No. 23-124

In The
Supreme Court of the United States

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

Petitioner,

vs.

PURDUE PHARMA L.P., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA AND THE NATIONAL BANKRUPTCY VENUE REFORM COMMITTEE AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

BRIAN L. DAVIDOFF
GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP
2049 Century Park East, Suite 2600
Los Angeles, California 90067
T: 310-201-7520
bdavidoff@ggfirm.com

DOUGLAS B. ROSNER
Counsel of Record
GOULSTON & STORRS
400 Atlantic Avenue
Boston, Massachusetts 02110
T: 617-574-6517
drosner@goulstonstorrs.com

[Additional Counsel Listed On Signature Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTERESTS OF AMICI CURIAE

This amicus curiae brief reflects the views of the Commercial Law League of America and the National Bankruptcy Venue Reform Committee.[1]

The Commercial Law League of America (the "CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance. Its membership is approximately 1000 lawyers, judges and other professionals who represent virtually every state, both small and large practices and divergent interests and parties, who are actively engaged in the fields of commercial law, bankruptcy, and reorganizations. The CLLA has testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields. The CLLA also appears as amicus to provide a practical, experienced perspective to complement and reinforce the relevant scholarship and arguments—and in this case regarding forum shopping and bankruptcy venue reform issues.

The CLLA has long represented and advocated creditor interests, but its members recognize that the fair, equitable, uniform, and efficient administration of bankruptcy cases and debtor-creditor relations requires that all parties fully and fairly participate in the bankruptcy process. The appearance as amicus of a

---

[1] This brief was authored by the National Bankruptcy Venue Reform Committee and the CLLA. The CLLA made a monetary contribution to fund the preparation and submission of this brief. No parties, other than the CLLA, made a monetary contribution. This disclosure is made pursuant to rule pursuant to Rule 37.6.

predominantly creditor-oriented organization to advocate a decision that promotes the uniform application of bankruptcy laws with regard to the treatment of non-consensual third-party releases is not paradoxical or incongruous. It is empirical and logical. Creditors recognize that the bankruptcy system best serves all interests when bankruptcy laws are applied uniformly and thus forum[2] shopping is not encouraged by the availability or unavailability of important bankruptcy laws, as interpreted by different Circuits.

The National Bankruptcy Venue Reform Committee ("Venue Reform Committee") is comprised of attorneys from around the country who practice commercial bankruptcy law. The Venue Reform Committee organizes an effort among insolvency professionals around the country advocating for an end to rampant forum shopping in the federal bankruptcy system.

The CLLA and the Venue Reform Committee each certify that they are non-profit, voluntary organizations that have no corporate parents or stockholders.

INTRODUCTION

Amici curiae CLLA and Venue Reform Committee submit this brief in support of neither Petitioner nor Respondents. While the amici take no position with respect to whether non-consensual third-party releases

[2] This brief uses the terms "forum" and "venue" interchangeably.

are valid under the Bankruptcy Code, the amici believe that if the Court were to adopt a multi-factor or otherwise discretionary test to determine the propriety of non-consensual third-party releases, it will intensify the already prevalent problem of forum shopping of bankruptcy courts for large case Chapter 11 filings.

This Court has previously stated that "it is absolutely clear" that Congress did not intend to provide plaintiffs with "unfettered choice among a host of different districts" to establish venue.[3] Corporate debtors engineer more venue options under the bankruptcy venue statute than those available to plaintiffs in the civil litigation context. However, Chapter 11 debtors abuse the statute's permissiveness by manufacturing venue in the run up to bankruptcy. Effectively, these corporations have an "unfettered choice among a host of different districts" where they may properly file for bankruptcy.

On August 10, 2023, the Court granted certiorari to decide this issue: "Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent." In deciding this issue, the Court should consider how affirming the multi-factor test adopted by the Second Circuit—requiring significant judicial discretion—will encourage Chapter 11 debtors to forum

---

[3] *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 24 (1987) (citing *Leroy v. Great Western United Corp*., 443 U.S. 173, 185 (1979)).

shop their cases to districts with judges with a known history of deciding these factors in favor of debtors and thereby exacerbate the many problems associated with forum shopping currently plaguing the bankruptcy system.

SUMMARY OF ARGUMENT

In 1978, with the passage of the Bankruptcy Reform Act, Congress amended 28 U.S.C. § 1408 to allow debtors a total of four bases for establishing venue: (1) the district in which the debtor's principal place of business is located; (2) the place of the debtor's principal assets; (3) any district in the state in which the debtor is incorporated; or (4) the district in which a case concerning an affiliate of the debtor is pending. This broad grant of venue choice was not historically controversial. It enables companies within the same corporate family to file for bankruptcy before the same court. However, today companies of all sizes use § 1408 to venue shop their bankruptcy cases to courts perceived as "magnet courts" in a manner that bears little relation to the policy basis of the statute.[4]

[4] While the focus of this brief is on large cases as discussed and defined in section 3(b), venue shopping occurs in cases with less than $7.5 million in liabilities as well. Happy Joe's Pizza, a company with headquarters in Davenport, Iowa, recently filed three Chapter 11, Subchapter V cases in Delaware. *See, e.g.*, *In re Dynamic Restaurant Acquisition, Inc. d/b/a Happy Joe's Pizza*, No. 22-10839-JKS (Sep. 2, 2022); *In re TS Dynamic Acquisition,*

