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 FOR *AMICI CURIAE* BANKRUPTCY LAW PROFESSORS RALPH BRUBAKER, BRUCE A. MARKELL, AND JONATHAN M. SEYMOUR IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae are professors who have devoted their careers to teaching, studying and writing about bankruptcy law, complex litigation, federal courts, and constitutional law. They are nationally and internationally recognized scholars who have participated as *amici* in this Court in prior cases involving foundational issues of bankruptcy law. *Amici* have a strong interest in the correct interpretation of the Constitution and the Bankruptcy Code and in their sound and effective implementation.

Ralph Brubaker is the James H.M. Sprayregen Professor of Law at the University of Illinois. He has written extensively on the issues before the Court in this case, including:

- Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960 (2022);
- Ralph Brubaker, *A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter 11*, 38 Bkrtcy. L. Ltr. No. 2, at 1 (Feb. 2018);
- Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Callaway v. Benton *Case*, 72 Am. Bankr. L.J. 1 (1998); and

1. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution to fund the preparation or submission of this brief.

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

Bruce A. Markell is the Professor of Bankruptcy Law and Practice and the Edward Avery Harriman Lecturer in Law at Northwestern University. He has served as a bankruptcy judge for the District of Nevada and as a member of the Ninth Circuit's Bankruptcy Appellate Panel.

Jonathan M. Seymour is an Associate Professor of Law at Duke University. He addresses issues before the Court in this case in Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. Chi. L. Rev. 1925 (2022).

SUMMARY OF ARGUMENT

This case presents what the district court below aptly called "the great unsettled question" of whether a bankruptcy court can approve so-called nonconsensual nondebtor (or third-party) release provisions. *In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021). Nonconsensual nondebtor releases extinguish creditors' direct claims of liability against a nondebtor without the consent (and even over the objection) of creditors in precisely the same way that a bankruptcy discharge extinguishes a bankruptcy debtor's debts. *See* 11 U.S.C. §1141(d)(1)(A). As in this case, such provisions frequently appear in a Chapter 11 debtor's proposed plan of reorganization. And in confirming a plan containing such a nondebtor-discharge provision, the court will typically enter an order permanently enjoining assertion of the released claims (now commonly known as a "channeling" injunction), which replicates the effect of the Bankruptcy Code's statutory discharge injunction (which is, of course, by its terms applicable to only *the debtor's* discharged debts). *See id.* §524(a).

Courts have *no* power to approve such nondebtor-discharge provisions. Indeed, from the very inception of the device, authority therefor was "manufactured out of whole cloth, and in disregard of Supreme Court precedent prohibiting" it, and the practice of approving nondebtor discharge has always been "an abusive one, with no redeeming theoretical merit." Brubaker, 1997 U. Ill. L. Rev. at 1080.

Courts' approval of nondebtor discharge contravenes the separation-of-powers limitation embedded in the Constitution's Bankruptcy Clause, which gives Congress the exclusive power to authorize discharge of indebtedness and to prescribe the circumstances under which such a discharge is appropriate. The nonconsensual nondebtor-release jurisprudence of those courts permitting the practice is also an unconstitutional exercise of substantive federal common lawmaking, in violation of the federalism and separation-of-powers constraints established by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Moreover, the Court's jurisprudence for interpreting the Bankruptcy Code directly incorporates those constitutional limitations, cogently elucidating why nothing in the Bankruptcy Code can plausibly be read to authorize nondebtor discharge. In particular, the Court's decision in *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), indicates that nondebtor discharge is not an appropriate exercise of a bankruptcy court's traditional equitable authority.

The process by which nonconsensual nondebtor releases are negotiated, proposed, and approved also violates nonconsenting claimants' constitutional due-process rights, denying them both an adequate, unconflicted litigation representative, and any opportunity to exclude themselves from a mandatory no-opt-outs settlement process involuntarily imposed upon them. Additionally, nondebtor discharge unconstitutionally abrogates nonconsenting claimants' Seventh Amendment jury-trial rights, extinguishing traditional private-rights damages actions against nondebtors for which claimants have constitutional rights to both jury trial and final judgment from an Article III judge.

Repudiating nondebtor discharge will not impair bankruptcy courts' traditional *in rem* injunctive powers, necessary to prevent actions against property of the debtor's bankruptcy estate. It will simply put an end to the abusive "bankruptcy grifting" that this case vividly illustrates.

ARGUMENT

I. THE CONSTITUTION VESTS CONGRESS WITH THE EXCLUSIVE POWER TO AUTHORIZE DISCHARGE OF INDEBTEDNESS

A. Nonconsensual Nondebtor "Release" Is a Discharge of Debt

The panel majority below stated that "the releases at issue…do not constitute a discharge of debt for the Sacklers." *In re Purdue Pharma L.P.*, 69 F.4th 45, 71 (2d Cir. 2023). Whatever rhetorical suasion the panel majority sought to achieve with that assertion, it is contradicted by reality, common sense, and the panel majority's own opinion. The entire purpose and function of a nonconsensual nondebtor-release provision is to discharge debts of a nondebtor, in precisely the same fashion that the Bankruptcy Code authorizes discharge of a debtor's debts.

This Court elegantly and accurately described discharge as follows:

> The discharge order releases a debtor from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt and by operating as an injunction to prohibit creditors from attempting to collect or to recover the debt.

Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004). Substitute "release/d" for "discharge/d," and "nondebtor" for "debtor," and that passage also perfectly describes so-called nonconsensual nondebtor releases.

