No. 23-124

IN THE

Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2

Petitioner,

v.

PURDUE PHARMA L.P., *et al.*,

Respondents.

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

AMICI CURIAE BRIEF OF MARTIN J. BIENENSTOCK AND DANIEL S. DESATNIK IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae, Martin Bienenstock and Daniel Desatnik, are two practitioners of bankruptcy law at Proskauer Rose LLP. Martin Bienenstock also teaches corporate reorganization at Harvard Law School, University of Michigan Law School, and University of Pennsylvania Carey Law School. This brief represents only the views of amici, and not the views of any of their employers.

Amici and their law firm have no client or other direct or indirect interest in the outcome of this case, other than amici's interest in the practice and development of business bankruptcy law to which they have devoted their entire respective careers to date, forty-six and eight years.

Amici submit this brief pursuant to Supreme Court Rule 37.1 to bring to the Court's attention highly relevant matter in respect of whether the Bankruptcy Code authorizes coerced releases of claims held by nondebtors against other nondebtors.

Specifically, amici discuss why the question presented is controlled by and must be analyzed in the context of whether the Constitution grants Congress the bankruptcy power to authorize coerced releases, and if so, whether they violate the fundamental right to sue, procedural and substantive due process, and the separation of powers principle. For whatever reason, each of these issues has been totally ignored or given short shrift by the lower courts and litigants in

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[1] No attorney for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to its preparation or submission.

this case and in the other jurisprudence and literature addressing coerced releases. Each of these issues independently demonstrates coerced releases are unconstitutional. Therefore, the constitutional avoidance canon corroborates the most plausible interpretation of the Bankruptcy Code, namely that it does not authorize coerced releases.

SUMMARY OF ARGUMENT

It is common ground that if the Bankruptcy Code authorizes coerced releases, section 1123(b)(6)[2] is the section that does so. It provides a chapter 11 plan may include any "appropriate provision not inconsistent with the applicable provisions of" the Bankruptcy Code. The Bankruptcy Code conditions the granting of discharges on an elaborate set of requirements in both chapter 7 (liquidation) and chapter 11 (reorganization) cases. Coerced releases satisfy none of them.

For instance, chapter 7 and 11 debtors must file under oath statements of all their assets, liabilities, and pre-bankruptcy transfers. That way, creditors and the court can determine if a debtor's assets are accounted for and fairly distributed in accordance with the Bankruptcy Code's distribution scheme and the Constitution. In contrast, coerced releases allow the released persons, without filing such disclosures, to retain unknown and unlimited assets for themselves and to pay their personal creditors in full. But their creditors who are also the debtor's creditors only receive value constituting undetermined fractions of their claims. Moreover, even though the debtor's creditors have independent state law claims against the Sackler family, the chapter 11 plan forces the debtor's creditors to share value from the Sacklers in the same proportion as their claims against the debtor, rather than in proportion to their claims against the Sacklers. While Bankruptcy Code section 502(a) allows any creditor to object to other creditors' claims against

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[2] 11 U.S.C. § 1123(b)(6).

the debtor, no creditor is allowed to litigate their own or other creditors' claims against the Sackler family. So whether the value allocation of the Sackler family payment is even rough justice is unknown.

That just scratches the surface of the list of inconsistencies, which is why the district court below ruled the Bankruptcy Code does not authorize coerced releases.[3] That should end the inquiry, except the court of appeals below and other courts of appeal have ruled to the contrary without considering the inconsistent provisions. Some say a release is not a discharge. That is the ultimate distinction without a difference.

The bulk of this brief is devoted to explaining how the constitutional avoidance canon clinches the answer by corroborating the most plausible interpretation of the Bankruptcy Code, namely that it does not authorize coerced releases.

As a threshold matter, the inquiry as to whether the Bankruptcy Code authorizes coerced releases must start with whether the Constitution grants Congress the bankruptcy power to enact bankruptcy laws authorizing the coerced releases at issue here. It does not. This Court has already ruled the bankruptcy power cannot violate fundamental rights, and acknowledged the right to sue is a fundamental right. The courts holding bankruptcy jurisdiction includes power to order coerced releases erroneously start their analyses with 28 U.S.C. § 1334(b) granting subject matter jurisdiction over all civil proceedings "related

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[3] *In re Purdue Pharma, L.P.,* 635 B.R. 26 (S.D.N.Y. 2021), *rev'd and remanded,* 69 F.4th 45 (2d Cir. 2023).

to" the case.[4] This Court has observed the choice of those words "suggests a grant of some breadth." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). Not realizing Congress cannot grant courts power not granted to it by the Constitution, leads some courts to treat bankruptcy courts as having virtually unlimited power thinking they can order anything "related to" the case.

Coerced releases also violate other Constitutionally protected rights. In violation of the Fifth Amendment's just compensation requirement, they take an entity's claim without a valuation of the claim and without a valuation of what the entity receives for it.

Coerced releases also violate procedural due process by allowing the released Sacklers to retain assets and to pay their personal creditors in full, while paying other creditors fractionally, thereby creating an unfair and unreasonable distribution scheme not otherwise allowed by the Bankruptcy Code or the Constitution.