There are several negative consequences of forum shopping generally, and its effects are more pronounced in the bankruptcy context than in ordinary litigation. First, rampant forum shopping undermines the integrity of the bankruptcy system. It creates the perception that a commercial debtor can choose the judge to oversee its reorganization and how its creditors, employees and retirees will be treated. Second, allowing companies to file in any far-flung jurisdiction makes it more difficult for smaller creditors and the debtor's employees to actively participate in a bankruptcy case. Third, forum shopping stymies the development of innovative case management techniques and legal interpretations from judges across the country. Fourth, forum shopping allows debtors to affect the fate of litigation across the country in a venue that has little or no connection to the debtor companies or their local communities left behind. Unlike other forms of litigation, bankruptcy is ultimately a procedural device that enables debtors to bring all claims against them into a single forum where they can be addressed in an orderly fashion. In choosing to file in a particular venue, debtors, particularly those facing mass tort litigation, subject litigants to the bankruptcy forum's procedural laws. Finally, bankruptcy decisions are often appeal proof. Given the bankruptcy doctrine known as "equitable mootness," and the limited appellate remedies available in the bankruptcy code, there are very

---

Inc., No. 22-10840-JKS (Sep. 2, 2022); *In re TS Dynamic Holdings, LLC*, Case No. 22-20898-JKS (Sep. 2, 2022).

few checks on bankruptcy judges, making the choice of the initial filing judge a particularly powerful one.

Purdue presents the quintessential case of a Chapter 11 forum shopping and indeed its more pernicious corollary, judge picking. The Debtor's headquarters are in Stamford, Connecticut, and it could have filed for bankruptcy in Connecticut. Instead, Purdue selected White Plains, New York. At the time Purdue filed for bankruptcy, Judge Robert Drain was the only bankruptcy judge sitting in that division. This allowed for predictability over the outcome of the case, specifically the controversial issue of non-consensual third-party releases, which Judge Drain had previously opined on in two separate cases. This Court's ability to review the bankruptcy court's decision is only because the district court recognized the risk that appellate review could be frustrated through the doctrine of equitable mootness and precluded the case from befalling this fate.[5]

While the issue before the Court is not about venue shopping, it is part of the fabric of how this case came to be before the Court. The Court should ensure that its ruling on the issue before the Court—non-consensual third-party releases—does not further

---

[5] *See* Memorandum and Order Denying Without Prejudice the United States Trustee's Emergency Motion for a Stay Pending Appeal, No. 21-cv-7969(CM) (S.D.N.Y. Oct. 13, 2021) (ECF No. 48) at 12 ("I am on the record as stating that I will not allow this appeal to be equitably mooted."); Stipulation, *In re Purdue Pharma L.P. Bankruptcy Appeals*, No. 21-cv-7969 (CM) (S.D.N.Y. Oct. 15, 2021) (ECF No. 52) (stipulation among all parties not to argue that the appeal had been rendered equitably moot by virtue of a bankruptcy court order allowing certain plan features to go into effect).

exacerbate the deleterious use of venue shopping in bankruptcy cases.

ARGUMENT

I. The Permissive Venue Provisions and Chapter 11 Debtors' Unfettered Venue Choices

Title 28 of the U.S. Code, provides as follows:

> Except as provided in section 1410 of this title,[6] a case under title 11 may be commenced in the district court for the district—
>
> **(1)** in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
>
> **(2)** in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

For a corporate debtor, § 1408 provides four primary bases for establishing venue in a district: (1) the

[6] Dealing with venue of cases ancillary to foreign proceedings.

debtor's principal place of business in the United States is in the district; (2) the debtor's principal assets in the United States are located in the district; (3) the debtor is incorporated in the state in which the district is found; or (4) a case concerning an affiliate of the debtor is pending in the district.

This rule provides considerable flexibility to entity debtors.[7] The bankruptcy case may be filed in any location in which an affiliate is headquartered, is incorporated or has assets, even if that affiliate is inactive or holds only nominal assets. The more complex a corporate debtor's structure is, the greater venue options under the statute.

Surprisingly, allowing commercial debtors to file in the district where an affiliate has a pending case was traditionally one of the least controversial provisions of the venue rules when they were first enacted. Without this basis for venue, various companies within the same corporate family could be forced to file for bankruptcy in different districts, and a wholesale adjudication of the corporate family's bankruptcy cases would be impossible. The net result would be a significant reduction in a meaningful reorganization of an

---

[7] Application For A Stay Of The Mandate Of The United States Court Of Appeals For The Second Circuit Pending The Filing And Disposition Of A Petition For A Writ Of Certiorari, *William K. Harrington v. Purdue Pharma L.P., et al*., No. 23A87 (U.S. July 28, 2023), "In light of the flexible venue rules applicable to bankruptcy cases, most large debtors who seek to confirm a plan with such a release will be able to file their petitions within the Second Circuit."

