No. 23-124

IN THE

Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2,

Petitioner,

v.

PURDUE PHARMA L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Association of the Bar of the City of New York (the "City Bar") was founded in 1870 and has been dedicated ever since to maintaining the highest ethical standards of the profession, promoting reform of the law and providing service to the profession and the public. With its over 23,000 members, the City Bar is among the nation's oldest and largest bar associations.

Members of the City Bar's Committee on Bankruptcy and Corporate Reorganization (the "Committee")[2] represent both debtors and creditors (including individuals) in business bankruptcy cases and have been involved in Chapter 11 cases of varying degrees of size and complexity across the country. The Committee's interest in this case is in the well-being and efficient functioning of the bankruptcy system as a whole.

1. Pursuant to Sup. Ct. R. 37.6, *amicus curiae* represents that no counsel for any party authored the brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of the brief; and no person, other than *amicus curiae*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of the brief.

2. The current members of the judiciary and employees of the U.S. Trustee Program who are on the Committee have abstained from participation in the preparation and review of this brief and do not express any views with respect to the subject matter of or positions taken in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, courts have allowed non-consensual third-party releases in appropriate Chapter 11 plans. Such releases have been approved when they are necessary to the reorganization and fair to the releasing parties as a class and otherwise satisfy specified tests, and have been rejected when they do not.

The Debtors have already explained why third-party releases of the type involved in the Second Circuit's decision affirming the U.S. Bankruptcy Court for the Southern District of New York's confirmation of the Purdue Pharma L.P. plan of reorganization are consistent with the statutory and constitutional authority of bankruptcy courts and are thus lawful. This brief explains why third-party releases are justified in appropriate cases, in particular why (i) the use of third-party releases in appropriate Chapter 11 plans allows for the highest recovery for the greatest number of claimants, (ii) bankruptcy as a forum for implementing third-party releases enhances fairness through its equal treatment requirements and (iii) this Court should adopt the Second Circuit's multifactor test as a necessary and appropriate uniform standard by which bankruptcy and district courts should evaluate third-party releases.

In determining whether the Bankruptcy Code[3] permits non-consensual third-party releases, this Court "give[s] effect to the intent of Congress". *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940).

3. 11 U.S.C. § 101 *et seq.*

In evaluating that intent, this Court has interpreted the Bankruptcy Code to embody certain core principles: the maximization of creditor recoveries, *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999), fair distribution among creditors, *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006), and the efficient resolution of complex disputes, *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). Indeed, a central aim of U.S. bankruptcy law is "to preserve the countervailing interests of creditors and other stakeholders by maximizing total creditor return on debts in an orderly and efficient fashion".[4] In other words, bankruptcy law favors the expeditious and fair resolution of complex disputes among disparate parties in a manner that promotes the *collective interests* of creditors.

The third-party releases at issue in this appeal arise in corporate Chapter 11 bankruptcies.[5] Chapter 11 allows corporate debtors facing crippling debt (or other overwhelming claims such as those faced by Purdue Pharma and other mass tort debtors) to avoid liquidation and reorganize their obligations, while maintaining day-to-day operations. Chapter 11 thus provides a pathway for these companies to return to profitability while maximizing distributions to their creditors. When a business fails, as some inevitably do, the bankruptcy system is designed to spread the impact of that failure evenly across creditors

4. Congressional Research Service, Bankruptcy Basics: A Primer (2022).

5. The third-party releases at issue in this appeal have been consented to by a bankruptcy supermajority of the releasing creditor class (*i.e.*, of those who voted), but not by every single releasor. They are, thus, referred to by some as "non-consensual".

(including victims of a corporate wrong). And while each creditor can fight to maximize her recovery, the system that Congress has designed is founded on the principle that each similarly situated creditor must receive an equal distribution. Congress has determined that this allows for fair recoveries by creditors when a business is unable to satisfy fully its obligations.

Bankruptcy is, and has been, critical to this country's economic growth and development, permitting businesses to take risks to create products for our advancement while also providing a mechanism for creditors to be fairly repaid when those risks result in failure or, as here, where a business's product causes massive harm. The important role that bankruptcy plays was recognized by the Founding Fathers: of the limited powers expressly granted to the federal government, bankruptcy appears near the top of the list. *See* U.S. Const., art. I, § 8. Thus, when businesses fail, and value and jobs are at risk, Congress has provided Chapter 11 as a path away from liquidation and toward reorganization.

While it is true that in a plan of reorganization containing third-party releases, certain individual rights may be subordinated to the overall interests of the group of creditors, that is the collective nature of bankruptcy proceedings as designed by Congress. In appropriate cases, third-party releases allow for a greater recovery for creditors, and a more uniform and equitable treatment of creditors, than individual litigation. And bankruptcy courts may be the only U.S. legal forum in which these complex, multi-party issues can be resolved on a global basis. That is, Chapter 11 proceedings "mitigate" the problems inherent in individual litigation "and provide an

appropriate and often superior forum in which to resolve mass tort claims".[6] But in cases like the one on appeal, a viable, fair and recovery-maximizing settlement can *only* be achieved through the use of third-party releases.

