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 OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amici curiae, whose names and affiliations are set forth in the attached Addendum, are law professors who teach, write, and research in the areas of bankruptcy law, commercial law, civil procedure, and business law. Their scholarship focuses on the text, structure, legislative history, and policy objectives of the U.S. Bankruptcy Code and the economic implications of the bankruptcy system. Accordingly, amici have a strong interest in the correct interpretation of the Bankruptcy Code and the effective implementation of its public policies.

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

Amici submit this brief to provide their perspective on the textual and historical support for the use of nonconsensual third-party releases in appropriate circumstances under the Bankruptcy Code and their views regarding the importance of third-party releases in bankruptcy cases. Consistent with the centralizing purpose of the bankruptcy process, amici curiae urge this Court to preserve the availability of nonconsensual third-party releases as an important tool in appropriate chapter 11 reorganizations—one which can provide bankruptcy estates with substantial value and augment the pool of distributable value for all creditors.

SUMMARY OF THE ARGUMENT

Nonconsensual third-party releases have played a part in bankruptcy proceedings since at least the year 1619. See *Tiffin* v. *Hart* (1618-19), *in* John Ritchie, *Reports of Cases Decided by Francis Bacon* 161 (London 1932). Today—as then—these releases are essential bankruptcy tools available to courts and debtors seeking global resolution of complex cases. And, contrary to Petitioner's claims, these foundational tools are directly authorized under the plain text of chapter 11 of the Bankruptcy Code.

And for good reason: Over the last three decades, nonconsensual third-party releases have provided the means for successful resolution of several mass tort and other complex bankruptcies. In cases where these releases were appropriate, they have unlocked value from third parties to maximize recoveries and provide a fair, ratable distribution to victims and other claimants. Reversing course now and imposing a blanket prohibition on this long accepted and statutorily authorized tool would have devastating effects for mass tort

restructurings and the collective victims of mass torts, as well as for other complex restructuring cases. Claimants and debtors would be forced to undergo expensive, piecemeal litigation outside of the bankruptcy arena that would take years to resolve. Assets would be depleted, and victims would be in competition with one another for recoveries, resulting in inconsistent compensation.

The structure of chapter 11, with its deliberate flexibility and extensive safeguards, is designed to avoid such value destruction and inequitable recovery by solving the collective action problems and facilitating global resolution in a single forum. Thus, nonconsensual third-party releases are not the product of judicial overreach, as Petitioner suggests; rather, they are an important part of the chapter 11 structure that is supported by statute, legislative history, and a long historical practice. They are also supported by *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990) where this Court construed Section 1123(b)(6) as requiring appropriate plan provisions to be "necessary to the success of a reorganization." To be sure, nonconsensual third-party releases require rigorous judicial oversight. But to strip them from the bankruptcy system will greatly reduce the usefulness of bankruptcy for some of the most challenging situations which may not be solvable, or solvable on equivalent terms and with equivalent speed, elsewhere in the court system.

Accordingly, this Court should affirm the continued availability of nonconsensual releases as permissible chapter 11 plan provisions, in accordance with Bankruptcy Code Section 1123(b)(6), when such releases are fair, equitable, and necessary for the overall restructuring.

ARGUMENT

I. The Bankruptcy Code's Text And History Support The Use Of Third-Party Releases Under Appropriate Circumstances

A. Sections 1123(b)(6) and 1129 of the Bankruptcy Code Authorize the Use of Nonconsensual Third-Party Releases

Petitioner's argument that nonconsensual third-party releases are prohibited reflects a view of the bankruptcy court's powers that is in conflict with the plain text of the Bankruptcy Code found in Sections 1123(b)(6) and 1129. Petitioner recognizes the breadth of Section 1123(b)(6) regarding the contents of a chapter 11 plan, but nonetheless reads into that section limiting language that simply isn't there. As a policy matter, Petitioner would prefer if Congress had prohibited the approval of any plan provision not directly adjusting the claims and relationship between a debtor and its creditors and so urges this Court to ignore Section 1123(b)(6)'s language to the contrary. See Pet. Br. 23-24. Such a reading defies the statute's plain terms, the Bankruptcy Code's overall structure, and the nature of reorganization proceedings.