Indeed, "releasing" a debtor from any personal liability on a discharged debt has *always* been the characteristic, defining feature of our modern bankruptcy discharge, first enacted in "1705 [by] the English Parliament" to authorize "release of debts." *Cent. Va. Community Coll. v. Katz*, 546 U.S. 356, 364 (2006). In fact, the Bankruptcy Act of 1898 explicitly provided that "a discharge in bankruptcy shall *release* a bankrupt from all of his [dischargeable] debts." *See* 1A Collier on Bankruptcy 1571 (James Wm. Moore et al. eds., 14th ed. 1978) (reprinting 1898 Act §17) (emphasis added). And even the panel majority below repeatedly equated liability "releases" with "discharge."[2]

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2. *See* 69 F.4th at 70 ("The bankruptcy court's ability to release claims at all derives from its power of discharge."); *id.* ("a

The panel majority below made the mistaken assumption that "discharge of debt" must "offer umbrella protection against liability" by "extinguish[ing] all claims." 69 F.4th at 71. But that has *never* been the case in *any* federal bankruptcy statute. Congress decides which debts are dischargeable and has always categorically excluded specified debts from discharge. *See generally* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325 (1991). *See, e.g.*, 11 U.S.C. §§523(a), 1141(d)(6); 18 U.S.C. §3613(e).

It is entirely understandable why nondebtor "release" proponents resist the ineluctable discharge characterization: it emphasizes (uncomfortably, from their perspective) the extent to which the courts are usurping Congress's discharge power.

B. Nondebtor Discharge Violates the Bankruptcy Clause's Separation of Powers

This Court delineated the nature of the constitutional Bankruptcy Power in *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902), stating that such power—

> 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

bankruptcy discharge releases a debtor from personal liability" on "any discharged debt"); *id.* at 76 (describing plan releases that allowed "non-debtor directors and officers" to "receive a full and complete release, waiver and discharge from" specified debts to creditors); *id.* at 83 (discussing "all releases through bankruptcy, including bankruptcy discharges"); *id.* at 84 (equating *Purdue* "releases" with "a discharge" of debts).

> substance and form, but tending to further the great end of the subject—*distribution and discharge*—are in the *competency and discretion of Congress*.

Id. at 186 (quoting *In re Klein*, 14 F.Cas. 716, 718 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865)) (emphasis added). Distribution and discharge, therefore, are the twin pillars of Congress's Bankruptcy Power.

Granting Congress the power to provide for discharge of indebtedness is what motivated the Founders' inclusion of the Bankruptcy Clause in the Constitution. *See generally* Ralph Brubaker, *Explaining* Katz's *New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 Am. Bankr. Inst. L. Rev. 95, 128-29 (2007); Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 Am. J. Legal Hist. 215 (1957).

Moreover, there is no common-law discharge power. In the entirety of Anglo-American jurisprudential history, bankruptcy discharge has *always* been authorized solely by statute. *See* Tabb, *supra*. Consequently, the Constitution explicitly provides that "*Congress* shall have Power…[t]o establish…uniform Laws on the subject of Bankruptcies." U.S. Const. art. I, §8, cl. 4 (emphasis added).

The essence of Congress's constitutional distribution-and-discharge power embodied in the Bankruptcy Clause is determining the appropriate distribution of someone's assets that warrants discharge of their debts. *See Kuehner v. Irving Tr. Co.*, 299 U.S. 445, 453 (1937) (as regards the scope of Congress's Bankruptcy Power, "if the [creditor]s' claims were to be discharged…they must be admitted to participation on an equitable basis with other claims in [the bankruptcy] distribution," as "determined in the light of all circumstances Congress might properly consider").

Nondebtor-discharge jurisprudence wrongly presumes that the federal courts can supplant Congress and make such distribution-and-discharge determinations in the first instance, using *judicially created* factors and requisites, such as the (exceedingly vague) "requirement" that the released nondebtor has contributed "substantial assets" in exchange for nonconsensual discharge of its liability to a debtor's creditors. *Purdue*, 69 F.4th at 78. The Constitution, however, reserves such determinations for Congress alone, "in the light of all circumstances *Congress* might properly consider." *Kuehner*, 299 U.S. at 453 (emphasis added).

C. Nondebtor Discharge Is an Unconstitutional Exercise of Substantive Federal Common Lawmaking Proscribed by *Erie*

Erie and its progeny restrain the federal courts' creation of substantive federal common law, and those constraints are *not* limited to diversity cases. *See* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.122 (1964) (calling the contrary assumption "an oft-encountered heresy"). Indeed, "the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 541 n.1 (2d Cir. 1956). *Erie*'s limitations are, therefore, pervasive in federal bankruptcy proceedings, because nonbankruptcy "state law governs the substance of claims" asserted in federal court via federal bankruptcy jurisdiction. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000). *See generally* Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013 (1953).

Federal courts have subject-matter jurisdiction to hear and adjudicate state-law claims in federal bankruptcy proceedings pursuant to the grant in 28 U.S.C. §1334(b) over all claims "arising in or related to" the debtor's bankruptcy case. As each of the courts below recognized, claimants' direct claims of liability against the Sacklers and other released nondebtors, because they are neither claims by nor against Purdue Pharma's bankruptcy estate, are within federal bankruptcy jurisdiction only if they are sufficiently "related to" Purdue's bankruptcy case. *See In re Purdue Pharma, L.P.*, 633 B.R. 53, 95-98 (Bankr. S.D.N.Y. 2021), *vacated on other grounds*, 635 B.R. at 83-89, *rev'd on other grounds*, 69 F.4th at 71-73; *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) ("Proceedings 'related to' the bankruptcy include… suits between third parties which have an effect on the bankruptcy estate.").

