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

BRIEF OF "TEXAS TWO-STEP" VICTIMS AS AMICI CURIAE IN SUPPORT OF PETITIONER

DEEPAK GUPTA
Counsel of Record
GREGORY A. BECK
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com

Counsel for Amici Curiae

September 27, 2023

TABLE OF CONTENTS

Table of authorities iii

Introduction and summary of argument 1

Interest of amici curiae 2

Statement 4

Argument 7

- I. Nonconsensual third-party releases implicate serious concerns that counsel against reaching overbroad pronouncements on section 524(g). 7
  - A. Nonconsensual third-party releases raise longstanding jurisdictional problems. 7
    - 1. Claims against non-debtor third parties are not core proceedings. 8
    - 2. Claims against non-debtor third parties are not "related to" proceedings. 9
  - B. Nonconsensual third-party releases, including those under section 524(g), raise serious constitutional concerns. 12
    - 1. Nonconsensual third-party releases infringe Seventh Amendment rights 14

2. Nonconsensual third-party releases impair due process rights. 17

II. The increasing prevalence of bankruptcy abuse by wealthy, solvent tortfeasors underscores the need for this Court to proceed cautiously. 20

Conclusion 24

TABLE OF AUTHORITIES

Cases

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 19

Buzard v. Houston,
119 U.S. 347 (1886) 15

Celotex Corp. v. Edwards,
514 U.S. 300 (1995) 9, 11, 12

Czyzewski v. Jevic Holding Corp.,
580 U.S. 451 (2017) 22

Dairy Queen, Inc. v. Wood,
369 U.S. 469 (1962) 15

Gardner v. New Jersey,
329 U.S. 565 (1947) 7

Georgine v. Amchem Products, Inc.,
83 F.3d 610 (3d Cir. 1996) 22

Granfinanciera, S. A. v. Nordberg,
492 U.S. 33 (1989) 15, 16

Gupta v. Quincy Medical Center,
858 F.3d 657 (1st Cir. 2017) 8

Hansberry v. Lee,
311 U.S. 32 (1940) 18

In re 3M Combat Arms Earplug Products Liability Litigation,
2022 WL 3370146 (N.D. Fla. 2022) 22

In re Bestwall LLC,
71 F.4th 168 (4th Cir. 2023) 2, 20

In re Cedar Shore Resort, Inc.,
235 F.3d 375 (8th Cir. 2000) 13

In re Combustion Energy, Inc.,
391 F.3d 190 (3d Cir. 2004) 7, 10, 14, 17

In re LTL Management, LLC,
64 F.4th 84 (3d Cir. 2023) 2, 5, 6

In re LTL Management, LLC,
652 B.R. 433 (Bankr. D.N.J. 2023) 6

In re SGL Carbon Corp.,
200 F.3d 154 (3d Cir. 1999) 22

In re W.R. Grace & Co.,
591 F.3d 164 (3d Cir. 2009) 9, 11

Law v. Siegel,
571 U.S. 415 (2014) 7, 13

Lewis v. Clarke,
137 S. Ct. 1285 (2017) 11

Marrama v. Citizens Bank of Massachusetts,
549 U.S. 365 (2007) 5

Martin v. Wilks,
490 U.S. 755 (1989) 12, 13

Matter of Wood,
825 F.2d 90 (5th Cir. 1987).. 8

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 2, 19, 20, 22

Parsons v. Bedford, Breedlove & Robeson,
28 U.S. 433 (1830) 14

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 20

Sampsell v. Imperial Paper & Color Corp.,
313 U.S. 215 (1941) 12

Shapiro v. Wilgus,
287 U.S. 348 (1932) 20

Stern v. Marshall,
564 U.S. 452 (2011) 8, 10, 12

Stoe v. Flaherty,
436 F.3d 209 (3d Cir. 2006) 8

Taylor v. Sturgell,
553 U.S. 880 (2008) 18

Tenn. Student Assistance Corp. v. Hood,
541 U.S. 440 (2004) 10

United States v. Energy Resources Co., Inc.,
495 U.S. 545 (1990) 7

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 20

Statutes

11 U.S.C. § 524 .... 5, 18

28 U.S.C. § 157 8

28 U.S.C. § 1334 8

28 U.S.C. § 1334 .... 8, 9

28 U.S.C. § 1407 22

28 U.S.C. § 1411 15

Other Authorities

140 Cong. Rec. H. 27692 (1994) 5

Adam J. Levitin,
The Constitutional Problem of Nondebtor Releases in Bankruptcy, 91 Fordham L. Rev. 429 (2022) 12

Evading Accountability: Hearing on Corporate Manipulation of Chapter 11 Bankruptcy Before the S. Comm. on the Judiciary, 118th Cong. (2023) 23

Lindsey D. Simon,
Bankruptcy Grifters, 131 Yale L.J. 1154 (2022) 21

Maria J. Glover,
Due Process Discontents in Mass-Tort Bankruptcy, 72 DePaul L. Rev. 535 (2023). 14, 18

Melissa B. Jacoby,
Shocking Business Bankruptcy Law, 131 Yale L.J.F. 409 (2021) 16

