No. 15-649

IN THE

Supreme Court of the United States

CASIMIR CZYZEWSKI, *et al.*,

Petitioners,

v.

JEVIC HOLDING CORP., *et al.*,

Respondents.

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

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

RONALD J. MANN
Columbia Law School
435 W. 116th Street
New York, NY 10027
(212) 854-1570

JONATHAN C. LIPSON
Counsel of Record
TEMPLE UNIVERSITY—
BEASLEY SCHOOL OF LAW
1719 North Broad Street
Philadelphia PA 19122
(215) 204-0608
jlipson@temple.edu

QUESTION PRESENTED

The question presented, on which the circuits are split, is whether a bankruptcy judge may approve a settlement dismissing a Chapter 11 case that harms objecting creditors in violation of the Bankruptcy Code?

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INTEREST OF *AMICI CURIAE*[1]

Amici, whose names and institutions are set forth in alphabetical order on Appendix A, are professors at law schools around the nation who study the United States' bankruptcy system. They write solely based on their concern about the effect that the opinion below will have on this system.

SUMMARY OF ARGUMENT

May a dismissal order in a Chapter 11 bankruptcy case strip objecting creditors of priority claims they have in bankruptcy and legal rights they have outside bankruptcy? The Third Circuit in *Jevic* broke with the Fifth and Seventh Circuits, respectively, to hold that it could. The correct answer, however, is that it cannot. *Jevic's* dismissal order (known as a "structured dismissal") violates the express language of the Bankruptcy Code, long-held priority norms, and important limits on bankruptcy court power.

Jevic creates two circuit splits, one explicit, the other implicit. The explicit split reflects disagreement between the Fifth and Third Circuits over the role that priority in right of payment should play in final distributions in bankruptcy. The implicit circuit split reflects a disagreement between the Seventh and Third Circuits regarding a Bankruptcy

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[1] The parties have consented to the filing of this brief in blanket letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no persons or entities other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Court's post-dismissal power to preclude creditor collection activities outside bankruptcy.

We write to support the Petition because these splits and errors create uncertainty about the Bankruptcy Code's priority structure and the reach of dismissal orders. This uncertainty will increase the costs, and undermine the integrity, of the Chapter 11 system by promoting gamesmanship and collusion among stakeholders powerful enough to obtain agreement to a structured dismissal. Given the Third Circuit's role in Chapter 11 practice—it reviews the Bankruptcy Court for the District of Delaware, the nation's busiest Chapter 11 court—*Jevic* will have a disproportionate impact. Unstopped, structured dismissals like *Jevic*'s will spell the practical end of the Chapter 11 process as a framework for consensual negotiation.

I. CASE BACKGROUND

A. Statement

This case is about "structured dismissals." A "structured dismissal" is "a hybrid dismissal and confirmation order in that it typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third party-releases, [and] enjoining certain conduct by creditors . . . ." American Bankruptcy Institute, *2012-2014 Final Report and Recommendations*, Commission to Study the Reform of Chapter 11, at 270 (2014), https://commission.abi.org/full-report, ("*ABI Commission Report*"). Structured dismissals can be "troubling" because "these new forms of a la carte bankruptcy relief are typically accompanied by few of the procedural protections found in the more traditional resolutions—disclosure, creditor voting, claim resolution standards, [or] the oversight of a trustee (in a Chapter 7)." *See* Christopher W. Frost, *Structured Dismissals: Smooth Off-Ramp or Artful Dodge?*, 35 Bankr. L. Letter 10, 3 (2015).

B. Case History

Jevic Transportation, Inc. ("Jevic," or the "Debtor") was a New Jersey trucking company. Pet. App. B 2a.[2] A subsidiary of Respondent Sun Capital Partners, a private equity firm, acquired Jevic in a leveraged buyout (LBO) in 2006. *Id.*[3] After the LBO, Jevic refinanced its debt with CIT Group ("CIT"), which lent Jevic $85 million in revolving credit secured by Jevic's assets. Pet. 8.

Jevic could not service this debt. It filed a Chapter 11 bankruptcy on May 20, 2008, one day after terminating 90% of its employees, including Petitioners, Jevic's truck drivers (the "Drivers"). *Id.* at 9; *see also Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* at 2, ¶ 1 ("Settlement Motion"). Petitioners hold about $8.3 million in priority wage claims against Jevic for termination in violation of the New

[2] All appendix citations refer to the appendices in the Petitioners' certiorari petition ("Petition").

