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.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, THE PRODUCT LIABILITY ADVISORY COUNSEL, INC., AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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STATEMENT OF INTEREST[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 three 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. For more than three decades, ATRA has filed amicus briefs in cases, such as this one, that involve important liability and jurisdictional issues.

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. These companies seek to contribute to the improvement and reform of law in the United

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that 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.

States and elsewhere, with emphasis on the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived primarily from its corporate members' experiences spanning a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of its members and seeking fairness and balance in the development and application of the law as it affects product risk management.

The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici and their members have a strong interest in ensuring that bankruptcy courts are capable of effectively resolving mass tort claims through the bankruptcy process. One key component of resolution of mass tort claims is the power to confirm reorganization plans, which may sometimes require nonconsensual third-party releases. Amici and their members believe that such releases, when used appropriately, are an efficient and equitable way to pool resources available to compensate tort claimants. As amici's brief explains, the Bankruptcy Code grants bankruptcy courts broad equitable authority to issue third-party releases when appropriate to ensure the success of a plan of reorganization.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. Bankruptcy courts are creatures of statute, but Congress has given them broad equitable powers to carry out the purposes of the Bankruptcy Code. Those equitable powers are codified most clearly in 11 U.S.C. §§ 105(a) and 1123(b)(6). As explained below, these provisions authorize bankruptcy courts to include nonconsensual releases of non-debtors' claims against other non-debtors ("third-party releases") in bankruptcy reorganization plans in appropriate circumstances.

Section 1123(b)(1)–(5) authorizes bankruptcy courts to include certain specific provisions in a reorganization plan. But Congress also included a catchall provision, which provides that a reorganization "plan may" "include *any* other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6) (emphasis added). Section 105(a), in turn, gives bankruptcy courts authority to "issue *any* order … that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (emphasis added). Read together, these two provisions give bankruptcy courts authority to issue any order necessary or appropriate to effectuate a plan of reorganization, so long as that order is not inconsistent with some other applicable provision of the Code. Third-party releases fit comfortably within that grant of equitable authority.

This conclusion is consistent with decades of jurisprudence interpreting the All Writs Act, which provides that "courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). As this Court has recognized, that statute fills "the interstices of federal judicial power when those gaps threaten[] to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40–41 (1985). Section 105(a) plays the same role, and courts have recognized that Section 105(a) gives bankruptcy courts similar equitable powers to those conferred on all federal courts by the All Writs Act.

Federal courts may exercise the All Writs Act's gap-filling authority when that authority is "consistent with" the governing statutory scheme and federal laws. *United States v. New York Tel. Co.*, 434 U.S. 159, 176 (1977). That authority "extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *Id.* at 174 (citations omitted).

Sections 105(a) and 1123(b)(6), taken together, similarly authorize bankruptcy courts to issue third-party releases. No statute specifically prohibits such orders, and Congress has specifically authorized these types of injunctions in the context of asbestos claims, *see* 11 U.S.C. § 524(g), confirming that third-party releases are not contrary to any other section of the Code.

Of course, the fact that bankruptcy courts have the authority to issue third-party releases does not mean that they should do so routinely. On the contrary, sections 105(a) and 1123(b)(6) should be interpreted harmoniously with the All Writs Act, which requires courts to consider the "burden[]" imposed on third parties. *New York Tel. Co.*, 434 U.S. at 175. Indeed, every court of appeals that has upheld the use of third-party releases has insisted that they be reserved for "unusual cases." *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015). But where a bankruptcy court concludes that third-party releases are necessary to ensure the success of a reorganization, the court may use its congressionally delegated equitable authority to enjoin claims against third parties.

II. Third-party releases are an important tool to help bankruptcy courts resolve mass tort cases involving thousands of claimants. The collective action problem that arises in all bankruptcy cases is especially pronounced in mass tort cases where the rush to the courthouse could deplete the distressed firm's assets given the possibility of enormous jury awards. Bankruptcy offers a superior forum in which to resolve mass tort claims because it gathers the largest possible pool of available assets to pay the largest number of claimants. Creditors often demand third-party releases because hold-out litigation against non-debtors can reduce the pool of assets available to all creditors, and targeted third-party releases can increase the asset pool by encouraging third parties to make significant financial contributions to the bankruptcy estate.

