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United States Court of Appeals
for the
Second Circuit

IN RE: PURDUE PHARMA L.P., PURDUE PHARMA INC.,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK NO. 7:21-CV-07532(L)
(HONORABLE COLLEEN McMAHON, JUDGE)

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, AND PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF NO PARTY

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Debtors.

PURDUE PHARMA L.P., PURDUE PHARMA INC., PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMA MANUFACTURING L.P., PURDUE PHARMACEUTICALS L.P., IMBRIUM THERAPEUTICS L.P., ADLON THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVIRO HEALTH L.P., PURDUE PHARMACEUTICAL PRODUCTS L.P. PURDUE NEUROSCIENCE COMPANY, NAYATT COVE LIFESCIENCE INC., BUTTON LAND L.P., RHODES ASSOCIATES L.P., PAUL LAND INC., QUIDNICK LAND L.P., RHODES PHARMACEUTICALS L.P., RHODES TECHNOLOGIES, UDF LP, SVC PHARMA LP, SVC PHARMA INC.,

Debtors-Appellants-Cross-Appellees,

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PURDUE PHARMA L.P., ET AL., AD HOC COMMITTEE OF GOVERNMENTAL AND OTHER CONTINGENT LITIGATION CLAIMANTS, THE RAYMOND SACKLER FAMILY, AD HOC GROUP OF INDIVIDUAL VICTIMS OF PURDUE PHARMA, L.P., MULTI-STATE GOVERNMENTAL ENTITIES GROUP, MORTIMER-SIDE INITIAL COVERED SACKLER PERSONS,

Appellants-Cross-Appellees,

– v. –

THE CITY OF GRANDE PRAIRIE, AS REPRESENTATIVE PLAINTIFF FOR A CLASS CONSISTING OF ALL CANADIAN MUNICIPALITIES, THE CITIES OF BRANTFORD, GRAND PRAIRIE, LETHBRIDGE, AND WETASKIWIN., THE PETER BALLANTYNE CREE NATION, ON BEHALF OF ALL CANADIAN FIRST NATIONS AND METIS PEOPLE, THE PETER BALLANTYNE CREE NATION ON BEHALF OF ITSELF, AND THE LAC LA RONGE INDIAN BAND,

Appellees-Cross-Appellants,

THE STATE OF WASHINGTON, STATE OF MARYLAND, DISTRICT OF COLUMBIA, U.S. TRUSTEE WILLIAM K. HARRINGTON, STATE OF CONNECTICUT, RONALD BASS, STATE OF CALIFORNIA, PEOPLE OF THE STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL ROB BONTA, STATE OF OREGON, STATE OF DELAWARE, BY AND THROUGH ATTORNEY GENERAL JENNINGS, STATE OF RHODE ISLAND, STATE OF VERMONT, ELLEN ISAACS, ON BEHALF OF PATRICK RYAN WROBLEWSKI, MARIA ECKE, ANDREW ECKE, RICHARD ECKE,

Appellees.

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The American Tort Reform Association ("ATRA") is a nonprofit corporation incorporated in the District of Columbia. ATRA has no parent corporation, and no publicly held company has 10% or greater ownership in ATRA.

The Product Liability Advisory Council, Inc. ("PLAC") is a Michigan corporation, headquartered in Virginia. PLAC has no parent corporation, and no publicly held company has 10% or greater ownership in PLAC.

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. Those companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

Many of Amici's members and affiliates have been and will be participants in bankruptcy proceedings in different capacities, including during plan confirmations under Chapter 11. They therefore have a strong interest in ensuring that courts properly analyze their equitable authority, consistent with the Bankruptcy Code, to confirm Plans with nonconsensual third-party releases in appropriate circumstances.

Amici submit this brief in support of no party, and, accordingly, Amici take no position on the merits of the third-party releases at issue here. Instead, Amici wish to highlight one central point: the district court's sweeping holding that bankruptcy courts lack statutory authority to confirm plans with nonconsensual third-party releases is inconsistent with this Circuit's settled precedent and incorrect as a matter of law. While this Court's precedent makes clear that such releases are not appropriate in every case, also it recognizes that they are permissible in certain circumstances. Based on this precedent, litigants in this Circuit have established expectations that in uniquely challenging situations, such releases may be considered

on their merits. The district court's decision has injected fresh uncertainty on this issue. Amici have a strong interest in this Court's review of the district court's statutory analysis and a return to the settled understanding of the Bankruptcy Code in this Circuit.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici take no position on the underlying merits of the plan confirmed by the bankruptcy court in this case nor on the nonconsensual releases approved for third parties here. Instead, Amici offer this brief to address the narrow but important question of whether bankruptcy courts have legal authority to issue nonconsensual third-party releases in circumstances where such releases are appropriate. Amici respectfully submit that this Court should reaffirm the statutory and constitutional authority for bankruptcy courts to confirm plans with nonconsensual third-party releases.

