on its real property. Dkt. No. 4-2 at 34.

Later, Sherwin Alumina filed for reorganization in the Bankruptcy Court for the Southern District of Texas. During those proceedings, Sherwin Alumina attempted to sell its real property under U.S.C. § 363(f), which allows a debtor to sell its property "free and clear" of liens and other interests. Sherwin Alumina filed its original disclosure statement and plan of reorganization on January 11, 2016. Dkt. No. 4-2 at 8. At an April 21, 2016, auction, Corpus Christi Alumina emerged as the successful bidder. *Id.* at 6

During proceedings to confirm the sale, Sherwin Alumina amended the reorganization plan four times, and the bankruptcy court held a confirmation hearing on February 17, 2017. *Id.* at 8-20.

The evening before the confirmation hearing, Sherwin Alumina filed its proposed confirmation order, which allowed certain "permitted encumbrances," including generally "such easements or encumbrances [that] were recorded prior to July 1, 2009. *Id.* at 19. This language implicitly indicated that the Port's easement would be discharged from the property by the sale. *Id.* at 18-20. Prior versions of the reorganization plan had stated that the property would be sold free of "encumbrances" and had included special exclusions for certain easements, but had mentioned or distinguished between easements recorded before or after July 1, 2009. *Id.* at 8-17. At the confirmation hearing, Sherwin Alumina's attorney

informed the bankruptcy court that the latest modifications to the plan documents, although "extensive," were not "material in any real way." *Id.* at 21. The bankruptcy court entered the confirmation order without objection. *Id.*

On February 27, 2017, Sherwin Alumina sold the property to Corpus Christi Alumina pursuant to the final confirmation order. *Id.* at 7. On March 31, 2017, Corpus Christi Alumina sold the same property to Cheniere Land Holdings, LLC ("Cheniere"). *Id.*

Also on March 31, 2017, Cheniere informed the Port that the confirmation order had stripped its easement from La Quinta Road. *Id.* The Port filed an adversary complaint again Sherwin Alumina, seeking revocation of the confirmation order as barred by sovereign immunity under the Eleventh Amendment, barred by fraud under 11 U.S.C. § 1144, and barred for failure to afford the Port due process. *Id.* at 1-26.

Sherwin Alumina moved to dismiss the Port's complaint. *Id.* at 78-26. After a hearing, the bankruptcy court granted the motion to dismiss as to the Port's sovereign-immunity and fraud counts, denied the motion as to the due-process count, and denied the Port's request to amend its complaint. *Id.* at 167-69

This interlocutory appeal followed. *See id.* at 170-73.

II. Analysis

a. Eleventh Amendment immunity

The Court reviews the bankruptcy Court's denial of Eleventh Amendment immunity *de novo. See McCarthy v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004).

The Eleventh Amendment bars "suits by individuals against nonconsenting states." *Id.* But under the *in*

rem exception, a bankruptcy court's "exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty," and a state is "bound by a bankruptcy court's discharge order no less than other creditors." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (citations omitted).

The *in rem* exception to sovereign immunity acts, in essence, to treat state parties the same as private parties when a bankruptcy court adjudicates interests in the *res*, including when it sells a debtor's property free and clear of other property interests via a § 363(f) sale. Therefore, the bankruptcy court in this case could discharge the Port's easement so long as it could discharge a similar easement held by a private party. In a § 363(f) sale, a debtor's property may be sold

> free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

An easement is an "interest in land owned by another person" and may therefore be sold under § 363(f). *Easement*, BLACK'S LAW DICTIONARY (10th ed. 2014). The bankruptcy court's *in rem* jurisdiction thus

includes an easement over land subject to a § 363(f) sale. Accordingly, the *in rem* sovereign immunity exception applies, the Port's easement could be discharged via the § 363(f) sale in this case, and the bankruptcy court correctly decided this issue.

b. Fraud under § 1144

The Court reviews *de* novo the bankruptcy court's dismissal of the Port's § 1144 count for failure to state a claim. *See Melder v. Morris*, 27 F.3d 1097, 1099.

A court should dismiss the complaint for failure to state a claim after "accepting as true all well-pled allegations of fact and dismissing only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thomas v. Smith*, 897 F.2d 154, 156 (5th Cir. 1989) (internal quotations omitted).

When alleging fraud, "a party must state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b). "This requires, at a minimum, that a plaintiff plead the 'who, what, when, where, and how' of the alleged fraud." *United States ex rel. Colquitt v. Abbott Laboratories*, 858 F.3d 365, 371 (5th Cir. 2017) (quoting *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997). "However, Rule 9(b) is read in connection with [FED. R. CIV. P. 8] which requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief.' " *Landry v. Air Line Pilots Ass'n Intern. AFL-CIO*, 892 D.2d 1238, 1264 (5th Cir. 1990) (quoting FED. R. CIV. P. 8).

A claim under 11 U.S.C. § 1144 must state the following traditional fraud elements:

> (1) that the debtor or proponent made a materially false representation or omission; (2)

> that the representation was either known to be false, or was made without belief in its truth, or was made with reckless disregard for the truth (i.e., scienter); (3) that the representation was made to induce the court to rely upon it; (4) the court did rely upon it; and (5) that as a consequence of such reliance, the court entered the confirmation order.

In re Davis Petroleum Corp., 385 B.R. 892, 912 (Bankr. S.D. Tex. 2008) (citations omitted).

> The bankruptcy court concluded that the Port had not stated a fraud claim. Dkt. No. 4-2 at 168-69. The Court agrees. Even when viewing all of the Port's well-pleaded facts as true and viewing them in the light most favorable to the Port, the Port fails to state a fraud claim under § 1144.

