

IN THE
Supreme Court of the United States

SAMUEL BANKMAN-FRIED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**BRIEF OF BANKRUPTCY LAW PROFESSORS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE**

Amici are law professors who teach, research, and write about bankruptcy law and corporate reorganization. Their interest is in promoting the sound interpretation and effective administration of the Bankruptcy Code. *Amici* hope to preserve the balance Congress struck between the interests of debtors and creditors, and the economic value that collective administration protects.

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In submitting this brief, *amici* offer the bankruptcy context necessary to understand the problems with the trial court's approach, which the Second Circuit approved. Chapter 11 imposes several procedural hurdles before an unpaid creditor may recover. This

* No counsel for a party authored this brief in whole or part. No person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici*'s intention to file this brief.

brief explains why those hurdles matter when a prosecutor asks a jury to infer fraud from a debtor's nonpayment of creditors. It also addresses how the treatment of bankruptcy-related nonpayment can affect the incentives of managers deciding whether (or when) to file for bankruptcy. Those consequences extend well beyond this prosecution. The first question presented is therefore an important question of law that this Court should settle now.

SUMMARY OF ARGUMENT

Chapter 11 of the Bankruptcy Code lets a financially distressed business reorganize under court supervision rather than be dismantled by creditors one lawsuit at a time. Filing a petition immediately halts most collection efforts. *See* 11 U.S.C. § 362(a). The debtor's property becomes a bankruptcy estate, managed for creditors as a group. And creditors generally are paid only under a plan of reorganization that the bankruptcy court confirms. So creditors must often wait to get paid. That delay ordinarily is a feature—not a bug—of the bankruptcy process. It gives the parties time to assess the debtor's business and assets and divide them in an equitable, value-maximizing way.

But where criminal law and bankruptcy law collide, that delay risks prejudicing defendants. Without context, a jury could (wrongly) treat evidence that creditors have not *yet* been paid as proof that their money is gone forever. And a jury could further infer that the debtor's executives lied about the company's solvency and the safety of investing in the company. Those conclusions may be intuitive—they may also be wrong.

I. Filing a Chapter 11 petition begins a multi-step process. But taking that first step says nothing about what creditors eventually will recover. A company

may seek relief even when its assets exceed its liabilities—for example, because it lacks the cash to pay debts as they come due. An illiquid debtor may regain liquidity as it generates revenue from operations or as its assets are sold. The automatic stay and the rules governing distributions may prevent creditors from collecting even when a debtor accrues a large cash balance. And once the case begins, the estate’s fiduciaries—often new management—decide, under court supervision, when creditors get paid. Present nonpayment thus may reflect legal restrictions or an unfinished recovery process, not permanent loss.

But a jury cannot distinguish legal delay from permanent loss unless someone explains the difference. So if the prosecution offers a Chapter 11 debtor’s nonpayment of creditors as evidence that former executives lied, the defense must have a meaningful opportunity, subject to ordinary evidentiary limits, to explain what that nonpayment actually shows.

This is exactly the opportunity the district court denied petitioner Samuel Bankman-Fried. He was replaced as CEO of the cryptocurrency exchange FTX, which then filed for bankruptcy because, “at that time, it was unable to meet withdrawal requests from customers.” App. 4a. And nearly a year before the bankruptcy court confirmed a plan for paying creditors, he was tried on a fraudulent-inducement theory. Under that theory, which this Court later endorsed, the government need not prove that any victim lost money. *See Kousisis v. United States*, 605 U.S. 114, 118, 132 (2025). Even so, the district court permitted the government to call customers to testify that they never recovered their deposits, and to argue that billions of dollars were “gone.” Pet. 8-9. And it barred the de-

fense from introducing evidence that FTX and its affiliate Alameda, “while temporarily illiquid, held sufficient assets to ultimately make investors and customers whole.” App. 3a, 6a, 14a-15a. The Second Circuit affirmed, holding that evidence the money “was not accessible” went “to Bankman-Fried’s knowledge” of misappropriation, but that whether the assets “appreciated in value is irrelevant.” App. 14a-15a. Yet the court itself recognized that many victims “may be made whole.” App. 30a.