As a starting point, the contents of a chapter 11 plan are governed by Bankruptcy Code Section 1123. Section 1123(a) lists the fundamental provisions that must be included in all chapter 11 plans, such as provisions designating classes of claims, specifying the treatment of each claim, and providing adequate means to implement the plan. See 11 U.S.C. 1123(a). Section 1123(b), in turn, provides a plan proponent with flexibility to include other provisions in its chapter 11 plan to address the

particular facts and circumstances surrounding the debtor and its case. Congress identified several specific permissible plan provisions, including ones providing for the assumption, rejection, or assignment of contracts and leases, the sale of a debtor's assets, and the settlement, retention, or enforcement of claims a debtor may have against third parties. 11 U.S.C. 1123(b)(1)-(5).

But because each debtor and each chapter 11 case is unique, Congress could not anticipate and list each issue that might need to be addressed in a given chapter 11 plan. Recognizing this fact, Congress enacted Section 1123(b)(6) which allows chapter 11 plans to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. 1123(b)(6). That language provides flexibility to plan proponents to accommodate case-specific provisions and thus "invites creativity in drafting a plan and allows bankruptcy professionals to tailor a plan to the specific needs of the case so long as the plan terms are not inconsistent with specific provisions elsewhere in the Bankruptcy Code." *In re Astria Health*, 623 B.R. 793, 797-798 (Bankr. E.D. Wash. 2021).

Petitioner seeks to avoid the plain meaning of Section 1123(b)(6) by arguing that the language would create unlimited equitable authority. See Pet. Br. 37. But this argument takes Section 1123(b)(6) out of context and ignores the limitations that Section 1129 places on the confirmation of a plan. Section 1129 sets out an extensive list of requirements that must be met before a plan can be confirmed. This list, which is discussed in more detail below, includes specific as well as broad requirements. For example, to be confirmed a plan must meet specific voting thresholds, 11 U.S.C. 1129(a)(8).

And it also must be proposed in "good faith," 11 U.S.C. 1129(a)(3); be "fair and equitable," 11 U.S.C. 1129(b) and must not "discriminate unfairly," *ibid.*[2]

Taken as a whole, chapter 11 thus creates a deliberate system that grants the plan proponent broad authority to include appropriate plan provisions—including third-party releases—that are necessary to a successful reorganization but at the same time vests the court with the power and responsibility to make sure those provisions comply with all the requirements of Section 1129, including the broad requirements that they are proposed in good faith, are fair and equitable, and do not discriminate unfairly.

This authority of the courts to approve a wide range of appropriate plan provisions is consistent with historical practice and Congressional intent to give bankruptcy courts control over the contents of reorganization plans.

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[2] In their amicus brief, Professors Brubaker, Markell, and Seymour argue that judicial interpretation of broad statutory language constitutes an "unconstitutional exercise of substantive federal common lawmaking proscribed by Erie." Bankruptcy Law Professors et al. Amici Br. 8. Even assuming that the *Erie* doctrine applies to bankruptcy cases—which it does not—this argument confuses statutory interpretation with the making of federal common law. Federal courts interpret broad statutes all the time. Indeed, if one were to take this argument seriously, it would undermine decades of precedent regarding the meaning of other broad phrases in the Bankruptcy Code such as "fair and equitable," "good faith," and "for cause." For example, it would draw into question the bankruptcy court's power to dismiss cases "for cause" if not filed in good faith or to reject a plan that was not "fair and equitable." See, *e.g.*, *In re Castleton Plaza*, 707 F. 3d 821 (2013) (rejecting a plan of reorganization for providing new value to a spouse of an equity investor under Section 1129(b)'s fair and equitable requirement despite a specific statutory reference to spouses).

See *American United Mutual Life Ins. Co.* v. *City of Avon Park*, 311 U.S. 138, 145-146 (1940) (Douglas, J.) (describing the "control which the [bankruptcy] court has over the whole process of formulation and approval of plans of composition or reorganization, and the obtaining of assents thereto" and highlighting "the range and type of the power which a court of bankruptcy may exercise in these proceedings"); 138 Cong. Rec. S15,063 (daily ed. June 17, 1992) (statement of Sen. Sanford) (noting that Congress wanted to ensure that bankruptcy courts continue to "have the widest degree of latitude in crafting responsible reorganizations that fit the specific needs of each case").

