No.

IN THE

Supreme Court of the United States

BARINGS LLC, ET AL.,

Petitioners,

v.

AG CENTRE STREET PARTNERSHIP, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW D. MCGILL
Counsel of Record
JESSICA L. WAGNER
DAVID W. CASAZZA
CHRISTIAN DIBBLEE
LAVI M. BEN DOR
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 887-3680
MMcGill@gibsondunn.com

SCOTT GREENBERG
C. LEE WILSON
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166

GREGG J. COSTA
GIBSON, DUNN & CRUTCHER LLP
811 Main Street
Suite 3000
Houston, Texas 77002

Counsel for Petitioners

QUESTION PRESENTED

In *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204 (2024), this Court held certain provisions in a confirmed Chapter 11 bankruptcy plan unlawful and then vacated the order confirming the plan and remanded for further proceedings in which creditors would be afforded a fresh opportunity to vote on the new plan conforming to this Court's ruling. Because the order confirming the *Purdue Pharma* plan had been stayed pending appeal, the plan had not been consummated, and this Court accordingly did not address the question whether, when an appellate court invalidates material provisions of a fully consummated bankruptcy plan, creditors must be afforded an opportunity to renegotiate and vote on a conforming bankruptcy plan. See *id.* at 226. The question presented here is the question left unanswered by *Purdue Pharma*—an issue of critical importance to participants in Chapter 11 bankruptcies and on which the circuits are divided:

Whether an appellate court can materially alter a consummated plan of reorganization without permitting a new vote of creditors or whether a material alteration by an appellate court requires a vacatur of the order confirming the plan and a new creditor vote.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Barings LLC, Boston Management and Research, Inc., Eaton Vance Management, Invesco Senior Secured Management, Inc., and UBS Asset Management (Americas) LLC (as successor in interest to Credit Suisse Asset Management LLC)[1] were intervenors-appellees in the court of appeals and parties in interest in the bankruptcy court.[2]

Barings LLC is a wholly-owned subsidiary of MM Asset Management Holding LLC, which is a wholly-owned subsidiary of MassMutual Holding LLC, which, in turn, is a wholly-owned subsidiary of Massachusetts Mutual Life Insurance Company. Massachusetts Mutual Life Insurance Company has no parent company, and no publicly held corporation has an ownership interest in 10% or more of Massachusetts Mutual Life Insurance Company's stock.

Boston Management and Research, Inc. is a wholly-owned subsidiary of Eaton Vance Management, which is a wholly-owned subsidiary of Morgan Stanley Capital Management, LLC, which, in turn, is a wholly-owned subsidiary of Morgan Stanley, a publicly traded corporation. Morgan Stanley has no par-

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[1] In the courts below, Credit Suisse Asset Management LLC was a named party. That entity has been merged with and into UBS Asset Management (Americas) LLC.

[2] Except where noted, the parties to this proceeding were parties listed on the dockets of the court of appeals that are at issue in this petition, Nos. 23-20363 and 23-20451, which sought review of the bankruptcy court's confirmation order. Those appeals were decided alongside the appeals from the adversary proceeding, Nos. 23-20181 and 23-20450, which had additional parties that are not listed here.

ent company; based on Securities and Exchange Commission rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 4-5, Marunouchi 1-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

Eaton Vance Management is a wholly-owned subsidiary of Morgan Stanley Capital Management, LLC, which, in turn, is a wholly-owned subsidiary of Morgan Stanley, a publicly traded corporation. Morgan Stanley has no parent company; based on Securities and Exchange Commission rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 4-5, Marunouchi 1-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

Invesco Senior Secured Management, Inc. is a wholly-owned subsidiary of Invesco Advisers, Inc., which, in turn, is a wholly-owned subsidiary of Invesco Group Services, Inc., which, in turn, is a wholly-owned subsidiary of OppenheimerFunds, Inc., which, in turn, is a wholly-owned subsidiary of Oppenheimer Acquisition Corporation, which, in turn, is a wholly-owned subsidiary of Invesco Holding Company (US), Inc., which, in turn, is a wholly-owned subsidiary of Invesco Holding Company Limited, which, in turn, is a wholly-owned subsidiary of Invesco Ltd., a publicly traded corporation. Invesco Ltd. has no parent company; based on Securities and Exchange Commission rules regarding beneficial ownership, BlackRock, Inc., The Vanguard Group, and Massachusetts Mutual Life Insurance Company each owns greater than 10% of Invesco Ltd.'s outstanding common stock.

UBS Asset Management (Americas) LLC (as successor in interest to Credit Suisse Asset Management

LLC) is a wholly-owned subsidiary of UBS Americas Inc., which, in turn, is a wholly-owned subsidiary of UBS Americas Holding LLC, which, in turn, is a wholly-owned subsidiary of UBS AG, which, in turn, is a wholly-owned subsidiary of UBS Group AG. UBS Group AG has no parent company, and no publicly traded corporation owns 10% or more of UBS Group AG's stock.

Respondent Citadel Equity Fund Ltd. was an appellant in the court of appeals and a party in interest in the bankruptcy court.

Respondents AG Centre Street Partnership L.P., AG Credit Solutions Non-ECI Master Fund, L.P., AG Super Fund Master, L.P., AG SF Master (L), L.P., Silver Oak Capital, L.L.C., Ascribe III Investments, LLC, Columbia Cent CLO 21 Limited, Columbia Cent CLO 27 Limited, Columbia Floating Rate Fund, a series of Columbia Funds Series Trust II, Columbia Strategic Income Fund, a series of Columbia Funds Series Trust I, Contrarian Capital Fund I, L.P., Contrarian Distressed Debt Fund, L.P., Contrarian Centre Street Partnership, L.P., Gamut Capital SSB, LLC, North Star Debt Holdings, L.P., Shackleton 2013-III CLO, Ltd., Shackleton 2013-IV-R CLO, Ltd., Shackleton 2014-V-R CLO, Ltd., Shackleton 2015-VII-R CLO, Ltd., Shackleton 2017-XI CLO, Ltd., Z Capital Credit Partners CLO 2018-1 Ltd., and Z Capital Credit Partners CLO 2019-1 Ltd. were appellants in the court of appeals and parties in interest in the bankruptcy court.

Respondent Serta Simmons Bedding, LLC was an appellee in the court of appeals and the debtor in the bankruptcy court.

Respondents Dawn Intermediate, LLC, Serta International Holdco, LLC, National Bedding Company L.L.C., SSB Manufacturing Company, The Simmons Manufacturing Co., LLC, Dreamwell, Ltd., SSB Hospitality, LLC, SSB Logistics, LLC, Simmons Bedding Company, LLC, Tuft & Needle, LLC, Tomorrow Sleep LLC, SSB Retail, LLC, and World of Sleep Outlets, LLC were also appellees in the court of appeals and debtors in the bankruptcy court.