[3] This brief refers to Sun Capital Partners and its affiliated entities as "Sun."

Jersey analogue to the federal Worker Adjustment and Retraining Notification ("WARN") Act, which requires notification before mass layoffs. *See* Pet. at 9; 29 U.S.C. §§ 2101–2109; N.J. Stat. Ann. §§ 34:21-1 to -7.

The Official Committee of Unsecured Creditors ("Committee") sued Sun and CIT, alleging that the LBO transfers were avoidable fraudulent and preferential transfers (the "Adversary Proceeding"). Pet. App. A 3a. Sun and CIT moved to dismiss the Adversary Proceeding. The Bankruptcy Court denied the motion, concluding that the Committee adequately pleaded such claims. *Id.* at 3a–4a. If the Adversary Proceeding succeeded, the estate could avoid liens and potentially recover more than $100 million from CIT and Sun. Pet. 10.

Jevic borrowed more from CIT during its case on a "super-priority," secured basis. Settlement Motion at 3–4, ¶ 8. Jevic was left "administratively insolvent" because its administrative expense and other priority claims exceeded the value of its unencumbered assets. Pet. 6; *see also* Pet. App. A 12a.

All major parties except the Drivers entered into an agreement (the "Settlement Agreement") settling the claims in the Adversary Proceeding. Pet. App. A 4a. The Settlement Agreement included a structured dismissal with two main elements:

First, Sun and CIT would pay about $3.7 million to satisfy certain first-priority administrative expenses, such as fees of the Committee's counsel, with the remainder going to general unsecured creditors—failing to pay the priority claims of the Drivers. Pet. 11.

Second, Sun and CIT would be released from—

> any and all claims or counterclaims, causes of action, remedies, damages, liabilities, debts, suits, demands, actions, costs, expenses, fees, controversies, set-offs, *third party actions or proceedings relating in any way to, or arising from any transaction with or in connection to, the Debtors or their estates of whatever kind or nature* . . . including, without limitation, *any and all claims asserted in or which could have been asserted in, or which related to the subject matter of the Adversary Proceeding,* or which are based on any avoidance or other powers afforded the Estate Releasing Parties under the Bankruptcy Code . . . . "

Settlement Agreement ¶ 2(c)(i), (ii), at 4–6 (emphasis supplied) (exhibit A to the Settlement Motion).

The Bankruptcy Court entered an order over Petitioners' objection approving the Settlement Agreement December 4, 2012 (the "Dismissal Order"). Pet. App. D.

The Bankruptcy Judge granted the Dismissal Order because, he reasoned, the estate was administratively insolvent and the Bankruptcy Code's priority scheme did not apply in a settlement, as distinct from a Chapter 11 reorganization plan or Chapter 7 liquidation. Pet. App. E 58a. The Bankruptcy Court rejected the suggestion that the case should be converted to a Chapter 7 liquidation because "it does not appear that a Chapter 7 Trustee would have any money to operate, investigate or litigate." *Id.*

Whether this was true depended on the viability of the Adversary Proceeding. The Bankruptcy Judge approved the Settlement Agreement because, he said, the Committee's "prospect[s] for success" were "uncertain at best." *Id.* at 60a. Because the estate was administratively insolvent, it lacked funding to pursue the lawsuit. *Id.* Yet, because the litigation was "in its earliest stages" (*id.*), he could not have known the strength of the claims in the Adversary Proceeding—except that he had denied motions to dismiss them.

The District Court and the Third Circuit Court of Appeals affirmed the Bankruptcy Court. *See* Pet. App. C.; Pet. App. B. The Petition followed.

II. *JEVIC* CREATES CIRCUIT SPLITS REGARDING THE ROLE OF PRIORITY IN SETTLEMENT DISTRIBUTIONS IN CHAPTER 11 AND THE EFFECT OF DISMISSALS

This Court should grant the Petition because *Jevic* splits the circuits on (i) the role of the Bankruptcy Code's priority rules in final distributions in a settlement; and (ii) a bankruptcy court's power to strip creditors of rights that they otherwise could exercise after dismissal.