The authority under Section 1123(b)(6) is therefore not limited to a narrow set of provisions directly addressing claims between the debtor and its creditors—it is limited instead by what is prohibited by other Bankruptcy Code provisions, and specifically by the requirements of Section 1129. This Court's decision in *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990) supports this conclusion. The Court there recognized that bankruptcy courts have broad "residual authority" under Sections 105(a) and 1123(b)(6) to approve plan provisions even if they limit a creditor's ability to pursue actions against or recoveries from non-debtor third parties. *Id.* at 549. In *Energy Resources*, the bankruptcy court confirmed a corporate debtor's chapter 11 plan that required the Internal Revenue Service (IRS) to apply certain tax payments towards trust fund taxes instead of non-trust fund taxes. *Id.* at 547. Such a provision, the IRS argued, violated its right to designate payments in its discretion and improperly defeated the IRS's right to pursue recovery on the trust fund taxes from non-debtor third parties (*i.e.*, officers and

employees of the debtor). *Id.* at 550-551. This Court rejected the IRS's argument, reasoning that the plan provision was within the bankruptcy court's broad authority under Section 1123(b)(6) because the provision was "necessary for [the] reorganization's success" and was not inconsistent with any Bankruptcy Code provision. *Id.* at 551.

Consistent with that analysis, the court of appeals below correctly observed that under Section 1123(b)(6), an appropriate provision "is limited only by what the Code expressly forbids, not what the Code explicitly allows." J.A. 878. As was the case in *Energy Resources* and as set forth below, plan provisions limiting or enjoining a creditor's ability to recover from third parties do not contravene other Bankruptcy Code sections. And because Congress did not otherwise limit the scope of Section 1123(b)(6) as Petitioner suggests, this Court should not read any such limitation into the statute. Congress's use of broad statutory language "reflects an intentional effort to confer flexibility" for courts. *Massachusetts* v. *Envtl. Prot. Agency*, 549 U.S. 497, 532 (2007). "When Congress want[s] to restrict the application of a particular provision of [Bankruptcy] Code," it does so in the plain text of the provision. *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 n.5 (1989).

B. Third-Party Releases Are Consistent with Historical Bankruptcy Practice and the Bankruptcy Code's Core Function in Centralizing Disputes of Creditors Against Third Parties that Impact the Bankruptcy Estate

1. Historical Practice Supports the Use of Third-Party Releases

One amicus has argued that releases would have been "incomprehensible to the framers" and "were entirely unknown in American bankruptcy" prior to 1986. Adam J. Levitin Amicus Br. 4-5. This is a puzzling claim that misses the mark by at least 367 years.[3]

Third-party releases have been known and comprehended in bankruptcy law as means to achieve global resolution since at least 1619, when the Lord Chancellor used his injunctive powers to release third-party sureties from the non-debtor claims in exchange for compelled contributions to a bankruptcy composition. See *Tiffin* v. *Hart* (1618-19), *in* John Ritchie, *Reports of Cases Decided by Francis Bacon* 161 (London 1932). Similar to the releases at issue in the present, the injunction in *Tiffin* was directed at dissenting creditors to facilitate a resolution that had been approved by the majority. *Ibid.*; see also *Finch* v. *Hicks* (1620), *in* Ritchie, Reports, at 166-167 (enjoining creditors from pursuing actions at common law against non-debtor sureties of an insolvent individual); see also *Roosevelt* v. *Mark*, 6

[3] Other amici argue, "Indeed, from the very inception of the device, authority therefor was 'manufactured out of whole cloth * * *.'" Bankruptcy Law Professors et al. Amici Br. 3. This statement is similarly puzzling in light of the historical record.

Johns. Ch. 266, 285 (N.Y. Ch. 1822) (English decisions are applicable in construing U.S. bankruptcy law because the Bankruptcy Act of 1800 "consolidated the provisions of the English statutes of bankruptcy.").