Third-party releases issued in connection with a corporate reorganization can also prevent the race to the courthouse that can arise between the debtor and its claimants when they both seek recovery from officers, shareholders, or other alleged corporate insiders accused of wrongdoing. If a handful of claimants are able to pursue those claims outside of bankruptcy, the assets available to the debtor may be diminished, decreasing its ability to pay claims to all claimants. Allowing those third parties to settle with the bankruptcy estate in exchange for releases furthers the goal of bankruptcy by ensuring the largest pool of assets to make payment on all claims.

Although some claimants might prefer to opt out and try their luck in individual litigation, allowing these holdouts to pursue their claims separately against third-party non-debtors may threaten the recovery of all other claimants. Congress gave bankruptcy courts discretion to determine whether a third-party release is necessary to ensure the success of a reorganization under the particular circumstances at issue.

III. Petitioner contends that the Due Process Clause prohibits courts from permanently extinguishing claims against third parties without the "affirmative consent of the affected claimants." Pet. Br. at 41. But this Court has recognized that bankruptcy is necessarily an "exception" to the general rule that everyone deserves their day in court, because it authorizes the discharge of both current and future claims. Put otherwise, the Bankruptcy Code presumes that creditors can have claims cut off without their consent. Accordingly, third-party releases cannot present an insurmountable due process problem. At all events, due process requires only an opportunity to be heard and to present objections, and bankruptcy courts can issue third-party releases consistent with that requirement.

ARGUMENT

I. The Bankruptcy Code Authorizes Courts to Approve Nonconsensual Third-Party Releases

A. Although bankruptcy involves the relations between a debtor and its creditors, Congress has provided bankruptcy courts with broad subject-matter jurisdiction extending to all civil actions where the "outcome might have any 'conceivable effect' on the bankrupt estate," *Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011) (citation omitted), including "suits between third parties." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). Petitioner does not dispute that, in certain situations, claims against non-debtors may directly affect the bankruptcy estate. Instead, Petitioner contends that nonconsensual third-party releases are always *ultra vires* because the Bankruptcy Code does not "specifically authorize[]" a bankruptcy court to release such claims. Pet. Br. at 21. That broad contention rests on a fundamental misunderstanding of the nature of the equitable power that Congress has conferred on bankruptcy courts.[2]

1. It is axiomatic that "a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of equity jurisprudence." *Pepper v. Litton*, 308 U.S. 295, 304 (1939). In wielding equitable authority, bankruptcy courts follow the tradition of the English courts of

[2] The Court granted certiorari to decide only this question, and the Chamber accordingly takes no position on the appropriateness of the specific releases at issue in this case.

equity, which were first given power to address bankruptcies in 1542. Marcia S. Krieger, *"The Bankruptcy Court Is A Court of Equity": What Does That Mean?*, 50 S.C. L. Rev. 275, 282–84 (1999). England's bankruptcy statutes, while not directly adopted in the United States, influenced American law and prompted the Founders to grant Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. And Congress enacted several short-lived bankruptcy statutes in the nineteenth century conferring equitable jurisdiction on the federal district courts to resolve bankruptcies.[3] For example, the 1841 statute vested district courts with "the full jurisdiction of a court of equity, over the whole subject-matters which may arise in bankruptcy." *Ex parte Foster*, 9 F. Cas. 508, 512 (Cir. Ct. D. Mass. 1842) (Story, J.) (discussing power conferred by the 1841 bankruptcy statute). The district court was authorized "to administer all relief which a court of equity could administer under the like circumstances." *Id.* The district court's jurisdiction under the 1841 statute was even "more wide and liberal" than the jurisdiction that "the lord chancellor, sitting in bankruptcy, was authorized to exercise." *Id.* ("In short, whatever [the lord chancellor] might properly do, sitting in bankruptcy, or sitting in the court of chancery, under his general equity jurisdiction, the courts of the United States are by the act of 1841 competent to do.").