A. *Jevic* Creates A Circuit Split Regarding Priority In Final Distributions Under Chapter 11

The Bankruptcy Code embeds two different, but related, sets of priority rules: (i) those created by Congress and contained in § 507 of the Bankruptcy Code, and (ii) the "absolute priority rule," recognized as a matter of common law and reflected in § 1129 of the Bankruptcy Code. *Jevic* defies both, in the process splitting from the Fifth Circuit.

1. *Statutory Priority*

First, and most important for this case, are the statutory priorities created by the Bankruptcy Code. 11 U.S.C. § 507. Section 507(a)(4) provides that unpaid wage claims, such as the Drivers', must be paid fourth in order of priority from assets of the debtor's estate. *Id.* Thus, § 507 bars distributions from a bankruptcy estate to any junior claimants—including general unsecured creditors, who received about $1.7 million from Jevic's estate—until priority creditors either are paid in full or agree otherwise.

The Bankruptcy Code provides only two ways to make final distributions in a case such as *Jevic*: (i) a confirmed Chapter 11 plan of reorganization, or (ii) a liquidation, if the Chapter 11 case is converted to a case under Chapter 7. The statutory priority rules set out in § 507 apply in either event.[4] Because the estate was administratively insolvent, Respondents concluded that a plan was implausible. If, instead,

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[4] To be confirmed, a Chapter 11 plan must (among other things) provide that "with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title," holders of such claims must receive either "deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or . . . cash on the effective date of the plan equal to the allowed amount of such claim." 11 U.S.C. § 1129(a)(9)(B). If, instead, the case were converted to a liquidation under Chapter 7, § 726 of the Bankruptcy Code provides that "(a) property of the estate shall be distributed—(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title . . . ." 11 U.S.C. § 726(a).

the Bankruptcy Court converted the case to a liquidation under Chapter 7, a trustee might pursue the Adversary Proceeding. To avoid that, Respondents needed a third way out.

2. *Absolute Priority*

Respondents believed they found one, in the Settlement Agreement approved under Federal Rule of Bankruptcy Procedure 9019.[5] Rule 9019 contains no explicit standards regarding priority. It merely says that "the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). Although silent on the matter, the Rule has long been understood to embed the second set of priority rules central to Chapter 11 reorganization, the "absolute priority rule" ("APR").

The APR (a subset of the "fair and equitable" test) holds that junior stakeholders cannot receive or retain property of the debtor unless senior stakeholders either (i) are paid in full, or (ii) agree to a different treatment. The APR is the "cornerstone of reorganization practice and theory." *See* Bruce A. Markell, *Owners, Auctions, and Absolute Priority in*

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[5] The Dismissal Order was also predicated on § 105 of the Bankruptcy Code, which provides that a bankruptcy court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Since the Bankruptcy Court entered the Dismissal Order, this Court has made clear that "[i]t is hornbook law that § 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'" *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) (citing 2 Collier on Bankruptcy ¶ 105.01[2], 105–06 (16th ed. 2013)). Thus, unless Rule 9019 permitted the distributions in *Jevic*, nothing did.

Bankruptcy Reorganizations, 44 Stan. L. Rev. 69, 123 (1991).

Because *Jevic* involved neither a plan nor a Chapter 7 liquidation, the priority question was simple: does the APR require distributions under the Settlement Agreement to be paid to the Drivers before general unsecured creditors? Although the *Jevic* majority failed to appreciate it, this Court answered that question—affirmatively—nearly 50 years ago, in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

In *TMT Ferry,* a bankrupt shipping company had granted liens that the bankruptcy trustee investigated and initially concluded were avoidable as fraudulent transfers. *Id.* Later, the trustee decided to compromise the claim by paying it in full, over time, under a plan of reorganization. Over objections from unsecured creditors, the trial court (acting as a bankruptcy court) approved these settlements. *Id.* at 432. Before the Supreme Court, the central question was whether this compromise should have been approved. If the trustee's fraudulent transfer claim had merit, the settling creditor would have lost its lien (and thus priority), increasing distributions to (junior) general unsecured creditors. In reversing the lower courts, this Court stated that the absolute priority rule "appl[ies] to compromises just as to other aspects of reorganizations." *Id.* at 424 (citations omitted).