First, the district court's decision that bankruptcy courts lack statutory authority under the Bankruptcy Code to issue releases directly conflicts with this Court's settled precedent. The district court's destabilizing decision to the contrary—greatly undermining the established expectations of debtors, creditors, and interested parties alike—must be corrected.

Second, even if this Court were to consider the question anew, this Court should reaffirm that bankruptcy courts retain the authority to confirm plans with such

releases. The district court's flawed statutory analysis, with its heavy reliance on legislative history, does not survive scrutiny and does not reflect a proper assessment of the enacted statutory text.

Third, as the Third Circuit recently held, bankruptcy courts can constitutionally confirm plans with such releases in a manner consistent with Article III.

ARGUMENT

I. This Court Has Long Recognized that Nonconsensual Third-Party Releases Are An Important Tool for the Reorganization of Uniquely Situated Debtors.

The district court held that the law in this Circuit is "unsettled, except in asbestos cases, where statutory authority is clear." *In re Purdue Pharma, L.P.*, 21 CV 7532 (CM), 2021 WL 5979108, at *60 (S.D.N.Y. Dec. 16, 2021). The district court's analysis cannot be squared with this Court's caselaw or the settled understanding of courts both within and outside of this Circuit.

This Court has said, in no uncertain terms: "In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir.1992). For instance, in *Drexel*, "the injunction limit[ed] the number of lawsuits that may be brought against [the debtor's] former directors and officers." *Id.* In *MacArthur Co. v. Johns-Manville Corp.* ("*Manville*

I"), 837 F.2d 89 (2d Cir. 1988), the bankruptcy court "enjoined all suits" against the debtor's insurers "based upon, arising out of, or related to the [debtor's insurance] policies" as part of a settlement agreement with the insurers. 837 F.2d at 91.

In *Manville I*, in particular, the Court had a fixed eye on the statutory framework of the bankruptcy code. The Court explained that the debtor's claim for compensation from the insurance companies under its policies was a kind of "property of the estate." *Id*. at 92. For traditional property of the debtor, the bankruptcy court was authorized under the Code to dispose of that property "free and clear of any interest in such property of an entity other than the estate." *Id*. at 93 (citing 11 U.S.C. § 363). In those circumstances, a third-party's claim would be channeled into the bankruptcy proceeding. Recognizing that a "voluntary settlement" was "not precisely the same as the traditional sale of real property free and clear" of other interests, this Court also looked to 11 U.S.C. § 105(a)'s broad grant of equitable power as "additional authority" for the release. *Id*. at 93–94. And the Court followed past precedent in "constru[ing]" § 105(a) "liberally to enjoin suits that might impede the reorganization process." *Id*. (citing *In re Johns-Manville Corp.*, 801 F.2d 60, 64 (2d Cir. 1986); *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984)).

The district court dismissed *Manville I* because it was an "asbestos case," and because Congress subsequently enacted amendments to the Bankruptcy Code that

deemed the *Manville I* releases to have been lawful. *See In re Purdue Pharma*, 2021 WL5979108, at *53. But the district court's dismissal of *Manville I* cannot be squared with simple chronology. This Court decided *Manville I* more than half a decade *prior to* Congress's enactment of the current 11 U.S.C. § 524(g) and 524(h) in 1994. And the Court plainly did not decide *Manville I* based on speculation that Congress would enact new provisions of the Code that would retroactively render the releases in that case lawful. Instead, the authority for *Manville I*'s releases was found in the text of the Bankruptcy Code as it stood in 1988, relying on the authority of the bankruptcy court as found in, *inter alia*, § 105(a). That *Manville I* could be decided today based on additional provisions is beside the point. *Manville I* firmly established the legality of nonconsensual releases in certain extraordinary circumstances. With its subsequent enactments, Congress merely put an exclamation point on this authority and directed other circuits to follow this Court's lead in asbestos cases.