Respondents LCM XXII Ltd., LCM XXIII Ltd., LCM XXIV Ltd., LCM XXV Ltd., LCM 26 Ltd., LCM 27 Ltd., LCM 28 Ltd. appeared as intervenors in the court of appeals in No. 23-20363 but did not participate in that appeal; they participated only in the appeals from the adversary proceeding. They were parties in interest in the bankruptcy court.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *In re Serta Simmons Bedding, LLC*, No. 23-bk-90020 (Bankr. S.D. Tex.) (judgment entered June 14, 2023);
- *Serta Simmons Bedding, LLC, et al.* v. *AG Centre Street Partnership L.P.*, No 23-ap-9001 (Bankr. S.D. Tex.) (judgment entered June 14, 2023);
- *In re Serta Simmons Bedding, LLC*, No. 23-cv-2173 (S.D. Tex.) (motion to stay denied June 29, 2023);
- *Excluded Lenders* v. *Serta Simmons Bedding, LLC, et al.*, No. 23-20181 (5th Cir.) (judgment entered Dec. 31, 2024);
- *Citadel Equity Fund, Ltd.* v. *Serta Simmons Bedding, LLC, et al.*, No. 23-20363 (5th Cir.) (judgment entered Dec. 31, 2024);
- *Ad Hoc Group of Non-PTL Lenders, et al.* v. *Serta Simmons Bedding, LLC, et al.*, No. 23-20450 (5th Cir.) (judgment entered Dec. 31, 2024);
- *Excluded Lenders* v. *Serta Simmons Bedding, LLC*, No. 23-20451 (5th Cir.) (judgment entered Dec. 31, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Barings LLC, Boston Management and Research, Inc., Eaton Vance Management, Invesco Senior Secured Management, Inc., and UBS Asset Management (Americas) LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 125 F.4th 555 (App. 1a-62a). The order of the court of appeals denying rehearing is unpublished (App. 169a-172a). The bankruptcy court's order confirming the plan of reorganization is unpublished (App. 99a-168a), and the bankruptcy court's opinion explaining its rationale for that order is available at 2023 WL 3855820 (App. 63a-98a).

JURISDICTION

The court of appeals entered judgment on December 31, 2024. A timely petition for rehearing en banc was denied on February 18, 2025. App. 169a. On May 1, 2025, Justice Alito granted petitioners' application to extend the time to file this petition to and including June 18, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. 322a-331a.

INTRODUCTION

Chapter 11 bankruptcies often involve hundreds, if not thousands, of parties and billions of dollars. The bankruptcy here, for example—of the mattress manufacturer Serta Simmons Bedding, LLC—concerned several hundred creditors and had $2.3 billion dollars at issue. Given the stakes, the plans of reorganization that arise from such bankruptcy processes are carefully negotiated, hard-fought, and frequently subject to extensive litigation.

In bankruptcy court, a plan cannot be confirmed if any provision of it is deemed unlawful—a determination that is typically made following objections by creditors. 11 U.S.C. § 1129(a)(1)-(3). But if a plan is confirmed by the bankruptcy court over the objections of creditors and a material provision of the plan is later deemed unlawful on appeal, the question arises whether the appellate court can blue-pencil the plan, rewriting the parties' agreement itself to conform to the law, or instead must vacate the confirmation order and send the parties back to the drawing board.

In *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204 (2024), this Court ruled that an "essential" provision in a confirmed Chapter 11 bankruptcy plan was unlawful, reversed confirmation, and remanded for the parties to renegotiate the plan. *Id.* at 227; *id.* at 229 (Kavanaugh, J., dissenting). The Court thus substantially answered the question of remedy. But *Purdue Pharma* involved a confirmed plan that had been stayed pending appeal, and the Court cabined its holding to that circumstance, explicitly reserving the question "whether [its] reading of the bankruptcy code would justify unwinding reorganization plans that

have already become effective and been substantially consummated." *Id.* at 226.

This petition presents that follow-on question. Given the import of this remedial issue, which, as the Court has already recognized, is of vital significance to both debtors and creditors, as well as the courts reviewing confirmed bankruptcy plans on appeal, the Court should answer this outstanding question now.

The majority of circuits to address the issue, including the First, Second, Third, and Fourth Circuits, have concluded it is improper for an appellate court to rewrite a confirmed plan on appeal when a material provision is deemed unlawful without giving the parties a chance to renegotiate. But in a series of cases, the Fifth Circuit has reached the opposite conclusion—holding that it "may 'fashion whatever relief'" it deems "'practicable' for the benefit of appellants." App. 61a (quoting *In re Scopac*, 649 F.3d 320, 322 (5th Cir. 2011)). Thus, in this case, although the Fifth Circuit apparently recognized that an indemnity provision it deemed unlawful was material to the confirmed plan (the "Plan")—it credited the testimony of "multiple witnesses * * * that they would not have voted in favor of the plan without the settlement indemnity," App. 17a—it excised the indemnity from the Plan, rewriting the confirmed Plan without affording any creditor the opportunity to revote or renegotiate in light of the revision, App. 61a.

That decision cannot be squared with the Bankruptcy Code or established interpretive principles. The "Chapter 11 process relies on creditors and equity holders"—not courts—"to engage in negotiations toward resolution of their interests." *Bank of America National Trust & Savings Ass'n* v. *203 North LaSalle*

Street Partnership, 526 U.S. 434, 458 n.28 (1999). The Bankruptcy Code provides a carefully reticulated scheme whereby creditors negotiate their claims with the debtor, culminating in a plan of reorganization. The Code sets forth specific rules for solicitation and acceptance of creditor votes on a proposed plan. 11 U.S.C. § 1129(a)(7). Creditors must be afforded notice and the opportunity to accept or reject any modifications to a plan affecting their interests both before and after confirmation in bankruptcy court. *Id.* § 1127(a)-(d). Allowing an appellate court to do what a bankruptcy court cannot—materially rewrite a confirmed bankruptcy plan on its own without giving the creditors a chance to change their votes—runs afoul of the principles enshrined in the Bankruptcy Code.

The Fifth Circuit's approach also cannot be squared with standard principles of contract interpretation. A confirmed bankruptcy plan is treated as a contract between the debtor and its creditors. 8 Collier on Bankruptcy § 1142.04[2] (16th ed. 2025). When a court deems a contract provision unenforceable, it must conduct a severability analysis to determine whether the offending provision was critical to the parties' bargain, making the entire contract unenforceable, or whether the provision can be struck, leaving the remainder of the agreement in force. See Restatement (Second) of Contracts § 184 cmt. a (1981).

Courts addressing this remedial issue in the context of a confirmed bankruptcy plan have repeatedly looked to principles of severability, including the presence or absence of a severability clause in the plan, to determine whether a provision can be excised from the plan. The Fifth Circuit failed to conduct any such

analysis here, ignoring the many textual indicators of the indemnity's materiality to the Plan, including a nonseverability provision, as well as trial testimony and the findings of the bankruptcy court establishing that the indemnity was "essential to the Plan." App. 122a.

The Fifth Circuit thus has placed itself in conflict with the other circuits and at odds with the Bankruptcy Code. The question of what remedial relief an appellate court should enter when it holds a confirmed plan provision unenforceable is both recurring and important; its answer is critical to creditors and debtors alike in all bankruptcy cases. The Court should grant the petition.

STATEMENT

A. Statutory Background

"Under Chapter 11, the debtor can work with its creditors to develop a reorganization plan governing the distribution of the estate's assets; it must then present that plan to the bankruptcy court and win its approval." *Purdue Pharma*, 603 U.S. at 214. This system furthers Congress's view that creditors "are very often better judges of the debtor's economic viability and their own economic self-interest than courts." *Bank of America National Trust & Savings Ass'n*, 526 U.S. at 457 n.28. The negotiation process is "the essence of the formulation of any plan of reorganization." 7 Collier on Bankruptcy § 1127.03[1].

A "prerogative" of certain creditors is the ability to vote on a proposed plan. *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 207 (1988). To structure the voting process, Chapter 11 plans divide creditors into classes with "substantially similar" claims. 11 U.S.C.

§ 1122(a). The plan must "specify" whether each class is "impaired," *id.* § 1123(a)(2)-(3), meaning that the claims of those creditors are affected by the plan. Only holders of impaired claims are entitled to vote on whether a plan is approved.