More recent cases also demonstrate that, when the current Bankruptcy Code was enacted, third-party releases and injunctions were contemplated as a means of addressing the collective action problems that arise when debtors are in financial distress and facilitating a global settlement. In *In re Equity Funding Corp. of America*, for example, the court enjoined the prosecution of claims against non-debtor subsidiaries because "the pendency of the described claims [against the non-debtors] in the MDL proceedings will frustrate the ability of this court to reorganize [the debtor] or will make it impossible for this court to proceed with the plan of reorganization." 396 F. Supp. 1266, 1274 (C.D. Cal. 1975); see also *In re Portland Electric Power Co.*, 97 F. Supp. 877, 880 (D. Or. 1943) (restraining a state public utilities commissioner from taking action against a public utility company that was a non-debtor subsidiary of the debtor).

2. *Third-Party Releases Are Consistent with the Core Objectives of Bankruptcy*

More broadly, bankruptcy law has a regular core function of centralizing claims that creditors have against third parties. This is most apparent in the treatment of fraudulent transfer claims. Fraudulent transfer claims against third-party transferees of debtor assets are, in the first instance, creatures of state law that individual creditors can pursue and resolve individually. See, *e.g.*, N.Y. Debt. & Cred. Law 273. But once a bankruptcy case is filed by the debtor, the Bankruptcy Code

precludes such piecemeal litigation and centralizes the disputes within the bankruptcy to maximize value for *all* estate creditors. Upon the initiation of a bankruptcy case, the bankruptcy trustee (here, the debtors in possession, 11 U.S.C. 1107(a)) is provided the statutory right to step into the shoes of those individual creditors and bring fraudulent transfer claims on their behalf against third-party transferees pursuant to the "strong-arm" powers of Section 544(b) of the Bankruptcy Code. The automatic stay of Section 362(a)(3), in turn, *enjoins* individual creditors from commencing or continuing such fraudulent transfer claims against third-party transferees. And the bankruptcy trustee (here, the debtor in possession) is provided the right to settle such claims for the benefit of the estate and *all* of its creditors, subject only to court approval of the settlement terms. See Fed. R. Bankr. P. 9019 and 11 U.S.C. 1123(b)(3).

As all parties agree, the Bankruptcy Code thus requires the rights and interests of individual creditors to yield to the centralizing function of bankruptcy law to maximize value for all creditors. See Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725, 731 (1984) ("At bottom, bankruptcy overrides non-bankruptcy rights because those rights interfere with the group advantages associated with creditors acting in concert."). That is true not only with respect to fraudulent transfer claims, but as applicable here, where purported "direct claims" of creditors would compete with the bankruptcy trustee's fraudulent transfer (or other derivative) claims. See, *e.g.*, *Marshall* v. *Picard* (*In re Bernard L. Madoff Inv. Secs. LLC*), 740 F.3d 81, 96 (2d Cir. 2014) (holding individual creditors could not bring their own actions under different claim theories against the same defendants the bankruptcy trustee already

sued where such claims "echo those made by the Trustee" in his fraudulent transfer action); see also *Glenny* v. *Langdon*, 98 U.S. 20, 28 (1878) (individual creditor fraudulent conveyance remedies are "absorbed in the great and comprehensive remedy" provided by bankruptcy).

Once again, history supports this practice as the centralization of fraudulent transfer claims dates at least as far back as the 1700s. See, *e.g.*, *Martin* v. *Pewtress*, 4 Burr. 2477 (1769) (noting the commissioner's ability to pursue avoidance action).

The rationale behind this centralization is to coordinate the prosecution of overlapping claims to avoid destructive competition among the creditors and the estate pursuing similar claims. As Professor Thomas Jackson explained, "[b]ankruptcy avoiding powers ought to facilitate the substitution of a collective proceeding for individual remedies when it is collectively optimal to do so." Jackson, 36 Stan. L. Rev. at 744. Professor Jackson went on to note, "[i]n the collective proceeding, the trustee may, in the name of order and economy, act as agent for creditors in asserting their various rights, many of which may overlap." *Ibid.*

The rationale behind the centralization of fraudulent transfer claims is of particular relevance in the instant case because the released claims are of the type that bankruptcy courts regularly centralize. For instance, Petitioner points to the billions of dollars that the beneficiaries of the third-party releases "siphoned from Purdue in the years before these Chapter 11 proceedings." Pet. Br. 45. Petitioner argues that releases of claims related to these payments "deprive tort victims of their day in court without consent." *Ibid.* But while Petitioner acknowledges that creditors' remedies for the

siphoning of assets from an insolvent company are found under fraudulent transfer law, *id.* at 26, he ignores the history and structure of bankruptcy law and its centralizing function to resolve these types of fraudulent transfer claims, which regularly limit a party's "day in court."