Nothing required the government to delay its prosecution until the bankruptcy wrapped up. *See* 11 U.S.C. § 362(b)(1). But when a criminal prosecution runs alongside a bankruptcy in process, the defendant must have the opportunity to present the jury with evidence of what that process entails.

II. The stakes of this case extend beyond criminal courtrooms to the boardrooms of distressed companies. Managers attempting to rescue a company on the brink often must express optimism about its prospects to keep customers and lenders from running. But when those rescue efforts fail, Chapter 11 may offer the best remaining means of preserving value.

The Second Circuit’s rule discourages managers from taking that step. Under it, managers must fear that a prosecutor will treat the nonpayment (or delayed payment) that is an ordinary part of the Chapter 11 process as evidence that they misled customers about the vitality of their company. They must also fear that a trial court may deny them the chance to rebut that inference with evidence of the true value of the debtor and its capacity to pay.

Bankruptcy scholarship long has recognized that managers, with individual incentives, may delay filing even when promptly seeking Chapter 11 protection

would better serve creditors. A rule that obscures the reasons for nonpayment exacerbates that problem. And the chief victims will be creditors, employees, and others who depend on preserving the debtor's value.

This Court should grant review of the first question presented to clarify when, if ever, a prosecutor may introduce evidence of financial loss in a fraudulent-inducement case that overlaps with a pending bankruptcy—and when a criminal defendant may respond in kind. That question will recur wherever a fraud prosecution runs alongside a Chapter 11 case. Resolving it now will protect the integrity of future criminal trials while supporting timely resort to Chapter 11.

REASONS FOR GRANTING THE PETITION

I. Evidence Of Nonpayment Is Uniquely Misleading When A Fraud Trial Overlaps With A Bankruptcy

A fraudulent-inducement prosecution does not require proof of net economic loss. *See Kousisis v. United States*, 605 U.S. 114, 132 (2025). But where (as here) the government offers financial-loss evidence to prove fraudulent intent, a parallel bankruptcy creates a distinctive risk of jury confusion. That is because the Bankruptcy Code distinguishes a debtor's *present* ability to pay from its *eventual* ability to satisfy claims. Filing under Chapter 11 does not establish that a company lacks recoverable assets. *See* 11 U.S.C. § 109(d). And nonpayment during bankruptcy may result from legal restrictions designed to preserve assets for collective administration. *See id.* § 362(a).

But a jury cannot be expected to intuit these points on its own. Reorganization under Chapter 11 can be enormously complex. *See* Jonathan C. Lipson & Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism: Purdue Pharma and the Problem of Social Debt*, 46

Cardozo L. Rev. 861, 920 (2025) (observing that “hundreds of words of dense legalese” accompanying a Chapter 11 ballot “were nearly impossible to understand”). A jury that hears creditors cannot access their funds therefore may conclude (understandably, but wrongly) that the creditors’ money is gone for good. From there, it is a short step to inferring (again understandably, but wrongly) that the assurances made by the debtor’s former executives—for example, that the company was stable and that creditor funds remained secure—must have been knowingly false.

This Court should grant the petition to clarify when financial-loss evidence may support that inference and what safeguards its admission requires. At minimum, it should confirm that a defendant must have a meaningful opportunity to rebut the inference the prosecution seeks to draw by offering evidence of where the bankruptcy proceeding stands and what losses (if any) creditors in fact sustained. That approach, which the Second Circuit rejected, respects both the rule that fraud is complete once the victim is induced to part with money and the obligation to guard against misleading the jury. *See Kousisis*, 605 U.S. at 127 n.5; Fed. R. Evid. 401, 403.