And, coerced releases violate the separation of powers principle in several ways. Congress would be authorizing the judicial branch to jettison creditors' rights to outcomes determined by trial by jury and

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[4] For instance, *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.),* 885 F.2d 621, 624-26 (9th Cir. 1989), ruled that while the bankruptcy court has subject matter jurisdiction to impose third party releases because they are related to the chapter 11 case, they do not have the power pursuant to Bankruptcy Code section 105(a) to grant a release of a creditor's guarantor because that would run afoul of Bankruptcy Code section 524(e). *In re Am. Hardwoods, Inc.*, 885 F.2d at 627.

common law, and to impose novel, non-common law remedies. Neither the legislative nor the judicial branch can do this, even with consent of the judicial branch.

ARGUMENT

I. THE BANKRUPTCY POWER DOES NOT AUTHORIZE CONGRESS TO ENACT LAWS ALLOWING COERCED RELEASES.

Article I, Section 8, Clause 4 of the United States Constitution authorizes Congress to establish "uniform laws on the subject of Bankruptcies throughout the United States," and is referred to herein as the "Bankruptcy Power." If Congress is empowered to authorize coerced releases in the Bankruptcy Code, the authorization must come from its Bankruptcy Power. Article I, Section 8 of the Constitution does not grant Congress any other power even remotely enabling Congress to authorize coerced releases.

The decision below,[5] neither identifies nor considers the rights the coerced releases take away (the "Lost Rights"). The legality of coerced releases, how-

[5] *Purdue Pharma, L.P. v. City of Grande Prairie (In re Purdue Pharma L.P.),* 69 F.4th 45 (2d Cir. 2023), *cert. granted, Harrington v. Purdue Pharma L.P.*, No. 23-124, 2023 WL 5116031 (2023) ("*Purdue Pharma*").

ever, can only be ascertained by determining the constitutionality of extinguishing each Lost Right. The Lost Rights include:

1. Loss of the right to sue the released party for money damages.
2. Loss of the right to a judgment determined by the common law.
3. Loss of the right to enforce the judgment against the released party.
4. Loss of the right to discover the released party's assets in enforcement proceedings.
5. Loss of the judicial branch' right and power to determine a creditor's common law claims against the released party and to determine the common law remedy.
6. Loss of the right to jury trial.
7. Forfeiture to the judicial branch of the legislative branch' power to legislate rules governing coerced releases.[6]

[6] We attribute this brief's identification of the Lost Rights and issues to a chemistry lab teacher in at Horace Mann School in 1967. Dr. Albert J. Kroner handed a short candle to each student and instructed them to write lists of all possible observations. Most wrote ten to twenty observations. Dr. Kroner identified thirty six.

Loss of the first five Lost Rights is loss of the fundamental right to sue. This Court made clear in *Crandall v. Nevada*[7] and the *Slaughter-House Cases*[8] that "every citizen of the United States . . . is entitled to free access . . . to its judicial tribunals . . . in every State in the Union."[9] Intuitively, this makes sense because no right, whether a property right or liberty right, has meaning if it cannot be judicially enforced.[10] Likewise, the Constitution's Privileges and Immunity clause[11] expressly grants citizens of every state the privileges and immunities of citizens of the other states, which includes the right to sue in each state's courts.

In 1823, in response to a claim made under the Privileges and Immunity clause, the circuit court in

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[7] *Crandall v. Nevada*, 73 U.S. 35, 48 (1867).

[8] *Slaughter-House Cases*, 83 U.S. 36, 79 (1873).

[9] *Crandall*, 73 U.S. at 48 (quoting unopposed *dicta* from Chief Justice Taney's dissent in the *Passenger Cases*, 48 U.S. 283, 492 (1849)).

[10] When Chief Justice Marshall, in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), was confronted with the issue whether a person commissioned by the president of the United States as a justice of peace had a remedy if the signed commission was not delivered to him, Marshall declared the power of the judiciary branch over the legislative and executive branches. He started by quoting Blackstone's statement of the law in England, saying "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

[11] U.S. Const., art. IV, § 2, cl. 1 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.").

Corfield v. Coryell ruled the privileges and immunities of citizens in all states were "fundamental; which belong, of right, to the citizens of all free governments."[12] Alongside the right of *habeas corpus*, the circuit court identified as a fundamental right protected by the Privileges and Immunity clause, the right "to institute and maintain actions of any kind in the courts of the state . . . ."[13] The right to sue and defend is fundamental because it is the alternative to force and lies at the foundation of orderly government.[14] This Court has cited *Corfield* with approval

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[12] *See Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (issue was whether right of state's residents to oysters from state's waters was a privilege and immunity of citizens of all states, and court ruled it was not because it was not a fundamental right to share in the property collectively owned by citizens of another state); *Ward v. Maryland*, 79 U.S. 418, 430 n.12 (1870), cites with approval Professor Thomas Cooley's treatise, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. Boston: Little, Brown & Co. 1871), which cites *Corfield* for the proposition in the text.