[3] *See* 6 Cong. Ch. 19, 2 Stat. 19 (1800), repealed by 8 Cong. Ch. 6, 2 Stat. 248 (1803); 27 Cong. Ch. 9, 5 Stat. 440 (1841), repealed by 27 Cong. Ch. 82, 5 Stat. 614 (1843); 39 Cong. Ch. 176, 14 Stat. 517 (1867), repealed by 45 Cong. Ch. 160, 20 Stat. 99 (1878).

The Bankruptcy Act of 1898, the first national bankruptcy statute to survive more than a decade, again vested equity jurisdiction in the district courts. Pub. L. 55-541, 30 Stat. 544 (1898). Although the 1898 Act gave companies the option of protecting themselves from creditors, it did not provide for corporate reorganizations. *See* 1 Bankruptcy Law Manual § 1:3 (5th ed.). That option was first provided in the Chandler Act of 1938, which created the bankruptcy courts and gave them "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act." *See* Pub. L. 75-696, § 2, 52 Stat. 840, 842–844 (1938). The Act enumerated certain powers vested in the bankruptcy courts, *see id.* § 2(a)(1)-(21), including to "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act," *id.* § 2(a)(15). The Act further provided that "[n]othing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." *Id.* § 2(b). The Chandler Act also empowered bankruptcy courts to "[c]onfirm or reject arrangements or plans proposed under this Act." *Id.* § 2(a)(9); *see also id.* §§ 101–276. "The corporate reorganization chapters" of the Chandler Act "became the precursors of Chapter 11 of the current Bankruptcy Code," which was enacted in 1978. 1 Bankruptcy Law Manual § 1:4 (5th ed.).

As this brief history confirms, bankruptcy courts are creatures of statute, but "[t]he traditions of both law and equity are woven" into the Bankruptcy Code. Krieger, *"The Bankruptcy Court Is A Court of*

Equity", 50 S.C. L. Rev. at 295. This Court has long recognized that "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). To be sure, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). But "the traditional understanding" is "that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990).

Historically, courts in equity provided an array of remedies, including injunctions, surcharges, constructive trusts, and equitable liens. *See generally* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 541–42 & n.53 (2016) (listing equitable remedies). A surcharge, for example, is an equitable remedy that permits courts "to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *CIGNA Corp. v. Amara*, 563 U.S. 421, 441–42 (2011). And a plaintiff can seek in equity "a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002). Constructive trusts and equitable liens generally did not seek "to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. At bottom, traditional equitable remedies allow "courts to compel action or inaction." Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. at 553.

2. The Bankruptcy Code extends this equitable power to include nonconsensual third-party releases that are necessary or appropriate to ensure the success of a plan of reorganization. This authority arises from the interplay of the two statutes at issue here: 11 U.S.C. §§ 105(a) and 1123(b)(6).

Section 1123(b) provides that a reorganization plan may "impair or leave unimpaired any class of claims, secured or unsecured"; "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate"; "provide for the sale of all or substantially all of the property of the estate"; and "modify the rights of holders of secured claims." 11 U.S.C. § 1123(b)(1), (3)(A), (4), (5). Because each reorganization plan is unique, Congress included a catchall provision that allows bankruptcy courts to deal with unusual situations. Section 1123(b)(6) provides that a reorganization "plan may" "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). This section plainly authorizes courts to include provisions not specifically permitted by the Code. *See Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 634 (2019) (explaining that a "catchall phrase" "captures material that does not fit neatly into the statute's enumerated categories but is nevertheless meant to be covered"). The only limitations are that the adopted provision must be appropriate and cannot conflict with *other* sections of the Bankruptcy Code.

