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

AMICUS BRIEF IN SUPPORT OF RESPONDENTS BY CERTAIN FORMER COMMISSIONERS OF THE AMERICAN BANKRUPTCY INSTITUTE'S COMMISSION TO STUDY THE REFORM OF CHAPTER 11

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INTEREST OF AMICI CURIAE[1]

The American Bankruptcy Institute ("ABI") is a national organization with nearly 10,000 members from all sectors of the restructuring community. In 2012, the ABI formed and funded a commission (the "Commission") to evaluate and propose possible changes to reorganization laws, especially chapter 11 of the Bankruptcy Code. After over two years of intensive study by the Commission and multiple advisory committees, including gathering testimony at field hearings throughout the United States, and input from experts from all sides of various issues, the Commission issued a formal report containing its findings and recommendations (the "Report").[2] Counsel for amici curiae (the "Amici") co-chaired the Commission. Four additional former commissioners join in this brief.[3]

Included in the Commission's purview was a review of the use of nonconsensual third-party releases in chapter 11 plans of reorganization. After careful study and discussion, the Commission recommended their continued

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1. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Sup. Ct. R. 37(6).

2. Am. Bankr. Inst., Commission to Study the Reform of Chapter 11: 2012-2014 Final Report and Recommendations (2014), http://commission.abi.org/full-report [hereinafter, the "Report"].

3. The Amici include: D.J. Baker, Geoffrey L. Berman, Jack Butler, Robert J. Keach, Albert Togut, and Deborah D. Williamson. The Amici emphasize that they do not speak or write for or on behalf of the ABI, and that this brief is filed in their individual capacity and does not constitute the views of the ABI.

use as an essential tool in certain chapter 11 cases, subject to a multi-factor balancing test. *See* Report, *supra* note 2, at 252.

The issues raised in this appeal are of interest to the Amici because the position advocated by the Petitioner, if adopted by this Court, will have a destructive effect on the entire chapter 11 restructuring process. The Petitioner's contention that, under the Bankruptcy Code, bankruptcy courts have only the authority specifically and precisely enumerated is contrary to the basic construction and text of the Bankruptcy Code and Congressional intent. Congress knew it could not possibly forsee all plan provisions and structures needed to successfully restructure complex business organizations in industries not contemplated when the Bankruptcy Code was passed or anticipate the countless challenges future bankruptcy courts would need to meet. Congress provided, in numerous provisions of the Bankruptcy Code, judicial authority and discretion to achieve reorganizations that balanced the interests of all constituencies. Congress' wisdom spawned needed innovation and creativity in restructuring businesses that made chapter 11 a model for restructuring statutes throughout the world. Petitioner's constricted view of the bankruptcy court's authority is simply contrary to what Congress intended.

The availability of third-party releases drives settlements essential to complex reorganizations, particularly in, but not limited to, mass tort cases. Barring such releases will curtail, if not end, such global settlements to the great detriment of claimants. If nonconsensual third-party releases are prohibited, tort victims will suffer the most. A tiny minority of holdouts could destroy a settlement beneficial to and favored by the vast majority of claimants.

For these reasons, the Commission warned in the Report that a blanket prohibition on nonconsensual third-party releases was inadvisable and recommended their continued use under certain conditions. In particular, the Commission included in the Report this recommendation:

> In reviewing a proposed third-party release included in a chapter 11 plan, the court should consider and balance each of the following factors: (i) the identity of interests between the debtor and the third party, including any indemnity relationship, and the impact on the estate of allowing continued claims against the third party; (ii) any value (monetary or otherwise) contributed by the third party to the chapter 11 case or plan; (iii) the need for the proposed release in terms of facilitating the plan or the debtor's reorganization efforts; (iv) the level of creditor support for the plan; and (v) the payments and protections otherwise available to creditors affected by the release. In a case involving the application of third-party releases to creditors and interest-holders not voting in favor of the plan, the court should give significant weight to the last of these factors.

Report, *supra* note 2, at 252. In the Commission's view, balancing these factors makes third-party releases available only in appropriate cases, while ensuring that the recipients of releases pay adequate consideration for them, and that the parties releasing claims receive as much or more than they would receive through nonbankruptcy litigation, and likely receive that consideration far sooner. This balancing test prevents overuse of this critical tool; the test is exacting and stringent, requiring a particularized factual basis and substantial and credible evidence.

Bankruptcy Judge Robert D. Drain confirmed a plan in the case below that, while consented to by the overwhelming majority of affected claimants, contained nonconsensual third-party releases applicable to only a tiny number of holdouts. *See In re Purdue Pharma L.P.*, 633 B.R. 53, 61, 115 (Bankr. S.D.N.Y. 2021). Judge Drain relied upon the established statutory basis in the Bankruptcy Code for confirmation of plans containing such releases and assiduously applied the multi-factor test adopted by the Commission (and the majority of circuit courts) with relevant findings backed by substantial evidence. *See id.* at 85-95.

