NO. 21-1047

IN THE

Supreme Court of the United States

ANNICK ROY, et al., *Petitioners*,
v.
CANADIAN PACIFIC RAILWAY CO., *Respondent*.

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

BRIEF OF LAW PROFESSORS WHO TEACH OR WRITE ON CIVIL PROCEDURE OR FEDERAL COURTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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QUESTIONS PRESENTED

1. Do "cases under title 11," as used in Federal Rule of Bankruptcy Procedure 1001 and understood from the structure and rules governing the bankruptcy system, include cases in district court that are merely "related to a case under title 11," so that an appellate court may displace the Civil Rules used in the district court with the different requirements of the Bankruptcy Rules to ascertain its appellate jurisdiction?

2. May an appellate court, consistent with due process, change the applicable rules from civil to bankruptcy, after the notice of appeal has been filed, to determine appellate jurisdiction?

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INTEREST OF *AMICUS CURIAE*[1]

Amici are law professors who teach or write in the areas of Civil Procedure and Federal Courts. They are filing this brief to urge this Court to grant the pending Petition in this case in order to set forth a coherent and workable approach to the civil rules when the case has, as here, an attenuated relationship to a bankruptcy proceeding.

Amici are of the firm view that the decision below erred in its understanding of the applicability of the rules governing bankruptcy, with troubling and far-reaching implications that will affect a wide range of cases. Moreover, if left unexamined, the First Circuit's novel approach would subjugate the Civil Rules to the Bankruptcy Rules in a way never contemplated in promulgating the two sets of separate rules and would fail to achieve the uniformity of approach that apparently motivated the First ruling below.

Amici are listed here by name and school affiliation for identification purposes, though they file this brief in their personal capacities and not as school representatives:

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[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than amici, their members, or their counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have received timely notice and have consented to the filing of this brief.

Richard Lorren Jolly, Southwestern Law School

Alan B. Morrison, George Washington University Law School

SUMMARY OF ARGUMENT

Left unexamined, the First Circuit's imposition of the Bankruptcy Rules' more contracted limit on when a notice of appeal must be filed after the case was heard in the district court under the civil rules has troubling consequences for a large number of other cases in the federal courts. It places a premium on a type of gamesmanship this Court has repeatedly condemned by encouraging a party to urge consideration of a tangentially related non-party's bankruptcy to change which rules apply once the case enters the appellate level. The surprise visited upon the appealing party will likely produce anomalous results and a process that departs significantly from the trust-seeking objective and due-process considerations that rules of procedure are designed to facilitate.

Which rules apply should not be a guessing game, but informed by bright lines that allow the parties to order their claims or defenses. The Bankruptcy Rules derive from a history and evince a structure that is consistent with clear separation from the Civil Rules. However, the First Circuit's almost mechanical imposition of the Bankruptcy Rules for the first time as the case reached the appellate level runs exalted a need for uniformity whenever a bankruptcy is "related to" the litigation, regardless of the stage of the

litigation. However, bankruptcy rules have not imposed that type of uniformity, as courts have long imposed local rules that depart from or add to the applicable rules. In addition, many bankruptcy matters will be resolved in state court, where the Bankruptcy Rules will never apply.

Procedural rules are intended to further due process – and notice is one of the most fundamental requirements of due process. This Court's structural bankruptcy decisions, for example, allow the parties to consent to have a matter heard by a bankruptcy court. That requirement of consent builds in notice (and due process) because it enables the parties to understand both the judicial authority of the court and the rules it will apply in advance.

Because these issues have a critical importance, particularly in times when bankruptcies are common, this Court's guidance is urgently needed, and the Petition should be granted.

REASONS FOR GRANTING THE PETITION

The approach taken by the First Circuit to determine whether the civil or bankruptcy rules apply to a given case, in a case in which no party is in bankruptcy, has troubling and far-reaching consequences for a substantial number of cases in federal courts.[2] By allowing a non-party's bankruptcy

[2] Even without an expansion in the number of cases deemed bankruptcy cases as a result of the ruling below, bankruptcy cases already include commercial and business law disputes, mass torts, and environmental cases, as well as other

to transform a civil case into a bankruptcy case, courts will produce anomalous results, creating a train wreck that needs to be headed off now. The importance of resolving this issue immediately provides sufficient reason to warrant this Court's attention by itself, independent of the circuit conflicts discussed in the Petition.