Congress further provided bankruptcy courts with authority to "issue *any* order . . . that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (emphasis added). Read together, these two provisions give bankruptcy courts authority to issue any order necessary or appropriate to effectuate a plan of reorganization, so long as that order is not inconsistent with some other applicable provision of the Code. *See Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))); *see also* 2 *Collier on Bankruptcy* ¶ 105.01[2] (Lawrence P. King ed., 15th ed. 2001) ("The equitable origins of the bankruptcy power suggest substantial leeway to tailor solutions to meet the diverse problems facing bankruptcy courts."). It follows that third-party releases are authorized under the Code in the unusual circumstance where they are appropriate to ensure the success of a plan of reorganization.

B.1. This conclusion is bolstered by decades of jurisprudence granting judges substantial authority to issue orders to third parties under the All Writs Act, which contains a similar grant of equitable authority to all federal judges.

Originally adopted in the Judiciary Act of 1789, the All Writs Act now provides that "courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act serves to fill "the interstices of federal judicial power when those gaps threaten[] to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania*

Bureau of Corr., 474 U.S. at 40–41.

As Congress explained when it reorganized the Bankruptcy Code in the late 1970s, "Section 105 is similar in effect to the All Writs Statute." H.R.Rep. No. 95-595, at 316–17 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6273–74 ("The section is repeated here for sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute."); *see also In re G.S.F. Corp.*, 938 F.2d 1467, 1475 n.6 (1st Cir. 1991) (noting that the All Writs Act "provides Article III courts with statutory authority to issue [certain] injunction[s]" and that "Section 105 of the Bankruptcy Code was apparently intended to extend such authority to the bankruptcy courts") (citing 2 *Collier on Bankruptcy* ¶ 105.01[1] (15th ed. 1991)). Courts have thus recognized that "Section 105 provides bankruptcy courts with powers of equity similar to those granted to federal courts under the All Writs Act, including writs of injunction." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 224 n.36 (3d Cir. 2004); *see also E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir. 1986); *Rohe v. Wells Fargo Bank, N.A.*, 988 F.3d 1256 (11th Cir. 2021); *Cent. W. Va. Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, 245 F. App'x 415, 420 (6th Cir. 2007).

As this Court has explained, the All Writs Act provides federal courts with gap-filling authority in situations where the exercise of that authority is "consistent with" the governing statutory scheme and other relevant laws. *New York Tel. Co.*, 434 U.S. at 176. That authority is "not limited to those situations where it is 'necessary' to issue the writ or order 'in the sense that the court could not otherwise physically discharge its … duties.'" *Id.* at 173 (citation omitted). Rather, the All Writs Act confers "a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999); *see also New York Tel. Co.*, 434 U.S. at 172 ("This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve the rational ends of law.'"" (cleaned up)) (citing *Harris v. Nelson*, 394 U.S. 286, 299 (1969)); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942) ("Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.").

In *New York Telephone*, this Court explained that "[t]he power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." 434 U.S. at 174 (collecting cases). The question in that case was whether the Act authorized courts to order telephone companies to install pen registers in connection with ongoing criminal investigations. This Court held that the All Writs Act granted courts this sweeping authority even though no statute at the time specifically authorized such orders. *Id.* at 177.[4] Rejecting the telephone company's

[4] Congress later provided the authority for such orders in 18

argument that the district court had interpreted the All Writs Act too broadly, this Court explained that although the company was a third party to the underlying criminal investigation, it was not "so far removed from the underlying controversy that its assistance could not be permissibly compelled." *Id.* at 174.

2. The same logic applies here, and this Court should thus reject the Solicitor General's argument in this case that Sections 105(a) and 1123(b)(6) do not authorize orders affecting third parties. First, as several courts of appeals have recognized, third-party releases are, in certain situations, essential for the confirmation of a plan of reorganization. *See infra* Part II. This is because such releases are essential to resolving overlapping claims against the third parties and protecting the estate. Second, no statute specifically prohibits third-party releases. Indeed, in the lone instance where Congress has considered the matter—in the context of asbestos claims—it has authorized them. *See* 11 U.S.C. § 524(g)(4)(A)(ii) ("an injunction may bar any action directed against a third party" in certain enumerated situations, including where the "alleged liability of such third party arises by reason of … (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party"). Section 524(g) permits companies "to set up a trust that will assume its asbestos liabilities" and "authorizes an injunction to channel all asbestos-related claims to such a trust." *In re W.R. Grace & Co.*, 729 F.3d 311, 315 (3d Cir. 2013). The procedure in § 524(g),

