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

BRIEF FOR THE BOY SCOUTS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

The Boy Scouts of America (BSA) is one of the Nation's preeminent organizations for developing the char-

[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae the Boy Scouts of America (BSA) states that no party or counsel for a party, or any other person other than amicus curiae and its counsel, made a monetary contribution to fund the preparation or submission of this brief. BSA's counsel includes Jessica Lauria, Michael Andolina, Matthew Linder, and Laura Baccash of White & Case LLP, who contributed to this brief. Those attorneys represented BSA in its bankruptcy proceedings prior to joining White & Case in 2020. Separately, other counsel at White & Case represents one respondent here, the Ad Hoc Group of Individual Victims of Purdue Pharma, L.P. No White & Case attorney involved in the representation of the Ad Hoc Group had any role in the preparation of this brief. And similarly, no White & Case attorney involved in the representation of BSA as amicus curiae has had any role in representing the Ad Hoc Group.

acter of American youth. BSA is a non-profit corporation founded in 1910 and chartered by Congress since 1916. See 36 U.S.C. § 30901 *et seq.* BSA holds its congressional charter alongside a select few organizations distinguished for their national non-profit service, including the American Gold Star Mothers, the Veterans of Foreign Wars, and Little League Baseball. BSA's mission is to prepare young people for life by instilling in them the virtues of the Scout Oath and Scout Law.[2]

Since BSA's inception 113 years ago, more than 125 million scouts have participated in its programs. In 2019, the year before BSA entered chapter 11 bankruptcy proceedings, nearly three million scouts and volunteer adult leaders were enrolled in Scouting. They dedicated more than 13 million service hours across the country.

BSA today welcomes all young men and women who are willing to accept Scouting's values and meet the other requirements of membership. BSA began welcoming girls in 2018. Today more than 220,000 girls have participated in Scouting and thousands have earned the Eagle Scout rank—the highest achievement attainable in the Scouts BSA program. President Gerald Ford, Justices Tom Clark and Stephen Breyer, and Astronauts Neil Armstrong and Jim Lovell are all distinguished Eagle Scouts. See Alvin Townley, *Legacy of Honor: The Values and Influence of America's Eagle Scouts* 12, 56, 79–80 (2007).

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[2] The Scout Oath is: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight."

The Scout Law is: "A Scout is Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent."

Tragically, however, not every adult volunteer over BSA's century of service conducted themselves appropriately. When BSA commenced its chapter 11 bankruptcy in 2020, it had been named as a defendant in numerous lawsuits related to historical acts of sexual abuse in Scouting. The vast majority of the claims concern alleged abuse that occurred before 1988. In recent decades, BSA has implemented volunteer-screening and youth-protection policies that meet or exceed the highest industry standards. See Boy Scouts of America, *Youth Protection*.[3]

BSA successfully emerged from bankruptcy in April 2023 with a confirmed and effective reorganization plan overwhelmingly supported by its abuse-survivor creditors. BSA's plan resolves "a complex array of overlapping liabilities and insurance rights" and "establish[es] … the largest sexual abuse compensation fund in the history of the United States." *In re Boy Scouts of Am. & Del. BSA, LLC*, 650 B.R. 87, 104 (D. Del. 2023). The BSA plan "channels" the claims of more than 82,000 abuse survivors into a trust vested with $2.46 billion in cash and other property, plus insurance rights worth at least another $4 billion. *Ibid.* Notably, BSA's plan will compensate *in full* all allowed claims of its abuse-survivor creditors. *Id.* at 116–121. More than 85% of voting survivors voted in favor of the plan, the bankruptcy court confirmed it, and a federal district has affirmed confirmation. *Id.* at 110, 192.

BSA's plan reflects a comprehensive sex-abuse settlement among the BSA national organization, Scouting's 250 local councils, and the thousands of partner organizations that have chartered Scouting units over decades (such as churches, schools, and community centers). Under the plan, BSA, local councils, and chartering organi-

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[3] https://scouting.org/training/youth-protection/

zations contributed property and insurance policies worth billions of dollars to the trust for the benefit of abuse survivors. To access those essential contributions from the third parties that share in Scouting's liability, as well as to enable them to continue delivering the Scouting program, the BSA plan includes tailored nonconsensual third-party releases for the non-profit local councils, chartering organizations, and certain other third parties that contributed substantially to the trust. The district court's order affirming confirmation of BSA's plan found that this structure was essential to funding payment in full of all survivors' claims, to achieving equitable compensation among survivors, and to making it possible for BSA to emerge from bankruptcy to continue its charitable mission. *Boy Scouts*, 650 B.R. at 138–143.

BSA has an interest in this Court's decision in this case because BSA's chapter 11 plan, like that of respondent Purdue Pharma L.P., contains nonconsensual third-party releases. This Court should reject petitioner the U.S. Trustee's position that such releases are never permitted by the Bankruptcy Code and affirm the Second Circuit's judgment upholding Purdue Pharma's plan, consistent with Congress's grant of statutory authority to bankruptcy courts to craft successful reorganization plans. BSA's plan illustrates why, in exceptional cases, such releases are consistent with the text and purposes of the Bankruptcy Code. And BSA's case shows why the U.S. Trustee's position is not only legally wrong but would have devastating consequences for both victims and venerable non-profit institutions in mass-tort situations.

