

No. 26-20166

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

IN RE THE CONTAINER STORE GROUP, INC., ET AL.,

Debtors.

KEVIN M. EPSTEIN, UNITED STATES TRUSTEE,

Appellant/Cross-Appellee,

v.

THE CONTAINER STORE GROUP, INC., ET AL.,

Appellees/Cross-Appellants.

On Appeal From the United States District Court for the Southern District of Texas
No. 4:25-cv-00618 (Hon. Lee H. Rosenthal)

**BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA IN SUPPORT OF
DEBTORS-APPELLEES/CROSS-APPELLANTS**

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CERTIFICATE OF INTERESTED PERSONS

No. 26-20166

Under Fifth Circuit Rules 26.1, 28.2.1, and 29.2, counsel of record certifies that, in addition to those already listed in the Opening Brief of Appellees/Cross-Appellants, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. *Amicus Curiae*: The Chamber of Commerce of the United States of America (“Chamber”) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

2. Counsel for *Amicus Curiae*: C. Kevin Marshall and Daniel Paul Johnson of Jones Day, in addition to Andrew R. Varcoe and Janet Galeria of the U.S. Chamber Litigation Center.

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INTEREST OF *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

¹ All parties consented to the submission of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

A consensual, non-debtor release can be a key that unlocks value in bankruptcy. In exchange, non-debtors can make significant contributions to the bankruptcy estate that are integral to successful reorganizations. The Trustee takes the categorical position that, although the Bankruptcy Code does authorize consensual non-debtor releases in plans of reorganization, plans may not employ “opt-out” methods for obtaining consent. Rather, only “opt-in” methods suffice—and under state, not federal, law. That is wrong. Nothing in *Harrington v. Purdue Pharma L.P.* supports that rule; the Court there declined to “express a view on what qualifies as a consensual release.” 603 U.S. 204, 226–27 (2024). The Trustee’s rule would be detrimental to successful reorganizations and to creditors across the board, but especially to mass-tort claimants.

First, the Bankruptcy Code empowers courts to include consensual non-debtor releases in reorganization plans, and it charges bankruptcy courts with selecting the “necessary or appropriate” measures for carrying out that authority. 11 U.S.C. §§ 1123(b)(6), 105(a). The specific facts and circumstances of a bankruptcy thus dictate the proper method for soliciting and determining creditors’ consent to non-debtor releases. With appropriate safeguards, opt-out methods can reduce transaction costs, promote prompt resolution, maximize the size of the estate for the benefit of all creditors, and make possible reorganizations that would not otherwise be achievable.

Second, absent economically feasible opt-out methods for determining the consent of creditors, many mass-tort bankruptcies would become an impossibility.

Contributions to the bankruptcy estate in exchange for a release are sometimes the only source of meaningful recovery for mass-tort victims and other creditors. As Justice Sotomayor observed at oral argument in *Purdue*, in a case with “thousands, if not hundreds of thousands, maybe millions of personal injury claims,” it is not apparent “how an opt-in process ... would actually work.” Tr. of Oral Arg. in *Harrington v. Purdue Pharma L.P.*, No. 23-124, at 15–16 (U.S. Dec. 4, 2023) (“*Purdue* Tr.”). In such bankruptcies, a carefully crafted opt-out procedure is essential to an efficient and prompt method that maximizes the value of the bankruptcy estate available to claimants, including tort victims, and that respects the incentives that claimants actually face.

Third, the Trustee’s position that state law governs this issue would further frustrate successful reorganizations. The Trustee offers no choice-of-law rule that would apply to the next case, and the answer is nowhere near clear. Uncertainty over enforceability would lead potential contributors to discount the value of a release, to the detriment of creditors. And if state law controls, a State could legislate how—or whether—creditors may ever assent to such releases. The resulting potential patchwork would be antithetical to having “uniform Laws on the subject of Bankruptcies,” U.S. Const. art. I, § 8, cl. 4, and would throw a wrench into mass-tort resolutions.

Should the Court reach the merits, it should reject the Trustee’s categorical position and should affirm the judgment below.²

² The Chamber takes no position on the Parties’ dispute over standing.

ARGUMENT

I. **CONSENSUAL, NON-DEBTOR RELEASES REMAIN ESSENTIAL TO SUCCESSFUL REORGANIZATIONS AFTER *PURDUE*.**

Courts have approved of non-debtor releases for decades, recognizing their particular value in securing meaningful compensation for mass-tort claimants. *E.g., In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (“non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets”). In *Purdue*, the Supreme Court held that the Bankruptcy Code’s catchall provision for reorganization plans, 11 U.S.C. § 1123(b)(6), does not authorize a plan provision extinguishing a claim against a non-debtor without the claimant’s consent. 603 U.S. at 226. But the Court emphasized that its holding did not “call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan” or “express a view on what qualifies as a consensual release.” *Id.* at 226–27. Consensual releases remain essential to unlocking value for creditors, and the Court should resolve this dispute with an eye to the important implications for mass-tort bankruptcies.