[13] *Corfield*, 6 F. Cas. at 551-52. This Court cites these pages of *Corfield* as "describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, §2, as those 'fundamental' rights 'which have, at all times, been enjoyed by the citizens of the several states.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 n.22 (2022).; *see Slaughter-House Cases*, 83 U.S. at 75-76 (refers to *Corfield* as leading case on Privileges and Immunities issue).

[14] *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

and articulated and reaffirmed this fundamental principle several times,[15] and confirmed these fundamental rights are protected by the Constitution.[16] Fundamental rights and liberties are "deeply rooted in this Nation's history and tradition."[17] The United States has a "deep-rooted historic tradition that everyone should have his own day in court."[18] This Court has ruled the right to enjoy property without unlawful deprivation is a personal right no less than liberty rights such as the rights to speak and travel.[19] As a practical matter, no property or other legal right has substance if its owner cannot enforce it in court or with legal self-help. This Court concludes personal rights to liberty and personal rights in property have no meaning without each other.[20]

This brief would end here if Congress has no power to intrude on the people's fundamental rights, including the right to sue, protected by the Constitution. But, it does. Chief Justice John Marshall, ruled Congress can impact fundamental rights when acting

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[15] *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990) (quoting *McKnett v. St. Louis & S.F. R. Co.*, 292 U.S. 230, 232 (1934)); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 560 (1920).

[16] *Jones v. Helms*, 452 U.S. 412, 418-19 (1981).

[17] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. E. Cleveland,* 431 U.S. 494, 503 (1977)).

[18] *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)).

[19] *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

[20] *Id.*

pursuant to a power expressly given for national purposes, or a power clearly incidental[21] to some power expressly given.[22] Indeed, it is virtually unchallenged that bankruptcy courts can *temporarily* enjoin creditors and shareholders from suing third parties needed to effectuate a reorganization.[23] Thus, the question becomes whether the Bankruptcy Power or a power incidental to it includes the power to deprive persons *permanently* of their fundamental right to their day in court.

This Court has articulated neither every component of the Bankruptcy Power granted to Congress

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[21] U.S. Const. art. I, § 8, cl. 18 (Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

[22] *Gibbons v. Ogden*, 22 U.S. 1, 203-04 (1824); *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819) ("When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.").

[23] *See, e.g.*, *Caesars Ent. Operating Co. v. BOKF, N.A. (In re Caesars Ent. Operating Co.)*, 808 F.3d 1186 (7th Cir. 2015); *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.),* 502 F.3d 1086, 1094-95 (9th Cir. 2007); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5th Cir. 1995); *In re W. Real Est. Fund, Inc.*, 922 F.2d 592, 601-02 (10th Cir. 1990);

nor every limitation on the Bankruptcy Power[24] consistent with Article III, Section 2 of the Constitution providing the judicial power of the United States only extends to actual cases and controversies, not to advisory opinions.[25]

But, this Court has consistently ruled fundamental rights are protected in bankruptcy. It has ruled "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law."[26] Here, the chapter 11 plan did exactly what the Bankruptcy Power cannot do – discharged the Sacklers without providing trials of creditors' claims against them. This Court has explained that while English law does not generally constrain the Constitution, English law's protections of fundamental

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[24] *See, e.g.*, *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-516 (1938) (footnotes omitted) ("The subject of bankruptcies is incapable of final definition. The concept changes. It has been recognized that it is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution. An adjudication in bankruptcy is not essential to the jurisdiction. The subject of bankruptcies is nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.' This definition of Judge Blatchford, afterwards a member of this Court, has been cited with approval here."); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902).

[25] *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation*, 454 U.S. 464, 475-76 (1982); *Camreta v. Greene*, 563 U.S. 692, 701 (2011).

[26] *Hanover Nat'l Bank*, 186 U.S. at 192.

rights continue to protect the fundamental right to trial:

> Certainly, these rules [English law] have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring* v. *Clarke, supra*), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the *Sixth* and *Seventh Amendments*, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted.[27]

Consistent with protecting the fundamental right to trial, the Supreme Court has shown the Bankruptcy Power is subject to the constitutional right to

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[27] *Cont'l Ill. Nat'l Bank & Tr. Co. v. Chicago, R. I. & P. R. Co.*, 294 U.S. 648, 669 (1935). Trial by jury requires trial by jury as understood in 1789 under English law when the Judiciary Act was enacted (citing *Patton v. United States*, 281 U.S. 276, 288, 301 (1930) "(1) [t]hat the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.")).

jury trial in instances where it applied in England in 1789.[28] The Bankruptcy Power has never been held to allow violation of fundamental rights.