BSA also has an interest here because its chapter 11 plan has now been effective for six months, after multiple courts denied motions to stay implementation of that plan by the 140 survivors—0.2% of the 82,000 claimants—who

appealed BSA's confirmation order. A settlement trust has been established to administer and pay allowed abuse claims, and hundreds of claimants have already received payments from the trust. BSA has a critical interest in ensuring that this Court's ruling in this case does not alter vested rights—including survivors' rights—under the effective BSA plan.

SUMMARY OF ARGUMENT

A. The U.S. Trustee is wrong in asserting that the Bankruptcy Code never authorizes nonconsensual third-party releases, no matter the circumstances. BSA supports the Second Circuit's ruling that the releases approved as part of Purdue Pharma's reorganization plan were approved under the circumstances. BSA's case further illustrates why tailored nonconsensual third-party releases are authorized by the Bankruptcy Code in appropriate circumstances, and in some cases necessary to Congress's objectives. This Court has previously interpreted the Code to confer on bankruptcy courts a "'residual authority' to formulate plans that enable successful and value-maximizing reorganizations, including relief not specifically authorized elsewhere in the Bankruptcy Code." *In re Boy Scouts of Am. & Del. BSA, LLC*, 650 B.R. 87, 136 (D. Del. 2023) (quoting *United States* v. *Energy Res. Co.*, 495 U.S. 545, 549 (1990)).

The bankruptcy court in BSA's case, as in Purdue Pharma's case, appropriately exercised that authority. The district court affirmed after reviewing the bankruptcy court's specific factual findings that the nonconsensual third-party releases in BSA's plan were absolutely necessary to BSA's ability to obtain the Bankruptcy Code's promise of a fresh start, and were also fair to BSA's survivor-creditors. *Boy Scouts*, 650 B.R. at 138–143. The courts in *Boy Scouts* explained in detail why,

without those releases in the BSA plan, the organization could never emerge from bankruptcy to continue its charitable mission. And survivors would have no hope of obtaining the full compensation that the plan provides.

It is important to understand the disastrous consequences of the U.S. Trustee's position in this case. If his reading of the Bankruptcy Code had been applied in the BSA bankruptcy, then most survivors of Scouting-related abuse would get nothing, and Scouting as an organization would likely be finished. Fortunately that is not the law.

B. Whatever this Court may hold about nonconsensual third-party releases, it is critical for the Court to make clear that is ruling in this case is not intended to affect other chapter 11 plans that have already become effective like BSA's. Unlike Purdue Pharma's bankruptcy plan that was stayed before becoming effective, BSA's plan became effective in April 2023. Since then, hundreds of plan contributors and tens of thousands of survivor-creditors have substantially relied on it. Hundreds of parcels of real property have been sold and transferred; more than 1,000 insurance policies have been sold back to issuing insurers and insurance rights conveyed to the settlement trust by BSA and thousands of nondebtors; hundreds of abuse survivors have begun receiving payments from the trust; BSA has refinanced $262 million of funded debt; and BSA has paid millions of dollars to nearly one thousand non-abuse creditors.

In light of those circumstances, it would be deeply inequitable and practically impossible for BSA's plan to be unwound now. Nevertheless, simply because this Court accepted review of this case, a small number of objectors in BSA's case are attempting to disrupt distributions of the already effective BSA plan in anticipation of this Court's decision here. That litigation threatens to inject

chaos into the BSA proceeding and prevent payment in full to an aging population of abuse survivors that has already waited decades for compensation and closure. It would also jeopardize BSA's successful reorganization.

Given the extraordinary harm that would stem from uncertainty about the impact of this Court's decision on parties that have emerged from bankruptcy, the Court should state that its opinion is not intended to affect effective chapter 11 plans confirmed in accordance with then-applicable law, challenges to which may implicate distinct questions of bankruptcy law not presented by this case.

ARGUMENT

In the Boy Scouts' bankruptcy case, tailored nonconsensual third-party releases were indispensable to achieving what this Court has recognized as three of chapter 11's critical objectives: (1) maximizing property available to satisfy creditor claims; (2) equitably distributing estate property to creditors; and (3) enabling the debtor to achieve a fresh start. See *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006); *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'Ship*, 526 U.S. 434, 453 (1999). The bankruptcy and district courts in BSA's case made detailed factual findings that the BSA plan—including the nonconsensual third-party releases for the closely interrelated and co-liable non-profit entities that helped fund the plan with contributions of billions of dollars of cash and other property—was the *only* way for BSA to emerge from bankruptcy and continue its important charitable mission. *In re Boy Scouts of Am.*, 642 B.R. 504, 608–616 (Bankr. D. Del. 2022), supplemented, 2022 WL 20541782 (Bankr. D. Del. Sept. 8, 2022); *In re Boy Scouts of Am. & Del. BSA, LLC*, 650 B.R. 87, 138–141 (D. Del. 2023). That plan structure was also the only way to provide meaningful and fair compensation for Scouting abuse

survivors. *Boy Scouts*, 650 B.R. at 139–140. Indeed, the courts determined that the BSA plan pays in full all allowed claims of abuse survivors. *Id.* at 116–121, 141; see *Boy Scouts*, 642 B.R. at 616–617.