A. **Bankruptcy Law Solves a Value-Destroying Collective Action Problem, Particularly in Mass-Tort Cases.**

The prospect of insolvency gives rise to a collective action problem akin to a bank run. The earliest creditor to claim its due leaves a dwindling—and increasingly inadequate—supply of assets for the rest. The fastest walk away whole; the rest may take nothing. The resulting run pits creditor against creditor, while the piecemeal sale of the debtor’s business to satisfy individual debts may destroy the debtor’s greater value

as a going concern. As a result, the run extinguishes value and jobs, to the detriment of creditors as a whole, the potentially valuable business of the debtor and the employees who make it function, and members of the public who would have benefited from continued jobs (not only with the debtor but with businesses in the value chain), goods, and services. See Brook E. Gotberg & Annette W. Jarvis, *Defending “Second-Party” Releases in Mass Tort Bankruptcies*, 41 EMORY BANKR. DEV. J. 195, 211–12 (2025).

In the context of a bankruptcy involving mass-tort claimants, that dynamic is punishing. The number of claimants is greater, and the resulting competition among them fiercer. See, e.g., Andrew D. Bradt & Sergio J. Campos, *The Ordinary and Extraordinary in Mass Tort Litigation*, 110 CORNELL L. REV. 1823, 1841–42 (2026). With thousands of individual claimants holding unliquidated claims against a debtor who might not be able to satisfy them all, timing and luck drive recoveries: Those “who file early, or who find themselves before a sympathetic jury, or whose injuries happen to manifest quickly, may receive a large payout.” Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 977 (2023). Those who follow may collect nothing. *Id.* Mass torts also push plaintiffs and defendants to engage in duplicative litigation efforts, where each seeks “to expend resources ensuring that his claim will be determined first.” Gotberg & Jarvis, *supra*, at 211. Every dollar of litigation costs spent on either side of the effort is a dollar less to compensate victims.

One purpose of the Bankruptcy Code is to solve these problems. Chapter 11 bankruptcies gather creditors together in a single proceeding, aiming to maximize the

size of the bankruptcy estate and to preserve the value of the firm as a going concern. *See Toibb v. Radloff*, 501 U.S. 157, 163–64 (1991). By doing so, Chapter 11 stops the run on the debtor, aligns creditors’ incentives across each class of claims, reduces transaction costs, and aims to distribute a larger bankruptcy estate equitably. Superintending that process, the bankruptcy court exercises “broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 389 (1993).

Because the “race to the courthouse” is particularly harmful for mass-tort claimants—as well as besieged companies and their affiliates—bankruptcy’s procedural advantages are especially valuable in that setting. Gotberg & Jarvis, *supra*, at 211–12; Casey & Macey, *supra*, at 977. Bankruptcy minimizes duplicative efforts at case resolution in mass torts while also enhancing the funds available for victims’ recovery. *See, e.g., In re Bestwall LLC*, 71 F.4th 168, 183 (4th Cir. 2023) (“[B]ankruptcy procedures promote the equitable, streamlined, and timely resolution of claims in one central place compared to the state tort system, which can and has caused delays in getting payment for legitimate claimants.”). Bankruptcy procedure likewise “accelerat[es] and broaden[s] discovery,” lets courts tailor notice requirements to the circumstances, and allows estimated claims against the bankruptcy estate—with no comparable procedure available in class litigation. Gotberg & Jarvis, *supra*, at 212–13; *see generally* 6 NORTON BANKRUPTCY LAW & PRACTICE § 179:4 (3d ed. 2025) (examples of “flexible”

bankruptcy tools making bankruptcy law “better able to deal with claims resulting from mass torts”).

Class litigation is not able to substitute for the efficiencies and safeguards provided by bankruptcy law. *See* Casey & Macey, *supra*, at 977; *contra* Trustee Br. 21. Mass-tort plaintiffs, for instance, rarely satisfy the predominance requirement of Rule 23(b)(3): They are exposed to wrongdoing in different ways, to different effects, and over different time periods. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–25 (1997) (rejecting certification of a settlement class of asbestos-exposed plaintiffs and observing that “significant” individualized questions are “likely” in the mass-tort context). The Supreme Court has likewise rejected an effort to use a Rule 23(b)(1)(B) limited-fund settlement class to aggregate mass-tort claims against a defendant with finite assets. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 843–45, 864–65 (1999); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (“individualized monetary claims belong in Rule 23(b)(3)”). Without the tools necessary to resolve mass-tort claims that are available in bankruptcy, the likely result is uncoordinated litigation in the federal courts and in every State, to the detriment of victims. *E.g., In re Bestwall LLC*, 71 F.4th at 183.