U.S.C. § 3123(b)(2).

including the authorized third-party releases, permits the pooling of assets and allows late-filers to nevertheless receive recoveries from their tort claims. *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. 973, 998–99 (2023). This consolidation of assets permits a more equitable distribution of funds to claimants. *See* C. Anne Malik, *Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts*, U.S. Chamber of Commerce Institute for Legal Reform, at 16–17 (2022), https://tinyurl.com/5dfdn3fe. And though Section 524(g) applies only to asbestos-related bankruptcies, Congress made clear that nothing in that section "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." Pub. L. 103-394, § 111(b), 108 Stat. 4106, 4117 (1994).

Of course, as with the All Writs Act, neither sections 105(a) nor 1123(b)(6) of the Bankruptcy Code can be invoked to "to override explicit mandates of other sections of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014) (quoting 2 *Collier on Bankruptcy* ¶ 105.01[2] (16th ed. 2013)). "Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits." *Id.* And section 1123(b)(6) prohibits a plan from including terms "inconsistent with" "applicable provisions" of the Bankruptcy Code. 11 U.S.C. § 1123(b)(6). But no provision of the code expressly (or even impliedly) prohibits third-party releases, as the Trustee's brief itself confirms.

The fact that bankruptcy courts have the authority to issue such releases does not mean that they always should. Nor does it give bankruptcy courts license to disregard the interests of the claimants whose claims are released. Sections 105(a) and 1123(b)(6) should instead be interpreted harmoniously with the All Writs Act, which requires courts to consider any "burden[]" imposed on third parties. *New York Tel. Co.*, 434 U.S. at 175. The Second Circuit adopted this interpretation of the statute in the decision below when it held that one of the factors a bankruptcy court should consider when deciding whether to authorize a third-party release is "whether the plan provides for the fair payment of enjoined claims." *In re Purdue Pharma L.P.*, 69 F.4th 45, 79 (2d Cir. 2023) ("the determinative question is not whether there is full payment, but rather whether the contributed sum permits the fair resolution of the enjoined claims."); *see also In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (requiring the plan to "provide[] a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction").

As these limitations make clear, sections 105(a) and 1123(b)(6) do not give bankruptcy courts a roving commission to extinguish claims against third parties however they see fit. On the contrary, every appellate court that has interpreted the Bankruptcy Code has cautioned that third-party releases should be reserved for "those unusual cases in which such an order is necessary for the success of the reorganization." *Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078. For example, the Second and Sixth Circuits have adopted seven-factor tests to determine whether third-party releases are warranted. *See Purdue Pharma*, 69 F.4th at 78–79; *Dow Corning*, 280 F.3d at 658 (explaining that "enjoining a nonconsenting creditor's claim is only appropriate in 'unusual circumstances'" (citation omitted)). Other circuits have imposed "exacting standards that must be satisfied if such releases and injunctions are to be permitted." *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019); *see also In re A.H. Robins Co.*, 880 F.2d 694, 702 (3d Cir. 1989) (discussing factors supporting third-party releases in that case). And all courts upholding such releases have recognized that "whether a release is 'appropriate' for the reorganization is fact intensive and depends on the nature of the reorganization." *In re Airadigm Comms., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *Seaside Eng'g & Surveying*, 780 F.3d at 1079 ("The inquiry is fact intensive in the extreme").

A careful factual inquiry is therefore required. But where a bankruptcy court finds that such releases are necessary to ensure the success of a reorganization, the court may use its congressionally delegated equitable authority to enjoin claims against third parties.

II. Third-Party Releases Are Important Tools for Addressing Mass Tort Claims Efficiently and Fairly

The power to issue third-party releases can be a crucially important tool for bankruptcy courts working to resolve mass tort claims through reorganization.