It is therefore not an exaggeration to say that the U.S. Trustee's position in this case—that nonconsensual third-party releases are never permitted by the Bankruptcy Code—would have been the death knell for Scouting. The U.S. Trustee's position is wrong. This Court should affirm the Second Circuit's judgment and hold that tailored releases of substantially contributing nondebtor third parties are permitted by the Bankruptcy Code in appropriate cases, where they are supported by detailed factual findings regarding their fairness and necessity to the reorganization and do not contravene any applicable provisions of the Code.

Ultimately, however, if this Court holds that the nonconsensual third-party releases contemplated by Purdue Pharma's chapter 11 plan are not authorized by the Bankruptcy Code (which they are in appropriate circumstances like those here), it is imperative for the Court to note that its decision is not intended to affect other chapter 11 plans (like BSA's) that were confirmed and became effective in accordance with then-applicable law. Providing that clarity is essential to ensure that debtors that have already successfully emerged from bankruptcy under a chapter 11 plan, as well as the creditors relying on payment under the terms of those plans, can depend on the settled reliance interests that vested when their plans became effective. This Court's opinion here should expressly note that challenges to effective plans based on subsequently arising legal developments may raise distinct issues under bankruptcy law, and those issues are not presented by this case.

A. Nonconsensual releases of closely related co-liable parties are consistent with the Bankruptcy Code and can be essential to achieving the Code's aims

The *Boy Scouts* bankruptcy case powerfully illustrates why the U.S. Trustee is incorrect in asserting that nonconsensual releases of third parties are never permitted by the Bankruptcy Code. The Code's unambiguous text authorizes bankruptcy courts to issue such nonconsensual third-party releases in certain circumstances, as the Second Circuit held below in Purdue Pharma's case and as the Third Circuit has similarly recognized. See *In re Continental Airlines*, 203 F.3d 203, 214–215 (3d Cir. 2000). Both courts have emphasized that nonconsensual third-party releases should be issued only upon detailed factual findings that they are necessary to the debtor's reorganization and fair to the creditors whose claims are released. The district and bankruptcy courts found those requirements satisfied in BSA's case, and that case demonstrates how some nonconsensual third-party releases advance the Bankruptcy Code's core objectives.

1. BSA's plan fully and fairly compensates its creditors while enabling BSA to continue its charitable mission

After more than three years of work, the bankruptcy court confirmed a chapter 11 plan of reorganization for BSA that is the archetype of an appropriately constructed resolution of mass tort claims involving co-liable parties through bankruptcy.

a. BSA's plan enables the organization to continue its charitable mission through its existing network of local councils and chartering organizations.

The relationship between BSA and the local councils is roughly analogous to a franchisor and franchisee. BSA is the national umbrella organization responsible for de-

signing and maintaining the structure and content of Scouting programs. BSA licenses intellectual property, establishes membership qualifications, purchases a single set of general liability insurance policies shared by it and over 250 local councils, and provides shared support, accounting, and other corporate services. But most scouts never interact with the national organization directly. Instead, the individual Scouting units nationwide (*e.g.*, "troops," "packs," and "crews") are locally organized and sponsored by one of tens of thousands of chartering organizations. Chartering organizations include religious institutions, schools, and civic associations. Scouting units and their chartering organizations are, in turn, supported by 250 local councils. Local councils are legally independent non-profit corporations, each with their own articles of incorporation, bylaws, boards, officers, and employees. Each local council receives a charter from BSA, subject to annual renewal, that authorizes the council to operate Scouting programs in a particular geographic area.

Local councils are required to organize, operate, and promote Scouting in a manner consistent with BSA's charter, bylaws, and policies. Local councils rely on BSA to provide shared insurance, certain employee benefits, and other services. BSA in turn relies on local councils for most of its direct funding via scouts' membership fees and the sale of merchandise. Local councils also maintain relationships with chartering organizations and local donors. These relationships are vital to BSA, as they drive membership and provide essential revenues.

The district court that affirmed the bankruptcy court's confirmation of BSA's plan found that this tripartite structure—a close and interlocking relationship between the BSA national organization, the local councils, and the chartering organizations—has been essential to fulfilling

BSA's congressional charter and charitable mission. *Boy Scouts*, 650 B.R. at 106–107.

b. BSA commenced its chapter 11 case in February 2020 after changes in state statutes of limitations enabled survivors of sexual abuse to assert claims that previously had been time-barred. Those legal changes led to a sharp increase in the number of claims asserted against BSA, local councils, and chartering organizations, and those claims placed immense financial pressure on the organization. After spending more than $150 million on settlements and legal fees by 2020, BSA determined that it could not continue to address abuse litigation on a case-by-case basis. BSA accordingly sought to utilize the chapter 11 process to both equitably compensate abuse survivors and ensure that BSA could continue its charitable work. During BSA's bankruptcy, more than 82,000 abuse claims were timely filed—approximately 80% of which allege abuse before 1988.

After two years of mediated negotiations in bankruptcy among BSA, survivor representatives, and insurers, the bankruptcy court confirmed a proposed chapter 11 plan for BSA. Because the liability for sex abuse in Scouting was alleged to be shared among BSA, local councils, and chartering organizations, and because the insurance coverage for that liability is also shared through a complex series of policies, the BSA plan sought to achieve a "global resolution" of abuse claims that would expedite payments to the aging population of survivors. *Boy Scouts*, 650 B.R. at 112; *see id.* at 109–110 (describing insurance relationships). This global structure was "critical to securing the contributions from the Local Councils, Chartered Organizations, and Settling Insurance Companies, and [to] unlocking BSA's insurance for the benefit of" survivors. *Id.* at 112.