The alleged misrepresentation at issue is the statement by Sherwin Alumina's counsel at the February 17, 2017, confirmation hearing that "the plan that was filed last night has a significant amount of redlining . . . [w]hile these are extensive modifications, we don't believe that they are material in any real way." Dkt. No. 4-2 at 32.

The Port alleges that this statement was materially false because the newly filed proposed confirmation order generally excluded easements recorded since July 1, 2009, such as the Port's easement, from the definition of "permitted encumbrances," while earlier documents had not explicitly mentioned pre- or post-2009 easements or the Port's particular easement. But to state a claim, the Port must also allege how the language previously used in the asset purchase agreements, including that it would be sold "free and

clear of all Liens, Claims, charges, and other encumbrances" would have preserved the Port's easement; otherwise the change in language is immaterial. The Port has not done so. It therefore fails to state a fraud claim under 11 U.S.C. § 1144.

c. Futility of amendment

The Court reviews the bankruptcy court's denial of leave to amend the complaint for abuse of discretion. *Lewis v. Fresne*, 252 F.3d 352, 356 (5th Cir. 2001).

In its brief, conclusory request for leave to amend, the Port offered no new allegation or argument that it would present in an amended complaint. The bankruptcy court therefore did not abuse its discretion in denying leave to amend because of futility.

III. Conclusion

Accordingly, the Court AFFIRMS the judgment of the bankruptcy court.

SIGNED this 30th day of May, 2018.

/s/ Hilda Tagle
Hilda Tagle
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 6, 2019]

No. 18-40557

In the Matter of: SHERWIN ALUMINA COMPANY, L.L.C.;
SHERWIN PIPELINE, INC.,

Debtors.

PORT OF CORPUS CHRISTI AUTHORITY,

Appellant,

v.

SHERWIN ALUMINA COMPANY, L.L.C.;
SHERWIN PIPELINE, INC.,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, SMITH, and HIGGINSON, *Circuit Judges*.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

A bankruptcy sale extinguished an easement of the Port of Corpus Christi Authority, an arm of the State of Texas. The Port initiated an adversary proceeding against the debtors, Sherwin Alumina Company and Sherwin Pipeline Incorporated, seeking to invalidate the sale and regain its easement. The bankruptcy

court rejected the Port's sovereign immunity and fraud claims, and the district court affirmed. On appeal from the district court, we find no Eleventh Amendment violation or basis for a claim of fraud. We affirm.

I.

In 1998, the Port of Corpus Christi Authority purchased an 1,100 acre parcel near Corpus Christi Bay in San Patricio County, Texas, adjacent to land owned by the Sherwin Alumina Company, together with an easement granting use and access to a private roadway on the Company's land known as La Quinta Road. Fifteen years later, in 2013, the Port and Sherwin Alumina Company agreed to modify the easement, giving the Port permanent non-exclusive access along a specific portion of the road and across an adjoining drainage ditch.[1] The easement provided the primary means of commercial access to the Port's parcel.

Three years later, on January 11, 2016, Sherwin Alumina Company and Sherwin Pipeline Incorporated (collectively "Sherwin") filed voluntary petitions for Chapter 11 relief in the Bankruptcy Court for the Southern District of Texas. Sherwin also filed an initial Joint Plan for reorganization, proposing in relevant part to sell real property in the bankruptcy estate "free and clear of all Liens, Claims, charges and other encumbrances" under Section 363(f) of the Bankruptcy Code.

The bankruptcy court approved bidding procedures. The Port bid for a part of the bankruptcy estate, a port facility that did not include the La Quinta Road parcel. The Port conditioned its bid on "an access easement . . .

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[1] In 2015, the Port released broader rights it held from the unmodified pre-2013 easement.

over Seller's private roadway known as La Quinta Road . . . if Buyer has been unable to obtain such an easement before the Closing." On April 21, 2016, the Port and other bidders participated in an auction from which Corpus Christi Alumina emerged as the successful bidder.

In the following months Sherwin filed modified plans and associated purchase agreements in which encumbrances other than those deemed "permitted" would be stripped off the estate's property in the proposed sale, as authorized under Section 363(f) of the Bankruptcy Code. Permitted encumbrances would be defined in a future proposed confirmation order. None of these documents suggested that the Port's easement would be a permitted encumbrance.

Sherwin filed a final proposed confirmation order in the early hours of February 17, 2017, the day of the confirmation hearing. As with previous filings, the proposed confirmation order provided that the buyer would receive the property free and clear of all encumbrances, subject to a limited exception for permitted encumbrances. In the proposed order, Sherwin defined permitted encumbrances to encompass a number of specific servitudes—not including the Port's easement—as well as "easements or encumbrances . . . recorded prior to July 1, 2009." The definition was not redlined or otherwise identified as a modification. The Port was served with the proposed confirmation order. Later that day, the bankruptcy court held a hearing on the proposed plan and confirmation order, which the Port "attended" telephonically. During the hearing, Sherwin's counsel stated that the proposed order submitted earlier that day included "extensive modifications," but that Sherwin "d[id]n't believe that they are material in any real

way." The court entered the order without objection, confirming Sherwin's modified Plan. The Plan went into effect on February 27, 2017, on which date Sherwin sold its real property to Corpus Christi Alumina. On March 3, 2017, the Confirmation Order became final and non-appealable.