B. Non-Debtor Releases Are Essential to Unlocking Value for Claimants in Mass-Tort Bankruptcies.

The non-debtor release is among the most important tools necessary to resolve mass-tort bankruptcies. *See* Casey & Macey, *supra*, at 981 (noting that mass-tort

bankruptcies “almost always involve the use of third-party releases”). In exchange for direct contributions to the estate or facilitating the reorganization plan with time, support, and resources, non-debtors with a relationship to the bankrupt business—often employees, directors, insurers, or non-debtor affiliates—will insist on a release of claims against them related to the bankruptcy. The logic for such releases is “entirely reasonable”: Contributing non-debtors “could not have been expected to commit millions of dollars to a reorganization plan and still remain liable to individual creditors for the full amount of their claims.” *In re AOV Indus., Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986).

For many mass-tort victims, a non-debtor release makes meaningful, robust recovery possible. Releases can unlock “significant financial contributions” for the bankruptcy estate and “benefit tort claimants by enlarging the pie of recoverable funds and reducing the duplicative administrative and legal expenses that arise when tort claimants sue the debtor in bankruptcy and the nondebtors in state and federal courts.” Casey & Macey, *supra*, at 1001. Bankruptcy pools assets not only from the debtor but also from affiliates, insurers, and other parties with “a vested interest in contributing to the estate to eliminate any derivative post-confirmation liability”—a mechanism that “provides the estate with a single, more comprehensive pool of assets to efficiently and completely compensate plaintiff creditors.” C. Anne Malik, *Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts*, at 12, U.S. Chamber of Commerce Institute for Legal Reform (2022). Conversely, without a release, non-debtors such as insurers, co-debtors,

or joint tortfeasors must account for their own liability to creditors as well as the costs of defending against a multitude of suits—resulting in fewer (if any) contributions to the estate. For this reason, third-party releases are often necessary to secure funds or cooperation integral to a reorganization’s success. *See, e.g., Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 141–42 (2009) (insurers’ \$770 million payment supplying “most of the initial corpus” of the Manville bankruptcy trust was the “cornerstone” of that reorganization, and “[t]here would have been no such payment” without precluding claims against non-debtors).

Releases similarly address the problem of backdoor depletion of the bankruptcy estate. Non-debtors with a relationship to the bankrupt—or to the reasons for the bankruptcy—may have claims for indemnification or contribution against the debtor, and a consensual release reduces the prospect of “costly and time-consuming litigation, including post-confirmation contribution and indemnification claims.” *Matter of Specialty Equip. Cos.*, 3 F.3d 1043, 1049 (7th Cir. 1993). Such suits against non-debtors may be, “in essence, a suit against the debtor,” or may “deplete the assets of the estate.” *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 310 (1995) (noting that allowing recovery from a non-debtor surety would have “a direct and substantial adverse effect” on the debtor’s “ability to undergo a successful reorganization”).

Yet even setting aside indemnification and contribution, a similar race-to-the-courthouse arithmetic governs claims against individual non-debtors whose potential

exposure arises from the debtor’s affairs. Where the bankruptcy estate shrinks below the point of meaningful recovery, or where no reorganization plan is proposed and confirmed, thousands of tort claimants may race to pursue individual defendants. *See* Daniel J. Bussel, *The Mass Tort Claimants’ Bargain*, 97 AM. BANKR. L.J. 684, 732 (2023). This secondary race is even less efficient than the first—involving numerous individual defendants, perhaps none of whom, individually, can satisfy the claims. The result is that the duplication of litigation is greater, the claims weaker, and the recoveries smaller.

C. Courts Have Approved Non-Debtor Releases for Decades as Essential Components of Confirmed Plans in Mass-Tort and Other Contexts.

For decades, courts have affirmed that non-debtor releases can be “appropriate” provisions of a plan of reorganization, and they have implemented them through processes “necessary or appropriate” to the case at hand. 11 U.S.C. §§ 1123(b)(6), 105(a). In many circuits, these releases have always involved consent. *See Purdue*, 603 U.S. at 214 n.1.