This Court's unanimous opinion in *Marshall v. Marshall*, 547 U.S. 293 (2006), acknowledged that for a state-law claim within federal courts' "related to" bankruptcy jurisdiction, "[i]t is clear, under *Erie*, that [state] law governs the substantive elements of [the] claim." *Id.* at 313 (citation omitted).[3] The "substantive rules… applicable in a State" must govern such claims, because "no clause in the Constitution purports to confer…a power upon the federal courts" to "declare substantive rules of common law applicable" to such claims. *Erie*, 304 U.S. at 78. "[S]tate law must govern because there can be no other law." *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965).

3. *See Celotex*, 514 U.S. at 307 n.5 (stating that "causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. §541," such as the debtor's state-law cause of action at issue in *Marshall*, are a "type of 'related to' proceeding").

Erie's constitutional holding is that the "*substantive* rules…applicable in a State" for the claim at issue must govern the parties' rights and obligations in federal court. *Erie*, 304 U.S. at 78 (emphasis added); *see Hanna* 380 U.S. at 471-72. *Extinguishing* those state-law rights and obligations via nondebtor-discharge provisions is an alteration thereof that is "'substantive' in every traditional sense." *Hanna*, 380 U.S. at 472. The jurisprudence by which federal courts have taken it upon themselves to determine the circumstances that justify such relief is, therefore, a form of substantive federal common law that contravenes *Erie*'s constitutional holding.

That courts are creating substantive federal common law is apparent from the lists of factors they have promulgated—exclusively the product of judicial imagination and edict—that supposedly give rise to bankruptcy courts' power to discharge the obligations of nondebtors. Indeed, the bankruptcy court below acknowledged as much. *See* 633 B.R. at 103 (suggesting that the "source for third-party releases and injunctions under a plan i[s] federal common law") (citing Adam Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 Am. Bankr. L.J. 1, 79-80, 83-84 (2006)).

Erie's constitutional holding is that the parties' substantive state-law rights and obligations on creditors' direct claims of liability against nondebtors must be respected in federal bankruptcy proceedings, notwithstanding the grant of "related to" bankruptcy jurisdiction over such claims. Separation of powers, moreover, embedded in the text of the Bankruptcy Clause, reserves the power to authorize discharge of debt to Congress alone; the federal courts have *no* common-law discharge power. Courts' nonconsensual nondebtor-release jurisprudence contravenes both of those constitutional limitations. Those constitutional limits on the substantive common-lawmaking powers of the federal courts also constrain bankruptcy courts' general equitable and other vague "residual" powers under the Bankruptcy Code.

II. NOTHING IN THE BANKRUPTCY CODE AUTHORIZES NONDEBTOR DISCHARGE

The principal statutory provision courts rely upon as authorizing nondebtor-discharge provisions is §105(a) of the Bankruptcy Code, which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. §105(a). That provision, however, cannot be construed to authorize nondebtor discharge.

A. This Court has repeatedly emphasized that in enacting the Bankruptcy Code in 1978, Congress did "not write 'on a clean slate.'" *Hall v. United States*, 566 U.S. 506, 523 (2012). Consequently, the Court has refused to interpret the Bankruptcy Code to alter pre-Code law "absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990). And that presumption of continuity in the law is particularly strong when Congress merely reenacted a provision from the predecessor bankruptcy statute, the Bankruptcy Act of 1898. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 379-80 (1988).

The 1898 Act contained an equitable-powers provision virtually identical to Code §105(a).[4] The courts uniformly held that this provision did *not* authorize nondebtor-discharge provisions. *See, e.g.*, *Com. Wholesalers, Inc. v. Invs. Com. Corp.*, 172 F.2d 800, 801 (9th Cir. 1949); *In re Diversey Bldg. Corp.*, 86 F.2d 456, 457-58 (7th Cir. 1936); *In re Nine N. Church St.*, 82 F.2d 186, 188-89 (2d Cir. 1936). *See generally* Brubaker, 72 Am. Bankr. L.J. at 29-33.

Likewise, this Court held that bankruptcy courts' equitable injunctive powers did *not* authorize nondebtor discharge via permanent injnction in *Callaway v. Benton*, 336 U.S. 132, 136-41 (1949). *See In re Digital Impact, Inc.*, 223 B.R. 1, 13 (Bankr. N.D. Okla. 1998) (noting that "*Callaway*'s relevance to [so-called nonconsensual nondebtor releases] is manifest"). Nothing in the current Bankruptcy Code or its legislative history indicates any intention of overturning the 1898 Act law prohibiting discharge (and/or permanently enjoining the assertion) of third-party nondebtor claims.

B. The only provision enacted in 1978 that plainly addressed such third-party nondebtor claims was the expansion of federal bankruptcy jurisdiction to now reach any such third-party claim—*i.e.*, a claim made neither by nor against the debtor's bankruptcy estate—that is sufficiently "related to" the debtor's bankruptcy case. *See* 28 U.S.C. §1334(b). Courts seized upon that jurisdictional grant to conclude that it, for the first time, authorized them

4. *See* 1 Collier (14th ed.), *supra*, at 134 (reprinting 1898 Act §2a(15), which authorized bankruptcy courts to "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act").

to permanently enjoin and involuntarily release creditors' claims against a nondebtor. *See* Brubaker, 72 Am. Bankr. L.J. at 31-35, 59 (analyzing the early case law). Indeed, the bankruptcy court below disregarded the *Callaway* holding solely because "[t]hat decision…preceded 28 U.S.C. §1334(b)'s jurisdictional grant, which…significantly broadened the jurisdictional scheme that existed before the Bankruptcy Code's enactment." 633 B.R. at 98.

