No. 22-2606

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: AEARO TECHNOLOGIES, LLC, et al.

AEARO TECHNOLOGIES, LLC, ET AL.,
Debtors-Appellants,
v.
THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT AND JOHN & JANE DOES, 1-1000,
Appellees.

On Direct Appeal from the United States Bankruptcy Court
for the Southern District of Indiana, Indianapolis Division
No. 22-2890, Adv. No. 22-50059

BRIEF FOR AMICI ERWIN CHEMERINSKY AND OTHER LEGAL SCHOLARS IN SUPPORT OF APPELLEES

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2606

Short Caption: IN RE AEARO TECHNOLOGIES, LLC, et al. (Aearo Technologies, LLC v. Those Plaintiffs Listed on Appendix A)

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Erwin Chemerinsky, Diane Lourdes Dick, Christopher D. Hampson, Jonathan Lipson, Bruce A. Markell,

Nancy B. Rapoport

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Massey & Gail LLP; Jonathan S. Massey

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Debtors are wholly owned subsidiaries of non-debtor 3M Company

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Attorney's Signature: /s/ Jonathan S. Massey Date: Feb. 1, 2023

Attorney's Printed Name: Jonathan S. Massey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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INTEREST OF AMICI CURIAE

The legal scholars joining this brief have a strong interest in the important issues presented in this case.[1] Amici are:

Erwin Chemerinsky, Dean of the University of California, Berkeley School of Law and the Jesse H. Choper Distinguished Professor of Law, whose academic career spans nearly 40 years. Prior to assuming his current position, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law from 2008-2017, with a joint appointment in Political Science. Before that, he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School. Dean Chemerinsky has frequently written and lectured about constitutional issues relating to the bankruptcy courts. He is the author of fourteen books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. He also is author of

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than amici or their counsel contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

more than 200 law review articles and is a contributing writer for several publications, including the Los Angeles Times and the ABA Journal. He frequently argues appellate cases, including in the United States Supreme Court. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States. In 2022, he was the President of the Association of American Law Schools.

Professor Diane Lourdes Dick of the University of Iowa College of Law is a scholar and teacher of business and tax law, with particular emphasis on business bankruptcy. She has published numerous articles in law reviews, peer-reviewed journals, practitioner-oriented publications, and on prominent commercial law blogs. She has been invited to deliver lectures at the Harvard Kennedy School, The Brookings Institution, and at professional association meetings, law schools, and graduate tax programs around the country. Her scholarship has been showcased by The New York Times and Reuters BreakingViews, and has been cited and discussed by courts and litigants. She is active in practitioner circles and regularly consults with attorneys, investors, private equity funds, and think tanks about commercial finance, bankruptcy and insolvency, and business taxation.

Christopher D. Hampson is Assistant Professor at the University of Florida Levin College of Law, where he researches and teaches in the areas of bankruptcy,

insolvency, and the ethics of debt. Prior to assuming his current position, he practiced law at Wilmer Cutler Pickering Hale and Dorr LLP, where he led litigation and transactional teams as part of the firm's bankruptcy and financial restructuring group. Professor Hampson has received degrees in law, religion, and ethics from Harvard College, Harvard Law School, and Harvard Divinity School, and served as a law clerk to Judge Richard A. Posner on the U.S. Court of Appeals for the Seventh Circuit.

Jonathan Lipson holds the Harold E. Kohn Chair and is a Professor of Law at Temple University Beasley School of Law. He teaches Contracts, Bankruptcy, Corporations, Commercial Law, Lawyering for Entrepreneurship, International Business Transactions, and a variety of other business law courses. He has taught at the law schools of the University of Wisconsin (where he held the Foley & Lardner Chair), the University of Pennsylvania, and the University of Baltimore. Professor Lipson is a member of the American Law Institute, a Regent of the American College of Commercial Finance Lawyers and has held various leadership positions in the Business Law Section of the American Bar Association. His research focuses on corporate governance, reorganization, and contracting practices. He has published in some of the nation's top law reviews, including those of the UCLA, Boston University, Notre Dame, and Southern California law schools. His work has been cited by the United States Supreme Court and U.S. Courts of Appeals, as well