Michael A. Francus,
Texas Two-Stepping Out of Bankruptcy, 120 Mich. L. Rev. Online 38 (2022) 6

Ralph Brubaker,
A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall, 86 Am. Bankr. L.J. 121 (2012) 17

Ralph Brubaker,
Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations, 1997 U. Ill. L. Rev. 959 (1997) 19

Ralph Brubaker,
Mandatory Aggregation of Mass Tort Litigation in Bankruptcy, 131 Yale L.J.F. 960 (2022) 17

Thomas A. Smith,
A Capital Markets Approach to Mass Tort Bankruptcy, 104 Yale L.J. 367 (1994) 19

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by this case is whether nonconsensual third-party releases are permissible under the Bankruptcy Code. In answering that question, both the United States and Purdue rely in different ways on section 524(g) of the Code, which authorizes the discharge of asbestos claims against third parties in tightly prescribed circumstances. The government reads this section to suggest that Congress intended third-party releases only in the narrow context of asbestos bankruptcies. *See* U.S. Br. at 21. Purdue, in turn, reads the government's reliance on section 524(g) as a concession that third-party releases are constitutional in some circumstances. *See* Debtors' Stay Opp. at 56-57.[1]

Amici are a group of asbestos claimants who file this brief to urge the Court to exercise caution in resolving these issues. Since Congress adopted section 524(g) in 1994, debtors have sought to extend its reach to contexts progressively further afield from the statute's text and purpose—not to give relief to financially distressed companies, but to allow *profitable* corporations to escape juries by forcing their tort victims into bankruptcy court.

A prime example is the so-called "Texas Two-Step," in which a corporation transfers its tort liability to a shell company created for the sole purpose of discharging that liability in bankruptcy. This abusive tactic is the subject of a brewing fight in the lower courts over injunctions that have blocked thousands of terminally ill asbestos victims,

---

[1] Unless otherwise specified, all internal quotation marks, citations, and alterations are omitted. No counsel for a party authored this brief in whole or in part and no person other than amici and their counsel made a monetary contribution to its preparation or submission.

like amici here, from prosecuting their claims against even highly solvent corporations like Johnson & Johnson. *See In re LTL Mgmt., LLC*, 64 F.4th 84 (3d Cir. 2023); *cf. In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023). Premature discussion by this Court about section 524(g) or the cases applying it could risk putting the Court's imprimatur on these disputed, expansive interpretations. The Court should avoid doing so.

Even in the narrow contexts in which section 524(g) expressly authorizes third-party releases, this Court should be wary of broad pronouncements on the law's legality or scope. The Court has warned of the "serious constitutional concerns that come with any attempt to aggregate individual tort claims" in a way that "compromises Seventh Amendment rights" and the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46, 868 (1999).

Taking notice of these concerns now does not require this Court to agree with amici on the jurisdictional and constitutional concerns raised here. Rather, because these issues were not decided below or briefed by the parties, the Court would be better served by reserving judgment until questions regarding section 524(g) are squarely presented in an asbestos case. In the meantime, the Court should take care to avoid the sweeping, unintended consequences that could result from an overbroad pronouncement on the statute's validity or scope.

INTEREST OF AMICI CURIAE

Amici curiae are victims of the "Texas Two-Step": terminally ill cancer patients and family members injured by the carcinogenic products and corporate maneuvers of Georgia-Pacific, CertainTeed, Trane Technologies, and

Johnson & Johnson. Amici were converted from plaintiffs to creditors—and forced into bankruptcy court—after each corporation assigned billions of dollars in asbestos-related liability to a newly created shell that swiftly filed for Chapter 11 protection.

Thus, like the respondents in this case, amici were injured by well-resourced tortfeasors who sought to discharge their liability in the bankruptcy system without subjecting themselves to the rigors of bankruptcy. In each Texas Two-Step, the bankruptcy court went even further, issuing sweeping injunctions that halted amici's claims against non-debtor third parties without compensation or consent.

Amici include Theresa Germont, whose husband, Bill, was diagnosed with mesothelioma, an aggressive and deadly cancer, following his exposure to asbestos as a machine tender at CertainTeed. Theresa learned of CertainTeed's bad-faith bankruptcy—and the resulting stay of her lawsuit against the corporation—on the day of Bill's funeral. Now 86 years old, Theresa is still waiting to hold CertainTeed accountable in court.

Wilson Everett Buckingham, a former contractor, was exposed to asbestos while routinely sweeping up a drywall-joint compound manufactured by Georgia-Pacific. Everett was diagnosed with malignant pleural mesothelioma at 70 years old. He has undergone several rounds of chemotherapy but is alive and determined to fight for justice, even while his claims against Georgia-Pacific remain unresolved.

Robert Semian was exposed to asbestos during his decades-long employment with Trane Technologies from 1966 to 1992. He was diagnosed with testicular mesothelioma at 82 years old. Robert's health has declined

even after his surgery, but he has been unable to litigate his case against Trane in Pennsylvania state court because of the company's fraudulent bankruptcy.