I. The First Circuit's Approach to "Related to" Title 11 Cases Will Encourage Courts to Transform Inapt Cases into a Bankruptcy Proceedings to which the Bankruptcy Rules Will Apply, Contrary to the Applicable Statutory and Rulemaking Design.

Bankruptcy cases have distinctive timeliness and financial considerations that are usually absent from other civil cases. It is for this reason that the resolution of bankruptcy matters has long been treated separately from actions at law between adversarial parties. Even the modern bankruptcy system retains aspects of the English practice from which it was derived, which used referees superintended by courts of equity,[3] and explains the

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noncommercial litigation. Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 Notre Dame L. Rev. 633, 634 (2004). For the year ending March 31, 2020, federal courts reported 764,282 new bankruptcy petition filings. Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2020, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020.

[3] Dennis Connolly and Kevin Hembree, *Arriving at Arkison and Wellness: Making Sense of the Procedural Quagmire After the Supreme Court's Rulings on Bankruptcy Court Jurisdiction and*

longtime use of non-Article III systems in the United States to resolve creditor-debtor disputes.

The bankruptcy system has also always relied upon bankruptcy-specific rules that depart from those applicable to other civil cases. Seventy percent of the Bankruptcy Act of 1898, "if not more," according to one scholar's estimate, consisted of procedural, rather than substantive, provisions. Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 Am. Bankr. L.J. 217, 218 (1996). To conform existing civil rules to the experiential demands of bankruptcy, courts relied heavily upon General Orders on Bankruptcy issued by this Court, 4 Fed. Prac. & Proc. Civ. § 1016 (4th ed.), and bankruptcy-specific local rules. Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DePaul Bus. & Com. L.J. 383, 384 (2005).

A "rising tide of consumer bankruptcies" after World War II strained the judiciary's ability to respond to bankruptcy petitions[4] and likely encouraged the 1960 formation of the Advisory Committee on Bankruptcy Rules, which originally proposed updates to the existing General Orders on

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Authority, 2015 Ann. Surv. of Bankr. Law 1, 2. It was not until this Court promulgated the first comprehensive set of bankruptcy rules in 1973 that referees, reflecting the English practice, were renamed "bankruptcy judges." Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 Harv. J. on Legis. 1, 2 (1985).

[4] *See* H.R. Doc. No. 137, 93d Cong., 1st Sess., part I, at 2 (1973).

Bankruptcy. King, 70 Am. Bankr. L.J. at 218. The Advisory Committee subsequently recommended that Congress authorize the Supreme Court to promulgate bankruptcy rules in the same manner that it developed civil, criminal, and admiralty rules, resulting in the 1964 enactment of that authority in 28 U.S.C. § 2075. *Id.* at 219. The congressional authorization in Section 2075 specifies that the rules apply to the "practice and procedure in cases under title 11."[5] Hence, Fed. R. Bankr. P. 1001 declares that the Bankruptcy Rules Procedure "govern[] procedure in cases under title 11 of the United States Code."

On the other hand, the Federal Rules of Civil Procedure "govern the procedure in *all civil actions* and proceedings in the United States district courts, except as stated in Rule 81." Fed. R. Civ. P. 1 (emphasis added). Among the exceptions specified in Rule 81 are those cases governed by the Bankruptcy Rules. Fed. R. Civ. P. 81(b). The Civil Rules, then, "govern virtually all civil actions, the vast majority of which involve only private litigants." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 469 (1983).

The resulting 1973 bankruptcy-specific rules were issued based on a more than decade-long effort by the Advisory Committee on Bankruptcy Rules. Louis W. Levit, *The New Bankruptcy Rules*, 57 Marq. L. Rev. 1,

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[5] Unlike 28 U.S.C. § 2072(b), which authorizes rules to supersede all laws in conflict with the rules, "§ 2075 does not contain a supersession clause," making the Bankruptcy Rules "the only federal rules that may not conflict with a procedural statutory provision." Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 Am. Bankr. L.J. 245, 262 (1996).

1-2 (1973). The enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, brought about yet another rules-drafting effort to conform the rules to the congressional design. 4 Fed. Prac. & Proc. Civ. § 1016.