On March 31, 2017, Corpus Christi Alumina sold the land encompassing La Quinta Road to Cheniere Land Holdings LLC. Cheniere notified the Port that its easement had been extinguished by the sale of the land. As the time to appeal the confirmation order had expired, the Port filed an adversary complaint with the bankruptcy court, collaterally attacking the confirmation order as having been procured by fraud, barred by the state's sovereign immunity, and a denial of due process for want of notice. The bankruptcy court dismissed the claims of fraud and sovereign immunity, and denied dismissal of the due-process claim and leave to amend. The Port appealed the dismissals and denial of leave to amend to the district court, which affirmed. This appeal followed.

II.

A.

We have jurisdiction to hear the appeal of the district court's dismissals of the Eleventh Amendment and fraud claims.[2] We review cases originating in bankruptcy "perform[ing] the same function, as did the district court: [f]act findings of the bankruptcy court are reviewed under a clearly erroneous standard

[2] *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 44 (1993); 28 U.S.C. § 158(d)(1).

and issues of law are reviewed de novo."[3] At this stage, we take the well-pleaded facts as true, viewing them in a light most favorable to the plaintiff.[4] We review the denial of leave to amend for abuse of discretion.[5]

B.

Under the Eleventh Amendment, federal courts lack jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State,"[6] or the state's own citizens.[7] "States, nonetheless, may still be bound by some judicial actions without their consent,"[8] including a bankruptcy proceeding. Congress has the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[9] The Supreme Court has read the Clause "to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[10]

In *Tennessee Student Assistance Corporation v. Hood,* the Supreme Court held that a bankruptcy court's discharge of an individual's debt to the state of

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[3] *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007) (quoting *Nationwide Mut. Ins. Co. v. Ben Berryman Prods.*, 159 F.3d 941, 943 (5th Cir. 1998) (emphasis omitted)).

[4] *Matter of ATP Oil & Gas Corp.*, 888 F.3d 122, 125-26 (5th Cir. 2018).

[5] *Lewis v. Fresne*, 252 F.3d 352, 356 (5th Cir. 2010).

[6] U.S. CONST. amend. XI.

[7] *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004) (citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

[8] *Id*.

[9] U.S. CONST. art. I, § 8, cl. 4.

[10] *Cent. Virginia Catty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

Tennessee did not violate the Eleventh Amendment. Debtor Pamela Hood's educational debts were guaranteed by and later assigned to the state of Tennessee.[11] When Hood filed for bankruptcy and sought to have this debt discharged in an adversary proceeding, Tennessee protested that it did not consent to the proceeding, and that the bankruptcy court's discharge would violate the Eleventh Amendment.[12] The Supreme Court disagreed. It found that the discharge proceeding was an exercise of the bankruptcy court's *in rem* jurisdiction over the debtor's estate; the debtor sought no affirmative relief against the state, and the proceeding did not subject the state to any coercive judicial process.[13] The federal court's disposition of a bankruptcy estate within which a state has interests, where the proceeding is principally *in rem* and avoids coercive judicial process against the state,[14] does not implicate, let alone violate, the Eleventh Amendment.[15]

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[11] *Hood*, 541 U.S. at 444.

[12] *Id.* at 445.

[13] *Id.* at 450; *In re Soileau*, 488 F.3d at 307 ("[A]n *in rem* bankruptcy proceeding brought merely to obtain the discharge a debt or debts by determining the rights of various creditors in a debtor's estate—such as is brought here—in no way infringes the sovereignty of a state as a creditor.").

[14] *Hood*, 541 U.S. at 446 (analogizing to "*in rem* admiralty actions when the State is not in possession of the property").

[15] *Id.* at 451. *Hood* is consistent with the previous holdings of this court. In a pre-Hood case, *Texas v. Walker*, we similarly held that a bankruptcy court's discharge of a debt owed to the State of Texas was not a suit against the state, and therefore did not violate the Eleventh Amendment. 142 F.3d 813, 822 (5th Cir. 1998) ("Walker's entitlement to assert his discharge against the state's claims invoked no Eleventh Amendment consequences.

Under Texas law, the Port's easement is a non-possessory property interest in Sherwin's land.[16] That the servient land was within the bankruptcy estate is not disputed. Exercising jurisdiction over the Sherwin estate, and thus the servient land, the bankruptcy court approved a Section 363(f) sale "free and clear" of encumbrances, including the Port's La Quinta Road easement. The bankruptcy court did not award affirmative relief nor deploy coercive judicial process against the Port—it did not exercise *in personam* jurisdiction over the state.[17]

The Port argues that even if the encumbered land was within the court's jurisdiction, the La Quinta Road easement was its property, and not part of the bankruptcy estate, such that exercise of the bankruptcy court's *in rem* jurisdiction could not reach the easement. *Hood* instructs otherwise. The Port's easement is like Tennessee's debt claim against Pamela Hood's estate: the state holds an interest burdening the bankruptcy *res*. *Hood* holds that a bankruptcy court's exercise of *in rem* jurisdiction over the debtor's estate can extinguish the state's interest burdening that *res* without implicating the Eleventh Amend-

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The state never was hauled into federal court against its will in the bankruptcy.").

[16] *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."). The Port points to Texas law under which an easement is compensable if condemned under the State's eminent domain power. *City of Houston v. Northwood Mun. Util. Dist. No. 1*, 73 S.W.3d 304, 310 (Tex. App. 2001); *Houston Lighting & Power Co. v. State*, 925 S.W.2d 312, 314 (Tex. App. 1996).

[17] *Hood*, 541 U.S. at 453 ("The issuance of process, nonetheless, is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State.").

ment. Section 363(f) specifically provides that, in exercising core *in rem* jurisdiction over the bankruptcy estate, the court may strip others' interests—that is, property rights—in that *res.* Specifically, Section 363(f) provides that under certain limited circumstances the trustee may sell estate property "free and clear of any interest in such property of an entity other than the estate."[18] The Port argues that "the Debtors' attempt to sell the Port's Easement could not have complied with the limitations and safeguards of 11 U.S.C. § 363(f)." This argument is foreclosed. As the Port concedes, any Section 363(f) objection had to have been raised on direct appeal of the confirmation order and cannot be raised in this collateral adversary proceeding. We affirm the dismissal of the Port's Eleventh Amendment claim.