A. Filing For Chapter 11 Does Not Mean A Company Is Insolvent

Chapter 11 of the Bankruptcy Code provides the main legal mechanism for reorganizing troubled companies in the United States. Enacted in 1978, it seeks “to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.” *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (citing H.R. Rep. No. 95-595, at 220 (1977)). Individual collection efforts can force as-

set sales or dismantle a business, leaving less for creditors as a group. The Code therefore discourages creditors from “racing to the courthouse to dismember the debtor.” *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (quoting H.R. Rep. No. 95-595, at 177-78). Instead, it provides a collective forum to resolve creditor claims, serving both creditors’ private interests and the public’s interest in maintaining a functioning, value-generating economy. See Jonathan C. Lipson & David Skeel, *FTX’d: Conflicting Public and Private Interests in Chapter 11*, 77 Stan. L. Rev. 369, 387 (2025).

Chapter 11 permits relief to a wide range of companies in varying degrees of financial distress. An eligible debtor, see 11 U.S.C. § 109(d), may file so long as the petition serves a legitimate bankruptcy purpose, see *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119-22 (3d Cir. 2004) (requiring good faith and *some* degree of financial distress). Those purposes usually map onto the “two recognized policies” of Chapter 11: “preserving going concerns and maximizing property available to satisfy creditors.” *Bank of Am. Nat’l Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 453 (1999).

Understanding Chapter 11 thus requires distinguishing between three related concepts: liquidity, balance-sheet insolvency, and creditor recovery. Liquidity asks whether a business can meet its payment obligations “as they come due.” *In re Marshall*, 300 B.R. 507, 513 n.9 (Bankr. C.D. Cal. 2003). Balance-sheet insolvency asks whether the debtor’s debts exceed its property “at a fair valuation.” 11 U.S.C. § 101(32)(A). Creditor recovery asks how much value the bankruptcy estate will make available for distribution—and what portion a creditor will receive under

the applicable rules of priority and distribution. *See id.* § 1129(a)(7), (b)(2)(B). The three can diverge. A company can be solvent but illiquid. It can be insolvent when it files and solvent a year later. And even an insolvent company may repay much of what its creditors are owed.

A corporation need not be insolvent—that is, it need not have debts exceeding its assets, *see id.* §§ 101(32)(A), 109(d)—to seek Chapter 11 relief. (That distinguishes Chapter 11 from Chapter 9, which *does* impose an insolvency requirement on municipalities seeking to declare bankruptcy. *See id.* § 109(c)(3), (d).) Rather, an eligible corporation commences a voluntary Chapter 11 case simply by filing a petition, which constitutes an order for relief. *See id.* § 301(a)-(b). Corporations may take that step even where they have enough assets to cover all their liabilities—for example, because they face a short-term liquidity shortfall. “[E]ven solvent firms can, at times, suffer from financial distress.” *Integrated Telecom*, 384 F.3d at 122.

B. Even Insolvency At Filing Does Not Fix What Creditors Will Ultimately Recover

Even when a debtor is insolvent at filing, that insolvency does not fix creditors’ losses in amber. A balance-sheet shortfall may prove temporary. What creditors ultimately recover depends on the value realized and distributed through the bankruptcy.

An estate’s value is not fixed when the petition is filed; it emerges as the case proceeds. “At the moment a debtor files for bankruptcy, it is axiomatic that valuations are uncertain.” Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 Yale L.J. 862, 896 (2014). Courts and creditors often begin the case with

limited information about the debtor’s assets and prospects. The process gives them time to investigate, assess continued operations, and make better-informed decisions about those assets. *See id.* at 896-98; *see also* Kathleen G. Noonan et al., *Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation*, 94 Ind. L.J. 545, 593 (2019) (discussing bankruptcy courts’ capacity to produce and manage information). Congress built that investigation into the statute: Creditors generally may not be asked to vote on a plan to reorganize the debtor until the court approves a disclosure statement containing “adequate information.” 11 U.S.C. § 1125(a)(1), (b).