Forty years ago, the D.C. Circuit approved a consensual non-debtor release included in a plan of reorganization for a coal company. *In re AOV Indus.*, 792 F.2d at 1142. Two major creditors—who faced debtor-related suits from fellow creditors—agreed to relinquish tens of millions of dollars of their own claims and to contribute millions more to the bankruptcy estate. *Id.* at 1142–43, 1152. Of that contribution, \$3 million would be available to unsecured creditors who agreed to release their claims against the contributing creditors. *Id.* at 1143. “In voting on the plan, each creditor of

the debtor was given a choice whether to accept or reject the plan and a separate choice whether or not to release” the contributing creditors. *In re AOV Indus., Inc.*, 31 B.R. 1005, 1009 (D.D.C. 1983). The vast majority of creditors approved the plan and accepted the release.

Upholding the release in relevant part, the D.C. Circuit explained that it was “entirely reasonable” and integral to the success of the reorganization: without the release, the contributing non-debtors “could not have been expected to commit millions of dollars.” *In re AOV Indus.*, 792 F.2d at 1152. Those releases, too, unlocked value for creditors as a whole: Individual claims against the contributing creditors “were probably unrecoverable,” and “liquidation of [the] debtor’s assets probably would not produce enough to pay even the priority creditors of the debtor, let alone unsecured creditors.” *In re AOV Indus.*, 31 B.R. at 1013; *see also, e.g., In re Monroe Well Serv., Inc.*, 80 B.R. 324, 329 (Bankr. E.D. Pa. 1987) (overruling objections to consensual release that unlocked over \$6 million in contributions to the bankruptcy estate, noting that the alternative “would result in little or no dividend for unsecured creditors”).

Consensual non-debtor releases can also unlock value without a monetary contribution, by facilitating the reorganization or protecting the estate from further litigation. For instance, following *AOV*, the Seventh Circuit approved a reorganization plan providing “that all creditors voting in favor of the Plan are deemed to give Releases to a number of third parties”—that is, senior lenders, as well as certain management and underwriters—“from any liability arising out of a relationship with the Debtors.”

Specialty Equip., 3 F.3d at 1045. Although the released parties did not make a cash contribution to the estate, the court found the release “serve[d] the objectives of the Plan by facilitating the resolution of claims” and reduced the chance of “costly and time-consuming litigation, including post-confirmation contribution and indemnification claims.” *Id.* at 1049. Applying a procedure suited to the specifics of that case, the court treated a vote in favor of the plan as “consent” to the releases, and it held that “consensual and non-coercive” releases are “in accord with the strictures of the Bankruptcy Code.” *Id.* at 1047, 1049.

Releases have similarly played a prominent role in resolving bankruptcies centered on “mass claims.” *See In re Pac. Lumber Co.*, 584 F.3d at 252 (“non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets”). In *Johns-Manville*—one early and famous example—the plan of reorganization for that asbestos bankruptcy required tens of thousands of claimants to look exclusively to a particular trust for compensation. That trust—funded by contributions from the debtors, settlements with insurers, and future proceeds of the reorganized company—served as the “cornerstone” of the reorganization and was designed to “provide a means of satisfying Manville’s ongoing personal injury liability while allowing Manville to maximize its value by continuing as an ongoing concern.” *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988). In exchange for the contributions, the plan extinguished the claimants’ asbestos injury claims against the non-debtors. *Id.*; *see also In re Johns-Manville Corp.*, 68 B.R. 618, 624–26 (Bankr. S.D.N.Y.

1986) (confirming the plan and finding the channeling injunction necessary because otherwise “the intended beneficiaries of the reorganization ... will certainly suffer”), *aff’d sub nom. MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988). Though this release did not require claimants’ consent, Congress later approved of *Manville’s* process—and specified safeguards for nonconsensual releases—in § 524(g). *See Purdue*, 603 U.S. at 222; *infra* Part II.A.

Manville is not alone in looking to non-debtor releases to unlock value for mass-tort claimants. *See, e.g., In re Mallinckrodt PLC*, 639 B.R. 837, 875–76, 878–80 (Bankr. D. Del. 2022) (approving consensual opt-out releases in opioid mass-tort case, where the released parties’ contributions funded trusts for claimants); *In re Roman Cath. Diocese of Syracuse*, 667 B.R. 628, 635–36 (Bankr. N.D.N.Y. 2024) (approving consensual opt-out release where an opt-in requirement might have “prompt[ed] the [released parties] to withdraw their \$50M contribution”); *see also Malik, supra*, at 12 (over 100 companies have used bankruptcy to resolve asbestos liabilities, and “dozens” of other mass-tort defendants have done the same). In so doing, courts have repeatedly endorsed the central role such releases play in resolving “mass claims.” *See In re Pac. Lumber Co.*, 584 F.3d at 252.