In 1949, this Court confronted the issue as to whether the United States district court sitting in bankruptcy could determine whether the owner of tracks formerly leased to the debtor-railroad was validly authorized by its shareholders to sell its tracks to the debtor which the debtor had negotiated to purchase so it could stay in business post-reorganization.[29] Some of the track owner's shareholders contended the sale required unanimous shareholder consent, not simply majority consent. This Court ruled the Bankruptcy Power unquestionably gives the bankruptcy court power over the debtor, its property, and all rights asserted against it, but the debtor's purchase of formerly leased property from a non-Title 11 debtor does not involve rights asserted against the debtor and therefore the relief requested was outside the Bankruptcy Power and governed by state law, and the district court lacked jurisdiction to order the sale.[30] The Supreme Court went on to observe the jurisdiction over the debtor's dispute with the solvent lessor asserted by the district court presiding over the debtor's railroad reorganization was "an extension of

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[28] *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 53 (1989) ("*Granfinanciera*"). With consent of the litigant, government, and court, the jury trial right can be waived because it is not jurisdictional. *Patton*, 281 U.S. at 301.

[29] *Callaway v. Benton*, 336 U.S. 132 (1949) ("*Callaway*").

[30] *Id*. at 147.

these traditional powers not justified by any provisions of the Bankruptcy Act."[31]

The bankruptcy court in *Purdue Pharma* distinguished *Callaway* on the ground the bankruptcy court's jurisdiction was then narrower than it is today under 28 U.S.C. § 1334(b).[32] While it may have been narrower, the jurisdiction included jurisdiction to "[B]ring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy."[33] Therefore, had the Supreme Court believed the Bankruptcy Power was broad enough to resolve the track owner's intra-shareholder disputes, the grant of statutory subject matter jurisdiction was not an impediment. Put differently, even if Congress were to grant bankruptcy subject matter jurisdiction over creditors' actions against shareholders, there is no basis in the jurisprudence to believe the Bankruptcy Power in the Constitution authorizes that jurisdictional grant. Additionally, the U.S. Court of Appeals for the Third Circuit ruled in *Combustion Engineering* that parties cannot create subject matter jurisdiction over a third party's actions by rendering a reorganization plan dependent on the third party's contributions.[34]

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[31] *Id.* at 148.

[32] *In re Purdue Pharma LP*, 633 B.R. 53, 98 (Bankr. S.D.N.Y. 2021), *vacated,* 635 B.R. 26 (S.D.N.Y. 2021).

[33] Former Bankruptcy Act, 1898 Act § 2a(6) (1938).

[34] *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228-29 (3d Cir. 2004) ("a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that

Significantly, this Court's rulings defining aspects of the Bankruptcy Power have not encompassed anything remotely akin to coerced releases or related disputes with third parties not involving the debtor's property. Rather, the rulings have focused on the relation between the debtor and creditor. Early on, this Court approved a lower court's attempt to describe the Bankruptcy Power:

> "it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject -- distribution and discharge -- are in the competency and discretion of Congress."[35]

Thus, when discharge entails impairing contractual obligations with the debtor, the Bankruptcy Power authorizes impairment.[36] The Bankruptcy

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it depended upon third-party contributions . . . by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization." (quoting *In re Resorts Int'l, Inc.,* 372 F.3d 154, 161 (3d Cir. 2004))).

[35] *Hanover Nat'l Bank*, 186 U.S. at 186 (quoting Justice Catron in *In re Klein*, decided in the Circuit Court for the District of Missouri, and reported in a note to *Nelson v. Carland,* 1 How. 265, 277 (1843)).

[36] *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982).

Power "would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate."[37] This Court has concluded the framers of the Constitution understood the Bankruptcy Power included more than simple adjudication of rights in the *res* of the debtor's estate, as shown by the first bankruptcy statute authorizing the bankruptcy commissioner appointed by the district court to imprison a person in possession of estate property.[38] Indeed, the Bankruptcy Power encompasses the power to punish bankruptcy by death, and the framers of the Constitution did not carve out that aspect of the Bankruptcy Power because they trusted Congress not to abuse it.[39]

Notably, the Bankruptcy Power "is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution," and "[a]n adjudication in bankruptcy is not essential to the jurisdiction."[40] Thus, the fact the shareholders obtaining coerced releases were not debtors in bankruptcy cases is not what renders the coerced releases unconstitutional. That Congress can render any class of unfortunate and meritorious debtors eligible for bankruptcy, even though English law restricted bankruptcy eligibility to traders, "is really not

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[37] *Butner v. United States*, 440 U.S. 48, 54 (1979).

[38] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370-71 (2006).

[39] *Hanover Nat'l Bank*, 186 U.S. at 187.

[40] *Wright*, 304 U.S. at 513.

open to discussion."[41] Similarly, the Bankruptcy Power authorizes Congress to allow debtors to invoke bankruptcy law voluntarily, and not only at the instance of creditors.[42] As shown above, it is their destruction of fundamental rights that shows coerced releases are not countenanced by the Bankruptcy Power and insulated from constitutional challenges. Coerced releases have no history of having been part of bankruptcy practice in England or in the United States until being invented in the twentieth century. We have found no reported decisions suggesting the Bankruptcy Power incorporates coerced releases. *Purdue Pharma* does not mention the Bankruptcy Power.

In 1935, Charles Warren, a historian of United States legal history, authored his book, *Bankruptcy in United States History,* which describes the Bankruptcy Power deployed to that time and nowhere mentions any power to determine disputes between two entities not in bankruptcy.[43] This Court considered Charles Warren a "competent scholar" and attributed its landmark decision in *Erie R. Co.* v. *Tompkins*,[44]

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[41] *Hanover Nat'l Bank*, 186 U.S. at 187.