Jacklyn Pena is 30 years old and was diagnosed with pleural mesothelioma in 2021. Her only known exposure to asbestos was through personal care products—primarily J&J's baby powder from her birth in 1992 through 2011. Jacklyn's suit against J&J was suspended for nearly two years because of the corporation's Texas Two-Step.

Randy Derouen is 48 years old and has lived with peritoneal mesothelioma since 2019. His only known exposure to asbestos was his lifetime use of J&J's baby powder. Randy sued J&J one year before the corporation filed its first bad-faith bankruptcy in 2021. Unable to walk without assistance or lift himself out of a chair, Randy is cared for full-time by his 80-year-old father.

STATEMENT

In recent years, a growing number of wealthy corporations have exploited the Bankruptcy Code to permanently free themselves from mass-tort litigation. One maneuver is the "Texas Two-Step." With that device, a corporation facing tort liability attempts to limit its exposure (and evade jury verdicts) by reincorporating in Texas, dividing itself in two, and offloading its liability to a newly formed shell company. Once the shell promptly declares bankruptcy, the entire corporate enterprise gains the benefit of the bankruptcy court's automatic stay, shielding valuable assets from victims' reach.

The "Texas Two-Step" is particularly lucrative in the asbestos context. Section 524(g) of the Code was enacted to allow financially distressed companies facing "overwhelming" asbestos liabilities to create a trust that

would compensate present and future victims equally from limited funds. 140 Cong. Rec. H. 27692 (1994). The statute permits the limited release of asbestos claims against non-debtor third parties, so long as these third parties are "liable for the conduct of, claims against, or demands on the debtor" and have one of four specified legal relationships with the debtor. 11 U.S.C. § 524(g)(4)(A)(ii). Section 524(g) was intended to help Congress test "whether the [trust-injunction] concept should be extended into other areas." 140 Cong. Rec. H. 27692. That test has not gone well.

Under the auspices of section 524(g), highly profitable corporations have used the Texas Two-Step to obtain sweeping preliminary injunctions without ever filing for bankruptcy themselves. These injunctions bar personal-injury claimants like amici—critically ill and dying cancer patients—from pursuing state-law remedies against the entities that caused their injuries. In other words, by systematically manipulating the procedures that were designed to give the "honest but unfortunate debtor" a "fresh start," *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007), these companies have sought to ensure that their victims will never access our nation's tort system during their limited lifetimes.

Johnson & Johnson carried out this plan after it was held liable for concealing asbestos in its signature baby powder. In October 2021, J&J created and dissolved multiple corporate entities over the course of days until its consumer products business was replaced with two new entities. *LTL Mgmt.*, 64 F.4th at 96. The first was essentially identical to its old consumer products subsidiary but ostensibly free of its tort liabilities. The second was a shell that received all of its liabilities but

none of its assets. *Id.* at 96-97. Within 48 hours, the shell filed for bankruptcy, obtaining a preliminary injunction that protected the entire J&J corporate enterprise and seeking to force victims to accept pennies on the dollar for their claims. *Id.* at 97.

Earlier this year, the Third Circuit unequivocally blocked J&J's maneuver, characterizing it as "the bankruptcy filing of a company created to file for bankruptcy." *Id.* at 110. Undaunted, and after abandoning its claim that it would seek certiorari with this Court to challenge the Third Circuit's decision, J&J filed a second bankruptcy petition. *See In re LTL Mgmt., LLC*, 652 B.R. 433, 439 (Bankr. D.N.J. 2023). The bankruptcy court rejected this attempt as another bad faith filing, *see id.* at 456, and J&J was granted a direct appeal to the Third Circuit. *See* Order Certifying Direct Appeal, *In re LTL Mgmt., LLC*, No. 23-12825 (Bankr. D.N.J. Sept. 20, 2023).

But the corporation is far from alone in trying out the Texas Two-Step: Georgia-Pacific pioneered the move in 2017, CertainTeed replicated it in 2019, and Trane Technologies followed suit in 2020. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. Online 38, 41-42 (2022). In each case, the new, liability-laden shell declared bankruptcy, obtaining a preliminary stay for itself, and seeking a permanent, nonconsensual release to safeguard its corporate empire against mass-tort claims.

That same type of release is at issue here. The Sackler family may not have reincorporated in Texas. But they also exploited the bankruptcy system to obtain a sweeping release—one that protects the Sackler family from virtually all opioid-related liabilities, even those that couldn't be discharged if they entered bankruptcy

themselves. Despite Purdue's arguments to the contrary, such a release was never contemplated by the Code—much less sanctioned in cases where the joint tortfeasor never files for bankruptcy itself.

The recent application of section 524(g) thus illustrates the infirmities of nonconsensual third-party releases—and the danger that bankruptcy abuse, if left unchecked, will inappropriately block claimants like amici here form reaching the courthouse doors.

ARGUMENT

I. Nonconsensual third-party releases implicate serious concerns that counsel against issuing overbroad pronouncements on section 524(g).