as leading business courts such as the Delaware Supreme Court, the Delaware Chancery Court, and the Bankruptcy Court for the Southern District of New York. He is a coauthor (with Macaulay *et al.*) of CONTRACTS LAW IN ACTION, a leading casebook taking a "realist" approach to contract law. An occasional empiricist, Professor Lipson has published two articles on the use of "examiners" in chapter 11 bankruptcies, the second of which won the Editors' Prize as the best paper published in the American Bankruptcy Law Journal in 2016. His study of employment at the Trump Casinos in connection with their bankruptcies received widespread attention and was noted in Hillary Clinton's presidential campaign. He was counsel of record to amici law professors in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017) (supporting successful petitioners) and in *Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573-74 (3d Cir. 2003) (supporting successful appellants).

Bruce A. Markell is the Professor of Bankruptcy Law and Practice and Edward Avery Harriman Lecturer in Law at Northwestern University's Pritzker School of Law in Chicago. He is a former partner of Sidley & Austin, a retired bankruptcy judge for the District of Nevada, and a former member of the Bankruptcy Appellate Panel of the Ninth Circuit. Professor Markell is the author of four law school casebooks, including one (it its fifth edition) on bankruptcy, and is a member of the board of editors of Collier on Bankruptcy. He is a conferee of the National

Bankruptcy Conference, a fellow of the American College of Bankruptcy, a founding member of the International Insolvency Institute, and a life member of the American Law Institute. Professor Markell has been a visiting professor at several institutions, including Harvard Law School and Peking University School of Law. He was the recipient of the 2022 Lawrence King Award presented by the Commercial Law League of America.

Nancy B. Rapoport is a UNLV Distinguished Professor, as well as the Garman Turner Gordon Professor of Law, Boyd School of Law, UNLV, and an Affiliate Professor of Business Law and Ethics, Lee Business School, UNLV. Her specialties include bankruptcy ethics, ethics in governance, and law firm behavior. In 2001, she was elected to membership in the American Law Institute, and in 2002, she received a Distinguished Alumna Award from Rice University. In 2017, she was inducted into Phi Kappa Phi (Chapter 100). She is a Fellow of the American Bar Foundation and a Fellow of the American College of Bankruptcy. In 2017, she received the Commercial Law League of America's Lawrence P. King Award for Excellence in Bankruptcy. She has served as the fee examiner or as chair of the fee review committee in such large bankruptcy cases as *Zetta Jet*, *Toys R Us*, *Caesars*, *Station Casinos*, *Pilgrim's Pride*, and *Mirant*.

The scholars joining this brief have substantial expertise in the questions presented by this case and a strong interest in their proper resolution.

SUMMARY OF ARGUMENT

The Bankruptcy Code provides powerful relief that potentially infringes on a host of constitutional guarantees: the right to have Article III courts resolve traditional causes of action, such as personal injury suits; the right to jury trial in such cases; and the right to a day in court and the right to have each individual case heard on the merits. In addition, the Code potentially intrudes on principles of federalism recognizing the fundamental authority of the states to resolve state law tort actions in state court forums. When bankruptcy filings adhere to the Code's "basic policy" of "affording relief only to an 'honest but unfortunate debtor,'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998), ordinarily these elementary principles and constitutional guarantees are satisfied. But serious constitutional issues arise where the Bankruptcy Code is abused, such as where the party filing for bankruptcy is a mere stand-in for the party against whom tort claims have been asserted.

The Third Circuit recently upheld these principles in dismissing a bankruptcy filed by a corporate stand-in (LTL Management, LLC) but orchestrated by its parent (Johnson & Johnson, Inc.) for its own benefit. *See In re LTL Management, LLC*, __ F.4th __, 2023 WL 1098189 (3d Cir. Jan. 30, 2023). The Third Circuit explained that "Chapter 11 vests petitioners with considerable powers" and "significantly disrupts creditors' existing claims against the debtor." *Id.* at *10 (citation omitted). Accordingly, "testing the nature and immediacy of a debtor's financial troubles, and

examining its good faith more generally," are critically important to ensure a debtor satisfies the "intended purposes" of the Bankruptcy Code. *Id.* at *1, *10. "Congress designed Chapter 11 to give those businesses teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liability." *Id.* at *10 (citation omitted).