Nor is it surprising that an estate’s value fluctuates over time. The very premise of Chapter 11 is that collective administration can preserve value that simple liquidation would destroy. In enacting Chapter 11, Congress presumed that a debtor’s assets would be “more valuable if used in a rehabilitated business than if ‘sold for scrap.’” *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) (quoting H.R. Rep. No. 95-595, at 220). How a reorganized business will perform is rarely clear while the case is pending. Either way, the distress that prompted the filing does not dictate how the case will end.

Beyond rehabilitation, other features of a pending case can affect significantly the recovery available to creditors. For example, the estate is not limited to the assets on hand at filing. It also includes property recovered through the Bankruptcy Code’s recovery powers; proceeds and profits of estate property; and property the estate acquires after the case begins. *See* 11 U.S.C. § 541(a)(3), (6)-(7). Notably, the Code lets a trustee recover transferred property, or its value, for the estate’s benefit when the transfer is avoided under

the Code. *See id.* § 550(a). So the assets available for distribution may grow—sometimes considerably—as the case proceeds.

And markets do not stand still during bankruptcy. In *Ultra Petroleum*, for example, the debtors “entered Chapter 11 bankruptcy deep in the hole,” but, “as natural gas prices soared, they became supremely solvent.” *In re Ultra Petroleum Corp.*, 51 F.4th 138, 142 (5th Cir. 2022). The resulting plan proposed to pay creditors’ principal and prepetition interest in full. *Id.*; *see also In re SW Boston Hotel Venture, LLC*, 748 F.3d 393, 411 (1st Cir. 2014) (“Where the value of collateral is changing, a one-size-fits-all valuation poorly reflects that reality.”).

FTX’s own bankruptcy illustrates the point. In April 2024, the FTX debtors sold a portion of their Anthropic shares for approximately \$884 million—what they described as “a premium of over 267% above the original purchase price.” Disclosure Statement for Debtors’ Joint Chapter 11 Plan of Reorganization at 56, *In re FTX Trading Ltd.*, No. 22-11068, ECF No. 19143 (Bankr. D. Del. June 27, 2024). That sale came months after the jury convicted Bankman-Fried. “If customers had simply been permitted to keep their assets or been credited with their value based on the debtors’ rebuilt books and records, many customers would have received 300-400% of the face amount of their deposits as of November 2022.” Lipson & Skeel, 77 *Stan. L. Rev.* at 443.

It is true, of course, that the Bankruptcy Code generally fixes the *amount* of each creditors’ allowed *claim* as of the date the debtor files its petition. *See* 11 U.S.C. § 502(b). But that fixes what a creditor is owed, not what it will be paid. Distinct provisions gov-

ern the payment question—for example, the requirement that a creditor who has not accepted the plan receive at least what it would get in a hypothetical liquidation on the plan’s effective date. *See id.* § 1129(a)(7)(A)(ii).

It also is true that delay imposes costs on creditors—repayment a year from now is not as valuable as repayment today. The Bankruptcy Code recognizes as much. *See Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004) (plurality opinion). But that fact does not license prosecutors or courts to conflate three distinct concepts: (1) the loss of immediate access; (2) permanent nonrecovery; and (3) the fraudulent intent of the debtor’s former executives. A creditor’s testimony that it cannot access its funds establishes (1), but not (2). And what either circumstance shows about (3) depends on the prosecution’s theory of fraud. Explaining those distinctions to a jury does not erase the costs creditors have borne. Instead, it keeps those costs from being used to suggest a permanent loss—and an inference of earlier dishonesty—that the evidence does not establish.

The uncertain nature of evidence of recovery counsels in favor of caution in criminal trials. In civil RICO cases, the Second Circuit has declined to award lost-debt damages while bankruptcy proceedings remain unresolved because “it is not known whether some or all of the fraudulently transferred funds will be recovered by the corporation.” *Bankers Tr. Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988); *see also Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1165-66 (2d Cir. 1993). That ripeness rule of course does not govern admissibility in a criminal case. But the same economic logic applies. An unpaid debt during bank-

ruptcy does not necessarily establish permanent non-recovery. A jury asked to infer prior fraudulent intent from that nonpayment needs a sound basis for making the connection. *See* Fed. R. Evid. 401, 403.