affiliated group of companies. Today, however, § 1408(2) is used in a manner that bears little relation to the policy basis of the provision. There is a recent trend among corporate debtors to abuse this provision by incorporating a subsidiary in a favorable district for the sole purpose of establishing venue.[8]

The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer.[9] While venue rules are not jurisdictional provisions, they exist to serve the interests of justice and the convenience of all parties in interest.[10] Venue is the determination of where judicial authority may be exercised as determined by applicable legislation.[11]

In typical civil litigation, the plaintiff chooses from one of a few venue options, which are presumed to be fair to the defendant because they are based on the defendant's actions or business. To the extent the plaintiff's choice is in fact inappropriate, the defendant has

---

[8] Portions of this argument are drawn from Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 Conn. L. Rev. 159 (2013) (hereinafter "Parikh, Modern Forum Shopping").

[9] *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939).

[10] *See United States v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969) ("Venue is a forum limitation imposed for the convenience of the parties. . . . [I]t may be conferred on a court either by consent or by the failure of the defendant to make a timely objection."); *In re Bankers Trust*, 403 F.2d 16, 22 (7th Cir. 1968) ("Ordinarily, no doubt the venue rules in bankruptcy will serve the interest of justice. . . .").

[11] Parikh, Modern Forum Shopping, *supra* note 8, at 164.

the right to attempt to have the plaintiff's choice overturned by the chosen court.[12] Other than the right to seek a change of venue, a defendant does not have the right to designate the specific court that will hear the lawsuit.

Conversely, in bankruptcy, the party who is unable to pay its debts—the presumptive defendant in any other civil context—is the party instituting the proceeding and selecting venue.[13] In bankruptcy, the harmed parties, usually creditors, are often at the mercy of the debtor's venue selection.[14]

The permissive venue rules in bankruptcy afford a corporate debtor wide latitude in selecting venue. From those options, the corporate debtor can choose the venue that it believes will be most favorable to ownership, management, insiders, or lenders depending on which party exercises the most control and leverage over the decision-making process.[15]

---

[12] 28 U.S.C. § 1412.

[13] Nat'l Bankr. Review Comm'n, *Bankruptcy: The Next Twenty Years* 783 (Nov. 26, 1997), https://tinyurl.com/The-Next-Twenty-Years (hereinafter, "NBRC Report") (noting that in bankruptcy actions, unlike in other civil actions, "[a] multitude of parties that are not necessarily adverse to each other are brought into the bankruptcy court by the debtor to determine the claims and interests in the property of the estate").

[14] *See id*. (noting the "disenfranchisement of smaller creditors in the current venue statute").

[15] *See id*. (asserting that "when a few judges, by virtue of sitting in desirable venues, are the only judges to review certain issues, the system breaks down," and arguing that "[d]eleting state

A debtor's choice of venue may not be final, however the burden is on creditor to request a change of venue, and courts are often reluctant to challenge a debtor's choice. The venue transfer statute provides that a court may transfer a bankruptcy case to a different district "in the interest of justice or for the convenience of the parties."[16] It is often quite difficult, and enormously expensive, for parties to a case to file a venue transfer motion.

Given the permissive nature of the venue statute, initiatives for reform of the bankruptcy venue statute began at least twenty-five years ago.[17] Congress established the independent National Bankruptcy Review Commission in 1995 ("NBRC"[18]) to investigate and recommend changes to bankruptcy law and procedure, to propose changes to bankruptcy venue laws to prohibit debtors from seeking relief based on state of incorporation, and to modify the ability of a business to file for

---

of incorporation as a venue option increases the number of courts that can decide important issues").

[16] 28 U.S.C. § 1412.

[17] Portions of the argument herein are adopted from Laura N. Coordes, Joan N. Feeney, *Why Bankruptcy Venue Reform Now*?, 2021 No. 12 Norton Bankruptcy Law Advisor NL 1 (2021). (hereinafter, Coordes and Feeney, *Why Bankruptcy Venue Reform Now*?).

[18] The National Bankruptcy Review Commission was an independent commission established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. The Commission ceased to exist on November 19, 1997. The Commission's Report can be found at https://govinfo.library.unt.edu/nbrc/reporttitlepg.html (hereinafter, "NBRC Report") (October 20, 1997).

bankruptcy where a corporate subsidiary or affiliate already filed.[19] In 2018, the National Conference of Bankruptcy Judges established a committee to report on the arguments, literature, and other material relevant to then pending venue reform legislation.[20]

Bankruptcy venue reform bills have been introduced in Congress six times since 2011. Presently there is pending in the House of Representatives H.R.1017—118th Congress (2023-2024) which would require that companies file for bankruptcy in the jurisdiction where their principal place of business or principal assets are located. S2827 was introduced in the Senate during the last session (2022-2023). This bill too would have required a business debtor to file in the district court for the district in which the principal place of business or principal assets of the debtor are located; or in a district where there is a pending bankruptcy case concerning an affiliate that has a certain level of control or ownership of the debtor (e.g., if the affiliate or parent is a controlling shareholder of the debtor), if that pending case was in a proper venue under the bill.

---

[19] NBRC Report, *supra* note 18.