The BSA chapter 11 plan thus memorializes a series of interrelated settlements and channels all Scouting sex-abuse claims to a trust created for the benefit of abuse survivors. Through the BSA plan, that trust has already been vested with $2.46 billion in cash and other property, plus insurance rights found to be worth at least another $4 billion. *Boy Scouts*, 650 B.R. at 104, 110–111. The assets vested in the trust were contributed by BSA, insurers, local councils, and chartering organizations. The plan also provides survivors with an opportunity to participate directly in further improvements to BSA's ongoing youth-protection efforts.

In light of the closely interlocking relationships between BSA, local councils, the chartering organizations—particularly as it concerned shared liability for sex-abuse claims and inter-connected insurance coverage—the third parties' contributions to the creditor trust were found indispensable both to fully compensate survivors and to enable Scouting to continue after bankruptcy. See *Boy Scouts*, 650 B.R. at 138–143. Based on those particular facts, the BSA chapter 11 plan enjoins the commencement or continuation of any abuse-related actions against the contributing local councils and chartering organizations through nonconsensual third-party releases. Notably, all of the released entities under the BSA plan are, like BSA, non-profit entities. And the scope of the BSA plan's releases is narrowly tailored to Scouting-related abuse that occurred before commencement of BSA's bankruptcy case. *Id.* at 112. These are not broad, general releases.

BSA's chapter 11 plan was supported by every major constituency in its case, including statutory and court-appointed fiduciaries for abuse survivors. *Boy Scouts*, 650 B.R. at 110. More than 85% of survivors who returned a ballot voted to accept the plan. *Ibid.* The bankruptcy court

confirmed the plan in September 2022 after holding a 22-day trial, considering an extensive evidentiary record, and issuing a 269-page opinion. *Boy Scouts*, 650 B.R. 87.

c. Two law firms representing 140 survivors—0.2% of the survivors who filed claims—appealed the confirmation order to challenge the nonconsensual releases. The district court affirmed the bankruptcy court's confirmation order in a 155-page decision after considering the voluminous briefing and record evidence. *Boy Scouts*, 650 B.R. 87. The district court determined that the BSA plan would pay in full the allowed claims of sex abuse survivors (including those appealing confirmation of the plan). *Id.* at 116–121. The court also determined that the bankruptcy court had subject-matter jurisdiction to issue the nonconsensual third-party releases by discussing at length the identity of interests among BSA, the local councils, and the chartering organizations; the existence of shared insurance; the contractual indemnification obligations between the parties; and the BSA's residual interest in local councils' property. *Id.* at 122–135.

The district court determined that it had constitutional and statutory authority to affirm the nonconsensual third-party releases. *Boy Scouts*, 650 B.R. at 135–143. The Third Circuit has recognized that the Bankruptcy Code makes such releases available in appropriate circumstances based on two "'hallmarks'": "fairness and necessity to the reorganization." *Id.* at 137 (quoting *Continental Airlines*, 203 F.3d at 214–215). The district court found that both hallmarks supported the releases in BSA's plan. Specifically, the nonconsensual third-party releases were necessary to BSA's reorganization because without them, the assets of BSA itself—a non-profit charitable organization—were grossly inadequate to compensate survivors. See *id.* at 139 ("The record … reflects that

a BSA only plan would fail to unlock the value from the Abuse Insurance Policies and provide virtually no recovery to holders of Abuse Claims."). Furthermore, without the contributions from local councils and chartering organizations and the corresponding channeling releases, BSA could never successfully reorganize and would merely spiral into a "death trap of litigation." *Ibid.* (citation omitted). Even if BSA could technically emerge from bankruptcy, it would be left "in shambles" because the local councils and chartering partners could not continue to deliver the Scouting program and provide membership revenues if they faced a continuing campaign of abuse-related litigation. *Id.* at 138–139.

The district court further found that the nonconsensual third-party releases were fair to creditors because the BSA plan provides a mechanism for payment in full of all allowed claims. *Boy Scouts*, 650 B.R. at 141. The court noted the survivors' overwhelming support for the plan, the transparency and rigor of the process of calculating contributions to the trust, the equality of treatment that the plan afforded to survivors as compared to the tort system, and the need for an efficient and global resolution after many survivors had waited decades for closure and compensation. *Id.* at 141–143.