In appropriate cases, third-party releases are a critically important tool to implement the U.S. Bankruptcy Code and its underlying policies and principles. Their use promotes the principle of maximizing creditors' recoveries, particularly in mass-tort cases, by encouraging non-debtor third parties who may have liabilities related to the debtor's conduct to fund plans of reorganization.[7] Indeed, in cases where the debtor corporation's assets are insufficient to fund a plan providing for meaningful recoveries—usually the case in mass-tort bankruptcies—third-party releases are the *essential tool* that allows a reorganization plan to proceed, thereby avoiding liquidation of the debtor with the attendant value destruction and reduced recovery by creditors. The Second Circuit's test—like those employed by most other courts of appeals—ensures that third-party releases are allowed only when appropriate. *First*, the affected class of claimants must overwhelmingly support the reorganization plan, which will occur only if the creditors, as a voting class, determine that the plan is in their best interests. *Second*, the bankruptcy court must independently conclude, based on specific and detailed findings of fact, that a third-party release as part of a reorganization plan is appropriate and equitable. By facilitating reorganization plans that maximize creditor

6. Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chic. L. Rev. 973, 977 (2023).

7. Tort victims are creditors of the company that causes them harm.

recoveries in this way, third-party releases allow for a more equitable resolution of creditors' claims than may be obtained through individual (and uncertain) litigation.

The potential for abuse can be adequately addressed by this Court's adopting the limiting principles that have been used by experienced lower courts when approving plans that contain third-party releases. The potential for abuse *does not* call for a blanket ban on a tool that has so successfully served the fundamental goals of U.S. bankruptcy law. The multifactor test articulated below by the Second Circuit embodies such appropriate limiting principles. This Court should adopt that test as a uniform guide to bankruptcy courts to ensure that they approve third-party releases in Chapter 11 plans only in appropriate cases: when the releases are fair to—and in the best interests of—the releasing parties (as a class), and necessary to the reorganization.

ARGUMENT

I. THIRD-PARTY RELEASES ARE AN IMPORTANT TOOL IN PROMOTING BEDROCK PRINCIPLES OF BANKRUPTCY LAW.

This Court has taught that there is no "rare case" exception that can justify a departure from the requirements of the Bankruptcy Code. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 471 (2017). But third-party releases do not fall into that category, as they are both authorized by the Bankruptcy Code and do not seek to override any of the Code's express provisions.

Beyond being lawful, third-party releases play an important role in appropriate Chapter 11 plans because they promote bedrock principles of bankruptcy law. *First*, third-party releases promote the principle of maximizing creditors' recoveries: these releases encourage (indeed, enable) third parties who may have liabilities related to the debtor's conduct to fund plans of reorganization, especially in mass-tort cases. In this way, they promote a fundamental aim of Chapter 11: in cases where third-party releases are essential to reorganization plans, the releases avoid liquidation of the debtor, thereby preserving value and maximizing creditors' recoveries. *Second*, third-party releases promote the principle that recoveries should be fairly distributed among creditors: in the bankruptcy system, equal treatment rules require that similarly situated creditors receive the same recovery (whereas in the tort system, outside bankruptcy, some victims may recover substantial amounts and others may recover nothing). *Third*, third-party releases promote the principle that complex disputes should be resolved efficiently: reorganization plans that depend on third-party releases provide a unified and global way of fairly resolving disputes, to the benefit of debtors and claimholders, that individual litigation does not and cannot.

A. Third-Party Releases Maximize Creditor Recoveries.

Third-party releases have been essential to maximize creditors' recoveries, especially in mass-tort cases, by enabling third parties who may have liabilities related to the debtor's conduct to fund plans of reorganization. *See Bank of Am. Nat'l Tr. & Sav. Ass'n*, 526 U.S. at 453

(noting that one of the main policies underlying Chapter 11 is "maximizing property available to satisfy creditors"). When a corporation commits a mass tort, it is rarely alone in responsibility for recompense: it has officers, owners and affiliates that may have committed or influenced the tortious actions, or may bear or share legal responsibility for those actions, and insurers that may be obligated to pay for the consequences of those actions. And in a mass-tort bankruptcy, not only does the corporation usually not have the funds necessary to pay all victims the full amounts of their claims, it often has nowhere near the necessary funds.

In these circumstances, third-party releases play a critical role: they incentivize the responsible third parties (or insurance companies that have provided insurance coverage for the responsible third parties) to contribute funds that can significantly enhance victims' recoveries through the corporate bankruptcy in exchange for protection against future litigation that *directly relates to the very issues that led to the corporate bankruptcy.* Often the amount funded by the released third parties is so significant that it is the difference between the victims receiving a meaningful recovery and receiving none.[8]

8. This is true whether the amounts involved are in the billions of dollars, as in this case, or lesser amounts (but still significant to the victims), such as in The Weinstein Company bankruptcy, in which it would not have been possible to establish the multimillion-dollar victims' settlement fund without the use of non-consensual third-party releases. Transcript of Plan Confirmation Hearing at 115, *In re The Weinstein Co. Holdings*, No. 18-10601-MFW (Bankr. D. Del. Jan. 27, 2021), ECF No. 3207 (THE COURT: "[I]t is clear that without the contributions by the insurance company and the directors and officers who are being released, there could be no

Indeed, one such Chapter 11 plan recently provided the largest fund ever established to address sexual abuse claims—a total of $2.5 billion, $2.35 billion of which was the result of third-party contributions. *In re Boy Scouts of Am.*, 642 B.R. 504, 555, 602 (Bankr. D. Del. 2022).