The voting process typically begins with circulation of a disclosure statement, 11 U.S.C. § 1125(b), which must describe the consequences of the plan such that "a hypothetical investor of the relevant class [can] make an informed judgment about the plan," *id.* § 1125(a)(1). Once the bankruptcy court approves the disclosure statement, the proponent of the plan may solicit "acceptance or rejection" of it. *Id.* § 1125(b).

Although the plan proponent "may modify such plan at any time before confirmation," 11 U.S.C. § 1127(a), the proponent must distribute a new disclosure statement and call for another round of voting if a modification "adversely affect[s] the treatment of any creditor under the plan * * * in more than a purely ministerial, *de minimis* manner," 7 Collier on Bankruptcy § 1127.03[1][b].

The final step in a Chapter 11 bankruptcy is confirmation of the plan. "Once the bankruptcy court issues an order confirming the plan, that document binds the debtor and its creditors going forward." *Purdue Pharma*, 603 U.S. at 214. Section 1127(b) of the Code allows modifications after that point only if the modified plan is consistent with "section 1129," which contains the processes for creditor voting. 11 U.S.C. § 1127(b); see 11 U.S.C. § 1129(a)(7)-(8), (10). And modifications to a confirmed plan are permitted only "until substantial consummation of the plan." 7 Col-

lier on Bankruptcy ¶ 1101.02[1][a]. Substantial consummation occurs when the property proposed for transfer under the plan has been conveyed, the debtor has assumed management of the reorganized entity, and distributions to creditors have commenced in accordance with the plan's terms. 11 U.S.C. § 1101(2); see Karen Visser, Chapter 11 Reorganizations § 15:10 (2d ed. 2025) (substantial consummation is "[a] term of art unique to bankruptcy").

B. The Present Controversy

1. Serta Simmons Bedding, LLC is an American manufacturer of mattresses and other bedding products. App. 3a. In 2016, Serta entered into a credit agreement with various lenders. That agreement generally required loan payments to be made to each lender pro rata, but it carved out payments made via Serta's repurchase of its own debt through "open market purchases," a term undefined by the credit agreement. In 2020, as COVID-19 threatened Serta's financial health, the company solicited lenders for a debt reduction transaction. The two best offers proposed that Serta lower its debt load through open market purchases of its debt at a discount.

Serta eventually chose the proposal offered by a group of lenders that included lenders managed by petitioners here ("Petitioning Lenders"). Under that proposal, Serta received $200 million in new financing, see Record on Appeal at 24520, *Citadel Equity Fund, Ltd.* v. *Serta Simmons Bedding, LLC*, No. 23-20363 (5th Cir.) ("CA5 ROA"), and purchased $1.2 billion of the lenders' existing 2016 loans with $875 million in new, superiority loans, *id.* at 23267. Serta and the Petitioning Lenders signed a credit agreement

governing those new, superpriority loans that, among other things, indemnified the lenders receiving the loans for "all losses, claims, damages and liabilities" arising from the transaction. *Id.* at 24642-43.

Both the unsuccessful lender group, led by Apollo and Angelo Gordon (the "Competing Lenders"), and LCM, who had not participated in the transaction or the preceding negotiations, immediately challenged the transaction. Between 2020 and 2022, they filed four lawsuits arguing, among other things, that the transaction was an improper use of the open market purchase provision of the 2016 credit agreement. See *North Star Debt Holdings, L.P.* v. *Serta Simmons Bedding, LLC*, No. 652243/2020 (N.Y. Sup. Ct.); *LCM XII Ltd.* v. *Serta Simmons Bedding, LLC*, No. 20-cv-5090 (S.D.N.Y.); *LCM XXII Ltd.* v. *Serta Simmons Bedding, LLC*, No. 21-cv-3987 (S.D.N.Y.); *AG Centre Street Partnership L.P.* v. *Serta Simmons Bedding, LLC*, No. 654181/2022 (N.Y. Sup. Ct.).

In 2022, Serta contacted multiple lenders to engage in restructuring discussions. Serta entered negotiations with a group led again by the Petitioning Lenders. After months of diligence sessions and term-sheet exchanges, CA5 ROA 1309, Serta decided to file for Chapter 11 bankruptcy, and Serta and the negotiating creditors agreed on a proposed plan of reorganization. Serta filed its Chapter 11 petition and the proposed plan in January 2023. *Id.* at 4232-36 (petition), 4658-4717 (plan). The proposed plan placed holders of the superpriority loans issued in 2020 in Classes 3 and 4, while the remaining holders of the 2016 loans were placed in Class 5. *Id.* at 15698-99.

To protect the Petitioning Lenders against the continuing litigation challenging the 2020 transaction, the initial plan proposed that the 2020 credit agreement's indemnity would "survive [bankruptcy] unimpaired and unaffected." CA5 ROA 4699. In addition, Serta and the lenders supporting the plan initiated an adversary proceeding to resolve whether the 2020 transaction constituted an open market purchase under the 2016 agreement. *Id.* at 4922-48.

At summary judgment in the adversary proceeding, the bankruptcy court ruled that the 2020 transaction was an "open market purchase" permitted by the contract. CA5 ROA 2327-29. But the court held for trial the question whether the transaction violated the implied covenant of good faith and fair dealing. *Ibid.*

Before the joint trial on that claim, the defendants' counterclaims and third-party claims, as well as confirmation of the plan, the solicitation agent announced that 98.65% of Class 3 and 97.97% of Class 4 had voted in favor of the plan. App. 83a. Other creditors objected that the indemnity provision was a contingent claim disallowed by 11 U.S.C. § 502(e). In response, Serta modified the indemnity to cover only members of Classes 3 and 4, which constituted all holders of the superpriority loans issued under the 2020 credit agreement who were entitled to receive consideration in exchange for their claims under the plan. CA5 ROA 18748.

At trial, proponents of the plan testified about the importance of the indemnity provision, which the Petitioning Lenders viewed as critical given the ongoing suits and potential liability from the 2020 transaction.

Witnesses from the Petitioning Lenders uniformly testified that they would not have voted in favor of the plan absent the indemnity. CA5 ROA 3424:22-3454:4, 3477:20-23, 3514:15-17, 3551:1-3. One of Serta's independent directors testified similarly: "[I]f we did not do the indemnity today, I don't think we would have a confirmable plan." *Id.* at 3223:1-3.

The plan contained multiple terms protecting the voting rights of the supporting creditors and confirming the interdependency of its provisions, including the indemnity. A nonseverability provision specified that upon confirmation, "each term and provision of the Plan" shall be treated as "(a) valid and enforceable * * * (b) integral to the Plan * * * and (c) nonseverable and mutually dependent." App. 315a. The plan also expressly stated that any modifications were "[s]ubject to the applicable consent rights of the Requisite Consenting Creditors," *i.e.*, a majority of those lenders holding superpriority loans who had accepted the plan. App. 313a, 207a. Similarly, execution of the plan documents containing the indemnity, which were also subject to the "approval" of the Consenting Creditors, App. 183a, 186a, was a condition precedent to the plan's effectiveness, App. 286a.

After trial, the bankruptcy court confirmed the Plan, holding that the indemnity was "essential" and "an integral part" of the Plan. App. 122a. The court also reiterated its summary-judgment decision that the 2020 transaction was an open market purchase. App. 91a-92a.

