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Mass Confusion: Win, Lose or Draw, What's Next After the Supreme Court Rules?

Hon. Philip Bentley

U.S. Bankruptcy Court (S.D.N.Y.)

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Proskauer

Hon. Shelley C. Chapman (ret.)

Willkie Farr & Gallagher LLP

Hon. Melanie L. Cyganowski (ret.)

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Mass Confusion: win, lose or draw, what's next after the Supreme Court rules?

Panelists:

Hon. Philip Bentley, U.S. Bankruptcy Court for the Southern District of New York
Martin J. Bienenstock, Proskauer Rose LLP
Hon. Shelley C. Chapman (Ret.), Willkie Farr & Gallagher LLP
Hon. Hon. Melanie L. Cyganowski (Ret.), Otterbourg P.C.
Marshall Huebner, Davis Polk & Wardwell LLP
Edward E. Neiger, ASK LLP
John D. Penn, Perkins Coie LLP

Moderator:

Albert Togut, Togut, Segal & Segal LLP



Albert Togut

Al Togut is the founder and senior member of Togut, Segal & Segal LLP, a firm that prides itself on having no retainer clients that would impair its disinterestedness. Al pioneered the use of conflicts counsel in megacases.

Over the nearly 50 years Al has been practicing, he has represented many high-profile companies in their Chapter 11 cases including Latam Airlines, Endo Pharmaceutical, McClatchy Newspapers, Westinghouse, American Airlines, Kodak, Lehman Brothers' Aurora, General Motors, Chrysler Automotive, Enron, Dewey & LeBeouf, Sun Edison, Frontier Airlines, Rockefeller Center and Olympia & York's World Financial Center. He served as trustee in thousands of cases including Refco LLC which at \$4 billion, was at the time the largest Chapter 7 case in the history of bankruptcy. He represented Kenneth Feinberg, the Court's Rule 706 expert, in the Johnson & Johnson \$61 billion LTL case.

Al was an officer and director of the American Bankruptcy Institute, Fellow of the American College of Bankruptcy, and Fellow of the International Insolvency Institute. He co-chaired ABI's Chapter 11 Reform Commission. He also served on the ABI's fee-study commission.

He has written and lectured on many topics under the former Bankruptcy Act and current Bankruptcy Code and has particular expertise in conflicts of interest and ethics.



Hon. Philip Bentley

Philip Bentley was sworn in as a United States Bankruptcy Judge for the Southern District of New York on September 7, 2022. He received his B.A. degree cum laude in 1981 from Yale College and his J.D. degree cum laude in 1984 from Columbia Law School, where he was a Harlan Fiske Stone scholar.

Prior to joining the Court, Judge Bentley was a partner in the bankruptcy and restructuring department of Kramer Levin Naftalis & Frankel LLP. His practice focused on complex litigation in bankruptcy courts, as well as other federal and state courts. In addition to representing debtors, trustees and examiners, he frequently litigated on behalf of official committees and creditor groups in large bankruptcies, including Purdue Pharma, Puerto Rico, Residential Capital, Madoff Investment Securities, General Motors, W.R. Grace, Adelphia Communications, WorldCom, Dow Corning and SGL Carbon.

Judge Bentley is a regular speaker on bankruptcy issues. He is a member of the National Conference of Bankruptcy Judges and the Federal Bar Council's Bankruptcy Litigation Committee. Prior to his appointment, he was a member of the advisory board for the American Bankruptcy Institute's annual New York City Bankruptcy Conference, as well as a longstanding member of the Policy Committee of Human Rights Watch.





Martin J. Bienenstock

Martin Bienenstock teaches Corporate Reorganization at Harvard Law School, University of Michigan Law School, and University of Pennsylvania Carey Law School and chairs restructuring at Proskauer Rose LLP. Martin currently leads the representation of the Oversight Board for Puerto Rico. He has led restructurings of such companies as General Motors, Chrysler Financial, Enron, and Global Marine, and represented creditors such as the Owens Corning commercial creditors, the Caesar Entertainment creditors' committee and the MF Global creditors' committee. Martin authored the treatise Bankruptcy Reorganization and is named one of the 100 Most Influential Attorneys in the United States by the New York Law Journal.



Hon. Shelley C. Chapman (Ret.)

Hon. Shelley C. Chapman (Ret.) is Senior Counsel in the Business Reorganization & Restructuring Department and Chair of the Alternative Dispute Resolution Practice Group. Prior to joining Willkie in 2022, she served as U.S. Bankruptcy Judge for the Southern District of New York since 2010. A widely-recognized leader of the bankruptcy bar, Judge Chapman oversaw the Lehman Brothers Holdings bankruptcy case – the largest bankruptcy case in history – and many other chapter 11 mega-cases and chapter 15 cross-border proceedings, including Boston Generating, Innkeepers, Ambac, LightSquared, Sbarro, NII Holdings, Sabine Oil & Gas, Nine West, Century 21, Aeromexico, and Philippine Airlines. She has also acted as a court-appointed mediator in numerous complex chapter 11 cases, including Windstream, Frontier Communications, OneWeb, Avianca S.A., Purdue Pharma, Madison Square Boys & Girls Club, and Sears. She is currently serving as the lead mediator in the PROMESA/Title III case of The Puerto Rico Electric Power Authority (PREPA)/The Commonwealth of Puerto Rico and as the court-appointed mediator in the FTX Trading Ltd., Rite Aid Corporation and Endo International chapter 11 cases. Committed to furthering excellence in the wider bankruptcy community, she has mentored newly appointed bankruptcy judges and has hosted hundreds of school-age children in her courtroom for mock trials.

Before beginning her service on the bench, Judge Chapman was a partner at Willkie from 2001 – 2010, where her practice included the representation of debtors, creditors, and other parties in interest in major chapter 11 cases and out-of-court restructurings.

Judge Chapman received a B.A. with distinction in all subjects from Cornell University in 1978 and a J.D. from Harvard Law School, from which she graduated cum laude in 1981. She served as an editor of the Harvard Civil Rights-Civil Liberties Law Review.





Hon. Melanie L. Cyganowski (Ret.)

Melanie Cyganowski joined Otterbourg P.C. as a partner in 2008, after serving a full 14-year term as a Bankruptcy Judge in the Eastern District of New York where she also served as the Court's Chief Judge from 2005 until the end of her term.

Melanie presently chairs Otterbourg's Bankruptcy practice. She is active in the mass torts bankruptcy field where she was lead co-counsel to the Official Committees of Claimants in LTL/J&J 1 and 2, and Aeero Technologies (3M). She is also co-counsel to the Ad Hoc Committee of consenting governmental parties in Purdue Pharma, and in Mallinckrodt, among others.

Melanie is also an SEC Receiver and has been appointed as a fiduciary in healthcare and related cases.

In 2014, Melanie was inducted as a Fellow into the American College of Bankruptcy and sits on the Editorial Advisory Board of the Norton Journal of Bankruptcy Practice & Law. She taught for over 20 years as an adjunct professor of law at St. John's University School of Law.



Marshall Huebner

Co-head of Davis Polk's Restructuring group, Marshall Huebner has played a key role in many of the largest and most complex restructurings of the last 30 years, including serving as lead counsel to the U.S. Treasury and the Federal Reserve in the \$182 billion rescue of AIG, and counsel to notable companies including Delta Air Lines, Ford Motor, Lehman Brothers (Europe), Aeroméxico and Arch Resources in their landmark restructurings. He is lead counsel to the Purdue Pharma chapter 11 estate, and has been lead counsel to both lenders and other major creditors in dozens of landmark restructurings including Bed Bath & Beyond, LATAM Airlines, Silicon Valley Bank, Hertz, Enron, Lyondell, American Airlines, Kodak, Polaroid and Toys "R" Us.

In 2023, Marshall was named "Dealmaker of the Year" by *NYLJ* and "Litigator of the Week" by *American Lawyer*. In 2022, he was named "Debtor Counsel of the Year" by *The Deal*, one of the top 30 restructuring professionals in the world by *Euromoney*, a "Bankruptcy MVP" by *Law360* and a 2022 "Outstanding Lawyer" by *Turnarounds and Workouts*. He is also one of the very few restructuring lawyers twice named "Dealmaker of the Year" by the *American Lawyer*.

A thought leader in his field, Marshall frequently authors articles for publications including *Corporate Disputes*, *Bloomberg Law* and *Practical Law*. He also lectures widely at multiple law schools, including Harvard, Yale, Columbia and Chicago, and routinely keynotes major industry conferences.

He is a member of the National Bankruptcy Conference and the American College of Bankruptcy. He also runs marathons for charity and has volunteered as an EMT for 39 years.





Edward E. Neiger

Ed is one of the few nationally recognized leaders in both bankruptcy and mass tort law.

He started off his career as a bankruptcy attorney, training under the legendary Harvey R. Miller, at the bankruptcy and litigation powerhouse Weil, Gotshal & Manges LLP. At Weil Ed earned his stripes working on the bankruptcies of Enron and WorldCom. In 2008, he founded his own law firm which then merged with ASK LLP in 2012.

Ed is currently co-managing partner of ASK, one of the leading mass tort, sexual abuse and bankruptcy law firms in the country, with client recoveries and settlements totaling more than \$500 million.

Ed has devoted his career to standing up to powerful people, entities and government, taking an aggressive stance to fight and recover money for victims. Mass disaster and bankruptcy case involvement includes: PG&E, Boy Scouts of America, Purdue Pharma, and Mallinckrodt.

Ed is also one of the nation's leading attorneys representing creditors in bankruptcies. He has represented clients on over two hundred Official Committees of Unsecured Creditors, including in the bankruptcies of Revlon, The Weinstein Companies and J.C. Penney.



John D. Penn

John Penn is a partner in Perkins Coie's Bankruptcy & Restructuring Practice and practices in the New York and Dallas offices of the firm. John recently completed a term as the Chair of the firm's Bankruptcy & Restructuring practice.

John was licensed by the Supreme Court of Texas in 1982 and the Supreme Court, Appellate Division of New York in 2010. During more than four decades of practice, John has represented secured and unsecured creditors, debtors, trustees and unsecured creditor committees in major and high-profile reorganizations and insolvency proceedings.

John is a Fellow of the American College of Bankruptcy and served as the President of the American Bankruptcy Institute during 2005 – 2006 when the most recent overhaul of the Bankruptcy Code became effective and later served as ABI's Chairman. John is also certified by both the American Board of Certification and Texas Board of Legal Specialization in Business Bankruptcy Law. John has written extensively on bankruptcy and reorganization topics and has been published in the American Bankruptcy Institute Law Review, the American Bankruptcy Institute Journal and a number of other publications. John has recently been blogging about Voyager Holdings and Celsius Networks' bankruptcy cases on the firm's Virtual Currency Report located at <https://www.virtualcurrencyreport.com/>. John is a frequent speaker at educational programs and has made presentations at seminars across the United States and in Europe.

John has been active in a number of charitable endeavors, including the Longhorn Council Boy Scouts of America and Tarrant County Chapter of March of Dimes. John served on the National Eagle Scout Association Committee of the Longhorn Council, a Life Member of NESA and the proud parent of two Eagle Scouts who are now members of the State Bar of Texas. In February of this year, the 11th full marathon was completed by John.



22-110-bk (L)

In re: Purdue Pharma L.P.

1 In the
2 United States Court of Appeals
3 For the Second Circuit
4

5 AUGUST TERM 2021

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7 ARGUED: APRIL 29, 2022

8 DECIDED: MAY 30, 2023
9

10 Nos. 22-110-bk (L), 22-113-bk, 22-115-bk, 22-116-bk, 22-117-bk, 22-119-bk,
11 22-121-bk, 22-299-bk, 22-203-bk
12

13 In Re: Purdue Pharma L.P., Purdue Pharma Inc, Purdue Transdermal
14 Technologies L.P., Purdue Pharma Manufacturing L.P., Purdue Pharmaceuticals
15 L.P., Imbrium Therapeutics L.P., Adlon Therapeutics L.P., Greenfield
16 BioVentures L.P., Seven Seas Hill Corp., Ophir Green Corp., Purdue Pharma of
17 Puerto Rico, Avrio Health L.P., Purdue Pharmaceutical Products L.P., Purdue
18 Neuroscience Company, Nayatt Cove Lifescience Inc., Button Land L.P., Rhodes
19 Associates L.P., Paul Land Inc., Quidnick Land L.P., Rhodes Pharmaceuticals
20 L.P., Rhodes Technologies, UDF LP, SVC Pharma LP, SVC Pharma Inc.,
21

22 *Debtors.*

23 *****
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25 PURDUE PHARMA, L. P., PURDUE PHARMA INC, PURDUE TRANSDERMAL
26 TECHNOLOGIES L.P., PURDUE PHARMA MANUFACTURING L.P., PURDUE
27 PHARMACEUTICALS L.P., IMBRIUM THERAPEUTICS L.P., ADLON THERAPEUTICS L.P.,
28 GREENFIELD BIOVENTURES L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP.,
29 PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE PHARMACEUTICAL
30 PRODUCTS L.P., PURDUE NEUROSCIENCE COMPANY, NAYATT COVE LIFESCIENCE

INC., BUTTON LAND L.P., RHODES ASSOCIATES L.P., PAUL LAND INC., QUIDNICK
LAND L.P., RHODES PHARMACEUTICALS L.P., RHODES TECHNOLOGIES, UDF LP,
SVC PHARMA LP, SVC PHARMA INC.,

Debtors-Appellants-Cross-Appellees,

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PURDUE PHARMA L.P., ET
AL., AD HOC COMMITTEE OF GOVERNMENTAL AND OTHER CONTINGENT LITIGATION
CLAIMANTS, THE RAYMOND SACKLER FAMILY, AD HOC GROUP OF INDIVIDUAL
VICTIMS OF PURDUE PHARMA, L.P., MULTI-STATE GOVERNMENTAL ENTITIES GROUP,
MORTIMER-SIDE INITIAL COVERED SACKLER PERSONS,

Appellants-Cross-Appellees,

— v. —

THE CITY OF GRANDE PRAIRIE, AS REPRESENTATIVE PLAINTIFF FOR A CLASS
CONSISTING OF ALL CANADIAN MUNICIPALITIES, THE CITIES OF BRANTFORD, GRAND
PRAIRIE, LETHBRIDGE, AND WETASKIWIN, THE PETER BALLANTYNE CREE NATION,
ON BEHALF OF ALL CANADIAN FIRST NATIONS AND METIS PEOPLE, THE PETER
BALLANTYNE CREE NATION ON BEHALF ITSELF, AND THE LAC LA RONGE INDIAN
BAND,

Appellees-Cross Appellants,

THE STATE OF WASHINGTON, STATE OF MARYLAND, DISTRICT OF COLUMBIA, U.S.
TRUSTEE WILLIAM K. HARRINGTON, STATE OF CONNECTICUT, RONALD BASS, STATE
OF CALIFORNIA, PEOPLE OF THE STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY
GENERAL ROB BONTA, STATE OF OREGON, STATE OF DELAWARE, BY AND THROUGH
ATTORNEY GENERAL JENNINGS, STATE OF RHODE ISLAND, STATE OF VERMONT,
ELLEN ISAACS, ON BEHALF OF PATRICK RYAN WROBLEWSKI, MARIA ECKE, ANDREW
ECKE, RICHARD ECKE,

Appellees.

1 Before: NEWMAN, WESLEY, and LEE, *Circuit Judges*.

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4 Appellants appeal from an order of the United States District Court for the
5 Southern District of New York (Colleen McMahon, J.) reversing an order of the
6 United States Bankruptcy Court for the Southern District of New York (Robert D.
7 Drain, *Bankr. J.*) confirming a Chapter 11 plan that included nonconsensual third-
8 party releases of direct claims against non-debtors. We hold that nonconsensual
9 third-party releases of such direct claims are statutorily permitted under 11 U.S.C.
10 §§ 105(a) and 1123(b)(6) of the Bankruptcy Code. We further conclude that this
11 Court's case law also allows for nonconsensual third-party claim releases in
12 specific circumstances, such as those presented in this appeal. Accordingly, we
13 **REVERSE** the district court's order holding that the Bankruptcy Code does not
14 permit nonconsensual third-party releases against non-debtors, **AFFIRM** the
15 bankruptcy court's approval of the Plan, and **REMAND** the case to the district
16 court for such further proceedings as may be required, consistent with this
17 opinion. We also **AFFIRM** the district court's denial of the Canadian Creditors'
18 cross-appeal.

19 Judge Wesley concurs in the judgment in a separate opinion.

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1 *Purdue Transdermal Technologies L.P.,*
2 *Purdue Pharma Manufacturing L.P.,*
3 *Purdue Pharmaceuticals L.P., Imbrium*
4 *Therapeutics L.P., Adlon Therapeutics*
5 *L.P., Greenfield BioVentures L.P., Seven*
6 *Seas Hill Corp., Ophir Green Corp.,*
7 *Purdue Pharma of Puerto Rico, Avrio*
8 *Health L.P., Purdue Pharmaceutical*
9 *Products L.P., Purdue Neuroscience*
10 *Company, Nayatt Cove Lifescience Inc.,*
11 *Button Land L.P., Rhodes Associates*
12 *L.P., Paul Land Inc., Quidnick Land L.P.,*
13 *Rhodes Pharmaceuticals L.P., Rhodes*
14 *Technologies, UDF LP, SVC Pharma LP,*
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11 *Representative Plaintiff for a Class*
12 *Consisting of All Canadian*
13 *Municipalities, The Cities of Brantford,*
14 *Grand Prairie, Lethbridge, and*
15 *Wetaskiwin, The Peter Ballantyne Cree*
16 *Nation, on behalf of All Canadian First*
17 *Nations and Metis People, the Peter*
18 *Ballantyne Cree Nation, on behalf of*
19 *itself, and the Lac La Ronge Indian Band.*
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36

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31 *American Bankruptcy Institute’s*
32 *Commission to Study the Reform of*
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8 & Centola, New Orleans, Louisiana,
9 for Amicus Curiae the Ad Hoc
10 Committee of NAS Children.