Further revision became necessary after this Court invalidated the congressional design in the Bankruptcy Reform Act of 1978 because it unconstitutionally endowed Article I judges with Article III authority. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 (1982). Congress remedied this defect by placing bankruptcy courts and judges under the umbrella of Article III district courts in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

The Advisory Committee on Bankruptcy Rules then produced new rules that took effect on August 1, 1983 that "were intended to codify and simplify bankruptcy practice, to make it similar to civil procedure whenever possible." 4 Fed. Prac. & Proc. Civ. § 1016. Even so, the separate rules demonstrate separate needs.

This history makes clear that the bankruptcy system's structure and intent, as determined both by Congress and the separate advisory rules apparatus, have maintained important bright lines between civil and bankruptcy cases that the First Circuit's decision disregards. By its own description, the "related to" cases it treated as "cases under title 11 of the United States Code," as described in Fed. R. Bankr. P. 1001,

are but "loosely connected to title 11 claims" and thus the type of cause that *Northern Pipeline* held could only be adjudicated to a final resolution by an Article III court as a non-core proceeding. App. 9a, 11a.

The post-*Northern Pipeline* decision to establish bankruptcy courts to which a district court may refer a bankruptcy case, *see* 28 U.S.C. § 157(a), reflects a determination that bankruptcy cases require special considerations not present in other civil cases.

Those same considerations are not present when the claim "is in no way derived from or dependent upon bankruptcy law; [but] it is a state tort action that exists without regard to any bankruptcy proceeding." *Stern v. Marshall*, 564 U.S. 462, 499 (2011). That is because bankruptcy jurisdiction extends to "civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

A case that *arises under* Title 11 is a core proceeding that deals with questions specific to the bankruptcy petition. *See* 28 U.S.C. § 157(b)(2). A proceeding "*arises in* bankruptcy only if it has "no existence outside of the bankruptcy." *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir.2006).

"Related to" jurisdiction is the most amorphous of the three categories. Congress did not provide much guidance, but this Court has said that it "cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). While it is plainly focused on the bankrupt estate, *id*. at 308, this Court also recognized that "related to" jurisdiction reaches proceedings that have a "direct and substantial adverse effect on [a

company's] ability to undergo a successful reorganization. *Id*. at 300.

The First Circuit, however, gave broad meaning to "related to," finding the cases related to a non-party's bankruptcy, even though that defendant had been dismissed pursuant to a settlement agreement that was part of its liquidation plan on November 18, 2015. App. 5a. The relationship of the current case, involving only a non-bankrupt defendant, to the bankrupt non-party's liquidation was so remote in time and in effect that the substitution of the Bankruptcy Rules' time requirements for a notice of appeal a judgment of dismissal based on Fed. R. Civ. P. 12(b)(6) would appear to permit a similar substitution even after the non-party's bankruptcy petition was resolved. *See* App. 8a, 20a, 27a, 28a.

In holding that the Bankruptcy Rules govern appellate jurisdiction—even though they were never previously applied in the case, the First Circuit emphasized the need for uniformity as a reflection of the congressional design. App. 16a. It ruled that a court must apply "the same set of procedural rules in all proceedings having a nexus to a bankruptcy case," to "facilitate[] the efficient disposition of claims." App. 15a.

Left to stand, the court's holding and analysis encourages other courts that they must switch to the Bankruptcy Rules as soon as some tangentially related bankruptcy can be located with a vaguely colorable claim of an impact on reorganization. That would make the civil rules—which would have

governed up to that point—at least temporarily inapplicable, even as late as a notice of appeal. Yet, Congress did not insist on the type of uniformity that the First Circuit ascribed to it. Congress plainly considered uniform rules of secondary value, as exemplified by the statute's explicit acknowledgement that many bankruptcy matters will be resolved in state court, where the Bankruptcy Rules will never apply. *See* 28 U.S.C. § 1334.

Indeed, as this Court held, "the framework Congress adopted in the 1984 [Bankruptcy] Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts," *Stern,* 564 U.S. at 502, and thus by procedural rules other than the Bankruptcy Rules. This Court provided two examples. It recognized that 28 U.S.C. § 1334(c)(2) "requires that bankruptcy courts abstain from hearing specified noncore, state law claims that 'can be timely adjudicated[] in a State forum of appropriate jurisdiction.'" *Id*. It further added that 28 U.S.C. § 1334(c)(1) "similarly provides that bankruptcy courts may abstain from hearing any proceeding, including core matters, 'in the interest of comity with State courts or respect for State law.'" *Id*.