[20] *See* Terrence L. Michael, Nancy V. Alquist, et al., *National Conference of Bankruptcy Judges, Report of the Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 Am. Bankr. L.J. 741 (2019) (hereinafter, "NCBJ Report"). The NCBJ Special Committee on Venue was directed to refrain from taking a position for or against venue reform legislation.

II. Purdue's Path to Bankruptcy

In the *Purdue* bankruptcy, all of the factors that make forum shopping particularly pernicious are at play. The facts surrounding Purdue make it clear that it intentionally selected White Plains, New York.

Purdue claimed that it wanted a venue close to its Stamford, Connecticut headquarters. But debtor's routinely file for bankruptcy in Delaware, despite it being physically inconvenient to their headquarters. A Connecticut venue would have been just as convenient, and Purdue had proper venue there.[21] Additionally, Purdue could have also chosen another court at Bowling Green within the Southern District of New York. White Plains is not as convenient as the Bowling Green courthouse for Purdue's counsel at Davis Polk & Wardwell LLP—or any of the other Manhattan-based attorneys involved in the case. The White Plains venue only added cost to the case.[22]

The petition for Purdue Pharma Inc.—the venue hook for S.D.N.Y.—listed the debtor's principal place of business as being in Stamford, Connecticut, and gave no other address. Yet, on March 1, 2019, Purdue entered a change in address to Westchester County, just 18

---

[21] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances* (March 23, 2022), Tex. L. Rev. 100 Vol. 103, 157 (2022) (hereinafter "Levitin, Purdue's Poison Pill").

[22] *See* Jeremy Hill & Dawn McCarty, With $2,300 Phone Calls, Purdue Runs Up Huge Bankruptcy Tab, Bloomberg (May 11, 2021, 7:13 AM), https://tinyurl.com/Purdue-Runs-up-Bankruptcy-Tab).

days beyond the 180-day minimum time required in the venue statute for venue to be appropriate. Using this new address as its venue hook, Purdue selected the check box on CM/ECF indicating that it was based in Westchester County, New York.

As discussed below in Section 3(c), in September 2019, the Southern District of New York had a local rule that assigned all cases where the debtor's address on the bankruptcy petition is in Rockland or Westchester counties to its single-judge White Plains Division in the New York City suburbs. As expected, Purdue's case was assigned to the sole bankruptcy judge sitting in White Plains.

Purdue's choice of venue was not surprising. Judge Drain, sitting in White Plains, was one of three bankruptcy judges in S.D.N.Y. who had written several opinions regarding nondebtor releases. *See, e.g.*, *In re MPM Silicones, L.L.C.*, 2014 Bankr. LEXIS 3926, *99-105 (Bankr. S.D.N.Y. Sep. 9, 2014) (Drain, Bankr. J.) (allowing third-party release); *Lynch v. Lapidem Ltd. (In re Kirwan Offices S.A.R.L.)*, 592 B.R. 489, 503-12 (Bankr. S.D.N.Y. 2018) (McMahon, J.) (upholding nonconsensual nondebtor release in plan confirmed by Judge Drain).

While Purdue could have chosen Bowling Green, two of the judges sitting at Bowling Green previously entered opinions limiting or expressing reluctance to enter third-party releases. *See, e.g.*, *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 723-26 (Bankr. S.D.N.Y. 2019) (Wiles, Bankr. J.) (declining to

enter non-consensual third-party release); *In re SunEdison Inc.*, No. 16-10992 at 16-17 (Bankr. S.D.N.Y. Nov. 8, 2017) (Bernstein, Bankr. J.) (disapproving of opt-out third-party release).

III. Purdue Follows a Storied History of Venue-Shopped Cases

a. Prior High-Profile Cases

Purdue is not the first of its kind to venue shop its case. Several other high-profile Chapter 11 debtors filed in districts where they lacked substantial assets or a base of operations.

The Los Angeles Dodgers were undergoing financial difficulties in 2011. Unable to reach agreement with Major League Baseball to allow the Dodgers to enter into a television contract with Fox Sports, the Dodgers filed for bankruptcy on June 27, 2011 in the District of Delaware.[23] The Los Angeles team, an icon in the City of Angels, the place where it had its headquarters, base of operations and key employees, filed bankruptcy thousands of miles away in Wilmington, Delaware.[24]

More recently, in *In re Boy Scouts of Am.*, 642 B.R. 504 (Bankr. D. Del. 2022), Boy Scouts of America, a federally chartered non-profit corporation, headquartered in Texas, filed for bankruptcy in the District of Delaware by virtue of the existing bankruptcy case of an

[23] *In re L.A. Dodgers*, 457 B.R. 308 (Bankr. D. Del. Jul. 22, 2011).

[24] Los Angeles Dodgers, LLC was a Delaware entity.

affiliate, Delaware BSA, LLC.[25] The Delaware entity was incorporated within the year of the bankruptcy filing and had assets consisting primarily of a bank account in Delaware.[26] The Delaware affiliate carried on no business and had no employees.