The risk of prejudice is particularly acute when the government uses nonpayment to prove earlier fraudulent intent, as it did here. *See* App. 14a. While courts permit financial-loss evidence to support that inference, they recognize limits on prejudicial victim-impact testimony. *See United States v. Copple*, 24 F.3d 535, 545 (3d Cir. 1994). A jury told that creditors “lost” their money may conclude that earlier assurances of safety were knowingly false. But present nonpayment does not establish that conclusion by itself. The government thus risks presenting an unfinished recovery process as a settled economic outcome—and “misleading the jury” in the process. Fed. R. Evid. 403.

At minimum, the defense must be allowed to address the specific inference for which bankruptcy-related nonpayment is admitted, subject to ordinary evidentiary limits. Evidence bearing on eventual recovery may qualify the inference a jury is asked to draw from present nonpayment. *Cf. United States v. Foshee*, 578 F.2d 629, 631-33 (5th Cir. 1978) (per curiam) (on petition for rehearing) (distinguishing, in a check-kiting prosecution, repayment as a defense from its relevance to intent, and explaining that defendants have “just as much right to argue that payment of the checks related to their intent”).

C. Chapter 11 Delays Payment Even When The Assets Exist—For Reasons Unrelated To Prior Management

Finally, even when a debtor has enough assets to make *all* its creditors whole, Chapter 11 still delays

their recovery. Subject to limited statutory exceptions, filing a bankruptcy petition stays individual actions to recover prepetition claims; efforts to obtain possession of estate property; and “any act to collect, assess, or recover” a prepetition claim against the debtor. 11 U.S.C. § 362(a)(1), (3), (6), (b); *see Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 37 (2020). This breathing spell serves important purposes—most significantly the ability to “establish a repayment plan with creditors.” *In re City of Detroit*, 841 F.3d 684, 695 (6th Cir. 2016).

Separate rules constrain distributions on prepetition claims. A Chapter 11 plan ordinarily specifies the treatment of those claims and the means of implementing that treatment. *See* 11 U.S.C. § 1123(a)(1)-(5). The Bankruptcy Code’s priority rules protect creditors’ relative entitlements: Paying one creditor may diminish the property available to others with equal or superior rights. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 457, 464-65 (2017). Courts may authorize certain limited payments before confirmation—such as “first-day” orders paying employees’ prepetition wages—but those exceptions do not give any creditor a right to demand immediate payment from available estate assets. *See id.* at 468-69.

Chapter 11 also shifts how a debtor manages its own property—and, in some cases, who is in charge. With some exceptions, a debtor in possession ordinarily exercises a trustee’s powers and has a trustee’s responsibilities. *See* 11 U.S.C. § 1107(a). Its directors thus “bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession.” *CFTC v. Weintraub*, 471 U.S. 343, 355 (1985). Those obligations include conserving estate property and maximizing the value of

the estate. *See In re Advanced Contracting Sols., LLC*, 582 B.R. 285, 304 (Bankr. S.D.N.Y. 2018). Continued nonpayment therefore may reflect decisions made for creditors collectively, under the bankruptcy court’s supervision. And when new management has displaced the accused executive—as it did here, *see* App. 4a—someone else is making those decisions. A jury must understand that institutional setting before treating continued nonpayment as evidence of the prior leadership’s intent.

For all those reasons, a debtor may have the required assets and *still* lack legal authority to pay a particular prepetition claim prior to plan confirmation. Even a debtor willing and able to pay certain creditors cannot disregard Chapter 11’s limits on preferential treatment. *See, e.g., In re Kmart Corp.*, 359 F.3d 866, 872-74 (7th Cir. 2004). A jury unfamiliar with those limits, though, may attribute nonpayment entirely to what the debtor’s managers did before the filing. Standing alone, testimony that a creditor cannot *yet* collect does not distinguish missing assets from restrictions on distributing assets the estate already has. Admitting testimony to that effect without adequate context risks turning compliance with bankruptcy law into apparent evidence of earlier dishonesty. *See* Fed. R. Evid. 403.