The Competing Lenders and Citadel Equity Fund Ltd. ("Citadel"), a holder of Class 4 loans who objected to the indemnity provision in the Plan, appealed the

confirmation order. The bankruptcy court certified that order for direct appeal to the Fifth Circuit. CA5 ROA 26215; see 28 U.S.C. § 158(d)(2)(A). All parties jointly certified the bankruptcy court's final judgment for direct appeal. CA5 ROA 26214. The Fifth Circuit consolidated the various appeals, including separate appeals from the adversary proceeding, for oral argument.

Meanwhile, Citadel and the Competing Lenders sought stays of the confirmation order before the bankruptcy court, the district court, and the Fifth Circuit. All three courts denied those requests. CA5 ROA 3959-60 (bankruptcy court), 4076-95 (district court), 4108-09 (Fifth Circuit). The Plan became effective on June 29, 2023, and was substantially consummated on the same day.

2. A Fifth Circuit panel reversed the bankruptcy court's conclusion that the indemnity was permissible under the Bankruptcy Code. The panel reasoned that claims based on the 2020 indemnity were contingent claims for reimbursement disallowed by 11 U.S.C. § 502(e)(1)(B). App. 53a. The panel then concluded that the Plan's indemnity, though distinct from the 2020 indemnity with regard to the lenders indemnified and the time period covered, was, "for all intents and purposes, the same as or similar to that which was disallowed before." App. 57a. Although Serta and the Petitioning Lenders argued the indemnity was authorized as part of a settlement of the claims of Classes 3 and 4 under 11 U.S.C. § 1123(b)(3)(A), the panel disagreed, concluding that the provision "does not affirmatively provide for the back-end resurrection of claims already disallowed on the front end." App. 55a.

Alternatively, the panel also concluded that the settlement violated the equal-treatment requirement of 11 U.S.C. § 1123(a)(4). App. 59a.

As the remedy for this violation, the panel chose "to excise the offending indemnity" from the Plan. App. 61a. The panel determined that it could enter this "surgica[l]" relief "without unwinding the entire Plan and triggering a whole new confirmation proceeding." App. 48a. At no point did the panel consider, consult, or cite the Plan's provisions that prohibited piecemeal modifications of the Plan without input from the supporting creditors. And although the panel credited testimony from the Petitioning Lenders "assert[ing] that they would not have voted in favor of the plan without the [plan] indemnity," App. 17a, the panel did not consider or even mention that testimony in analyzing whether excision was an appropriate remedy.

In the appeals from the adversary proceeding, the panel held that the "open market purchase" provision in the 2016 credit agreement did not encompass the 2020 transaction. App. 43a. With the indemnity stricken but Serta's plan of reorganization otherwise undisturbed, the Petitioning Lenders now face potential exposure to the Competing Lenders' claims for breach of the 2016 credit agreement—a potential liability the Petitioning Lenders had successfully bargained for Serta to take on as part of the negotiations over the Plan.

The panel denied rehearing, and the Fifth Circuit denied rehearing en banc. App. 172a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Fifth Circuit's decision conflicts with the decisions of its sister circuits. The First, Second, Third, and Fourth Circuits have all reasoned that appellate excision of a material provision in a consummated plan requires that the creditors revote on the plan. By contrast, the Fifth Circuit here excised a material plan provision, giving short shrift to the negotiating rights that are the "essence" of the Chapter 11 process. 7 Collier on Bankruptcy § 1127.03[1]. Only the Ninth Circuit has come close to the Fifth Circuit, though even it stopped short, merely concluding that some form of relief apart from revoting on a plan is theoretically possible.

This Court should grant certiorari to resolve the conflict among the circuits on the important question presented here. These courts—the First, Second, Third, Fourth, Fifth, and Ninth Circuits—accounted for about 91% of new bankruptcy appeals in 2024; thus, there is no need to wait for other circuits to address the issue. See Federal Judicial Center, U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding (Mar. 31, 2025), https://www.uscourts.gov/data-news/data-tables/2025/03/31/federal-judicial-caseload-statistics/b-1. Until this Court provides clarity, appellate courts will continue to struggle with what relief to enter when they find plan provisions unlawful, and bankruptcy parties will remain uncertain about the sanctity of their negotiated resolutions.

A. The "essence of the formulation of any plan of reorganization" is the negotiation process, which is enshrined in the Bankruptcy Code. 7 Collier on Bankruptcy § 1127.03[1]. A confirmed plan is "primarily the product of negotiations between the debtor and creditors." *Truck Insurance Exchange* v. *Kaiser Gypsum Co.*, 602 U.S. 268, 272 (2024). The "Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan." *Norwest Bank Worthington*, 485 U.S. at 207. Since the Code treats approval of a plan as the "prerogative" of creditors, that determination "is for the creditors to make in the manner specified by the Code." *Ibid.* "[C]ourts applying the Code must effectuate their decision." *Ibid.*

Given the high value accorded to the parties' negotiations, the majority of courts—including the First, Second, Third, and Fourth Circuits—have declined to materially modify a bankruptcy plan on appeal without giving the creditors a chance to revote in accordance with the Code.

For example, in *In re Charter Communications, Inc.*, 691 F.3d 476 (2d Cir. 2012), objectors, who had lost in bankruptcy court, asked the Second Circuit to rewrite a "prenegotiated" settlement between the debtor and its main creditor that was the "cornerstone" of the consummated plan. *Id.* at 480. Although the objectors argued that the Second Circuit could revise the settlement by "surgically excis[ing]" third-party releases and modifying payments under the settlement without unwinding confirmation, the Second Circuit rejected that proposal. *Id.* at 484. The court concluded that because the settlement was "critical to the bargain," "undoing" it "would cut the heart out of the reorganization," making "a quick, surgical change

to the confirmation order" impossible. *Id.* at 486. The settlement was "the product of an intense multi-party negotiation," and "removing a critical piece of [it] * * * would [have] impact[ed] other terms of the agreement." *Id.* at 485. Importantly, the compromising creditor might "not be willing to give up the benefit he received * * * without also reneging on at least part of the benefit he bestowed." *Id.* at 486. Necessarily, then, excising portions of the settlement would require the parties "to enter renewed negotiations" and "reopened" bankruptcy proceedings. *Id.* at 486 & n.5.

Other circuits have agreed. In *In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015), the Third Circuit concluded that severing a settlement that was "a central issue in the formulation of [the] plan" and a "crucial component" of the consummated plan would "recall the entire Plan for a redo." *Id.* at 274, 280-81. And the Third Circuit applied the "same reasoning from *Tribune* * * * with great force" in *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019). There the court rejected the argument that it could revise a consummated plan by striking "essential" third-party releases "only as to [the objector]." *Id.* at 141-42. The Third Circuit explained that given the centrality of the releases to the plan's funding, such excision would cause the "plan to collapse," necessitating a "do-over." *Ibid.*[3]

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[3] In *Purdue Pharma*, this Court abrogated *Millennium*'s holding that the Code allows nonconsensual releases of claims against third-party debtors. See 603 U.S. at 214 n.1. But *Purdue Pharma* did not disturb *Millennium*'s analysis regarding excision; rather, in *Purdue Pharma* (although it did not involve a substantially consummated plan, as in *Millennium* and this

The Third Circuit further observed that judicial blue-penciling of the releases in *Millennium* would unfairly upend the parties' negotiations. Under the proposed revisions, the objector "would receive a windfall—at the substantial and uncompensated expense of [other parties]—if [the court] were to let it avoid the release provisions without requiring it to return the value it obtained through the reorganization." 945 F.3d at 143. In other words, the objector wanted "all of the value of the restructuring and none of the pain." *Ibid*. The resulting inequity was yet another reason why it was inappropriate for the court to simply rewrite the settlement without unwinding the plan.