A court's refusal to permit individual creditors to compete with litigation (or settlement) by a bankruptcy trustee is thus consistent with the centralizing function of the Bankruptcy Code. It is hard to imagine that third-party transferees would make payments to the estate to settle fraudulent conveyance claims if those third parties remained exposed to claims by the debtor's creditors based largely on the same alleged conduct. Far from being "inconsistent with" chapter 11, third-party releases and injunctions with respect to individual litigation by creditors that "echo" the bankruptcy estate's settlement of fraudulent transfer claims are consistent with the Bankruptcy Code's structure to centralize litigation for the "great and comprehensive remedy" that only bankruptcy can provide.

C. Third-Party Releases Are Not Inconsistent with Any Bankruptcy Code Provisions

1. Petitioner's reading of Bankruptcy Code Section 524(g) contravenes the statute's history and express statutory language on the scope of the provision. In 1994, with courts facing a wave of asbestos-related mass tort cases, Congress enacted Section 524(g) to provide clarity on the use of third-party injunctions and releases in the asbestos context and to address unique issues relating to future asbestos claimants given the lengthy latency periods that can exist following asbestos exposure. H.R. Rep. No. 835, 103rd Cong., 2d Sess. 40 (1994) (discussing the asbestos trust and injunction mechanisms

used in then-recent cases and recognizing that "other asbestos manufacturers are reportedly considering the same approach"); *ibid.* (Section 524(g) intended to deal "with future personal injury claims against the debtor based on exposure to asbestos-containing products").

But more to the point, when Congress enacted Section 524(g), it included an express "Rule of Construction" directing that the provision should not be read to abridge the existing authority of courts to grant third-party injunctions under chapter 11 plans:

> RULE OF CONSTRUCTION.—Nothing in subsection (a) or in the amendments made by subsection (a), 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.

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106 (Oct. 22, 1994).

At the time Section 524(g) and the accompanying savings clause were enacted, third-party releases and non-debtor injunctions had recently been utilized by courts in high-profile bankruptcies outside of the asbestos context. Two years earlier, in *SEC* v. *Drexel Burnham Lambert Group (In re Drexel Burnham Lambert Group)*, the Second Circuit had approved nonconsensual third-party releases in a restructuring involving widespread securities litigation and held that "[i]n bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important role in the debtor's reorganization." 960 F.2d 285, 293 (1992). Similarly, in *In re A. H. Robins Co.*, the Fourth

Circuit had recently upheld non-debtor releases of personal injury claims in connection with the restructuring of a pharmaceutical enterprise facing mass tort product liability stemming from the malfunction of an intrauterine contraceptive device. 880 F.2d 694, 700-702 (1989).

As Congress made clear, its enactment of Section 524(g) did not, and was never intended to, curtail or foreclose the continued use of injunctions and third-party releases in non-asbestos cases. Instead, the savings clause "was intended by Congress to avoid any conjecture that, absent cases involving asbestos, bankruptcy courts lacked the power to issue permanent injunctions." *In re Richard Potasky Jeweler, Inc.*, 222 B.R. 816, 827 n.19 (S.D. Ohio 1998); 140 Cong. Rec. H10,766 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) (the rule of construction "make[s] clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan [of] reorganization").

Because Section 524(g) is at best silent on the use of third-party releases in non-asbestos cases and because Congress expressly left the door open for the ongoing use of third-party releases through the saving clause, Section 524(g) cannot and should not be interpreted as a bar to nonconsensual third-party releases in non-asbestos cases.

2. Petitioner also reads too much into Bankruptcy Code Section 524(e), which provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. 524(e). Section 524(e) does not prohibit or even address third-party releases; instead, it

only provides that the discharge of a debtor, which occurs by operation of law under Bankruptcy Code Sections 524(a) and 1141(d), does not by itself extinguish the liability of co-debtors and guarantors for the exact same debt. S. Rep. 989, 95th Cong., 2d Sess. 80-81 (1978) (Section 524(e) "provides the discharge of the debtor does not affect co-debtors or guarantors."); see also Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 972 (1997) ("Nothing in section 524(e) can be read to affirmatively prohibit a bankruptcy court from using its equitable injunctive powers in furtherance of a successful reorganization by the debtor.").