The circuit courts have split over how to apply *TMT Ferry*. The Fifth Circuit rejected a settlement of a lawsuit against a Chapter 11 debtor that would have transferred $5.3 million in estate assets to an unsecured creditor over the objection of outstanding senior creditors. *In re AWECO, Inc.*, 725 F.2d 293, 295–96 (5th Cir. 1984). The Fifth Circuit held that the "fair and equitable" standard applies to settlements, and "'fair and equitable'" means compliant with the priority system." *Id.* at 298.

Characterizing the Fifth Circuit in *AWECO* as "too rigid," the Second Circuit reasoned in *In re Iridium* that the absolute priority rule "is not necessarily implicated" when "a settlement is presented for court approval apart from a reorganization plan[.]" *In re Iridium Operating LLC*, 478 F.3d 452, 463–64 (2d Cir. 2007). In *Iridium*, the unsecured creditors' committee sought to settle a suit it had brought against a group of secured lenders that would have divided the estate's cash between the lenders and a litigation trust set up to fund a suit against Motorola, a priority administrative creditor and the debtor's former corporate parent. *Id.* at 456, 459–60. Motorola objected to the settlement, arguing that the distribution violated the APR by skipping its first-priority claim. *Id.* at 456.

The Second Circuit did not approve the priority-skipping distribution in *Iridium*. Rather, although it acknowledged *TMT Ferry, id.* at 463, it remanded with the observation that "whether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable' under Rule 9019." *Id.* at 464. A priority-skipping distribution could, however, be approved when "the remaining factors weigh heavily in favor of approving a settlement[.]" *Id.*

The *Jevic* majority rejected *AWECO* as "too rigid," a "per se rule." Pet. App. A 18a, 20a. Instead, it followed the more flexible analysis of the Second Circuit's *Iridium* decision. Indeed, given the limited attention the *Jevic* majority opinion gave to the Bankruptcy Code's priority scheme—hardly "the most important factor" in the opinion below—the Third Circuit appears to have staked out yet a third position on the question, one that permits priority-skipping final distributions as a matter of convenience or contract. Whatever the tension might be between *Jevic* and the Second Circuit, *Jevic* has crystallized a split between the Fifth Circuit, on one hand, and the Second and Third Circuits, on the other, regarding the obligation to respect priority in final distributions under a settlement agreement.

B. Jevic Creates An Implicit Circuit Split Regarding The Effect Of Dismissal Of A Chapter 11 Case

The explicit rejection of the Fifth Circuit's decision in *AWECO* is only one of the circuit splits created by *Jevic*. The other, implicit, circuit split derives from the effect of the dismissal itself.

Section 349 of the Bankruptcy Code provides, in pertinent part, that "[u]nless the court, for cause, orders otherwise, a dismissal of a case . . . (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." 11 U.S.C. § 349(b). This means that dismissal should "undo the bankruptcy case, as far as practicable." H.R. Rep. No. 95-595, at 338 (1977).

Here, but for *Jevic*'s bankruptcy, the Drivers would have been able to assert in state court fraudulent transfer claims similar to those in the Adversary Proceeding, because every state has a law permitting avoidance of fraudulent transfers. *See, e.g.,* N.J. Stat. Ann. § 25:2-20 (2015) (New Jersey's version of Uniform Fraudulent Transfer Act). Thus, the dismissal of the bankruptcy should have revested those claims in the Drivers, who neither agreed to the Dismissal Order nor received payment under it (other than their ratable share as general unsecured creditors).

The Third Circuit majority in *Jevic* ignored this. It reasoned that § 349(b) "explicitly authorizes the bankruptcy court to alter the effect of dismissal 'for cause'—in other words, the Code does not strictly require dismissal of a Chapter 11 case to be a hard reset." Pet. App. A 14a. To support this conclusion, the majority selectively quoted the Seventh Circuit's opinion in *In re Sadler* for the proposition that "'[c]ause' under § 349(b) means an acceptable reason." *Id.* (quoting *In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991)).