A. At its core, bankruptcy law exists to resolve the collective action problem that arises when creditors of an insolvent firm pursue their claims in separate proceedings—the so-called "race to the courthouse" that can drain a firm's assets and leave late claimants with no recovery. Mass tort cases with thousands of potential creditors present an acute version of this collective action problem, as "claimants who file early, or who find themselves before a sympathetic jury, or whose injuries happen to manifest quickly, may receive a large payout" while late claimants get nothing. Casey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. at 977. "[T]he costs of a decentralized, lengthy resolution of mass torts claims over time can be large and value destructive for all stakeholders." *Id.* Indeed, if a small number of early claimants obtain massive awards—perhaps because their juries seek to punish the defendants and are unaware of the number of other potential claimants—a firm's assets may be drained before even a fraction of the potential claimants receive any recovery.[5] Absent an organized process, "luck plays a large role in determining who gets paid." Casey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. at 999. This is precisely why Congress authorized bankruptcy courts to create asbestos trusts in the 1990s following the explosion of mesothelioma litigation in the 1970s and 1980s. *Id.* at 998–99.

1. As bankruptcy scholars have recognized, Chapter 11 is often a "superior forum in which to

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[5] For example, one jury awarded around $4.69 *billion*—which included $4.14 billion in punitive damages—to 22 plaintiffs who sued Johnson & Johnson ("J&J") for injuries related to the company's baby powder, though the award was reduced on appeal to $2.24 billion to 20 plaintiffs. *See Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2716 (2021). Even a small number of such awards could have stripped J&J of its ability to pay later claimants, and J&J was battling 9,000 similar cases at the time of the verdict. *See* Tina Bellon, *Jury orders J&J to pay $4.7 billion in Missouri asbestos cancer case*, Reuters (July 12, 2018), https://tinyurl.com/mr227y4u.

resolve mass tort claims" because it "provides tools for dealing with holdouts and future claimants that are unavailable in conventional class action or multidistrict litigation." *Id.* at 977. Third-party releases are one such tool. Third-party releases benefit claimants by preventing holdout creditors from undermining collective global settlements necessary for the confirmation of a reorganization plan. *Id.* at 1003. Third parties are unlikely to provide funding to the bankruptcy estate if opt-out creditors can still pursue them in separate litigation. *Id.* "Why would they offer to settle if they still face hundreds or thousands of state court claims?" *Id.* And even where third parties might be willing to contribute *some* amount to the bankruptcy estate, they would undoubtedly offer less in a world where they are still subject to suit by the holdouts. *Id.* This would "decrease[] the relative attractiveness of a bankruptcy settlement compared to the alternative litigation system." *Id.* Thus, when used appropriately, third party releases can result in "significant financial contributions" to the bankruptcy estate. *Id.* at 1001. This "benefit[s] tort claimants by enlarging the pie of recoverable funds and reducing the duplicative administrative and legal expenses that arise when tort claimants sue the debtor in bankruptcy and the nondebtors in state and federal courts." *Id.*

By channeling related claims against the bankrupt entity and third parties into a single forum, third-party releases "lower legal fees and administrative costs." *Id.* at 1002; *see also* Malik, *Unlocking the Code* at 30 (The "Bankruptcy Code can be an efficient and equitable way to pool assets and claims into one setting so mass tort liabilities can be appropriately resolved.”). After all, mass tort litigation is notoriously slow and expensive. *See, e.g., In re LTL Management, LLC*, 637 B.R. 396, 412 (Bankr. D. N.J. 2022), *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023) (“The fact remains that since 2014—over seven years ago—only 49 trials have gone to verdict, and many of those remain on appeal or have been remanded to retry.”).