That jurisdictional grant, however, simply gives the federal courts the power to hear and adjudicate state-law claims that could otherwise be heard and adjudicated only in state court—just like the diversity and supplemental jurisdiction statutes—thus, the relevance of *Erie*'s constitutional holding, discussed above. *Cf. United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (federal courts are "bound to apply state law to" supplemental claims under *Erie*). Any right to substantive relief must exist independent of the jurisdictional grant via substantive provisions of the bankruptcy statute, such as the third-party release provisions Congress expressly enacted for certain asbestos obligations in Code §524(g)(4)(A)(ii)-(iii). But there is nothing else in the Bankruptcy Code that can plausibly be construed as authorizing such substantive discharge relief for nondebtors.

C. The constitutional separation-of-powers principles expressed in both the Bankruptcy Clause and the *Erie* decision, as well as the core federalism values safeguarded by *Erie*, are also reflected in multiple presumptions or so-called substantive canons of statutory interpretation that the Court has deployed in interpreting the Bankruptcy Code. Indeed, this Court's use of such substantive canons in construing vague or ambiguous statutory text has been aptly characterized as a form of "constitutional implementation." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 168-82 (2010).

One of the Court's most prominent substantive canons for interpreting the Bankruptcy Code is the so-called *Butner* doctrine, which is a baseline presumption that all parties' substantive rights and obligations in bankruptcy are governed by otherwise-applicable nonbankruptcy state law. The *Butner* doctrine is simply an expression of the *Erie* doctrine in federal bankruptcy proceedings:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

Butner v. United States, 440 U.S. 48, 55 (1979) (quoting *Lewis v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609 (1961)). Those "justifications for application of state law" in bankruptcy proceedings "are not limited to ownership interests," *Butner*, 440 U.S. at 55, and they precisely replicate "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws" in the sense "that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna*, 380 U.S. at 467-68.

The *Erie*/*Butner* doctrine directly constrains the legitimate scope of bankruptcy courts' equitable powers under Code §105(a). Indeed, the *Butner* Court itself emphasized that "[t]he equity powers of the bankruptcy court play an important part in the administration of bankrupt estates in countless situations," but "undefined considerations of equity provide no basis for adoption of a…federal rule" giving a party substantive "rights that are not his as a matter of state law," 440 U.S. at 55-56, such as the right to a discharge of debt without filing bankruptcy.

The *Erie*/*Butner* doctrine thus prohibits bankruptcy courts from creating substantive federal common law via their equitable powers, in vindication of bedrock constitutional separation-of-powers principles. Indeed, this Court recently invoked both *Erie* and *Butner* "to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking," which hazards "the mistake of moving too quickly past important threshold questions at the heart of our separation of powers." *Rodriguez v. FDIC*, 140 S.Ct. 713, 717-18 (2020). By "stretching the discharge to protect non-debtors," the "courts are making law to the extent of violating the constitutional separation of powers." Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 Chap. L. Rev. 7, 18 (2000).

D. This Court has also invoked a nondelegation substantive canon that vindicates the separation-of-powers principle expressed in the Bankruptcy Clause. Pursuant thereto, the Court's jurisprudence limiting bankruptcy courts' §105(a) equitable powers explicitly safeguards

Congress's legislative supremacy over distribution and discharge determinations. As the Court has directed, exercise of bankruptcy courts' equitable powers "must not occur at the level of policy choice at which Congress itself operated in drafting the [Bankruptcy] Code." *United States v. Noland*, 517 U.S. 535, 543 (1996). An exercise of equitable powers "that takes place at the legislative level of consideration" is "tantamount to a legislative act and therefore" is "beyond the scope of judicial authority." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996). *See generally* Seymour, 89 U. Chi. L. Rev. at 1946-57.

Moreover, that presumption of nondelegation of the most fundamental aspects of Congress's Bankruptcy Power—to specify the appropriate *distribution* of a person's assets amongst her creditors and the essential requisites for *discharge* of that person's obligations—goes beyond interpretation of the scope of bankruptcy courts' equitable powers. The important decision of *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464-67 (2017), made clear that there is no implicit authority for such fundamental legislative-order determinations in other vague Bankruptcy Code authorizations either, such as the general "necessary and proper" authorizations of §1123(a)(5) & (b)(6) that many courts cite as supposedly authorizing nondebtor discharge.

Discharge of debt is the "greatest" power granted to Congress via the Constitution's Bankruptcy Clause. *Moyses*, 186 U.S. at 186. The Bankruptcy Code enacted by Congress does not explicitly authorize discharge of a nondebtor's obligations. Indeed, the Bankruptcy Code explicitly states that a debtor's bankruptcy discharge "does *not* affect the liability of any other entity." 11

U.S.C. §524(e) (emphasis added). Consequently, a vague and indeterminate "for cause" or general "necessary and proper" implementation provision "is too weak a reed upon which to rest [delegation of] so weighty a power." *Jevic*, 580 U.S. at 466; *see id.* at 465 ("Congress…does not, one might say, hide elephants in mouseholes.") (quoting *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001)).

As is equally true with the distribution-priority issues addressed in *Noland*, *Reorganized CF&I Fabrictors*, and *Jevic*, "[t]he importance of [discharge] leads us to expect more than simple statutory silence if, and when, Congress were to intend" to authorize discharge of nondebtors' obligations. *Jevic*, 580 U.S. at 465. "Put somewhat more directly, we would expect to see some affirmative indication of intent," *id.*, such as that expressed in §524(g)(4)(A)(ii)-(iii).