Reaffirming that the *Manville I* and *Drexel* decisions remain good law, this Court in *Metromedia* (a case that, like *Drexel*, was not an asbestos case) restated what it had "previously held," namely that "a court *may enjoin* a creditor from suing a third party." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (quoting *Drexel*, 960 F.2d at 293) (emphasis added); *see id.* (noting contrary positions of Ninth and Tenth Circuits, which "have held that nondebtor releases are

prohibited by the Code"); *id.* at 142 (citing first *Drexel*, then *Manville I*, in an enumeration of cases in which "[c]ourts have approved nondebtor releases"). The only uncertainty that the *Metromedia* court identified was that surrounding "when a nondebtor release is 'important' [enough] to a debtor's plan." *Id*. at 141. In doing so, this Court explicitly acknowledged that "such a release *is proper* only in rare cases." *Id.* (emphasis added); *see also id.* at 143 ("A nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan"). To be sure, the *Metromedia* decision also explained that there is a "reluctance to approve nondebtor releases" because the text of the Bankruptcy Code does not provide "explicit authorization." *Id.* at 142. But the "reluctance" that this Court identified is merely reflective of the settled view that bankruptcy courts—in exercising equitable authority—are not "roving commission[s] to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003). The courts' equitable authority remains anchored within the confines of the Code. Consequently, *Metromedia* endorses caution—not forbearance—in determining when a nonconsensual third-party release "is proper," *Metromedia*, 416 F.3d at 141.

With *Manville I*, *Drexel*, and *Metromedia* in the Federal Reporter, courts throughout this Circuit have recognized the authority to enter nonconsensual third-party releases as part of Chapter 11 plan confirmations (even if those courts

ultimately decided that the particular releases at issue were not proper under the particular circumstances presented). *See In re Stearns Holdings, LLC*, 607 B.R. 781, 787 (Bankr. S.D.N.Y. 2019) ("If a bankruptcy court has subject matter jurisdiction to enjoin third-party claims, it may approve a non-debtor release under some circumstances, but not as a routine matter." (internal quotation marks omitted)); *In re Sabine Oil & Gas Corp.*, 16-CV-2561 (JGK), 2016 WL 4203551, at *6 (S.D.N.Y. Aug. 9, 2016) ("[A] bankruptcy court has the power to approve third-party releases as part of the confirmation of a plan."); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 266 (Bankr. S.D.N.Y. 2007) ("In the Second Circuit, it has long been the law that third party releases are permissible under at least some circumstances."); *see also Campos v. Aegis Realty Mgmt. Corp.*, 19 Civ. 2856 (KPF), 2020 WL 433356, at *5 (S.D.N.Y. Jan. 28, 2020); *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 722 (Bankr. S.D.N.Y. 2019); *In re SunEdison, Inc.*, 576 B.R. 453, 461–62 (Bankr. S.D.N.Y. 2017); *In re Residential Cap., LLC*, 512 B.R. 179, 188 (Bankr. S.D.N.Y. 2014). That all of these lower courts followed this Court's past precedents makes sense: "A decision of a panel of this Court is binding unless and until it is overruled by the Court en banc or by the Supreme Court." *United States v. Hightower*, 950 F.3d 33, 36 (2d Cir. 2020) (quoting *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995)) (brackets and emphasis omitted).

But it is not just those courts duty-bound to follow this Circuit's precedent that have recognized its past holdings; courts around the country have recognized it too. *In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (recognizing Second Circuit's "more lenient approach to non-debtor releases"); *In re Cont'l Airlines*, 203 F.3d 203, 212 (3d Cir. 2000) (recognizing Second Circuit's "more flexible approach . . . in the context of extraordinary cases"); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015) (listing Second Circuit as in the "majority of the circuits," which hold that "releases/injunctions are permissible, under certain circumstances"); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008) (noting Second Circuit "permit[s] the releases").

The treatise writers concur with the consensus of the courts. *See* 2 COLLIER ON BANKRUPTCY ¶ 105.04 ("Cases from the Seventh and Second Circuits also approve third-party releases, albeit on different grounds"); 6 NORTON BANKR. L. & PRAC. 3d § 109:22 (Jan. 2022) ("[T]he Second, Third, Fourth, Sixth, Seventh and Eleventh Circuits permit them under certain circumstances."); 2 BANKRUPTCY LAW MANUAL § 11:58 (5th ed. Dec. 2021) ("Other courts, including the Second . . . have ruled the bankruptcy court has the power to approve a plan containing a provision enjoining suits against and releasing liabilities of nondebtors, reasoning that either § 105(a) or § 1123(b)(6) give the court authority to approve such provisions."). To accept the district court's legal analysis would be to decide that *all of these* courts

and treatises have simply been wrong about the law in this Circuit for decades. That is implausible.

The district court's analysis is all the more troubling because this Circuit encompasses the financial capital of the world. This Court's settled law—upended by the district court's decision—provided predictability (both before and during bankruptcies) to the business community, including debtors, creditors, and all other parties. The negotiation of a Plan operates, by necessity, with expectations surrounding what is and is not permissible under the Code. *See* 11 U.S.C. § 1129(a)(1) (plan shall be confirmed only if "[t]he plan complies with the applicable provisions of this title," among other requirements); *see also* John M. Czarnetzky, *Time, Uncertainty, and the Law of Corporate Reorganizations*, 67 FORDHAM L. REV. 2939, 2974 (1999) ("The congressional vision for a chapter 11 case is for the parties to negotiate a consensual, binding plan of reorganization that preserves the corporation's 'going concern' value, defined as the value of the corporation above its liquidation value."); DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY 257 (6th ed. 2014) (explaining that plans are bargained for in the shadow of Chapter 11).