In this case, a tortfeasor with independent liability seeks the benefits of bankruptcy (including sweeping stay relief against thousands of lawsuits) with none of the burdens. Such a request would upset the congressionally calibrated balance between debtors and creditors and offend the constitutional principles with which the bankruptcy system ordinarily comports. Where bankruptcy is used not to preserve an estate or maximize value for creditors but rather to circumvent the tort system and impose a new procedure for resolving claims against a non-debtor, the requested relief stretches the Bankruptcy Code beyond the breaking point. This Court should not adopt such a system in the absence of a clear statement by Congress.

Here, the Aearo Debtor-Appellants ("Aearo") are defendants in name only in the product liability lawsuits that form the claimed justification for the bankruptcy. The principal defendant in the tort litigation is the 3M Company ("3M"). But 3M has not filed for bankruptcy and has not subjected itself to the checks and balances

of the bankruptcy system. Instead, 3M seeks the benefit of extraordinary stay relief that would halt thousands of ongoing federal and state lawsuits against it, without having to incur any of the downsides of bankruptcy. The requested stay relief is not needed to permit Aearo to reorganize. Indeed, the bankruptcy court expressly found that continued tort litigation "will not endanger or otherwise impair Aearo's reorganization." *In re Aearo Techs., LLC*, 642 B.R. 891, 911 n.16 (Bankr. S.D. Ind. 2022).

Aearo argues that the bankruptcy courts must intervene in the product liability litigation against 3M because the congressional created procedure for Multi-District Litigation (MDL) is broken. But that judgment is not for the bankruptcy courts to make. The MDL system was established by Congress more than five decades ago to create centralized forums for addressing mass tort litigation. 28 U.S.C. § 1407. Congress has not created the bankruptcy system as an alternative procedure for claims resolution whenever solvent companies like 3M face large volumes of litigation they believe could be resolved more cheaply and efficiently in bankruptcy.

Moreover, there is ample reason not to take 3M's criticisms of the MDL system seriously. When the product liability litigation began, 3M itself "actively and successfully lobbied" the Judicial Panel on Multidistrict Litigation to centralize the product liability claims in an MDL. *In re 3M Combat Arms Earplug Prods. Liab.*

Litig., No. 3:19-md-2885, 2022 WL 17853203, *2 (N.D. Fla. Dec. 22, 2022). 3M did not change its tune until it started losing bellwether trials.

Using Aearo's bankruptcy filing as a pretext for extending sweeping stay relief to 3M perverts the bankruptcy system and raises grave constitutional questions. The Court should avoid those questions by construing the Bankruptcy Code as foreclosing the Debtor's requested relief. Such a course of action would comport with separation of powers principles by upholding the Congressionally created MDL procedure and ensuring that courts do not apply the Bankruptcy Code in a manner that Congress never imagined, let alone authorized. 3M's argument lacks any basis in equity, fails to establish any benefit to the bankruptcy debtor, and seeks relief contrary to the basic bankruptcy goal of aiding only the "honest but unfortunate debtor." The bankruptcy court properly rejected 3M's radical strategy, and its order should be affirmed.

ARGUMENT

A. Aearo's Requested Relief Raises Grave Constitutional Concerns.

Aearo's requested relief would freeze thousands of ongoing federal and state lawsuits against not only Aearo, but against non-debtor entities like 3M that have independent tort liability to injured plaintiffs. The relief would hamstring the MDL court and deny it the ability to conduct bellwether trials, decide motions in pending cases, and otherwise manage the litigation before it. Stay relief is "a powerful tool

of the bankruptcy courts." *Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of Fox Masonry and Expert Restorations*, 140 F.3d 661, 666 (7th Cir. 1998). But precisely because a bankruptcy stay is such strong medicine, its justifications must be carefully examined and any relief strictly confined to the boundaries authorized by Congress.