Using the same flexible venue rules, Johnson & Johnson facing approximately 35,000 tort actions pending in federal multi-district litigation in New Jersey due to its sale of carcinogenic talc products, created LTL Management, LLC under Texas law just *two days* prior to its bankruptcy filing in North Carolina.[27] Texas law allows a business to transfer liabilities to a separate entity through a controversial mechanism known as a "divisive merger" (colloquially known as "the Texas two-step") in which liabilities of a business, not assets, are transferred to a separate entity.[28] In the words of the Third Circuit, "[p]erhaps not by coincidence then" Johnson and Johnson, and others before it,

---

[25] Disclosure Statement for the Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC, *In re Delaware BSA, LLC*, No. 20-10342 (Bankr. D. Del. Feb. 18, 2020) (Dkt. No. 21) at 18.

[26] Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Delaware BSA, LLC*, No. 20-10342 (Bankr. D. Del. Feb. 18, 2020) (Dkt. No. 1).

[27] Order of Hon. J. Craig Whitley to Appear and Show Cause Why Venue Should Not Be Transferred to Another District, *In re LTL Mgmt. Co., LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 208 (Oct. 26, 2020).

[28] Tex. Bus. Orgs. Code Ann. § 10.008 (Sep. 1, 2015).

filed in the Fourth Circuit, which has a more stringent standard for dismissal of Chapter 11 filings.[29]

There are too many other notable examples of high profile, large companies, that have venue shopped their bankruptcy filings to their jurisdiction of choice to list. The breadth of the issue was focused on in a November 9, 2021 letter from the National Association of Attorneys General to members of Congress, in support of then pending legislation:[30]

> There have been numerous examples where corporations have taken advantage of this freedom: Eastern Airlines, based in Florida, filed in New York in the 1980s, relying solely on the location of its frequent flyer club subsidiary. Enron and Worldcom similarly were

---

[29] *In re LTL Management LLC*, No. 22-2003, at fn.8 (3d Cir. 2023) ("In the Fourth Circuit, a court can only dismiss a bankruptcy petition for lack of good faith on a showing of the debtor's subjective bad faith and the objective futility of any possible reorganization. The Bankruptcy Court in the District of New Jersey described this as a much more stringent standard for dismissal of a case for lacking good faith than the Third Circuit's test. Perhaps not by coincidence then, debtors formed by divisional mergers and bearing substantial asbestos liability seem to prefer filing in the Fourth Circuit, with four such cases being filed in the Western District of North Carolina in the years before LTL's filing.") (citations omitted).

[30] *See* Press Release and Letter of the National Association of Attorneys General executed by 42 United States Attorneys General dated November 9, 2021, supporting passage of H.R. 4193 and S. 2821 (Nov. 9, 2021), *available at* https://tinyurl.com/NAAGLetterandPressRElease (hereinafter, "NAAG Letter") in support of H.R. 4193—Bankruptcy Venue Reform Act of 2021, and S. 2827—Bankruptcy Venue Reform Act of 2021.

> able to file in New York in 2001 and 2002 based on initial filings by single small subsidiaries affiliated there, even though they were based in Texas and Mississippi, respectively and had by far the largest amount of their operations in those states. General Motors, an iconic Michigan company, used a single dealership based in Harlem to allow it to file in New York in 2009 while Patriot Coal, which was headquartered in St. Louis and had subsidiaries in a number of coal states, filed in New York based on its incorporation of two new subsidiaries there (where it previously had no assets) the month before it filed in 2012. Similarly, the Herald newspaper, which had been publishing in Boston since 1846, filed bankruptcy in Delaware in 2017 and that same year, Venoco, LLC, a Denver-based company, also filed bankruptcy in Delaware following massive losses incurred from an oil spill from its Santa Barbara, CA operations.

b. Statistics Demonstrating the Trend

An analysis of the statistics of cases that have been venue shopped, readily supports the conclusion that the above-described high-profile examples of specific venue shopped cases are but a sliver of the wholesale use of venue shopping in bankruptcy cases.

According to Professor Samir D. Parikh[31] in his analysis of the Florida-UCLA-LoPucki Bankruptcy

---

[31] Samir D. Parikh, *Modern Forum Shopping*, *supra* note 8, at 1, based on his review of the LoPucki Bankruptcy Database

Research Database,[32] from 1991 to 1996, 55 percent of megacases[33] had forum shopped. From 2007 to 2012, 69 percent of megacases had forum shopped. Further, within each of these periods the absolute number of cases of forum shopping increased. There were 88 megacases from 1991 to 1996 and 48 of those corporate debtors forum shopped. From 2007 to 2012, there were 159 megacases and 110 of those corporate debtors forum shopped.[34]

According to Professor Adam J. Levitin's[35] review of the LoPucki Bankruptcy Database, from 2016-2020, there were approximately 591 unique (meaning unaffiliated) Chapter 11 bankruptcy cases filed in the District of Delaware. Only 29 (4.9 percent) of those cases were of companies with a Delaware headquarters.

---

compiled by Professor Lynn LoPucki for cases filed that filed a bankruptcy petition under Chapter 11 between January 1, 2007 and June 30, 2012.

[32] Lynn M. LoPucki, Florida-UCLA-LoPucki Bankruptcy Research Database | A window on the world of big-case bankruptcy. (2022), https://LoPucki.law.ufl.edu/index.php (last visited Sep. 18, 2023) (hereinafter "LoPucki, Bankruptcy Research Database").