The legal authority of the bankruptcy court to impose third-party releases is well-established in this Court, and the district court erred in holding otherwise.

Amici take no position on the merits of the specific releases negotiated below and confirmed by the bankruptcy court.

II. The Bankruptcy Code Authorizes Courts to Impose Nonconsensual Third-Party Releases in Appropriate Circumstances.

Even if this Court were writing on a blank slate (it is not), it should find that the Bankruptcy Code grants authority to impose nonconsensual third-party releases in appropriate circumstances. Yet in assessing the legal issues, the scope of the existing circuit split should not be overstated. "No circuit has held or even suggested that" the types of nonconsensual third-party releases at issue here "are anything less than an extraordinary use of the bankruptcy court's power." *In re Firstenergy Sols. Corp.*, 606 B.R. 720, 733 (Bankr. N.D. Ohio 2019). While the circuits are divided on this issue, "[t]he circuit split occupies the spectrum between 'impossible' and 'very rare.'" *Id.* Therefore, this Court's reaffirmance of its past precedent need not open the floodgates to abusive practices. *See Metromedia*, 416 F.3d. at 142 ("No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique.").

A. Bankruptcy Courts Retain Equitable Authority.

Bankruptcy sounds in equity with courts having "broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990); *see also Pepper v. Litton*, 308 U.S. 295, 304 (1939) ("[A] bankruptcy court . . . applies the principles and rules of equity jurisprudence."). The Code

acknowledges as much by authorizing a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Code. 11 U.S.C. § 105(a). And specifically in the context of confirming a reorganization plan, the Code further provides that courts are authorized to approve reorganization plans that "include *any other appropriate provision* not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6) (emphasis added). As the Supreme Court has explicitly recognized, these two statutory provisions are a source of "residual authority" that are consistent with bankruptcy's traditional equitable character. *Energy Res. Co.*, 495 U.S. at 549.

Yet a bankruptcy court's authority under these provisions can be exercised only "within the confines of" the Bankruptcy Code, "subordinate to [its] valid statutory directives and prohibitions." *Law v. Siegel*, 571 U.S. 415, 421 (2014). Thus, the exercise of this authority cannot contradict the Code itself. *Id.* (collecting cases). The text of these two provisions firmly establishes this limit. Section 105(a) grants authority to "carry out" the provisions of the Code, but "it is quite impossible" to "carry out" the provisions of the Code by "taking action that the Code prohibits." *Id.* And Section 1123(b)(6) similarly extends only to actions that are "not inconsistent" with the Code. 11 U.S.C. § 1123(b)(6). In addition, § 1123(b)(6) directly limits the court's equitable authority in plan confirmations because the "additional" components of a confirmed plan must also be "appropriate." *Id.*

Consistent with this grant of limited equitable authority, the majority of circuits to consider the issue have found that bankruptcy courts can, in certain circumstances, confirm plans with nonconsensual third-party releases. *In re Seaside Eng'g*, 780 F.3d at 1078 (collecting cases). The Seventh Circuit's discussion of this issue is particularly persuasive. That court found that, "in light of" Sections 105(a) and 1123(b)(6), the Code's grant of "residual authority permits the bankruptcy court to release third parties from liability to participating creditors." *In re Airadigm*, 519 F.3d at 657. But, again to ensure this authority is exercised within the "confines of the Bankruptcy Code," *Law*, 571 U.S. at 421, the releases must be "not inconsistent with any provision of the bankruptcy code" and must be otherwise "appropriate," *In re Airadigm*, 519 F.3d at 657.

B. As A General Matter, Nonconsensual Third-Party Releases Are "Not Inconsistent" With The Bankruptcy Code.

Contrary to the district court's analysis, a nonconsensual third-party release is not inconsistent with any other provision of the Bankruptcy Code. Consider the enacted text of the three provisions that the district court discussed: 524(e), 524(g), and 524(h).