First, bankruptcy stay relief interferes with the power of Article III courts to adjudicate traditional causes of action, such as personal injury suits, as part of their constitutionally established role as one of the "coordinate branches of the National Government." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955). Article III serves a crucial function in our "system of checks and balances" and "preserve[s] the integrity of judicial decisionmaking[.]" *Stern v. Marshall*, 564 U.S. 462, 483-84 (2011).

Article III constrains the power of Congress to withdraw common-law suits from federal district courts into the Article I bankruptcy system. The Supreme Court has "long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Id.* at 484 (citation omitted). "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts."

Id. (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment) (citations omitted); *see also Northern Pipeline*, 458 U.S. 50 (1982) (plurality opinion) (holding bankruptcy court could not constitutionally decide state law claim for breach of contract against entity that was not otherwise part of the bankruptcy proceedings).

A bankruptcy stay also interferes with the ability of state courts to entertain tort actions. Such extraordinary relief is highly disfavored under our system of federalism. The circumstances in which state court proceedings may be enjoined "are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo v. Exxon Corp*., 486 U.S. 140, 146 (1988) (citation omitted; alteration in original). "[A]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Smith v. Bayer Corp*., 564 U.S. 299, 306 (2011) (citation omitted). As this Court has explained, bankruptcy "courts must be particularly careful in ascertaining the source of their power, lest bankruptcy courts displace state courts for large categories of disputes[.]" *Matter of Kubly*, 818 F.2d 643, 645 (7th Cir. 1987).

In addition, bankruptcy stay relief has Seventh Amendment implications, because the bankruptcy system restricts the right to jury trial for many claimants. Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury" by assigning them to a bankruptcy court.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-52 (1989). In an Article III court, "the seventh amendment entitles a party to a jury trial" for "a tort action for damages." *United States v. Balistrieri*, 981 F.2d 916, 927 (7th Cir. 1992). But bankruptcy courts typically provide only meager jury-trial opportunities. As the bankruptcy court in this case explained, "most mass tort claims in a bankruptcy are resolved not through jury trials before a district court, but by consensual resolution through a plan of reorganization, often through a trust mechanism[.]" 642 B.R. at 902.

All of these constitutional principles require that bankruptcy stay relief be closely scrutinized to ensure it comports with the congressionally enacted bankruptcy scheme.

B. This Case Exceeds the Limits of the Bankruptcy System.

This case falls far outside the bankruptcy system created by Congress. It offends the Bankruptcy Code's "basic policy" of "affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217. This case is a transparent attempt to protect non-debtor 3M and to freeze claims against 3M based on its independent tort liability, rather than to protect Aearo, its estate, or its creditors. This case is a Potemkin bankruptcy filed by Aearo but staged for 3M's benefit.

The requested stay relief is not necessary to Aearo's reorganization. In fact, the bankruptcy court expressly found that continued tort litigation "will not endanger

or otherwise impair Aearo's reorganization." 642 B.R. at 911 n.16. That finding reflects Aearo's very limited role in the product liability litigation. In the words of the MDL judge, Aearo has been a defendant in the MDL litigation "in name only." *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-2885, 2022 WL 3345969, *2 (N.D. Fla. Aug. 14, 2022). Indeed, the MDL court has precluded 3M from attempting to avoid any portion of its alleged liability for the claims in the MDL litigation or to shift liability to the Aearo defendants, given 3M's "explicit statements and conduct establishing itself as the sole responsible party for nearly four years in the MDL." *In re 3M Combat Arms*, 2022 WL 17853203, at *1.

Further, the bankruptcy court found that the funding agreement would eliminate any impact on Aearo's estate from the MDL litigation. The court noted that the funding agreement "provides for an *uncapped, non-recourse* commitment from 3M to fund all of the Aearo Entities liabilities pre- and post-petition financing, including those arising from" the products liability actions. 642 B.R. at 909 (emphasis in original). "[W]hatever liability the Pending Actions generate—in bankruptcy, outside of bankruptcy, stay in place, or no stay—Aearo can satisfy such liability by making a payment request under the Funding Agreement. From this, the Court is unable to discern any financial impact to creditors, let alone a significant and adverse one, from the continuation of the Pending Actions." *Id.* at 910. "3M is more than able to honor the Funding Agreement, even if the Pending Actions

proceed." *Id.* at 911. The Third Circuit similarly pointed to a funding agreement between Johnson & Johnson, Inc. and debtor LTL Management, LLC, in finding lack of financial distress sufficient to establish the debtor's eligibility for Chapter 11. *In re LTL Management*, 2023 WL 1098189, at *13-14.