[33] "Megacases" are defined in Professor Parikh's *Modern Form Shopping* includes cases filed by or against public companies that reported assets of $500 million or more (measured in 1980 dollars) on the last form 10-K that the debtor filed with the SEC before filing the bankruptcy case.

[34] Parikh, *Modern Forum Shopping*, *supra* note 8.

[35] Adam J. Levitin, *Judge Shopping And The Corruption Of Chapter 11 Bankruptcy*, 2023-2 Ill. L. Rev. 351, 360 (2023) calculations using the LoPucki Bankruptcy Research Database (hereinafter "Levitin, Judge Shopping").

Looking just at public or large private companies (at least $50 million in assets or liabilities), there were 306 unique Chapter 11 bankruptcy cases filed in the District of Delaware between 2016 and 2020. Of these 306 cases, only a single case (0.3 percent) was for a company with a Delaware headquarters.

In 2020, nearly 80 percent of large, public company Chapter 11 cases were forum shopped, in that they were filed in a district other than the location of the debtor's headquarters.[36]

Data from the U.S. Court's website reveals that for the 12 month period ending March 31, 2021, out of the total 7360 business Chapter 11 cases filed, fifty two percent (52 percent) were filed in just four courts:[37]

Location	**Number**
Delaware	1783
S. D. Tex.	1267
S.D.N.Y.	554
E. D. Va.	93

Using other data, Christopher D. Hughes and Peter C. Califano provide the following statistics for

---

[36] Levitin, *id.* at 359**,** calculations using the LoPucki Bankruptcy Database (45 of 57 cases in 2020).

[37] Christopher Hughes and Peter Califano, *It's Time to Change Bankruptcy Venue Laws*, California Lawyers Association, https://tinyurl.com/Time-to-Change (Fall 2022) (hereinafter, "Califano and Hughes, *It's Time to Change Bankruptcy Venue Laws*").

Chapter 11 cases filed during the year ending on March 31, 2021):[38]

Court Location of Filed Cases	Total Cases	Origin of Case Was Outside of Filed District	Percent From Outside Filed District
Delaware	1784	1760	99.8%
Houston	1271	928	73.0%
S.D.N.Y	562	334	59.4%
E.D.Va.	199	92	46.2%

c. Changes in Local Rules Lead to More Filings of Megacases

Until the last few years, Delaware was the preferred filing venue for large public companies, followed by the S.D.N.Y. The shift in preferred venue moved from Delaware, and secondarily Manhattan, where a debtor could end up with one of eight judges, to venues where the debtor is assured a particular judge or pair of judges: Houston, Richmond, and White Plains. In all, Houston, Richmond, and White Plains attracted 63 percent of large public company bankruptcies in 2020, compared with the mere 29 percent of cases filed in either Delaware and Manhattan.[39]

The change in filings coincide with the adoption of changes of the local rules for case assignments for

---

[38] *Id.*

[39] LoPucki, Bankruptcy Research Database, *supra* note 32.

bankruptcy cases in Southern District of New York and in the Southern District of Texas. Prior to November 2021, the S.D.N.Y. Bankruptcy Court had a local rule that assigned all cases where the debtor's address on the bankruptcy petition is in Rockland or Westchester counties to its single-judge White Plains Division in the New York City suburbs.[40] In other words, if a debtor filed for bankruptcy listing a Rockland or Westchester county address, it was guaranteed to have its case assigned to a particular judge. Between 2018 and 2020, there were as many or more large public companies filing before the single judge in White Plains than before the other eight judges in Manhattan.[41]

Houston adopted in 2016 its "complex" case assignment rule, followed in 2018 by an expansion of the rule's application.[42] Cases that were designated as "complex" were assigned to a panel of just two judges. Two years later, the district expanded the system to

---

[40] Levitin, *Judge Shopping*, *supra* note 35, at 370 citing Bankr. S.D.N.Y. R. 1073-1(a) (basing case assignment on "the street address on the petition"); Bankr. S.D.N.Y. R. 1073-1(a) (1996) (basing case assignment on the "the street address of the debtor set forth on the petition"); Bankr. S.D.N.Y. R. 5(a) (1986) (basing case assignment on the "the street address of the debtor set forth on the petition"). A general order of the court now provides that an unspecified percentage of the Chapter 11 cases assigned to White Plains shall go to another specific judge. General Order M-547 (Bankr. S.D.N.Y. 2020).

[41] LoPucki Bankruptcy Research Database, *supra* note 32; Levitin, *Purdue's Poison Pill*, *supra* note 21, at 159-60.