The First Circuit in *In re Financial Oversight & Management Board for Puerto Rico*, 989 F.3d 123 (1st Cir. 2021), likewise concluded that it could not rewrite a plan on appeal without sending the parties back to the drawing board. At issue in *Puerto Rico* were debtor releases that objecting creditors sought to strike from the consummated plan. *Id.* at 128-29. But the First Circuit ruled that those releases were "a fundamental component of the Plan" and part of the "compromises and settlements * * * inextricably interwoven" in the plan, which "all hinge[d] on one another." *Id.* at 133. As a result, the court could not simply "tweak" the plan nor "compel" the debtor "to accept the Plan without the release of all claims against it." *Ibid.* Rather, the only decision on appeal

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case), the Court agreed with the Third Circuit—invalidation of the third-party releases necessitated a redo of confirmation. *Id.* at 227.

was an "up-or-down" vote: "affirm" the plan as negotiated or "vacate Plan approval," unwinding the plan and reopening confirmation proceedings. *Ibid.*

Similarly, in *In re U.S. Airways Group, Inc.*, 369 F.3d 806 (4th Cir. 2004), the Fourth Circuit agreed that material modifications to a consummated plan on appeal require a revote by creditors. The appellant there sought to reverse the termination of a pension plan that was "a necessary condition" to confirmation of the bankruptcy plan. *Id.* at 811. Reversal "would essentially 'unsatisfy'" the condition. *Ibid.* Once that occurred, "other parts of the plan would have to be reconfigured," and those changes would require "approval by [the debtor]'s lenders." *Ibid.*

All of these circuits thus have recognized that it is improper to make material changes to a confirmed plan without giving the parties a chance to renegotiate. Although these decisions went on to apply the doctrine of equitable mootness because the courts were ultimately hesitant to disturb confirmation, the appropriate remedy if a plan provision is deemed invalid is a threshold question that arises irrespective of equitable mootness considerations. It suffices that these other circuits declined to blue-pencil a confirmed plan; the Court need not address whether the next step, after concluding that it is improper to rewrite a confirmed plan on appeal, is to dismiss under the equitable mootness doctrine or vacate for a revote.

B. Against that backdrop, the Fifth Circuit has taken the opposite position, holding that it is appropriate to excise material portions of a plan on appeal without sending the plan back for a new vote. App. 61a-62a. In the Fifth Circuit's view, it can "fashion

whatever relief" it deems "practicable" "[o]n review of a confirmed plan," without affording the parties the opportunity to redo confirmation. App. 61a (quoting *In re Scopac*, 649 F.3d 320, 322 (5th Cir. 2011), and *In re Pacific Lumber Co.*, 584 F.3d 229, 241 (5th Cir. 2009)). Thus, the Fifth Circuit in this case rejected contentions that it could not "excise the indemnity" challenged by objectors "without unwinding the entire Plan and triggering a whole new confirmation proceeding." App. 48a. Instead, under the Fifth Circuit's approach, an appellate court can blue-pencil confirmed plans as it sees fit.

Unlike the other circuits, the Fifth Circuit dismissed concerns about upsetting the parties' careful negotiations or imposing a plan that neither the debtor nor creditors created. The Fifth Circuit below was untroubled "about depriving a creditor of the benefits of its bargain," because it viewed plan revisions as a natural consequence of appeal. App. 51a. Thus, although the court observed that "multiple witnesses * * * asserted that they would not have voted in favor of the plan without the settlement indemnity," App. 17a, the court concluded that an adverse appellate result should have been "foreseeable to them as sophisticated investors," App. 52a. And the Fifth Circuit rejected arguments that it was "unfair for t[he] court to excise the indemnity [on appeal] without letting [the parties] go back to the drawing board," or that the court "cannot excise specific provisions but must let the parties go back to square one." App. 50a-51a.

Instead, the court viewed Fifth Circuit precedent as requiring "just the opposite"—"explicitly rejecting

the notion that the court cannot surgically excise certain provisions rather than unravel the entire plan." App. 48a (citing *In re Highland Capital Management, L.P.*, 48 F.4th 419, 430 (5th Cir. 2022)); see *ibid.* ("our precedents does [sic] not indicate that the remedy of excision requires" "the unraveling of the Plan"). Thus, the Fifth Circuit built on its earlier decisions holding it proper to excise provisions from confirmed plans on appeal without triggering a revote. See *Highland Capital Management*, 48 F.4th at 430-31, 438 (rewriting exculpation provisions, despite arguments that the altered "provisions [were] 'integral to the consummated plans'"); *Pacific Lumber*, 584 F.3d at 252-53 (striking "non-consensual non-debtor releases" while rejecting arguments that "release clause [was crucial] part of [the parties'] bargain"). Accordingly, the Fifth Circuit here chose "to excise the offending indemnity" without offering a revote. App. 61a.

The Fifth Circuit's approach cannot be reconciled with that of the First, Second, Third, and Fourth Circuits. The Fifth Circuit engaged in precisely the kind of "quick, surgical change" that the Second Circuit rejected in *Charter Communications*, 691 F.3d at 486, and the material "tweak" that the First Circuit rejected in *Puerto Rico,* 989 F.3d at 133. Unlike the Fifth Circuit, these other circuits have held that material modifications require a "do-over" of confirmation, *Millennium*, 945 F.3d at 141, including obtaining the requisite "approval" from lenders, *U.S. Airways Group, Inc.*, 369 F.3d at 811.

C. Only the Ninth Circuit has come close to the Fifth Circuit's position. In *In re Transwest Resort Properties, Inc.*, 801 F.3d 1161, 1171-73 (9th Cir.

2015), the Ninth Circuit concluded that it was theoretically possible to "devise" "potential options for relief * * * that could be provided without unravelling the plan," including modifying a plan provision or imposing monetary remedies. Nonetheless, the Ninth Circuit did not impose such a remedy itself but remanded for the district court to consider the merits of the claims. *Id*. at 1173. And elsewhere, the Ninth Circuit has recognized that by "knocking the props out from under the plan," material modifications to a confirmed plan "would require * * * a new vote on the plan." *In re CPESAZ Liquidating, Inc.*, 2023 WL 7411536, at *1 (9th Cir. Nov. 9, 2023).

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The circuits are divided over whether a revote is required when a court materially modifies a plan on appeal—and the Fifth Circuit stands as an outlier against the considered jurisprudence of four circuits, which, combined with the Fifth Circuit, hear the majority of bankruptcy appeals. The Court should resolve this fundamental dispute over the proper appellate remedies on review of a consummated bankruptcy plan.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG.

Review is also warranted because the decision below defies the Code and established legal interpretive principles and deprives creditors of the vote that is the heart of the Chapter 11 reorganization process. That process is designed to "brin[g] all interested parties to the bargaining table and encourag[e] them, against the background of insolvency law, to work out a plan of reorganization with which they all can live." *LaSala* v. *Bordier et Cie*, 519 F.3d 121, 136 (3d Cir.

2008). Under the Fifth Circuit's approach, however, an appellate court can excise an essential provision of that plan and bind creditors to what remains of the plan, without affording them the opportunity to renegotiate or revote on the reworked plan.

That is wrong. Both the Bankruptcy Code and background principles of contract law protect parties from being subjected against their will to a bargain materially different from the one to which they agreed. Courts should not be permitted to blue-pencil a confirmed plan on appeal.

A. The Decision Below Conflicts With The Bankruptcy Code's Mandate To Secure Creditor Assent To Material Plan Modifications.