[42] *Id.* at 185.

[43] CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 95-159 (Harvard University Press 1935).

[44] *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938).

overturning *Swift* v. *Tyson*,[45] to Warren's new research[46] of the Federal Judiciary Act of 1789[47] which *Erie* and *Swift* interpreted.[48]

If the shareholders receiving coerced releases had commenced their own bankruptcy cases, the creditors would have had their day in court. They would be allowed to file and prove their claims against the shareholders' estates based on the common law and obtain fair distributions from them. The bankruptcy court trials would be nonjury trials because in England in 1789 bankruptcy was handled in the equity courts,[49] not the law courts. There is nothing in bankruptcy jurisprudential history remotely suggesting creditors can constitutionally be deprived of their fundamental trial right and liberty interest to sue the debtors' shareholders in state or federal court and to enforce whatever judgments they procure under state or federal law.

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[45] *Swift v. Tyson*, 41 U.S. 1 (1842).

[46] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

[47] 28 U.S.C. § 725 (1789).

[48] *Erie R. Co.,* 304 U.S. at 72-73.

[49] *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 689-90 (2015) (Roberts, CJ and Thomas, J., dissenting).

II. THE CONSTITUTIONAL VIOLATIONS IMPOSED BY COERCED RELEASES CORROBORATE PURSUANT TO THE CONSTITUTIONAL AVOIDANCE CANON THAT THE BANKRUPTCY CODE SHOULD NOT BE INTERPRETED TO AUTHORIZE COERCED RELEASES

If not for several appellate decisions ruling or implying the Bankruptcy Code authorizes coerced releases in various circumstances,[50] it would be easy to conclude the Bankruptcy Code does not, as shown below. Although *Millennium*[51] proclaims "[t]he Bankruptcy Court indisputably had 'core' statutory authority to confirm the plan,"[52] another circuit court disagrees the statute grants power to compel nonconsensual non-debtor releases.[53]

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[50] *See, e.g.*, *In re American Hardwoods Inc.,* 885 F.2d at 624-26; *In re Ingersoll, Inc*., 562 F.3d 856, 863 (7th Cir. 2009); *Menard-Sanford v. Mabey (In re A.H. Robins Co.),* 880 F.2d 694, 702 (4th Cir. 1989)*; In re Dow Corning Corp.,* 280 F.3d 648, 658 (6th Cir. 2002); *Gillman v. Cont'l Airlines (In re Cont'l Airlines),* 203 F.3d 203, 212 (3d Cir. 2000); *Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 66 (2d Cir. 2008), *rev'd and remanded on other grounds, Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195 (2009); *In re Drexel Burnham Lambert Grp., Inc.*, ("*Drexel*"), 960 F.2d 285, 293 (2d Cir. 1992).

[51] *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019) (*"Millennium"*).

[52] *Millennium,* 945 F.3d at 137. *Millennium's* proclamation is easily explained and illustrates a perilous way to determine statutory authority in bankruptcy cases. Because 28 U.S.C. § 1334(b) grants federal courts subject matter jurisdiction of civil

The only sections of the Bankruptcy Code arguably authorizing coerced releases outside asbestos cases[54] are Bankruptcy Code sections 1123(b)(6) and 105(a). Section 1123(b)(6) provides a plan may include any appropriate provision not inconsistent with the applicable provisions of title 11 of the United States Code. Bankruptcy Code section 105(a) provides the court can issue any order necessary or appropriate to carry out the Bankruptcy Code.

A straight forward application of the words of Bankruptcy Code sections 105(a) and 1123(b)(6) shows they do not authorize coerced releases because the release of shareholders from creditors' claims is inconsistent with many Bankruptcy Code provisions.

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proceedings "related to cases under title 11," if one ignores that Congress can only grant jurisdiction it has from the Bankruptcy Power, it is easy to conclude coerced releases in a chapter 11 plan are "related to" plan confirmation, and therefore subject matter jurisdiction exists to approve coerced releases in a chapter 11 plan.

[53] *Bank of N.Y. Tr. Co., NA v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.),* 584 F.3d 229, 252-53 (5th Cir. 2009), held the release of entities from liability (other than for willfulness and gross negligence) for proposing, implementing, and administering a chapter 11 plan must be struck from the plan, except for the release and exculpation of the creditors' committee and its members because they have "qualified immunity for actions within the scope of their duties." *Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419, 434-38 (5th Cir. 2022) (cert. petition pending), followed *Pacific Lumber*.

[54] Coerced releases in asbestos cases are unconstitutional for the same reasons provided in this brief, but their legality is not before the Court.