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15 EUNICE C. LEE, Circuit Judge:

16 Bankruptcy is inherently a creature of competing interests, compromises,
17 and less-than-perfect outcomes. Because of these defining characteristics, total
18 satisfaction of all that is owed—whether in money or in justice—rarely occurs.
19 When a bankruptcy is the result of mass tort litigation against the debtor, the
20 complexities are magnified because the debts owed are wide-ranging and the
21 harm caused goes beyond the financial. That is the circumstance here.

22 The Debtor, Purdue Pharma L.P. (“Purdue”), was owned and operated by
23 the Sackler family¹ for decades. In the 1990s, Purdue introduced to market—and

¹ The district court explained that the “Sackler Family,” as used in the court’s opinion, “means the Mortimer D. Sackler Family (also known as ‘Side A’ of the Sackler family) and the Raymond R. Sackler Family (also known as ‘Side B’ of the Sackler family).” *In re Purdue Pharma, L.P.*, 635 B.R. 26, 35 n.2 (S.D.N.Y. 2021). The Mortimer D. Sackler family

1 promoted as non-addictive—OxyContin, a controlled-release semisynthetic
2 opioid analgesic. In the years following, OxyContin has been blamed for
3 significantly contributing to one of the largest public health crises in this nation’s
4 history: the opioid epidemic.

5 The fallout from this crisis led to a veritable deluge of litigation against both
6 Purdue and individual members of the Sackler family. Claimants, spread across
7 the United States and Canada, included many sufferers of opioid addiction and
8 the families of those lost to opioid overdoses. To settle the mass of civil claims, the
9 parties, including Purdue and the Sacklers, agreed that in exchange for Purdue
10 filing for bankruptcy, the Sacklers would personally contribute billions of dollars
11 to the bankruptcy if all civil claims against them were released.²

explains that the “Mortimer-side Initial Covered Sackler Persons include Theresa Sackler, Ilene Sackler Lefcourt, Kathe Sackler, and Mortimer D.A. Sackler, as well as trusts of which they are beneficiaries and the trustees of those trusts, and Beacon Company.” Br. for Appellant-Cross-Appellee Mortimer-Side Initial Covered Sackler Persons at 1 n.1. The Raymond R. Sackler family explains that the “Raymond Sackler family is comprised of natural persons who are descendants of Raymond R. Sackler and current and former spouses of their descendants.” Br. for Appellant-Cross-Appellee the Raymond Sackler Family at 1 n.1.

² The district court explained that the Sacklers’ contribution would go “to a fund that would be used to resolve both public and private civil claims as well as both civil and criminal settlements with the federal government.” *In re Purdue Pharma, L.P.*, 635 B.R. at 70.

1 In accordance with that plan, Purdue and its related entities (together, the
2 “Debtors” or “Purdue”) filed for bankruptcy; the Sacklers did not. Following an
3 intensive months-long and multi-phase mediation involving various interested
4 parties and potential creditors of Purdue, the bankruptcy court approved the
5 proposed bankruptcy plan. In doing so, the court limited the release of claims
6 against the Sacklers to *only* claims that directly affected the Debtors’ estate and for
7 which Purdue’s conduct was a legal cause, or a legally relevant factor, of any
8 released cause of action against the Sacklers. In exchange, the Sacklers agreed to
9 contribute a total \$5.5-6.0 billion to the bankruptcy. On subsequent appeal,
10 however, the district court for the Southern District of New York reversed the
11 bankruptcy court and vacated the court’s confirmation order, ruling that the
12 Bankruptcy Code did not permit such releases.

13 This appeal followed. During the pendency of the appeal, the various
14 parties to the mediation engaged in further negotiations, resulting in additional
15 changes to the proposed bankruptcy plan. These changes resulted in several more
16 parties dropping their opposition and supporting the further-revised bankruptcy
17 plan. The Appellants, who are challenging the district court’s rejection of the
18 proposed plan, include the Debtors, various creditor and claimant groups, and

1 certain Sackler family members. The Appellees are those parties opposed to the
2 proposed plan, although, as noted, their number has dropped since the initial
3 filing of this appeal. These remaining Appellees consist of the U.S. Trustee, several
4 Canadian municipalities and indigenous nations, and several individual *pro se*
5 plaintiffs.

6 Aside from their legal arguments, the parties contend that various policy
7 considerations should inform whether a bankruptcy plan containing
8 nonconsensual third-party releases of direct claims may be approved. They also
9 raise questions about fairness and accountability, particularly as it relates to the
10 Sacklers, in releasing parties from liability for actions that cause great societal
11 harm. They debate the very nature of bankruptcy, including the role it is intended
12 to serve and the parties it is intended to benefit.

13 But, our role in this appeal does not require us to answer all of these serious
14 and difficult questions. Instead, we are tasked only with resolving two key
15 questions: *First*, does the Bankruptcy Code permit nonconsensual third-party
16 releases of direct claims against non-debtors, and, *Second*, if so, were such releases
17 proper here in light of all equitable considerations and the facts of this case. We
18 answer both in the affirmative.

1 We conclude that two sections of the Bankruptcy Code, 11 U.S.C. §§ 105(a),
2 1123(b)(6), jointly provide the statutory basis for the bankruptcy court's authority
3 to approve a plan that includes nonconsensual releases of third-party claims
4 against non-debtors. In addition, this Court has recognized that in specific
5 circumstances—such as those presented by this appeal—bankruptcy courts are
6 permitted to approve of restructuring plans that include such releases. We
7 accordingly hold that the bankruptcy court's approval of the releases here is
8 permissible both statutorily and under this Court's case law. We further hold that
9 the bankruptcy court's inclusion of the releases is equitable and appropriate under
10 the specific factual circumstances of this case, and we articulate several factors to
11 guide the analysis as to when to allow similar releases in reorganization plans.

12 Accordingly, we **REVERSE** the district court's order holding that the
13 Bankruptcy Code does not permit nonconsensual releases of third-party direct
14 claims against non-debtors, **AFFIRM** the bankruptcy court's approval of the
15 reorganization plan, and **REMAND** the case to the district court for such further

1 proceedings as may be required, consistent with this opinion. We also **AFFIRM**
2 the district court's denial of the Canadian Creditors' cross-appeal.

3 **BACKGROUND**

4 **I. Factual Background**

5 The following discussion is limited to those underlying facts that are
6 necessary for a determination of the issues on appeal.³

7 **A. Purdue and OxyContin**

8 The Sackler brothers, including Mortimer and Raymond Sackler,⁴
9 purchased Purdue, a privately held pharmaceutical company, in the 1950s.
10 Members of the Sackler family held various director and officer positions
11 throughout the company and, from approximately 1993 to 2018, Purdue's Board
12 of Directors contained at least six members of the Sackler family. Beyond the
13 board, Sackler family members held other positions of influence in the company.
14 For example, Mortimer and Raymond Sackler served as co-chief executive officers

³ The decisions of the bankruptcy and district courts provide a more detailed recitation of the background facts. See *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) ("*Purdue I*"); *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021) ("*Purdue II*").

⁴ Arthur Sackler sold any interest in Purdue before the development of OxyContin. He and his heirs are therefore not involved in this action.

1 until their deaths, Richard Sackler served as a president, and Mortimer D.A., Ilene,
2 and Kathe Sackler all served as officers.

3 In 1995, Purdue developed, and the Food and Drug Administration (“FDA”)
4 approved, OxyContin, a controlled-release semisynthetic opioid analgesic. At that
5 time, and for years following, Purdue advertised that the time-release formulation
6 prevented OxyContin from posing a threat of abuse or addiction. OxyContin’s
7 FDA label reflected a purportedly low risk of addiction. From 1996 to 2001,
8 Purdue aggressively marketed OxyContin to patients and doctors while
9 downplaying growing addiction concerns. Over this time-period, both prescribed
10 and illegal use of OxyContin increased across the country.

11 Starting in 2000, state governments began to alert Purdue to the widespread
12 abuse of OxyContin, and, in 2001, the FDA required Purdue to remove from its
13 label that OxyContin had a low risk of addiction. In the years that followed,
14 lawsuits against Purdue—brought by, among others, individuals, state
15 governments, and federal agencies—proliferated across the United States.

16 **B. The 2004 Indemnity Agreement**

17 At the end of 2004, Purdue’s Board of Directors voted to indemnify, among
18 others, Purdue’s directors and officers against claims made in connection with
19 their service to the company. *Bryant C. Dunaway v. Purdue Pharma L.P. (In re Purdue*

1 *Pharma L.P.*), No. 19-cv-10941-CM (S.D.N.Y. June 22, 2020), ECF No. 24-2
2 (Appellees' Suppl. App'x at SA 627–36) (the “Sackler-Purdue Indemnity
3 Agreement” or the “Indemnity Agreement”). As part of its obligations under the
4 agreement, Purdue agreed to:

5 indemnify and hold harmless each Indemnitee from and against any
6 and all expenses (including attorneys' fees), amounts paid or incurred
7 in satisfaction of or as part of settlements, judgments, fines, penalties,
8 liabilities and similar or related items incurred or suffered or
9 threatened to be incurred or suffered as a result of or in connection
10 with such Indemnitee being made or threatened to be made a party
11 to or participant in any pending, threatened or completed actions,
12 suits or proceedings, whether civil, criminal, administrative,
13 arbitral or investigative
14

15 *Id.* at 628–29. Purdue further agreed to “advance all costs and expenses (including
16 attorneys' fees and expenses) incurred by the Indemnitee in defending any one or
17 more Proceedings.” *Id.* at 630.

18 The protections conferred by the Indemnity Agreement were expansive and
19 had no immediate time limit. The agreement ensured that “[t]he Indemnitee's
20 rights under these provisions shall continue after the Indemnitee has ceased to
21 serve” in his or her official capacity at Purdue, and “shall be binding on and inure
22 to the benefit of successors, assigns, legatees, distributees, heirs, executors,
23 guardians, administrators, estates and other legal representatives.” *Id.* at 635.

1 At the same time, the Indemnity Agreement contained a bad faith carveout.
2 Purdue’s indemnification obligations did not extend to matters where “a final
3 decision by a court . . . establishe[d] that the Indemnatee did not act in good faith.”
4 *Id.* at 629.

5 **C. Sackler Conduct Between 2007 and 2019**

6 Starting in 2007, the Sacklers anticipated that the effects of litigation against
7 Purdue would eventually impact them directly. *See, e.g.,* Deferred Joint App’x at
8 5059 (David Sackler emailed Jonathan and Richard Sackler, “We will be sued
9 [A]sk yourself how long it will take these lawyers to figure out that we might settle
10 with them if they can freeze our assets and threaten us.”). From 2008 to 2016,
11 Purdue distributed a significant proportion of the company’s revenue—an
12 approximated \$11 billion in total—to Sackler family trusts and holding companies.
13 This represented an increase in the distribution pattern from years prior and
14 “drained Purdue’s total assets by 75% and Purdue’s ‘solvency cushion’ by 82%”
15 during that same time period. Special App’x at 40. By 2018, Purdue defended the
16 many lawsuits against it from a significantly weakened financial position, and, by
17 2019, all Sacklers had stepped down from Purdue’s Board of Directors.

1 **D. The DOJ Suit**

2 In 2019, the United States Attorneys' Offices for the Districts of New Jersey
3 and Vermont, and the United States Department of Justice ("DOJ") brought federal
4 criminal and civil charges against Purdue. The criminal counts alleged that
5 Purdue defrauded the government by inducing healthcare providers to prescribe
6 OxyContin and violated the federal anti-kickback statute. The DOJ also brought
7 civil claims under various federal statutes and common law doctrines (such as
8 mistake, unjust enrichment, fraud, nuisance, and negligent entrustment).

9 In 2020, after filing for bankruptcy, Purdue entered into a plea agreement
10 with the DOJ, the terms of which created future obligations on Purdue. First, in
11 exchange for Purdue pleading guilty to violations of the federal anti-kickback
12 statute, the DOJ agreed it would "not initiate any further criminal charges against
13 Purdue." Deferred Joint App'x at 4798. Second, regarding its civil liability,
14 Purdue agreed to a forfeiture judgment of \$2 billion; the judgment gave the DOJ
15 "superpriority" to collect on the forfeiture judgment in the event of a liquidation
16 of Purdue's estate. Deferred Joint App'x at 4804. Thus, in any future bankruptcy
17 proceedings, the plea required that Purdue satisfy the DOJ's \$2 billion claim ahead
18 of all other creditors' claims.

1 However, the plea agreement also stipulated that the DOJ would agree to
2 release \$1.775 billion of its \$2 billion claim so long as a future distribution plan met
3 certain requirements, specifically that an abatement trust for the public benefit
4 would be established and a document repository created. Finally, while the plea
5 agreement released Purdue from any additional civil or administrative monetary
6 claims by the government for the covered conduct, it expressly did not release
7 criminal liability.

8 **E. Purdue Files for Bankruptcy**

9 On September 15, 2019, Purdue and its related entities⁵ declared
10 bankruptcy; the Sacklers did not. The Estate of the Debtors (the “Estate” or the
11 “*res*”) is estimated at approximately \$1.8 billion.

12 Three days after the bankruptcy filing, the Debtors sought an injunction
13 halting all other lawsuits (almost 3,000 actions against Purdue and over 400 actions
14 against the Sacklers concerning liability for OxyContin). On October 11, 2019, the

⁵ Purdue consists of Purdue Pharma L.P., Purdue Pharma Inc., Purdue Transdermal Technologies L.P., Purdue Pharma Manufacturing L.P., Purdue Pharmaceuticals L.P., Imbrium Therapeutics L.P., Adlon Therapeutics L.P., Greenfield BioVentures L.P., Seven Seas Hill Corp., Ophir Green Corp., Purdue Pharma of Puerto Rico, Avrio Health L.P., Purdue Pharmaceutical Products L.P., Purdue Neuroscience Company, Nayatt Cove Lifescience Inc., Button Land L.P., Rhodes Associates L.P., Paul Land Inc., Quidnick Land L.P., Rhodes Pharmaceuticals L.P., Rhodes Technologies, UDF L.P., SVC Pharma L.P., and SVC Pharma Inc.

1 bankruptcy court enjoined all litigation. At the time, claims against the Debtors
2 and Sacklers were estimated at more than \$40 trillion.

3 **II. Procedural History**

4 **A. The Mediation and Confirmation Process**

5 Following discovery, as is typical in Chapter 11 bankruptcy, the bankruptcy
6 court ordered mediation to reach a plan of reorganization and avoid liquidation
7 of the Estate. In addition to Purdue and the Sacklers, there were a number of
8 groups that participated in the mediation.⁶

9 The first phase of the mediation addressed the allocation of the Estate's
10 available funds to non-federal public claimants, such as states and political
11 subdivisions, and private claimants. The second phase largely focused on
12 determining what the Sacklers would contribute to the Debtors' estate. While this
13 second phase resulted in an agreement in principle among the Sacklers, the

⁶ The Debtors, Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. (the "UCC"), Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants ("AHC"), Ad Hoc Group of Non-Consenting States ("NCSG"), Multi-State Governmental Entities Group ("MSG"), Ad Hoc Group of Individual Victims of Purdue Pharma, L.P. ("PI Ad Hoc Group"), Ad Hoc Committee of NAS Children ("NAS Children"), Ad Hoc Group of Hospitals ("Hospitals"), Third-Party Payor Group ("TPP Group"), and Ratepayer Mediation Participants ("Ratepayers") all participated in the mediation as official Mediation Parties. The Native American Tribes Group ("Tribes Group"), Public School District Claimants ("Public Schools"), the National Association for the Advancement of Colored People, and others also participated in mediation, although not as official Mediation Parties.

1 Debtors, and several creditors, a group of twenty-five non-consenting states,
2 among others, rejected the agreement.

3 That agreement guaranteed that the Sacklers would contribute at least
4 \$4.275 billion to the Debtors' estate over approximately nine years. In exchange,
5 the Debtors' plan of reorganization contained several nonconsensual releases (the
6 "Shareholder Release," the "Release," or the "Releases") that, in effect,
7 permanently enjoined certain third-party claims against the Sacklers. As initially
8 proposed, the Release provisions were extremely broad and included the release
9 of claims pertaining to, *inter alia*, the same subject matter as any claim treated in
10 the plan; any business or other contractual arrangements including transfers; any
11 employment-related conduct; any pending opioid actions and opioid-related
12 activities; and the bankruptcy process.

13 In the third phase of the mediation, the Sacklers reached a modified
14 agreement with fifteen out of the twenty-five non-consenting states.⁷ The new
15 terms of the modified settlement included additional payments of \$50 million by
16 the Sacklers, and the accelerated payment of an additional \$50 million from a

⁷ The majority of the non-consenting states (California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia) (the "Nine") maintained their objections to the plan and were parties to the appeal to the district court.

1 previously agreed-upon settlement payment. These modifications raised the
2 Sacklers' aggregate contribution to the proposed plan to \$4.325 billion. At that
3 time, no changes were made to the Shareholder Release.

4 Following mediation, a vote on the proposed plan was set in motion. Notice
5 of the confirmation hearing was published in the summer of 2021, with votes for
6 or against confirmation due by mid-July 2021, and reached 98% of adults in the
7 United States and 86% of adults in Canada. More than 120,000 votes were cast,
8 and each voting class voted "overwhelmingly" in favor of the plan. Special App'x
9 at 150–51 ("In the aggregate, the vote was over 95 percent in favor of confirmation
10 In each class the percent voting in favor of the plan was above 93 percent with
11 the exception of the class of hospital claims, which was over 88 percent").