It is unsurprising that funding through a reorganization plan can result in greater recoveries, given that individual litigation in Article III and state (or foreign) courts is uncertain and typically more costly and protracted than bankruptcy proceedings. Individual litigation against non-debtor third parties can also drain or even consume the assets available to compensate victims, as indemnity agreements often exist that require a debtor corporation to pay for the legal fees of its officers and directors and to cover, subject to certain carve-outs, liability that may be established against the officer or director—rendering litigation against a nondebtor, in effect, litigation against a debtor. And the third-party releases are often, if not always, the only way to obtain significant contributions from responsible third parties; absent a release of claims, these third parties would be unlikely to contribute to the plan, as they would have to fund defense against an unpredictable (and, in the mass-tort context, potentially exponential) number of individually litigated claims and potentially pay out on individual settlements.

Moreover, where third-party releases are essential to plan confirmation, *i.e.*, without them the plan cannot go forward, the releases avoid liquidation. In this way, third-

confirmation. The debtor has $3 million, which is not sufficient to pay administrative claims, let alone any recovery for other creditors. So, without the settlement, no plan is possible.”).

party releases serve one of the fundamental purposes—if not *the* fundamental purpose—of Chapter 11: to maximize value, thereby allowing for maximum creditor recoveries. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." (citing H.R. Rep. No. 95-595, at 220 (1977))).[9] This Chapter 11 mandate is predicated on the widely accepted proposition that in the vast majority of cases, going concern value will be higher than liquidation value, and thus the creditors' interests are best served by avoiding liquidation.[10]

Indeed, in this case, it is the uncontested finding of the bankruptcy court that, absent the third-party releases, the result would be a liquidation in which the unsecured creditors (including the tort victims) would receive no recovery from the estate. *See In re Purdue Pharma L.P. ("Purdue I")*, 633 B.R. 53, 90 (Bankr. S.D.N.Y. 2021)

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9. Petitioner suggests that "the public interest strongly supports holding third-party releases unlawful". (Pet. Br. 14.) *Amicus curiae* disagrees. Its constituents, and those they represent, believe there is a strong public policy favoring, as well as a practical need for, this important tool, which, when used in appropriate cases (such as those compliant with the Second Circuit's test), prevents liquidation of corporate debtors and enables recoveries for creditors who otherwise may stand to recover nothing. Even where a loss of jobs may not be a principal concern, the fact remains that liquidation is typically value-destructive, resulting in lower recoveries for creditors.

10. This is in contrast to the insolvency systems of many non-U.S. jurisdictions, which are liquidation-based. The U.S. Chapter 11 reorganization system is generally perceived to be the superior approach.

(“Under the most realistic scenarios . . . , there would literally be *no* recovery by unsecured creditors from the estates in a Chapter 7 liquidation, which is, I believe, the most likely result if the settlements with the shareholder released parties were not approved, given the likely unraveling of the heavily negotiated and intricately woven compromises in the plan and the ensuing litigation chaos.” (emphasis in original)). Individual litigation against the Sackler family members, while possible, would be prohibitively expensive for many if not the vast majority of claimants, and would entail significant collection risk even if the individual litigants were to prevail (as opposed to the voluntary funding of the plan by the Sackler family predicated on third-party releases). Along the same lines, if each individual Sackler family member and related entity eligible to file for bankruptcy were to file, a litigation morass—with claims of contribution and relative fault litigated between and among the various bankruptcy estates—would result in significantly lower overall recovery for victims due to both the extended time required to resolve those claims and the attendant additional administrative expenses.

B. Third-Party Releases Promote Fair Distributions.

Third-party releases promote the bankruptcy principle of fairly distributing recoveries. *See Howard Delivery Serv.*, 547 U.S. at 655 (“[T]he Bankruptcy Code aims, in the main, to secure equal distribution among creditors.”). In those cases where releases have been found to be appropriate, the releases have enabled recoveries from both the third parties and the debtor to be distributed through the bankruptcy process rather than

the uncertain and costly process of individual litigation that would likely benefit relatively few of the victims. The result is a greater recovery for most claimants, and a more equitable distribution of funds among claimants, than could be obtained through individual litigation. This is because the bankruptcy process is governed by provisions requiring that similarly situated creditors receive similar recoveries. *See* 11 U.S.C. § 1123(a)(4). The individual civil tort litigation process is not. As a result, individual litigation in this context suffers from at least two obvious inequities: first, victims who sue (and obtain judgment) more quickly have greater access to the finite pool of resources (*i.e.*, the "race to the courthouse" issue); and second, victims who are able to pay more for litigation fare better. These factors arbitrarily shift recovery to the rapid and the rich, a result bankruptcy law is designed to prevent. And the unfairness of this distributive system is particularly pronounced in the mass-tort setting, where the verdicts that particular victims obtain vary quite widely for reasons unrelated to substantive differences in their cases. Lottery-like results—potentially massive recovery for some, and little or nothing for almost all others—cannot occur in bankruptcy, and third-party releases allow a debtor to address tort liabilities in a way that is more fair to the claimholders *as a whole* than the tort system.