A. Nonconsensual third-party releases raise longstanding jurisdictional problems.

The subject-matter jurisdiction of bankruptcy courts is limited to "the confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014). The Code, in sections 105(a) and 1123(b)(6), provides bankruptcy courts with "residual" equitable authority to issue orders. *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990). But it "does not provide an independent source of federal subject matter jurisdiction." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 225 (3d Cir. 2004). The first question, then, is whether a bankruptcy court has jurisdiction to enjoin a claimant from recovering against a non-debtor third party without that claimant's consent.

Under longstanding precedent, it does not. Bankruptcy courts only have the power to adjudicate the "interests claimed in a res"—the assets of the bankruptcy estate that are available to satisfy creditors. *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). In enacting section

524(g), Congress did not extend the power of bankruptcy courts to relieve non-bankrupt third parties. Nor did it enlarge the jurisdiction of the Code to shield non-debtor tortfeasors from liability. To the contrary, Congress has only granted bankruptcy courts jurisdiction over only two kinds of proceedings: (i) core proceedings and (ii) proceedings "related to" core proceedings. 28 U.S.C. § 1334(b); *id.* § 157(a). A victim's direct claim of liability against a non-debtor third party constitutes neither.

1. Claims against non-debtor third parties are not core proceedings.

This Court has explained that bankruptcy jurisdiction extends to three categories of core proceedings: cases "under" Chapter 11, proceedings "arising under" Chapter 11, and proceedings "arising in" a Chapter 11 case. 28 U.S.C. § 1334(a)-(b); *see Stern v. Marshall*, 564 U.S. 452, 495 (2011). In these core proceedings, a bankruptcy judge may "hear and determine" the controversy and "enter appropriate orders and judgments," subject only to appellate review. 28 U.S.C. § 157(b).

Although Congress has not provided an exhaustive list of core proceedings, *see id.* § 157(b)(2), the courts of appeals have defined the three categories in greater detail. First, a case "under" Chapter 11 "refers merely to the bankruptcy petition itself." *See, e.g.*, *Matter of Wood*, 825 F.2d 90, 92 (5th Cir. 1987). Second, a proceeding "arising under" Chapter 11 requires that "the Bankruptcy Code creates the cause of action or provides the substantive right invoked." *Stoe v. Flaherty*, 436 F.3d 209, 217 (3d Cir. 2006). Finally, a proceeding "arising in" a Chapter 11 case is one that "by its nature, not its particular factual circumstance, could arise *only* in the

context of a bankruptcy case." *Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 665 (1st Cir. 2017).

Here, the enjoined personal-injury and wrongful-death claims against the Sacklers and other third parties are not "core" under any definition. The claims are distinct from the bankruptcy petition. They are founded in state tort law, not the federal Bankruptcy Code. And they are not unique to Purdue's bankruptcy filing; for years, state governments and individuals sued the Sacklers directly for precisely the same tort violations. *See* U.S. Br. at 7.

Congress's careful designation of core proceedings makes plain that the mere "existence of a bankruptcy proceeding" is not "an all-purpose grant of jurisdiction." *In re W.R. Grace & Co.*, 591 F.3d 164, 174 (3d Cir. 2009). If it were, "a bankruptcy court would have power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding." *Id.*

2. Claims against non-debtor third parties are not "related to" proceedings.

Because third-party claims against third-party defendants cannot be core proceedings, they are at best "related to" proceedings. 28 U.S.C. § 1334(b). Related-to jurisdiction encompasses "suits between third parties" only if they "have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). Simply put: "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Id.* at 308 n.6. Because claims against third parties for their own liability do not affect the estate, bankruptcy courts lack jurisdiction to enjoin claimants from bringing such suits.

Here, the court of appeals held that the bankruptcy court had statutory jurisdiction to enjoin claims against the Sacklers and other third parties because it was "conceivable" that these claims would affect the estate. J.A. 874. Since there was a "specter" of impact, *id.* at 873, it didn't matter that these releases touched the "outer limit of a bankruptcy court's *in rem* jurisdiction." *Id.* at 736. That is wrong for two reasons.

First, it is irrelevant that "some of the third-party claims . . . are closely related to the derivative claims which the Estate might bring against the Sacklers." *Id.* A bankruptcy court cannot transfigure its jurisdiction over core proceedings to enjoin unrelated proceedings on the basis of factual similarity. The intertwined facts only demonstrate a connection between the claims. They do not establish an impact on the estate.

That's why bankruptcy courts can only exercise related-to jurisdiction over claims that affect "the property or thing *in question*." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (emphasis added). That's also why "some overlap" between debtor and non-debtor claims is insufficient to establish jurisdiction. *Stern*, 564 U.S. at 497. Factual similarity between claims might make it more likely that a claim impacts the estate. But likelihood is not evidence, and it cannot create a connection to the estate where one does not exist.

Second, the fact that the Sacklers might seek indemnification, contribution, or insurance coverage from the estate also fails to establish related-to jurisdiction. *See* J.A. 875. As the Third Circuit has explained, related-to jurisdiction requires that "the allegedly related lawsuit would affect the bankruptcy *without* the intervention of yet another lawsuit." *Combustion Eng'g*, 391 F.3d at 227

(emphasis added). But "potential indemnification and contribution claims by non-debtors" do not establish jurisdiction automatically—these claims "would require another lawsuit before they could affect" the estate. *Id.* And insurance coverage cannot supply a basis for jurisdiction without "findings regarding the terms and operation of the subject policies." *Id.* at 232.