12 Ultimately, on September 1, 2021—after a confirmation hearing that
13 included the live testimony of 41 witnesses and extensive oral argument—the
14 bankruptcy court rendered an oral ruling stating that it would confirm the
15 proposed plan, but with a few changes. Most relevantly, the court modified the
16 Shareholder Release to ensure that the Debtors' conduct must be a legal cause or
17 a legally relevant factor of any released cause of action against the Sacklers:

18 I . . . require that the shareholder releases . . . be further qualified than
19 they now are. To apply [only] where . . . a debtor's conduct or the

1 claims asserted against it [are] a legal cause or a legally relevant factor
2 to the cause of action against the shareholder released party
3
4 Deferred Joint App'x at 1330–31. The new Shareholder Release thus read in
5 pertinent part:

6 [T]he Shareholder Released Parties . . . shall be conclusively,
7 absolutely, unconditionally, irrevocably, fully, finally, forever and
8 permanently released . . . from any and all Causes of Action, including
9 any derivative claims [and future claims] . . . (x) based on or relating
10 to, or in any manner arising from, in whole or in part, (i) the Debtors,
11 . . . (ii) the Estates or (iii) the Chapter 11 Cases and (y) as to which any
12 conduct, omission or liability of any Debtor or any Estate is the legal
13 cause or is otherwise a legally relevant factor.

14
15 Special App'x at 920.

16 **B. Bankruptcy Court Order Confirming the Plan⁸**

17 The bankruptcy court confirmed its modified version of the proposed plan
18 (“the Plan”) on September 17, 2021, and issued an extensive opinion
19 memorializing its decision. *See In re Purdue Pharma L.P. (“Purdue I”)*, 633 B.R. 53
20 (Bankr. S.D.N.Y. 2021) (Robert D. Drain, *Bankr. J.*).

21 The bankruptcy court order began by describing its task as “resolv[ing] the
22 collective problem presented by an insolvent debtor and a large body of creditors
23 competing for its insufficient assets . . . especially when there are mass claims

⁸ This opinion describes the bankruptcy court’s opinion and the subsequent district court opinion only to the extent required to explain our reasoning today.

1 premised on . . . massive harm.” *Purdue I*, 633 B.R. at 58. The court found that
2 the confirmation hearing established that the Plan was the *only* “reasonably
3 conceivable” way to resolve the issues in the case, *id.* at 59, and, in doing so,
4 grounded its opinion on the principle that, in bankruptcy, courts “focus the
5 solution away from individual litigations to a fair collective result subject to the
6 unique ability under bankruptcy law to bind holdouts under well-defined
7 circumstances who could not otherwise be bound under non-bankruptcy law.” *Id.*
8 at 58.

9 1. Equitable Considerations

10 From there, the bankruptcy court asked whether the terms of the Plan
11 created an equitable plan and answered in the affirmative. *Purdue I*, 633 B.R. at
12 84–95. The court explained that to approve a settlement, a bankruptcy court must
13 determine whether the proposed terms are fair, equitable, and in the estate’s best
14 interest. *Id.* at 84. Here, in exchange for the Shareholder Release, the terms
15 included:

16 \$4.325 billion, coupled with the Sackler[s’] other agreements,
17 including the dedication of the two charities worth at least \$175
18 million for abatement purposes, the Sacklers’ agreement to a
19 resolution on naming rights, their agreement not to engage in any
20 business with NewCo [Purdue’s successor company], their
21 agreement to exit their foreign companies within a prescribed time,
22 their agreement to various ‘snap back’ protections to ensure the

1 collectability of their settlement payments, and their agreement to an
2 unprecedented extensive document depository accessible to the
3 public that will archive in a comprehensive way the Debtors' history,
4 including as it relates to the development, production, and sale of
5 opioids.

6
7 *Id.* The bankruptcy court also highlighted the extensive mediation and discovery
8 processes that led to the development of these terms. *Id.* at 85–87.

9 As a legal framework for balancing the equities and determining whether to
10 approve the plan, the court was guided by the factors from *In re Iridium Operating*
11 *LLC*, 478 F.3d 452, 464–66 (2d Cir. 2007):

12 (1) The probability of success, should the issues be litigated, versus
13 the present and future benefits of the settlement; (2) the likelihood of
14 complex and protracted litigation if the settlement is not approved,
15 with its attendant expense, inconvenience and delay, including the
16 difficulty of collecting on a judgment; (3) the interests of the creditors,
17 including the degree to which creditors support the proposed
18 settlement; (4) whether other interested parties support the
19 settlement; (5) the competence and experience of counsel supporting,
20 and the experience and knowledge of the court in reviewing, the
21 settlement; (6) the nature and breadth of the releases to be obtained
22 by officers and directors or other insiders; and (7) the extent to which
23 the settlement is the product of arms-length bargaining.

24
25 *Purdue I*, 633 B.R. at 85.

26 In applying the *Iridium* factors, the bankruptcy court observed that, in this
27 case, counsel on both sides were experienced and formidable. *Id.* at 86–87. Over
28 95% of the voters approved the Plan, showing clear creditor support, and the

1 potential difficulty in collecting from the Sacklers and their related entities on any
2 successfully litigated claims was an issue of “significant concern.” *Id.* at 89. The
3 court noted that while the Sacklers are worth approximately \$11 billion, they are
4 a large family whose assets are “widely scattered and primarily held” in
5 spendthrift trusts—both offshore and in the United States—that are largely
6 unreachable via bankruptcy proceedings.⁹ *Id.* at 88. Moreover, certain members
7 of the Sackler family live “outside of the territorial jurisdiction of the United States
8 and might not have subjected themselves sufficiently to the U.S.” such that a U.S.
9 court would have personal jurisdiction over them. *Id.* And, perhaps most
10 importantly, according to the court, continued litigation—even if it were limited
11 to the claims at issue—would be extremely expensive and lead to delays. *Id.* at 89–
12 90. Thus, the court reasoned, an order against confirmation would not only
13 destroy the entire settlement but would also result in a major escalation of costs
14 and time. *Id.*

15 The bankruptcy court also noted that, in exchange for the Shareholder
16 Release, the Sacklers were contributing “the largest amount that shareholders have
17 ever paid in such a context of these types of third party claims and closely related

⁹ Spendthrift trusts in the United States may be recovered from, however, if the transfers to such trusts are fraudulent. *Id.* at 88–89.

1 claims” and that “the non-monetary consideration under the settlement also is
2 substantial.” *Id.* at 107. And, according to the bankruptcy court’s findings,
3 without approval of the Plan including the Release, Purdue would be forced into
4 liquidation, the DOJ would recover its \$2 billion claim first, and recovery by all
5 other creditors would be extremely limited because it would not be supplemented
6 with Sackler funds. *Id.* at 108–09; *see also id.* at 84 (“Without the \$4.325 billion being
7 paid by the Sacklers under the plan and the other elements of the Sackler
8 settlements, those other elements of the plan would not happen. The record is
9 clear on that.”). Thus, the court concluded that, in a world without the Plan, the
10 Sacklers would likely be mired in litigation, but it would also be likely that they
11 could successfully shield much of their estimated \$11 billion fortune from
12 creditors through spendthrift trusts and offshore accounts, and broader creditor
13 recovery from Purdue’s estate would be extremely limited due to the DOJ’s
14 superpriority. *Id.* at 84, 109.

15 2. The Authority of the Bankruptcy Court to Release Third-Party
16 Claims Against the Sacklers

17 The bankruptcy court next turned to the Plan’s release of third-party claims
18 against the Sacklers, which included all claims that had by then been asserted in
19 litigations against the Sacklers by third parties. The Release encompassed both

1 those based on a direct injury to the third-party claimant and those where the claim
2 properly lay with the Debtors (including, for example, whether the Sacklers
3 fraudulently transferred Purdue funds to family spendthrift trusts and other
4 offshore accounts). *Purdue I*, 633 B.R. at 91–95. This overview of claims led the
5 court to the thornier legal issue: whether direct claims by a third-party against a
6 non-debtor (here, the Sacklers) could ever be released through the bankruptcy
7 process. *Id.* at 95.

8 In addressing the question of its own authority, the bankruptcy court first
9 evaluated threshold arguments and determined that it had subject-matter
10 jurisdiction over the released claims. *Id.* at 95–98. But, in so finding, the court
11 narrowed the Release even further to cover only those claims that directly affect
12 the *res*—these claims included “insurance rights” and “the shareholder released
13 parties’ rights to indemnification and contribution” from the Debtors. *Id.* at 97.
14 Likewise, the court noted that “the Debtors’ ability to pursue the estates’ own
15 closely related, indeed fundamentally overlapping, claims” against the Sacklers
16 also directly affected the *res*. *Id.* at 97–98. The court did not exclude derivative
17 claims from the Release, reasoning that those claims were similarly likely to affect
18 the *res*. *Id.* at 98.

1 The bankruptcy court next addressed the objectors’ due process arguments
2 and found that they reduced to two claims—neither of which it found meritorious.
3 *Id.* at 98–99. The first due process claim argued that the Release was an
4 impermissible “adjudication of the claim.” *Id.* at 98. The court disagreed, and
5 instead characterized a release as “part of the settlement of the claim that channels
6 the settlement funds to the estate.” *Id.* As such, the bankruptcy court held that the
7 Release did not rule on the underlying merits of the claims being released. *Id.* The
8 objectors’ second due process argument claimed that there was inadequate notice.
9 *Id.* at 98–99. The court found adequate notice because the holders of claims against
10 the Debtors had received notice of “the plan’s intention to provide a broad release
11 of third-party claims against the shareholders” and other “entities related to the
12 Debtors.” *Id.* at 98. As the final part of its due process analysis, the bankruptcy
13 court also found that the claims released by the Plan were constitutionally core
14 claims, so the bankruptcy court had the constitutional power to issue “a final order
15 under Article III of the Constitution.” *Purdue I*, 633 B.R. at 99–100.

16 After clearing the constitutional hurdles, the bankruptcy court began its
17 analysis of statutory authority by noting that the majority of Circuits permit
18 nonconsensual third-party releases, while only three Circuits—the Fifth, Ninth,

1 and Tenth—do not. *Id.* at 100–01. The bankruptcy court concluded that the
2 provision of the Bankruptcy Code relied upon by that minority, 11 U.S.C. § 524(e),
3 is not a statutory impediment to third-party releases. *Id.* at 101–02.

4 The bankruptcy court instead looked to 11 U.S.C. § 105(a) and § 1123(b)(6)
5 as two potential sources of a bankruptcy court’s equitable authority to approve the
6 releases. *Id.* at 102–05. Following a review of pertinent case law, the bankruptcy
7 court held that so long as the releases are limited to those claims legally
8 intertwined with the Debtors’ conduct, they are appropriately subject to
9 settlement under both statutory and common law frameworks. *Id.* at 103–05.

10 The bankruptcy court then looked to this Court’s decision in *In re Metromedia*
11 *Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005), and other case law from this Circuit,
12 to determine which factors a bankruptcy court should consider when determining
13 whether third-party releases are appropriate. *Id.* at 105–06. The court identified
14 the following factors: (1) the third-party releases were narrowly tailored; (2)
15 monetary contributions were critical to the Plan; (3) the success of the Plan hinged
16 on the third-party releases; (4) the affected class or classes overwhelmingly
17 accepted the Plan; (5) the amount being paid under the Plan was substantial
18 (which, the court noted, is not determined by the Sacklers’ net worth because

1 defendants' wealth should not dictate settlement terms); and (6) claimants would
2 be compensated fairly under the Plan. *Id.* at 106–09.

3 Evaluating those factors, the bankruptcy court found that they supported
4 approval of the Plan. It pointed to the significant overlap in third-party claims
5 against both the Debtors and the Sacklers, chiefly that: (1) claims against both
6 derived from the Debtors' conduct, and (2) to the extent that one or more of the
7 Sacklers could be said to have directed that conduct, or to have possessed the
8 knowledge and power to do so, the Sacklers' and Debtors' defenses would be the
9 same. *Id.* at 108. And it added that the potential difficulty, as discussed above, of
10 collecting on any judgment, the existence of spendthrift trusts, and the Estate's
11 limited resources that the litigation process would likely deplete, also weighed in
12 favor of approval of the Plan. *Id.* at 108–09.

13 In sum, the bankruptcy court predicated confirmation of the Plan on a few
14 limitations to the third-party releases (namely that the Debtors' conduct amount
15 to a legally relevant factor to a released cause of action and that the settled claims
16 affect the *res*), but otherwise—having established its authority to do so—
17 confirmed the Plan. *Id.* at 115.

1 3. Canadian Creditors' Objections

2 The bankruptcy court also rejected the objections of certain Canadian
3 municipalities and First Nations (the "Canadian Creditors") to the Plan, which
4 were essentially based on an argument that the Plan improperly classified their
5 claims. *Id.* at 69–72. Specifically, they objected on the basis that those claims
6 should have been classified like the claims of American non-federal governmental
7 creditors and tribal entities, such that they could participate in abatement trusts.
8 *Id.* at 69. Yet, the bankruptcy court observed that, even if the Canadian claims had
9 been otherwise classified, notwithstanding the resulting change in the Canadian
10 Creditors' voting status, the Plan still would have been approved. *Id.* The
11 bankruptcy court's reasons for classifying the Canadian claims separately boiled
12 down to: (1) different regulatory regimes of the United States and Canada, and (2)
13 that the Canadian Creditors did not participate in the mediation process. *Id.* at 70.
14 The bankruptcy court also noted that certain decisions to recognize or confirm the
15 Plan would be left to the Canadian courts. *Id.* at 71.

16 4. Pro Se Objections

17 Several *pro se* parties also objected to the Plan, but the bankruptcy court
18 similarly found their objections to be without merit. For example, one *pro se*
19 objector asserted that it was improper and unfair that the Plan provided only \$700–

1 \$750 million to a particular claimant group’s personal injury claims. *Id.* at 78. The
2 bankruptcy court looked to the length of the mediation, rigor of the legal analysis
3 and negotiation, and quality of mediators and lawyers, all to support that the
4 valuation of personal injury claims was reasonable. *Id.* at 78–79. Another *pro se*
5 objector claimed that releasing the Sacklers from civil liability under the Plan was
6 unfair and should not be approved because this plan is “the Sacklers’ plan.” *Id.* at
7 82. However, the bankruptcy court disagreed and emphasized that the Plan was
8 “*not* the Sacklers’ plan” because it involved an arms-length negotiation among all
9 interested parties with three experienced mediators. *Id.* at 82–83 (emphasis in
10 original).

11 **C. District Court Order Rejecting the Plan**

12 In a December 16, 2021 opinion, the district court vacated the bankruptcy
13 court’s decision to confirm the Plan. *In re Purdue Pharma, L.P.* (“*Purdue II*”), 635
14 B.R. 26 (S.D.N.Y. 2021) (Colleen McMahon, J.). Principally, the court ruled that no
15 statutory authority permits third-party releases such as the ones found in the Plan.
16 *Id.* at 89–90. The court based its reasoning on two propositions: first, that the
17 Bankruptcy Code does not expressly allow such releases; and second, that this
18 Circuit’s case law “has not yet been required to identify any source [in the
19 Bankruptcy Code] for [the] authority” to grant such releases. *Id.*

1 1. Subject-Matter Jurisdiction

2 The district court's analysis of statutory authority was preceded by the
3 preliminary question of the bankruptcy court's jurisdictional reach under the
4 Bankruptcy Code to release the claims encompassed by the Shareholder Release.
5 The district court agreed that the bankruptcy court had subject-matter jurisdiction
6 over all claims because: (1) the third-party claims raised questions as to the
7 distribution of the Estates' property, *id.* at 85; (2) the third-party claims might have
8 altered the liabilities of the Debtors and changed the amount available from the
9 *res*, *id.* at 85–86; (3) the claims had a high degree of interconnectedness with claims
10 against the Debtors, *id.* at 86–87; and (4) Purdue's insurance obligations to
11 members of the Sacklers who were officers of Purdue could have burdened the *res*.
12 *Id.* at 87–88. Accordingly, having found that the release of the third-party claims
13 “*might have some conceivable effect on the estate of a debtor,*” the district court
14 concluded that they fell within the bankruptcy court's jurisdiction. *Id.* at 89
15 (emphasis in original).

16 2. Statutory Power to Release Third-Party Claims

17 Turning to the primary issue in this appeal, the district court next ruled that
18 the bankruptcy court did not have statutory authority to release third-party direct
19 claims against the Sacklers because the Sacklers were not the Debtors, and the

1 Bankruptcy Code does not authorize the “non-consensual” release of
2 “direct/particularized claims asserted by *third parties* against *non-debtors*.” *Purdue II*,
3 635 B.R. at 90 (emphasis in original).

4 The district court’s analysis on this issue considered the case law from this
5 Court, the Supreme Court, and other circuit courts. It characterized this Court’s
6 holding in *Metromedia* as indicating that third-party releases could be permissible,
7 but as being inconclusive as to whether “such releases [a]re consistent with or
8 authorized by the Bankruptcy Code.” *Purdue II*, 635 B.R. at 101. And, to the extent
9 that *Metromedia* suggested that such releases would be permissible in “unique
10 instances,” the district court viewed the opinion as having failed to identify what
11 those instances are. *Id.* (internal quotation marks omitted). Due to this perceived
12 lack of clarity, the district court concluded that “while *Metromedia* said a great deal,
13 the case did not hold much of anything,” *id.*, and thus a bankruptcy court’s
14 statutory authority to impose third-party releases is “questionable.” *Id.* at 89.

15 Moving on to the Supreme Court, the district court acknowledged that
16 although the Court has never spoken directly on whether the Bankruptcy Code
17 provides authority for these types of releases, it has held, “albeit in contexts
18 different from the one at bar, that a bankruptcy court lacks the power to award

1 relief that varies or exceeds the protections contained in the Bankruptcy Code,”
2 and it lacks such power “even in ‘rare’ cases, and [] even when those orders would
3 help facilitate a particular reorganization.” *Id.* at 94–96 (citing *Law v. Siegel*, 571
4 U.S. 415 (2014) and *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017)).