D. Bankman-Fried’s Jury Heard That Customers’ Money Was “Gone,” But Not That It Might Be Recovered

Here, Bankman-Fried’s jury was asked to assess bankruptcy-related nonpayment while the work of determining and distributing recoverable value remained unfinished. *See* Pet. 8-9; App. 14a-15a.

Other major corporate-fraud prosecutions followed a different sequence. In both Enron and WorldCom,

plans addressing creditors' claims had been confirmed *before* the principal executives' convictions. Enron's plan was confirmed in July 2004; its executives Jeffrey Skilling and Kenneth Lay were convicted in May 2006. *See* Order Confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, and Related Relief ¶ 12, *In re Enron Corp.*, No. 01-16034 (AJG), ECF No. 19759 (Bankr. S.D.N.Y. July 15, 2004); Press Release, U.S. Dep't of Just., *Federal Jury Convicts Former Enron Chief Executives Ken Lay, Jeff Skilling on Fraud, Conspiracy and Related Charges* (May 25, 2006) (opening paragraph). Similarly, WorldCom's plan was confirmed in October 2003, before Bernard Ebbers's March 2005 conviction. *See* Order Confirming Debtors' Modified Second Amended Joint Plan of Reorganization ¶ 13, *In re WorldCom, Inc.*, No. 02-13533 (AJG), ECF No. 9686 (Bankr. S.D.N.Y. Oct. 31, 2003); Press Release, U.S. Dep't of Just., *Statement of Attorney General Alberto R. Gonzales on the Bernard Ebbers Conviction* (Mar. 15, 2005) (opening paragraph).

This prosecution followed the opposite sequence. Bankman-Fried was convicted in November 2023—nearly a year *before* the bankruptcy court's October 2024 confirmation of FTX's plan. *See* Press Release, U.S. Att'y's Off., S.D.N.Y., *Statement of U.S. Attorney Damian Williams on the Conviction of Samuel Bankman-Fried* (Nov. 2, 2023) (fifth paragraph); Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Chapter 11 Plan of Reorganization of FTX Trading Ltd. and Its Debtor Affiliates ¶¶ 89, 91, *In re FTX Trading Ltd.*, No. 22-11068, ECF No. 26404 (Bankr. D. Del. Oct. 8, 2024). At trial, no confirmed plan fixed the treatment of creditors'

claims, and substantial questions about recovery remained open.

That sequence is not necessarily cause for concern. The Bankruptcy Code did not require the government to wait to bring criminal prosecutions—to the contrary, the automatic stay expressly carves out criminal proceedings. *See* 11 U.S.C. § 362(a)(1), (b)(1). But juries may encounter evidence of nonpayment at materially different stages of the bankruptcy process, and courts must equip them with the context to make sense of that evidence. As explained above, a creditor’s present inability to collect may say more about the Chapter 11 process than about the debtor’s underlying financial condition. *See id.* § 362(a)(3), (6).

The prosecution’s presentation below shows the risk of jury confusion. One FTX customer was asked: “[A]s we sit here today, have you ever been able to withdraw your FTX customer deposits that we see?” The answer: “Never.” Pet. 8 (citation omitted). And the government told the jury that billions of dollars were “gone” and that “[t]housands of people lost billions of dollars.” Pet. 9 (citations omitted). With no explanation from the court and no contrary evidence from the defense, those statements told the jury that customers’ money was gone for good.

The Second Circuit upheld the admission of the bankruptcy evidence. It held that facts “showing that the money was not accessible, when juxtaposed with Bankman-Fried’s public statements and assurances to the contrary, went directly to Bankman-Fried’s knowledge that he had misappropriated FTX customer funds.” App. 14a. At the same time, it upheld the exclusion of evidence about the current value of Bankman-Fried’s investments, agreeing that “any-

thing that occurred after ‘the minute the misappropriation happen[ed]’ was irrelevant.” *Id.* (citation omitted). But both cannot be true. Either the bankruptcy—the economic consequence—was irrelevant, in which case no evidence of loss should have been admitted at all. Or the bankruptcy and prosecution were “inextricably intertwined,” in which case the defense should have been given equal airtime to explain the economic effect of the defendant’s actions.