[42] Gen. Order 2016-1 (Bankr. S.D. Tex. Mar. 3, 2016); Gen. Order 2018-1 (Bankr. S.D. Tex. Jan. 29, 2018).

cover the entire district, channeling all complex cases to two judges.[43]

The net result of the foregoing is that a majority of large, public company bankruptcy filings in 2020 were handled by only three of the nation's 375 bankruptcy judges, one in White Plains and two in Houston.[44]

IV. The Consequences of Forum Shopping

In the ordinary civil litigation context, this Court has noted that "discouragement of forum shopping and avoidance of inequitable administration of the laws" are important goals for the judiciary to consider.[45] Unfortunately, forum shopping is ubiquitous in the bankruptcy context and creates both perceived and real inequities.

a. Forum Shopping Undermines the Perception and Integrity of the Bankruptcy System

Rampant forum shopping undermines the perception and integrity of the bankruptcy system. Judge

---

[43] *Id.* Gen. Order 2022-6 (Bankr. S.D. Tex. Nov. 28, 2022).

[44] According to Prof Levitin's review, there were 56 large public company bankruptcies in 2020. Fourteen megacases ended up with Chief Judge Jones, and 14 before Judge Isgur. *Id.* (The LoPucki Bankruptcy Database lists 13 for Judge Isgur, but omits Carbo Ceramics, Inc.) Judge Drain came in fourth nationwide with 3. Levitin, *Purdue's Poison Pill*, *supra* note 21.

[45] *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Russell F. Nelms summarized the harmful effects as follows:

> So, what motivates local companies to file so far from their home base? Clearly, part of it is lawyer-driven for reasons that only those lawyers can purport to defend. I doubt, for example, that the president of Quicksilver, whose offices are a two-minute walk from this court, was the one who made the compelling argument that it would be much more convenient for the company if its bankruptcy case were filed 1,400 miles away.
>
> One might ask why we should care where a case is filed as long as the case is successful. The answer lies in the definition of "successful." Even in "successful" cases hard-working people lose jobs, have their retirement cut, or have their claims significantly compromised. And yet, most large cases today are filed with little or no thought given to whether small or medium-sized creditors can appear and be heard in those cases. Some are filed with a goal of precluding easy access to the court by small creditors, especially if those creditors are soon-to-be former employees.
>
> Individual citizens of this country interact with our judicial system primarily in two venues, the family courts and the bankruptcy courts. It is here where they see justice done or not done. And it is important that they have the opportunity to see it.
>
> There is value in witnessing the messiness and frequent tedium of court proceedings.

> There is value in hearing someone argue why you are right and why you are wrong. There is value in watching a judge wrestle with uncomfortable issues that affect your livelihood. There is value in knowing that even though our judicial system is not perfect, those who serve it work hard to achieve what is fair, just, and right under the law.

But the mere *perception* of inequality is not the only problem. Filing for bankruptcy in a city far away from the debtor's center of operations or business often makes it more difficult for smaller creditors and employees to meaningfully engage in the bankruptcy process. To operate effectively, a creditor or party in interest must have legal representation to navigate the bankruptcy issues. It is a burden to do so when the venue for a case is not near the locus of a creditor's relationship with the debtor. Many creditors find it very expensive to hire counsel in Delaware or the S.D.N.Y. Delaware, like many other jurisdictions, requires that Delaware lawyers must appear in court with outside-of-Delaware counsel.[46]

While there is an argument that debtors in mega-cases have creditors all over the country, the consequences of a corporate bankruptcy are most profound in the region and community in which the debtor's principal place of business or principal assets are located, not only are there jobs involved, but also the local economy might depend to a larger extent on business from that debtor. When the bankruptcy is

---

[46] NAAG Letter, *supra* note 30.

filed in a foreign venue, there may be little or no media coverage on the progress of the debtor's efforts to reorganize, leaving employees in the dark.

b. Forum Shopping Stymies the Development of Innovative Case Management Techniques and Legal Interpretations

Widespread forum shopping stymies the development of innovative case management techniques and legal interpretations from judges across the country, resulting in important legal issues being decided by a handful of bankruptcy judges and a disproportionate number of appellate decisions from the reviewing courts in those few circuits, thus skewing the law of Chapter 11.[47] In addition, statutory limitations on appellate review to only final orders, statutory and equitable mootness resulting in dismissal of many appeals, and restrictions on direct appeals to the courts of appeals, reduce the number of appellate opinions by the intermediate appellate courts, circuit courts of appeals, and ultimately this Court. Bankruptcy court decisions that are not appealed are left unchallenged and then given repeated application by magnet court judges.

While there may be a perception that bankruptcy judges in Delaware are more experienced than their counterparts at administering complex Chapter 11 cases, this is belied by the fact that from 2000-2006, 21

---

[47] Levitin, *Purdue's Poison Pill*, *supra* note 21, at 170; Coordes and Feeney, *Why Bankruptcy Venue Reform Now?*, *supra* note 17, at 22-25.

visiting judges from 15 states presided over approximately 50 percent of the Chapter 11 cases filed in Delaware.[48]

A survey of the business reorganization opinions of the courts of appeals from the twelve circuits that hear bankruptcy appeals since the inception of the Bankruptcy Code reveals that the Second and Third Circuits (where the Southern District of New York and the District of Delaware are located) have produced more opinions on reorganization issues than the court of appeals in any other circuit. Since the effective date of the Bankruptcy Code in October 1979, the Third Circuit has issued 16 percent of all opinions on Chapter 11 issues, and the Second Circuit has issued 15 percent of the total Chapter 11 decisions. Thus, 31 percent of the circuit level law on business reorganization has been generated by two of the smallest circuits. The largest circuit by far, the Ninth Circuit, has issued 12.5 percent of the reorganization opinions.