5 At bottom, the district court concluded that no section of the Bankruptcy
6 Code expressly or impliedly provided the requisite statutory authority for the
7 Releases. *Id.* at 115. The district court also rejected the argument that the
8 bankruptcy court possessed residual equitable authority to impose the Releases.
9 *Id.* at 112–14. The district court further ruled that the fact that the Plan required
10 the Releases for confirmation did not vest the bankruptcy court with authority to
11 approve them. *Id.* at 108–09.

12 3. Classification of Canadian Claims

13 Finally, the district court agreed with the bankruptcy court that the
14 Canadian Appellants’ claims were properly classified differently than those of the
15 domestic claimants, and that all the Bankruptcy Code requires is a reasonable basis
16 for differentiation. *Id.* at 116–17. The equal treatment mandate applies only to
17 creditors within the same class, and the district court held that, under this Court’s
18 precedent, there was a reasonable basis to differentiate the Canadian creditors’

1 claims because different regulatory regimes apply, and because the mediation
2 solely involved U.S.-based claimants. *Id.*

3 This Appeal followed.

4 **D. This Appeal**

5 The Appellants include a variety of interests unified in favor of the
6 confirmation of the Plan: the Debtors, the Official Committee of Unsecured
7 Creditors (the “UCC”),¹⁰ the Ad Hoc Committee of Governmental and Contingent
8 Litigation Claimants (the “AHC”),¹¹ the Ad Hoc Group of Individual Victims of
9 Purdue Pharma, L.P. (“Pl. Ad Hoc Group”),¹² the Multi-State Governmental

¹⁰ The UCC is composed of eight dedicated members, including individuals who are themselves (or whose loved ones are) victims of the opioid epidemic, representatives of a trade association for 35 independent health insurance companies collectively insuring 110 million members, a member of one of the largest hospital systems in the United States, the Pension Benefit Guaranty Corporation (the federal entity responsible for insuring defined benefit pension plans), a co-defendant in opioid litigation that has asserted indemnification claims against the Debtors, and *three ex officio* members that represent political subdivisions, tribes, and public school districts.

¹¹ The AHC is composed of ten States, the court-appointed Plaintiffs’ Executive Committee in the multi-district litigation captioned *In re National Prescription Opiate Litigation*, Case No. 17-md-02804 (DAP) (N.D. Ohio), six counties, cities, parishes, or municipalities, and one federally recognized American Indian Tribe.

¹² This group comprises over 60,000 individuals who were injured by direct exposure to Purdue’s opioid products, who together make up approximately one-half of those who filed personal injury claims in Purdue’s Chapter 11 Cases.

1 Entities Group (the “MSGGE”),¹³ the Mortimer-side Initial Covered Sackler Persons
2 (the “Mortimer Sacklers”), and the Raymond Sackler Family (the “Raymond
3 Sacklers,” and together with the Mortimer Sacklers, the “Sacklers” or “Sackler
4 family”).

5 While this Appeal was pending, eight states—California, Connecticut,
6 Delaware, Maryland, Oregon, Rhode Island, Vermont, and Washington—and the
7 District of Columbia (the “Nine”) that had appealed the confirmation of the
8 original settlement, the Debtors, and the Sacklers filed a new settlement agreement
9 with the bankruptcy court that provided for an additional \$1.175–\$1.675 billion in
10 Sackler contributions (resulting in an aggregate \$5.5 to \$6.0 billion contribution to
11 the Plan). See Order Pursuant to 11 U.S.C. §§ 105 and 363(b) Authorizing and
12 Approving Settlement Term Sheet, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr.
13 S.D.N.Y. Mar. 10, 2022), ECF No. 4503. The bankruptcy court granted the motion
14 to confirm the revised plan but noted that its confirmation would require one or
15 more orders by this Court or the district court. *Id.* As part of the revised settlement

¹³ Members of the MSGE Group are creditors of the Debtors, and many filed prebankruptcy lawsuits against them for their role in fostering the nationwide opioid crisis.

1 agreement, the Nine agreed to withdraw their opposition to the Plan, including
2 the Shareholder Releases. *Id.*

3 As a result, the Appellees currently left defending the district court's
4 decision include only U.S. Trustee William K. Harrington ("the Trustee"),¹⁴ several
5 Canadian municipalities and indigenous nations (the "Canadian Creditors"), and
6 several individual *pro se* personal injury claimants (Ronald Bass, Ellen Isaacs,
7 Maria Ecke, Richard Ecke, Andrew Ecke, the Estate of David Jonathan Ecke, and
8 Peter Sottile).

9 **DISCUSSION**

10 **I. Standard of Review**

11 **A. The Bankruptcy Court's Adjudicatory Authority**

12 As stated by the district court, to the extent claims encompassed by the
13 third-party releases are non-core under *Stern v. Marshall*, the bankruptcy court was
14 required to submit "proposed findings of fact and conclusions of law to the district

¹⁴ Congress has authorized the Attorney General to appoint U.S. Trustees, who are Department of Justice officials, to supervise the administration of bankruptcy cases. 28 U.S.C. §§ 581–589a. U.S. Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena." H.R. Rep. No. 95-595, at 88 (1977). They "may raise and may appear and be heard on any issue in any case or proceeding" brought under the Bankruptcy Code. 11 U.S.C. § 307. Congress specifically empowered U.S. Trustees to comment on proposed disclosure statements and Chapter 11 plans of reorganization. 28 U.S.C. § 586(a)(3)(B).

1 court, for that court's [de novo] review and issuance of final judgment." 564 U.S.
2 462, 471 (2011). *Stern* defines core claims as those stemming "from the bankruptcy
3 itself" or those which "would necessarily be resolved in the claims allowance
4 process." *Id.* at 499. For substantially the same reasons articulated by the district
5 court, *see Purdue II*, 635 B.R. at 79-83, we agree that the bankruptcy court lacked
6 constitutional authority to finally approve of the releases, and, therefore, that the
7 district court correctly construed the bankruptcy court's decision as setting forth
8 its proposed findings of fact and conclusions of law for the district court's de novo
9 review. In short, the released claims at issue here—which, pursuant to the Plan,
10 are permanently enjoined, have res judicata effect, and, as such, are effectively
11 finally resolved—do not stem "from the bankruptcy itself," *Stern*, 564 U.S. at 499,
12 but are direct claims, arising under state law, against non-debtors held by third
13 parties who have not sought to recover on those claims in bankruptcy, or
14 otherwise consented to a bankruptcy court's adjudication of those claims.

15 It is true, as Debtors note, that the resolution of the third-party claims might
16 impact the *res* of the Estate—a fact determinative of the district court's statutory
17 jurisdiction under the Code—but the same was true for the counterclaims held in
18 *Stern* to be beyond the bankruptcy court's constitutional reach to finally

1 determine. To the point, had the debtor in *Stern* been successful on her
2 counterclaim against the creditor, the value of the estate would have been
3 impacted; she would have had a property interest in the resulting damages award,
4 which would have, in turn, increased the value of her estate. *See id.* The focus of
5 the constitutional analysis in *Stern* does not turn on the extent to which the non-
6 core claim might alter the creditor-debtor relations in a given bankruptcy. That
7 said, we agree with the district court that the practical import of the *Stern* issue is
8 nonexistent given that only conclusions of law are at issue here, requiring our de
9 novo review under any standard. *See Purdue II*, 635 B.R. at 82 n.54.

10 **B. Appellate Review of the District Court**

11 In an appeal from a district court's review of a bankruptcy court's decision,
12 this Court "independently" reviews the bankruptcy court's conclusions of law de
13 novo and its factual findings for clear error. *Morning Mist Holdings Ltd. v. Krys (In*
14 *re Fairfield Sentry Ltd.)*, 714 F.3d 127, 132 (2d Cir. 2013). A factual finding is clearly
15 erroneous when "the reviewing court on the entire evidence is left with the definite
16 and firm conviction that a mistake has been committed." *United States v. U.S.*
17 *Gypsum Co.*, 333 U.S. 364, 395 (1948). "[I]n reviewing factual findings for clear
18 error, an appellate court is not confined to evidence cited in a lower court's

1 opinion, but must instead review all of the record evidence.” *Bankr. Servs, Inc. v.*
2 *Ernst & Young (In re CBI Holding Co.)*, 529 F.3d 432, 449 (2d Cir. 2008).

3 This Court may uphold a bankruptcy court decision on any ground—even
4 one not relied upon by the district court. *Resol. Tr. Corp. v. Best Prods. Co. (In re Best*
5 *Prods. Co.)*, 68 F.3d 26, 30 (2d Cir. 1995). As such, we decide all pertinent issues
6 necessary to confirm the Plan and do not limit our analysis solely to the issues
7 addressed below.

8 **II. Nonconsensual Third-Party Releases of Direct Claims**

9 The two primary questions posed on appeal are: (1) whether the bankruptcy
10 court had the authority to approve the nonconsensual release of direct third-party
11 claims against the Sacklers, a non-debtor, through the Plan; and (2) whether the
12 text of the Bankruptcy Code, factual record, and equitable considerations support
13 the bankruptcy court’s approval of the Plan. We answer both in the affirmative.

14 To explain our reasoning, we begin by describing the scope of the
15 Shareholder Releases (including the types of claims covered and the claims at issue
16 here). We then address the various statutory and constitutional arguments raised
17 by the parties. Finally, we evaluate the bankruptcy court’s findings regarding the

1 fairness and equitable nature of the Plan, and we articulate factors to help guide
2 future courts evaluating similar issues.

3 **A. The Scope of the Releases**

4 The original version of the Release from the September 2, 2021 Plan of
5 Reorganization settles

6 any and all Causes of Action, including . . . [present and future
7 claims], (x) based on or relating to, or in any manner arising from, in
8 whole or in part, (i) the Debtors, . . . (including the Debtors' Opioid-
9 Related Activities, manufacture, marketing and sale of Products,
10 interaction with regulators concerning Opioid-Related Activities or
11 Products, and involvement in the subject matter of the Pending
12 Opioid Actions, and the past, present or future use or misuse of any
13 opioid by a Releasing Party) . . . and (y) as to which any conduct,
14 omission or liability of any Debtor or any Estate is the legal cause or
15 is otherwise a legally relevant factor.

16
17 Special App'x at 920. As discussed *supra*, the bankruptcy court subsequently
18 limited the releases such that they only "apply where . . . a debtor's conduct or the
19 claims asserted against it [are] a legal cause or a legally relevant factor to the cause
20 of action against the shareholder released party," Deferred Joint App'x at 1330–31,
21 and the released claims directly affect the *res*, *Purdue I*, 633 B.R. at 97–98.

22 The released claims can be grouped into two categories: direct claims and
23 derivative claims. In this context, direct claims are causes of action brought to
24 redress a direct harm to a plaintiff caused by a non-debtor third party. *See Marshall*

1 *v. Picard (In re Bernard L. Madoff Inv. Secs. LLC)*, 740 F.3d 81, 89 n.9 (2d Cir. 2014).
2 By contrast, derivative claims are “ones that arise from harm done to the estate
3 and that seek relief against [the] third part[y] that pushed the debtor[s]
4 into bankruptcy.” *Id.* at 89 (internal quotation marks and alterations omitted); *see*
5 *also Tronox Inc. v. Kerr-McGee Corp. (In re Tronox Inc.)*, 855 F.3d 84, 100-04 (2d Cir.
6 2017) (explaining the law of derivative claims in the bankruptcy context). The
7 potential claims released against the Sacklers include, *inter alia*, fraudulent
8 transfer, constructive fraudulent transfer, deceptive marketing, public nuisance,
9 unfair competition, fraudulent misrepresentation, violation of state consumer
10 protection acts, civil conspiracy, negligence, and unjust enrichment. Some of these
11 claims are direct, and some are derivative. As conceded by the parties, fraudulent
12 transfer claims, for example, are typically derivative claims in that the real injury
13 is to the Debtors’ estate,¹⁵ and it is well-settled that a bankruptcy court may
14 approve not only third-party releases which are consensual, but also third-party
15 releases of derivative claims because those claims really belong to the estate of the

¹⁵ Although the Plaintiff Ad Hoc Group contends that the district court erred in concluding the claims against the Sacklers are not all derivative, we find no error because certain consumer protection act claims at a minimum constitute direct claims in that the injury belongs directly to the claimant, and not to the Debtors. We need not define the exact claims which fall under the umbrella of direct claims but note that certain state law claims under consumer protection acts likely do.

1 debtor. *See, e.g.*, 11 U.S.C. § 1123(b)(3)(A) (permitting release of claims as to the
2 estate's property); *Madoff*, 740 F.3d at 88 ("A claim based on rights derivative of,
3 or derived from, the debtor's typically involves property of the estate. By contrast,
4 a bankruptcy court generally has limited authority to approve releases of a non-
5 debtor's independent claims." (internal citation and quotation marks omitted)).
6 The more controversial issue, however, is this Plan's likely release of some direct
7 claims against the Sacklers.

8 The bankruptcy court's ability to release claims at all derives from its power
9 of discharge. *See generally* 11 U.S.C. § 524(a). Under the Bankruptcy Code, a
10 bankruptcy discharge releases a debtor from personal liability with respect to any
11 debt by enjoining creditors from attempting to collect on that debt, so long as the
12 debtor discloses all its financial information and puts those assets towards its
13 estate. 11 U.S.C. § 524; *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447
14 (2004) ("The discharge order releases a debtor from personal liability with respect
15 to any discharged debt by voiding any past or future judgments on the debt and
16 by operating as an injunction to prohibit creditors from attempting to collect or to
17 recover the debt."); *see also* 11 U.S.C. §§ 521–523. This extraordinary remedy is
18 based on bankruptcy courts' *in rem* jurisdiction over the property of the debtor.

1 While the Bankruptcy Code forbids a *discharge* of a non-debtor's claim under 11
2 U.S.C. § 524(e), the releases at issue on appeal do not constitute a discharge of debt
3 for the Sacklers because the releases neither offer umbrella protection against
4 liability nor extinguish all claims. *See MacArthur Co. v. Johns-Manville Corp.*
5 (*"Manville I"*), 837 F.2d 89, 91 (2d Cir. 1988) (ruling that the bankruptcy court had
6 the authority to enjoin third-party claims because "the injunctive orders d[id] not
7 offer the umbrella protection of a discharge in bankruptcy" and were instead
8 limited to suits "that ar[o]se out of or relate[d] to" specific issues central to the
9 bankruptcy).

10 Thus, the primary dispute is whether direct claims brought by creditors of
11 Purdue against the Sacklers (for which the Debtors' conduct is legally relevant)
12 can be released. As described in the following sections, we conclude that the
13 bankruptcy court possessed both jurisdiction and statutory authority to approve
14 the Releases because the limitations on the scope of the releases are significant and
15 no other argument bars their imposition.

16 **B. Subject-Matter Jurisdiction**

17 As an initial matter, we must ensure the bankruptcy court had subject-
18 matter jurisdiction, pursuant to the Bankruptcy Code, over the released claims.
19 *See Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006) ("[W]e have an independent

1 obligation to consider the presence or absence of subject matter jurisdiction *sua*
2 *sponte*.”).

3 A bankruptcy court’s subject-matter jurisdiction under the Code is broad. It
4 extends to all civil actions so long as “the action’s outcome might have any
5 conceivable effect on the bankrupt estate.” *Parmalat Cap. Fin. Ltd. v. Bank of Am.*
6 *Corp.*, 639 F.3d 572, 579 (2d Cir. 2011) (internal quotation marks omitted); *see also*
7 28 U.S.C. §§ 157(a), 1334. However, that jurisdictional reach is not endless: a
8 bankruptcy court may only “enjoin third-party non-debtor claims that directly
9 affect the *res* of the bankruptcy estate.” *Johns-Manville Corp. v. Chubb Indemnity Ins.*
10 *Co.* (“*Manville III*”), 517 F.3d 52, 66 (2d Cir. 2008). That limitation is in line with the
11 goal that “extending bankruptcy jurisdiction to actions against certain third
12 parties, as well as suits against debtors themselves, is to protect the assets of the
13 estate so as to ensure a fair distribution of those assets at a later point in time.”
14 *Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.)*, 676 F.3d 45, 57 (2d
15 Cir. 2012) (internal quotation marks and alteration marks omitted).

16 A direct claim brought against non-debtors, such as the Sacklers, “that
17 nevertheless poses the specter of direct impact on the *res* of the bankrupt estate
18 may just as surely impair the bankruptcy court’s ability to make a fair distribution

1 of the bankrupt's assets as a third-party suit alleging derivative liability." *Id.* at 58.
2 Accordingly, if, for example, the litigation of the settled claims "would almost
3 certainly result in the drawing down of . . . the bankruptcy estate of [the debtor],
4 the exercise of bankruptcy jurisdiction to enjoin [third-party direct claims is]
5 appropriate." *Id.* Thus, as to statutory jurisdiction, our key inquiry is into the
6 likely impact on the *res*.

7 We agree with both the bankruptcy court and the district court that the
8 bankruptcy court had statutory jurisdiction to impose the Releases because it is
9 conceivable, indeed likely, that the resolution of the released claims would directly
10 impact the *res*.

11 First, as both courts below noted, at least some of the third-party claims,
12 although directly asserted against the Sacklers, are closely related to the derivative
13 claims which the Estate might bring against the Sacklers. For example, many of
14 the states that, below, objected to the Plan (but have since withdrawn their claims
15 in favor of settlement) have laws which impose direct liability on individuals who,
16 as officers of a corporation, personally participated in acts of corporate fraud. *See*,
17 *e.g.*, U.S. Trustee's App'x at 2644–47, 2765, *In re Purdue Pharma L.P.*, No. 21-07532
18 (S.D.N.Y. Sept. 9, 2021), ECF Nos. 91-7, 91-8. However, although the various state

1 statutes ensure that managerial personnel can be held independently liable for the
2 same conduct that subjects the corporation to liability, those claims often “rely on
3 detailed and virtually identical set of facts to make the claims” against both Purdue
4 and the Sacklers. *Purdue II*, 635 B.R. at 86. As a result of that substantial overlap,
5 the litigation of third-party direct claims against the Sacklers would likely impact
6 the Debtor’s ability to pursue, and the likelihood of recovering on, the Estate’s own
7 claims against the Sacklers.