As Circuit Judge Wesley noted in his separate concurring opinion below, the panel majority's interpretative methodology is directly at odds with *Jevic*, and tellingly, the panel majority did not even attempt to reconcile its interpretation of §1123(b)(6) with *Jevic*. Moreover, the panel majority held that §1123(b)(6) endows the bankruptcy courts with nearly unlimited powers, that greatly exceed their traditional equitable authority.

III. *ENERGY RESOURCES* INDICATES THAT NONDEBTOR DISCHARGE IS INAPPROPRIATE

A. The panel majority below correctly recognized that §105(a) is simply in the nature of a vague, general "necessary and proper" authorization that, by its terms, can only be used to "carry out" some other provision of the Bankruptcy Code. And according to the panel majority, the Code provision that §105(a) implements in the case of nondebtor-discharge provisions is §1123(b)(6). But the latter provision is *also* simply in the nature of a vague, general necessary-and-proper authorization.

According to the panel majority below, then, one necessary-and-proper authorization can be used to implement another necessary-and-proper authorization. What's more, by combining the two, a bankruptcy court magically obtains vast, virtually limitless powers, because purportedly "§1123(b)(6) is limited *only* by what the Code expressly forbids." 69 F.4th at 74 (emphasis added).

If true, though, §1123(b)(6) necessary-and-proper powers would be much broader than §105(a) necessary-and-proper powers, because the bankruptcy court need not be implementing anything in the Bankruptcy Code at all under §1123(b)(6). As long as the bankruptcy court is not doing something explicitly prohibited by the Code, the sky's the limit. Quoting Judge Wesley: that simply "can't be right." 69 F.4th at 90 (Wesley, C.J., concurring).

In *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990), the Court interpreted §§105(a) and 1123(b)(6) as complementary grants of residual equitable authority grounded in "the traditional understanding that bankruptcy courts [are] courts of equity." "The power to grant a discharge of indebtedness, however, does not descend from the equity powers of the Lord Chancellor. Bankruptcy discharge has always been a creature of statute." Brubaker, 131 Yale L.J.F. at 977-78.

If allowed to stand, the Second Circuit's interpretation of §1123(b)(6) would eviscerate this Court's extensive jurisprudence *limiting* bankruptcy courts' equitable powers. Moreover, it will have dramatic and unpredictable implications that go well beyond just nonconsensual nondebtor releases.

B. Many courts, including the panel majority below, have invoked *Energy Resources* in support of the proposition that §§105 and 1123(b)(6) authorize discharge of the obligations of a nondebtor. Nothing in the *Energy Resources* decision, however, even remotely suggests that those statutory provisions contain an implicit authorization of nondebtor discharge. To the contrary, the *Energy Resources* opinion was careful to point out that the plan-of-reorganization provisions at issue did *not* interfere at all with the objecting creditor's nonbankruptcy right to fully pursue nondebtors for their own personal liability to the objecting creditor.

In fact, it was entirely unnecessary to even resort to §§105 and 1123(b)(6) for any *implicit* authority to approve the plan provisions as issue in *Energy Resources*; they were *explicitly* authorized by the Code's provisions regarding impairment and treatment of creditor claims. The Court discussed a bankruptcy court's residual equitable authority, therefore, solely as a potential *limitation* on a bankruptcy court's *express* statutory powers to modify the debtor-creditor relationship.[5]

The corporate debtors in the cases on appeal in *Energy Resources* each owed two different federal tax debts: "both trust fund and ordinary (non-trust fund) taxes." *In re Energy Resources Co.*, 871 F.2d 223, 225 (1st Cir. 1989) (Breyer, C.J.), *aff'd*, 495 U.S. 545. In each case, the debtor's proposed plan of reorganization provided that both of the IRS's tax claims were "to be paid in full,"

5. The Court subsequently recognized such an *implicit equitable limitation* on individual debtors' *explicit statutory right* to convert a Chapter 7 case to Chapter 13 in *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

with interest, "by making partial payments each year for several years," as explicitly authorized and required "in accordance with section 1129(a)(9)(C) of the Code." *In re Energy Resources Co.*, 59 B.R. 702, 703 (Bankr. D. Mass. 1986), *aff'd*, 871 F.2d at 225, *aff'd*, 495 U.S. 545. And in "specify[ing] the treatment of [the IRS's tax] claims…that [were] impaired under the plan" by altering "the legal, equitable, and contractual rights to which such claim[s]… entitle[d] the holder of such claim[s]," 11 U.S.C. §§1123(a)(3), 1124(1), each plan also provided that the debtor would repay "the corporation's *trust fund tax* debts *first*," and "only after" fully paying those trust fund tax debts would the debtor pay "the corporation's non-trust fund tax debts." 871 F.2d at 225.

The IRS objected to that treatment on the basis that its own internal policy required chapter 11 debtors to pay non-trust fund taxes first, before paying trust fund taxes. Yet its real concern was not collecting the non-trust fund taxes as quickly as possible; the IRS was concerned about the personal liability of nondebtors for nonpayment of the corporation's trust fund taxes under 26 U.S.C. §6672. The IRS wanted to keep those "responsible" individuals on the hook for the trust fund taxes as long as possible.

The fact that "[i]f it had its druthers, [the] IRS would apply payments first to the non-trust fund taxes due," however, was entirely immaterial. *In re Newport Offshore, Ltd.*, 75 B.R. 919, 920 (Bankr. D.R.I. 1987), *aff'd sub nom.*, *Energy Resources*, 871 F.2d 223, *aff'd*, 495 U.S. 545. Impairing and treating creditors' claims in a manner that they may not like is a pervasive, characteristic feature of the chapter 11 process. All that really mattered was "Congress specifically granted the bankruptcy court the power to restructure tax debts," by confirming a plan that provides for full repayment of those taxes over time, with interest, in accordance with the express terms of §1129(a)(9)(C). 871 F.2d at 231. "While this result might be [un]desirable from the Government's standpoint," what the Government wanted was "an added protection not specified in the Code itself." 495 U.S. at 550.