The Second Circuit properly affirmed. *See In re Purdue Pharma L.P.,* 69 F.4th 45, 56-57 (2d Cir. 2023). The Second Circuit's stringent seven-factor test is entirely consistent with, and perhaps an improvement upon, the Commission's proposal. As the Second Circuit found, use of the multi-factor test, along with exacting standards for notice to all affected parties, also ensures that the due process rights of victims are protected and imposition of nonconsensual releases cannot constitute an uncompensated taking or otherwise run afoul of constitutional limitations. The Second Circuit found, in unity with a majority of circuit courts, statutory authority for approval of plans containing nonconsensual third-party releases in sections 1123(b)(6) and 105 of the Bankruptcy Code. *Id.* at 72-73.

Judge Drain's decision below, in confirming the debtors' plan and authorizing the third-party releases essential to the plan's implementation, proceeded with appropriate caution, properly balanced each of the factors suggested by the Commission (and the seven factors later adopted by the Second Circuit), and supported essential factual findings for each by reference to considerable and irrefutable evidence. No party disputes the bankruptcy court's factual findings. The appellants raised no challenge to the bankruptcy court's determination that all parties -in-interest, including those with claims against the released parties, would be worse off if the plan were not confirmed, and if they pursued non-bankruptcy remedies. The parties with actual claims against the released parties clearly agreed, not just by their overwhelming vote in favor of the plan but also by not joining this appeal; the Petitioner, of course, has no claim and no economic stake.

Statutory authority in the Bankruptcy Code empowered Judge Drain to so rule. The Second Circuit properly affirmed Judge Drain's decision confirming Purdue Pharma's plan, a plan supported by nearly all affected claimants and parties-in-interest. The Amici support affirmance of the Second Circuit's decision, a decision consistent with the Commission's recommendation and more than forty years of case law in the clear majority of circuits.

PRELIMINARY STATEMENT

In confirming the plan below, Judge Drain properly noted the following:

> Bankruptcy cases present a unique and perhaps the only means to resolve the collective problem presented by an insolvent debtor and a large body of creditors competing for its insufficient assets, including especially when there are mass claims premised on products to which, as here, massive harm is attributed.

In re Purdue Pharma L.P., 633 B.R. at 58. Further, and premised on the overwhelming evidence presented to him, Judge Drain found that the plan was the only "reasonably conceivable" way to resolve the issues in the case, *id.* at 59, and, as the Second Circuit found, "in doing so, grounded [his] opinion on the principle that, in bankruptcy, courts 'focus the solution away from individual litigations to a fair collective result subject to the unique ability under bankruptcy law to bind holdouts under well-defined circumstances who could not otherwise be bound under bankruptcy law,'" *In re Purdue Pharma L.P.,* 69 F.4th at 62 (quoting *In re Purdue Pharma L.P.*, 633 B.R. at 58). Judge Drain recognized, as has this Court, that bankruptcy, and chapter 11 in particular, constitutes a "special remedial scheme . . . [capable of] expressly foreclosing successive litigation by nonlitigants" in appropriate circumstances. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (distinguishing bankruptcy from "mandatory" class action settlements). The bankruptcy court properly framed the issue as one regarding the primacy, in reorganization cases, of a collective result, concluding that a small number of holdouts could be bound to the comprehensive settlement embodied in the plan. *In re Purdue Pharma L.P.,* 633 B.R. at 97-98. So did the Second Circuit. *In re Purdue Pharma L.P.,* 69 F.4th at 77-85.

The Second Circuit emphasized that Judge Drain twice reduced the scope of the proposed releases, a critical fact ignored by the Petitioner. The plan's releases were limited to claims of creditors of the debtors against third parties where "the Debtors' conduct must be a legal cause or legally relevant factor of any released cause of action against the Sacklers." *Id.* at 61. In addition, "the [bankruptcy] court narrowed the Release even further to cover only those claims that directly affect the *res*" of the debtors' bankruptcy estates. *Id.* at 63-64. The claims covered by the narrowed releases, being "legally intertwined with the Debtors' conduct . . . are appropriately subject to settlement under both statutory and common law frameworks." *Id.* at 64 (citing *In re Purdue Pharma L.P.*, 633 B.R. at 103-05). Limiting the releases to claims overlapping and intertwined with like claims against the chapter 11 debtor and affecting its estate makes their approval and extension to holdout parties (all but the Petitioner creditors of the chapter 11 debtor) a natural extension of what the Bankruptcy Code expressly provides as to plan confirmation: a class of claims may accept a plan if requisite majorities in number and dollar amount vote to accept, but the confirmation of the plan binds not only the claimants voting to accept, but those voting to reject as well. 11 U.S.C. §§ 1126, 1141(a). With respect to claims that affect the *res* of the estate, this is what plan confirmation does: holdouts are bound to the settlement accepted by the majority in favor of a necessary collective result. Confirmation of the plan below did nothing radical, but was a natural extension of what typically happens in chapter 11.