8 Second, the Sacklers are covered by the Sackler-Purdue Indemnity
9 Agreement, and, therefore, depending on the outcome of any given claims against
10 them, would have a reasonable basis to seek indemnification from the Debtors.¹⁶
11 That possibility is enough to implicate the bankruptcy court’s “related to”
12 jurisdiction under our precedent. *See SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 341-
13 42 (2d Cir. 2018).¹⁷

¹⁶ In addition to indemnification claims, the Sacklers might also assert claims against the Estate for either insurance coverage or contribution. *See generally* Appellees’ Suppl. App’x at 627–35, *Bryant Dunaway v. Purdue Pharma L.P. (In re Purdue Pharma L.P.)*, No. 19-10941 (CM) (S.D.N.Y. June 22, 2020), ECF No. 24-2.

¹⁷ In *SPV*, the plaintiffs asserted direct claims against, among other defendants, UBS AG, alleging principally that UBS had aided and abetted the infamous fraud perpetrated by the debtor, Bernard L. Madoff Investment Securities LLC. *See SPV*, 992 F.3d at 338. Although the plaintiffs sought recovery from UBS itself, UBS, in turn, had viable claims for indemnification and contribution against the debtor. *See id.* at 340–42. The possibility that those claims might have succeeded—and the fact that the debtor would incur

1 To be sure, the Indemnity Agreement plainly bars any indemnification
2 obligation flowing from the Debtors to the Sacklers where a court determines the
3 Sacklers “did not act in good faith.” SA 629. Consequently, as to any successful
4 claims against the Sacklers sounding in fraud (such as the state consumer
5 protection claims), the Sacklers would not have any reasonable basis to seek
6 indemnification. Yet, as the district court noted, “the question of bad faith in this
7 case is hotly disputed.” *Purdue II*, 635 B.R. at 88. In the end, the jurisdictional issue
8 does not require us to resolve that question; the relevant inquiry is whether the
9 claims for indemnification “*might have* any conceivable effect on the bankrupt
10 estate.” *SPV*, 883 F.3d at 339-40 (emphasis added) (internal citation omitted). That
11 standard is plainly satisfied here.

12 **C. Bankruptcy Code Authority**

13 The ultimate authority for the imposition of nonconsensual releases of direct
14 third-party claims against non-debtors is rooted—as it must be—in the
15 Bankruptcy Code, specifically 11 U.S.C. §§ 105(a) and 1123(b)(6). Further
16 bolstering this statutory authority is this Circuit’s caselaw stating that a
17 bankruptcy court has authority to impose such releases.

expense in litigating such claims—was enough to confer jurisdiction on the bankruptcy court to enjoin the plaintiff’s direct claims against UBS. *See id.* at 341-42.

1 1. Statutory Authority

2 The bankruptcy court correctly grounded its authority for approving the
3 Releases in §§ 105(a) and 1123(b)(6), which provide the statutory basis for the
4 bankruptcy court's equitable authority and permit the bankruptcy court's
5 approval of the Plan. 11 U.S.C. § 105(a) states that "[t]he court may issue any order,
6 process, or judgment that is necessary or appropriate to carry out the provisions
7 of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6) states that "a plan may . . .
8 include any other appropriate provision not inconsistent with the applicable
9 provisions of this title." We deem Appellees' arguments—that since the
10 Bankruptcy Code does not explicitly authorize third-party releases, they are
11 outside of a bankruptcy court's statutory authority—unpersuasive.

12 First, although we have stated that § 105(a) gives "*broad equitable power* to
13 the bankruptcy courts to carry out the provisions of the Bankruptcy Code,"
14 *Adelphia Bus. Sols., Inc. v. Abnos*, 482 F.3d 602, 609 (2d Cir. 2007) (emphasis added),
15 we reject Appellants' suggestion that § 105(a) alone supports the imposition of the
16 releases in this action. Indeed, our case law, and that of the majority of our sister
17 circuits, support the proposition that § 105(a) alone cannot justify the imposition
18 of third-party releases. See *New England Dairies, Inc. v. Dairy Mart Convenience*
19 *Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 92 (2d Cir. 2003)

1 (ruling that an exercise of § 105(a) power must “be tied to another Bankruptcy
2 Code section and not merely to a general bankruptcy concept or objective”); *see*,
3 *e.g.*, *Brown v. Viegelahn (In re Brown)*, 960 F.3d 711, 719–20 (5th Cir. 2020) (ruling
4 that bankruptcy courts must link Section 105(a) with another provision of the
5 Bankruptcy Code); *Bird v. Carl’s Grocery Co. (In re NWFX, Inc.)*, 864 F.2d 593, 595
6 (8th Cir. 1989) (same); *Southern Ry. Co. v. Johnson Bronze Co. (In re Johnson Bronze*
7 *Co.)*, 758 F.2d 137, 141 (3d Cir. 1985) (same). Thus, at least one other provision of
8 the Bankruptcy Code must provide the requisite statutory authority. Section
9 1123(b)(6) does.

10 As previously stated, 11 U.S.C. § 1123(b)(6) permits the inclusion of “any
11 other appropriate provision” in a plan so long as it is “not inconsistent” with other
12 sections of the Bankruptcy Code. In *United States v. Energy Resources Co., Inc.*, the
13 Supreme Court held that this provision—acting in tandem with § 105(a)—grants
14 bankruptcy courts a “*residual authority*” consistent with “the traditional
15 understanding that bankruptcy courts, as courts of equity, have broad authority
16 to modify creditor-debtor relationships.” 495 U.S. 545, 549 (1990) (emphasis
17 added).¹⁸ Thus, in *Energy Resources*, the Court, relying on § 1123(b)(6), permitted

¹⁸ *Energy Resources* refers to 11 U.S.C. § 1123(b)(5). That provision was later recodified as § 1123(b)(6).

1 bankruptcy courts “to approve reorganization plans designating tax payments as
2 either trust fund or nontrust fund” —even absent express authorization from the
3 Bankruptcy Code. *Id.* at 545. Appellees, however, nevertheless argue that *Energy*
4 *Resources* does not permit reliance on § 1123(b)(6) because the third-party releases
5 at issue here are “not specifically authorized by the Code.” Trustee Br. at 48.
6 Appellees further maintain that *Energy Resources* only speaks to the ability of
7 bankruptcy courts to modify “creditor-debtor” relationships, and that these
8 releases go beyond such relationships. Trustee Br. at 54.

9 We are not persuaded by Appellees’ arguments. First, as the Court’s
10 language in *Energy Resources* indicates, § 1123(b)(6) is limited only by what the
11 Code expressly forbids, not what the Code explicitly allows. Second, and as the
12 Seventh Circuit convincingly has held, bankruptcy courts’ equitable powers under
13 § 1123(b)(6) include the power “to release third parties from liability.” *Airadigm*
14 *Commc’ns, Inc. v. FEC (In re Airadigm Commc’ns, Inc.)*, 519 F.3d 640, 657 (7th Cir.
15 2008). The Sixth Circuit has also ruled that the residual authority grounded in
16 §§ 105(a) and 1123(b)(6) supports a bankruptcy court’s power to impose third-
17 party releases. *Class Five Nev. Claimants (00-2516) v. Dow Corning Corp. (In re Dow*
18 *Corning Corp.)*, 280 F.3d 648, 656–58 (6th Cir. 2002) (concluding that third-party

1 releases can be appropriate, but that the factual findings presented did not support
2 them). Although our case law has never expressly cited § 1123(b)(6) to support
3 the imposition of third-party releases, we now explicitly agree with these Circuits
4 and conclude that § 1123(b)(6), with § 105(a), permit bankruptcy courts'
5 imposition of third-party releases.

6 Our sister circuits that have held that the Bankruptcy Code does not support
7 the imposition of nonconsensual third-party releases rely upon the provisions
8 limiting the discharge of debt under 11 U.S.C. § 524(e). *See Bank of N.Y. Tr. Co. v.*
9 *Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 251–53 (5th
10 Cir. 2009); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401–
11 02 (9th Cir. 1995); *Landsing Diversified Props.-II v. First Nat'l Bank and Tr. Co. of Tulsa*
12 *(In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600–02 (10th Cir. 1990). Section 524(e)
13 states that “discharge of a debt of the debtor does not affect the liability of any
14 other entity on, or the property of any other entity for, such debt.” 11 U.S.C. §
15 524(e).

16 This language assures that an entity also liable with a bankruptcy debtor for
17 “such debt” remains liable notwithstanding the debtor’s discharge of its
18 obligation. For example, the entity might be jointly liable for the debt.

1 The circuits that have read § 524(e) as a bar to third-party releases have
2 reasoned that “it is the debtor[] who has invoked and submitted to the bankruptcy
3 process, that is entitled to its protections; Congress did not intend to extend such
4 benefits to third-party bystanders.” *In re W. Real Estate Fund, Inc.*, 922 F.2d at 600–
5 02 (quoting 11 U.S.C. § 524(e)); *In re Pac. Lumber Co.*, 584 F.3d at 252 (“In a variety
6 of contexts, this court has held that Section 524(e) only releases the debtor, not co-
7 liable third parties. These cases seem broadly to foreclose non-consensual non-
8 debtor releases and permanent injunctions.” (internal citations omitted)); *In re*
9 *Lowenschuss*, 67 F.3d at 1401 (“This court has repeatedly held, without exception,
10 that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-
11 debtors.”).

12 In contrast to these holdings, we do not consider 11 U.S.C. § 524(e) to be a
13 bar to such releases. As explained by the Seventh Circuit in *Airadigm*:

14 § 524(e) does not purport to limit the bankruptcy court’s powers to
15 release a non-debtor from a creditor’s claims. If Congress meant to
16 include such a limit, it would have used the mandatory terms “shall”
17 or “will” rather than the definitional term “does.” And it would have
18 omitted the prepositional phrase “on, or . . . for, such debt,” ensuring
19 that the “discharge of a debt of the debtor *shall* not affect the liability
20 of another entity” — whether related to a debt or not.
21

1 519 F.3d at 656. Moreover, “where Congress has limited the powers of the
2 bankruptcy court, it has done so clearly—for example, by expressly limiting the
3 court’s power . . . or by creating requirements for plan confirmation.” *Id.* (citing to
4 11 U.S.C. § 105(b) (“a court may not appoint a receiver in a case under this title”)
5 and 11 U.S.C. § 1129(a) (“The court shall confirm a plan only if the following
6 requirements are met”) as illustrative examples). Following this logic, we see no
7 reason grounded in the text of the Bankruptcy Code to bar the inclusion of third-
8 party releases in plans of reorganization.

9 2. Second Circuit Case Law

10 Despite the district court’s pronouncement to the contrary, *Purdue II*, 635 at
11 89, this Court’s precedents permit the imposition of nonconsensual third-party
12 releases. Appellants uniformly agree that our precedents support the approval of
13 a plan containing nonconsensual third-party releases. *See, e.g.*, AHC Br. at 18
14 (“This Court has held on multiple occasions that third-party releases are allowed
15 in appropriate circumstances.”); Debtors Br. at 32 (“For more than three decades,
16 this Court has held that bankruptcy courts are authorized to enjoin and release
17 third-party claims against non-debtors, as part of a plan of reorganization, in
18 appropriate circumstances.”). But Appellees contend that such releases are the
19 equivalent of an inappropriate discharge, that this Circuit at no point has

1 permitted the release of direct third-party claims in non-asbestos actions, and that
2 no case supports a plan doing so here. Trustee Br. at 69–77; Canadian Creditors
3 Br. at 27–35. That reading is incorrect in the face of our case law, most explicitly
4 *Drexel*, where we concluded: “In bankruptcy cases, a court may enjoin a creditor
5 from suing a third party, provided the injunction plays an important part in the
6 debtor’s reorganization plan.” *In re Drexel Burnham Lambert Group, Inc.* (“*Drexel*”),
7 960 F.2d 285, 293 (2d Cir. 1992). Our opinions in *Manville I* and *Metromedia* further
8 confirm that such releases are neither discharges nor allowable only in the context
9 of asbestos cases.

10 *Manville I* stated that injunctive orders barring third-party claims are not
11 necessarily impermissible discharges. 837 F.2d at 91. There, we were presented
12 with a Chapter 11 bankruptcy plan that released over \$2 billion in asbestos victims’
13 claims against the insurers of Manville, a distributor of asbestos products. 837 F.2d
14 at 90. While Manville was a debtor in the bankruptcy, its insurers were not. *Id.* at
15 91. Thus, to obtain the releases, the insurers paid Manville a \$770 million
16 settlement. *Id.* at 94. Before this Court, the appellant (a distributor of Manville’s
17 products) challenged the bankruptcy court’s jurisdiction and authority by arguing
18 that the third-party releases operated as a bankruptcy discharge that cannot be

1 granted to non-debtors under the Bankruptcy Code. *Id.* at 91. We disagreed and
2 ruled that the releases did not constitute a bankruptcy discharge because they (1)
3 did not offer the umbrella protection of a discharge, and (2) did not extinguish the
4 claims against the insurer, but rather “channeled” them “away from the insurers
5 and redirected [them to] the proceeds of the settlement.” *Id.* at 91. Moreover, the
6 insurers’ rights were “completely derivative of” and “inseparable from” the
7 debtor’s rights. *Id.* at 92–93. Thus, plaintiffs’ released claims fell well-within the
8 bankruptcy court’s jurisdiction over the debtor’s estate. *Id.*

9 We also stated in *Manville I* that the bankruptcy court properly imposed the
10 releases under the Bankruptcy Code. While the bankruptcy court primarily relied
11 on § 363(f)—which permits channeling orders (the funneling of claims into one
12 proceeding to preserve the debtors’ estate) under certain circumstances applicable
13 to *Manville I*—it also looked to § 105(a) for additional support. *Id.* at 93; *id.* at 94
14 (noting both statutory and equitable powers to dispose of the debtor’s property
15 free from third-party interests). Moreover, the releases there were “essential” to a
16 “workable reorganization.” *Id.* at 94. Thus, although *Manville I* was in the asbestos
17 context, its premise that this Circuit permits third-party releases in bankruptcy still
18 stands. See *In re Metromedia Fiber Network, Inc.* (“*Metromedia*”), 416 F.3d 136, 142

1 (2d Cir. 2005) (citing *Manville I*); *Drexel*, 960 F.2d at 293 (recognizing the propriety
2 of third-party releases in a reorganization).

3 Appellees argue, however, that it is significant that *Manville I*, unlike the
4 current appeal, concerned asbestos products because the Bankruptcy Code now
5 explicitly authorizes releases in such circumstances. Trustee Br. at 41–42. That is
6 because in 1994 Congress enacted 11 U.S.C. § 524(g), which expressly allows for
7 the injunction of third-party claims against non-debtors in “actions seeking
8 recovery for damages allegedly caused by the presence of, or exposure to, asbestos
9 or asbestos-containing products.” 11 U.S.C. § 524(g)(2)(B)(i)(I); see Bankruptcy
10 Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). Thus, under
11 Appellees’ view, “[h]ad Congress intended to allow bankruptcy courts to adjust
12 the relationship between non-debtors and other non-debtors in this manner, it
13 would have said so expressly—as it did when it authorized narrow non-debtor
14 releases in the context of bankruptcies involving asbestos.” Trustee Br. at 3.

15 The first blow to Appellees’ restrictive reading of the statute comes from the
16 text of the Bankruptcy Reform Act of 1994 itself, which states:

17 RULE OF CONSTRUCTION.—Nothing in [the language since
18 enacted as § 524(g)], shall be construed to modify, impair, or
19 supersede any other authority the court has to issue injunctions in
20 connection with an order confirming a plan of reorganization.

1
2 Pub. L. 103-394, § 111(b), 108 Stat. 4106, 4117 (1994). Thus, in enacting § 524(g),
3 Congress expressly intended not to change the pre-existing powers of bankruptcy
4 courts. Therefore, neither *Manville I* nor the subsequent adoption of § 524(g)
5 supports a limitation of its reasoning to asbestos claims.

6 More importantly, this Court's opinion in *Metromedia* flatly rejects a
7 restrictive interpretation of the Bankruptcy Code by stating that third-party
8 releases can be valid outside of the asbestos context. 416 F.3d at 141. In that case,
9 the debtor Metromedia's reorganization plan allowed certain non-debtor directors
10 and officers of the company to "receive a full and complete release, waiver and
11 discharge from . . . any holder of a claim of any nature . . . arising out of or in
12 connection with any matter related to" Metromedia or its subsidiaries. *Id.* at 141
13 (alterations in original). Creditors challenged the imposition of these types of
14 releases generally on statutory grounds, and specifically on equitable grounds.
15 Although this Court ultimately rejected the imposition of the releases, we did so
16 based on insufficient factual findings, *not* because we found that such releases
17 could not ever be approved. *Id.* at 143.

18 Regarding the third-party releases themselves, the *Metromedia* court faced
19 many of the same arguments we are presented with today. There, appellants had

1 primarily contended that the non-debtor releases were unauthorized by the
2 Bankruptcy Code, at least on the findings made by the bankruptcy court. *Id.* at
3 141. But in *Metromedia*, we did not accept those arguments. Instead, we noted that
4 “[w]e have previously held that ‘in bankruptcy cases, a court may enjoin a creditor
5 from suing a third party, provided the injunction plays an important part in the
6 debtor’s reorganization plan.’” *Id.* at 141 (alterations adopted) (quoting *Drexel*, 960
7 F.2d at 293); *see also Metromedia*, 416 F.3d at 141 (“it is clear that such a release is
8 proper only in rare cases”). And, while we acknowledged that some circuits have
9 permitted such releases only in the asbestos context, *id.*, we focused on the
10 circumstances under which other circuits “have approved nondebtor releases,”
11 such as when: “the estate received substantial consideration,” the plan channeled
12 enjoined claims to a settlement fund as opposed to extinguishing them, “the
13 enjoined claims would indirectly impact the debtor’s reorganization” due to
14 factors like indemnification, “the plan otherwise provided for the full payment of
15 the enjoined claims,” and affected creditors consent to such releases. *Id.* at 142.
16 Following this review, we then articulated two requirements for the imposition of
17 such releases in this Circuit. First, in order for the inclusion of a release to be
18 approved, the release “*itself*” must be “important to the Plan.” *Id.* at 143 (emphasis

1 in the original). Second, the “breadth” of the release must also be “necessary to
2 the Plan.” *Id.*

3 Thus, while we ultimately ruled that the bankruptcy court’s findings were
4 insufficient for the imposition of releases under the facts of that case, *Metromedia*
5 nevertheless rests upon the premise that such releases *may* be permitted so long as
6 bankruptcy courts make sufficient factual findings and satisfy certain equitable
7 considerations. *Id.* at 143.