Discharge is a creature of statute, and Section 524(e) speaks only to the statutory effects of a grant of a discharge to a debtor. See *Class Five Nev. Claimants* v. *Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657 (6th Cir. 2002) (Section 524(e) "explains the effect of a debtor's discharge. It does not prohibit the release of a non-debtor."). When a plan of reorganization contains no express third-party release, Section 524(e) ensures that a discharge in favor of a debtor will not, by itself, impair a non-debtor's liabilities on the same debt. But that is the limit of the statute's impact. It cannot be read to inhibit the powers of bankruptcy courts to approve separate plan provisions containing injunctions and releases in appropriate cases.

II. THE BANKRUPTCY CODE'S FRAMEWORK SAFEGUARDS AGAINST THE MISUSE OF THIRD-PARTY RELEASES

Amici agree that nonconsensual third-party releases should be used only when appropriate under the circumstances of the case. But Petitioner's concerns over potential misuse of third-party releases ignore the safeguards inherent in bankruptcy law and which have been and continue to be applied by courts.

Plan proponents are permitted to include nonconsensual third-party releases in chapter 11 plans under Section 1123(b)(6), but, as noted above, such releases remain subject to the confirmation requirements of Section 1129. Bankruptcy law provides the necessary tools for global resolution of mass tort cases when those resolutions are fair, broadly supported, and subjected to the requirements for plan confirmation and the safeguards of Section 1129. Among other things, these safeguards include statutory requirements that the chapter 11 plan in which the release is contained:

- comply with all applicable Bankruptcy Code provisions (11 U.S.C. 1129(a)(1));
- be proposed in good faith (11 U.S.C. 1129(a)(3));
- satisfy the "best interest of creditors" test (11 U.S.C. 1129(a)(7));
- satisfy the required voting thresholds for all impaired classes of claims (11 U.S.C. 1129(a)(8));

- be feasible and not likely to be followed by the liquidation or further financial reorganization of the debtor (11 U.S.C. 1129(a)(11)); and
- be fair and equitable, comply with the Bankruptcy Code's required priority of distribution scheme, and not unfairly discriminate against creditors (11 U.S.C. 1129(b)).

While all these requirements are important and constrain the use of third-party releases, the "best interest of creditors" standard is particularly critical. That standard requires courts to determine that creditors will receive at least as much value under the plan as they would in a chapter 7 liquidation, including after taking into account the value of any claims against third parties released under the plan that otherwise would be retained by creditors in chapter 7. 11 U.S.C. 1129(a)(7). A bankruptcy court recently denied confirmation of a chapter 11 plan because the debtors failed to carry their burden of proving that creditors whose claims against third parties were to be released under the plan would recover at least as much value under the plan as they would in a hypothetical chapter 7 case where the third-party claims would be retained. See *In re Ditech Holding Corp.*, 606 B.R. 544, 614 (Bankr. S.D.N.Y. 2019).

Petitioner looks to this Court's decisions in *Czyzewski* v. *Jevic Holding Corp.* and *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank* to support its arguments for limiting the bankruptcy court's authority. Pet. Br. 28-29, 40. But these decisions merely reaffirm the protections afforded creditors through the Section 1129 requirements and reinforce that debtors are precluded from obtaining relief that the Bankruptcy Code expressly forbids. See *Czyzewski* v. *Jevic Holding*

Corp., 580 U.S. 451, 457-458 (2017) (debtor cannot, through a dismissal outside of a chapter 11 plan, evade the express priority of distribution scheme set forth in the Bankruptcy Code and the plan confirmation safeguards under Section 1129);[4] *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (a debtor cannot include a plan provision on credit bidding that is expressly proscribed by Section 1129(b)(2) of the Bankruptcy Code). As set forth above, third-party releases are not expressly forbidden by any Bankruptcy Code provision, and Sections 1123 and 1129 ensure that releases will be subject to all plan confirmation requirements.