Judge Drain's assessment of chapter 11's efficacy as a tool for collective outcomes in mass liability cases was correct, as was the Second Circuit's agreement with that assessment. Since passage of the Bankruptcy Code, debtors and creditors have used chapter 11 to craft solutions to intractable problems in cases requiring a "global settlement of massive liabilities against . . . debtors and co-liable parties." *In re Continental Airlines*, 203 F.3d 203, 212-13 (3d Cir. 2000) (describing a "central focus" of three recent reorganizations before appellate courts). As Judge Drain and the Second Circuit agreed, chapter 11 orients a debtor, its creditors, and other stakeholders—parties with disparate and often conflicting interests and goals—towards a *collective* solution. *See In re Purdue Pharma L.P.*, 633 B.R. at 58. In mass tort cases, reaching such a solution depends on the unique tools available to a bankruptcy court based on the broad authority provided by the Bankruptcy Code. One such essential tool, used after careful scrutiny and only if premised on sufficient evidence and acceptance by the clear majority of affected claimants, is the nonconsensual release of inevitably intertwined claims the debtor's creditors hold against non-debtors. In these cases, a nonconsensual third-party release is critical in reaching a global settlement with creditors and, thus, an essential element of a debtor's plan of reorganization. As the narrowed scope of the releases in *Purdue* demonstrates, mass tort cases involve third-party claims not easily distinguished from the claims of and against the chapter 11 debtor, an absence of black and white distinctions between claims against the debtor and third parties, and, rather, a massive amount of gray area.

In the mass tort context, use of third-party releases permits and drives settlements that distinctly benefit tort claimants; without such releases, and the third-party contributions they incentivize, debtors lack sufficient assets to compensate victims. *And those victims would receive far less via litigation.* Tellingly, Judge Drain found, based on days of testimony, that victims would undoubtedly receive a far greater recovery as a result of the reorganization plan at issue than they would receive by fully litigating their alleged claims against the Sacklers, and they would receive that amount far faster. *See In re Purdue Pharma L.P.*, 633 B.R. at 109 ("I therefore conclude that if I denied confirmation of the plan, the objectors' aggregate net recovery on their claims against the Debtors <u>and</u> the shareholder released parties would be materially less than their recovery under the plan."). A chapter 11 plan incorporating such settlements—grounded in nonconsensual releases as to any settlement holdouts—is often the only possible rational solution to value-destructive years of uncertain litigation.

History is the best teacher. Before the use of chapter 11 to resolve mass tort crises, such cases precipitated a chaotic race to the courthouse with often unfair results. Early-filing plaintiffs were covered by limited insurance that, once exhausted, left remaining claimants with no source of recovery as the underlying business, besieged with litigation, failed and liquidated. Judgment amounts varied greatly. Courts were swamped with these actions, often tens of thousands of them, severely taxing the tort system, with attendant, years-long delays. Future claimants were often left with no remedy.

Once companies with mass tort exposure filed for chapter 11 relief, starting most notably with the Johns-Manville Corporation in 1982, greater order and fairness was achieved. Equality of treatment, required under the

Bankruptcy Code, occurred. A centralized forum for adjudication of all claims was created, often via claims processes designed by the tort claimants' counsel. All relevant assets came under the supervision and control of the bankruptcy court, including valuable insurance rights. *See* 11 U.S.C. §§ 365(f), 541(a). The rights of future claimants (those whose diseases would manifest after the bankruptcy) were protected through the appointment of future claims representatives. *See, e.g.*, *In re Johns-Manville Corp.*, 600 F.3d 135, 140 (2d Cir. 2010) (describing the appointment of a future claims representative early in that case, in 1984, to represent future asbestos claimants). Critically, potentially co-liable third parties were incentivized to contribute to the settlements because they could be protected by third-party releases. *Id.* at 142. This was a seminal change in the resolution of mass tort crises.

The list of successful mass tort chapter 11 cases involves varying factual contexts: defective airbags in cars,[4] wildfires,[5] sexual abuse,[6] ground water

4. *See In re TK Holdings Inc.*, No. 17-11375 (BLS), 2018 WL 1306271 (Bankr. D. Del. Mar. 13, 2018).

5. *See In re PG & E Corp.*, 617 B.R. 671 (Bankr. N.D. Cal. 2020).

6. *See* Findings of Fact, Conclusions of Law, and Order Confirming the Second Am. Chapter 11 Plan of Reorganization of Catholic Diocese of Wilmington, Inc., *In re Catholic Diocese of Wilmington, Inc.*, No. 09-13560 (CSS) (Bankr. D. Del. July 28, 2011), ECF No. 1471; Findings of Fact, Conclusions of Law, and Order Confirming the Modified Third Am. Joint Chapter 11 Plan of Reorganization Proposed by USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors,

contamination,[7] and opioids[8] to name a few. The plans in each rely upon nonconsensual third-party releases. Numerous new mass tort cases are currently in progress involving previously unforseen and disputed causes. These historical and current dynamics lead to the Commission's recommendation.

SUMMARY OF ARGUMENT

Pursuant to the plain meaning of relevant provisions of the Bankruptcy Code, and Supreme Court and circuit court case law interpreting them, bankruptcy courts have statutory authority to approve and enforce nonconsensual third-party releases contained in chapter 11 plans.

That authority resides in sections 1123 and 105 of the Bankruptcy Code, as held by the majority of the circuit courts. This Court's decision in *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), provides an unequivocal roadmap for the construction of Bankruptcy Code sections 1123(b)(6) and 105(a) working in tandem. An appropriate plan provision, such as one providing

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In re USA Gymnastics, No. 18-09108 (RLM) (Bankr. S.D. Ind.), ECF No. 1764.

7. Findings of Fact, Conclusions of Law and Order Confirming the Fourth Am. Chapter 11 Plan of Reorganization for Met-Coil Systems Corp., *In re Met-Coil Sys. Corp.*, No. 03-12676 (MFW) (Bankr. D. Del. Aug. 16, 2004), ECF No. 1216.