Unfortunately, the *Jevic* majority did not quote the balance of Judge Easterbrook's opinion in *Sadler*: "Desire to make an end run around a statute," he explained, "is not an adequate reason." *Sadler*, 935 F.2d at 921. "At all events," he continued, "*a bankruptcy judge may not give away the rights of creditors* . . . ." *Id.* (emphasis supplied). This, however, is what the Dismissal Order appears to do, because the Settlement Agreement released Sun and CIT from "*third party actions or proceedings relating in any way to, or arising from any transaction with or in* *connection to, the Debtors or their estates of whatever kind or nature* . . . including, without limitation, *any and all claims asserted in or which could have been asserted in, or which related to the subject matter of the Adversary Proceeding* . . . ." Settlement Agreement ¶ 2(c)(i), (ii), at 4–6 (emphasis supplied).

The *Jevic* majority significantly expanded the "cause" exception in § 349, clashing with *Sadler*. The legislative history explains that deviations from a "hard reset" are permissible only "to protect rights acquired in reliance on the bankruptcy case." H.R. Rep. No. 95-595, at 338 (1977). Here, the Drivers' claims were nullified not in reliance on any actions taken *in the case,* but instead solely to *dismiss the case.* Until *Jevic,* courts disapproved dismissals that harmed objecting creditors. In *Sadler,* for example, the Seventh Circuit reversed the lower courts' approval of a dismissal order that stripped a secured creditor of its collateral. *Sadler,* 935 F.2d, at 921.

Despite the approving tone of its citation to *Sadler*, the practical effect of the *Jevic* Dismissal Order is precisely what the Seventh Circuit condemned in that case. Specifically, the settlement approved here did not only prefer junior creditors in final distributions; it went on essentially to discharge the claims of the objecting senior creditors, attempting to bar them from potential future recoveries under state law.

III. *JEVIC*'S UNCERTAINTY

The *Jevic* majority found the "dire circumstances" of the case enough to justify its derogation from the Code's priority and dismissal rules. Pet. App. A 8a. Thus, the Third Circuit majority concluded that priority-skipping settlements that cancel out state law rights of objectors may be approved "in a rare case," if the bankruptcy court has "'specific and credible grounds to justify [the] deviation.'" *Id.* at 2a, 21a (citing *Iridium*, 478 F.3d at 466) (alteration in original). Unfortunately, the opinion offers no guidance on what makes this case "rare." It will leave future participants in Chapter 11 uncertain what sort of "specific and credible" grounds justify a priority-skipping final distribution.

The key factor, according to the Bankruptcy Court, appears to have been the estate's administrative insolvency. Because the Debtor's assets were fully encumbered by liens held by Sun and CIT, the Bankruptcy Judge stated that—

- "[T]here is no prospect here of a confirmable plan being filed." Pet. App. E 58a.
- "[I]n the event of conversion [to Chapter 7] it does not appear that a Chapter 7 Trustee would have any money to operate, investigate or litigate." *Id.*

Administrative insolvency may be grounds to convert or dismiss a case. *See, e.g., In re Acme Cake Co.,* 495 B.R. 212, 217 (Bankr. E.D.N.Y. 2010). It does not, however, make a case "rare"—or justify deviations from the Code's priority scheme. *See ABI Commission Report*, *supra*, at 173 (noting that "'administratively insolvent' cases have become more common"). Indeed, administrative insolvency is likely to occur routinely whenever, as here, the prepetition lender (CIT) is also the post-petition lender, and requires that the later loan "roll up" all of the debtor's assets to secure both loans. *See id.* at 74–79 (detailing the commission's findings on post-petition financing); The Loan Syndications and Trading Association, *The Trouble with Unneeded Bankruptcy Reform,* The LSTA's Response to the ABI Chapter 11 Commission Report, 53–56 (2015) (responding to the *ABI Commission Report* and justifying post-petition "roll-up" lending).

At bottom, this case was a garden-variety failed leveraged buyout (LBO). Failed-LBO bankruptcies are hardly rare.[6] They often result in fraudulent transfer suits, as happened here. *See, e.g., Boyer v. Crown Stock Distribution, Inc.*, 587 F.3d 787 (7th Cir. 2009); *In re Lyondell Chem. Co.*, 503 B.R. 348 (Bankr. S.D.N.Y. 2014); *In re Tribune Co. Fraudulent Conveyance Litigation*, 499 B.R. 310 (S.D.N.Y. 2013); *see also* Martin D. Ginsburg, Jack S. Levin & Donald E. Rocap, Mergers, Acquisitions and Buyouts ¶ 1706 (Wolters Kluwer, Sept. 2015) (collecting cases LBO/fraudulent transfer cases).