In its decision below, the court of appeals identified seven factors for courts to consider with third-party releases: (1) there is an identity of interests between the debtor and released parties such that a suit against the non-debtor is in essence a suit against the debtor or will deplete the debtor's assets; (2) the released claims are factually and legally intertwined with claims against the debtor; (3) the breadth of the release is necessary to the plan; (4) the release is essential to the reorganization; (5) the released non-debtors contributed substantial assets to the reorganization; (6) the affected claimants expressed overwhelming support for the plan; and (7) the plan provides for the fair payment of enjoined claims.

[4] The holding in *Jevic* highlights the importance of the structure of chapter 11 to the analysis. In that case, the Court took issue with the debtor's attempt to circumvent the safeguards of Section 1129. Because third-party releases are deliberately authorized as part of chapter 11, they will always be subject to the safeguards found in Section 1129. Any attempt to impose third-party releases in a dismissal outside of chapter 11 would be prohibited by *Jevic*.

J.A. 887-889. The Sixth Circuit applies a similar seven-factor test. *Class Five Nev. Claimants* v. *Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (2002).

These are hardly relaxed standards as Petitioner suggests. To the contrary, these factors ensure that such releases are utilized in the narrowest of circumstances to prevent any potential "misuse [of] the bankruptcy system" of which Petitioner warns. Pet. Br. 44-45. By focusing on the necessity of the releases, the compensation offered in exchange, the value of the released claims, and the support of the victims, these factors address the whether the releases are fair and equitable, whether they were proposed in good faith, whether they satisfy the necessary voting threshold, and whether they are providing creditors more value than they would receive outside of bankruptcy. In other words, these factors go to the heart of the safeguards contained in Section 1129. See Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev 973, 1001 (2023) ("[W]hen third-party releases induce individuals and corporations to make significant financial contributions, they benefit 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.").

III. Third-Party Releases Have Been Crucial To Maximizing Value And Resolving Mass Tort Reorganizations

A. Third-Party Releases Help Overcome Collective Action Problems for the Benefit of Creditors as a Whole

Third-party releases have been a critical component in the successful resolution of numerous mass tort bankruptcies. When properly tailored, such releases provide a means to enhance value, through both the bankruptcy estate and through monetary contributions from third parties, and use that value to provide equitable distributions to all affected claimants.

Importantly, global resolutions under chapter 11 plans, facilitated by third-party releases, resolve the collective action problems that arise when creditors that are all victims of mass torts separately pursue claims in different forums, against different defendants, and on different timelines, all of which results in value-destruction and inconsistent creditor treatment. See Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev 973, 1002 (2023) ("Third-party releases facilitate global settlement and therefore address collective action problems that accompany financial distress."). Here, as the courts below recognized, the impacted creditors' claims against third parties are not only factually and legally intertwined with the creditors' claims against Purdue (J.A. 888), but the claims also are intertwined with significant potential fraudulent conveyance claims that Purdue possesses against the same third parties being released under the Purdue Plan (J.A. 682). Without the global resolution under the Purdue Plan, Purdue and its creditors would

be engaged in a "disorderly race to the courthouse" that would end in an inefficient, uneven, and piecemeal distribution of assets. See *Zacarias* v. *Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 896 (5th Cir. 2019) (describing collective action problem that is avoided through a federal receivership and injunction with respect to third-party claims); Douglas G. Baird, *A World Without Bankruptcy*, 50 Law & Contemp. Probs. 173, 184 (1987) ("[T]he self-interest of creditors leads to a collective action problem, and a legal mechanism is needed to ensure that the self-interest of individuals does not run counter to the interests of the group."). Simply put, a confirmable chapter 11 plan providing for a fair and orderly distribution of assets and recoveries for claimants would not be possible in certain cases without third-party releases.

The Bankruptcy Code's scheme is designed to limit these potential collective action issues, bring all parties to the negotiation table with a fair opportunity to be heard, and ultimately preserve far more value for distribution to mass tort claimants than would be attainable through piecemeal litigation outside of the bankruptcy forum.