For example, Bankruptcy Code section 523(a)(2)(A) renders nondischargeable an individual debtor's debts for fraud. But, as the concurring opinion in *Purdue Pharma* explains, the Purdue Pharma chapter 11 plan releases the individual Sackler family members from "any claim 'of any kind, character[,] or nature . . . so long as the Debtors' 'conduct, omission, or liability' is . . . a legally relevant factor."[55] As a result, the concurrence concludes the Sacklers sought "a release broader than that which Congress decided was wise to make available to a debtor in bankruptcy."[56] Moreover, Bankruptcy Code section 727(a)(2)(A) deprives individual debtors of discharges if within a year of bankruptcy they transferred property with intent to hinder, delay, or defraud creditors. This Court has ruled that when a person transfers his own assets into his wholly owned corporation, the transfer is a fraudulent transfer if done to hinder and delay creditors.[57] *Purdue Pharma* acknowledges the shareholders transferred assets to spendthrift trusts and offshore accounts.[58]

If a shareholder becomes a chapter 11 debtor under the Bankruptcy Code it cannot procure a discharge of claims against it without assuring creditors they receive at least what they would receive if all the shareholder's assets were liquidated in a chapter 7

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[55] *Purdue Pharma*, 69 F.4th at 86 (Wesley, CJ, concurring in judgment).

[56] *Id.* at 87.

[57] *Shapiro v. Wilgus*, 287 U.S. 348 (1932).

[58] *Purdue Pharma*, 69 F.4th at 63.

case.[59] This requires disclosure and proof of the shareholder's assets and liabilities and the allowed amount of each creditor's claim. A coerced release comes with no such disclosure or proof. Curiously, one of the Second Circuit decisions opining a coerced release is authorized in rare situations, concedes "it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."[60] The concession shows coerced releases neither carry out nor are consistent with the Bankruptcy Code. Indeed, the basics of bankruptcy administration require every debtor (other than municipality debtors) to disclose its assets and liabilities within fourteen days of voluntary filings,[61] which is well before a discharge is granted. The court may not grant a discharge to an individual debtor who fails to disclose all assets.[62] The notion that courts, on an *ad hoc* basis, can issue releases to shareholders without such disclosure fosters inconsistencies with the Bankruptcy Code in violation of sections 105(a) and 1123(b)(6) and thwarts many constitutional protections including the principle that Congress may enact only uniform bankruptcy laws.[63]

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[59] 11 U.S.C. § 1129(a)(7).

[60] *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005).

[61] Fed. R. Bankr. P. 1007(b)(1)(A), 1007(c).

[62] 11 U.S.C. §§ 727(a)(3), 1141(d)(3)(C).

[63] This Court ruled the uniformity requirement applies to substantive and administrative bankruptcy laws. *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022).

Purdue Pharma contends that while the court's power to release shareholders of certain claims derives from its discharge power, the releases are not discharges because they do not provide the umbrella protection of discharges.[64] Eighteen years earlier, the same appellate court had reasoned: "In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."[65] When it comes to individuals, their discharges in bankruptcy cases are limited by a multitude of nondischargeable claims, just as the Sacklers are released from the debtors' creditors' claims, but not their personal creditors' claims.[66] Besides, the use of the discharge power to release shareholders from the only claims they are not paying in full does not rescue coerced releases from being inconsistent with the Bankruptcy Code.

Given the constitutional violations described in this brief, the interpretation of Bankruptcy Code sections 105(a) and 1123(b)(6) should also be guided by the substantive[67] constitutional-doubt canon under which a "statute should be interpreted in a way that

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[64] *Purdue Pharma*, 69 F.4th at 70-71 (citing *MacArthur Co. v. Johns-Manville Corp.* , 837 F.2d 89, 91 (2d Cir. 1988)).

[65] *Metromedia Fiber Network, Inc.*, 416 F.3d at 142.

[66] *See* 11 U.S.C. §§ 523(a)(1)-(19), 1141(d)(2).

[67] "Substantive canons are rules of construction that advance values external to a statute." *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (footnote omitted) (Barrett, J., concurring).

avoids placing its constitutionality in doubt."[68] Under that canon the statutes would not be interpreted to allow coerced releases.

A. Coerced Releases Violate the Fifth Amendment's Just Compensation and Due Process Requirements

Just Compensation. This Court consistently rules the Bankruptcy Power is subject to the Fifth Amendment's takings clause[69] in cases in which the bankruptcy statute authorizes takings of property interests after[70] the bankruptcy case commences.[71] Justice Brandeis ruled: "The bankruptcy power, like the

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[68] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247 (2012).

[69] U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

[70] There is a split of authority as to whether the Fifth Amendment bars postpetition discharge of prepetition takings claims. *Compare Cobb v. City of Stockton (In re City of Stockton)*, 909 F.3d 1256, 1268 (9th Cir. 2018) (rejects argument that takings claim "has protected status because it was originally founded as a constitutional claim") and *Poinsett Lumber & Mfg. Co. v. Drainage Dist. No. 7*, 119 F.2d 270, 272–73 (8th Cir. 1941), with *Fin. Oversight & Mgmt. Bd. for P.R. v. Cooperativa de Ahorro y Credito Abraham Rosa (In re Fin. Oversight & Mgmt. Bd. for P.R.),* 41 F.4th 29, 41 (1st Cir. 2022) ("we move on to assessing whether the Fifth Amendment precludes the impairment or discharge of prepetition claims for just compensation in Title III bankruptcy [under PROMESA]. For the following reasons, we conclude that it does."), *cert. denied*, 143 S. Ct. 774 (2023).