11 U.S.C. § 524(e) states that, except as otherwise provided, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." As is readily apparent from the text, this statute provides no broad prohibition against third-party releases. Instead, § 524(e) is a

definitional provision that sets the metes and bounds of a bankruptcy court's *discharge* order. "Pursuant to § 524(e), the discharge of the debtor's debt does not *itself* affect the liability of a third party, but § 524(e) says nothing about the authority of the bankruptcy court to release a non-debtor from a creditor's claims." *In re Seaside Eng'g*, 780 F.3d at 1078 (emphasis added); *see also Matter of Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993) ("[S]ection 524(e) provides only that a discharge does not affect the liability of third parties. This language does not purport to limit or restrain the power of the bankruptcy court to otherwise grant a release to a third party."). Generally speaking, when Congress seeks to proscribe certain actions, it will use mandatory terms. Thus, "[if] Congress meant to include such a [third-party release] limit, it would have used the mandatory terms 'shall' or 'will' rather than the definitional term 'does.'" *In re Airadigm*, 519 F.3d at 656. Likewise, "if Congress had meant to limit the powers of bankruptcy courts, it would have done so clearly, as it did in other instances," or Congress "would have done so by creating requirements for plan confirmation as in 11 U.S.C. § 1129(a) ('The court shall confirm a plan only if the following requirements are met . . . .')." *In re Seaside Eng'g*, 780 F.3d at 1078.

Further, reading § 524(e) to apply to third-party releases generally would be fitting a square peg into a round hole. After all, § 524(e) speaks about a discharge specifically in relation to a third-party's liability "on, or . . . .for, such debt." This

prepositional phrase ties § 524(e)'s discharge limit directly to consequences as it relates to *particular* third parties that also have obligations for a *particular* debt by the debtor. But if Congress sought to broadly prohibit third-party releases, it would have "omitted" this prepositional phrase to "ensur[e] that the 'discharge of a debt of the debtor shall not affect the liability of another entity'—whether related to a debt or not." *In re Airadigm*, 519 F.3d at 656. But Congress did not do so, leaving § 524(e) to apply to specific circumstances not implicated by the third-party releases of the sort at issue here. *See In re Purdue Pharma*, 2021 WL5979108, at *63 (explaining that the releases at issue here, unlike a § 524(e) situation, involve "debts of non-debtors that were not also debts of the debtor"). "[A] matter not covered" by a statute "is to be treated as not covered." SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93.

Similarly, 11 U.S.C. §§ 524(g) and 524(h) do not generally bar third-party releases. Section 524(g) provides a framework for a bankruptcy court to impose third-party releases "for a very limited class of chapter 11 cases involving asbestos liability." 4 COLLIER ON BANKRUPTCY ¶ 524.05; *see also* 11 U.S.C. § 524(g)(2)(B)(i)(I). And § 524(h) retroactively deemed prior asbestos-related injunctions to comply with the Code. The district court stated that these two provisions "suggest" that Congress sought "to preempt the field where non-debtor releases were concerned" to only those releases concerning asbestos. *In re Purdue*

Pharma, 2021 WL5979108, at 66. For its conclusion, the district court relied, in part, on those statutes' legislative history, *id.* at 51, 66, and the presumption that the specific controls the general, i.e., the specific authorization for asbestos-related releases suggests a lack of a general authority to issue other kinds of releases, *id.* at 67.

But the district court erred by sidelining another statute that Congress enacted in conjunction with §§ 524(g) and 524(h). In the Bankruptcy Reform Act of 1994, Public Law 103–394 § 111(b), 108 Stat. 4106, 4117, Congress provided an explicit rule of construction, stating that "*nothing* in" the provisions codified at §§ 524(g) and (h) "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." (emphasis added). Remarkably, the district court dismissed this precise instruction because of snippets of legislative history. *See In re Purdue Pharma*, 2021 WL5979108, at *51 ("The very next sentence from that statute's legislative history reveals that nothing could be further from the truth."). The district court's use of unenacted legislative history to displace the enacted text of Congress is badly out of step with how federal courts read statutes. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("[L]egislative history is not the law. It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute we do not inquire what the legislature meant; we ask only what the statute

means."); *United States v. Taylor*, 487 U.S. 326, 345 (1988) (Scalia, J., concurring) ("[I]t must be assumed that what the Members of the House and the Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said.").

In Public Law 103–394 § 111(b), Congress enacted its rule of construction to explicitly counteract the general/specific presumption that the district court adopted. "[A]ll of the time" legislatures will "not only define the terms" in a statute but also "limit the implications of their terms—which means that a . . . statute can exclude a canon of construction." SCALIA & GARNER, READING LAW 232–33. And that is exactly what Congress did by instructing that "*nothing*" in 524(g) and (h) should be "construed" to have an effect on "any *other* authority" that a bankruptcy court has to issue an injunction. Such "interpretation clauses are to be carefully followed." *Id*. at 225. Nevertheless, the district court not only failed to follow it, but took the exact opposite of the approach commanded by Congress.