This Court has made clear that an "indemnification provision does not somehow convert [a] suit against [a third party] into a suit against [the estate]." *Lewis v. Clarke*, 137 S. Ct. 1285, 1293 (2017). A judgment against a third party for its own independent liability "will not bind [the estate] in any way," and the existence of a potential claim for indemnification or contribution does not alter that fact. *Id.*

That precedent controls here. Any tort judgment against the Sacklers or other third parties will not bind the estate. Instead, "an entirely separate action would be necessary for any liability incurred by [the Sacklers] to have an impact on [the] estate." *W.R. Grace*, 591 F.3d at 172. That is precisely the situation in which related-to jurisdiction doesn't exist—where the third-party claim has "only the *potential* to give rise to a separate lawsuit seeking indemnification from the debtor." *Id.* at 173 (emphasis added). If a later reimbursement proceeding were brought against the estate, the bankruptcy court could stay that action then. But enjoining tens of thousands of suits by third parties against other third parties in advance goes too far.

Even if the released claims did eventually "have an effect on the bankruptcy estate," *Celotex*, 514 U.S. at 307 n.5, that effect would arise only because the Sacklers ensured it would. To the extent that any "third-party

direct claims against the Sacklers would likely impact" the estate's own assets, J.A. 874, the Sacklers manufactured that situation. After all, Purdue declared bankruptcy only after the Sacklers extracted billions from Purdue's bank accounts, leaving the corporation in "a significantly weakened financial position." *Id.* at 848. For the Sacklers to then exploit the bankruptcy system to immunize themselves from liability would render the Code "nothing but a sham and a cloak." *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 217 (1941).

In any event, it cannot be the case that a bankruptcy court can enjoin a claimant from suing a non-debtor third party because of the mere *possibility* that the claimant would recover against the third party, causing that third party, perhaps, to seek reimbursement from the estate. That entire scenario guarantees no impact on the estate, much less the "direct and substantial adverse effect" required to confer jurisdiction. *Celotex*, 514 U.S. at 310. And issuing a permanent injunction because of that scenario would not only render bankruptcy jurisdiction "limitless." *Id.* at 308. It would also reduce "Article III . . . into mere wishful thinking." *Stern*, 564 U.S. at 495.

B. Nonconsensual third-party releases, including those under section 524(g), raise serious constitutional concerns.

The Constitution has long required that "everyone should have [their] own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Nonconsensual third-party releases deny victims of this "deep-rooted historic tradition." *Id.* Their claims are extinguished despite "hav[ing] never been adjudicated in any fashion by any court," and "without any opportunity for adjudication of individual direct claims whatsoever." Adam J. Levitin, *The*

Constitutional Problem of Nondebtor Releases in Bankruptcy, 91 Fordham L. Rev. 429, 440 (2022).

Purdue asserts that the "special remedial scheme" of bankruptcy negates any constitutional concerns. Debtors' Stay Opp. at 57. "The Bankruptcy Clause is an independent source of constitutional authority," its argument goes, so "other constitutional provisions like the Due Process Clause must be read with it in mind." *Id.* at 58. But the Bankruptcy Clause grants authority over only the bankrupt, not non-debtor third parties. And a bankruptcy filing, standing alone, does not cause the rest of the Constitution to vanish into thin air.

Bankruptcy is only special because of "[t]he Code's meticulous—not to say mind-numbingly detailed"—requirements. *Law*, 571 U.S. at 424. These provisions serve one purpose—to give "businesses teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liability." *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 381 (8th Cir. 2000). By directing Purdue's bankruptcy without ever entering bankruptcy themselves, the Sacklers forfeited their right to benefit from bankruptcy's termination of claimants' "preexisting rights." *Martin*, 490 U.S. at 762 n.2.

That alone explains why claimants' Seventh Amendment and due process rights were unconstitutionally abridged. But both the government and the Canadian Creditors go further, contending that section 524(g) is, in contrast, "a special remedial scheme" because it "imposes stringent procedural requirements to protect the rights of absent parties." U.S. Br. at 43; *see* Canadian Creditors' Br. at 41.

To be sure, in enacting section 524(g), Congress did include certain "statutory prerequisites . . . to protect the due process rights of future claimants." *Combustion Eng'g*, 391 F.3d at 234 n.45. In practice, however, these requirements are threatened by tactics like the Texas Two-Step. Defendants may "cloak these so-called bankruptcy arrangements with many of the superficial formalities of previous § 524(g) deals." Maria J. Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DePaul L. Rev. 535, 562 (2023). But "beneath the surface of the formal designations . . . defendants simply cherry-pick the most advantageous elements of the § 524(g) claim-resolution apparatus." *Id.*

Even if section 524(g)'s requirements were strictly followed, constitutional concerns related to the Seventh Amendment and due process still linger. To recognize these concerns does not compel the conclusion that there can be no constitutional application of section 524(g). But it does mean that section 524(g) cannot stand for the proposition that nonconsensual third-party releases are constitutional across all contexts, including in this case.