2. The Bankruptcy Code permits releases of nondebtors in appropriate circumstances

As the majority of the courts of appeals have agreed, nonconsensual third-party releases are consistent with the Bankruptcy Code's text in rare, exceptional cases. See, *e.g.*, *Continental Airlines*, 203 F.3d at 214–215 (3d Cir.); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015); *In re Aradigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008); *In re Dow Corning Corp.*, 280

F.3d 648 (6th Cir. 2002); *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989).

a. "Congress enacted several provisions that provide bankruptcy courts the flexibility to accommodate unique, case-specific circumstances." *Boy Scouts*, 650 B.R. at 135–136. The bankruptcy court in BSA's case "correctly relied upon [those provisions] as the statutory basis for the non-consensual third-party releases in the [BSA] Plan." *Ibid.*

Specifically, Sections 105(a) and 1123(a)(5) and (b)(6) of the Bankruptcy Code "confer what [this Court] has described as a bankruptcy court's 'residual authority' to formulate plans that enable successful and value-maximizing reorganizations, including relief not specifically authorized elsewhere in the Bankruptcy Code." *Boy Scouts*, 650 B.R. at 136 (quoting *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990)); see 11 U.S.C. §§ 105(a), 1123(a)(5), 1123(b)(6); 2 *Collier on Bankruptcy* ¶ 105.01 (16th ed. 20223) ("Given the broad mandate to bankruptcy courts generally to reorganize debtors, to afford a fresh start to debtors and to distribute funds equitably to creditors, an expansive construction is justified."). This Court's decision in *Energy Resources* read Sections 105(a) and 1123(b)(6) of the Bankruptcy Code to give bankruptcy courts "the authority … , even though the Bankruptcy Code did not explicitly so provide, to reallocate the debtor's tax liabilities 'if the bankruptcy court determines that this reallocation is necessary to the success of a reorganization plan.'" *Boy Scouts*, 650 B.R. at 136 (brackets omitted) (quoting 495 U.S. at 549). "*Energy Resources* demonstrates that §§ 105(a) and 1123(b)(6) are sufficiently broad to authorize plan provisions that are both fair and necessary to the reorganization, including third-party releases, so long as such provisions are not inconsistent with the Bankruptcy Code." *Ibid.*

b. That is not to say nonconsensual third-party releases should be freely available in any chapter 11 proceeding. They assuredly should not. The Second Circuit in Purdue Pharma's case emphasized that nonconsensual third-party releases may not be based "solely on the non-debtor's financial contribution to the estate," and may not issue without "specific and detailed findings" by the bankruptcy court on "each" of "seven factors." J.A. 886 n.19, 887–890. The Third Circuit imposes a similarly rigorous standard, which the district court applied in affirming confirmation of the BSA plan, that requires "showing with specificity" that a nonconsensual third-party release "is both necessary to the reorganization and fair." *Boy Scouts*, 650 B.R. at 135 (citing *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 206 (3d Cir. 2011)); see *Continental Airlines*, 203 F.3d at 214–215. Requiring detailed findings on those "'hallmarks'" of "fairness and necessity to the reorganization" ensures that nonconsensual third-party releases are used only in accordance with the terms of Sections 105(a) and 1123(a)(5) and (b)(6) of the Bankruptcy Code. While nonconsensual third-party releases should be authorized in rare cases, they are not a "rare case" exception to the Code; they are instead squarely within the ambit of Section 1123(b)(6).

When considering a proposed chapter 11 plan's nonconsensual third-party releases, it may be relevant that the plan provides for full payment of creditors' claims, as the BSA plan does. The bankruptcy and district courts reviewing BSA's plan made detailed factual findings supporting their conclusion that there is no risk of survivor-creditors receiving less than full compensation for their released claims. See *Boy Scouts*, 650 B.R. at 116–121. As

a result, the abuse claims of BSA's creditors were not so much released by the BSA plan as they were re-directed.[4]

3. BSA's plan demonstrates how some releases of nondebtors are essential to achieving the Bankruptcy Code's objectives

When interpreting the Bankruptcy Code, this Court has recognized fundamental guiding principles that are especially relevant to the question presented here: (1) enabling the debtor to achieve a "fresh start" free from "further liability for old debts"; (2) maximizing property available to satisfy the claims of creditors; and (3) "the equitable distribution of [the debtor's] property among [its] creditors." *Central Virginia*, 546 U.S. at 364; see *Bank of America*, 526 U.S. at 453. BSA's reorganization plan reinforces the wisdom of the majority of the circuit courts' holding that nonconsensual third-party releases can, in certain situations and with appropriate guardrails, reinforce the Bankruptcy Code's overarching objectives. In particular, the bankruptcy and district courts in BSA's case made numerous detailed factual findings that such releases were absolutely necessary *both* to enable BSA to achieve reorganization and to adequately and equitably compensate BSA's creditor-survivors. *Boy Scouts*, 650 B.R. at 138–141. The bankruptcy court described "[t]he undisputed evidence … that without the Scouting-Related Releases, the Settling Insurers would not settle their liability," nor would the local councils come "on board." *Boy Scouts*, 642 B.R. at 616–617.

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[4] If this Court were inclined to hold in this case that nonconsensual third-party releases are generally unavailable under the Bankruptcy Code (which it should not given the unambiguous statutory authority supporting such releases in exceptional cases), it should reserve the question whether the Code permits a different outcome for a pay-in-full plan.

In short, there could be *no* reorganization plan for BSA and survivors without this type of release structure. The nonconsensual third-party releases were thus integral to restructuring the debtor-creditor relationship between BSA and the survivors, and they were "appropriate provision[s]" to advance the Bankruptcy Code's objectives in restructuring that relationship. 11 U.S.C. § 1123(b)(6).

a. The BSA plan's nonconsensual third-party releases were indispensable to BSA's fresh start. See *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991) ("[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.") (internal quotation omitted).