Moreover, cases pooling in a handful of districts is inefficient. The magnet court judges are overburdened while judges in other courts are underutilized

Finally, Lynn M. LoPucki & Joseph Doherty found that the refiling rate for large public company Chapter 11s filed in Delaware was three times that in other courts, and concluded "Delaware-reorganized firms were significantly more likely to refile . . . and

---

[48] Califano and Hughes, *It's Time to Change Bankruptcy Venue Laws*, at 22, *supra* note 37.

significantly less likely to perform successfully under their plans of reorganization".[49]

c. Forum Shopping is More Pernicious in the Bankruptcy Context

Forum shopping sends bankruptcy cases to jurisdictions with judges often least familiar with the home state's law. Bankruptcy law frequently requires bankruptcy judges to interpret and understand state law issues. In *Butner v. United States*, the Supreme Court held that claims and property interests in a bankruptcy case are fundamentally impacted by state law.[50] State law issues are confronted and frequently decided in bankruptcy cases, and a judge familiar with the applicable state law (usually the law of the state in which the debtor conducts its activities) will often be more knowledgeable about the law underlying the legal issues than a judge in another district.

V. The Court's Ruling in the *Purdue* Case Should Avoid Further Expansion of Venue Shopping

No fault can or should be laid on the attorneys and other professionals who seek out the favorable venues

---

[49] Lynn M. LoPucki and Joseph Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 Vand. L. Rev. 1933, 1945 (2002).

[50] *Butner v. United States*, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").

for their clients. Indeed, one would expect no less from zealous advocates. Nor can any fault be attributed to the judges who have a view of the law that may be favorable to a given outcome. The system, however, encourages a process that is undermining both the actual fairness and perceived fairness of large bankruptcy cases by allowing parties who have the means and sophistication to choose jurisdictions and judges they perceive as being both predictable and favorable. This Court should not embolden that ruinous process through its ruling in this case.

Where the rule of law, in this case, on whether a third-party non-consensual release is appropriate, is to be based on a multi-factor test, each judge will have considerable discretion on how the facts apply. In this case, the majority of the Second Circuit Court of Appeals adopted a seven-factor balancing test to govern the approval of such releases: (1) whether there is an identity of interests between debtors and released parties; (2) whether the released claims are factually and legally intertwined with claims against the debtor; (3) whether the breadth of release is necessary to the plan; (4) whether the releases are essential to the reorganization; (5) whether the released nondebtors contributed substantial assets to the reorganization; (6) whether the impacted claimants expressed overwhelming support for the plan; and (7) whether the

plan provides for the fair payment of enjoined claims.[51]

The test adopted by the Second Circuit leaves considerable discretion to the courts who will interpret the standard. If the Court affirms the use of such a test, then undoubtedly the judges in those circuits which have a narrow view of the permissibility of third-party releases will interpret these factors narrowly, while courts in circuits which adopt of broader view of third-party releases, are more likely to find more cases amenable to satisfying the test. The Court should not favor such an approach because the differences will encourage forum shopping. If the Court does indeed allow third-party releases, it should provide a bright-line test for doing so, so that forum shopping is not further encouraged in mass tort cases which by definition affects a broad swath of people.

CONCLUSION

Amici curiae take no position on the disposition on the question of third-party releases. Amici curiae do, however, urge the Court to ensure that if the Court does permit the use of third-party releases to stand, that the test adopted for the use of such releases provides a bright line so that the vagaries inherent in the Second Circuit's standard will not be used to result in yet another reason to forum shop a mass tort

[51] *In re Purdue Pharma L.P.*, 69 F.4th 45, 78-79 (2d Cir. 2023).

bankruptcy case to a judge or jurisdiction perceived by the debtor to more likely rule in its favor.

Respectfully submitted,

BRIAN L. DAVIDOFF
GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP
2049 Century Park East, Suite 2600
Los Angeles, California 90067
T: 310-201-7520
bdavidoff@ggfirm.com

HANNAH G. WALDMAN
GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP
2049 Century Park East, Suite 2600
Los Angeles, California 90067
T: 310-201-7527
hwaldman@ggfirm.com

HON. JOAN N. FEENEY (Ret.)
JAMS
One Boston Place
201 Washington Street, Suite 3300
Boston, Massachusetts 02108
T: 617-228-0200
JFeeney@jamsadr.com

DOUGLAS B. ROSNER
Counsel of Record
GOULSTON & STORRS
400 Atlantic Avenue
Boston, Massachusetts 02110
T: 617-574-6517
drosner@goulstonstorrs.com

PETER C. CALIFANO
NIESAR & VESTAL LLP
90 New Montgomery Street, 9th Floor
San Francisco, California 94105
T: 415-882-5300
pcalifano@nvlawllp.com

JOSEPH A. PEIFFER
AG & BUSINESS LEGAL STRATEGIES
PO Box 11425
Cedar Rapids, Iowa 52410-1425
T: 319-363-1641
joe@ablsonline.com

Counsel for Amici Curiae