Recent Supreme Court decisions interpreting the scope of bankruptcy court's equitable authority are not to the contrary. *Law v. Siegel*, stands for the undisputed principle that any equitable authority retained by bankruptcy courts cannot be exercised in direct violation of an on-point statutory command of the Bankruptcy Code. In *Law*, the bankruptcy court placed a "surcharge" on the individual debtor's

homestead exemption in order to compensate the trustee for attorney's fees incurred because of the debtor's bad faith conduct in the proceedings. 571 U.S. at 422. The court did so by invoking its equitable authority. The Supreme Court reversed because the Code explicitly exempts a designated amount of the debtor's home from "any [prepetition] debt" or "any administrative expense." 11 U.S.C. § 522(c), (k). Since attorney's fees are classified as administrative expenses, the Code *explicitly* forbade the relief that the bankruptcy court ordered. *Law*, 571 U.S. at 422. But as discussed above, the Bankruptcy Code does not similarly forbid nonconsensual third-party releases.

The Supreme Court's application of the general/specific canon in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012), does not support the district court's analysis, because *RadLAX* did not involve a specific instruction from Congress not to apply that canon. In *RadLAX*, debtors sought to cramdown a plan over the objection of a class of secured creditors. Two of the three statutory means for doing so were facially open to the debtors. But one provision, § 1129(b)(2)(A)(ii), spoke directly to the specific circumstances of the creditors and the plan at issue, while another provision, § 1129(b)(2)(A)(iii), spoke to more generally applicable circumstances. The Court resorted to the general/specific canon, noting that "general language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment" even

though the general language is "broad enough to include" that specific matter. *Id.* at 646 (cleaned up); *see id.* (applying this formulation of the canon to § 1129(b)(2)(A)(ii) and (iii)). Under this "canon," "[t]he terms of the specific authorization must be complied with." *Id.* at 645. But, as discussed, Congress in enacting § 524(g) recognized the possibility that a court might use the general/specific canon in the context of § 524(g) and the Code's grant of "other authority" to issue injunctions—and Congress expressly directed courts not to use that canon of construction. *Cf. id.* at 646–47 ("Of course the general/specific canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction.").

In *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), the Court addressed a perceived conflict of a different nature. There, the Court addressed "structured dismissals," an "increasingly common" tool of bankruptcy practice. In the dismissal at issue in *Jevic*, the bankruptcy court ordered dismissal of the Chapter 11 case, but the court also ordered the distribution of assets to high-priority secured creditors and to low-priority general unsecured creditors. In doing so, the bankruptcy court skipped over "certain dissenting mid-priority creditors." *Jevic*, 137 S. Ct. at 978. "The skipped creditors would have been entitled to payment ahead of the general unsecured creditors in a Chapter 11 plan (or in a Chapter 7 liquidation)" under the principle of absolute priority. *Id.* The Code provided explicitly for absolute

priority (or overcoming it) when discussing Chapter 11 plans and Chapter 7 liquidations, but with respect to absolute priority in the context of dismissals, the Code said nothing. Because "[t]he Code's priority system constitutes a basic underpinning of business bankruptcy law," the Court "expect[ed] more than simple statutory silence if, and when, Congress were to intend a major departure." *Id.* at 983–84. Accordingly, the Court held that silence was not enough to suggest that bankruptcy courts were authorized to contradict a fundamental organizing principle of American bankruptcy law.

The district court implied that, similar to *Jevic*, there exists some policy of bankruptcy that stands in the way of allowing for nonconsensual third-party releases in extraordinary circumstances. *See In re Purdue Pharma*, 2021 WL 5979108, at *67. But no other policy in bankruptcy is of similar magnitude to the rule of absolute priority. *See Jevic*, 137 S. Ct. at 984 (citing, *inter alia*, sources arguing that absolute priority is "quite appropriately, bankruptcy's most important and famous rule," and "the cornerstone of reorganization practice and theory"); BAIRD, *supra*, ELEMENTS OF BANKRUPTCY at 1 (describing "the absolute priority rule" as "the basic principle of corporate reorganizations"); *id.* at 74 ("[T]he absolute priority rule is central to the law of corporate reorganizations because it is the source of the substantive rights as well as the procedural protections that each participant in a reorganization enjoys."). In that respect, *Jevic* addresses a *sui generis* situation. Moreover, unlike

the order at issue in *Jevic*, nonconsensual third-party releases can be confirmed in a reorganization plan in a manner that does not contradict, but is rather fully consonant with, bankruptcy's organizing principles.