8. *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); Findings of Fact, Conclusions of Law, and Order Confirming the Second Am. Joint 11 Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors, *In re Insys Therapeutics, Inc.*, No. 19-11292 (KG) (Bankr. D. Del. Jan. 16, 2020), ECF No. 1115.

for properly narrowed nonconsensual third-party releases, may be approved by the court confirming the plan in the absence of a clear and specific prohibition in the Bankruptcy Code (or coequal federal law) barring inclusion and enforcement of the plan provision. There is no clear and specific bar on nonconsensual third-party releases in the Bankruptcy Code. The majority of the circuit courts have rejected section 524(e) as a prohibition on releases in plans, given the plain meaning and limited scope of that provision.

Bankruptcy courts exercise this authority with great care and only in appropriate circumstances, and subject to strict guidelines. While articulation of their approaches varies, courts in almost all of the circuits employ a stringent, multi-factor balancing test, understanding that a tool like the nonconsensual third-party release should not be employed lightly. *See, e.g.*, *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) ("Our precedents regarding nonconsensual third-party releases and injunctions in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest that courts considering such releases do so with caution.").

This Court's construction of section 1123(b)(6) is consistent with Congressional intent to provide bankruptcy courts with considerable authority and discretion in reorganization cases. Numerous Bankruptcy Code sections provide similarly broad authority to the courts to determine the appropriateness and fairness of plan provisions, settlements, and other outcomes.

The vast majority of the claimants below consented in some fashion to the narrowed releases in the confirmed plan. Thus, the bankruptcy court properly considered whether the plan releases could be imposed on a tiny minority of holdouts to achieve a beneficial collective result that far exceeded in value what could be achieved outside of chapter 11. The bankruptcy court properly concluded that it had statutory authority to impose the releases on the nonconsenting minority, and that doing so was necessary and appropriate.

In total agreement that the Bankruptcy Code provided authority to approve the third-party releases included in the Purdue plan, and that it was appropriate to exercise that authority after careful consideration of seven factors, the Second Circuit affirmed. This Court should similarly affirm.

ARGUMENT

I. The Majority of Circuit Courts Interpret the Bankruptcy Code as Providing Authority to Approve Nonconsensual Third-Party Releases in Chapter 11 Plans.

Beginning with *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988), the vast majority of circuit courts have endorsed the use of nonconsensual third-party releases in plans under appropriate circumstances. These circuits include at least the First, Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. *See Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983-84 (1st Cir. 1995); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005); *In re Lower Bucks Hosp.*, 571 Fed.

Appx. 139, 144 (3d Cir. 2014); *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying*, Inc., 780 F.3d 1070, 1078-79 (11th Cir. 2015).

Within these circuits, courts employ multi-factor balancing tests to determine whether third-party releases should be approved. *See, e.g.*, *In re Tribune Co.*, 464 B.R. 126, 176-180 (Bankr. D. Del. 2011) (summarizing the Third Circuit's approach and applying a four-factor test); *Dow Corning*, 280 F.3d at 658 (enumerating a seven-factor test, which has been applied by the Fourth and Eleventh Circuits). *But see Airadigm*, 519 F.3d at 657 (permitting third-party releases but eschewing the multi-factor approach and favoring an analysis that "is fact intensive and depends on the nature of the reorganization"). Although the factors applied by these courts vary slightly from circuit to circuit, each approach involves examining whether the nonconsensual release is necessary to the success of the reorganization, whether the non-debtor releasee contributed assets to the reorganization, whether the plan provides a mechanism for the payment of the claims of the class affected by the release, and whether the settlement, including the use of third-party releases, is supported by the majority of the affected claimants.

Similarly, a bankruptcy court within the Eighth Circuit has approved nonconsensual third-party releases using a balancing test that considers: (1) the "identity of interest between the debtor and the third-party non-debtor, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate"; (2) whether "[t]he non-debtor has contributed substantial assets to the reorganization"; (3) whether "[t]he injunction is essential to reorganization"; (4) whether "[a] substantial majority of the creditors agree to such injunction"—specifically, whether "the impacted class or classes have 'overwhelmingly' voted to accept the proposed plan treatment"; and (5) whether "[t]he plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction." *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994). No one factor is dispositive, and the list is neither exclusive, nor conjunctive; in all instances, the inquiry is fact driven. *See, e.g.*, *In re Charles St. African Methodist Episcopal Church of Bos.*, 499 B.R. 66, 100 (Bankr. D. Mass. 2013) (explaining that it would apply the factors from *Master Mortgage* and noting that the factors are a "useful starting point," but they are "neither exclusive or conjunctive requirements") (quoting *In re Washington Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011). The test in *Master Mortgage*, with clarification as to the final factor, was the model for the Commission's recommendation precisely because it is flexible enough to accommodate different factual contexts and stringent enough to ensure that nonconsensual releases will be the exception. Particular emphasis is placed on the last two factors: acceptance by the majority of claimants and ensuring the existence of mechanisms to facilitate adequate payment to affected creditors. *See* Report, *supra* note 2, at 256.