The alternatives to resolving mass-tort claims through a Chapter 11 plan—class action lawsuits and multidistrict litigation—typically do not provide victims with the equitable distributions that are required in bankruptcy. Class actions are usually not a solution in the mass-tort setting, including because questions of law and fact common to class members tend not to predominate

over questions affecting individual members, given the differences in their injuries and the multiplicity of laws under which they are likely to sue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624–25 (1997). Multidistrict litigation (MDL) does not provide an alternative solution either. In some cases—like the claims brought by the state attorneys general here—MDL is not available, as MDL serves to consolidate proceedings pending in federal district courts, not state courts. *See* 28 U.S.C. § 1407(a). And even in cases where MDL may result in a broad settlement of claims, it too is susceptible to unfair distribution. Unlike the fair distribution and court approval requirements applicable to bankruptcy settlements, there is no requirement that settlements in MDLs be fair—or even court-approved. *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. 447, 477 (2022) ("[Section 1407] fails to allow the [Judicial Panel] or the transferor court to assess the fairness of settlements or even direct the settlement process. In other words, there are no statutory requirements for the MDL court to review or assess the integrity of a settlement process or any settlement reached by the parties."). Absent a broad settlement, MDL verdicts may vary as in individual litigation because MDL only consolidates pre-trial proceedings and the verdicts are independent of each other in MDL cases.

C. Third-Party Releases Allow Bankruptcy Courts to Resolve Complex Disputes Efficiently.

By enabling a global settlement of all related claims, third-party releases enable the efficient resolution of complex, multi-party disputes. *See Celotex*, 514 U.S. at 308 ("Congress intended to grant comprehensive

jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate[.]" (citation omitted)). A global settlement benefits both debtors and claimholders as it allows for a fair and centralized process for resolving mass-tort cases. *See* H.R. Rep. No. 95-595, at 5 (1977) (explaining that the purpose of Chapter 11 is to "mak[e] a business reorganization a quicker, more efficient procedure, and [to] provid[e] greater protection for debtors, creditors, and the public interest"). Allowing a mass-tort dispute to go forward as thousands—or tens or hundreds of thousands—of individual lawsuits in a multitude of courts of general jurisdiction is a significant and needless waste of public and private resources when that entire dispute can be resolved in a single bankruptcy court through the collective settlement procedure embedded in a creditor-approved and court-approved plan of reorganization.[11] Bankruptcy judges are well equipped for that task: they are experienced and expert in fairly resolving massive conflicts with competing claims for relief, and specific Bankruptcy Code provisions give them the flexible power that is required to do so. *See, e.g.*, 11 U.S.C. §§ 105(a), 1123(b)(6); *see also United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) ("The[] statutory directives [of the Bankruptcy Code] are consistent with

11. There may be exceptions where a global settlement can be achieved outside the bankruptcy process, but that does not mean that the tool of third-party release should be taken away for the many important circumstances in which bankruptcy has been the only place where global resolution has been possible. *See, e.g.*, *In re Boy Scouts of Am.*, 642 B.R. at 610 ("Without the global settlement[,] . . . these cases would devolve into a morass of coverage litigation, and recoveries to holders of [a]buse [c]laims would be delayed for countless years.").

the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."); *Bildisco & Bildisco*, 465 U.S. at 525 (noting that "the policies of flexibility and equity [are] built into Chapter 11 of the Bankruptcy Code"). As a fully consensual settlement is typically impossible in a mass-tort case, the bankruptcy court, through the bankruptcy law rule of creditor democracy—whereby a plan may be confirmed (and bind all creditors) when two-thirds in dollar amount and a majority in number of each voting class that have accepted or rejected the plan vote to accept the plan, *see* 11 U.S.C. §§ 1126(c),[12] 1129(a)(8), 1141(a)—provides the *only* forum in the U.S. legal system where a unified and complete resolution of mass-tort cases can reliably occur in a manner that results in a fair recovery and distribution for all claimants.