Thus, one cannot identify from the Third Circuit majority opinion, or even the underlying facts, what is "rare" about this case. In application, the opinion suggests that priority-evading structured dismissals are appropriate whenever the post-petition lender

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[6] The bankruptcies of Caesar's Entertainment and Energy Future Holdings Corp., for example, were precipitated by failed leveraged buyouts. *See* Jim Christie, *Caesars Invites Bankruptcy Examiner to Probe Leveraged Buyout*, Reuters, July 2, 2015, http://www.reuters.com/article/bankruptcy-caesars-idUSL1N0ZI0FB20150702#EQIcL2jYOSClJILY.97; Matt Levine, *Largest Leveraged Buyout Ever Is Finally Bankrupt*, Bloombergview, Apr. 29. 2014, http://www.bloombergview.com/articles/2014-04-29/largest-leveraged-buyout-ever-is-finally-bankrupt (discussing Energy Future Holdings).

obtains liens that fully encumber the debtor's assets. Nothing about such a transaction justifies routinizing deviation from the Code's priority structure or its limitations on the bankruptcy court's ancillary post-dismissal authority. At a minimum, the Court needs to grant the Petition to bring clarity to practice in the area.

IV. THE CIRCUIT SPLITS AND UNCERTAINTY CREATED BY *JEVIC* WILL UNDERMINE THE CHAPTER 11 SYSTEM, YET NO OTHER COURT IS LIKELY TO CORRECT ITS ERRORS

Jevic is also problematic because it introduces needless costs into the Chapter 11 system and undermines its integrity.

A. *Jevic*'s Costs

The violation of the Bankruptcy Code's priority rules permitted by the *Jevic* majority creates at least two types of costs. First, it will promote "rent seeking": "Contestable priority rules make creditors' returns more variable and harder to predict. The greater variance of their returns may cause creditors to raise their prices or forgo what would otherwise be value-increasing transactions." Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 Va. L. Rev. 1235, 1273 (2013).

This rent seeking could take many forms. Suppose, for example, that an administratively insolvent Chapter 11 debtor, a secured creditor, and the debtor's shareholder threaten to ask a bankruptcy court to approve a structured dismissal that distributes property of the estate between the secured creditor and the shareholder, leaving nothing for general unsecured creditors. Faced with uncertainty over whether this settlement is permissible under *Jevic*, the unsecured creditors may agree to compromise their claims, ceding value to the shareholder that they should otherwise receive under a Chapter 11 plan or a Chapter 7 liquidation. Nor is there any apparent reason why the shareholder and unsecured creditors could not, instead, agree to strip the secured creditor of its priority in property of the debtor's estate. The logic of the majority opinion in *Jevic* offers a roadmap for a strategy that threatens all priority entitlements.

To be sure, commercial lenders who can "adjust" to these new conditions can respond simply by contracting the supply of credit or raising its price. Other, "non-adjusting" creditors—such as the Drivers, the objecting creditors in *Jevic*—may not be so fortunate. "Non-adjusting" creditors are those who "do not choose to extend credit to the corporation, and so cannot through pricing or other market mechanisms adjust their rights against the debtor, even if the debtor fully encumbers its assets." Jonathan C. Lipson, *Directors Duties to Creditors: Power Imbalance and the Financially Distressed Corporation,* 50 UCLA L. Rev. 1189, 1240 (2003). "[I]f," however, "the jumped creditors adjust more slowly than the nimble jumping creditors, value transfers occur and such jumps make for winners and losers." Roe & Tung, *supra,* at 1241–42. The winners and losers may conflict directly with the priority system created by Congress.

The Drivers are a classic example: "employees are typically not as able as large institutional creditors to diversify their credit portfolio so as to minimize the impact of their employer filing bankruptcy." *See* Daniel Keating, *The Fruits of Labor*, 35 Ariz. L. Rev. 905, 907 (1993).