A small minority of circuits have held in particular cases (none mass tort cases) that nonconsensual releases are inappropriate.[9] *See In re Pac. Lumber Co.*, 584 F.3d

9. These holdings are premised on the argument that section 524(e) of the Bankruptcy Code—which simply explains the scope

229, 252-53 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Est. Fund*, 922 F.2d 592, 600 (10th Cir. 1990). The Fifth Circuit, however, stated that third-party releases can be appropriate in mass tort cases. *See, e.g.*, *Pac. Lumber*, 584 F.3d at 252 (explaining that third-party "non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets"); *Feld v. Zale Corp.*, 62 F.3d 746, 760-61 (5th Cir. 1995) (distinguishing its holding from *Drexel Burnham*, 960 F.2d at 293, on the factual basis that the *Drexel Burnham* court approved an injunction of third-party claims because it channeled those claims to allow recovery from separate assets, whereas the "the injunction at issue in this case provided no alternative means . . . to recover from [the third party insurer]"). At least one court within the Tenth Circuit found that the alleged bar on third-party releases attributed to the holding in *Western Real Estate Fund* was not absolute, noting that section 524(e) does not preclude such releases. *See In re Midway Gold US, Inc.*, 575 B.R. 475, 505 (Bankr. D. Col. 2017). And a recent Ninth Circuit decision suggested that release of third-party claims could be imposed in a plan. *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1081-85 (9th Cir. 2020); *see also Purdue Pharma*, 633 B.R. at 101-02 (explaining the recent movement of

of a debtor's discharge—necessarily precludes nonconsensual third-party releases. This interpretation of section 524(e) has been soundly refuted, as the scope of a debtor's *discharge* has nothing to do with authority to allow a *release* of a non-debtor, and the section contains no language supporting a bar on third-party releases. *See, e.g.*, *Dow Corning*, 280 F.3d at 657. The Second Circuit, citing its sister circuits, also rejected section 524(e) as a basis for barring nonconsensual releases. *See In re Purdue Pharma L.P.*, 69 F.4th at 74-75.

the minority circuits away from an absolute ban on third-party releases).

In sum, while a (modest and diminishing) split among the circuits may remain, the clear and long-standing majority support for use of nonconsensual third-party releases is not an accident. The Bankruptcy Code—and Supreme Court precedent interpreting the specific provisions undergirding nonconsensual third-party releases—offer solid statutory authority sufficient to warrant this Court's affirmance of the Second Circuit's decision below.

II. Supreme Court and Circuit Court Cases Recognize and Define a Statutory Basis Authorizing Bankruptcy Court Approval of Third-Party Releases.

The Second Circuit held that the "ultimate authority for the imposition of nonconsensual releases of direct third-party claims against non-debtors is rooted—as it must be—in the Bankruptcy Code, specifically 11 U.S.C. §§ 105(a) and 1123(b)(6)." *In re Purdue Pharma L.P.*, 69 F.4th at 72. Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Section 105(a) provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* § 105(a). Thus, within certain limits not relevant here, under the plain language of §1123(b), plans may incorporate provisions, such as third-party releases, even if nonbankruptcy law would bar them, unless a *specific* provision of the Bankruptcy Code prohibits inclusion of such a provision. The bankruptcy court then, given section 105, has the power to approve and enforce those plan provisions.

This Court—in a decision that standing alone articulates statutory authority for the approval and enforcement of third-party releases[10]—has instructed lower courts precisely how to interpret this particular combination of Bankruptcy Code provisions. *See Energy Res. Co.*, 495 U.S. 545.

In *Energy Resources*, this Court held that sections 105(a) and 1123(b)(6)[11] in combination conferred broad authority upon bankruptcy courts to approve and enforce plan provisions necessary to the implementation of the plan of reorganization. *Id.* at 549. Absent a provision of the Bankruptcy Code or a coequal federal stature *clearly, specifically, and unequivocally barring* the otherwise appropriate plan provision at issue, the bankruptcy court had the statutory authority to approve and enforce the provision. *Id.* at 549-50. In *Energy Resources*, the subject plans contained provisions providing that payments to the IRS would be first applied to the reduction of trust fund taxes (thus eliminating first the possible liability of non-debtor officers as "responsible" persons); outside of

10. *See* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Devs. J. 13 (2006).

11. The Court in *Energy Resources* cites to section 1123(b)(5), but the Bankruptcy Code has since been amended, and the provision to which the Court referred is now codified at section 1123(b)(6).

bankruptcy, pursuant to IRS regulations and decisions, the opposite result would have pertained, and the IRS claims against non-debtor parties would be preserved until all debtor federal taxes had been paid in full. *Id.* at 247-48. The Supreme Court held that the combination of sections 105(a) and 1123(b)(6) provided authority to approve and enforce against the IRS the subject plan provision unless the provision *was specifically barred* by another Bankruptcy Code provision or coequal federal law. *Id.* at 549-50. Scouring the sections of the Bankruptcy Code on tax priority and the provisions of the tax laws on trust fund taxes and responsible person liability, the court found no specific and express bar to the plan provisions at issue. *Id.* at 550 ("It is evident that these restrictions on a bankruptcy court's authority do not preclude the court from issuing orders of the type at issue here, for those restrictions do not address the bankruptcy court's ability to designate whether tax payments are to be applied to trust fund or non-trust-fund tax liabilities."). Accordingly, the Court held, the bankruptcy court had authority to approve and enforce the subject plan provisions, and properly exercised that authority. *Id.* at 550-51. Thus, the bankruptcy court in *Energy Resources* had authority to ensure that the first payments funded to the IRS from whatever the source resulted in the release of potentially responsible third parties before other, non-trust fund tax obligations were funded, despite the IRS's lack of consent.