II. THE BANKRUPTCY CODE EMPOWERS COURTS TO SELECT “NECESSARY OR APPROPRIATE” METHODS FOR SOLICITING AND OBTAINING CONSENT TO A NON-DEBTOR RELEASE.

The Trustee takes the position that there is only a single way to secure consent to non-debtor releases—explicit, affirmative consent, governed (here) by Texas law.

That is wrong under 11 U.S.C. § 1123(b)(6) and § 105(a). Moreover, restricting bankruptcy courts to affirmative, “opt-in” consent would effectively bar non-debtor releases in mass-tort bankruptcies. In a case involving “thousands, if not hundreds of thousands, maybe millions of personal injury claims,” it is not apparent “how an opt-in process ... would actually work.” *Purdue Tr.*, *supra*, at 15–16. The application of state law, too, would inject needless uncertainty into the use of releases in mass-tort bankruptcies and invite gamesmanship by States. The result would deprive mass-tort victims of meaningful recoveries that would otherwise be possible under a uniform federal rule.

A. The Bankruptcy Code Authorizes Consensual Third-Party Releases in a Chapter 11 Plan.

The Bankruptcy Code authorizes bankruptcy courts to include consensual releases in a plan of reorganization and to select the appropriate procedures for obtaining consent in a given case. Section 1123(b) “confer[s] ... authorities on a bankruptcy court,” granting it the power to include certain terms in a reorganization plan. *Purdue*, 603 U.S. at 215. Section 1123(b)(6), in turn, permits a plan to include “any other appropriate provision not inconsistent with the applicable provisions of this title.” “[T]he word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *E.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997). The “kind” specified in § 1123(b)(6) is a provision “appropriate” and “not inconsistent” with the rest of the Code.

As to “appropriate,” *Purdue* explains that this “‘context dependent’ term” must “draw meaning from [its] surrounding provisions”—that is, subsection (a), which specifies what a plan “shall” include, followed by subsection (b), which specifies what a plan “may” also include. *Purdue*, 603 U.S. at 215, 217–18. No provision in § 1123 restricts *how* parties may agree to relinquish a right in order to facilitate a successful reorganization. And subsection (a)(4) expressly contemplates that a “holder of a particular claim or interest” may “agree[] to a less favorable treatment of such particular claim or interest,” without prescribing how the bankruptcy court determines such agreement. 11 U.S.C. § 1123(a)(4).

As to “not inconsistent,” non-debtor releases can be “proposed in good faith,” 11 U.S.C. § 1129(a)(3), and necessary to a successful reorganization, 11 U.S.C. § 1129(a)(11). *See supra* Part I.A–C. It follows—and “is the consensus of courts so far”—that “post-*Purdue* as pre-*Purdue*, consensual third-party releases may be included in Chapter 11 plans” under § 1123(b)(6). *In re Lutheran Home & Servs. for the Aged, Inc.*, 2026 WL 626606, at *20 (Bankr. N.D. Ill. Mar. 4, 2026).

This interpretation is consistent with the long-standing practice of bankruptcy courts. For decades, “courts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code.” *Specialty Equip.*, 3 F.3d at 1047. And “[b]ankruptcy courts within the Fifth Circuit commonly exercise jurisdiction to approve [consensual] nonparty releases,” which “serve[] the bankruptcy law’s purpose of quick and efficient resolution of claims.” *Cole v. Nabors Corp. Servs., Inc.* (*In*

re CJ Holding Co.), 597 B.R. 597, 608–09 (S.D. Tex. 2019) (collecting authority); *see also*, e.g., *In re Adelphia Commc’ns Corp.*, 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007) (enforcing consensual non-debtor releases against claimants who agreed to them), *aff’d*, 544 F.3d 420 (2d Cir. 2008); *U.S. Bank Nat’l Ass’n v. Wilmington Tr. Co. (In re Spansion, Inc.)*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (similar).

Section 1123(b)(6), then, authorizes a bankruptcy court to include consensual releases. Section 105(a) augments that authority. Section 105(a) grants the bankruptcy court the power to “issue any order, process, or judgment that is necessary or appropriate” to “carry out the provisions of” the Bankruptcy Code. *See Purdue*, 603 U.S. at 216 n.2 (Section 105 “serves to ‘carry out’” authorities “conferred elsewhere in the code”). It is thus for the bankruptcy court to conduct a fact-dependent inquiry to determine and order the “necessary or appropriate” process for obtaining consent in any given case. *See In re Airadigm Commc’ns, Inc.*, 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.”); *see also In re ECI Pharms., LLC*, 2026 WL 1960802, at *3 & n.4 (11th Cir. July 7, 2026) (unpublished) (declining to excuse forfeiture of “fact-bound” challenge to opt-out third-party release). Federal bankruptcy law thus provides that, depending on those facts, different methods may be appropriate, including “opt in” or “opt out” procedures.