Petitioner points to a recent tentative $6.01 billion settlement reached by 3M Company relating to defective earplugs to support its argument that nonconsensual third-party releases are not necessary in mass tort cases. Pet. Br. 47. But Petitioner fails to point out that 3M has the ability to walk away from the settlement if less than 98% of eligible claimants participate and that the parties hope to achieve that 98% mark through coercive settlement terms. Namely, if any eligible claimant elects to not participate in the settlement, his or her

counsel is required by the agreement to withdraw from representing such claimant. See Brendan Pierson, Reuters, *3M Agrees to Pay $6 Billion in US Military Earplug Lawsuit Settlement* (Aug. 29, 2023); Combat Arms Settlement Agreement, §§ 5.6, 7.1 (Aug. 29, 2023), https://www.uscourts.gov/courts/flnd/3M-MSA_I.pdf. The contrast then is between a bankruptcy procedure that approves third-party releases subject to the safeguards of Section 1129 and a settlement agreement with a walkaway right that coerces releases by requiring lawyers to abandon their clients.

B. Third-Party Releases Have Been Indispensable to Many Complex Mass Tort Restructurings

The mass tort cases that have successfully achieved resolution through the use of third-party releases illustrate the indispensability of such releases and how they have evolved into a necessary and appropriate tool for chapter 11 plans. In *Johns-Manville*, for example, the debtor successfully used the bankruptcy system to resolve asbestos claims of tens of thousands of known and unknown asbestos victims. The Second Circuit found that the use of third-party releases unlocked substantial additional value through a $770 million payment from insurers that was "essential * * * to a workable reorganization" and avoided years of litigation that would have eroded assets and left creditors with substantially uneven recoveries. *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 90-91 (1988).

In *In re A. H. Robins Co.*, the debtor was driven into bankruptcy by mass tort product liability stemming from the malfunction of its Dalkon Shield, an intrauterine contraceptive device, which prompted nearly 200,000

claims against the company. 88 B.R. 742, 743-744 (E.D. Va. 1988), aff'd, 880 F.2d 649 (4th Cir. 1989). The use of third-party releases in that case allowed creditors to be paid in full and avoided "piecemeal litigation" which would have damaged the reorganization efforts and hindered the resolution of all claims. *Id.* at 751.

In *In re Dow Corning Corp* through the use of third-party releases, shareholders and insurers agreed to capitalize a multi-billion dollar trust for the benefit of victims of defective silicone breast implants, which far exceeded any pre-bankruptcy settlement proposals and fairly resolved years of litigation that would have otherwise eroded recoveries. 287 B.R. 396, 415-416 (E.D. Mich. 2002).

Third-party releases are not unique to the bankruptcy system, either, and have served a key role in resolving other complex federal cases. In *In re Masters Mates & Pilots Pension Plan & IRAP Litigation*, the Second Circuit stated that:

> [i]f a nonsettling defendant against whom a judgment had been entered were allowed to seek payment from a defendant who had settled, then settlement would not bring the latter peace of mind. He would remain potentially liable to a non-settling defendant for an amount by which a judgment against a non-settling defendant exceeded a nondefendant's proportionate fault. This potential liability would surely diminish the incentive to settle.

957 F.2d 1020, 1028 (1992); see also Lack Decl., Ex. 3, *Krischner* v. *Fitzsimons (In re Tribune Co. Fraudulent Conveyance Litig.)*, No. 11-md-2296-DLC (S.D.N.Y. Dec. 23, 2021), ECF No. 8272-3 (barring non-settling

defendants from pursuing contribution or non-contractual indemnity claims against settling defendants in the context of fraudulent conveyance claims arising out of a leveraged buyout); *Carroll* v. *LeBoeuf, Lamb, Greene & MacRae, LLP*, No. 05-cv-391(LAK), 2008 WL 2789766, at *3 (S.D.N.Y. July 16, 2008) (district court may properly bar claims by non-settling defendants against settling defendants for contribution and indemnity as long as the bar order ensures fairness).

There is a proven history of success in exceptionally complicated restructurings through the use of nonconsensual third-party releases that has paved the way for the best available outcomes for creditor bodies. Any ruling that broadly eliminates the availability of third-party releases in appropriate circumstances would upend chapter 11 mass tort restructurings and ultimately lead to less favorable, imbalanced recoveries for victims. It would also add to the burden these cases pose on the state and federal court systems that lack bankruptcy powers and a well-calibrated and balanced system of protection for claimants in a collective proceeding. This Court should therefore preserve the availability of nonconsensual third-party releases as a necessary and appropriate tool in exceptional bankruptcy cases.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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