Petitioner's claim that third-party releases unfairly "extend the benefits of a fresh start without requiring those nondebtors to file for bankruptcy" (Pet. Br. 21) ignores the practical implications—and gross inefficiencies—of requiring all such third parties to separately file for bankruptcy rather than allow them to contribute to the corporate debtor's estate in exchange for a release of claims. As a threshold matter, responsible third parties may not be eligible to file for bankruptcy in the U.S. bankruptcy courts or may be outside of the bankruptcy courts' jurisdiction. *See, e.g.*, 11 U.S.C. § 109. And where that is not the case, if third-party releases were disallowed, and each director, officer and stockholder of a

12. Because tort claims are unliquidated, they are often estimated at $1 each solely for plan voting purposes (*i.e.*, one person, one vote).

debtor that may be co-liable for liabilities connected to the debtor's business operations were required to separately file for bankruptcy protection, as Petitioner suggests should happen, the result (dozens, if not hundreds, of separate bankruptcy cases) may be no more efficient or effective than requiring hundreds or thousands of individual claimants to pursue their claims in litigation in scores or hundreds of federal, state and foreign courts. The administrative costs of individual bankruptcy cases generally and of prosecuting cross-claims among the various bankruptcy estates would eat up significant value and result in delayed recoveries. A global resolution through a single, central bankruptcy proceeding, as the tool of third-party release allows, can effectively induce a well-resourced party to make its assets available while avoiding uncertain and costly litigation over both liability and collection. The perfect should not be allowed to be the enemy of the good, particularly in circumstances like this one where real lives and true human suffering are involved, and where the use of third-party releases can enable considerably better, and more equitably distributed, recoveries for the greatest number of victims.

II. THE SECOND CIRCUIT'S MULTIFACTOR TEST PROVIDES AN APPROPRIATE FRAMEWORK TO GUARD AGAINST ABUSE OF THIRD-PARTY RELEASES.

The Second Circuit's test—like those of other courts of appeals that have approved the use of third-party releases in Chapter 11 reorganization plans—ensures that third-party releases are "appropriate" in Chapter 11 plans.[13]

13. *See In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) ("[E]njoining a non-consenting creditor's claim is only

In re Purdue Pharma L.P. ("Purdue III"), 69 F.4th 45, 78–79 (2d Cir. 2023). Section 1123(b)(6) of the Bankruptcy Code provides that a Chapter 11 plan may contain "any" provision that is "appropriate" and "not inconsistent with the applicable provisions" of the Code. 11 U.S.C. § 1123(b)(6). Apart from drawing the outer bound that permissible provisions are those that are "not inconsistent" with the Bankruptcy Code, Congress provided no additional specifics on what "appropriate" provisions may be. Thus, while there is a statutory basis for the lower courts' authority to approve third-party releases in appropriate plans, it is up to the courts interpreting the Bankruptcy Code to determine whether a particular third-party release is "appropriate". The Second Circuit's multifactor test guides lower courts in doing just that.

Bankruptcy courts, debtors and creditors would benefit from a uniform standard to guide their evaluation of when third-party releases are appropriate and when they are not. To promote uniformity in the bankruptcy laws, this Court should adopt the demanding test

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appropriate in 'unusual circumstances.'"); *In re Airadigm Commc'ns*, 519 F.3d 640, 657 (7th Cir. 2008) ("[W]hether a release is 'appropriate' for the reorganization is fact intensive and depends on the nature of the reorganization."); *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 712 (4th Cir. 2011) (commending a factor test to bankruptcy courts so that third-party releases are "granted cautiously and infrequently"); *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015) ("[Third-party releases] should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances.").

articulated by the Second Circuit in this case.[14] That test appropriately promotes the equitable maximization of claimant recoveries while also guarding against abuse of third-party releases by non-debtors seeking to serve their own interests. By requiring an identity of interests between debtors and released third parties, the Second Circuit's test promotes global resolution of disputes. *Purdue III*, 69 F.4th at 78. By requiring that the third-party release be essential to the plan and appropriately tailored, and that the third party contribute substantial assets to the reorganization, the Second Circuit's test promotes the maximization of creditor recoveries while protecting against abuse. *Id.* Finally, the test requires fair payment and its focus on overwhelming class support (in the form of supermajority creditor approval requirements) promotes creditor democracy by allowing the creditors (as a class) to decide what is best for themselves. *Id.* at 78–79.

A. A Uniform Standard Is Warranted.

This Court's adoption of the Second Circuit's factor test would enable a much-needed consistent and predictable approach towards third-party releases in Chapter 11 plans. Adopting a uniform test would promote the uniform application of the bankruptcy laws. *See Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1778 (2022) ("The Bankruptcy Clause empowers Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States.'" (quoting U.S. Const. art. 1, § 8,

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14. *Amicus curiae* welcomes the guidance provided by the Second Circuit's test. Indeed, in the court below, *amicus curiae* proposed a factor test that is substantially similar to the test adopted by the Second Circuit.

cl. 4)). A uniform test would provide clarity to debtors, creditors and bankruptcy courts as they work to develop and confirm a plan and, in doing so, would allow for a more efficient resolution.