Section 524(g) is consistent with that analysis. That provision—specific to asbestos mass torts—specifies the protections applicable to *nonconsensual* non-debtor

releases. *Purdue*, 603 U.S. at 222. Section 524(g) “imposes safeguards, including the appointment of a representative to protect the interest of future claimants,” treatment of “present claims and future demands that involve similar claims in substantially the same manner,” and “approval from at least 75% of current claimants.” *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 273–74 (2024). By doing so, Congress chose to shape with specificity the guardrails that serve as a prerequisite to unlocking nonconsensual releases. By contrast, it left bankruptcy courts to identify the “necessary or appropriate” measures in contexts involving consent. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (nothing in § 524(g) “shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization”).

The Bankruptcy Code thus entrusts bankruptcy courts to consider the facts of a particular case in determining the “necessary or appropriate” consent. Opt-out procedures may be warranted, or not, depending on the circumstances. *Compare In re Mallinckrodt*, 639 B.R. at 875–76, 878–80 (finding consent where notice reached roughly 91 percent of U.S. adults and 2,200 holders opted out), *with In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592, at *6–8 (Bankr. D. Del. Mar. 27, 2023) (accepting opt-out procedures “in the typical case” but refusing to approve the proposed form in the case before the court, because a prior order of the court may have prevented the affected creditors from learning that they held claims at all).

The experience of bankruptcy courts identifies at least four guardrails for cases involving opt-out procedures:

Conspicuous Notice. Without appropriate notice of a release, a creditor cannot consent to it by failing to opt out. An opt-out notice must therefore be calculated to reach the holder, describe the released claims conspicuously, and clearly explain how to decline. *See In re Spirit Airlines, Inc.*, 668 B.R. 689, 703 (Bankr. S.D.N.Y. 2025) (requiring, for opt-out releases, “clear and prominent notice and explanation of the releases” and “an opportunity to decline to grant them”); *see also, e.g., In re Tebum Care Servs., Inc.*, 672 B.R. 108, 113–14 (Bankr. S.D. Tex. 2025) (opt-outs must be reasonably calculated to actually reach holders). The Bankruptcy Rules require just as much of injunctions that enforce releases, directing the plan to describe them “in specific and conspicuous language (bold, italic, or underlined text)” and “identify the entities that would be subject to the injunction.” Fed. R. Bankr. P. 3016(c); *see also* Fed. R. Bankr. P. 2002(c).

Courts have refused opt-out procedures where notice is insufficient. *See Arsenal*, 2023 WL 2655592, at *6–8; *cf. Pioneer*, 507 U.S. at 398 (notice of a deadline that will bind a creditor should be “prominently announced and accompanied by an explanation of its significance”). Where notice is adequate, however, a creditor that ignores a validly served plan does so at its peril—like any other litigant who ignores a court’s process. *See, e.g., In re Spirit Airlines*, 668 B.R. at 703–04 (“When someone is clearly and squarely told if you fail to act your rights will be affected, that person is then given information

that puts them on notice that they need to do something or else. ‘That’s not a trap.’”); *In re Mallinckrodt*, 639 B.R. at 880. Notice is the starting point for an adequate opt-out procedure.

Relationship to the Bankruptcy. Claims released through an opt-out must relate to the debtor and the estate. *See Specialty Equip.*, 3 F.3d at 1049. Releases unrelated to the bankruptcy estate are neither “appropriate” nor in furtherance of the aims of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(6). Those who receive court-approved notice materials about a bankruptcy, *e.g.*, Debtors Br. 24–25, reasonably expect the contents of those materials to have a relationship to the bankruptcy. Courts have accordingly recognized that a relationship to the bankruptcy serves a limiting function: without a nexus, nothing would stop a plan from releasing *any* claim held by a creditor who failed to opt out. *See In re Lavie Care Ctrs., LLC*, 2024 WL 4988600, at *16 & n.59 (Bankr. N.D. Ga. Dec. 5, 2024). This limit also has a jurisdictional dimension. A bankruptcy court’s “related to” jurisdiction extends to suits between non-debtors that affect the estate. *Celotex*, 514 U.S. at 307–08 & n.5. Insufficiently related claims thus may raise doubts about the bankruptcy court’s power to enforce orders relating to them.