BSA's bankruptcy implicated a closely intertwined structure between the national organization, local councils, and chartering organizations; interrelated liability of all three; and numerous different insureds with claims to the same insurance policies for abuse liabilities. Because "membership drives BSA's finances," and membership "occurs at the Local Council and Chartered Organization level," BSA needed local councils and chartering organizations to both maintain and recruit scouts to continue operating. *Boy Scouts*, 642 B.R. at 610. Given that organizational structure, the *Boy Scouts* district court expressly noted that the success of BSA's Plan depended upon "BSA's future membership revenue, which, in turn, depends on Local Councils and Chartered Organizations resolving their abuse liabilities and continuing to deliver the Scouting program." 650 B.R. at 138–139. Each level of this organizational infrastructure is necessary to deliver

the mission of Scouting. *Id.* at 106–107. Thus, for BSA to emerge from bankruptcy and continue to carry out its charitable work, it was necessary for all Scouting-related abuse claims to be resolved against all entities. *Id.* at 139. The BSA plan structure was the only one that could accomplish that goal in light of the shared liability, the diffuse set of property interests, and the shared insurance policies covering literally thousands of different entities. *Ibid.*

A hypothetical BSA plan that included only voluntary releases would not have provided any genuine fresh start; it would merely "spiral the organization into a 'death trap of litigation.'" *Boy Scouts*, 650 B.R. at 139 (citation omitted). BSA would have been unable to obtain contributions from any nondebtor party without providing full releases in exchange. And although BSA would have received a discharge under such a plan, the rest of the tripartite Scouting infrastructure (the local councils and chartering organizations) would remain exposed. That exposure would have forced survivors into a nationwide race to the courthouse, competition for limited insurance coverage, and ultimately to uncoordinated local-council and chartering organization bankruptcy filings across the country. *Ibid.* Given that more than 82,000 abuse claims were filed against BSA, even a highly conservative estimate of "opt-out" releases (which give creditors an option to affirmatively opt out of the nonconsensual third-party releases) would leave nondebtors exposed to significant liabilities through the tort system, and leave BSA without essential revenues to continue operating. *Ibid.*; see also *Boy Scouts*, 642 B.R. at 608–611.

The ability to assure releases for the co-liable nondebtor third parties was therefore essential to BSA's continued existence. And those contributions made it possible

for BSA to achieve a payment-in-full chapter 11 plan; more than 90% of the contributions to the settlement trust under BSA's plan are being contributed by third parties. The BSA plan's widespread support among its survivor-creditors demonstrates just how successful the plan is at achieving its goals. As two courts have now found, no other structure could have allowed a continued future for the legacy of American Scouting.

b. Nonconsensual third-party releases in the BSA plan were also essential to achieving adequate and equitable compensation for survivors. Without this plan structure, claimants would have waited even longer for far less compensation. Many would have received nothing.

The BSA plan efficiently guarantees full payment of allowed abuse claims that otherwise would have been litigated individually by aging claimants against a diffuse set of defendants and deep-pocketed insurers. Survivors would have had to wait even longer while litigating their rights under the insurance policies and potentially waiting for local councils and some chartering organizations to resolve their own bankruptcies. By contrast, the plan ensures that survivors—a largely aged population—can finally obtain the resolution they have so long deserved.

Survivors would not have received even a fraction of the compensation afforded by the BSA plan if required to litigate separately. If BSA were forced to resolve its bankruptcy case without releases for the third-party local councils and chartering organizations, then "a BSA-only plan would fail to unlock the value from the Abuse Insurance Policies" given the inter-connected insurance rights. *Boy Scouts*, 650 B.R. at 139. Those policies, along with the billions of dollars' worth of other nondebtor contributions, "provide[d] the overwhelming majority of funding" for survivors and "would not have been possible without the

[releases]." *Id.* at 139–140. And forcing survivors to participate in hundreds or perhaps thousands of separate bankruptcies—with fights over shared resources—could not possibly provide a viable solution. The nonconsensual third-party releases were thus the only path to meaningful recovery for survivor-creditors.

4. Resolution of shared mass-liability situations will depend on nonconsensual third-party releases in exceptional cases

Contrary to the U.S. Trustee's contention, neither a non-bankruptcy solution nor a bankruptcy plan involving only voluntary releases could achieve the global resolution necessary to resolve Scouting-related abuse claims and ensure the future of Scouting.

The U.S. Trustee's brief suggests that "mass-tort cases can be resolved within the tort system or by providing compensation to claimants to obtain their consensual release," Pet'r Br. 14, invoking as examples 3M's recent settlement of multi-district litigation involving hundreds of thousands of claims from defective combat earplugs manufactured by a subsidiary, and PG&E's bankruptcy using only consensual releases, *id.* at 47. But the U.S. Trustee's suggestion erroneously assumes that all parties liable for mass-tort claims will be well-heeled corporations or wealthy individuals. 3M and PG&E are both multibillion-dollar for-profit corporations with sufficient financial resources, including cash and access to debt and equity capital markets, to independently pay all claims without substantial contributions from third parties. BSA, by contrast, is a charitable non-profit that relies on member fees and donations to sustain its operations.

Unlike a for-profit corporation, BSA cannot rely on revenues from the ordinary sale of products or services, an infusion of equity from investors, or the issuance of

additional debt to independently pay Scouting-related abuse claims in full (or even in material part) without third-party contributions. As described above, moreover, if BSA were forced to rely on a plan that contained only voluntary third-party releases, it could never have secured the global resolution needed to equitably compensate survivors and ensure the future of Scouting. Without the ability to assure that abuse survivors would universally grant full and complete releases, BSA would have been unable to obtain substantial contributions from any nondebtor party, including local councils, chartered organizations, and settling insurers. *Boy Scouts*, 642 B.R. at 608–611.