Left uncorrected, the Second Circuit’s error would permit a pending bankruptcy to be used as an impermissible one-way evidentiary ratchet against criminal defendants. The law does not tolerate that asymmetry. Rather, the defense must have a meaningful opportunity to answer the prosecution’s inference that ongoing nonpayment shows permanent loss, which in turn supports deliberate fraud. *Cf. Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (recognizing that the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense”) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Relevance must turn on the inference actually advanced, not solely on whether repayment would be a defense to completed fraud. *See* Fed. R. Evid. 401, 403; *Foshee*, 578 F.2d at 631-33.

II. The Decision Below Will Deter Managers From Filing For Chapter 11 In Time

The question presented has profound importance, even beyond criminal trials. How courts treat bankruptcy-related nonpayment shapes the incentives of those deciding whether (and when) a distressed company should seek relief. Managers already have individual incentives to postpone Chapter 11 filings beyond the point that best serves the enter-

prise and its creditors. See Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 Iowa L. Rev. 1127, 1129-30 (2020). A rule that lets prosecutors use a bankruptcy estate's nonpayment of creditors as proof that the debtor's former managers lied—while barring those managers from explaining it—gives them one more reason to wait.

Of course, not *every* corporate failure ends in prosecution. But Chapter 11 routinely creates the very condition—an inability for creditors to collect immediately—that a jury may mistake for proof of a dishonest assurance by executives. See 11 U.S.C. § 362(a). And under the Second Circuit's rule, those weighing a Chapter 11 filing must now ask whether the Bankruptcy Code's restrictions on payment will be presented later—without important context—as evidence of fraudulent inducement.

A. Nonpayment After A Filing Can Make Good-Faith Rescue Efforts Look Fraudulent In Hindsight

Managers trying to save a company seldom know how the story will end. They may seek new financing, sell assets, or negotiate with creditors. All the while, they must retain the confidence of customers, employees, and creditors. That often means making glass-half-full statements about the company's future. Like all forecasts, honest ones can prove wrong.

The law recognizes that financial distress does not bar managers from attempting legitimate rescue. Directors of an insolvent corporation may pursue a good-faith strategy to increase the firm's value without becoming guarantors of its success. See *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 204-05 (Del. Ch. 2006). They may continue, for example,

to negotiate with individual creditors for the enterprise's benefit. See *North Am. Cath. Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 103 (Del. 2007). Those efforts sometimes fail. But that does not mean that it was improper to undertake them.

Good-faith rescue efforts are not fraud, even when they fail. In *Durland v. United States*, for example, this Court explained that, if the defendant had entered a business in good faith, believing he could deliver the promised returns, “no conviction could be sustained, no matter how visionary might seem the scheme.” 161 U.S. 306, 314 (1896); cf. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 185-89 (2015) (distinguishing an incorrect but sincerely held opinion from false factual representations and misleading omissions). Lower courts likewise reject attempts to plead “fraud by hindsight” by setting executives’ optimistic statements against later bad news. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129-30 (2d Cir. 1994) (quoting *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978)). “[M]isguided optimism is not a cause of action, and does not support an inference of fraud.” *Id.*

But the decision below invites exactly that kind of reasoning-by-hindsight against managers who file for Chapter 11. Suppose a distressed company’s executive publicly expresses confidence in a refinancing, the refinancing fails, and the company enters Chapter 11. In a later criminal prosecution, the parties dispute whether the executive honestly held that expectation or instead knowingly misled creditors. Testimony that creditors *still* cannot collect from the bankruptcy estate may, at first blush, strike a jury as probative. Yet, for the reasons given in Part I, it says little about what the executive believed. Without context, the jury

may treat nonpayment at the time of trial as proof of the executive's state of mind when speaking. *Cf. id.*