C.

Under Section 1144 of the Bankruptcy Code, "[o]n request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud."[19] The elements of a claim for fraud are (1) that the debtor or proponent made a materially false representation or omission to the court; (2) that

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[18] Those circumstances are that "(1) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (2) [the] entity [with the interest in the property] consents; (3) [the entity's] interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f).

[19] 11 U.S.C. § 1144.

the representation was made with knowledge of its falsity or reckless disregard for the truth; (3) that the representation was made to induce the court's reliance; (4) that the court actually relied upon the representation; and (5) the court entered the confirmation order in reliance on the representation.[20] A claim for fraud in an adversary proceeding must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b).[21] Under Rule 9(b) "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[22]

We need not proceed beyond the first element, because the Port fails to allege any false representation. During the confirmation hearing, Sherwin's counsel described last-minute changes to the proposed order as "extensive modifications" that were not "material in any real way." The Port contends this was a misrepresentation because Sherwin's last-minute changes "[f]or the first time . . . attempt[ed] to directly impact the Port's easement property rights"—in other words, the modifications sprang a trap on the Port, isolating its easement for extinguishment, a material

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[20] *In re Davis Petroleum Corp.*, 385 B.R. 892, 912 (Bankr. S.D. Tex. 2008).

[21] FED. R. BANKR. P. 7009; *In re Fornesa*, 2016 WL 2930459, at *3 (Bankr. S.D. Tex. May 13, 2016) ("Rule 9(b), FED. R. CIV. P., as made applicable by Bankruptcy Rule 7009, requires that fraud be pled with particularity. The particularity requirement requires that the pleading identify who, what, when, where, and how the alleged fraud was committed.").

[22] FED. R. CIV. P. 9(b); *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) ("At a minimum, Rule 9(b) requires that a plaintiff set forth the who, what, when, where, and how of the alleged fraud." (internal quotation marks and citation omitted)).

change that should have been announced as such to the bankruptcy court. But Sherwin's last-minute modifications to the proposed confirmation order had no such effect on the Port's easement. The Port's allegation that Sherwin's last-minute changes for the first time "stripp[ed] third party easement property rights" from its land is inaccurate. From Sherwin's initial bankruptcy filing, more than a year before the confirmation hearing, the debtor proposed a sale in which "all property of the Estates to be acquired by the Buyer . . . shall vest in the Buyer, free and clear of all Liens, Claims, charges, and other encumbrances." Under Texas law, an easement is a type of encumbrance.[23] From the beginning, by the general terms of Sherwin's proposed sale, the debtor proposed a Section 363(f) sale that would extinguish the Port's easement. The Port's actions indicate that it so understood the proposed sale: in its unsuccessful bid for certain estate lands it also sought to preserve the La Quinta Road easement, on the implicit understanding that, absent agreement providing otherwise, its La Quinta Road easement would be extinguished under the terms of the sale.

Sherwin's last-minute modifications to the plan carved out exceptions to encumbrances on the estate lands to be extinguished in the sale, preserving a number of other encumbrances, including those recorded before July 2009. Debtors' counsel's description of the changes as not "material in any real way" was not misleading because they were not changes at all with respect to the Port's easement. They did not affect the La Quinta Road easement, which remained subject

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[23] *City of Beaumont v. Moore*, 146 Tex. 46, 55 (1947) (defining an "encumbrance" as a "burden on land, depreciative of its value, such as a lien, easement or servitude").

to the same general rule that it would be stripped in the Section 363(f) sale as a "encumbrance" on the servient estate land. The Port's situation remained unchanged by the last-minute modifications. The Port does not allege the first element of fraud. We affirm the dismissal of the Port's fraud claim.

D.

A court should grant leave to amend freely when justice so requires.[24] It follows that where amendment would be futile, the court need not grant the plaintiff leave to amend.[25]

Here, the bankruptcy court dismissed the Port's fraud claim with prejudice,[26] finding lilt would be futile to allow an amendment to the Complaint because there are no facts that could be plead[ed] to support" the claim. This determination was no abuse of discretion. The Port's fraud claim is premised on an alleged misrepresentation made by Sherwin's counsel regarding modifications. The bankruptcy court determined the Port could plead no additional fact to salvage this claim. The district court did not abuse its discretion in denying the Port leave to amend.

III.

We AFFIRM the dismissals of the Port's Eleventh Amendment and fraud claims, and the denial of leave to amend the complaint.

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[24] FED. R. CIV. P. 15(a).

[25] *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998).

[26] The Port's arguments are restricted to the issue of whether it was entitled to amend its § 1144 fraud claim.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed February 27, 2020]

No. 18-40557

In the Matter of: SHERWIN ALUMINA COMPANY, L.L.C.; SHERWIN PIPELINE, INC.,

Debtors.

PORT OF CORPUS CHRISTI AUTHORITY,

Appellant,

v.

SHERWIN ALUMINA COMPANY, L.L.C.; SHERWIN PIPELINE, INC.,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before HIGGINBOTHAM, SMITH, and HIGGINSON, *Circuit Judges.*

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

The petitions for panel rehearing and rehearing en banc are denied. This opinion is substituted in place

of the prior opinion, *In re Sherwin Alumina Co., L.L.C.*, 932 F.3d 404 (5th Cir. 2019).