It is important to understand the disastrous consequences of the U.S. Trustee's position in this case. If his reading of the Code had been applied to BSA's bankruptcy, then in the real world, most abuse-in-Scouting survivors would get nothing. And Scouting as an organization would likely be finished. The same fate would likely befall many other non-profit organizations that share tort liability for historical claims with other legally separate entities. Non-profits do not and will not have the resources to pay mass-tort claims without contributions from co-liable parties. Instead, for BSA and other similar institutions facing similar shared liability, the ability to obtain a global resolution with nonconsensual third-party releases will be absolutely essential to obtaining nondebtor contributions that can deliver actual compensation for victims.

The continued availability of appropriate nonconsensual third-party releases in certain circumstances is thus necessary to ensure that sex-abuse survivors and other mass-liability tort victims can receive not just full payment (as in BSA's case) but any payment at all.

B. To avoid massive disruption of settled rights and reliance interests, this Court should make clear that its opinion here will not impact effective plans

The case before this Court involves a chapter 11 plan that the Court stayed from becoming effective. The Court should affirm the Second Circuit's judgment. But whatever the Court may hold about the propriety of nonconsensual third-party releases in the context of Purdue Pharma's plan, bankruptcy law recognizes that challenges to already effective chapter 11 plans like BSA's plan present importantly different issues because debtors, creditors, and other stakeholders act in justified reliance on a chapter 11 plan once it becomes effective. This Court should make clear that its opinion here is not intended to disturb those reliance interests.

1. Appellate courts do not disrupt effective plans confirmed in accordance with then-applicable law based on subsequent legal developments

a. The bankruptcy appellate process reflects the "strong public interest in the finality of bankruptcy reorganizations." *In re Continental Airlines*, 91 F.3d 553, 561 (3d Cir. 1996). That principle facilitates a debtor's chance at successful reorganization by "fostering confidence in the finality of confirmed plans," which encourages investors and other third parties doing business with the debtor to rely on confirmation orders. *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 170 (3d Cir. 2012), as corrected (Oct. 25, 2012).

The Bankruptcy Code provides that the effective date of a confirmed chapter 11 plan is the day on which the rights, duties, and obligations under that plan take legal effect. See 11 U.S.C. § 1141. The Code also assigns a different status to a plan of reorganization that has been "substantially consummated" as opposed to a plan that

has not progressed to that status. See 11 U.S.C. § 1127(b) (providing that modifications to a plan of reorganization may be made "at any time *after* confirmation of such plan and *before* substantial consummation of such plan") (emphases added). That rule is critical to successful bankruptcy practice, because "substantial consummation" may create a situation where it is "legally and practically impossible to unwind the consummation of the Plan." *Miami Ctr. Ltd. P'ship* v. *Bank of N.Y.,* 838 F.2d 1547 (11th Cir. 1988); see 7 *Collier on Bankruptcy* ¶ 1129.09 ("[T]he success of plans of reorganization often requires prompt implementation. Assets are sold, new equity interests are issued, or whole companies merge into one another. By the time an appeal is finally decided, the ability to restore the parties to their pre-appeal status may be impracticable or even impossible.").

To avoid the gross inequity that would result from undoing effective chapter 11 plans, coupled with the difficulty of reversing important completed transactions, the courts of appeals have consistently abstained from disrupting parties' settled reliance interests in an implemented plan. Courts do so to "assure … stakeholders that a plan confirmation order is reliable and that they may make financial decisions based on a reorganized entity's exit from Chapter 11 without fear that an appellate court will wipe out or interfere with their deal." *In re Tribune Media Co.,* 799 F.3d 272, 280 (3d Cir. 2015); see, *e.g.*, *In re Pacific Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) (describing "a kind of appellate abstention" that "favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest"); *In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993) (Because "achiev[ing] finality is essential to the fashioning of effective remedies" in bankruptcy," "completed acts in accordance with an unstayed order of the bankruptcy court must

not thereafter be routinely vulnerable to nullification if a plan of reorganization is to succeed."). As explained by the Third Circuit, when a chapter 11 plan is effective and has been "substantially consummated," the court will not grant any "relief requested in [an] appeal" that would "(a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on the plan's confirmation." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 434–435 (3d Cir. 2015) (quoting *In re Semcrude, L.P.*, 728 F.3d 314, 321 (3d Cir. 2013)).

b. Like all chapter 11 plans, the BSA plan confirmed in September 2022 specified the conditions precedent that, if satisfied, would cause the confirmed plan to become effective. *In re Boy Scouts of Am. & Del. BSA, LLC*, No. 22-cv-1237, 2023 WL 6442586, at *2 (D. Del. Oct. 3, 2023). The BSA plan became effective when numerous transactions and transfers under the BSA plan occurred, including the formation of the settlement trust for the benefit of abuse survivors; receipt by the trust of proceeds from the sale of certain insurance policies back to the settling insurers; receipt by the trust of financial contributions from BSA, local councils, and chartering organizations; those entities' assignment to the settlement trust of additional insurance rights worth at least $4 billion; and the restructuring of $262 million of BSA's funded debt obligations. *Id.* at *5.