The Supreme Court has recognized, in the context of third-party litigation rights, that bankruptcy represents a "special remedial scheme." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989). To that end, unlike, for instance, Rule 23 class actions, a bankruptcy proceeding can serve as an "exception" to the general principle and "deep-rooted historic tradition that everyone should have his own day in court," by barring "successive litigation." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

That bankruptcy would uniquely address successive litigation makes sense, particularly in the quintessential scenario that often triggers a bankruptcy filing: a race to the courthouse to collect on limited assets. *In re Johns-Manville Corp.*, 36 B.R. 727, 740 (Bankr. S.D.N.Y. 1984) (finding that, but for bankruptcy, the debtor "would become a target for economic dismemberment, liquidation, and chaos, which would benefit no one except the few winners of the race to the courthouse."); *see also* BAIRD, *supra*, ELEMENTS OF BANKRUPTCY 8 (noting creditors can get "restless and may trigger the kind of destructive race to assets that a bankruptcy proceeding can prevent"). Bankruptcy brings order to this free-for-all. Once the debtor is in bankruptcy, all litigation against the debtor is stayed, and the court has the power to equitably resolve all claims against the debtor in one forum. In presiding over the

bankruptcy, the court has two overarching goals: marshal all the debtor's available assets and distribute the proceeds amongst creditors.

While the creditor-against-creditor race to the courthouse is the archetypal situation that bankruptcy seeks to avoid, another race that can emerge is a debtor-against-creditor race to the courthouse. For instance, in some scenarios the most valuable asset a debtor has is its claims against others, including insiders or co-liable parties. To increase assets available to all creditors, a debtor may pursue those claims within bankruptcy. *Cf. Lopez v. Specialty Restaurants Corp.,* (*In re Lopez*), 283 B.R. 22, 28 (B.A.P. 9th Cir. 2002) (explaining that "if the [debtor's lawsuit] has any value then creditors stand to benefit").

But, in a corporate setting, where there have been prolific allegations of wrongdoing, a debtor's creditors will likely have claims against those same insiders or co-liable parties too. *In re Cont'l Airlines*, 203 F.3d at 212–13 ("A central focus of these three reorganizations [with releases] was the global settlement of massive liabilities against the debtors and co-liable parties. Substantial debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities and made these reorganizations feasible."). But here there is a potential conflict: creditors have an incentive to pursue their claims directly—and before the debtor—to collect as much as possible outside of bankruptcy. Such actions, however, have the dual effect of decreasing the amount of assets a debtor has and

upsetting bankruptcy's purpose to equitably apportion assets to creditors. *Cf. Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 900 (5th Cir. 2019) ("The Plaintiffs-Objectors' claims affect receivership assets because every dollar the Plaintiffs-Objectors recover from Willis and BMB is a dollar that the receiver cannot, frustrating the receiver's pro rata distribution to investors—a core element of its draw upon equity.").

One solution to both issues is to allow the debtor to maximize its assets in a voluntary settlement with the third parties, and channel all proceeds for the benefit of all creditors, instead of allowing holdout creditors to try and get a better bargain from the third party outside of bankruptcy. *Manville I*, 837 F.2d at 94; *cf. Zacarias*, 945 F.3d at 902 ("These holdouts have been content for the receiver to pursue litigation for their benefit, then to participate as receivership claimants, collecting pro rata. Now, however, they ask to jump the queue, come what may to their fellow claimants who remain within the receivership distribution process. At bottom, the Plaintiffs-Objectors seek special treatment: their efforts to escape pro rata distribution, if successful, would recreate the collective-action problem that Congress sought to eliminate.").

That is not to say that the circumstances in which such releases will be called for are not "dramatic," *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002), or "extraordinary," *In re Cont'l Airlines*, 203 F.3d at 212. As one bankruptcy judge

has explained, "third-party releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. at 726. Instead, they are reserved for unique circumstances. While the appropriateness of any release as a solution to these issues will depend on the particular facts of a bankruptcy, there can be no question that a release that marshals significant assets and equitably apportions them can be fully consonant with bankruptcy's overarching purposes.

In sum, while no specific provision of the Bankruptcy Code "explicitly authorize[s]" nonconsensual third-party releases, no provision or animating principle of bankruptcy "prohibits" them either, *Law*, 571 U.S. at 421. Accordingly, consistent with the enacted provisions of the Bankruptcy Code and this Court's established precedent, such releases are a lawful tool that bankruptcy courts can use in appropriate circumstances.

III. The Confirmation of Plans With Non-Consensual Third-Party Releases Is Consistent With the Constitution.

Some parties have raised constitutional objections to the Bankruptcy Code's grant of authority, in appropriate circumstances, to impose nonconsensual third-party releases. These objections lack merit.[2]

[2] This brief does not discuss all of these objections in detail. Amici agree with the bankruptcy court that, for instance, the releases do not improperly override the states' police powers.