A bankruptcy sale extinguished an easement of the Port of Corpus Christi Authority, an arm of the State of Texas. The Port initiated an adversary proceeding against the debtors, Sherwin Alumina Company and Sherwin Pipeline Incorporated, seeking to invalidate the sale and regain its easement. The bankruptcy court rejected the Port's sovereign immunity and fraud claims, and the district court affirmed. On appeal from the district court, we find no Eleventh Amendment violation or basis for a claim of fraud under 11 U.S.C. Section 1144. We affirm. Our holdings should not be regarded as a disposition of the due process claim that remains pending below.

I.

In 1998, the Port of Corpus Christi Authority purchased an 1,100 acre parcel near Corpus Christi Bay in San Patricio County, Texas, adjacent to land owned by the Sherwin Alumina Company, together with an easement granting use and access to a private roadway on the Company's land known as La Quinta Road. Fifteen years later, in 2013, the Port and Sherwin Alumina Company agreed to modify the easement, giving the Port permanent non-exclusive access along a specific portion of the road and across an adjoining drainage ditch.[1] The easement provided the primary means of commercial access to the Port's parcel.

Three years later, on January 11, 2016, Sherwin Alumina Company and Sherwin Pipeline Incorporated

[1] In 2015, the Port released broader rights it held from the unmodified pre-2013 easement.

(collectively "Sherwin") filed voluntary petitions for Chapter 11 relief in the Bankruptcy Court for the Southern District of Texas. Sherwin also filed an initial Joint Plan for reorganization, proposing in relevant part to sell real property in the bankruptcy estate "free and clear of all Liens, Claims, charges and other encumbrances" under Section 363(f) of the Bankruptcy Code.

The bankruptcy court approved bidding procedures. The Port bid for a part of the bankruptcy estate, a port facility that did not include the La Quinta Road parcel. The Port conditioned its bid on "an access easement . . . over Seller's private roadway known as La Quinta Road . . . if Buyer has been unable to obtain such an easement before the Closing." On April 21, 2016, the Port and other bidders participated in an auction from which Corpus Christi Alumina emerged as the successful bidder.

In the following months Sherwin filed modified plans and associated purchase agreements in which encumbrances other than those deemed "permitted" would be stripped off the estate's property in the proposed sale, as authorized under Section 363(f) of the Bankruptcy Code. Permitted encumbrances would be defined in a future proposed confirmation order. None of these documents suggested that the Port's easement would be a permitted encumbrance.

Sherwin filed a final proposed confirmation order in the early hours of February 17, 2017, the day of the confirmation hearing. As with previous filings, the proposed confirmation order provided that the buyer would receive the property free and clear of all encumbrances, subject to a limited exception for permitted encumbrances. In the proposed order, Sherwin defined permitted encumbrances to encom-

pass a number of specific servitudes—not including the Port's easement—as well as "easements or encumbrances . . . recorded prior to July 1, 2009." The definition was not redlined or otherwise identified as a modification. The Port was served with the proposed confirmation order. Later that day, the bankruptcy court held a hearing on the proposed plan and confirmation order, which the Port "attended" telephonically. During the hearing, Sherwin's counsel stated that the proposed order submitted earlier that day included "extensive modifications," but that Sherwin "d[id]n't believe that they are material in any real way." The court entered the order without objection, confirming Sherwin's modified Plan. The Plan went into effect on February 27, 2017, on which date Sherwin sold its real property to Corpus Christi Alumina. On March 3, 2017, the Confirmation Order became final and non-appealable.

On March 31, 2017, Corpus Christi Alumina sold the land encompassing La Quinta Road to Cheniere Land Holdings LLC. Cheniere notified the Port that its easement had been extinguished by the sale of the land. As the time to appeal the confirmation order had expired, the Port filed an adversary complaint with the bankruptcy court, collaterally attacking the confirmation order as having been procured by fraud, barred by the state's sovereign immunity, and a denial of due process for want of notice. The bankruptcy court dismissed the claims of fraud and sovereign immunity without leave to amend but denied dismissal of the due process claim. The Port appealed the dismissals and denial of leave to amend to the district court, which affirmed. This appeal followed.

II.

A.

We have jurisdiction to hear the appeal of the district court's dismissals of the Eleventh Amendment and fraud claims.[2] We review cases originating in bankruptcy "perform[ing] the same function, as did the district court: [f]act findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed de novo."[3] At this stage, we take the well-pleaded facts as true, viewing them in a light most favorable to the plaintiff.[4] We review the denial of leave to amend for abuse of discretion.[5]

B.

Under the Eleventh Amendment, federal courts lack jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State,"[6] or the state's own citizens.[7] "States, nonetheless, may still be bound by some judicial actions without their consent,"[8] including a bankruptcy proceeding. Congress has the power to

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[2] *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 143-44 (1993); 28 U.S.C. § 158(d)(1).

[3] *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007) (quoting *Nationwide Mut. Ins. Co. v. Berryman Prods*, 159 F.3d 941, 943 (5th Cir. 1998) (emphasis omitted)).

[4] *Matter of ATP Oil & Gas Corp.*, 888 F.3d 122, 125-26 (5th Cir. 2018).

[5] *Lewis v. Fresne*, 252 F.3d 352, 356 (5th Cir. 2010).

[6] U.S. CONST. amend. XI.