8 For these reasons, our precedents permit the imposition of third-party
9 releases *jointly* under 11 U.S.C. § 105(a) and 11 U.S.C. § 1123(b)(6).

10 **D. Factors Relevant to Releasing Direct Third-Party Claims Against**
11 **Non-Debtors**

12 Having upheld the bankruptcy court’s statutory authority and jurisdiction
13 to impose such releases, we now turn to the circumstances under which releases
14 may be approved. The Trustee appears to take issue with the fact that the Releases
15 were approved despite their failing to satisfy certain factors stated in *Metromedia*.
16 The Debtors, by contrast, contend that this is exactly the sort of case that
17 epitomizes when third-party nonconsensual releases are proper because (1) the
18 releases are essential to the confirmation of the Plan (including serving as its
19 primary financing); (2) litigation of the settled claims would negatively impact the

1 *res* of the Debtors' estates; (3) the bankruptcy court already narrowed the scope of
2 the releases; and (4) this case is highly unusual and complex given the
3 "inextricable interrelation between the claims against the Debtors and against the
4 Sacklers," Debtors Br. at 65.

5 We now clarify any ambiguity and identify the factors that should be
6 considered in order for a bankruptcy court to approve of nonconsensual third-
7 party releases of direct claims against a non-debtor and to include them in a plan.
8 In doing so, we remain conscious of the "heightened" "potential for abuse" posed
9 by such releases, and our analysis of pertinent factors is informed by that risk.¹⁹
10 *Metromedia*, 416 F.3d at 140. We wholeheartedly endorse the view that "third-
11 party releases are not a merit badge that somebody gets in return for making a
12 positive contribution to a restructuring," nor are they "a participation trophy" or
13 "gold star for doing a good job." *In re Aegean Marine Petroleum Network Inc.*, 599
14 B.R. 717, 726–27 (Bankr. S.D.N.Y. 2019).

¹⁹ This Court has also observed that it is abusive for a bankruptcy court to enjoin third-party claims against a non-debtor based solely on the non-debtor's financial contribution to the estate. *Manville III*, 517 F.3d at 66. "It is . . . precisely this conditioning of financial participation by non-debtors on releases that is subject to the sort of abuse foreseen in *Metromedia*." *Id.* (internal quotation marks omitted).

1 With that said, bankruptcy courts should look to the following seven factors
2 before imposing nonconsensual third-party releases:

3 *First*, courts should consider whether there is an identity of interests
4 between the debtors and released third parties, including indemnification
5 relationships, “such that a suit against the non-debtor is, in essence, a suit against
6 the debtor or will deplete the assets of the estate.” *Dow Corning*, 280 F.3d at 658;
7 *see also In re Master Mortgage Investment Fund*, 168 B.R. 930, 935 (Bankr. W.D. Mo.
8 1994) (same).²⁰ This requirement reflects our observation in *Metromedia* that non-
9 debtor releases have been allowed in circumstances including those where “the
10 enjoined claims would indirectly impact the debtor’s reorganization by way of
11 indemnity or contribution.” *Metromedia*, 416 F.3d at 142 (internal quotation marks
12 omitted).

13 *Second*, courts should consider whether claims against the debtor and non-
14 debtor are factually and legally intertwined, including whether the debtors and
15 the released parties share common defenses, insurance coverage, or levels of

²⁰ The multifactor test articulated in *In re Master Mortgage Investment Fund* has been widely cited by courts in other circuits. *See, e.g., Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 980 (1st Cir. 1995); *Gillman v. Continental Airlines (In re Cont’l Airlines)*, 203 F.3d 203, 217 n.17 (3d Cir. 2000); *In re Chicago Invs., LLC*, 470 B.R. 32, 95 (Bankr. D. Mass. 2012); *In re U.S. Fidelis, Inc.*, 481 B.R. 503, 519 (Bankr. E.D. Mo. 2012).

1 culpability. We note that although the bankruptcy court did not list this as a factor,
2 it discussed that releases limited to those claims legally intertwined with the
3 Debtors' conduct are appropriately subject to settlement. *Purdue I*, 633 B.R. at 104.
4 We agree.

5 *Third*, courts should consider whether the scope of the releases is
6 appropriate. This is the second factor evaluated in *Metromedia*. 416 F.3d at 143. In
7 our view, a release is proper in scope when its "breadth" is "necessary to the Plan."
8 *Id.*

9 *Fourth*, courts should consider whether the releases are essential to the
10 reorganization, in that the debtor needs the claims to be settled in order for the *res*
11 to be allocated, rather than because the released party is somehow manipulating
12 the process to its own advantage. In other words, it must be the case that, without
13 the releases, "there is little likelihood of [a plan's] success." *Master Mortg. Inv.*
14 *Fund*, 168 B.R. at 935. This factor also reflects the first factor required by
15 *Metromedia*—that the release be important to the plan. 416 F.3d at 143.

16 *Fifth*, courts should consider whether the non-debtor contributed
17 substantial assets to the reorganization. This factor was mentioned by this Court

1 in *Metromedia*, 416 F.3d at 142–43, and is emphasized in *Dow Corning*, 280 F.3d at
2 658, and *Master Mortgage Investment Fund*, 168 B.R. at 935.

3 *Sixth*, courts should consider whether the impacted class of creditors
4 “overwhelmingly” voted in support of the plan with the releases. *Master Mortg.*
5 *Inv. Fund*, 168 B.R. at 935. A reference point to define “overwhelmingly” can be
6 found in 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb), which requires approval by a
7 minimum of 75% of voting creditors in favor of the plan. However, we consider
8 that threshold to be the bare minimum, and instead express approval for requiring
9 overwhelming approval of the plan.

10 *Seventh*, and finally, courts should consider whether the plan provides for
11 the fair payment of enjoined claims. In *Metromedia*, we noted that other courts
12 have found such releases permissible when “the plan . . . provided for the full
13 payment of the enjoined claims.” 416 F.3d at 142; *see also Dow Corning*, 280 F.3d at
14 658 (requiring that “[t]he plan provides a mechanism to pay for all, or substantially
15 all, of the class or classes affected by the injunction”). While the full payment of
16 the enjoined claims would of course tend to favor the approval of a plan containing
17 such releases, we are concerned with the fairness of the payment, as opposed to
18 the final amount of payment. Because the amount of the payment does not

1 necessarily indicate its fairness, the determinative question is not whether there is
2 full payment, but rather whether the contributed sum permits the fair resolution
3 of the enjoined claims.

4 Although consideration of each factor is required, it is not necessarily
5 sufficient—there may even be cases in which all factors are present, but the
6 inclusion of third-party releases in a plan of reorganization should not be
7 approved. Further, as contemplated by *Dow Corning*, the bankruptcy court is
8 required to support each of these factors with specific and detailed findings. 280
9 F.3d at 658. For the bankruptcy court to make such findings, extensive discovery
10 into the facts surrounding the claims against the released parties will most often
11 be required.

12 Finally, as with any term in a bankruptcy plan, a provision imposing
13 releases of claims like that at issue here must be imposed against a backdrop of
14 equity. See *Energy Resources*, 495 U.S. at 549 (describing the authority conferred by
15 § 1123(b)(6) as deriving from bankruptcy courts’ status as “courts of equity”); see
16 also *Adelphia Bus. Sols., Inc. v. Abnos*, 482 F.3d 602, 609 (2d Cir. 2007) (“Section 105(a)
17 grants broad equitable power to the bankruptcy courts to carry out the provisions
18 of the Bankruptcy Code so long as that power is exercised within the confines of

1 the Bankruptcy Code.”). Given the potential for abuse, courts should exercise
2 particular care when evaluating these types of releases.

3 **E. Application of These Factors Based Upon the Bankruptcy Court’s**
4 **Findings**

5 In light of these factors, we now evaluate the bankruptcy court’s findings
6 supporting its approval of the Plan. The thorough bankruptcy court opinion,
7 which indicated that it grounded its findings in the tens of millions of documents
8 produced in discovery, informs our analysis.²¹

9 Factor 1. Identity of Interests Between Debtors and Released
10 Parties

11
12 We have described *supra* the identity of interests between the Debtors and
13 those Sacklers named as defendants in the litigations, chiefly that the named
14 Sacklers were directors and officers of the Debtors. Purdue was a closely held
15 corporation, and, according to the bankruptcy court, the record tended to show
16 that the Sacklers “took a major role in corporate decision-making, including
17 Purdue’s practices regarding its opioid products that was more akin to the role of

²¹ The extensive discovery provided by the parties is exactly the sort that bankruptcy courts should expect when permitting broad third-party releases.

1 senior management.” *Purdue I*, 633 B.R. at 93. This overlap constitutes a sufficient
2 identity of interests between the Debtors and the Sacklers.

3 Factor 2. Factual and Legal Overlap Between Claims Against
4 Debtors and Settled Third-Party Claims

5
6 In the prior sections, we also discussed the factually and legally intertwined
7 nature of the claims against both the Debtors and the Sacklers. More importantly,
8 the bankruptcy court required that the releases only “apply where . . . a debtor’s
9 conduct or the claims asserted against it [are] a legal cause or a legally relevant
10 factor to the cause of action against the shareholder released party,” *Deferred Joint*
11 *App’x* at 1330–31, and the released claims directly affect the *res*, *Purdue I*, 633 B.R.
12 at 97–98. *Cf. Metromedia*, 416 F.3d at 141 (ruling that factual circumstances and
13 equitable considerations did not support a broad release that included the “waiver
14 and discharge from . . . *any* holder of a claim of *any* nature . . . of *any and all* claims
15 . . . arising out of or in connection with *any matter* related to [the Debtor] or one or
16 more subsidiaries . . . based in whole or in part upon *any act* or omission or
17 transaction” (alterations in original, emphasis added)). By so narrowing the
18 Releases, the bankruptcy court ensured sufficient overlap between claims against
19 the Debtors and the settled third-party claims.

1 Factors 3. and 4. The Releases are Essential to the
2 Reorganization & Proper in Scope
3

4 We next evaluate, in tandem with our analysis of the Releases' scope,
5 whether the Releases are essential to reorganization.²² See *Metromedia*, 416 F.3d at
6 143. The Releases are essential to reorganization for two reasons. First and
7 foremost, as described *supra*, the Releases are required to ensure that the valuation
8 of the *res* is settled. Otherwise, the Debtors would, in all likelihood, be required to
9 litigate indemnity and contribution claims brought against them by the Sacklers,
10 which would likely deplete the *res*, no matter the ultimate outcome of those claims.
11 The bankruptcy court limited the Releases extensively in order not to exceed its
12 jurisdiction, restricting their scope to ensure that the released claims related to the
13 Debtors' conduct and the Estate. Second, the *res* itself amounted to only
14 approximately \$1.8 billion. Without the Plan, the government would recover its
15 \$2 billion first, thereby depleting the *res* completely. As a result, many victims of
16 the opioid crisis would go without any assistance and face an uphill battle of

²² Although we describe these as two separate factors, following *Metromedia*, we analyze them together in this case because the two factors are interrelated. We nevertheless acknowledge that a case with a different factual record might require them to be considered separately.

1 litigation (in which a single claimant might disproportionately recover) without
2 fair distribution.

3 On the question of what is essential to the Plan, the Trustee argues that the
4 Sacklers themselves created the conditions that make these releases essential, and
5 that, as a term of their contribution, the Sacklers had insisted upon these releases
6 before the Debtors even entered bankruptcy. Per the Trustee, these facts
7 demonstrate the Sacklers' unworthiness of receiving the benefit of the releases.
8 First, we are not called upon to determine whether the Sacklers are worthy of
9 receiving the benefit of the releases. As noted *supra*, the various equities of the
10 Plan were carefully considered by the bankruptcy court. However, to the extent
11 that there is a fear that this opinion could be read as a blueprint for how
12 individuals can obtain third-party releases in the face of a tsunami of litigation, we
13 caution that the key fact regarding the indemnity agreements at issue is that they
14 were entered into by the end of 2004—well before the contemplation of
15 bankruptcy. Acts taken “in contemplation of” bankruptcy ha[ve] long been, and
16 continue[] to be, associated with abusive conduct.” *Milavetz, Gallop & Milavetz,*
17 *P.A. v. United States*, 559 U.S. 229, 240 (2010). We would be far less persuaded if
18 the party seeking to be released entered into this type of indemnity agreement in

1 contemplation of such a third-party release in bankruptcy. Of course, this similar
2 restriction falls in line with our decision in *Manville I*, where we approved of
3 releases in favor of insurance companies. 837 F.2d at 90. Similarly, in that action,
4 there was no suggestion that the insurance policies were taken out in
5 contemplation of bankruptcy. *See id.* at 90–91.

6 As our precedents have suggested, and as we make clear today, if the only
7 reason for the inclusion of a release is the non-debtor’s financial contribution to a
8 restructuring plan, then the release is not essential to the bankruptcy. *See Manville*
9 *III*, 517 F.3d at 66 (cautioning against this type of situation as abusive). But that is
10 not the present case. Here, the Releases are both needed for the distribution of the
11 *res* and to ensure the fair distribution of any recovery for claimants. Thus, we deem
12 the scope of the Releases—as limited by the bankruptcy court—appropriate and
13 the Releases essential to the reorganization.

14 Factor 5. Substantial Contribution to the Reorganization

15 When evaluating the substantial nature of the released parties’ contribution,
16 our primary focus is on the impact of the financial contribution. The bankruptcy
17 court found the financial contribution by the Sacklers, which totaled
18 approximately \$4.325 billion, to be substantial and of course did not change its

1 mind when the Sacklers agreed, after the initial approval of the Plan and during
2 the pendency of this appeal, to increase their contribution to make the settlement
3 equal approximately \$5.5-6.0 billion. Order Pursuant to 11 U.S.C. §§ 105 and
4 363(b) Authorizing and Approving Settlement Term Sheet, *In re Purdue Pharma*
5 *L.P.*, No. 19-23649-shl (Bankr. S.D.N.Y. Mar. 10, 2022), ECF No. 4503. The
6 bankruptcy court stated its belief that this is one of the largest contributions to
7 bankruptcy anywhere in the country. *Purdue I*, 636 B.R. at 107; *cf. In re Mallinckrodt*
8 *PLC*, 639 B.R. 837, 852 (Bankr. D. Del. 2022) (approving of bankruptcy plan with
9 releases where the non-debtor third-party contributed \$1.6 billion).

10 The Trustee primarily argues that the Plan is inequitable because it
11 improperly provides a *quid pro quo* to the Debtors, and that if the Sacklers had
12 declared bankruptcy, under the Bankruptcy Code they would have had to
13 dedicate substantially all of their net worth (an estimated \$11 billion) to the
14 Estate—well more than the approximately \$5.5-6.0 billion they have agreed at this
15 point to fund.²³ It is not for this Court to determine whether a greater contribution
16 from the Sacklers would be desirable, but rather our role is simply to decide

²³ At oral argument, answering a question from the Court, the Trustee conceded that it would oppose the releases even if the Sacklers contributed \$10 billion. Oral Arg. Hr'g at 1:27:45–58.

1 whether the bankruptcy court erred in finding the Sacklers' contribution
2 substantial. It did not. Five and a half billion dollars—purportedly the largest
3 contribution in history for such releases—is a significant sum.

4 Factor 6. Overwhelming Approval by Creditors

5 The claimants voted overwhelmingly to approve the Plan. Over 95% of the
6 personal injury classes voted to accept the plan, which is well above the 75%
7 benchmark. Moreover, with the Nine no longer pursuing their objection, the main
8 challenge to this appeal is not by creditors, but by the Trustee—a government
9 entity without a financial stake in the litigation.

10 Factor 7. Fair Payment of Enjoined Claims

11 Finally, the Plan provides for the fair payment of claims. As Appellees
12 concede, the valuation of the claims—estimated at \$40 trillion—far exceeds the
13 total funds available, as well as the Sacklers' personal wealth. The bankruptcy
14 court also acknowledged that although “in a vacuum the ultimate judgments that
15 could be achieved on the estates' claims (and the closely related third-party claims
16 that are being settled under the plan) might well be higher than” the Sacklers'
17 contribution to the plan, “the vast size of the claims against the Debtors and the
18 vast number of claimants creates the need for the plan's intricate settlements.”

7 * * *

75

1 **III. Due Process**

2 Although the bankruptcy court found that there was adequate notice to
3 impose the releases,²⁴ on appeal, the Trustee asserts that the releases in this action
4 did not comply with due process. We, however, find no due process violation.

5 A procedural due process claim entails a two-part inquiry: whether
6 claimants were deprived of a protected interest and, if so, whether claimants
7 received adequate notice and a meaningful opportunity to be heard. *Spinelli v.*
8 *City of New York*, 579 F.3d 160, 168 (2d Cir. 2009). The releases extinguish causes
9 of action, which, as the parties impliedly concede, are a constitutionally protected
10 property interest. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (“a
11 cause of action is a species of property protected by the Fourteenth Amendment’s
12 Due Process Clause”); *Rosu v. City of New York*, 742 F.3d 523, 526 (2d Cir. 2014)
13 (“[T]he cause of action itself constitutes a cognizable property interest.”). Thus,
14 the only remaining question is whether claimants lacked adequate notice or a
15 meaningful opportunity to be heard. *Spinelli*, 579 F.3d at 168.²⁵

²⁴ The district court did not reach this issue.