C. The *Energy Resources* opinion did cite §§105(a) and 1123(b)(6) as sources of a "residual authority" that is "consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." 495 U.S. at 549. But that is because the IRS was arguing that there was an *implicit limitation* on the bankruptcy court's *explicit statutory power* to modify the debtor-creditor relationship when it comes to trust fund taxes, by virtue of "a congressional decision [in Tax Code §6672] to protect the Government's tax revenues by ensuring an additional source from which trust fund taxes might be collected." *Id.* at 550.

The *Energy Resources* opinion, therefore, acknowledged the possibility that "[e]ven if consistent with the Code,...a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion." *Id.* But, of course, the plan provisions at issue did not impair in the least, much less extinguish, the Government's right to collect any unpaid trust fund taxes from responsible nondebtors. "As the Government concede[d], §6672 [liability for responsible nondebtors] remain[ed] both during and after the corporate Chapter 11 filing as an alternative collection source for trust fund taxes." *Id.* at 550-51.

To read *Energy Resources* as somehow authorizing the *discharge* of a nondebtor's obligations to creditors, therefore, turns that decision on its head. The bankruptcy courts' orders confirming the debtors' reorganization plans in those cases were "wholly consistent with a bankruptcy court's authority under the Bankruptcy Code," because the plans' impairment and treatment of the debtors' tax debts was explicitly authorized by the Code and "the Bankruptcy Courts' orders d[id] ***not*** prevent the Government from collecting trust fund revenue" from responsible nondebtors. *Id.* at 550-51 (emphasis added). Respondents would have this Court transmogrify *Energy Resources*, from a decision acknowledging potential *implicit* equitable *limitations* on bankruptcy courts' explicit statutory powers, into a vast reservoir of extraordinary and unlimited *implicit* equitable *powers*, untethered to any explicit statutory authority or any "traditional understanding" of bankruptcy courts' equitable "authority to modify creditor-debtor relationships." *Id.* at 549.

D. The extent to which Respondents must distort both the language of the Bankruptcy Code and this Court's jurisprudence in their efforts to legitimize nondebtor discharge is exemplified by the highly problematic proposition propounded by the panel majority below: "[A]s the Court's language in *Energy Resources* indicates, §1123(b)(6) is limited only by what the Code expressly forbids, not what the Code explicitly allows." *Purdue*, 69 F.4th at 73-74. But that is *not* what §1123(b)(6) says, and that is *not* how the *Energy Resources* Court interpreted that provision.

By its very terms, §1123(b)(6) only permits inclusion of an "appropriate" provision in a plan, which explicitly mandates an inquiry into whether a particular provision is indeed "appropriate." As the *Energy Resources* Court itself elaborated, a plan provision "might be *inappropriate* if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion," such as (in that very case) applicable nonbankruptcy law regarding a nondebtor's personal liability to a debtor's creditors. 495 U.S. at 550 (emphasis added). Nondebtor-discharge provisions, therefore, present precisely the circumstance that *Energy Resources* flagged as indicative of an "inappropriate" conflict with nonbankruptcy law.

Energy Resources provides *no* support for an implicit power to approve nondebtor-discharge provisions. In actuality, quite the opposite is true. That decision indicates that nondebtor-discharge provisions are improper.

Approval of nondebtor discharge is an unconstitutional exercise of substantive federal common lawmaking that violates the *Erie/Butner* doctrine preserving parties' substantive state-law rights and obligations in bankruptcy, by judicially usurping the exclusive "competency and discretion of Congress" concerning discharge of indebtedness. *Moyses*, 186 U.S. at 186. The utter impropriety of that federal common lawmaking is most evident in this case as regards the proposed discharge of *all* OxyContin-related liability of individual members of the Sackler family, including liability for alleged fraud or other intentional misconduct that the Bankruptcy Code expressly provides simply *cannot* be discharged. *See* 11 U.S.C. §523(a)(2), (6); *Law v. Siegel*, 571 U.S. 415, 421 (2014) ("Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits.").

Over 70 years ago, the *Callaway* Court compendiously explained why a federal bankruptcy court cannot extinguish a third-party nondebtor cause of action by permanently enjoining assertion thereof: "We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded, or to make the criterion to be applied the effect of the law upon the" debtor's proposed plan of reorganization. 336 U.S. at 141 (citation omitted).

IV. NONCONSENSUAL NONDEBTOR RELEASES VIOLATE CLAIMANTS' DUE-PROCESS RIGHTS

Through the grant of "related to" bankruptcy jurisdiction over creditors' claims against a nondebtor, the statutory design (pursuant to *Erie*) is for those claims to be heard and adjudicated in federal court, if at all, according to applicable nonbankruptcy substantive law and the incident procedural apparatus for adjudicating those claims, such as the Federal Rules of Bankruptcy Procedure (which incorporate nearly all of the Federal Rules of Civil Procedure). *See* Fed. R. Bankr. P. 7001-7071, 9014(a)-(c). The extraordinary resolution of such claims effected by nonconsensual nondebtor release, however, contravenes nonconsenting claimants' most fundamental due-process rights, by denying them an adequate, unconflicted litigation representative and by denying them the right to agree (or not) to participate in the process that will extinguish their claims against released nondebtors.