The decision below sits sharply at odds with the Bankruptcy Code's carefully calibrated voting system for Chapter 11 plans, which empowers creditors to approve or reject material changes to the plan. Under the Code, a plan cannot be confirmed unless a sufficient share of the creditors accepts it. See 11 U.S.C. § 1129(a)(7)-(10); see also *id.* § 1126(c)-(d). And the Code protects the negotiating rights of the parties by providing that creditors have a right to vote on material changes to the plan made in bankruptcy court.

After a plan has been proposed but before it has been confirmed, material modifications to the plan must receive sufficient affirmation from impacted creditors. Under the Code, a plan's proponent "may modify such plan at any time before confirmation," 11 U.S.C. § 1127(a), but a pre-confirmation modification that would "adversely change the treatment" of a creditor's claim requires notice to the affected creditors

and their assent to the modification, Fed. R. Bankr. P. 3019(a); see 11 U.S.C. § 1127(c)-(d). In other words, a modification that "materially and adversely affects the treatment of a class of claim or interest holders" cannot occur unless those creditors receive "a new disclosure statement and another opportunity to vote." *In re America-CV Station Group, Inc.*, 56 F.4th 1302, 1305 (11th Cir. 2023); accord 7 Collier on Bankruptcy ¶ 1127.03[1].

The rule for post-confirmation modifications is similar. In bankruptcy court, a plan may be modified after confirmation and before substantial consummation of the plan—but "only if * * * the court, after *notice and a hearing*, confirms such plan as modified[] under section 1129." 11 U.S.C. § 1127(b) (emphasis added). And Section 1129 sets forth the various voting rules that must be satisfied before confirmation. See *id.* § 1129(a)(7)-(10). By incorporating those rules, Section 1127 requires that the party seeking to modify the plan provide creditors with an opportunity to vote on the change, and that the modified plan attain the same degree of creditor buy-in required to confirm a Chapter 11 plan in the first place. See *In re FCX, Inc.*, 853 F.2d 1149, 1156 (4th Cir. 1988); 11 U.S.C. § 1127(d). After substantial consummation, if the debtor is a business, a plan cannot be materially modified in bankruptcy court at all. See 11 U.S.C. § 1127(b), (e).

A bankruptcy court can confirm a plan only if it finds that the plan is lawful and lawfully proposed. 11 U.S.C. § 1129(a)(1)-(3). Thus, when a bankruptcy court deems a plan provision unlawful (unless the plan itself provides for excision, see *infra* Part II.B), the only remedy is for the court to deny confirmation,

sending the parties back to the drawing board to restart the solicitation and acceptance process all over again. See 11 U.S.C. § 1129(a)(7)-(10); 9A Collier on Bankruptcy § 3020.02[3] ("At a confirmation hearing, the court must verify that the plan meets each of the tests prescribed by section 1129 of the Code[.]").[4]

The decision below undercuts these carefully reticulated provisions—with which it never engaged. Under the Fifth Circuit's rule, a court can reconfigure the parties' bargain by invalidating a key provision of a plan and holding the parties to the reconstituted plan against their will—even though the excised provision was essential to securing the agreement. And although the Plan here was the product of the painstaking "negotiations between the debtor and [its] creditors" that are integral to the Chapter 11 process, *Truck Insurance Exchange*, 602 U.S. at 272, the decision below afforded creditors no opportunity to renegotiate or rescind their acceptance of the materially altered plan the Fifth Circuit devised. Far from considering the voting rights of supporting creditors, the Fifth Circuit concluded that their rights were irrelevant because they were parties to the appeal and

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[4] *E.g.*, *In re Green Pharmaceuticals, Inc.*, 617 B.R. 131, 138 (Bankr. C.D. Cal. 2020) (denying confirmation because plan provision was unlawful); *In re Homitz*, 2014 WL 3721998, at *4 (Bankr. W.D. Pa. July 24, 2014) (same); *In re Irving Tanning Co.*, 496 B.R. 644, 659 (B.A.P. 1st Cir. 2013) (affirming denial of confirmation based on unlawful plan provision); *In re Mayslake Village-Plainfield Campus, Inc.*, 441 B.R. 309, 323 (Bankr. N.D. Ill. 2010) (denying confirmation because plan provision was unlawful)); *In re Bush Industries, Inc.*, 315 B.R. 292, 308 (Bankr. W.D.N.Y. 2004) (same); *In re Shin*, 306 B.R. 397, 414-15 (Bankr. D.D.C. 2004) (same); *In re Birdneck Apartment Associates, II, L.P.*, 156 B.R. 499, 506 (Bankr. E.D. Va. 1993) (same).

could have "foresee[n] the adverse consequences of an unfavorable appellate ruling." App. 52a; see App. 47a (highlighting that the creditors "are present" in the appeal).

That outcome is fundamentally at odds with the Code, which preserves a creditor's right to withdraw support if a plan is modified. Although Section 1127's express terms "d[o] not place any limit on the power of the court of appeals," "the reasons underlying" the Code's protections for the voting rights of creditors cannot be reconciled with the Fifth Circuit's approach. *In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (Easterbrook, J.). Indeed, it would be a strange result if a plan could be modified prior to substantial consummation in bankruptcy court only with the consent of the creditors, but an appellate court could impose an identical modification after consummation years later without affording the creditors any opportunity to revote. The Fifth Circuit's rule "make[s] an end run around" the Code, allowing "monkey wrenches" to be thrown "into the proceedings" that bulldoze the parties' painstaking negotiations. *Holstein* v. *Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993).

The proper approach instead is for an appellate court to follow the process prescribed in the Bankruptcy Code and the same approach that this Court applied in *Purdue Pharma*. See 11 U.S.C. § 1129(a)(1)-(2); *Purdue Pharma*, 603 U.S. at 227. If an appellate court deems a material plan provision invalid, then it should not rewrite the plan on its own and uphold confirmation; the only options on appeal are to affirm the plan as written or vacate plan confirmation and send the parties back to renegotiate an appropriate plan. See *Puerto Rico*, 989 F.3d at 133.

B. The Fifth Circuit's Rule Runs Afoul Of Bedrock Severability Principles.

The decision below is also incorrect for another reason: It contradicts the contract-law principles undergirding the Bankruptcy Code, which provide that a contract cannot be enforced if a material term is invalid. Applied to the Chapter 11 context, those principles require a court to determine whether an unenforceable provision is essential to the plan and, if it is, to declare the entire plan unenforceable and send the parties back to the drawing board.

Because the Bankruptcy Code is designed to protect and effectuate the parties' negotiations, a confirmed bankruptcy plan is treated as a contract between the debtor and its creditors. 8 Collier on Bankruptcy § 1142.04[2] ("After confirmation, the plan and any agreements necessary to effectuate the plan essentially function as contracts between the debtor and the other parties to them."); *JCB, Inc.* v. *Union Planters Bank, NA*, 539 F.3d 862, 870 (8th Cir. 2008) ("Once confirmed, a Chapter 11 plan acts as * * * a contract which binds the parties."). Thus, courts—including the Fifth Circuit—regularly "follo[w] principles of contract interpretation to interpret a confirmed plan of reorganization." *In re FFS Data, Inc.*, 776 F.3d 1299, 1304 (11th Cir. 2015); accord, *e.g.*, *In re Conco, Inc.*, 855 F.3d 703, 711 (6th Cir. 2017); *In re Advisory Committee of Major Funding Corp.*, 109 F.3d 219, 222 (5th Cir. 1997).