²⁵ In this respect, the Trustee is correct that the Release “permanently extinguish[es] virtually all opioid-related claims against the Sacklers and other non-debtors without the consent of every affected claimant.” Trustee Br. at 50. Certainly, that aspect of the Release raises due process concerns—but it does not resolve them. “Once due process is triggered, the question becomes what process is due.” *In Matter of Motors Liquidation Co.*,

1 The Trustee argues that there was a denial of due process because the
2 bankruptcy court failed to provide adequate notice of the confirmation hearing
3 and because the language of the Release is dense. “Due process requires notice
4 reasonably calculated . . . to apprise interested parties of the pendency of the
5 action.” *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005) (alteration in
6 original, internal quotation marks omitted). “There is no rigid formula as to the
7 kind of notice that must be given; notice required will vary with circumstances
8 and conditions.” *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995)
9 (internal quotation marks omitted). Here, the bankruptcy court made detailed
10 findings that notice of the confirmation hearing was widespread through a variety
11 of media and that direct notice was provided to any creditors of the Debtors
12 (potential claimants here). The bankruptcy court further observed that although
13 legal training may have been helpful to understanding the initial wording of the
14 releases, the narrowed releases were written more clearly and in “simple . . . plain
15 English.” *Purdue I*, 633 B.R. at 60. The Trustee has given no reason to consider
16 such findings error. *See also Mallinckrodt*, 639 B.R. at 876–77 (rejecting similar
17 arguments by the Trustee because of the extensive notice, the representation of the

829 F.3d 135, 158 (2d Cir. 2016). The Trustee’s focus on the effect of the Release only gets it so far.

1 victims by a UCC, the lack of a deadline on claims that can access the opioid trusts,
2 and the fact that the court considered those who might not have received or
3 understood notice). Moreover, the bankruptcy court gave process—*i.e.*,
4 meaningful opportunity to be heard—at the confirmation hearing, which lasted
5 for six days.

6 The Trustee also questions whether such a release, without an ability to opt-
7 out, can comply with due process because it effectively denies claimants their day
8 in court. But, again, the Due Process Clause does not absolutely protect against
9 the deprivation of property; it instead ensures that a deprivation does not occur
10 without due process. In bankruptcy, the sufficiency of process turns on the
11 adequacy of notice and a meaningful opportunity to be heard, both of which, as
12 explained above, occurred here.²⁶ The Trustee’s argument would essentially call
13 into question all releases through bankruptcy, including bankruptcy discharges
14 (which are one of the most important features of bankruptcy). We decline to so
15 undermine such a critical component of bankruptcy. As described *supra*, the
16 bankruptcy court here acted within its jurisdiction over the bankruptcy estate—

²⁶ Whatever other constitutional concerns might be raised by the extinguishing of state law claims in bankruptcy, the parties have not argued them here.

1 even if the third-party claims were not actually the property of the estate—and
2 therefore did not violate due process.

3 * * *

4 In sum, we reverse the district court's holding that the bankruptcy court
5 lacked the authority to approve the Plan that included the nonconsensual third-
6 party releases. We instead hold that the bankruptcy court properly approved the
7 Plan and made the requisite detailed factual findings to approve of the
8 Shareholder Releases.

9 **IV. The Canadian Creditors' Foreign Sovereign Immunity Act Claim**

10 The Canadian Creditors raise various arguments based upon their
11 contention that Section 10.7(b) of the Plan imposes liability personal to the
12 Canadian Creditors in a manner that violates their sovereign immunity.

13 As a threshold matter, it is not clear that sovereign immunity is even
14 implicated by the releases. To the contrary, at least in the context of discharging
15 claims against a debtor, "[a] debtor does not seek monetary damages or any
16 affirmative relief from a State by seeking to discharge a debt; nor does he subject
17 an unwilling State to a coercive judicial process. He seeks only a discharge of his
18 debts." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004). The releases

1 here do not require a suit to be maintained against the Canadian Creditors. Nor
2 do they seek to impose personal liability on the Canadian Creditors. The Canadian
3 Creditors also cannot be described as unwilling with regard to this judicial
4 process, in which they have fully and voluntarily participated. *S.G. Phillips*
5 *Constructors, Inc. v. City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d
6 702, 707 (2d Cir. 1995) (“The Supreme Court and this court have consistently held
7 that in filing a proof of claim the petitioner submits to the bankruptcy court’s
8 equitable jurisdiction.”). Moreover, the Foreign Sovereign Immunities Act also
9 does not protect the Canadian municipalities because 28 U.S.C. § 1605(a)(1)
10 provides that a foreign state will not be immune from jurisdiction of the courts
11 where the foreign state has waived its immunity either explicitly or by implication.
12 For these reasons, we find that the Plan does not violate the sovereign immunity
13 of the Canadian Creditors.

14 **V. The Cross-Appeal**

15 The bankruptcy court and the district court both determined that the Plan
16 properly differentiated the Canadian objectors’ claims from their domestic
17 counterparts. The Canadian Creditors contend it is inequitable that they do not
18 have access to the abatement trusts, but domestic creditors do. Thus, in their view,

1 because § 1129(a)(1) requires equal treatment, the Plan fails. We do not find those
2 arguments persuasive and affirm the district court.

3 Section 1123(a)(1) provides that “[n]otwithstanding any otherwise
4 applicable non-bankruptcy law, a plan shall designate, subject to section 1122 of
5 this title, classes of claims.” 11 U.S.C. § 1123(a)(1). Under 11 U.S.C. § 1122(a), plans
6 may classify claims in a particular class so long as those claims are “substantially
7 similar to the other claims or interests of such class.” Yet, the statute itself “does
8 not explicitly address whether similar claims *must* be placed in the same class.”

9 *Boston Post Rd. Ltd. P’Ship v. FDIC (In re Boston Post Rd. Ltd. P’ship)*, 21 F.3d 477, 481
10 (2d Cir. 1994). Looking to other circuits, which “have generally held that separate
11 classification of similar claims is permissible only upon proof of a legitimate
12 reason for separate classification, and that separate classification to gerrymander
13 an affirmative vote is impermissible,” *id.*, this Court has held that “similar claims
14 may not be separately classified solely to engineer an assenting impaired class,”
15 *id.* at 482. Instead, the separation of similar claims can only be justified by a
16 legitimate reason. *Id.* at 483; *see also In re W.R. Grace & Co.*, 729 F.3d 311, 329 (3d
17 Cir. 2013) (ruling that the separate classification of Canadian claims is appropriate
18 because the “Canadian and U.S. property damage claimants . . . operate under

1 separate tort regimes[] and reached separate settlement agreements”); *Dow*
2 *Corning*, 280 F.3d at 662 (approving the separate classification of foreign claims
3 because “the bankruptcy court determined that the evidence supported the factual
4 assumptions upon which the classifications are based,” including clear expert
5 witness testimony about tort recovery in other nations). Here, both the bankruptcy
6 court and the district court found that the claims were properly differentiated in
7 the Plan because the claims are subject to different regulatory regimes that result
8 in different types of recovery and the Canadian creditors did not participate in the
9 mediation allocation. *Purdue I*, 633 B.R. at 70; *Purdue II*, 635 B.R. at 117.

10 The Cross-Appellants argue regulatory differences do not suffice to account
11 for the different classification. However, we see no reason to disturb the
12 conclusions of the bankruptcy court and the district court. There are substantive
13 differences among the claims, including both the types of claims and elements of
14 causes of action. Moreover, the Canadian objectors have another source of
15 recovery: Purdue Canada.²⁷ We believe those reasons alone provide enough

²⁷ Of note, Purdue Canada reached a separate settlement of \$150 million. *See Settlement reached with Purdue Pharma (Canada) for opioid damages*, British Columbia Government News (June 29, 2022), <https://news.gov.bc.ca/releases/2022AG0044-001031>.

1 support to differentiate the claims, and thus to affirm the district court's holding
2 on the cross-appeal.

3 **CONCLUSION**

4 For the reasons set forth above, we **REVERSE** the district court's order
5 holding that the Bankruptcy Code does not permit nonconsensual third-party
6 releases of direct claims, and **AFFIRM** the bankruptcy court's approval of the Plan,
7 including the modification made on March 10, 2022, and the case is **REMANDED**
8 to the district court for such further proceedings as may be required, consistent
9 with this opinion. We also **AFFIRM** the district court's denial of the Canadian
10 Creditors' cross-appeal.

No. 23-124

In the Supreme Court of the United States

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

v.

PURDUE PHARMA L.P., ET AL.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

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.

PARTIES TO THE PROCEEDING

Petitioner (appellee in the court of appeals) is William K. Harrington, United States Trustee, Region 2.

Respondents (appellants and cross-appellees below) are Purdue Pharma L.P.; Purdue Pharma Inc.; Purdue Transdermal Technologies L.P.; Purdue Pharma Manufacturing L.P.; Purdue Pharmaceuticals L.P.; Imbrium Therapeutics L.P.; Adlon Therapeutics L.P.; Greenfield BioVentures L.P.; Seven Seas Hill Corp.; Ophir Green Corp.; Purdue Pharma of Puerto Rico; Avrio Health L.P.; Purdue Pharmaceutical Products L.P.; Purdue Neuroscience Company; Nayatt Cove Lifescience Inc.; Button Land L.P.; Rhodes Associates L.P.; Paul Land Inc.; Quidnick Land L.P.; Rhodes Pharmaceuticals L.P.; Rhodes Technologies; UDF LP; SVC Pharma LP; SVC Pharma Inc.; the Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al.; the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants; the Raymond Sackler Family; the Ad Hoc Group of Individual Victims of Purdue Pharma L.P.; the Multi-State Governmental Entities Group; and the Mortimer-Side Initial Covered Sackler Persons.

Respondents (appellees and cross-appellants below) also include the City of Grande Prairie, as representative plaintiff for a class consisting of all Canadian municipalities, the Cities of Brantford, Grand Prairie, Lethbridge, and Wetaskiwin; the Peter Ballantyne Cree Nation, on behalf of all Canadian First Nations and Metis People; the Peter Ballantyne Cree Nation, on behalf of itself; and the Lac La Ronge Indian Band.

Respondents (appellees below) further include the States of California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and Washington; the District of Columbia; Ronald Bass; Ellen Isaacs, on be-

III

half of Patrick Ryan Wroblewski; Maria Ecke, Andrew Ecke, and Richard Ecke.

RELATED PROCEEDINGS

United States Bankruptcy Court (S.D.N.Y.):

In re Purdue Pharma L.P., et al., No. 19-23649 (Sept. 17, 2021) (confirming plan of reorganization)

United States District Court (S.D.N.Y.):

In re Purdue Pharma L.P., et al., No. 21-cv-7532 (Dec. 16, 2021) (vacating confirmation order)

United States Court of Appeals (2d Cir.):

In re Purdue Pharma L.P., et al., No. 22-110 (May 30, 2023) (reversing district court judgment)

In re Purdue Pharma L.P., et al., No. 22-110 (July 24, 2023) (denying petition for rehearing and rehearing en banc)

In re Purdue Pharma L.P., et al., No. 22-110 (July 25, 2023) (denying motion for stay of mandate)

United States Supreme Court:

Harrington v. Purdue Pharma L.P., et al., No. 23A87 (Aug. 10, 2023) (granting certiorari and stay)

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In the Supreme Court of the United States

No. 23-124

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

v.

PURDUE PHARMA L.P., ET AL.

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 839-914) is reported at 69 F.4th 45. The order of the court of appeals denying petitioner's motion to stay the mandate (J.A. 917-919) is unreported. The opinion of the district court (J.A. 632-809) is reported at 635 B.R. 26. The opinion of the bankruptcy court (J.A. 297-418) is reported at 633 B.R. 53.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2023 (J.A. 840). A petition for rehearing was denied on July 24, 2023 (J.A. 915-916). On July 28, 2023, the United States Trustee applied to this Court for a stay of the court of appeals' mandate. On August 10, 2023, the Court treated the application as a petition for a writ of certiorari, granted the stay, and granted the

petition (J.A. 920). The Court’s jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App., *infra*, 1a-30a.

STATEMENT

This case concerns the reorganization in bankruptcy of respondent Purdue Pharma L.P. and its affiliates, stemming from their role in fueling the opioid epidemic that has ravaged families and communities throughout the Nation. In approving Purdue’s reorganization plan, the court of appeals relied on residual provisions of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, to validate a sweeping nonconsensual release of nondebtors’ claims against other nondebtors—the Sacklers and a host of associated individuals and entities. That release extends to claims based on fraud and other willful misconduct that could not have been discharged even if the Sacklers themselves had submitted to bankruptcy and thereby surrendered their assets for distribution to their creditors. The plan instead permits the Sacklers, who would otherwise face claims alleging damages in the trillions, to obtain full repose while keeping billions of dollars that they siphoned from Purdue in the years before these Chapter 11 proceedings.

1. Petitioner is the United States Trustee who oversees bankruptcy cases in the judicial districts for the States of Connecticut, New York, and Vermont. 28 U.S.C. 581(a)(2). He is a Department of Justice official, appointed by the Attorney General, *ibid.*, whose role includes “serv[ing] as [a] bankruptcy watch-dog[] to prevent fraud, dishonesty, and overreaching in the bankruptcy arena.” H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977). By statute, although he “may not file a plan”

of reorganization under Chapter 11 of the Bankruptcy Code, “[t]he United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under [the Code].” 11 U.S.C. 307.

2. Between 1999 and 2019, nearly 247,000 people in the United States died from prescription-opioid overdoses. J.A. 653. Purdue manufactured, sold, and distributed OxyContin and other medications that contributed to the opioid epidemic. See J.A. 845-846. Until 2018, Purdue was controlled by members of the Raymond and Mortimer Sackler families. J.A. 845. In addition to owning the company, members of those families had “held various director and officer positions throughout the company,” including co-CEO, President, and at least six seats on the Board of Directors. *Ibid.* Under the Sacklers’ leadership, Purdue aggressively marketed OxyContin to doctors and pain patients while downplaying concerns about the risks of addiction. J.A. 846.

The opioid epidemic spawned extensive litigation against Purdue and the Sacklers. As early as 2007, members of the Sackler families “anticipated that the effects of litigation against Purdue would eventually impact them directly.” J.A. 847. Apparently to mitigate that threat, the Sacklers began to take money out of Purdue, in what one family member characterized “as a ‘milking’ program.” J.A. 681 (citation omitted). Between 2008 and 2016, “Purdue distributed a significant proportion of the company’s revenue—an approximated \$11 billion in total—to Sackler family trusts and holding companies.” J.A. 847-848. Those distributions represented a dramatic increase from previous distribution patterns and left Purdue in “a significantly weakened financial position.” J.A. 848. The Sacklers arranged to

place many of those assets into “purportedly spend-thrift trusts,” including in offshore locations like the Bailiwick of Jersey, in an effort to “insulate” them from creditors in the United States. J.A. 711-712.

3. a. In 2019, Purdue and affiliated companies (collectively, “debtors”) filed a Chapter 11 bankruptcy petition. The Sacklers did not seek bankruptcy relief. Shortly after debtors’ bankruptcy filing, the bankruptcy court enjoined all litigation against debtors, the Sacklers, and other nondebtors associated with the Sacklers. At that time, “almost 3,000 actions against [debtors] and over 400 actions against the Sacklers concerning liability for OxyContin” had been filed. J.A. 849. The “claims against the Debtors and Sacklers were estimated at more than \$40 trillion.” J.A. 849-850. The state-law claims against the Sacklers “include[d], but [were] not limited to, product liability, wrongful death, negligence, * * * negligent misrepresentation, negligence *per se*[,] * * * gross negligence, fraud, fraudulent concealment, deceit and other willful misconduct, unjust enrichment, public nuisance, and claims under state consumer protection and controlled substances laws.” C.A. J.A. 1862; see J.A. 664-675. In some of the cases, state courts had already denied the Sacklers’ motions to dismiss the claims against them. See J.A. 669.

Instead of entering bankruptcy themselves, the Sacklers negotiated a separate settlement with debtors and a subset of claimants, which debtors implemented in their proposed plan of reorganization. J.A. 849-851. Under the plan, Purdue would become a public-benefit company dedicated to opioid abatement. The bankruptcy estate’s remaining funds would be used to pay administrative expenses before being distributed to various creditor trusts, with the bulk of the distribu-

tions going to abatement. An opioid victim—even one who suffered catastrophic injuries or loss of loved ones—might receive a gross amount between \$3500 and \$48,000, minus yet-to-be-calculated deductions and holdbacks, including payments for attorneys’ fees and expenses, for the operation of a personal-injury trust, for an ad hoc group of individual victims, and for committees representing personal-injury claimants. See J.A. 558-559, 575; C.A. J.A. 1695. To obtain payment, personal-injury claimants are required to submit records establishing the use of Purdue-branded opioids, even though many were never prescribed opioids and older medical records may be unavailable. See J.A. 564-573; see also Jonathan Lipson, *Purdue Pharma Victims Are Getting Caught in Bureaucracy of Harm*, U.S.L.W. (updated Aug. 14, 2023), <https://news.bloomberglaw.com/us-law-week/purdue-pharma-victims-are-getting-caught-in-bureaucracy-of-harm>. Payments to victims receiving more than the minimum amount will be spread over a period of up to ten years. See C.A. J.A. 1805, 1812; see also J.A. 574.

The bankruptcy estate lacks sufficient assets to fund the plan, in part because the Sacklers “drained Purdue’s total assets by 75%,” reducing its “‘solvency cushion’ by 82%.” J.A. 848 (citation omitted). Before the bankruptcy court, the Sacklers—who were then worth approximately \$11 billion, J.A. 895—agreed to fund the plan by contributing \$4.325 billion through payments spread over nearly a decade. J.A. 851. In exchange, the plan includes a series of provisions (referred to in this brief as the “Sackler release”), which would extinguish virtually all Purdue-related opioid claims against the Sacklers and associated nondebtors without the consent of all affected claimants. J.A. 852-853.