Unlocked Value. Consent obtained through opt-out procedures is also more likely to be present (all else being equal) when a creditor stands to gain from it—whether, as is common in mass torts, a contribution to the estate or something else that facilitates a successful reorganization. *See, e.g., In re Spirit Airlines*, 668 B.R. at 711 (affected creditors received substantial recoveries, most of them paid in full); *cf. In re*

Tonawanda Coke Corp., 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (sustaining an objection where creditors received no consideration for the release). In other words, the value unlocked by a release—which differs from bankruptcy to bankruptcy—helps to distinguish silence as a choice from silence born of inattention.³

Procedural Fairness Under the Code. A final consideration looks to the procedural fairness of the Parties’ negotiations. The Code reflects these considerations in requiring that a plan, for example, be “proposed in good faith,” 11 U.S.C. § 1129(a)(3), be likely to lead to a successful reorganization, § 1129(a)(11), and be solicited only after court-approved disclosure, § 1125(b). *Cf. In re Tommy’s Fort Worth, LLC*, 2025 WL 2092193, at *68, *70 (Bankr. N.D. Tex. July 24, 2025) (crediting the presence of someone “there to look out for the interests of unsecured creditors” in the negotiations); *In re Lavie Care Ctrs.*, 2024 WL 4988600, at *17–18 (crediting committee’s investigation on behalf of unsecured creditors and that more than 400 holders followed the procedures and opted out). An opt-out release negotiated through a good-faith process, superintended by the court, and needed for a successful reorganization is a “necessary or appropriate” one.

³ The district court held that the value unlocked for Classes 5 and 8 was inadequate to justify the opt-out release because those classes did not receive a distribution. The Debtors do not challenge that determination. Debtors Br. 43 n.8. But in many circumstances, value may be unlocked for the estate without a monetary transfer. *See Specialty Equip.*, 3 F.3d at 1049. A mutual release, too, may have value. This case does not present that question, and the Court need not decide on a quantum or kind of value to be unlocked as a result of opt-out procedures.

The bankruptcy and district courts accounted for these considerations here in finding an opt-out release appropriate on the facts of this case. *See* Debtors Br. 18–19. In caricaturing the district court’s analysis as “a new, 12-factor federal test,” *e.g.*, Trustee Br. 2, the Trustee mischaracterizes a thorough, fact-intensive inquiry as a hard-and-fast rule. The decision below addressed each of the key guardrails as part of its factual analysis—identifying conspicuous notice, approving releases related to the bankruptcy itself, examining the value exchanged for the releases, and superintending a procedurally fair resolution. Debtors Br. 18–19. That fact-intensive analysis is exactly what the Bankruptcy Code calls for—rather than a categorical prohibition on opt-out releases.

B. A Blanket Prohibition on Opt-Out Releases Would Harm Mass-Tort Bankruptcies, Where Opt-Out Procedures For Obtaining Consent Are Often “Necessary” and “Appropriate.”

The categorical prohibition on opt-out releases that the Trustee advances would be detrimental for mass-tort claimants. In cases with a discrete, manageable set of identifiable claimants, arguments for requiring affirmative consent may be stronger. *See In re AOV Indus.*, 792 F.2d at 1142. But when debtors face mass claims, that can become impossible. Plan proponents could not follow up with every claimant to obtain a decision on affirmative consent without consuming the value they seek to distribute. And absent prompt tender of sufficient releases, non-debtors would not contribute to the estate. *See FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285–86 (7th Cir. 2002) (“[T]ransaction costs would be prohibitive if everyone who might have an interest in the bankrupt’s assets had to execute a formal consent before they could be sold.”

(emphasis omitted)). When a debtor faces “thousands, if not hundreds of thousands, maybe millions of personal injury claims,” the administrative and transaction costs of an “opt-in process” are likely to be prohibitive. *See Purdue Tr.*, *supra*, at 15–16. Opt-outs are therefore “necessary” for many, if not all, successful mass-tort resolutions in bankruptcy. 11 U.S.C. §§ 105(a), 1123(b)(6).

Relatedly, at the scale of mass torts, a court-approved opt-out carries benefits that tend to make it particularly “appropriate.” 11 U.S.C. §§ 105(a), 1123(b)(6); *see In re Pac. Lumber Co.*, 584 F.3d at 252. **First**, opt-out procedures increase the value of the bankruptcy estate by reducing transaction costs and by incentivizing larger contributions. *See In re Roman Cath. Diocese of Syracuse*, 667 B.R. at 635–36; Casey & Macey, *supra*, at 1003 (non-debtors exposed to additional suits “would undoubtedly offer less”). Each dollar saved in costs or added to the estate is another dollar for victims. **Second**, opt-out methods increase the speed of resolutions. Speedy, pre-negotiated bankruptcies would lose their benefits in mass-tort cases if the bankruptcy were drawn out by the need to chase opt-ins from holders who have already received appropriate notice. *See, e.g., Cole*, 597 B.R. at 608–09. **Third**, opt-out methods track the incentives that mass-tort claimants actually face: In *Shutts*, the Supreme Court similarly recognized that small claimants may lack the incentive to “affirmatively request inclusion” in class action litigation, making opt-out methods desirable. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985). By contrast, if a claim “is sufficiently large or important that [a claimant] wishes to litigate it on his own, he will likely have retained

an attorney or have thought about filing suit, and should be fully capable of exercising his right to ‘opt out.’” *Id.* So too for mass-tort claimants in the context of a bankruptcy.