[7] *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004) (citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

[8] *Id*.

establish "uniform Laws on the subject of Bankruptcies throughout the United States."[9] The Supreme Court has read the Clause "to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[10]

In *Tennessee Student Assistance Corporation v. Hood*, the Supreme Court held that a bankruptcy court's discharge of an individual's debt to the state of Tennessee did not violate the Eleventh Amendment. Debtor Pamela Hood's educational debts were guaranteed by and later assigned to the state of Tennessee.[11] When Hood filed for bankruptcy and sought to have this debt discharged in an adversary proceeding, Tennessee protested that it did not consent to the proceeding, and that the bankruptcy court's discharge would violate the Eleventh Amendment.[12] The Supreme Court disagreed. It found that the discharge proceeding was an exercise of the bankruptcy court's *in rem* jurisdiction over the debtor's estate; the debtor sought no affirmative relief against the state, and the proceeding did not subject the state to any coercive judicial process.[13] The federal court's disposition of a bankruptcy estate within which a state has interests, where the proceeding is principally *in rem* and avoids

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[9] U.S. CONST. art. I, § 8, cl. 4.

[10] *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

[11] *Hood*, 541 U.S. at 444.

[12] *Id.* at 445.

[13] *Id.* at 450; *In re Soileau*, 488 F.3d at 307 ("[A]n *in rem* bankruptcy proceeding brought merely to obtain the discharge a debt or debts by determining the rights of various creditors in a debtor's estate—such as is brought here—in no way infringes the sovereignty of a state as a creditor.").

coercive judicial process against the state,[14] does not implicate, let alone violate, the Eleventh Amendment.[15]

Under Texas law, the Port's easement is a non-possessory property interest in Sherwin's land.[16] That the servient land was within the bankruptcy estate is not disputed. Exercising jurisdiction over the Sherwin estate, and thus the servient land, the bankruptcy court approved a Section 363(f) sale "free and clear" of encumbrances, including the Port's La Quinta Road easement. The bankruptcy court did not award affirmative relief nor deploy coercive judicial process against the Port—it did not exercise *in personam* jurisdiction over the state.[17]

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[14] *Hood*, 541 U.S. at 446 (analogizing to "*in rem* admiralty actions when the State is not in possession of the property").

[15] *Id.* at 451. *Hood* is consistent with the previous holdings of this court. In a pre-Hood case, *Texas v. Walker*, we similarly held that a bankruptcy court's discharge of a debt owed to the State of Texas was not a suit against the state, and therefore did not violate the Eleventh Amendment. 142 F.3d 813, 822 (5th Cir. 1998) ("Walker's entitlement to assert his discharge against the state's claims invoked no Eleventh Amendment consequences. The state never was hauled into federal court against its will in the bankruptcy.").

[16] *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."). The Port points to Texas law under which an easement is compensable if condemned under the State's eminent domain power. *City of Houston v. Northwood Mun. Util. Dist. No. 1*, 73 S.W.3d 304, 310 (Tex. App. 2001); *Houston Lighting & Power Co. v. State*, 925 S.W.2d 312, 314 (Tex. App. 1996).

[17] *Hood*, 541 U.S. at 453 ("The issuance of process, nonetheless, is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State.").

The Port argues that even if the encumbered land was within the court's jurisdiction, the La Quinta Road easement was its property, and not part of the bankruptcy estate, such that exercise of the bankruptcy court's *in rem* jurisdiction could not reach the easement. *Hood* instructs otherwise. For purposes of the Eleventh Amendment, the Port's easement is like Tennessee's debt claim against Pamela Hood's estate: the state holds an interest burdening the bankruptcy *res*. *Hood* holds that a bankruptcy court's exercise of *in rem* jurisdiction over the debtor's estate can extinguish the state's interest burdening that *res* without implicating the Eleventh Amendment.

Of course, there remain statutory restrictions on the extinguishment of third parties' interests in bankruptcy-estate property. Section 363(f) of the Bankruptcy Code provides that the court may sell property in the bankruptcy *res* free and clear of others' interests, but only under certain limited circumstances.[18] The Port argues that none of those circumstances was met in the sale of the easement. However, this argument is foreclosed. As the Port concedes, any Section 363(f) objection had to have been raised on direct appeal of the confirmation order and cannot be raised in this collateral adversary proceed-

[18] Those circumstances are that "(1) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (2) [the] entity [with the interest in the property] consents; (3) [the entity's] interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f).

ing. We affirm the dismissal of the Port's Eleventh Amendment claim.

C.

Under Section 1144 of the Bankruptcy Code, [o]n request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud."[19] The elements of a claim for fraud are (1) that the debtor or proponent made a materially false representation or omission to the court; (2) that the representation was made with knowledge of its falsity or reckless disregard for the truth; (3) that the representation was made to induce the court's reliance; (4) that the court actually relied upon the representation; and (5) the court entered the confirmation order in reliance on the representation.[20] A claim for fraud in an adversary proceeding must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b).[21] Under Rule 9(b) "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[22]

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[19] 11 U.S.C. § 1144.

[20] *In re Davis Petroleum Corp.*, 385 B.R. 892, 912 (Bankr. S.D. Tex. 2008).

[21] FED. R. BANKR. P. 7009; *In re Fornesa*, 2016 WL 2930459, at *3 (Bankr. S.D. Tex. May 13, 2016) ("Rule 9(b), FED. R. CIV. P., as made applicable by Bankruptcy Rule 7009, requires that fraud be pled with particularity. The particularity requirement requires that the pleading identify who, what, when, where, and how the alleged fraud was committed.").