This Court's holding in *Energy Resources* that section 1123(b)(6) provides broad authority and discretion to the bankruptcy court to approve appropriate plan provisions not expressly prohibited is consistent with Congressional intent. Throughout the Bankruptcy Code, bankruptcy courts are provided with such authority and discretion. Regarding plan confirmation, bankruptcy courts are empowered to confirm plans over the objection of a nonconsenting class of creditors (a so-called "cram down"), provided the court finds that the plan "does not discriminate unfairly, and is fair and equitable" with respect to that class and generally. 11 U.S.C. § 1129(b). In section 524(g), the court may approve a plan enjoining third-party claims in asbestos-related cases, provided the court determines that doing so is fundamentally fair and equitable to such parties. *Id.* § 524(g)(4)(B). In numerous provisions, the bankruptcy court is tasked with determining matters based on considerations of fairness, the equities of the case, the best interests of various constituencies, and like considerations.[12] The Bankruptcy

12. Those provisions include, but are not limited to, the following (with emphasis supplied): 11 U.S.C. §1112(b)(1) ("[T]he court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, *whichever is in the best interests of creditors and the estate*, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is *in the best interests of creditors and the estate*."); § 1114(g)(3) ("The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that . . . *such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably*, and is clearly favored by the balance of the equities . . . ."); § 365(d)(5) ("The trustee shall timely perform all of the obligations of the debtor . . . under an unexpired lease of personal property . . . unless the court, after notice and a hearing and *based on the equities of the case*, orders otherwise with respect to the obligations or timely performance thereof."); § 502(j) ("A reconsidered claim may be allowed or disallowed *according to the equities of the case*."); § 552(b)(1) (providing the court with discretion to invalidate after acquired property clauses in security agreements "*based on the equities of the case*" after notice and a

Code simply does not require that each element of the court's authority or discretion be specifically enumerated. Congress trusted the courts to do what was necessary and appropriate to accomplish the goals of the Code while balancing competing interests. As one bankruptcy court described this task, with reference to a decision of this Court:

> The Bankruptcy Code should be interpreted in light of the policies underlying reorganization. "[R]eorganization, in its fundamental aspects, involves the thankless task of determining who should share the losses incurred by an unsuccessful business and how the value of the estate should be apportioned among creditors and stockholders." Like all areas of the law, chapter 11 reorganization requires a balancing of the economic and social interests of those affected. There are three constituent groups in a reorganization—creditors, owners and those dependent upon the debtor such as

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hearing); § 723(d) ("If the aggregate that the trustee recovers from the estates of general partners under subsection (c) of this section is greater than any deficiency not recovered under subsection (b) of this section, the court, after notice and a hearing, *shall determine an equitable distribution of the surplus* so recovered, and the trustee shall distribute such surplus to the estates of the general partners in such partnership according to such determination."); § 1112(d) ("The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if . . . *such conversion is equitable*."); § 1113(c) ("The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that . . . *the balance of the equities clearly favors rejection* of such agreement.").

> employees, suppliers and customers. Although creditors have a compelling interest as the prime beneficiaries of the bankruptcy estate, all these interests must be considered. The reorganization process is much more than a collective proceeding for the enforcement of rights held by creditors under state law.

In re Bjomes Realty Trust, 134 B.R. 1000, 1011 (Bankr. D. Mass 1991) (internal citations omitted) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203-04 (1983)).

The circuit courts, given this Court's guidance, find statutory authority for plan provisions imposing nonconsensual releases in sections 1123 and 105. In *Dow Corning*, a chapter 11 case precipitated by mass tort litigation, the Sixth Circuit rejected the bankruptcy court's finding that approval and enforcement of third-party releases was entirely grounded in the court's inherent authority as a court of equity, and therefore inhibited by limits on the exercise of that power. 280 F.3d at 657-58. "The district court rejected this argument on the grounds that the releases were authorized by 'sufficient statutory authority under the Bankruptcy Code.' . . . [W]e agree with the district court." *Id.* at 657 (quoting *In re Dow Corning Corp.*, 255 B.R. 445, 480 (E.D. Mich. 2000)). The circuit court held the combination of sections 105(a) and 1123(b)(6) provided specific statutory authority for the inclusion of third-party releases in plans and the court's approval and enforcement of such releases. *Id.* at 658. Moreover, no provision of the Bankruptcy Code or coequal federal law, including, without limitation, section 524(e) of the Bankruptcy Code, barred third-party releases. *Id.* at 657-58.