In an attempt to block BSA's plan from becoming effective, a small number of objectors moved the district court in April 2023 to stay the plan's effective date. *Boy Scouts*, 2023 WL 6442586, at *2. The district court denied that stay request, as did the Third Circuit. See *ibid.* The BSA plan thereafter became effective on April 19, 2023 (referred to in the BSA plan and proceedings as the "Effective Date"), and BSA emerged from bankruptcy. *Ibid.*

Since then, parties involved with the BSA plan have substantially relied upon it. See *Boy Scouts*, 2023 WL 6442586, at *5. Billions of dollars of cash and other assets were vested in the settlement trust created under the BSA plan. To fund those plan contributions, BSA transferred to the trust an $80 million promissory note, a collection of Norman Rockwell artwork valued at $59 million, and oil and gas interests valued at $7.6 million. BSA and local councils have sold 1,050 insurance policies back to settling insurance companies and vested those proceeds in the trust. Local councils have sold real property, including camp properties, to fund their contributions to the trust of $619 million in cash. $40 million was contributed by the local councils on behalf of certain participating chartered organizations. And chartering organizations made their own direct contributions, such as a $30 million contribution from the United Methodist Church. BSA has also refinanced its secured debt and incurred associated closing costs and interest. The settlement trustee and her staff are managing the trust's assets and administering the claims process, and she is making distributions to holders of certain survivors' allowed claims under the BSA plan. See *id.* at *9 (noting "the consummation of the [BSA] Plan and the Settlement Trust's progress in processing abuse claims").

BSA's core bankruptcy transactions are thus completed. Numerous stakeholders have acted in reliance on the BSA plan through the transactions described above, which could not possibly be unwound at this stage. BSA has emerged from bankruptcy and has been operating as a reorganized entity for the last six months. And survivors are finally receiving the compensation and emotional closure that have eluded some of them for decades. See *Boy Scouts*, 2023 WL 6442586, at *9 ("Abuse survivors with claims against BSA are a largely aged group who should

not continue to wait for compensation or closure."). With so many transactions having occurred in reliance on the BSA plan, it would be deeply inequitable and practically impossible for the plan to be re-designed at this late stage, even in response to subsequent legal developments such as a decision by this Court interpreting the Bankruptcy Code regarding nonconsensual third-party releases.

2. It is critically important for this Court to state that its opinion will not disrupt effective plans in other cases

Members of this Court have often recognized a "simple yet fundamental principle" of judicial decision making: "If it is not necessary to decide more … then it is necessary not to decide more." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring in judgment); *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 405–406 (2010) (Stevens, J., concurring in part and dissenting in part); *Morse* v. *Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1036–1037 (1992) (Blackmun, J., dissenting). The Court thus routinely clarifies that its opinions do not reach other arguments or issues that either were not present before it or that may raise different considerations. See, *e.g.*, *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 457 n.2 (2022); *Moore* v. *Harper*, 600 U.S. 1, 37 n.2 (2023); *Van Buren* v. *United States*, 141 S. Ct. 1648, 1659 n.8 (2021); *Rodriguez* v. *FDIC*, 140 S. Ct. 713, 718 (2020).

Without this Court's clarification that the case before it does not concern a chapter 11 plan that is already effective, parties could attempt to use this Court's opinion to challenge effective plans and relitigate issues that were already decided in accordance with then-applicable law.

Such challenges might create years of new litigation and cast doubt on settled reliance interests. The district court in *Boy Scouts* recently rejected an attempt to use this Court's consideration of this case as a basis to stay further implementation of the BSA plan, recognizing the impossibility of returning the parties to "the status quo that existed before [the BSA plan's] entry" for a "whole host of reasons." *Boy Scouts*, 2023 WL 6442586, at *3–*4, *9. But the objectors have asked the Third Circuit to set aside or alter the BSA plan based on this Court's decision here. See *In re Boy Scouts of Am. & Del. BSA, LLC*, No. 23-1664 (3d Cir.).

That outcome would be disastrous. Not just because billions of dollars in real property and other assets of BSA, local councils, and chartering organizations have already been sold or transferred, but because sending the *Boy Scouts* parties back to the drawing board would eviscerate survivor recoveries, threaten a liquidation of BSA, and result in cascading chapter 11 filings by non-profit organizations nationwide, thus ending Scouting as it currently exists. See Declaration of Christopher D. Meidl in Support of Appellees' Response to Motions of Lujan and Dumas & Vaughn Claimants and Certain Insurers to Stay Plan and Appeals ¶ 16, *Boy Scouts*, No. 23-1664 (3d Cir. Oct. 23, 2023), Doc. 114 (declaration of scouting-abuse survivor describing "the harm that would befall thousands and thousands of survivors if we are denied closure" by the BSA plan being cast into doubt after survivors "have waited years to receive acknowledgement, be heard and see some form of recompense").

Given the extraordinary harm that could follow from uncertainty about the impact of this Court's decision on parties that have emerged from bankruptcy with effective chapter 11 plans, this Court should state that its opinion

is not intended to cast doubt on the validity of effective plans or plans that provide for payment in full, challenges to which implicate distinct questions of bankruptcy law that are not presented by Purdue Pharma's case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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