Among the "general contract principles" that inform the interpretation of a Chapter 11 plan, *In re Baroni*, 36 F.4th 958, 967 (9th Cir. 2022), is the rule

that courts reviewing a contract will not impose an entirely new bargain on the parties before them. Because a "refusal to enforce only part of the agreement will necessarily result in some inequality," if the unenforceable provision is "essential," "the inequality will be so great as to make the entire agreement unenforceable." Restatement (Second) of Contracts § 184 cmt. a (1981). Thus, if a court determines that a provision of a contract is unenforceable, the court conducts a severability analysis to determine whether the invalid provision is "an essential part of the agreed exchange." *Id*. § 184(1); see, *e.g.*, *Ronderos* v. *USF Reddaway, Inc.*, 114 F.4th 1080, 1099-100 (9th Cir. 2024) (courts assess whether a provision goes to "the central purpose of the contract" (citation omitted)); *Spinetti* v. *Service Corp. International*, 324 F.3d 212, 222 (3d Cir. 2003) ("severability of contract provisions" depends on whether the provisions "constitut[e] the primary or essential purpose" of the contract). Where a contract is not severable, the parties get sent back to the drawing board; the court does not create a contractual chimera to bind the parties.

In evaluating severability, courts often consider the presence (or absence) of a severability clause, which provides "one indication that a particular term was important to the bargaining parties." *Charter Communications*, 691 F.3d at 485. Other textual indicia, including the structure of the agreement and the relationships between its provisions, can also provide critical clues—since the best evidence of the parties' understanding is the text to which they agreed. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 29-30 (2012) (explaining that contracts "express the parties' intent in

a binding form"; "intent is * * * derived * * * from the words of the text"; and "words are given meaning by their context"). Beyond the text of the agreement itself, courts have also evaluated witness or documentary testimony. *E.g.*, *Charter Communications*, 691 F.3d at 486 (considering witness testimony "representing that [certain plan provisions] were important" to the negotiating parties).

These bedrock severability principles compel courts to respect the plan the parties negotiated, not impose a judicially-crafted reorganization. That is exactly what the circuits in conflict with the Fifth Circuit have correctly reasoned.

Thus, in *Puerto Rico*, the First Circuit held that the only remedial option was an "up-or-down decision * * * affirm or vacate Plan approval," by relying on a nonseverability provision stating that the challenged provisions "constitute an essential component of the compromises reached and are not severable from the other provisions of this Plan," as well as the lower court's finding that the "compromises and settlements [in the plan] are inextricably interwoven." 989 F.3d at 132-33. Similarly, in *Charter Communications*, the Second Circuit looked both to a "nonseverability clause" in the plan and to witness testimony regarding the importance of the challenged provisions, before concluding that "a quick, surgical change to the confirmation order" was impossible, and the parties "would have to enter renewed negotiations." 691 F.3d at 485-86. And the Third Circuit in *Millennium* relied both on a "[non]severability provision" making the plan's funding "contingent" on third-party releases, and on the bankruptcy court's finding that the releases "were essential to the plan," to hold that

excision of the releases "would undermine the fundamental basis for the parties' agreement," necessitating a "do-over of the plan." 945 F.3d at 141.

In contrast, where a confirmed plan included an express severability clause, which provided that the plan "would remain in effect" if "*any* provision" in the plan was "determined to be unenforceable," and the debtor failed to prove the import of a challenged release provision, the Fourth Circuit concluded that the challenged provision was "not essential." *National Heritage Foundation, Inc.* v. *Highbourne Foundation*, 760 F.3d 344, 349 (4th Cir. 2014). It could thus be severed from the plan. See *ibid.*[5]

The decision below wholly disregarded the bedrock principles these courts have faithfully applied. Although the Fifth Circuit credited the testimony of "multiple witnesses * * * that they would not have voted in favor of the plan without the settlement indemnity," App. 17a, and took at face value Petitioning Lenders' contention that they "agreed to support the Plan only because of the settlement indemnity," App. 50a, the court failed to conduct a severability analysis. It considered neither the express text of the Plan, nor the evidence regarding the importance of the indemnity, before remarking that "excision does not toll doom for the Plan," and concluding, based on its precedent, that it could excise the indemnity forthwith. App. 48a-49a, 61a.

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[5] It is precisely in this scenario, where the plan itself provides guidance, that a court can confidently sever provisions, while leaving the remainder of the plan enforceable between the parties.

In actuality, Serta's Plan—like those in *Millennium* and *Puerto Rico*—expressly stated that every provision was "nonseverable and mutually dependent." App. 315a. The Plan further provided, similar to the conditions in the plans in *Millennium* and *U.S. Airways*, that execution of the plan documents, which included the indemnity, and the bankruptcy court's entry of a confirmation order "in form and substance acceptable to the Requisite Consenting Creditors," were "conditions precedent" to consummation of the Plan. App. 286a-288a; see *U.S. Airways Group, Inc.*, 369 F.3d at 811. Moreover, the Plan stated that any modification "permitted by law" remains "[s]ubject to the applicable consent rights of the Requisite Consenting Creditors," App. 313a, underscoring that creditors should be given a chance to withdraw their consent after judicial modification.

The uncontroverted trial evidence—including testimony from both Serta and the supporting creditors—was that the indemnity was crucial to the Plan. CA5 ROA 3223:1-3, 3424:22-3454:4, 3477:20-23, 3514:15-17, 3551:1-3. Accordingly, the bankruptcy court found, "based upon the record" and the "evidence presented," that the indemnity was "an integral part" of the Plan, "essential to the Plan," and "necessary to implement the Plan." App. 122a. And it further found that the "provisions of the Plan * * * are nonseverable and mutually dependent," App. 150a, and that the "compromises" and "settlements" "in the Plan," including the indemnity, "are nonseverable from each other and from all other terms of the Plan," App. 141a.

The Fifth Circuit's decision to ignore both the text of the Plan and the bankruptcy court's evidentiary findings not only conflicts with the approach of the

other circuits, but makes a mockery of the parties' extensive negotiations. At minimum, before ordering excision and refusing to let the parties "go back to the drawing board," App. 50a, the Fifth Circuit should have conducted a severability analysis to evaluate the importance of the indemnity to the Plan. Had the Fifth Circuit properly analyzed the remedial question, it should have held that the centrality of the indemnity provision meant that the Plan could not be enforced without it—requiring the parties to negotiate a new plan.

* * *

The Code and contract law compel the same result: An appellate court may not strike material provisions from a Chapter 11 plan without affording the creditors an opportunity to vote on the revised plan. In holding otherwise and blessing the judicial rewriting of carefully brokered agreements between debtors and creditors, the Fifth Circuit undermined the "requirement for informed suffrage which is at the heart of Chapter 11," *In re Lionel Corp.*, 722 F.2d 1063, 1066 (2d Cir. 1983), and threatened the ability of parties to effectively engage in the negotiations that "[t]he Bankruptcy Code seeks to facilitate," *America-CV*, 56 F.4th at 1308; accord *Trantham* v. *Tate*, 112 F.4th 223, 239 (4th Cir. 2024) (Wilkinson, J., concurring) ("[n]egotiation and collaboration among numerous parties" are "an essential ingredient in the bankruptcy process" (citation omitted)).

III. THIS CASE SQUARELY PRESENTS A SIGNIFICANT AND RECURRING QUESTION.

The question presented here is critical to bankruptcy appeals, and its answer will have significant ramifications for how creditors and debtors negotiate

and structure Chapter 11 reorganization plans. This case provides an appropriate vehicle to address the issue, since the uncontroverted evidence was that the indemnity provision was a *sine qua non* for the Plan, and the Fifth Circuit erroneously imposed a plan on the parties that they did not craft.