1. Nonconsensual third-party releases infringe Seventh Amendment rights.

Since the Founding, the Court has recognized that the Seventh Amendment right to "trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830). The Seventh Amendment guarantees the right to a jury trial in suits at common law, or "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone

were recognized, and equitable remedies were administered." *Id.* at 447.

In enacting the Seventh Amendment, the Framers resolved that suits "for the payment of money by way of damages" could only "be recovered at law." *Buzard v. Houston*, 119 U.S. 347, 352 (1886). Because a claim for damages is "unquestionably legal," the right to a jury trial is always preserved. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476 (1962). Congress cannot abridge that right. It may create "novel causes of action" and "assign[] their adjudication to tribunals without statutory authority to employ juries as factfinders." *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 51 (1989). But it cannot "strip parties contesting matters of private right of their constitutional right to a trial by jury." *Id.* at 51-52.

That's why Congress was careful to provide that the Code "do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." 28 U.S.C. § 1411(a). Accordingly, the plan here allows victims to bring personal-injury or wrongful-death claims against *debtors* before a jury. *See* J.A. 560, 590, 607. The sweeping release, however, denies victims of a jury when personal-injury or wrongful-death claims are brought against *non-debtors*, including the Sacklers, for their own misconduct. *Id.* at 279. That restriction violates both the Constitution and the Code.

The Bankruptcy Code is not a super-statute, and the bankruptcy courts are not super-legislatures. The mere occurrence of a Chapter 11 filing does not entitle bankruptcy courts to enjoin jury trials against non-debtor tortfeasors, much less to fashion an alternative justice

system with none of the protections the Framers saw fit to guarantee in Article III and the Seventh Amendment.

a. Purdue argued, and the bankruptcy court agreed, that the release of direct liability against the Sacklers was "the critical element for ensuring the viability of the plan." Debtors' Stay Opp. at 10. But it is a fundamental precept of our bankruptcy system that its powerful tools "make sense only as part of Chapter 11's package deal"—when an *entire* corporate enterprise enters bankruptcy to avert financial disaster. Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 Yale L.J.F. 409, 411 (2021). The Sacklers' use of Purdue's bankruptcy to extinguish their own liabilities contravenes that central purpose.

To enjoin thousands of pending claims because "[c]ontinued litigation" would result "in a major escalation of costs" (because the Sacklers did too good of a job at sheltering Purdue's assets) not only lacks a statutory basis, but also offends the constitutional values of our nation's tort system. Debtors' Stay Opp. at 12. Here, the enjoined victims are pursuing personal-injury and wrongful-death claims that are purely "legal in nature." *Granfinanciera*, 492 U.S. at 55. Absent their consent, our Constitution demands that those claims "be adjudicated by an Article III court" in accordance with "the Seventh Amendment's guarantee of a jury trial," or in state court. *Id.* The fact that our civil-justice system may "increase the expense" or "impede swift resolution of bankruptcy proceedings" is "insufficient to overcome" the Constitution's "clear command." *Id.* at 63.

b. By acceding to Purdue's scheme, the bankruptcy court also exceeded its authority. Congress has placed sharp limits, rooted in constitutional principles, on the power that bankruptcy courts may exercise over Article

III and state courts. That is why this Court's most recent examination of bankruptcy jurisdiction "relied directly (and without qualification) upon Seventh Amendment jury trial decisions . . . as if they were binding precedent for purposes of the Article III decision in *Stern v. Marshall*." Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 Am. Bankr. L.J. 121, 151 (2012); *see also id.* ("[I]f the right to a jury trial exists in a particular proceeding, then so does the right to a final judgment from an Article III judge, and vice versa").

The court here blew past those constitutional limits by halting claims against thousands of third parties—damages claims "on which creditors have *both* a right to final judgment from an Article III judge *and* a Seventh Amendment right to a jury trial." Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960, 972 n.53 (2022). Nothing in this case authorizes the court's unprecedented action. And nothing in any case entitles a bankruptcy court or even an Article III court to issue a nonconsensual third-party release in violation of the Seventh Amendment.

2. Nonconsensual third-party releases impair due process rights.

As discussed above, the statutory prerequisites of section 524(g) were intended "to protect the due process rights of future claimants." *Combustion Eng'g*, 391 F.3d at 234 n.45. But these requirements, standing alone, didn't put an end to *all* constitutional concerns arising from *all* applications of section 524(g): "Minimal due process requirements extend to bankruptcy proceedings," even

when resolving "future asbestos liability, under bankruptcy or otherwise." *Id.* at 245 & n.64.

a. Consider the issue of adequate representation—that is, whether a victim is sufficiently represented in the bankruptcy proceeding before the victim's claims are enjoined. This Court has insisted that nonparties must receive adequate representation before being bound by a judgment. *See Taylor v. Sturgell*, 553 U.S. 880, 900 (2008). A party's representation of a nonparty is adequate "only if, at minimum": (i) the nonparty and their representative share aligned interests; (ii) the party or original court specifically protected the nonparty's interests; and (iii) the nonparty received notice of the original proceeding. *Id.*; *see Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

The Code, however, imposes no requirements on claimant representation *before* a corporation files for bankruptcy. Instead, whether in a conventional bankruptcy or a Texas Two-Step, the defendant-corporation is free to engineer its own funding agreement, manufacture its own reorganization documents, and orchestrate its own contribution and indemnification plans. Any release of a victim's claims thus proceeds solely on the debtor's terms. "It is talismanic that an adversary cannot be one's representative in negotiations." Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DePaul L. Rev. at 577. Yet that is the exact premise from which section 524(g) operates.