A. Plan Confirmation Does Not Run Afoul of *Stern v. Marshall*.

The district court also held that the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011), barred the bankruptcy court from constitutionally confirming the plan below with releases of third-party claims. *See In re Purdue Pharma*, 2021 WL 5979108 at *40. That holding is incorrect, because *Stern* allows bankruptcy courts to adjudicate matters that are integral to the restructuring of the debtor-creditor relationship.

In the district court's view, "[t]he third-party claims at issue neither stem from Purdue's bankruptcy nor can they be resolved in the claims allowance process." *Id.* at *41. As a result, the district court treated the bankruptcy court's decision as proposed findings of fact and conclusions of law. *Id.* at *42. The practical import of this ruling for this case is null because there are no factual issues in dispute and legal issues are always reviewed de novo, regardless of whether the bankruptcy court enters a final judgment. *Id.* at n.54.

Nevertheless, the district court's holding has practical significance for future cases. Bankruptcies are, by nature, time-sensitive proceedings. Debtors, creditors, and interested parties alike have an interest in the timely (and final) resolution of bankruptcy proceedings. The timeliness of adjudication is undermined if a district court must review all of the bankruptcy judge's work de novo.

Fortunately, such de novo review is unnecessary, because *Stern* does not bar bankruptcy courts from approving releases of third-party claims against non-debtors. As the Third Circuit thoughtfully explained,

> *Stern* teaches that the exercise of "core" statutory authority by a bankruptcy court can implicate the limits imposed by Article III. Such an exercise of authority is permissible if it involves a matter integral to the restructuring of the debtor-creditor relationship. And, in determining whether that is the case, we can consider the content of the "core" proceeding at issue.

In re Millennium Lab Holdings II, LLC., 945 F.3d 126, 137 (3d Cir. 2019).

"Applying the foregoing principles," the Third Circuit concluded that the bankruptcy court in that case "was resolving a matter integral to the restructuring of the debtor-creditor relationship" by approving certain nonconsensual third-party releases. *Id*. The Third Circuit further rejected the argument that Article III requires district court review because the released claims do not themselves "stem from the bankruptcy . . . and would not be resolved in the claims-allowance process." *Id.* at 137–38. "That argument fails primarily because it is not faithful to what *Stern* actually says"; *Stern* expressly allows for bankruptcy courts to finally adjudicate those matters that are "integral to the restructuring of the debtor-creditor relationship." *Id.* at 138. The Third Circuit's reasoning on this point is correct and should be followed here.

B. Plan Confirmation of Non-Consensual Third Party Releases Is Consistent With Due Process Requirements.

The district court did not reach the due process objections that have been raised by the releases at issue here. But as this Court's precedent confirms, such releases can meet the dictates of due process if they are appropriately handled in bankruptcy proceedings with adequate notice and a hearing of objections.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). A proposed plan that provides sufficient notice to those creditors, whose claims will be released, and a confirmation proceeding that provides for such creditors or their representatives to object can meet this "minimum." *Id.* at 313. This is all the more reinforced by the fact that the Supreme Court has repeatedly reaffirmed that bankruptcy is a "special statutory scheme" that "may expressly foreclos[e] successive litigation by nonlitigants" in a manner consistent with due process. *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) (quoting *Martin*, 490 U.S. at 762 n.2); *see also Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 799 (1996); *cf. Tulsa Pro. Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988) (Oklahoma's nonclaim statute terminating unsubmitted claims against the estate can comport with due process with the provision of actual notice).

This Court's precedent shows that the confirmation of third-party releases can be consistent with due process. In *Manville I*, this Court considered the contention that the party, whose claims had been released, "was denied due process of law because it received notice of the insurance settlements only after the settlements had been negotiated." *Manville I*, 837 F.2d at 94. This "contention [was] without merit" because all "interested parties were provided with notice and a hearing before the settlements were approved by the Bankruptcy Court." *Id*; *accord In re Drexel*, 995 F.2d 1138, 1145 (2d. Cir. 1993) (holding, in a separate appeal out of the *Drexel* bankruptcy proceedings, that a settlement does not violate due process when there is "adequate notice" and "[a]ll interested parties were provided with an opportunity to make written and oral objections to the proposed settlement agreement").

CONCLUSION

For the foregoing reasons, this Court should hold that bankruptcy courts in this Circuit have the statutory and constitutional authority to confirm plans of reorganization that include nonconsensual third-party releases in appropriate circumstances.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 29(a)(5), Local Rule 29.1(c), and 32.1(a)(4)(A) because this brief contains 6,736 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February 2022, I filed the foregoing via the Court's CM/ECF appellate system, which will electronically notify all counsel with the exception of the following, who will be served via email and USPS:

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