A. Courts that approve nonconsensual nondebtor releases characterize them as effectuating a "settlement" of creditors' direct claims of liability against released nondebtors. Given its nonconsensual nature, though, it is certainly not a "settlement" in any conventional sense. *See Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party…without that party's agreement."). Nondebtor releases, therefore, could only be a kind of representational settlement, akin to a class-action settlement, in which someone else is negotiating and compromising nonconsenting creditors' claims against released nondebtors.

The *sine qua non* of the due process necessary to bind claimants to the results of such a representative process is an adequate, unconflicted litigation representative. *See Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798-802 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40-46 (1940). But no such litigation representative is appointed to represent the interests of creditors with respect to their claims against released nondebtors.

The bankruptcy court below stated that the representative of Purdue's bankruptcy estate (Purdue as debtor-in-possession) and various claimant constituencies (official and unofficial committees of claimants) "whose interests were aligned with the third parties whose claims would be released" and "who negotiated the plan's [nonconsensual nondebtor-release] settlements in essence represented all of the creditors in these cases." 633 B.R. at 108, 82, 86. That is insufficient, however, to satisfy due process for two reasons.

First, "third party claims belong to third parties, not the estate." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019). Consequently, the estate representative and collective claimant constituencies have no authority or standing whatsoever to assert the direct claims of individual creditors against a nondebtor. *See Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416 (1972). Moreover, any decision to permit such a representative assertion of creditors' direct claims against nondebtors "is one that only Congress can make." *Id.* at 435.[6]

Second, this Court has held that the kind of "virtual representation" upon which the bankruptcy court below relied, simply from a perceived alignment of interests, does *not* satisfy due process because that would improperly "allow[] courts to 'create *de facto* class actions at will.'" *Taylor v. Sturgell*, 553 U.S. at 901 (quoting *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998)).

Those who were negotiating for the Sacklers to "contribute[] substantial assets to the reorganization," 69 F.4th at 78, in exchange for a discharge from the direct claims of creditors against the Sacklers, were bargaining with something that does *not* belong to them or the debtor's estate. *See Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("a cause of action is a species of property protected by the [Constitution]'s Due Process Clause[s]")). Consequently, they had *no* legitimate authority to bargain away those claims by selling them to the Sacklers without claimants' consent. Binding nonconsenting claimants to the proposed release of those claims would violate their due-process

6. And in enacting the Bankruptcy Code, Congress declined to include a proposed statutory provision that would have given the trustee or debtor-in-possession such representative standing. *See In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1227-28 & nn.9-10 (8th Cir. 1987).

rights. *See Patterson v. Mahwah Bergen Retail Grp.*, 636 B.R. 641, 686, 688 (E.D. Va. 2022) ("in the context of a non-debtor release in a bankruptcy action…no party litigates on behalf of the" releasing claimants, so "allowing the release of [their] claims…does not comport with due process"); *Aegean Marine*, 599 B.R. at 724 ("[w]hen third-party releases are proposed," releasing claimants have no "court-certified…representatives" that can bind them).

B. Approval of nonconsensual nondebtor releases also violates nonconsenting claimants' due-process rights because those claimants are (essentially by definition) afforded no opportunity to exclude themselves from the process by which their claims against nondebtors are compromised, and pursue those claims on their own. This Court's decisions have repeatedly, consistently, and strongly suggested, if not explicitly held, that for the kinds of money damages claims typically (and that would in this case be) compromised via nonconsensual nondebtor release, the "absence of…opt out violates due process." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).[7]

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7. Any suggestion that a mandatory no-opt-outs resolution of claimants' third-party nondebtor claims against the Sacklers is justified in this case, on a so-called "limited fund" rationale, is misplaced because, *inter alia*, the mandatory settlement in this case does not even purport to satisfy the requirement that "the whole of the inadequate fund [i]s to be devoted to the overwhelming claims." *Ortiz*, 527 U.S. at 839. The Sacklers would retain substantial wealth under the terms of the proposed settlement. *Cf. id.* at 859-60.

Nonconsensual nondebtor releases impose a mandatory no-opt-outs settlement process upon nonconsenting claimants that is inconsistent with the due process the Constitution guarantees.

V. NONCONSENSUAL NONDEBTOR RELEASES VIOLATE CLAIMANTS' SEVENTH AMENDMENT JURY-TRIAL RIGHTS

Both the district court and the Second Circuit below correctly concluded that a non-Article III bankruptcy court cannot, consistent with the requirements of Article III of the Constitution, enter final judgment approving a nonconsensual nondebtor release. *See generally* Brubaker, 38 Bkrtcy. L. Ltr. No. 2, at 3-5, 7-15. In addition, though, by extinguishing nonconsenting claimants' direct legal (as opposed to equitable) claims against a nondebtor, whether by final judgment of a non-Article III bankruptcy court or an Article IIII district court, nonconsensual nondebtor releases unconstitutionally contravene those claimants' Seventh Amendment right to jury trial on those claims.[8]

A. A creditor's direct claim of liability against a nondebtor under applicable nonbankruptcy law is not within the ambit "of those claims that fell within the scope of the historical" summary (now core) jurisdiction of non-Article III bankruptcy tribunals. *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 33 n.7 (2014). Rather, it is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring).

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8. That also violates the statutory jury-trial rights of "personal injury or wrongful death tort" claimants. 28 U.S.C. §1411(a).