[22] FED. R. CIV. P. 9(b); *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) ("At a minimum, Rule 9(b) requires that a plaintiff set forth the who,

We need not proceed beyond the first element, because the Port fails to allege any intentional false representation. During the confirmation hearing, Sherwin's counsel described last-minute changes to the proposed order as "extensive modifications" that were not "material in any real way." The Port contends this was a misrepresentation because Sherwin's last-minute changes "[f]or the first time . . . attempted] to directly impact the Port's easement property rights"—in other words, the modifications sprang a trap on the Port, isolating its easement for extinguishment, a material change that should have been announced as such to the bankruptcy court. But Sherwin's last-minute modifications to the proposed confirmation order had no such effect on the Port's easement. The Port's allegation that Sherwin's last-minute changes for the first time "stripp[ed] third party easement property rights" from its land is inaccurate. From Sherwin's initial bankruptcy filing, more than a year before the confirmation hearing, the debtor proposed a sale in which "all property of the Estates to be acquired by the Buyer . . . shall vest in the Buyer, free and clear of all Liens, Claims, charges, and other encumbrances."

Under Texas law, an easement is a type of encumbrance.[23] From the beginning, by the general terms of Sherwin's proposed sale, the debtor proposed a Section 363(f) sale that would extinguish the Port's easement. The Port's actions indicate that it so understood the proposed sale: in its unsuccessful bid

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what, when, where, and how of the alleged fraud." (internal quotation marks and citation omitted)).

[23] *City of Beaumont v. Moore*, 146 Tex. 46, 55 (1947) (defining an "encumbrance" as a "burden on land, depreciative of its value, such as a lien, easement or servitude").

for certain estate lands it also sought to preserve the La Quinta Road easement, on the implicit understanding that, absent agreement providing otherwise, its La Quinta Road easement would be extinguished under the terms of the sale.

Sherwin's last-minute modifications to the plan carved out exceptions to encumbrances on the estate lands to be extinguished in the sale, preserving a number of other encumbrances, including those recorded before July 2009. Debtors' counsel's description of the changes as not "material in any real way" was not misleading because they were not changes at all with respect to the Port's easement. They did not affect the La Quinta Road easement, which remained subject to the same general rule that it would be stripped in the Section 363(f) sale as a "encumbrance" on the servient estate land. The Port's situation remained unchanged by the last-minute modifications. The Port does not allege the first element of fraud. We affirm the dismissal of the Port's fraud claim. This conclusion does not undermine the Port's ongoing claim of a denial of due process.

D.

A court should grant leave to amend freely when justice so requires.[24] It follows that where amendment would be futile, the court need not grant the plaintiff leave to amend.[25]

Here, the bankruptcy court dismissed the Port's fraud claim with prejudice,[26] finding "Olt would be

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[24] FED. R. CIV. P. 15(a).

[25] *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998).

[26] The Port's arguments are restricted to the issue of whether it was entitled to amend its § 1144 fraud claim.

futile to allow an amendment to the Complaint because there are no facts that could be pleaded] to support" the claim. This determination was no abuse of discretion. The Port's fraud claim is premised on an alleged misrepresentation made by Sherwin's counsel regarding modifications. The bankruptcy court determined the Port could plead no additional fact to salvage this claim. The district court did not abuse its discretion in denying the Port leave to amend.

III.

We AFFIRM the dismissals of the Port's Eleventh Amendment and fraud claims, and the denial of leave to amend the complaint.

EDITH H. JONES, *Circuit Judge*, joined by OWEN, *Chief Judge*, and ELROD, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, *Circuit Judges*, dissenting from denial of *en banc* reconsideration:

The panel opinion gives the misleading impression that this is just another example of a bankruptcy claimant's having missed a deadline, argued the wrong issues (Eleventh Amendment immunity and 11 U.S.C. § 1144 fraud in inducement of the plan), and lost its chance at sharing in the debtor's estate. Still, the panel notes that a due process claim asserted by the Port of Corpus Christi Authority remains pending in the bankruptcy court. Moreover, the panel claims not to have placed a thumb on the scale of adjudicating that claim. Because half of the active judges disagree with the panel's dismissive attitude toward the due process claim, this decision was nearly vacated for en banc reconsideration.

I write to clarify the stakes at issue. An easement is a real property interest protected by Texas law,[1] the

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[1] *See generally Marcus Cable Assocs. L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002); *Redburn v. City of Victoria*, 898 F.3d 486, 495 (5th Cir. 2018) ("Because the easement holder is the dominant estate owner and the land burdened by the easement is the servient estate, the property owner may not interfere with the easement holder's right to use the servient estate for the purposes of the easement." (quoting *Marcus Cable*, 90 S.W.3d at 721)); *Rahmati v. AJBJK, L.L.P.*, No. 01-15-01936—CV, 2017 WL 4820336, at *4--5 (Tex. App.—Houston [1st Dist.] 2017, no pet.) ("[T]he transfer [of title to the servient estate] automatically passes all easements attached to the property, even if not expressly referenced in the instrument of transfer." (citing *Shelton v. Kalbow*, 489 S.W.3d 32, 46 & n.11 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)).

Bankruptcy Code[2], and the Constitution.[3] It cannot be "stripped" in bankruptcy court, if at all, without compensation or compliance with finely balanced statutory procedures. What occurred in the bankruptcy court, according to the Port's pleadings, raises troubling due process questions.

The Port has maintained a road easement for decades over the debtor's parcel that is the Port's sole access to its own property. For the first time, as far as research has uncovered, the bankruptcy court's confirmation order stripped the Port's easement, a "dominant estate" in the debtor's real property, without payment of any kind, without the Port's consent, and without otherwise satisfying the conditions of 11 U.S.C. § 363(f) for sales "free and clear" of "interests" in a debtor's property.[4] The bankruptcy court was not squarely informed of this dispossession, and the Port asserts that it did not learn about it in time to object to the confirmation. In fact, when the bankruptcy court dismissed the counts of the Port's adversary proceeding that are decided by the panel in this appeal, the court refused to dismiss the Port's due process claim, telling the parties,

> I'm looking at a pleading. I have somebody who says, not only did I not know, I couldn't have known, practically. . . . [T]hat's, effectively, the [Port's] argument: you gave me 300 pages, you hid a sentence and I couldn't

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[2] 11 U.S.C. § 363(f).