Indeed, this case illustrates the need for such a uniform test. Prior to its decision below, the Second Circuit had declined to adopt a definitive test for determining when a third-party release would be appropriate. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). The bankruptcy court, thus, evaluated the third-party releases by applying factors that it determined were applicable based on its review of the Second Circuit's decision in *Metromedia* and other Second Circuit case law. *See Purdue I*, 633 B.R. at 105–06. The district court, on the other hand, determined that the Second Circuit had failed to specify the circumstances in which third-party releases would be permissible. *See In re Purdue Pharma L.P. ("Purdue II")*, 635 B.R. 26, 89, 101 (S.D.N.Y. 2021).

To ensure a consistent approach among lower courts across the country, and to provide greater clarity to debtors, creditors and lower courts, this Court should adopt a uniform standard for assessing whether a third-party release is appropriate in a Chapter 11 plan. Doing so will promote uniformity in bankruptcy law and will further Congress's intent that bankruptcy courts "efficiently and expeditiously" adjudicate bankruptcies. *Celotex*, 514 U.S. at 308. For the reasons discussed next, the Second Circuit's test in this case is an appropriate standard that *amicus curiae* respectfully submits this Court should embrace.

B. The Second Circuit's Test Will Promote Bankruptcy Principles and Prevent Abuse.

The multifactor test developed by the Second Circuit in this case provides an appropriate framework for determining whether a third-party release should be permitted in a Chapter 11 plan. The test includes the following considerations:

1. whether there is an identity of interests between the debtor and released third party;
2. whether claims against the debtor and non-debtor are factually and legally intertwined;
3. whether the scope of the release is appropriate;
4. whether the release is essential to the reorganization;
5. whether the non-debtor contributed substantial assets to the reorganization;
6. whether the impacted class of creditors "overwhelmingly" voted in support of the plan with the release; and
7. whether the plan provides for the fair payment of enjoined claims.[15]

These factors are substantially similar to the factors adopted by the other courts of appeals that have approved

15. *Purdue III*, 69 F.4th at 74–75.

plans of reorganization with third-party releases.[16] While the tests applied by those courts may vary slightly in wording or detail, they, like the Second Circuit's test, are all designed to ensure that third-party releases are the exception, not the rule, and approved only in cases where they are necessary to the debtor's reorganization, approved by an overwhelming majority of affected claimants and ensure that affected claimants fare better than they otherwise would outside of bankruptcy.

As detailed below, the Second Circuit's test promotes bedrock bankruptcy principles and safeguards against improper use of third-party releases. Petitioner's concern that allowing third-party releases will lead to abuse of the bankruptcy system by wealthy corporations and individuals at the expense of releasing claimants (Pet. Br. 44–45) is adequately addressed by the Second Circuit's factor test, which, as discussed herein, appropriately tailors the proper use of third-party releases.

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16. Other courts of appeals that have approved third-party releases have uniformly required an identity of interests between the released third-parties and the debtor, that the releases be essential to the plan of reorganization, that the released third parties contribute substantial assets, and that the affected class of creditors overwhelmingly vote in support of the plan. *See, e.g.*, *In re Millennium Lab Holdings II*, 945 F.3d 126, 138–40 (3d Cir. 2019); *Behrmann*, 663 F.3d at 712; *In re A.H. Robins Co.*, 880 F.2d 694, 701–02 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d at 658; *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 657; *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1079.

1. The Second Circuit's Test Serves to Maximize Creditor Recoveries While Preventing Abuse.

The first four factors of the Second Circuit's test promote bankruptcy law's goal of maximizing creditors' recoveries while at the same time safeguarding against abuse. Factors (1) and (2) require an "identity of interests between the debtors and released third parties . . . 'such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate'", *Purdue III*, 69 F.4th at 78 (quoting *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002)), and that the released claims are "factually and legally intertwined" with claims against the debtor, *id.* These factors appropriately limit released claims to those that are the subject of the reorganization plan and prevent third-party releases from being used to allow third parties to avoid unrelated liabilities. Factors (3) and (4) require bankruptcy courts to assess whether a third-party release—both in its scope and effect—is essential to the reorganization, thereby maximizing creditors' recoveries while protecting against abuse by third parties. *See id.*

Applying these factors, a third-party release will be appropriate only when the released claims—if allowed to proceed—could deplete the estate, the plan is unlikely to succeed without the release and the release releases claims that relate closely to the debtor's conduct or the bankruptcy estate. *See id.* at 78, 80–81. Petitioner suggests that the third factor—considering whether "the scope of the release is appropriate"—is too amorphous. (Pet. Br. 39–40.) But the requirement that an element of a Chapter 11 plan be "appropriate" is, in fact, the precise

standard that Congress adopted in section 1123(b)(6) of the Bankruptcy Code. And as the Second Circuit explained when it applied the factors to the releases at issue here, this factor is satisfied when the bankruptcy court narrows or restricts the scope of a release "to ensure that the released claims related to the Debtors' conduct and the Estate." *Purdue III*, 69 F.4th at 80. These factors, thus, provide a significant limiting principle, as they will prevent third-party releases in all but those cases in which liquidation is the only likely alternative (*i.e.*, absent the third-party release and the corresponding third-party financial contribution, there could be no plan of reorganization) and will ensure that claims unrelated to the debtor remain pursuable. These factors also bring third-party releases within the bankruptcy court's equitable powers to "modify creditor-debtor relationships" as they ensure that the liability being released is closely linked to the debtor's conduct and estate. *Energy Res. Co.*, 495 U.S. at 549.