Similarly, following *Energy Resources*, the Seventh Circuit found authority to approve and enforce third-party releases in the provisions of the Bankruptcy Code. *See Airadigm*, 519 F.3d at 657-58. First, the circuit court rejected the argument that section 524(e) barred the inclusion of third-party releases in plans and the court's approval and enforcement of such releases. *Id.* at 656. Next, the court found the authority to approve and enforce third-party releases resided in the combination of sections 105(a) and 1123(b)(6):

> The second related question dividing the circuits is whether Congress affirmatively gave the bankruptcy court the power to release third parties from a creditor's claims without the creditor's consent, even if § 524(e) does not expressly preclude the releases. A bankruptcy court "appl[ies] the principles and rules of equity jurisprudence," *Pepper v. Litton*, 308 U.S. 295, 304 [] (1939), and its equitable powers are traditionally broad, *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549 (1990). Section 105(a) codifies this understanding of the bankruptcy court's powers by giving it the authority to effect any "necessary or appropriate" order to carry out the provisions of the bankruptcy code. *Id.* at 549; 11 U.S.C. § 105(a). And a bankruptcy court is also able to exercise these broad equitable powers within the plans of reorganization themselves. Section 1123(b)(6) permits a court to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). In light of these provisions, we

> hold that this "residual authority" permits the bankruptcy court to release third parties from liability to participating creditors if the release is "appropriate" and not inconsistent with any provision of the bankruptcy code.

Id. at 657.

The Eleventh Circuit, citing *Airadigm*, joined the majority view and "agree[d] that § 105(a) codifies the established law that a bankruptcy court 'applies the principles and rules of equity jurisprudence.'" *See Seaside Eng'g*, 780 F.3d at 1078 (quoting *Airadigm,* 529 F.3d at 657).

Beyond the circuits discussed above, lower courts often attribute the source of bankruptcy court authority to approve third-party releases to specific sections of the Bankruptcy Code. *See, e.g.*, *In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 584 (D. Del. 2018) (explaining that courts look to sections 1129(a)(1), 1123(b)(6), and 105 as sources of authority to approve third-party releases); *Charles St.*, 499 B.R. at 100 (citing sections 105 and 1123 as "statutory background" leading it to say that it "cannot conclude . . . that no third-party release, however well-tailored and justified, may ever be permitted in a plan of reorganization"); *see also Midway Gold*, 575 B.R. at 502 (explaining that "[c]ourts subscribing to the majority view" cite to sections 105(a) and 1123(b) when approving third-party releases in chapter 11 plans); *In re Kirwan Offs. S.à.r.l.*, 592 B.R. 489, 505, 511 (S.D.N.Y. 2018) (explaining that "the third-party releases contained in a confirmed plan are subject to 11 U.S.C. §§ 1129(a)(1), 1123(b)(5) & (6), 105, and 524(e)" and thus stem from a federal statutory scheme).

Thus, as directed by *Energy Resources*, the search is *not* for a specific provision *allowing* third-party releases; that authority resides in the broad statutory authority provided by section 1123(b)(6), unless a specific statutory provision expressly and unequivocally bans the exercise of that authority. That statute does not exist. No Bankruptcy Code provision bars third-party releases; the majority of circuits have rightly rejected section 524(e) as such a bar.

The Second Circuit decision below was thus grounded in this well-established precedent: "Although our case law has never expressly cited §1123(b)(6) to support the imposition of third-party releases, we now explicitly agree with these Circuits and conclude that §1123(b)(6), with §105(a), permit bankruptcy courts' imposition of third-party releases." *In re Purdue Pharma L.P.,* 69 F.4th at 74.

The Second Circuit expressly rejected the Petitioner's argument that *Energy Resources* only speaks to the ability of bankruptcy courts to modify relationships between the debtor and the debtor's creditors as such. Oddly, the Petitioner's argument is premised on this Court's statement in *Energy Resources* emphasizing the breadth of section 1123(b)(6): "These statutory directives are 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. The Second Circuit properly found this language expansive, not limited: "[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." *In re Purdue Pharma L.P.*, 69 F.4th at 73-74.

Seeking to limit this Court's prior holding and the clear implication of its language in *Energy Resources*, the Petitioner contends that section 1123(b)(6) must speak only to debtor-creditor relationships because sections 1123(b)(1) through 1123(b)(5) are seemingly so constrained. Pet'r's Br. 22-24. However, the actual application of those sections by bankruptcy courts reveals no such limitation. For example, section 1123(b)(5), which allows plan provisions that "modify the rights of holders of secured claims," has provided the basis for a plan-based injunction against enforcement of a non-debtor's guaranty of the debtor's secured debt conditioned upon the debtor's performance under the plan. *In re Seatco, Inc.*, 259 B.R. 279, 283-287 (Bankr. N.D. Tex. 2001).

The Petitioner's argument indeed ignores the facts of *Energy Resources*, where the plan provision directly affected the IRS's preservation of claims against non-debtor "responsible individuals" liable for unpaid trust fund taxes that would be first satisfied under the plan in defiance of the regulations applicable outside of bankruptcy. *See* 495 U.S. at 550-51.