[71] *See, e.g., United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 589 (1935). *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 162 (1974) (Douglas, J., dissenting).

other great substantive powers of Congress, is subject to the Fifth Amendment."[72] While takings in bankruptcy cases frequently take the form of allowing the debtor to use or consume a creditor's collateral as opposed to allowing the government to outright acquire for itself property such as a railroad, the Fifth Amendment's taking clause can still apply.[73] The rationale is that the government has enacted a bankruptcy statute authorizing takings of property in one way or another to serve the public purposes of bankruptcy.[74] Those purposes are to equalize distributions among creditors holding claims of equal rank, and to foster employment, fresh start, and recovery by stakeholders.[75]

Although there are exceptions to the rule that the Bankruptcy Power is subject to the takings clause,[76]

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[72] *Louisville Joint Stock Land Bank*, 295 U.S. at 589.

[73] *Sec. Indus. Bank*, 459 U.S. at 78.

[74] *See, e.g.*, *Louisville Joint Stock Land Bank*, 295 U.S.at 602 (public interest required legislation taking mortgagee's collateral to relieve mortgagors during the Great Depression).

[75] H.R. Rep. No. 95-595, at 16, 177-78, 200 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5977-78, 6137-39, 6179; *Young v. Higbee Co.*, 324 U.S. 204, 210 n.8 (1945).

[76] When 11 U.S.C. § 547 compels a creditor to disgorge, as a voidable preference, money it received validly in payment of a lawful debt, a clear taking of the creditor's property for the public purpose of an equitable distribution occurs. Before the Constitution was ratified the bankruptcy power was known to compel creditors to disgorge moneys the debtor had paid them shortly before bankruptcy, without any requirement that creditors be paid just compensation for the disgorged property. *See Schoenthal v. Irving Tr. Co.*, 287 U.S. 92, 94 (1932). Thus, it is unsurprising the

there is no historical exception applicable to the claims taken in the context of coerced releases.

Coerced releases patently violate the just compensation requirement. No creditor is allowed to prove the amount and value of its claims against the Sacklers, and there is no determination of the value each creditor receives for losing each claim. Conversely, in eminent domain proceedings, the person losing his or her property is entitled to a valuation of the property and just compensation for its value. Indeed, since the Sacklers are paying in settlement billions less than they took out of the debtor, it is possible they are paying creditors nothing for their released claims and only partially making whole the debtor's estate.

Supreme Court has signaled the bankruptcy power's claw back of voidable preferences is not subject to the Fifth Amendment's just compensation requirement: "Bankruptcy proceedings constantly modify and affect the property rights established by state law. A familiar instance is the invalidation of transfers working a preference, though valid under state law when made." *Wright v. Union Cent. Life Ins. Co.,* 304 U.S. at 517. In *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911), Justice Holmes, writing for the unanimous court, observed: "We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system." *Id.* Other exceptions to the Fifth Amendment built into the bankruptcy law are (a) the law's taking from creditors of the right to the discharged debtor's future earnings, *Hanover Nat'l Bank v. Moyses*, 186 U.S. at 188 , and (b) the law's taking from creditors the value of their valid, but unperfected security interests by granting the debtor a hypothetical lien senior to the unperfected interest in 11 U.S.C. § 544(a).

Due Process. No legal training is needed to discern unfairness if a billionaire runs up billions of debt and is allowed to discharge the debt without paying all of it while keeping the balance of his or her fortune and paying in full personal creditors. Our bankruptcy laws have never allowed discharges unless creditors receive the value of the debtor-estate's non-exempt assets and they share the value on a fair basis. Unsurprisingly, this common sense has constitutional underpinning.

The Fifth Amendment's due process clause (no person shall "be deprived of life, liberty, or property, without due process of law") requires that when the debtor receives a discharge, the debtor's assets must be distributed in a manner "consonant with a fair, reasonable, and equitable distribution of those assets."[77] The Bankruptcy Power allows courts to confirm chapter 11 plans distributing value in a manner rejected by classes of creditors and shareholders. But, the Bankruptcy Power requires that "the creditor gets all

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[77] *Kuehner v. Irving Tr. Co.*, 299 U.S. 445, 452 (1937); *accord ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 358 n.98 (S.D.N.Y. 2007) (citing *Kuehner*). Fair distribution has also been a hallmark of bankruptcy legislation. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors.").

the value of his lien and his share of any free assets."[78] To satisfy the fair, reasonable, and equitable distribution requirement, the debtor's assets and liabilities must be known. When they are unknown and creditors cannot prove the claims they make, due process is violated.[79]

Here, the distribution scheme approved below requires the Sacklers to pay an unknown fraction of their creditors' claims, allows the Sacklers to retain billions for themselves, from which they pay their personal creditors in full to stay out of personal bankruptcy–the opposite of a fair, reasonable and equitable distribution, as shown by 11 U.S.C. § 1129(b) requiring the owner or debtor to keep nothing if a class of creditors' claims rejects the plan.