As a result, third-party releases that comply with the Second Circuit's test will be a far cry from a "get out of jail free" card for non-debtors. Not only will such releases be permitted only when the non-debtors' alleged liability is closely related to the debtor's own conduct, but they also will not be applicable to claims plainly outside the jurisdiction of the bankruptcy courts, such as claims of criminal liability, despite Petitioner's suggestions to the contrary. (*See* Pet. Br. 46–47.) *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679 (2015) ("[B]ankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts. Their ability to resolve such matters is limited to 'a narrow class of common law claims as an incident to the [bankruptcy

courts'] primary, and unchallenged, adjudicative function." (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 854 (1986) (alterations in original))); *see also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153 n.6 (2009) (distinguishing criminal trials and resolution of custody disputes as "matters 'so plainly beyond the [bankruptcy] court's jurisdiction'"). Moreover, a third-party release is not "free", as the third party must provide a financial contribution that is "substantial" under the circumstances (here, some $6 billion) and that may not otherwise be available to satisfy claims. *See Purdue III*, 69 F.4th at 78.

Petitioner's suggestion that the release at issue here should be prohibited because it extends to fraud-related claims that would not be dischargeable in bankruptcy if the individual members of the Sackler family themselves had sought bankruptcy protection (Pet. Br. 2) is a red herring. The purpose of the Sackler release was not to provide a "discharge" of any individual debts of Sackler family members, but rather to attract substantial contributions to the estate that the Sacklers would not have contributed absent the release, and thereby to maximize creditor recoveries. The fact that certain types of claims may not be dischargeable in an individual bankruptcy proceeding is not relevant to the legal analysis of the issue on appeal to this Court.

In any event, even if the plan at issue here provides releases of certain claims that may not be dischargeable against individual debtors in bankruptcy, that should not be a reason for this Court to deem third-party releases categorically inappropriate in all Chapter 11 plans. Many third-party releases approved in reorganization plans do *not* involve claims that are non-dischargeable

in bankruptcy. Most of the third parties that contribute substantially to such plans in exchange for the releases are corporations or other legal entities with respect to which the Bankruptcy Code does not preclude the discharge of specified claims,[17] or are insurance companies that by statute are ineligible for bankruptcy.[18] *See, e.g.*, *In re Millennium Lab Holdings II*, 945 F.3d 126, 129–32 (3d Cir. 2019) (releasing claims against corporations); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1988) (releasing claims against insurers). The propriety of a third-party release should be assessed on a case-by-case basis, applying the factors in the Second Circuit's test, to determine if the scope of the release is appropriate.

2. The Second Circuit's Test Promotes Fairness in Creditor Recoveries.

The final three factors of the Second Circuit's test jointly ensure that the releasing claimants' best interests are served. These factors—requiring a substantial contribution from the released third parties, "[o]verwhelming" approval by creditors and "[f]air [p]ayment of [e]njoined [c]laims"—ensure that releasors obtain equitable recoveries in exchange for their releases, while promoting fair distributions to creditors and creditor democracy (on a class basis). *See Purdue III*, 69 F.4th at 80–81. These factors are also consistent with bankruptcy law's rule of creditor democracy, by which the interests of the creditor supermajority should not be

17. Section 523(a) of the Bankruptcy Code precludes the discharge of certain enumerated claims only with respect to individuals, not corporate entities. 11 U.S.C. § 523(a).

18. 11 U.S.C. § 109(b)(2).

scuttled to promote the interests of the few. *See* 11 U.S.C. §§ 1126(c), 1129(a)(8), 1141(a). There is no surer sign that a release is fair to and in the best interests of the releasors than the overwhelming approval of the releasing creditors themselves.

While the "non-consensual" descriptor of the third-party releases at issue may be construed to mean there is little or no agreement between claimants and the released third parties, these plans are, in fact, largely *consensual*. Approval of any plan by a class of creditors (such as tort victims) requires the approval of the holders of at least two-thirds in amount and more than one-half in number of the allowed claims in such class. 11 U.S.C. § 1126(c). And under the Second Circuit's test, approval of a third-party release would require an even higher percentage of class support by using as a reference point, as most other courts approving such releases have done, the 75% minimum vote required under 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). *See In re Boy Scouts of Am.*, 642 B.R. at 606–07 (approving a third-party release where between 82.41% and 85.72% of abuse claimants voted to accept the plan); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1143 (D.C. Cir. 1986) (90% vote in favor); *In re Millennium Lab Holdings II*, 945 F.3d at 132 (93% vote in favor); Debtors' and Official Committee of Unsecured Creditors' Joint Mem. ISO Confirmation of the fifth Am. Joint Ch. 11 Plan of Liquidation of the Weinstein Co. Holdings, LLC et al. and Omnibus Reply to Confirmation Objections, *The Weinstein Co. Holdings*, Case No. 18-10601 (MFW) (Bankr. D. Del. Jan. 20, 2021), ECF No. 3184 (82.98% vote in favor).[19]

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19. The plan in this case received support from over 95% of voting creditors. *Purdue I*, 633 B.R. at 61.