[3] *See* fn. 7, *infra*.

[4] As the panel opinion notes, the Port contends that none of these conditions was fulfilled. Sherwin hardly disputes this, on the sole basis that the Port "waived" compliance with Section 363(f) by failing to object to the plan.

> possibly have been expected to have found it and understood its implications...I do think there has been an awful lot of confusion with using defined terms inappropriately. That's something we'll ferret out.

Contrary to the bankruptcy court's wholesome openmindedness, the panel opinion repeatedly implies that the Port could have/should have known the debtor's intentions to "extinguish" its easement, which the debtor allegedly swept into its documentation under the generic term "encumbrance." Although the facts have not been fully vetted, the Port's pleadings suggest quite a different story. No less than ten lengthy draft documents required for a proposed sale of the debtor's property were filed in the bankruptcy court over a period of months.[5] Several of these described "Acquired Real Property" as including Easements, "other than the Excluded Properties." Excluded Assets, the debtor represented, was an undefined category that would be identified in a later schedule. The panel opinion states that "[n]one of these [transactional documents] suggested that the Port's easement would be a permitted encumbrance," i.e., an interest that would run with the land in an eventual sale. More precisely, however, never prior to the eve of confirmation was the schedule supplied, nor did any of the transactional documents reference the Port's easement directly or indirectly.

After midnight preceding the confirmation hearing, the debtor filed a proposed 334-page confirmation

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[5] It is unnecessary here to recite the shifting terminology and references used in amended plans of reorganization, disclosure statements, and modified asset purchase agreements submitted to the court before the final documents on the eve of confirmation.

order. At paragraph 108, the debtor at last defined "permitted encumbrances" to include a number of specific servitudes as well as "easements or encumbrances. . . recorded prior to July 1, 2009." This vague definition excluded the Port's easement, and only that easement, from "encumbrances" that would survive the sale of the debtor's real property. As the panel opinion acknowledges, this definition was neither highlighted nor otherwise identified, and the debtor's counsel represented in court the next day that he did not believe any material modifications had been made to the plan of reorganization. But the panel opinion says the Port is "inaccurate" "to allege that Sherwin's last-minute changes for the first time 'stripp[ed] third party easement property rights" from its land.

The record before us casts serious doubt on the panel's characterizations. Tellingly, during the hearing on the motion to dismiss, the debtor's counsel disavowed that any references to "acquired easements" and "excluded easements" in the transactional documents included the Port's easement. She explained that, "we can't sell the Port's easement. We don't own the Port's easement."[6] This concession heightens the imperative for the debtor's plan to have complied with Section 363(f), which limits a debtor's right to sell free and clear of others' interests in

[6] This statement is rendered even more confusing as counsel averred during the same hearing two other propositions: that the term "encumbrances" under Texas law includes easements, placing the Port on notice; and also that the transactional documents' definition of "liens" included easements. The first term has some purchase in Texas law because the generic term "encumbrance" includes easements and many other "interests" in real property. The second statement states a legally counterintuitive, if not simply incoherent, proposition from the standpoint of giving an easement holder notice.

property. *See In re Energytec*, 739 F.3d 215, 221-25 (5th Cir. 2013) (gas pipeline transportation fee, a covenant running with the land under Texas law, could be extinguished only in compliance with terms of Section 363(f)(5)); *see also Gouveia v. Tazbir*, 137 F.3d 295 (7th Cir. 1994) (although a property subject to covenants running with the land might be sold under Section 363(f)(5), the fact that state law did not ordinarily allow such covenants to be forcibly monetized meant that the covenants could not be expunged in bankruptcy).[7] Likewise, to confirm its plan, the debtor had to prove to the court that it had complied with all applicable law. 11 U.S.C. § 1129(a)(1), (3).

Whether the evolving terms of the transactional documents (a) informed the Port sufficiently that its

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[7] *See generally*, *Louisville Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (federal law may not take without compensation, and give to another, "rights in specific property which are of substantial value") (Brandeis, J.). Citing the few cases found in this area, commentators agree that easements may not be expunged in bankruptcy absent strict compliance with Section 363(f). *See, e.g.*, *You Can't Buy Me Love and You Can't Buy a 363(f) Order*, Weil Bankruptcy Blog (July 27, 2017) ("Practitioners should take note and make absolutely certain that they can satisfy at least one of the conditions of 363(f)(1)—(5) because courts will likely not tolerate any 363(f) deficiencies, regardless of how good a deal it represents for the estate."); Gregory G. Hesse & Cameron W. Kinvig, *How Problem Easements Can Limit Sale Rights*, 33 Am. Bankr. Inst. L.J. 32, 33 (May 1, 2014) ("[M]any courts have shown a willingness to maintain covenants and other rights that run with the land in a § 363(f)(1) sale context, unless a party can demonstrate a specific state or federal law provision that mandates that they be released."); Lisa H. Fenning & Rosa Evergreen, *Yet Another Exception to 363(f): Covenants Running with the Land, in §* 363 Sales: What You Get — and What You Are Stuck With 46, 47 (Commercial Law League of America, Oct. 9, 2014) (citing, *inter alia*, *In re Energytec*, 739 F.3d 215).

easement could be put at risk and (b) yielded sufficient opportunity to be heard at the confirmation hearing raises troubling and important due process issues to be resolved in the bankruptcy court.

For these reasons, I respectfully dissent.