Second, *Jevic* will make it more difficult to resolve Chapter 11 cases. "'[T]he Chapter 11 process,'" this Court has explained, "'relies on creditors and equity holders to engage in negotiations toward resolution of their interests.'" *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 n.28 (1999) (quoting Brunstad, Sigal, & Schorling, *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One*, 53 Bus. Law. 1381, 1406, n.136 (1998)). Yet, if negotiations are most effective when they can begin "inside a priority framework" (Roe & Tung, *supra*, at 1271), *Jevic* introduces a new and costly uncertainty. As previously noted, the majority opinion simply does not make clear when, or under what circumstances, a case would be "rare" or "dire" enough to warrant a deviation from priority. That uncertainty creates the possibility—or the threat of the possibility—of a *Jevic*-inspired priority-evading settlement in almost any situation. By removing the Bankruptcy Code's priorities as a firm and clear backdrop against which the parties negotiate, *Jevic*'s uncertainty will raise the cost of bargaining.

B. *Jevic* Promotes Collusion and Gamesmanship

Jevic not only creates needless costs; it also threatens the integrity of the Chapter 11 system, for two reasons.

First, the Bankruptcy Code's statutory priorities (such as the wage priority to protect the claims the Drivers lost in *Jevic*) reflect explicit legislative judgments. Thus, in Chapter 11, unpaid wages and benefits, unpaid taxes, and certain other obligations are entitled to special priority in payment relative to other creditors. These political judgments made by Congress, in turn, reflect democratic decision-making about the resolution of financial distress. In the analogous context of property exemptions for individual debtors, this Court recently observed that: "The Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014). So, too, for priorities. It is simply not the province of courts to displace Congressionally-established priorities, especially not for the reasons given by the *Jevic* majority.

Second, *Jevic* threatens the use of reorganization plans as the main mechanism to resolve Chapter 11 cases. As noted above, the Bankruptcy Code contemplates two paths for the final distribution of a debtor's assets: a plan confirmed by the court after creditor voting, or a liquidation under Chapter 7. In the years since the Bankruptcy Code was enacted, practice has relied increasingly on asset sales rather than reorganizations "in place." One might think that plans are less important if Chapter 11 has "morphed into a branch of the law governing mergers and acquisitions." *See* Douglas G. Baird, *The New Face of Chapter 11*, 12 Am. Bankr. Inst. L. Rev. 69, 71 (2004).

Yet, even with the increased use of asset sales, plans remain crucial because they provide procedural protections for stakeholders in the distribution of the consideration received in a sale. These procedural protections include: disclosure about the plan and the debtor (11 U.S.C. § 1125); the right to vote on the plan (11 U.S.C. § 1126); the right to receive at least the minimal amount that would be distributed in a Chapter 7 liquidation (11 U.S.C. § 1129(a)(7)); and, for unsecured creditors, the right to "absolute priority" in distributions. 11 U.S.C. § 1129(b)(2)(B).

To be sure, the procedural protections created by Congress are not costless. Some stakeholders will want to dispense with plans, especially if they can find a mechanism to take value from less sophisticated and concentrated creditors, like the Drivers. *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in* Chapter *11 Bankruptcy*, 123 Yale L.J. 862 (2013).

Jevic's structured dismissal is that mechanism.

Yet, the procedural protections Congress created for plans are not optional. They are central to the integrity of the Chapter 11 system. One of the driving forces underlying bankruptcy reform in the 1970's was "the need for greater transparency and dismantling of the 'bankruptcy ring' of perceived insiders among bankruptcy specialists and the courts." *See In re Hutch Holdings, Inc.*, 532 B.R. 866, 884 (Bankr. S.D. Ga. 2015). Congress sought to repair perceptions that "the [b]ankruptcy system operates more for the benefit of attorneys than for the benefit of creditors." H.R. Rep. No. 95-595, at 92 (1977). This, however, is what *Jevic*'s Dismissal Order does: It pays off Committee counsel and unsecured creditors while skipping the Drivers' undisputed payment priority and eliminating their claims in the Adversary Proceeding. *Jevic* permits that which the Bankruptcy Code's explicit and comprehensive rules forbid. There is every reason to think that these problematic workarounds will become more commonplace.[7]

C. No Other Court Is Likely To Correct The Lower Courts' Errors

Importantly, *Jevic* comes from the Bankruptcy Court for the District of Delaware. More large, publicly-held companies file for Chapter 11 relief there than any other district.[8] *See* Venue (by City), UCLA-LoPucki Bankr. Res. Database, http://lopucki.law.ucla.edu/design_a_study.asp (indicating that the plurality (36.1%) of large Chapter 11 cases have been filed in Delaware) (accessed Dec. 8, 2015). As a practical matter, the docket of only one other Bankruptcy Court—for the Southern District of New York, in the Second Circuit—approaches the volume of the Delaware Bankruptcy Court for large cases.