The phrase "debtor-creditor relationship," as used in the Bankruptcy Code, is simply not as limited as the Petitioner contends. Courts find injunctions against third parties to be well within the confines of that phrase, especially when third-party actions affect the administration of or the *res* of the bankruptcy estate. Title 28 U.S.C. § 157(b)(2)(O) provides that "core proceedings" include "other proceedings affecting the . . . adjustment of the debtor-creditor . . . relationship." This language encompassed a proceeding by non-debtor banks to enjoin abusive conduct by a non-debtor in connection with plan voting and confirmation. *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 284 & 303-04 (Bankr. W.D. Pa. 1990). The same language embraced a proceeding to establish "whether a nondebtor's rights, as allegedly established in [a plan of reorganization], prevented his fellow shareholders from suing him derivatively." *In re Birting Fisheries, Inc.*, 300 B.R. 489, 501 (9th Cir. B.A.P. 2003); *see also In re U.S. Brass Corp.*, 301 F.3d 296, 306 n.33 (5th Cir. 2002) (holding that proceedings invoking the bankruptcy court's authority to enter orders necessary for the consummation of a confirmed plan qualify as core proceedings "on the additional basis that it affects the adjustment of the debtor-creditor relationship" (citing 28 U.S.C. § 157(b)(2)(O)). Given that the releases within the Purdue Pharma plan were precisely limited to actions which affected the *res* of the bankruptcy estates and where the debtors' conduct was at least a legally relevant factor in determining liability, the claims released were intertwined with the same creditors' claims against the debtors' estates and would have impacted the distribution to the debtors' creditors' claims. Thus, the plan provision imposing third-party releases unquestionably involved Purdue's relationships with its creditors.

The Petitioner is left to resort to wild speculation, arguing that the majority of circuits' reading of section 1123(b)(6) would give bankruptcy courts "unlimited" authority to approve abusive plan provisions affecting innocent third parties unconnected to the chapter 11 case. Pet'r's Br. 37. But this appeal is not about what Judge Drain and the Second Circuit might have done, but what they did do. The nonconsensual releases were narrowly drawn. The Petitioner's parade of horribles is just that, and the language of the Bankruptcy Code, considerations of jurisdiction, and the multi-factor test mandated by the Second Circuit negate this imagined threat. As one district court noted, "it surely would be improper for a bankruptcy court to confirm a plan releasing third-party, non-debtor claims that were unrelated (or even only tangentially related) to the debtor or the bankruptcy case. A third-party release must be sufficiently related to the issues before the bankruptcy court in order for core jurisdiction to cover an order extinguishing that claim." *In re Kirwan Offs.,* 592 B.R. at 505-06. As the court further elaborated, "[t]his conclusion also follows from the statutory requirement that a third-party release be 'appropriate' to include in a reorganization plan and not violate another provision of the Bankruptcy Code." *Id.* at 506 (quoting 11 U.S.C. § 1123(b)(6)). Throughout the Bankruptcy Code, Congress placed trust in the bankruptcy courts to exercise such authority and discretion responsibly. The Petitioner's attempt to constrain that authority defies, rather than furthers, the intent of Congress.

The narrowed releases in the confirmed plan in *Purdue Pharma* were limited to claims that were related to the debtors, the debtors' estates, and the chapter 11 case. The confirmation of a plan binding holdout parties to such releases is not the exercise of unbridled power, but rather the natural and logical extension of what the Bankruptcy Code expressly provides; plan confirmation binds not only claimants voting to accept but also those voting to reject. 11 U.S.C. §§ 1126, 1141(a). These narrowly structured releases were thus "appropriate" provisions of the plan designed to protect the *res* of the bankruptcy estate and fit squarely within the types of provisions permitted under section 1123(b)(6) and enforceable through section 105(a).

The Purdue Pharma releases were consensual as to the vast majority of affected claimants. *See, e.g.*, *In re Arsenal Intermediate Holdings, LLC*, 23-10097 (CGT), 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023) (analyzing the body of case law on what constitutes a consensual third-party release). Claimants below who voted for the plan or received appropriate notice and failed to vote or object to the plan consented to the imposition of the releases as surely as if they had signed a release agreement; that is the way our system of justice operates.[13]

13. As Judge Goldblatt elaborated:

> In this respect, the word "consensual," when used to describe a third-party release, does not necessarily mean that every creditor who will be bound by the release has affirmatively agreed to it. As a descriptive matter, it may be just as likely that the creditor was careless, inattentive, or mistaken. Rather, the term "consensual" is used in the sense that a confirmation hearing in which no party-in-interest raises an objection is described as a "consensual" hearing. Can one be confident that every affected party has knowingly and voluntarily agreed to each provision in the plan? Of course not. But each affected party received notice and had an opportunity to be heard. No party availed itself of its procedural right to raise an objection. And in the absence of any objection, the Court entered a confirmation order that, in conjunction with § 1141(a) of the Bankruptcy Code, renders the plan binding on all creditors. Perhaps, as a technical matter, it would be more accurate to say that any objections to the third-party release were "forfeited," rather than to say that the releases are "consensual." The basic import, however, is the same.

In re Arsenal Intermediate Holdings, 2023 WL 2655592, at*7.

The analysis, therefore, circles back to Judge Drain's original framing below: Does the Bankruptcy Code authorize a court to confirm a plan embodying a collective settlement accepted by the overwhelming majority of affected parties and incorporating third-party releases, and to impose on the minority of nonconsenting holdout parties such releases? The text, history, and, indeed, the essence of the Bankruptcy Code, and the very nature of chapter 11 as a collective process generating collective outcomes, say it does.

CONCLUSION

For the foregoing reasons, this Court should uphold the Second Circuit's decision affirming the bankruptcy court's order confirming the Purdue Pharma plan. The Petitioner's narrow view of the bankruptcy court's authority is simply contrary to the intent of Congress. Congress trusted the courts to use judiciously the authority the Bankruptcy Code provides, and Judge Drain did just that, as the Second Circuit held. This Court should affirm.

Respectfully submitted,

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