Even after a bankruptcy petition is filed, due process concerns remain. Section 524(g) mandates the appointment of a legal representative to protect the interests of future claimants. *See* 11 U.S.C. § 524(g)(4)(B)(i). But one representative is no substitute for the adversarial system. Because section 524(g) groups

together all future claimants—whether their asbestos exposure results in mild or terminal illness—the representative may "face irreconcilable conflicts" in advocating for the entire class of victims. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 976-77 n.61 (1997).

Finally, the representative must resolve these conflicts while having no identifiable client. "The only monitor of the performance of the future claimants' representative is the court itself, whose incentive is less to ensure that future claimants receive the maximum possible or even a fair share, than it is to ensure that the parties reach some agreement." Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 Yale L.J. 367, 385 (1994). As a result, even in the bankruptcy proceeding that prompted the enactment of section 524(g), the "ultimate result . . . left future claimants almost entirely unprovided for, as the protections of future claimants in the plan proved completely ineffective." *Id.* at 391.

b. The nonconsensual nature of these releases raises independent due process concerns. By definition, creditors cannot opt out of nonconsensual releases. Because of the "serious constitutional concerns that come with any attempt to aggregate individual tort claims," the Court has reiterated that parties, even in the asbestos context, must be able to opt out of binding settlements before their claims are released. *Ortiz*, 527 U.S. at 845; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (emphasizing the "significance" of providing

asbestos victims with "the information or foresight needed to decide, intelligently, whether to stay in or opt out").

In a damages class action under Rule 23(b)(3), for example, an absent class member must have "an opportunity to remove himself from the class" before his right of action is extinguished. *Ortiz*, 527 U.S. at 848. Because each class member has a property interest in their "individualized claim for money" that is protected under the Due Process Clause, the "absence of . . . opt-out violates due process." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). These constitutional requirements hold in the state-law context as well. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Purdue's sole response to these longstanding rules is to say, "this is a bankruptcy case." Debtors' Stay Opp. at 58. But bankruptcy does not allow federal courts to sidestep the Constitution. It cannot be used to strip claimants of their day in court with no representation and no bargained-for exchange. That is doubly true where, as here, the bankruptcy is part of a "single scheme to hinder and delay creditors in their lawful suits"—a purpose long "condemned in Anglo-American law." *Shapiro v. Wilgus*, 287 U.S. 348, 353, 354 (1932).

II. The increasing prevalence of bankruptcy abuse by wealthy, solvent tortfeasors underscores the need for this Court to proceed cautiously.

This case is just one example of recent abuse within the bankruptcy system. As amici know too well, wealthy individuals and corporations across the country have exploited the Code, using bankruptcy to sidestep litigation without ever declaring bankruptcy themselves. *See, e.g.*, *In re Bestwall LLC*, 71 F.4th 168, 194 (4th Cir. 2023) (King, J., dissenting) ("In sum, I would squarely reject

Georgia-Pacific's use of its 2017 restructuring—little more than a corporate shell game—to artificially invoke the jurisdiction of the bankruptcy court and obtain shelter from its substantial asbestos liabilities without ever having to file for bankruptcy."). The practice has become so prevalent that it has a name—"bankruptcy grifting." *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154 (2022). It occurs when a joint tortfeasor "latch[es] onto a bankruptcy case," receiving benefits such as "channeling injunctions and releases" without incurring any of the associated costs. *Id.* at 1207.

This Court has rejected similar schemes for nearly a century. In *Shapiro v. Wilgus*, the debtor created a new corporation to take on his debts and, three days later, put that shell company into receivership and obtained an injunction against his creditors. 287 U.S. at 352-53. As Justice Cardozo explained, the debtor did not act in good faith because he designed the receivership to put his debt "in such a form and place that levies would be averted." *Id.* at 354. The same is true here.

The Sacklers may not have created a new shell company, but they stripped Purdue of its assets and entered the corporation into bankruptcy not for a "normal business purpose," but "for the very purpose of being sued." *Id.* at 355. The Sacklers' extraction of Purdue's billions, Purdue's subsequent Chapter 11 filing, and the sweeping third-party release were all "parts of a single scheme to hinder and delay creditors in their lawful suits." *Id.* at 353. Consequently, the entire bankruptcy is lawless—and dangerous inspiration for other deep-pocketed tortfeasors seeking to escape liability.

The court of appeals acknowledged the "fairness and accountability" questions inherent "in releasing parties

from liability for actions that cause great societal harm." J.A. 843. Yet it concluded there was no need "to answer all of these serious and difficult questions." *Id.* In downplaying the grave policy implications of Purdue's tactics, the court of appeals freely endorsed bankruptcy abuse as an end-run around mass-tort liability. And once those "floodgates are opened, debtors . . . can be expected" to replicate that move, making "every case that rare case." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 470 (2017).