For any such traditionally plenary, non-core claim, a "Bankruptcy Court's entry of *final judgment* on" that claim is unconstitutional. *Stern v. Marshall*, 564 U.S. 462, 487 (2011) (emphasis added). Yet, that is precisely what a bankruptcy court does in entering a final order confirming a plan of reorganization that contains nonconsensual nondebtor-release provisions. As confirmed by this Court's decisions in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), and *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009), such a confirmation order, by extinguishing specified third-party nondebtor claims, *is* a final judgment on each and every one of those claims.

The Second Circuit, however, ignored the most important constitutional implications of that conclusion, which have nothing to do with which federal court can or cannot enter such a final order. The relationship between claimants' constitutional right to final judgment from an Article III judge and their Seventh Amendment jury-trial rights means that extinguishing third-party nondebtor claims via nonconsensual release, whether by final judgment of a bankruptcy court or a district court, unconstitutionally extinguishes nonconsenting claimants' right to a jury trial on those claims.

B. The decisions in *Stern*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Langenkamp v. Culp*, 498 U.S. 42 (1990), have equated parties' Seventh Amendment jury-trial rights in federal bankruptcy proceedings with their right to final judgment from an Article III judge. Thus, if the claim at issue is one for which the parties have no right to final judgment from an Article III judge (*i.e.*, a traditionally summary, core matter), then the parties likewise have no Seventh Amendment jury-trial rights on that claim. *See Oil States Energy Servs. v. Greene Energy*

Grp., 138 S.Ct. 1365, 1379 (2018). Conversely, if the claim is one for which the parties do have a right to final judgment from an Article III judge (*i.e.*, a traditionally plenary, non-core matter), then the parties have the same Seventh Amendment jury-trial rights that would attach were the proceeding at issue brought in an Article III trial court. *See generally* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 Am. Bankr. L.J. 121, 150-51 (2012).

Because nonconsenting claimants have a constitutional right to final judgment from an Article III judge on the third-party nondebtor claims that are the subject of nonconsensual nondebtor releases, they also have a Seventh Amendment right to a jury trial on any such claims that are legal (as opposed to equitable) in nature, such as money damages claims. Whether approved by order of a non-Article III bankruptcy court or an Article III district court, then, by extinguishing such money damages claims (*e.g.*, opioid victims' direct claims of liability against the Sacklers), nonconsensual nondebtor releases unconstitutionally eliminate nonconsenting claimants' Seventh Amendment right to a jury trial on those claims.

In this regard, the mandatory no-opt-outs settlement effectuated via nonconsensual nondebtor release is unconstitutional on the same grounds as the mandatory no-opt-outs settlement this Court struck down in *Ortiz*. "By its nature," such a "mandatory settlement" of nonconsenting claimants' "legal issues…compromises their Seventh Amendment rights without their consent." 527 U.S. at 846.

VI. PROHIBITION OF NONCONSENSUAL NONDEBTOR RELEASES WILL NOT IMPAIR BANKRUPTCY COURTS' TRADITIONAL *IN REM* INJUNCTIVE POWERS

Federal bankruptcy courts are granted "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of [the bankruptcy] case, and of [all other] property of the estate." 28 U.S.C. §1334(e)(1). Moreover, Bankruptcy Code §105(a) gives federal bankruptcy courts the same equitable powers granted to all federal courts in the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdiction," 28 U.S.C. §1651(a), as well as "any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute," H.R. Rep. No. 95-595, at 317 (1977).

Those two provisions, in combination, give bankruptcy courts *in rem* injunctive powers to prevent interferences with property of the debtor's bankruptcy estate. Indeed, the essence of exclusive *in rem* jurisdiction lies in the power to enjoin any interference with the property and its administration. When a court exercises such exclusive *in rem* jurisdiction, "[t]o protect its jurisdiction, that court may issue an injunction." *Ex parte Baldwin*, 291 U.S. 610, 614 (1934).

Those traditional *in rem* injunctive powers, however, only empower a bankruptcy court "to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate," such as when creditors "seek to collect out of the proceeds of [the debtor]'s insurance policies," which is an "asset of the bankruptcy estate." *In re Johns-Manville Corp.*, 517 F.3d 52, 66, 62 (2d

Cir. 2008), *rev'd on other grounds,* 557 U.S. 137 (2009). By contrast, nonconsensual nondebtor releases are *not* an appropriate exercise of bankruptcy courts' equitable injunctive powers to the extent that they would permanently enjoin (and thereby extinguish) creditors' claims that "seek to recover directly from a [nondebtor] for the [nondebtor]'s own" liability to the creditor and that "make no claim against an asset of the bankruptcy estate," *id.* at 65, such as the nonconsensual nondebtor-release provisions at issue in this case. *See generally* Ralph Brubaker, *Supreme Court Validates "Clarified"* Manville *Insurance Injunction: Channeling…and So Much More!*, 29 Bkrtcy. L. Ltr. No. 8, at 1, 1-5 (Aug. 2009); Brubaker, 72 Am. Bankr. L.J. at 14-22.

Reversing the Second Circuit's decision in this case will only prohibit such illegitimate and unconstitutional nonconsensual nondebtor releases and permanent injunctions that extinguish creditors' direct claims of liability against nondebtors. It will not impair bankruptcy courts' traditional *in rem* injunctive powers.[9]

9. In fact, there are a number of uncontroversial releases and injunctions that are not at issue in this case and that the Court need not address. *See* Ralph Brubaker, *Third-Party Nondebtor Releases for "Bankruptcy Grifters"* at 3-6 (NACIIL 2022), https://nvrii.nl/wp-content/uploads/2023/09/Brubaker-Annual-Report-NACIIL-2022.pdf.

CONCLUSION

For these reasons, the Court should reverse the Second Circuit's decision.

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