Though the MDL process may be used to handle pre-trial coordination of mass-tort proceedings, MDLs “have limited utility in providing effective, timely, and final global resolution” of such claims, especially in situations involving “latent injuries and an unknown class of potential future claimants.” Malik, *Unlocking the Code* at 9–10, 30 (describing hurdles to efficient resolution of claims through the MDL process). “Even Judge Goodwin, who handled the seven pelvic-mesh MDLs, observed that ‘delay may deny the parties timely justice and is rightly considered by many as a major failure of the MDL paradigm.’” Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835, 1890 (2022) (quoting Joseph R. Goodwin, *Remand: The Final Step in the MDL Process—Sooner Rather than Later*, 89 UMKC L. Rev. 991, 995 (2021)). And even where the MDL process provides some pre-trial efficiencies, mass tort cases can still threaten to swamp the judicial system once the cases are remanded to their respective district courts. *See, e.g., In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-2885-MCR-GRJ, ECF No. 3188, at 2 (N.D. Fla. June 10, 2022) (noting that the unresolved cases “average[] to approximately 2,500 cases being remanded for trial to each of the 94 districts nationwide" and that "the amount of judicial resources required to handle this number of cases is staggering"). Bankruptcy proceedings can resolve these claims quickly and fairly, and in some circumstances these goals can be aided by issuing third-party releases to non-debtors who contribute substantial assets to the bankruptcy estate.

2. Third-party releases can also benefit claimants by avoiding the race to the courthouse that can sometimes arise between the debtor and its creditors. In a corporate setting, both the debtor and its creditors may have claims against the same alleged corporate insiders based on accusations of wrongdoing. Creditors have an incentive to pursue their claims directly—and before the debtor does so—in order to collect as much as possible outside the bankruptcy. Such actions have the dual effect of decreasing the amount of assets a debtor has and upsetting the core bankruptcy purpose of equitably apportioning 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 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. *See In re Cont'l Airlines*, 203 F.3d 203, 212–13 (3d Cir. 2000) ("A central focus of these three reorganizations [with releases] was the global settlement of massive liabilities against the debtors and co-liable parties.”).

To be sure, third-party releases necessarily limit the options of tort claimants who might prefer to opt out and roll the dice in individual litigation. But allowing a few holdouts to threaten third-party non-debtors with enormous jury verdicts “would threaten the recovery of the class claimants” by discouraging those third parties from contributing to the bankruptcy estate at all, much less in the amounts facilitated by a comprehensive settlement with enforceable third-party releases. Casey, *In Defense of Chapter 11 for Mass Torts*, at 1005. And the overarching goal of the bankruptcy process is to maximize recovery for creditors, not to punish wrongdoers. If the misconduct of a third-party tortfeasor is sufficiently egregious, criminal prosecution remains available to satisfy society’s need for personal accountability.

And creditors—who have a concrete interest in ensuring the largest possible recovery—are uniquely situated to ensure that third-party releases are appropriate and fair. *See* Malik, *Unlocking the Code* at 30 (noting that “interested parties” should provide “oversight to ensure that bankruptcy assets are equitably distributed”); *cf.* Casey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. at 995 (“Creditors as a group will receive more compensation if they can agree to leave valuable but financially distressed businesses intact.”). Indeed, many of the circuits that have approved third-party releases have held that such releases are not appropriate unless broadly supported by creditors. *See Dow Corning*, 280 F.3d at 658 (listing one of the factors to determine if a third-party release is appropriate is whether “[t]he impacted class, or classes, has overwhelmingly voted to accept the plan"); *Seaside Eng'g & Surveying*, 780 F.3d at 1079 (same); *Purdue Pharma*, 69 F.4th at 78 (same); *A.H. Robins*, 880 F.2d at 702 (similar). Requiring robust creditor support before approving third-party releases will prevent the sorts of abuses Petitioner hypothesizes.

Moreover, contrary to Petitioner's assertion, Pet. Br. at 21, released third parties plainly do not obtain all benefits of bankruptcy, because only claims related to the underlying corporate reorganization can be released under sections 105(a) and 1123(b)(6). Third parties continue to remain liable for any other debts and liabilities that they may have incurred unrelated to the bankrupt debtor.

For all these reasons, third-party releases, when used appropriately, can further the goals of the Bankruptcy Code by removing roadblocks to reorganizations. *See Kreisler v. Goldberg*, 478 F.3d 209, 215 (4th Cir. 2007) (explaining that section 105(a) permits injunctive relief to prevent "detrimental pressure on the[] reorganization effort"); *see also* Michelle M. Harner, *Final Report of the ABI Commission to Study the Reform of Chapter 11*, American Bankruptcy Institute, at 252 (2014), https://tinyurl.com/3zycxnay (recommending that debtors or plan proponents "should be permitted to seek approval of third-party releases").