In *Ortiz v. Fibreboard Corp.*,[80] this Court explained that for a limited fund class action settlement to be approved under Fed. R. Civ. P. 23(b)(1)(B), it must satisfy certain conditions making it equitable to bind class members to a fund insufficient to pay them in full: (a) the maximum size of the fund must be less than the maximum claims, (b) the entire fund must go to the claimants, and (c) the claims must share a common theory of liability.[81] Additionally, this Court

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[78] *Reconstruction Fin. Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495, 533 (1946).

[79] *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 655 (E.D. Va. 2022).

[80] 527 U.S. 815 (1999).

[81] *Id.* at 840-42.

opined there must be a necessity to deprive the claimant of his day in court and his jury trial.[82] Here, the Sacklers are retaining billions, and the creditors have claims based on different state statutes and common law. This Court also opined the existence of a negotiated settlement does not eliminate the need for proof the fund is less than the claims.[83]

B. Coerced Releases Violate the Separation of Powers Principle by the Executive and Legislative Branches Allowing the Judicial Branch to Deprive Itself and Creditors of Judicial Cognizance over Common Law Claims

The separation of powers principle permeates the Federalist Papers which explain why the Constitution adopts it to preserve liberty. In short, the early Americans did not want a government in which the same actor would have the executive, legislative, and judicial powers. The Federalist No. 47 explains: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[84]

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[82] *Id.* at 858-60.; *see Wilks*, 490 U.S. at 762.

[83] *Ortiz*, 527 U.S. at 821.

[84] The Federalist No. 47 (James Madison).

The Supreme Court's four decisions[85] the last forty-two years discussing Article III's application in bankruptcy cases identify the key issue—separation of powers—but that issue is not mentioned in most lower courts' jurisprudence discussing coerced releases, including *Purdue Pharma*. In the four decisions most of the Lost Rights were not at stake. A chapter 11 debtor or bankruptcy trustee was suing a third party for money damages. There was no dispute the debtor could sue, the court would apply the common law, and the debtor could procure and enforce a judgment. To satisfy the separation of powers, this Court only had to determine whether Article III judicial power or a jury was required.

So, the bankruptcy court's decision in *Purdue Pharma* and the Third Circuit's decision in *Millennium*, treated the need for an Article III judge as the sole constitutional issue. Reasoning backwards from *Stern* (which did not involve a coerced release), the courts determined a non-Article III judge can order a coerced release. If that had really been the only issue, the court would have been right for the wrong reason. Releasing shareholders derives from the discharge

[85] *N. Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982); *Granfinanciera,* 492 U.S. 33 ; *Langenkamp v. Culp*, 498 U.S. 42 (1990); and *Stern v. Marshall*, 564 U.S. 462 (2011) ("*Stern*").

power.[86] In 1789 in England, the bankruptcy commissioner in the equity courts granted discharges,[87] so Article III judges would not be required if coerced releases were otherwise constitutional.

But, as the Lost Rights show, the need for an Article III judge or jury is not the only variable required to carry out the separations of powers principle. In *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856), this Court ruled when a matter is within the executive power and determined as a "public right," it is not subject to the judicial power.[88] This Court established the rule religiously followed today:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."[89]

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[86] *Purdue Pharma*, 69 F.4th at 70-71.

[87] *See Sharif*, 575 U.S. at 689-90 (Roberts, CJ., Scalia, J., and Thomas, J., dissenting).

[88] *Murray,* 59 U.S. at 284.

[89] *Id.*

When applied to coerced releases, there is no dispute the creditors' common law tort actions against the shareholders were quintessentially subject to judicial cognizance at common law. Therefore, without violating the separation of powers principle, Congress as the legislative branch cannot constitutionally withdraw common law claims from judicial cognizance or authorize any Article III or non-Article III judge to do so. "The Constitution's division of *power* among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."[90] Therefore, it does not cure the coerced release's violation of the separation of powers principle if one or all Article III judges order the coerced release. Because bankruptcy judges lack lifetime tenure during good behavior[91] and an irreducible compensation,[92] they are not Article III judges. As non-Article III judges, their elimination of the creditors' entitlement to a trial based on settled law would be an act of the executive branch snatching power from the judicial branch while depriving creditors of their fundamental rights, and most certainly a separation of powers violation.

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[90] *New York v. United States*, 505 U.S. 144, 182 (1992) (even if State officials consent, Congress may not exercise power reserved to the States); *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976) (Congress cannot infringe on President's appointment power even if President consents); *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (legislative veto violates the separation of powers even if President consents).

[91] *See* 28 U.S.C. §§ 152(a)(1), 152(e).

[92] *See* 28 U.S.C. § 153(a).

In authorizing coerced releases, Congress would more egregiously usurp judicial power than Congress usurped judicial power with legislation this Court has already struck down. In *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995), and *United States v. Klein*, 80 U.S. 128 (1871), this Court struck statutes imposing judicial outcomes for preexisting common law disputes. Authorizing coerced releases eliminates common law outcomes and leaves to the judge's imagination the formulation of substitute outcomes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted

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