Instead of protecting Aearo's reorganization, the requested relief is aimed at freezing claims against Aearo's corporate parent, 3M. Aearo seeks to provide 3M with all the benefits of bankruptcy, including sweeping stay relief, with none of the burdens. For example, by staying outside bankruptcy, 3M is not required to place its assets under court supervision, 11 U.S.C. § 541, make disclosures regarding assets and liabilities, 11 U.S.C. § 521(a)(1)(B), or receive court approval for non-ordinary course transactions. 11 U.S.C. § 363. It is not required to place its management under bankruptcy court supervision. 11 U.S.C. § 1104(a); 11 U.S.C. § 1121(d). It is not required to treat same-level creditors equally, 11 U.S.C. § 1129(b), or honor the absolute priority rule, which requires that equity holders be placed "at the bottom of the priority list" and "receive nothing until all previously listed creditors have been paid in full." *Czyzewski*, 580 U.S. at 457. Giving 3M the sweet without the bitter upsets the basic bargain of bankruptcy that Congress enacted in the Code – that debtors would be afforded the powerful tools of bankruptcy, like the automatic stay, only when they accepted its restrictions.

This case skews the Congressional balance. In its quest to protect its corporate parent, Aearo would deprive the Article III courts of their power to resolve common-law tort claims against non-debtor 3M, deny jury trial rights to thousands of claimants, and invade the autonomy of the state courts. A bankruptcy court's authority to entertain state law tort claims is premised on the claims' integral relationship to the bankruptcy case. *See Stern*, 564 U.S. at 494-95. "[B]ankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts," and "their ability to resolve such matters is limited to 'a narrow class of common law claims as an incident to [their] primary . . . adjudicative function.'" *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679-80 (2015). But there is not a sufficient connection between the tort claims against 3M and Aearo's bankruptcy. Here, the tort claims' only connection to the bankruptcy was artificially created by 3M and Aearo on the eve of bankruptcy via a funding and indemnity agreement allocating 100% of 3M's liability for the tort claims in the MDL to Aearo in exchange for 3M's commitment to fund all of Aearo's liabilities and costs in bankruptcy. If the "exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by" such manipulation, "then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Stern*, 564 U.S. at 494-95.

Indeed, the orchestrated transactions and connections between Aearo and 3M that form the foundation of this bankruptcy are precisely the sort of "collusive" arrangements that federal courts have typically disregarded in examining their own subject-matter jurisdiction.[2] Such staged charades undermine "the integrity of the judicial process." *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (internal quotation marks and citation omitted). In *United States v. Johnson*, 319 U.S. 302 (1943), for example, the Supreme Court dismissed for want of a case or controversy a cooperative lawsuit brought by a tenant against a landlord, at the landlord's behest and expense, to vindicate the landlord's interests. The Court noted that the case "was instituted as a 'friendly suit' at [the defendant's] request;" that the plaintiff was represented by "counsel who was selected by [defendant's] counsel" in advance of the lawsuit; and that the defendant agreed in advance to pay the plaintiffs' counsel for bringing the suit. *See id*. at 304. By the same token, this case is a "friendly" bankruptcy dominated by 3M, financed by 3M, orchestrated by 3M and instituted to provide 3M the benefits of a litigation stay without the burdens of bankruptcy.

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[2] *See* 28 U.S.C. § 1359 (prohibiting collusive assignments as a basis for federal judicial jurisdiction); *see also Kramer v. Caribbean Mills, Inc*., 394 U.S. 823, 828-29 (1969) ("If federal jurisdiction could be created by assignments of this kind, which are easy to arrange . . . . , then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties."); *Siler v. Louisville & Nashville R.R. Co*., 213 U.S. 175, 191-92 (1909) ("Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction").