B. Recognizing these efficiencies, Congress specifically authorized certain types of third-party releases in the context of asbestos litigation. *See* 11 U.S.C. § 524(g)(4)(A)(ii); *see also* Malik, *Unlocking the Code* at 15 ("The administrative procedures of bankruptcy settlement trust funds are designed to eliminate certain transaction costs, time delays, and other burdens that the tort system can impose on litigants, such as discovery, depositions, expert testimony, motions and briefings, settlement negotiations, and in some instances, trial and appeals."). And it explicitly provided that the third-party releases specifically authorized in section 524(g) should not be interpreted as an indication that bankruptcy courts lack authority to issue *other* types of third-party releases. Pub. L. 103-394, § 111(b), 108 Stat 4106, 4117 (1994).

Because the same policy considerations that support third-party releases in the context of asbestos litigation support the use of third-party releases in other types of mass-tort litigation, this Court should interpret sections 105(a) and 1123(b)(6) consistent with their broad language and affirm the authority of bankruptcy courts to issue such releases in appropriate circumstances.

III. Bankruptcy Courts Can Confirm Plans Containing Nonconsensual Third-Party Releases Consistent with Due Process Requirements

Petitioner suggests that the Due Process Clause prohibits courts from permanently extinguishing claims against third parties without the "affirmative consent of the affected claimants." Pet. Br. at 41. But while it is axiomatic that "everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (citation omitted), this Court has recognized that bankruptcy proceedings can be an "exception" to the general principle and "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (citing *Martin*, 490 U.S. at 762). Specifically, "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Martin*, 490 U.S. at 762 n.2 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529–30, n.10 (1984)); *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988)); *see also Taylor v. Sturgell*, 553 U.S. 880, 895 (2008); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 799 (1996) (same). Indeed, holding that the Due Process Clause requires claimants to *consent* to the release of their claims would "call into question *all* releases through bankruptcy, including bankruptcy discharges." *Purdue Pharma*, 69 F.4th at 83 (emphasis added). That result would be incompatible with a core function of the Bankruptcy Code, and of historic bankruptcy law more generally.

Extinguishing claims against third parties is "otherwise consistent" with due process so long as the claimants are given notice and an opportunity to be heard. The "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). The relevant due process inquiry is thus whether claimants whose claims are extinguished received adequate notice or a meaningful opportunity to be heard. *See Spinelli v. City of New York*, 579 F.3d 160, 168 (2d Cir. 2009). A proposed plan that provides sufficient notice to those creditors whose claims will be released, and a confirmation proceeding that provides an opportunity for such creditors or their representatives to object, can meet this constitutionally required "minimum." *Mullane*, 339 U.S. at 313.

Consistent with this historical framework, several circuits have held that the confirmation of third-party releases can be consistent with due process. For example, the Eleventh Circuit concluded that due process was satisfied where the creditors received "actual notice" of "third-party releases in [a] bankruptcy plan." *In re Le Centre on Fourth, LLC*, 17 F.4th 1326, 1334, 1336 (11th Cir. 2021). This was true "even where [the] debtor violate[d] procedural requirements for supplying notice prescribed by the Bankruptcy Rules." *Id.* at 1336 (citing *United Student Air Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010)). The Second Circuit similarly 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." *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2nd Cir. 1988). The court held that 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.*

In short, interpreting sections 105(a) and 1123(b)(6) to authorize nonconsensual third-party releases does not raise any "substantial *questions* about constitutionality," Pet. Br. at 43, and the constitutional avoidance doctrine is thus not implicated.

CONCLUSION

The Court should answer the question presented in the affirmative and hold that the Bankruptcy Code authorizes bankruptcy courts to issue nonconsensual third-party releases when such releases are narrowly tailored to ensure the success of a plan of reorganization.

Respectfully submitted,

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