Even without an evidentiary asymmetry, hindsight bias presents a serious problem in cases involving bankruptcy. Studies demonstrate that even professional legal investigators, presented with information about a company's eventual bankruptcy, viewed that outcome as more foreseeable and evaluated the director's earlier decisions more negatively. *See* Niek Strohmaier et al., *Hindsight Bias and Outcome Bias in Judging Directors' Liability and the Role of Free Will Beliefs*, 51 J. Applied Soc. Psychol. 141, 153-54 (2021). That finding underscores the need for jurors to understand what the reported outcome actually establishes *before* using it to evaluate earlier conduct. *See also* Maggie Wittlin, *Hindsight Evidence*, 116 Colum. L. Rev. 1323, 1327, 1364-67 (2016) (distinguishing probative uses of outcome evidence from hindsight bias).

B. Adding That Risk Will Lead Managers To Delay Filing—At Creditors' Expense

For a manager considering Chapter 11, these risks are hardly academic. A manager may believe Chapter 11 is the best available course, yet fear that the resulting nonpayment will be offered as proof that earlier assurances were knowingly false. That concern adds to existing incentives to postpone relief. *See* Hynes & Walt, 105 Iowa L. Rev. at 1129-30; Paul Povel, *Optimal "Soft" or "Tough" Bankruptcy Procedures*, 15 J.L. Econ. & Org. 659, 659-62 (1999).

Chapter 11 works only if those who control the filing decision are willing to invoke it—and to do so in time. Congress recognized as much when it let debtors presumptively keep control in Chapter 11. The House Report warned that the alternative would risk debtors

delaying filing “until it would be too late for them to be an effective remedy.” H.R. Rep. No. 95-595, at 231; *see also id.* at 233-34.

But managers’ incentives do not always align with creditors’. Managers and shareholders often benefit personally from delaying a filing, even when a prompt filing would better serve creditors. *See* Hynes & Walt, 105 Iowa L. Rev. at 1129-30. So a system that relies on voluntary filings must account for the consequences managers expect to face when they file. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. Pa. L. Rev. 669, 756-58 (1993). Rules that make reorganization more personally risky lead managers to gamble on a turnaround rather than Chapter 11. *See* Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 Va. L. Rev. 921, 947, 953-54 (2001); *see also* Povel, 15 J.L. Econ. & Org. at 659-62 (recognizing managers’ informational advantages and the importance of their incentives to disclose distress).

That delay can destroy enterprise value. Managers often learn of financial difficulties long before outsiders do—and the personal consequences they anticipate influence when they act. When filing carries personal costs, managers have reason to conceal corporate distress. *See* Povel, 15 J.L. Econ. & Org. at 659-62. Empirical research bears this out: shifting control toward creditors drove later filings and greater financial distress at filing. *See* Barry E. Adler et al., *Value Destruction in the New Era of Chapter 11*, 29 J.L. Econ. & Org. 461, 480 (2013).

Creditors and the public ultimately may bear the cost. Once private restructuring is no longer feasible,

management may make unfavorable bargains to forestall execution against assets necessary to the business. *See* LoPucki & Whitford, 141 U. Pa. L. Rev. at 758 n.283. Delaying bankruptcy needlessly can divert resources from investments needed to preserve the firm’s prospects, making an eventual rescue costlier. *See* Povel, 15 J.L. Econ. & Org. at 660. Timely bankruptcy, by contrast, facilitates new investment, prevents competing collection efforts, and permits assets to be put to their most efficient use. *See* Hynes & Walt, 105 Iowa L. Rev. at 1129-30. And a company that waits too long may end up liquidating rather than reorganizing—a result that harms more than the company itself. One study found that liquidation, compared with reorganization, reduces employment even at nearby businesses that are not themselves bankrupt. *See* Shai Bernstein et al., *Bankruptcy Spillovers*, 133 J. Fin. Econ. 608, 609-10 (2019).

This Court should grant review to protect both the fairness of criminal trials and timely resort to Chapter 11.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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