In short, the requested relief in this case has nothing to do with the usual purposes of the automatic stay, which is designed "to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors." *Fox Valley Const. Workers*, 140 F.3d at 666 (internal quotation marks and citation omitted); *see also City of Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021) (automatic stay "benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others"). These purposes are entirely absent here. Aearo faces no such "scramble" here, and 3M has not filed for bankruptcy. In any event, as noted in Part D, *infra*, the MDL system created by Congress also provides for centralization of mass tort litigation.

Congress did not enact the stay to allow corporate parents with independent tort liability like 3M to orchestrate collusive bankruptcies that afford them all the benefits of bankruptcy with none of the burdens.

C. Aearo Cannot Show Clear Congressional Authorization for the Requested Relief.

In light of the serious constitutional questions presented by Aearo's requested relief, separation of powers principles require application of the canon of constitutional avoidance. That canon requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224,

237-38 (1998) (citations omitted); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems," courts will construe the statute to avoid such problems "unless such construction is plainly contrary to the intent [of the legislature]." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

The Bankruptcy Code contains no clear statement by Congress authorizing the extraordinary relief sought by Aearo. Quite the contrary: properly construed, the Code forecloses that relief.

Under § 362(a)(1), the automatic bankruptcy stay applies only to "action[s] or proceeding[s]" that are "*against the debtor*" or seeks "to recover a claim *against the debtor*." 11 U.S.C. § 362(a)(1) (emphasis added). The "debtor" in this case is Aearo, not 3M. "The clear language of Section 362(a)(1) thus extends the automatic stay provision only to the debtor filing bankruptcy proceedings and not to non-bankrupt co-defendants." *Pitts v. Unarco Indus., Inc.*, 698 F.2d 313, 314 (7th Cir. 1983). As this Court explained in *Pitts*, the statutory text is particularly significant given the distinction between Chapter 13 and Chapter 11 of the Code. "Chapter 13 expressly provides for the stay of an action against a co-debtor but Chapter 11 does not. . . . [S]uch Congressional silence would seem to indicate that the automatic stay provisions of Section 362(a) operate in favor of the bankrupt debtor only." *Id.*

Aearo points to language in two cases of this Court that did *not* extend Section 362(a) stay relief to non-debtors. *See Matter of Fernstrom Storage & Van Co.*, 938 F.2d 731 (7th Cir. 1991); *Fox Valley Constr. Workers Fringe Benefit Funds*, 140 F.3d 661. These cases cannot bear the weight Aearo attempts to place on them. In *Fox Valley Construction*, for example, the language to which Aearo points was a throwaway discussion in a decision firmly denying extension of stay relief: "we quickly dispose of any argument that the automatic stay" applies to a non-debtor; the "specious argument that the automatic stay [applies] hardly merits the brief discussion we have given it." 140 F.3d at 666. These cases are a thin reed for departing from the statutory language enacted by Congress and extending stay relief in the extraordinarily sweeping manner that Aearo seeks. They hardly supplant the need for a clear statement by Congress.

Aearo also relies on out-of-circuit precedent that is far afield from the situation here, where 3M has independent liability.[3]

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[3] For example, *In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992), involved a situation where the claimant had "no independent claim against the[] defendants." *Id.* at 132. This case is completely different, and *Colonial Realty* has no application here. *See Picard v Fairfield Greenwich Ltd.*, 762 F.3d 199, 208 (2d Cir. 2014) (automatic stay does not bar actions based on independent misconduct).