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[7] As the website of one prominent law firm explains "structured dismissals are becoming more commonplace as a way to minimize costs and maximize creditor recoveries." *See* Jones Day, *Taking a Stand Where Few Have Trodden: Structured Dismissal Held Clearly Authorized by the Bankruptcy Code*, Sept./Oct. 2014, http://www.jonesday.com/taking-a-stand-where-few-have-trodden-structured-dismissal-held-clearly-authorized-by-the-bankruptcy-code-10-01-2014/. This will be true, however, only for creditors who benefit from the structured dismissal—not those, such as the Drivers, who are harmed by it.

[8] This is due to venue rules that permit a corporate debtor to file in its state of incorporation. 28 U.S.C. § 1408.

Opinions of the Delaware Bankruptcy Court are appealed to the Third Circuit Court of Appeals, as happened here. This means that two circuit courts, the Second and Third Circuits, are responsible for overseeing appeals from the vast majority of large Chapter 11 cases. *Jevic* sides with the Second Circuit's questionable approach to priority as reflected in *Iridium*. There is little reason to think that either Circuit would have the opportunity or inclination to reverse itself without guidance from this Court. While Congress could amend the Bankruptcy Code to forbid priority-skipping settlements, there is little reason to think it will do so any time soon. In the meantime, corporate debtors and their controlling stakeholders, such as Sun and CIT, will seek to exploit the priority and dismissal-effect deviations of *Jevic*—unless this Court grants the Petition.

CONCLUSION

The structured dismissal order entered in *Jevic* stripped the Drivers of payment and collection rights they are promised by the Bankruptcy Code and state law. The Third Circuit majority, while declaring the case to be rare, articulated no limiting principles, creating a significant risk that the case will distort the nature and form of resolution for a wide range of negotiations over financially distressed companies. This Court should grant the Petition to resolve the circuit splits and correct the errors created by the majority opinion in *Jevic*.

Respectfully submitted.

RONALD J. MANN
Columbia Law School
435 W. 116th Street
New York, NY 10027
(212) 854-1570

JONATHAN C. LIPSON
Counsel of Record
TEMPLE UNIVERSITY—
BEASLEY SCHOOL OF LAW
1719 North Broad Street
Philadelphia PA 19122
(215) 204-0608
jlipson@temple.edu

DECEMBER 2015

APPENDIX

AMICI

Ralph Brubaker, Carl L. Vacketta Professor of Law, University of Illinois College of Law

Christopher W. Frost, Thomas P. Lewis Professor of Law, University of Kentucky College of Law

Melissa B. Jacoby, Graham Kenan Professor of Law, University of North Carolina at Chapel Hill

Bruce A. Markell, Professor of Bankruptcy Law and Practice, Northwestern University School of Law

Thomas E. Plank, Joel A. Katz Distinguished Professor of Law, University of Tennessee College of Law

Lawrence Ponoroff, Samuel M. Fegtly Chair in Commercial Law, University of Arizona—James E. Rogers College of Law

Katherine Porter, Professor of Law, University of California-Irvine

Robert K. Rasmussen, J. Thomas McCarthy Trustee Chair in Law and Political Science, University of Southern California—Gould School of Law

Mark J. Roe, David Berg Professor of Law, Harvard Law School

David A. Skeel, Jr., S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania Law School

Frederick Tung, Associate Dean for Academic Affairs and Howard Zhang Faculty Research Scholar and Professor of Law, Boston University School of Law

Jay L. Westbrook, Benno C. Schmidt Chair of Business Law, University of Texas School of Law

William J. Woodward, Jr., Senior Fellow, Santa Clara University School of Law & Professor of Law Emeritus, Temple University—Beasley School of Law