Requiring this supermajority will promote fairness to creditors while providing a realistic path to plan confirmation. A requirement of unanimity—which is not otherwise required by the Bankruptcy Code for plan confirmation, *see* 11 U.S.C. § 1126(c)—would render the holdout problem insurmountable, to the detriment of debtors and creditors alike. Ultimately, it is the claimants themselves who are empowered to determine, by supermajority vote, whether to accept the proposed compensation. Dissenters have an equal vote to reject the proposed plan (and may express their objections to it), and bankruptcy courts provide a check to ensure a fair process and outcome.

The Second Circuit's test—with its requirement for "fair" payment of the enjoined claims—is a welcome development in the jurisprudence on third-party releases. Earlier decisions had language suggesting that "full" payment may be required.[20] That would not make sense: putting aside the fact that it can be extremely difficult to determine what "full" payment to a mass-tort victim would be, or that full payment would leave nothing to be released, such a test ignores that third-party releases are granted in this context (much as in other settlement contexts) as part of a compromise. Requiring "fair" payment (as evidenced by approval by a supermajority of the voting creditors in the affected creditor class) provides a practical, and appropriate, benchmark by which lower

20. For example, the *Master Mortgage* decision, from which much later jurisprudence developed, included as one prong of its five-prong test whether the plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction. *In re Master Mortg. Inv. Fund Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994).

courts can evaluate the appropriateness of third-party releases.[21]

The Second Circuit's test does not "lower the standards" that other courts of appeals have applied, as Petitioner suggests. (Pet. Br. 39.) The lone case Petitioner cites does *not* stand for the proposition that third parties must contribute sufficient funds to pay the releasing claimants in full. (*See id.* (citing *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989)).) As the Fourth Circuit has explained, *A.H. Robins* did not establish a definitive test for evaluating third-party releases. *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 711 (4th Cir. 2011). Instead, the Fourth Circuit stated that "whether a court should lend its aid in equity to a Chapter 11 debtor will turn on the particular facts and circumstances of the case". *Id.* The Second Circuit's test provides necessary guidance to bankruptcy courts, while allowing them to appropriately account for the particular facts and circumstances of each case.

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21. As the Second Circuit recognized, and as occurred here, the bankruptcy court may require "extensive discovery" to make the requisite factual findings before a plan including a third-party release is confirmed. *Purdue III*, 69 F.4th at 79. Such discovery undoubtedly may include financial information relating to the third parties to be released, which information can be taken into account both by the creditors in deciding whether to vote in favor of the plan and by the reviewing courts in making their determination of whether the fair payment prong of the Second Circuit's test has been satisfied.

3. The Second Circuit's Test Appropriately Leaves Room for Bankruptcy Courts to Act Equitably Under the Circumstances.

While Petitioner criticizes the Second Circuit's test for its failure to specify the weight to be given to any particular factor (*see* Pet. Br. 40), the flexibility that is afforded lower courts under the test furthers bankruptcy courts' mandate to act equitably. Equity is flexible and requires consideration of all circumstances, including the public interest. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). And Chapter 11 bankruptcies are not one-size-fits-all. A test to evaluate when it is, and is not, appropriate to allow third-party releases in a Chapter 11 plan must allow flexibility to account for the particular circumstances of the case. The Second Circuit's test does just that. And its backstop—that any release must be viewed "against a backdrop of equity", supported by "specific and detailed findings" by the bankruptcy court and approved upon de novo review by the district court—provides further protection against abuse. *Purdue III*, 69 F.4th at 68, 79; *see also Stern v. Marshall*, 564 U.S. 462, 471 (2011).

* * *

In sum, third-party releases that pass muster under the Second Circuit's multifactor test are lawful under the Bankruptcy Code and consistent with bedrock bankruptcy principles, and this Court adopting the Second Circuit's test will give debtors, claimants and lower courts greater confidence in distinguishing third-party releases that are legally sound from those that are not. Far from providing

a "roadmap for corporations and wealthy individuals to misuse the bankruptcy system to avoid mass-tort liability" (Pet. Br. 44–45), the Second Circuit's test (as adopted by this Court) will allow lower courts to address mass-tort liabilities in a way that minimizes costs and provides a greater recovery to more creditors on a fairer, more equal basis. And the subject releases will be allowed only if the affected creditors (as a class) overwhelmingly approve them. Thus, public policy and creditor democracy will be enhanced, not diminished, if the availability of this important tool in appropriate cases is confirmed by the Court.

CONCLUSION

For the foregoing reasons and those set forth in Respondents' brief, this Court should hold that the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, non-consensual third-party releases, and should adopt the test articulated by the Second Circuit.

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