To be sure, certain tortfeasors have "faced enormous potential liabilities and defense costs." *Ortiz*, 527 U.S. at 829. But the extraordinary nature of these cases—in which lucrative enterprises face staggering liability only because they harmed thousands of individuals in the first place—does not justify dismissing the forum Congress provided to resolve mass claims: multi-district litigation. 28 U.S.C. § 1407. While "the Bankruptcy Code presents an inviting safe harbor for such companies," its "lure creates the possibility of abuse which must be guarded against to protect the integrity of the bankruptcy system and the rights of all involved." *In re SGL Carbon Corp.*, 200 F.3d 154, 169 (3d Cir. 1999).

In short, a well-heeled defendant cannot "evade the jurisdiction of an Article III court" solely because of "its policy disagreement with a system created by Congress." *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2022 WL 3370146, at *2 (N.D. Fla. 2022). Some judges may share that policy disagreement, but they are also "not free to devise" their own "ideal system for adjudicating these claims." *Ortiz*, 527 U.S. at 865 (Rehnquist, J., concurring). If there is to be "innovation in the management of mass tort litigation," that "reform must come from the policy-

makers, not the courts." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996).

Just last week, our nation's policymakers emphatically renounced abuse within the bankruptcy system. And they did so with bipartisan consensus. *See Evading Accountability: Hearing on Corporate Manipulation of Chapter 11 Bankruptcy Before the S. Comm. on the Judiciary*, 118th Cong., at 01:50:06 (2023) (statement of Sen. Josh Hawley), https://perma.cc/GS3B-TJ6M ("We need to give more Americans the ability to get that recourse in court. And we need to change the Bankruptcy Code to make sure that companies like J&J can't avoid it."); *id.* at 00:24:48 (statement of Sen. Dick Durbin) ("We have every reason to expect that corporations—at least those with deep enough pockets—will continue to try to manipulate bankruptcy in similar ways. That's not what Congress intended when it created bankruptcy. It's not something we should allow to continue."); *id.* at 02:06:29 (statement of Sen. Peter Welch) ("The Sackler family has a Sackler rule for how bankruptcy works. They put all their liabilities in there, and some of their money, but they keep billions. Is that how bankruptcy is supposed to work?").

In listening to the stories of Texas Two-Step victims, the senators underscored the human costs of bankruptcy abuse. Amici know those costs well. Mesothelioma patients like Robert Semian were exposed to asbestos for years as they labored tirelessly for large corporations; they shouldn't have to wait even longer to receive compensation for their injuries. And aging widows like Theresa Germont have suffered enough. She should be able to exercise her constitutional rights without a deep-

pocketed corporation stonewalling her under the pretense of bankruptcy.

In sum, these senators recognized what the court of appeals couldn't—the fatal implications of nonconsensual third-party releases, and the promise of bankruptcy abuse to keep terminally ill plaintiffs like amici out of our civil-justice system. This Court should recognize the same.

* * *

Wealthy individuals and corporations are increasingly abusing the bankruptcy system, using it to escape liability without ever entering bankruptcy themselves. To decide this case, the Court need not agree with amici on the constitutional and jurisdictional implications of the practice. But, at a minimum, the Court should take care to avoid the sweeping, unintended consequences that could result from any premature, overbroad pronouncement on section 524(g)'s validity or scope.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
GREGORY A. BECK
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com

Counsel for Amici Curiae Theresa Germont, Wilson Everett Buckingham, Randy Derouen, Robert Semian, and Jacklyn Pena (the Ad Hoc committee of "Texas Two-Step" victims)

CHRISTOPHER M. PLACITELLA
JARED M. PLACITELLA
COHEN, PLACITELLA & ROTH, P.C.
127 Maple Ave
Red Bank, NJ, 07701
(732) 747-9003

Counsel for Theresa Germont

JONATHAN RUCKDESCHEL
THE RUCKDESCHEL LAW FIRM, LLC
8357 Main Street
Ellicott City, MD 21043
(410) 750-7825

Counsel for Wilson Everett Buckingham

MOSHE MAIMON
JEROME H. BLOCK
AMBER R. LONG
LEVY KONIGSBERG LLP

605 Third Avenue, 33rd Floor
New York, NY 10158
(212) 605-6200

Counsel for Randy Derouen

CLAYTON L. THOMPSON
MAUNE RAICHLE HARTLEY
FRENCH & MUDD, LLC
150 West 30th Street, Suite 201
New York, NY 10001
(800) 358-5922

Counsel for Robert Semian

JEROME H. BLOCK
LEVY KONIGSBERG LLP
605 Third Avenue, 33rd Floor
New York, NY 10158
(212) 605-6200

SUZANNE M. RATCLIFFE
MAUNE RAICHLE HARTLEY
FRENCH & MUDD, LLC
150 West 30th Street, Suite 201
New York, NY 10001
(800) 358-5922

Counsel for Jacklyn Pena

September 27, 2023