A. The Question Presented Is Important.

As high-stakes bankruptcies continue to capture headlines,[6] the question of what relief courts can order in bankruptcy appeals has assumed vital significance, making it imperative for this Court to provide a single, clear rule. Chapter 11 plans, like the Plan here, often include hundreds of provisions, all carefully negotiated between the debtor and hundreds of its creditors. As occurred here, nonconsenting creditors frequently challenge individual provisions, and courts need clarity regarding what relief to order when they deem a provision unlawful on appeal, but the plan has already been consummated.

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[6] See, *e.g.*, Jordan Valinsky, *Rite Aid Files for Bankruptcy—Again*, CNN (May 5, 2025), https://www.cnn.com/2025/05/05/business/rite-aid-bankruptcy; Bhanvi Satija et al., *DNA Testing Firm 23andme Files for Bankruptcy as Demand Dries Up*, Reuters (Mar. 25, 2025), https://www.reuters.com/business/healthcare-pharmaceuticals/dna-testing-firm-23andme-files-chapter-11-bankruptcy-sell-itself-2025-03-24/; Kate Gibson, *Vodka Maker Stoli Group Files for Bankruptcy Protection in U.S.*, CBS News (Dec. 2, 2024), https://www.cbsnews.com/news/vodka-maker-stoli-group-bankruptcy/; Jordan Valinsky, *TGI Fridays Files for Bankruptcy*, CNN (Nov. 2, 2024), https://www.cnn.com/2024/11/02/food/tgi-fridays-bankruptcy/index.html; Ayana Archie, *The Boy Scouts Are Out of Bankruptcy and Will Pay $2.4 Billion to Sex Abuse Survivors*, NPR (Apr. 21, 2023), https://www.npr.org/2023/04/21/1171195077/boy-scouts-bankruptcy-survivors-fund.

The Court has already recognized the significance of the question presented here in its recent decision in *Purdue Pharma*—singling out and reserving the issue of whether invalidation of a confirmed plan provision on appeal "justif[ies] unwinding reorganization plans that have already become effective and been substantially consummated." 603 U.S. at 226. And while *Purdue Pharma* suggested that courts should reverse confirmation when invalidating a key plan provision, *id.* at 227, the decision has only brokered confusion among the lower courts about how to address the issue, see, *e.g.*, *In re Murray Energy Holdings Co.*, 665 B.R. 347, 358 (Bankr. S.D. Ohio 2024) (*Purdue Pharma* "does not support unwinding a substantially consummated plan or nullifying an integral element of that plan"); *Mercy Health Network, Inc.* v. *Mercy Hospital*, 2025 WL 1000782, at *8 (N.D. Iowa Mar. 3, 2025) (same); *see also In re Boy Scouts of America*, 137 F.4th 126, 171 n.5 (3d Cir. 2025) (Rendell, J., concurring) (citing with approval *Purdue Pharma*'s language indicating that its rule would not apply to consummated plans).

This case is the natural follow-on to *Purdue Pharma*. There, the Court considered "a stayed reorganization plan" and reversed its confirmation after ruling third-party releases unlawful, remanding "for further proceedings," *i.e.* renegotiation of the plan, which is precisely what has occurred on remand. 603 U.S. at 226-27; see *In re Purdue Pharma L.P.*, 666 B.R. 461, 467 (Bankr. S.D.N.Y. 2024). Here, in contrast, the Fifth Circuit deemed an integral plan provision unlawful but excised it without vacating confirmation or remanding for a new creditor vote.

Purdue Pharma demonstrates that an appellate court that invalidates a plan provision should vacate confirmation, resulting in a redo, if confirmation of the plan has been stayed. But if, as the Fifth Circuit's decision requires, a different rule governs when no stay is awarded, the decision of whether to grant a stay may have dramatic consequences for confirmation and for what the plan looks like after appellate review. This disparity invites forum shopping and makes it critical for this Court to answer the question it raised in *Purdue Pharma*.

More generally, the conflict among circuits on the question presented has profound practical stakes for debtors and creditors seeking to negotiate restructuring plans. Both creditors and debtors must be able to negotiate with assurance that their deal will hold, or that they will be given the chance to renegotiate. After all, the "essence of the formulation of any plan of reorganization" is the negotiation process. 7 Collier on Bankruptcy § 1127.03[1].

If the Fifth Circuit's decision is allowed to stand, the result may not only be a plan that "turn[s] out to be too good a deal for the debtor's owners"—or for its creditors, depending on what imbalance is created by the excision. *Bank of America National Trust & Savings Ass'n*, 526 U.S. at 444. The negotiation process itself also will be hampered. Creditors will be incentivized to demand more from debtors to shore up their financial interests against the risk of having their chief concessions nullified on appeal. This will result in extended and more complex negotiations that keep debtors in bankruptcy for much longer.

That, in turn, will have consequential effects on debt markets, as multiple commentators remarked in the wake of the Fifth Circuit's decision. See, *e.g.*, Adam Levitin, *Serta Simmons Uptier: Implications*, Credit Slips (Jan. 2, 2025), https://www.creditslips.org/creditslips/2025/01/serta-simmons-uptier-implications.html (predicting that the indemnity ruling will have "far-reaching implications" for debt markets); James Nani & Alex Wolf, *Serta Debt Ruling Lobs 'Grenade' Into Restructuring Strategies*, Bloomberg (Jan. 3, 2025), https://news.bloomberglaw.com/bankruptcy-law/serta-debt-ruling-lobs-grenade-into-restructuring-strategies (similar). This Court's intervention is therefore essential to providing much-needed clarity and stability to debtors and creditors across the economy.

B. This Case Is An Excellent Vehicle For Addressing The Question Presented.

This case squarely and cleanly presents the issue of an appellate court's remedial power in the Chapter 11 context. That question is a purely legal one that was explicitly addressed by the Fifth Circuit and is case-dispositive here. And because the case went to trial in the bankruptcy court, it comes to this Court on a full factual record. There are no outstanding factual disputes or other vehicle issues that could complicate this Court's review. Had the Fifth Circuit conducted a severability analysis, the only conclusion it could have reached on this record was that the indemnity provision was integral to the parties' bargain, and so the Plan could not be enforced without it. See *supra* pp. 28-30.

Importantly, the Petitioning Lenders do not contest the authority of reviewing courts to hold plan provisions unlawful or question the propriety of the equitable mootness doctrine. Contra App. 50a-51a. If a court "cannot excise specific provisions but must let the parties go back to square one," appellate courts would not be "stripped of their jurisdiction," as the court below feared. App. 51a. Rather, where a severability analysis indicates that a plan provision is essential, courts should have a binary choice to "affirm or vacate Plan approval," as other circuits have correctly held. *Puerto Rico*, 989 F.3d at 133.

This case therefore presents an ideal opportunity to resolve the split among the courts of appeals on how to remedy an unlawful provision in a confirmed plan. Because the majority of circuits handling bankruptcy appeals already have addressed the issue in conflicting ways, there is no need to await further percolation in the lower courts. And because the Fifth Circuit relied on its own precedent to reach its conclusion and then declined to consider the issue en banc, there is every reason to think that the conflict among the circuits will persist unless this Court intervenes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MATTHEW D. MCGILL
Counsel of Record
JESSICA L. WAGNER
DAVID W. CASAZZA
CHRISTIAN DIBBLEE
LAVI M. BEN DOR
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 887-3680
MMcGill@gibsondunn.com

SCOTT GREENBERG
C. LEE WILSON
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166

GREGG J. COSTA
GIBSON, DUNN & CRUTCHER LLP
811 Main Street
Suite 3000
Houston, Texas 77002

Counsel for Petitioners

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