McCartney v. Integra Nat'l Bank North, 106 F.3d 506 (3d Cir. 1997), did not involve an attempt to extend the automatic stay at all. It involved a lender's noncompliance with the Pennsylvania Deficiency Judgment Act. *Id.* at 511. In *McCartney*, had there been no stay, the lender would have been required under Pennsylvania law to name both the debtor and the non-debtor as respondents or "risk

Aearo relies on Section 362(a)(3), which operates as a stay of "any act to *obtain possession* of property of the estate or of property from the estate or to *exercise control* over property of the estate." 11 U.S.C. § 362(a)(3) (emphasis added). In *Nat'l Tax Credit Partners, L.P., v. Havlik*, 20 F.3d 705 (7th Cir. 1994), this Court instructed that Section 362(a)(3) must be construed according to its "language," rather than according "to a purpose imputed to that language." *Id*. at 707. "[S]tatutes—more accurately, the persons who wrote and voted for the statutes—often have multiple purposes. Courts enforce not these purposes in the abstract but the rules embedded in the language . . . ." *Id*.

Here, the bankruptcy court correctly found that the statutory language of Section 362(a)(3) was not met because the pending tort actions did not qualify as efforts to "obtain possession" or "exercise control" over property of the estate.

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discharging [the debtor] as loan guarantor." *Id*. Here, by contrast, tort claimants can pursue tort claims against 3M directly and alone, without suit against Aearo, which is a participant in the MDL in name only.

A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986), involved product liability actions against Aetna, the debtor's insurer, not against an independent tortfeasor like 3M. In fact, *Robins* cautioned that extension of the stay is inappropriate if the non-bankrupt defendant is "independently liable as, for example, where the debtor and another are joint tort feasors or where the nondebtor's liability rests upon his own breach of a duty." *Id.* at 999 (quoting *In Re Metal Ctr*., 31 B.R. 458, 462 (Bankr. D. Conn. 1983)). Courts have read *Robins* as precluding extension of stay relief whether "the non-bankrupt co[-]defendant is 'independently liable.'" *CAE Indus. Ltd. v. Aerospace Holdings Co*., 116 B.R. 31, 33 (Bankr. S.D.N.Y. 1990) (quoting *Robins*, 788 F.2d at 999).

"There is no evidence that the Stay Defendants are proceeding directly against the insurance policies. And 3M has taken no action against the insurance policies other than to put insurers on notice of the Pending Actions, . . . [s]o, there currently are no direct efforts to exercise control over property of the estate." 642 B.R. at 906. The court also found that the pending actions were not even an *indirect* effort to control property of the estate "because, ultimately, 3M will fully fund any liability incurred by Aearo relating to the Pending Actions pursuant to the Funding Agreement." *Id.* at 907. "[T]apping the insurance policies to cover any liability incurred in the Pending Actions does not affect the amount of money Aearo can pay its creditors because the Funding Agreement covers all claims arising from the Pending Actions in the absence or exhaustion of the applicable insurance." *Id.*

Aearo also points to Section 105(a), which authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to *carry out provisions*" of the Code. 11 U.S.C. § 105(a) (emphasis added). But this provision is hardly a clear statement by Congress authorizing Aearo's requested relief. Section 105(a) is merely a vehicle to carry out the otherwise provided powers of the bankruptcy court. It should not be interpreted as obliterating the textual limits that Congress enacted in Section 362(a)(1) and Section 362(a)(3). Section 105(a) powers may be exercised only "within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *see also Law v. Siegel*, 571 U.S.

415, 421 (2014) (Section 105(a) "confers authority to 'carry out' the provisions of the Code," and "whatever equitable powers remain in the bankruptcy courts must and can only be exercised 'within the confines of' the Bankruptcy Code") (citation omitted). "A bankruptcy court does not have 'free-floating discretion,' to create rights outside the Code." *Matter of Lloyd*, 37 F.3d 271, 275 (7th Cir. 1994) (citation omitted).

Aearo's amicus The Chamber of Commerce claims that Aearo's bankruptcy strategy is routine, but the examples cited illustrate the radical nature of Aearo's approach. The Chamber cites prior mass tort and asbestos bankruptcies where the corporate entity filing for bankruptcy was the same entity actually facing tort liability.[4] But this case involves 3M, a parent entity with independent tort liability, seeking to reap the benefit of the bankruptcy process while avoiding any of the burdens of bankruptcy itself.