Opt-out procedures have also proven themselves at scale, permitting the efficient resolution of mass claims while respecting the choice of those who wish to keep their claims. In *Mallinckrodt*, for example, notice of the release reached roughly ninety-one percent of American adults, and 2,200 holders returned opt-out forms. *E.g., In re Mallinckrodt*, 639 B.R. at 878–80. Holders in other mass claim cases have done the same. *See In re Lavie Care Ctrs.*, 2024 WL 4988600, at *17–18; *In re Robertshaw US Holding Corp.*, 662 B.R. 300, 323–24 (Bankr. S.D. Tex. 2024).

In short, third-party releases unlock value for mass-tort claimants, and they are frequently integral to successful bankruptcies involving mass claims. *See supra* Part I.B. If such releases are placed out of reach, the result would be “all litigants losing bankruptcy as an option for reorganization and aggregation of claims into one forum for global resolution”—an outcome that “would not serve the interests of justice, equity, and efficiency.” *Malik, supra*, at 30. A categorical rule would instead return tort claimants to the value-destroying race to the courthouse that the Code seeks to avoid.

C. Federal Law Controls the Appropriate and Necessary Methods for Obtaining Consent to a Third-Party Release.

Because the Bankruptcy Code empowers courts to include consensual non-debtor releases in a plan of reorganization, *supra* Part II.A, it is for a federal bankruptcy court, “governed solely by federal law,” to elicit and assess consent to a non-debtor

release based on the facts of the case at hand. *In re Pat McGrath Cosms. LLC*, 679 B.R. 591, 598 (Bankr. S.D. Fla. 2026); Debtors Br. 35–37, 44–48. The Trustee’s position that state law determines all questions of consent would throw a wrench into the resolution of mass-tort bankruptcies. Officers, directors, insurers, and affiliates weigh the durability of a release when they decide whether and what to contribute to a plan. Unpredictable and nonuniform rules spanning fifty different States would greatly impede that assessment; reduce the funds available to claimants; and pose an obstacle to reorganization plans.

Applying the law of 50 different States would be in tension with the constitutional charge to establish “uniform Laws on the subject of Bankruptcies.” U.S. Const. art. I, § 8, cl. 4; see *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 470–71 (2017) (emphasizing the “importance of clarity and predictability” in bankruptcy law). “[T]here is no answer to the question ‘which state’s law should be applied?’ The law of the state where the bankruptcy court sits? The law where the debtor is headquartered? Some other state’s law?” *In re Spirit Airlines*, 668 B.R. at 716 n.31; see *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012) (emphasizing the need for clarity and predictability under the Bankruptcy Code). The Trustee offers no method for resolving this choice-of-law difficulty, answering only that Texas law applies in *this* case because the Debtors have not argued for a different State. Trustee Br. 28. But the resulting uncertainty over the enforceability of releases does nothing for creditors who must determine whether—and how much—to contribute to a plan.

A state-controlled rule would also open the door to gamesmanship. If state law controls, then a State may define by statute what counts as consent to a reorganization plan—or even whether any consent is permitted in mass-tort cases. *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (“in the absence of a plain indication to the contrary, ... Congress when it enacts a statute is not making the application of the federal act dependent on state law”). And depending on the choice-of-law rule that applies, differing state laws would also invite forum shopping by debtors. *See* 28 U.S.C. § 1408. To avoid such variation, courts have supplied “uniform” federal content even for terms the Bankruptcy Code leaves undefined. *See In re Donald*, 328 B.R. 192, 200 (B.A.P. 9th Cir. 2005) (rejecting the argument that state definitions of “domicile” should be applied under the Code).

The uncertainty of determining which state law applies would burden debtors as well as creditors. A standard that shifts by state and filing district would raise the uncertainty—and price—of a workable plan. That would be to the detriment of mass-tort claimants, who depend on predictably enforced releases to unlock value and make a bankruptcy possible.

CONCLUSION

The Court should reject the Trustee’s merits position that opt-out procedures for establishing consent are categorically impermissible and should affirm the decision below.

Respectfully submitted,

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I hereby certify that on September 25, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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