The upshot is that courts following the First Circuit's approach – that uniformity demands that even a matter loosely connected to a non-party's bankruptcy should be subject to the Bankruptcy Rules – will enlarge the use of those Rules even when the dispute is "in no way derived from or dependent on bankruptcy law" and discourage the discretionary

remand of cases to state courts, where those rules do not apply, even though contrary to the "framework Congress adopted in the 1984 Act." *Id*. This Court's guidance is necessary to determine whether such a shift conforms to the structure put in place by both Congress in its bankruptcy legislation and this Court in promulgating both the Civil and Bankruptcy Rules.

II. The First Circuit's Decision Has Important Implications for Due-Process that Warrant this Court's Attention.

As the Petition emphasizes, due process entitles parties to know what rules apply from both the outset of a case and at each point of its duration. Pet. 18-19. The Federal Rules of Civil Procedure reflect a judgment against "trial by ambush," which "well may disserve the cause of truth." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 253 (1978) (Stevens, J., dissenting) (citations omitted). In this case, the parties operated under the Civil Rules until the First Circuit determined that the notice of appeal was untimely because the 14-day time limit of the Bankruptcy Rules applied. App. 20a. The surprise switch that deprived the Petitioners of their appeal cannot be reconciled with the requisite notice that due process requires. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice.").

To the contrary of that result, the Civil Rules "are designed to further the due process of law that the Constitution guarantees," *Nelson v. Adams USA, Inc.*,

529 U.S. 460, 465 (2000), by providing a clear and understandable path toward a "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. The Bankruptcy Rules must perform that same due-process function. Their unknowing application, after-the-fact, does not further due process.

Even this Court's structural decisions about bankruptcy, though couched in terms of Article III, reflect an abiding concern about due process. They recognize that the parties' consent can overcome the Article III structural infirmity that would otherwise limit the authority of bankruptcy courts. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 674 (2015) ("Our precedents make clear that litigants may validly consent to adjudication by bankruptcy courts."); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986) (characterizing *Northern Pipeline* as holding that the "absence of consent" comprised a "significant factor in determining that Article III forbade such adjudication" before a non-Article III court); *see also* 28 U.S.C. § 157(c)(2) (authorizing the district court, "with the consent of all the parties to the proceeding," to refer a "related to" matter to the bankruptcy court for final judgment). The requirement of consent has an obvious due-process basis for it provides notice of the applicable rules and reflects this Court's concern about ensuring adequate process.

Although many rules governing civil cases generally and bankruptcy cases in particular substantially overlap, distinctions exist that can be

outcome-determinative, as the case underlying the Petition demonstrates. Certainly, just as the "presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,'" which "makes the plaintiff the master of the claim," it seems anomalous to allow a defendant to inject a third party's bankruptcy that could speculatively be affected to "transform the action into one arising under [the bankruptcy rules], rendering the plaintiff "master of nothing." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 399 (1987).

This Court has recognized that "first-year law students in any basic course on federal civil procedure" learn that "'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570-71 (2004) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)). *See also Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) ("if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events").

Where a case begins or exists within a court's bankruptcy jurisdiction, there can be little doubt that the Bankruptcy Rules apply. However, the First Circuit's decision permits a case heard entirely under the Civil Rules to be governed by the Bankruptcy Rules constricting the time within which an appeal must be filed, even though nothing about the case suggests that it exists under the court's bankruptcy jurisdiction or that the decision entered by a district

judge under the Civil Rules should be examined only under the Bankruptcy Rules.

The First Circuit's willingness to substitute a new set of rules at that late stage raises a serious due-process question about the propriety of changing the rules mid-case, when it comes as a surprise development. The fact that cases "related to" bankruptcy can be heard under a State's civil rules suggests that no unfairness exists when the rules applied throughout the case are permitted to continue.

If left unexamined, the decision below will "encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits," as this Court condemned in *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). The high likelihood that the First Circuit's decision will open the door to efforts to change the rules mid-stream warrants this Court's attention.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant certiorari.

February 28, 2022

Respectfully submitted,

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