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[4] For example, the Chamber cites *In re Johns-Manville Corp.*, 36 B.R. 727 (Bankr. S.D.N.Y. 1984), but there the bankruptcy court explained, "it is undeniable that there has been no sham or hoax perpetrated on the Court in that Manville is a real business with real creditors in pressing need of economic reorganization." *Id.* at 738. The Chamber cites the example of silicone breast implants, but there the bankruptcy court explained that "[t]he Debtor 'is a real company with real debt, real creditors and a compelling need to reorganize in order to meet these obligations.'" *In re Dow Corning Corp.*, 244 B.R. 673, 677 (Bankr. E.D. Mich. 1999) (citation omitted).

The absence of any clear congressional authorization or established precedent for Aearo's strategy is damning.

D. Aearo's Criticism of the MDL Process Cannot Justify the Requested Relief.

In the end, Aearo and its amici fall back on the policy argument that bankruptcy is the only practical alternative to resolving product liability claims, because the MDL process supposedly is broken. But the MDL process was enacted by Congress (28 U.S.C. § 1407) to create centralized judicial forums for addressing mass tort litigation. There are currently 169 pending MDL proceedings, 61 of which involve product liability claims.[5] If Aearo's scheme is permitted in this case, nothing would prevent defendants in other MDLs from employing the same phony bankruptcy strategy to achieve sweeping injunctive relief protecting the entire corporate enterprise without having to place it into bankruptcy.

Aearo's criticisms of Congress' handiwork in 28 U.S.C. § 1407 is not an appropriate basis for judicial innovation in imposing a replacement – just as criticisms of the tort system in asbestos litigation did not provide a basis for judicial innovation in creating settlement class actions without clear authorization by Congress in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) ("The

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[5] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-December-15-2022.pdf.

argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution."). "The bankruptcy court is a court of limited jurisdiction and receives its jurisdictional mandate in a statutory grant of power." *In re Sheehan*, 48 F.4th 513, 520 (7th Cir. 2022). Aearo ignores that fundamental constraint. As the Third Circuit recently opined, "a filing to change the forum of litigation where there is no financial distress raises . . . the specter of 'abuse which must be guarded against to protect the integrity of the bankruptcy system.'" *In re LTL Management,* 2023 WL 1098189, at *16 n.19 (citation omitted).

Moreover, 3M's criticisms of the MDL process should not be taken at face value. The 3M MDL has already resolved 18,000 claims. 642 B.R. at 897. Indeed, 3M "actively and successfully lobbied" the Judicial Panel on Multidistrict Litigation to centralize the product liability claims in an MDL. *In re 3M Combat Arms*, 2022 WL 17853203, at *2. 3M vigorously litigated in the MDL for the next three and a half years, negotiating procedural rules; engaging in common corporate, military, and expert discovery, as well as case-specific discovery for 19 bellwether plaintiffs; completing case-specific discovery and dispositive motions practice for 374 cases in the first wave of actions; and extensively briefing more than 260 motions in limine,

109 *Daubert* challenges, 42 case-specific summary judgment motions, and 47 choice of law disputes. *Id.*

3M's change of heart came only after it started losing bellwether trials. The MDL court held 16 trials in total over 14 months, resulting in 19 verdicts—13 plaintiffs' verdicts, 6 defense. *Id.* at *3. In the words of the MDL court, "that's when the bottom fell out. Suddenly, according to 3M, the MDL was a 'failure,' this Court's legal rulings were riddled with 'substantial' errors (only those in which Plaintiffs prevailed, of course), and the bellwether trial process was 'tainted' and 'flawed' (again, only with respect to trials in which Plaintiffs prevailed." *Id.* As the MDL court explained, Aearo's bankruptcy reflects nothing more than "good old-fashioned litigation forum shopping, solely—and admittedly—designed to evade dissatisfactory legal rulings and verdicts in the MDL, and to avoid potential future liability for a *non-debtor*, 3M, in the tort system." *Id.* (emphasis in original.)

The bankruptcy court properly rejected 3M's attempted radical change to the bankruptcy system, which would raise serious constitutional questions in the absence of any clear authorization by Congress.

CONCLUSION

The bankruptcy court's order should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and Cir. R. 29 because it contains 6,178 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the word-count function of Microsoft Word.

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I hereby certify that on February 1, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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