Only those claimants who had previously filed proofs of claim against debtors were entitled to vote on the plan confirmation. See Fed. R. Bankr. P. 3003(c)(2). Hundreds of thousands of those claimants did not vote; fewer than 20% of 618,194 claimants entitled to vote—and fewer than 50% of the subset of claimants with personal-injury claims—ended up voting on the plan. C.A. J.A. 6253, 6258. The vast majority of the creditors who voted accepted the plan; but several States opposed confirmation, as did more than 2600 personal-injury claimants. See J.A. 635; C.A. J.A. 6258, 6260.

The U.S. Trustee, eight States, the District of Columbia, a group of Canadian creditors, and some individual claimants specifically objected to confirmation of a plan that included the Sackler release. See J.A. 635-636; see also, *e.g.*, Bankr. Ct. Doc. 3275, at 9 (July 19, 2021); D. Ct. Doc. 94, at 21-22 (Oct. 25, 2021).

b. The bankruptcy court rejected those objections and confirmed the plan. See J.A. 297-418, 419-555. The version of the Sackler release approved by the bankruptcy court provides that any current or future holder of a claim against the released parties “permanently release[s]” Purdue-related civil causes of action about opioids. J.A. 274. The release “permanently and forever stay[s], restrain[s] and enjoin[s]” all the current and future claimants “from taking any action” to “receiv[e] payments * * * or judgment of any form” J.A. 279. The released parties include hundreds and potentially thousands of nondebtors—including many members of the Sackler families, such as “[t]he spouses, children, and grandchildren” of several listed individuals, and their “predecessors, successors, permitted assigns, subsidiaries (other than the Debtors), controlled affiliates, spouses, heirs, executors, [and] estates and nominees.”

J.A. 117, 217. The release covers any civil claim “of any kind, character, or nature whatsoever,” expressly including claims for “fraud” and “willful misconduct,” so long as a debtor’s or the estate’s conduct is the “legal cause” of the claim “or is otherwise a legally relevant factor.” J.A. 193, 275. With the exception of the United States, the release governs everyone who holds a Purdue-related opioid claim against any of the released nondebtors. J.A. 215, 287-295. The release does not require affirmative consent through an opt-in requirement, and it applies even to claimants who expressly objected to it. See J.A. 274-276.

4. The district court vacated the confirmation order containing the release, concluding that the Bankruptcy Code does not authorize courts to extinguish, without consent, direct claims held by nondebtors against other nondebtors. See J.A. 632-809. The court deemed unpersuasive plan proponents’ reliance on general Code provisions recognizing bankruptcy courts’ residual equitable authority over bankruptcy proceedings. See J.A. 783-788 (citing 11 U.S.C. 105(a) and 1123(b)(6)). This Court’s decisions, the district court explained, have repeatedly rejected arguments based on “‘a general, equitable power’” seeking “to award relief that varies or exceeds the protections contained in the Bankruptcy Code.” J.A. 759-760 (quoting *Law v. Siegel*, 571 U.S. 415, 425 (2014)).

5. Debtors and several plan proponents appealed.

a. While the appeals were pending before the court of appeals, the eight objecting States and the District of Columbia reached an additional deal with debtors and the Sacklers. J.A. 865-866. Under that deal, the Sacklers increased their proposed contribution to the bankruptcy estate, agreeing to pay a further \$1.175 billion in

guaranteed payments and up to \$500 million in contingent payments. J.A. 811-815. The States and the District of Columbia agreed to advise the court of appeals of their “non-opposition to the Appeal,” and they further promised that if the court of appeals ruled in debtors’ favor but this Court later granted certiorari they would not “file a party brief at the merits stage in [this] Court.” J.A. 823-824.

b. A divided panel of the court of appeals reversed the district court’s order. J.A. 839-914. At the threshold, the majority held that the bankruptcy court had subject-matter jurisdiction over third-party direct claims against nondebtors because it was “likely” “that the resolution of the released claims would directly impact the *res*.” J.A. 874. The majority pointed to the similarity between some of the third parties’ and the estate’s claims against the Sacklers, and also to the possibility that some of the released parties could seek indemnification from the debtors based on the released claims. J.A. 874-875. The court further held that the claims encompassed by a third-party release are non-core under *Stern v. Marshall*, 564 U.S. 462, 471 (2011), meaning that the district court, rather than the bankruptcy court, would need to exercise de novo review before approving their release. J.A. 867-868.

On the merits, the court of appeals majority held that two provisions of the Bankruptcy Code, read together, authorize courts sitting in bankruptcy to approve non-consensual third-party releases. J.A. 876-880. The first provision states that “[t]he [bankruptcy] court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of” the Code. 11 U.S.C. 105(a). The second provision states that “a plan may[] * * * include any other appropriate provi-

sion not inconsistent with the applicable provisions of” the Code. 11 U.S.C. 1123(b)(6).

The majority acknowledged that Section 105(a) does not confer independent authority on bankruptcy courts; an invocation of Section 105(a) must instead be “tied to another Bankruptcy Code section,” J.A. 877 (citation omitted). But the majority interpreted Section 1123(b)(6) to permit a court sitting in bankruptcy to take any action not “expressly forbid[den]” by the Code. J.A. 878. The majority concluded that, because the Code does not expressly prohibit the approval of non-consensual third-party releases in bankruptcy, such releases are authorized.

As to the government’s constitutional arguments, the court of appeals majority acknowledged that the extinguished claims were a species of property interest. J.A. 897. But it held that affected claimants had been afforded constitutionally sufficient notice. J.A. 897-898. The majority also held that the bankruptcy court did not violate due process by terminating nondebtors’ opioid claims against other nondebtors without an ability to opt out. J.A. 898-899.

The court of appeals majority then adopted a novel seven-factor balancing test to govern approval of third-party releases. Those factors are whether (1) there is an identity of interests between debtors and released parties; (2) the released claims are factually and legally intertwined with claims against the debtor; (3) the breadth of the release is necessary to the plan; (4) the release is essential to the reorganization; (5) the released nondebtors contributed substantial assets to the reorganization; (6) the affected claimants expressed overwhelming support for the plan; and (7) the plan provides for the fair payment of enjoined claims. J.A. 887-

889. After concluding that the Sackler release satisfies that test, the majority affirmed “the bankruptcy court’s approval of the Plan” and remanded the case to district court for further proceedings. J.A. 902.

c. Judge Wesley concurred in the judgment, “reluctantly” agreeing that, under “binding” Second Circuit precedent, a bankruptcy court has authority to approve nonconsensual third-party releases. J.A. 903. But he expressed considerable skepticism of the reasoning in those earlier cases, which he viewed as being “without any basis in the Code.” J.A. 904.

Judge Wesley took the view that the majority erred by inferring “a power that is nothing short of extraordinary” from what is “effectively” “silence” in 11 U.S.C. 1123(b)(6). J.A. 910. The “residual equitable authority” granted by that provision, he explained, is authority “to modify *creditor-debtor relationships*.” J.A. 911 (quoting *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990)). He further reasoned that such equitable authority incorporates “traditional standards in equity practice,” and that “the involuntary release of direct claims against nondebtors is ‘an extraordinary thing’” that is unlike “anything traditionally recognized at equity.” J.A. 912-913 (citations omitted).

d. The government filed a motion to stay the court of appeals’ mandate. The court denied a stay and denied a petition for rehearing filed by a creditor. J.A. 915-919. This Court then granted a stay and, treating the government’s stay application as a petition for a writ of certiorari, granted certiorari. J.A. 920.

SUMMARY OF ARGUMENT

I. At the stay stage before this Court, some respondents challenged the U.S. Trustee’s standing to seek vacatur of the confirmation order. The Court need not

consider the U.S. Trustee's standing because at least one other party with standing is seeking the same relief as the U.S. Trustee as a respondent in support of petitioner. But if the Court wishes to address the question, the U.S. Trustee plainly has both statutory and Article III standing to pursue this appeal. As six courts of appeals have held, the U.S. Trustee's statutory authority to "raise" and "be heard" on any issue, 11 U.S.C. 307, gives him the right to appeal. And this Court's cases establish that Congress may confer standing upon the United States—acting, as here, through a federal officer—to pursue the United States' sovereign interests in vindicating federal law.

II. A. On the merits, the Sackler release, which extinguishes nondebtors' claims against other nondebtors without the claimants' consent, is not authorized by the Bankruptcy Code.

1. The Code grants courts unusual powers to modify relations between debtors and their creditors; those powers are specifically authorized by the Constitution for addressing a debtor's true financial distress. A debtor undergoing bankruptcy must shoulder a host of obligations and must generally apply all its assets to the satisfaction of its creditors' claims. In exchange, the debtor may receive a discharge of its debts, except for those that Congress has deemed nondischargeable, such as an individual's debts for money obtained by fraud. But the Code grants the benefits of a discharge only to the debtor who went through bankruptcy. With the exception of a narrow provision involving asbestos liability that is undisputedly inapplicable here, the Code provides no express authority to release nondebtors from personal liability to other nondebtors.

2. In the absence of an express authorization, plan proponents have relied on catchall provisions preserving the bankruptcy court's residual equitable authority, 11 U.S.C. 105(a) and 1123(b)(6). But there is no basis to infer a vast power, greater in many ways than the powers specifically authorized by the Code, from those residual provisions. Doing so violates two basic principles of statutory interpretation. First, plan proponents read a general authorization to approve "appropriate provision[s]," 11 U.S.C. 1123(b)(6), to swallow the Code's "more limited, specific authorization[s]." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Second, plan proponents treat a catchall provision as granting a power of a fundamentally different character from the preceding, enumerated examples of what is authorized.

3. Those problems only multiply when considering the broader statutory context. The Sackler release conflicts with several other express limitations on courts' authority under the Code. It grants the functional equivalent of a discharge to a nondebtor, despite the Code's clear provisions limiting a discharge to the debtor, who undertook the many duties and obligations imposed by the Code to obtain a fresh start. It also provides full repose to the Sacklers without requiring them to commit substantially all their assets to compensating their creditors; in that way, it allows the Sacklers to shield billions of dollars of their fortune while extinguishing, without payment, claims alleging trillions of dollars in damages. Equally troubling, it releases the Sacklers from claims based on fraud and other forms of willful misconduct that could not be discharged if the Sacklers themselves had filed for bankruptcy. And, while the plan appropriately preserves the jury trial

right for claims against the debtor, the release extinguishes claimants' jury rights against the Sacklers. A long line of this Court's cases has rejected similar efforts to read general grants of authority to reach outcomes incompatible with the structure and purposes of the Code.

The history of bankruptcy law further confirms the lack of authority for the release because this Court specifically held under the Bankruptcy Act of 1898 that courts lack power to enjoin nondebtors from pursuing state-law claims against other nondebtors.

4. Congress's narrow allowance for asbestos trusts in 11 U.S.C. 524(g)—which is the only provision of the Code specifically authorizing an injunction of claims between nondebtors—also illustrates the impermissible breadth of the release approved by the court of appeals. Unlike the Sackler release, Section 524(g) provides substantive protection for the value of released claims as well as procedural protections.

B. The court of appeals based its decision approving the release on Section 105(a) and Section 1123(b)(6), but it did not engage in a textual analysis, resting almost exclusively on this Court's prior characterization of Section 1123(b)(6) as codifying a residual authority to modify creditor-debtor relationships. The residual authority to modify *creditor-debtor relationships*, however, provides no license to transform the relations *between nondebtors*.

The court of appeals also disregarded the limits on equity courts' traditional authority, which did not include the power to enjoin nonparties or "to craft a 'nuclear weapon' of the law." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999).

C. At a minimum, the court of appeals' interpretation raises serious constitutional questions. The release allows federal courts to wield great power over state-law causes of action, a form of private property, and it extinguishes nonparties' causes of action, with *res judicata* effect, without providing the claimants an opportunity to affirmatively consent or even to opt out. In each of those ways, the legality of the release, if statutorily authorized, would raise difficult and sensitive constitutional questions. Neither Section 105(a) nor Section 1123(b)(6) contains the exceedingly clear language necessary to overcome the canon of constitutional avoidance.

D. Finally, plan proponents have made various policy arguments in support of the release. Appeals to policy cannot replace statutory authorization. Moreover, the public interest strongly supports holding third-party releases unlawful. Nonconsensual releases enable tortfeasors to obtain legal immunity from the claims of their victims without taking on the obligations required by the Code. And they deprive tort victims of their day in court without consent. Nor is forcing claimants to release claims in conjunction with a bankruptcy proceeding the only way to resolve sprawling tort liability. As recent examples illustrate, mass-tort cases can be resolved within the tort system or by providing compensation to claimants to obtain their consensual release.

ARGUMENT

I. THE U.S. TRUSTEE HAS STANDING

At the stay stage before this Court, two filings contended—for the first time in these proceedings—that the U.S. Trustee lacks standing to contest the court of appeals' order approving the reorganization plan.

See Debtors Stay Opp. 32-37; Official Committee of Unsecured Creditors (UCC) Stay Opp. 20-22. That contention lacks merit.

A. As an initial matter, those respondents' standing objections rest on the since-disproved assumption that the U.S. Trustee is the only party still seeking vacatur of the confirmation order. See Debtors Stay Opp. 36. The Canadian creditors have indicated that they intend to "file a brief on the merits as a respondent in support of the petitioner." Canadian Creditors Stay Resp. 4. And the Canadian creditors will seek the same relief as the U.S. Trustee: vacatur of the confirmation order. See *id.* at 3-4. Those creditors, who object to the reorganization plan's nonconsensual extinguishment of their right to bring claims against the Sacklers, see *id.* at 6-7, have standing to proceed. The existence of one litigant with standing to seek a particular form of relief satisfies Article III. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023). Thus, the Court need not address the U.S. Trustee's own standing.

B. 1. In any event, the U.S. Trustee plainly has standing to seek this Court's review of the lawfulness of the Sackler release. Debtors previously asserted that the U.S. Trustee lacks statutory "standing to appeal." Debtors Stay Opp. 4. That assertion, which debtors did not raise before the lower courts, is forfeited. It is also erroneous. Section 307 of the Bankruptcy Code specifically provides that "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under [the Code] but may not file a [Chapter 11] plan." 11 U.S.C. 307. U.S. Trustees—who are part of the Department of Justice—frequently appear in bankruptcy proceedings to litigate the legal viability of Chapter 11 reorganization plans. See U.S.

Dep't of Justice, *U.S. Trustee Program Annual Report Fiscal Year 2021*, at 13, Fig. 3 (2022), www.justice.gov/ust/page/file/1535521/download (showing U.S. Trustees sought relief in Chapter 11 plan confirmation proceedings 395 times in Fiscal Year 2021). And U.S. Trustees appeal orders in Chapter 11 cases, including as the sole appellant. See, e.g., *In re FTX Trading Ltd.*, No. 23-2297 (3d Cir. appeal docketed July 19, 2023) (pending); *Garvin v. Cook Invs. NW, SPNWY, LLC*, 922 F.3d 1031, 1033-1035 (9th Cir. 2019); *In re Diamond Offshore Drilling, Inc.*, No. 21-cv-1380 (S.D. Tex. Sept. 3, 2021), slip op. 1.

As a matter of plain text, the U.S. Trustee's Section 307 authority to "raise" and "be heard" on any issue includes the right to appeal. See *Black's Law Dictionary* 1318, 1510 (11th ed. 2019) (defining "raise" as "[t]o bring up for discussion or consideration" and "opportunity to be heard" as including "[t]he chance to appear in a court or other tribunal and present evidence and argument"). Tellingly, when Congress wished to grant a right to raise issues in a bankruptcy proceeding, but not to appeal, it specifically drew that line. For instance, the Securities and Exchange Commission (SEC) "may raise and may appear and be heard on any issue" in a case under the Code, "but [it] may not appeal from any judgment, order, or decree entered in the case." 11 U.S.C. 1109(a); see, e.g., 11 U.S.C. 1164 (providing that certain other entities may "raise" and "appear" and "be heard," "but may not appeal"). Section 307 contains no appeal exclusion for the U.S. Trustee.

It is thus well established that a U.S. Trustee's statutory authority to be heard on "'any issue' includes the right to appeal and the right to object to confirmation of the debtor's plan." 2 *Collier on Bankruptcy* ¶ 307.02,

at 307-3 (Richard Levin & Henry J. Sommer eds., 16th ed. Sept. 2020) (*Collier*) (footnote omitted). As the Sixth Circuit explained, a U.S. Trustee had “standing to appeal” a bankruptcy-court decision that “had not affected his pecuniary interest” because Congress made him “responsible for ‘protecting the public interest and ensuring that bankruptcy cases are conducted according to law.’” *In re Revco D.S., Inc.*, 898 F.2d 498, 499-500 (1990) (citation omitted). And every other court of appeals to consider the question has likewise held that Section 307 grants U.S. Trustees standing to appeal regardless of the government’s financial interest. See, e.g., *In re Zarnel*, 619 F.3d 156, 162 (2d Cir. 2010); *In re Donovan Corp.*, 215 F.3d 929, 930 (9th Cir. 2000); *In re Columbia Gas Sys. Inc.*, 33 F.3d 294, 299 (3d Cir. 1994); *In re Clark*, 927 F.2d 793, 796 (4th Cir. 1991); *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 824 (1st Cir. 1990).

2. Some plan proponents have contended that Article III may invalidate Congress’s grant of statutory authority to the U.S. Trustee, pointing to decisions about the limits on Congress’s authority to create statutory standing for private persons who have no concrete harm apart from a desire for proper application of the law. Debtors Stay Opp. 34-35; UCC Stay Opp. 21-22. But a statute authorizing suit by the United States is fundamentally different. As a matter of “history and tradition” informing “the types of cases that Article III empowers federal courts to consider,” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (citation omitted), the United States has a long-recognized right to sue in appropriate circumstances to prevent injury to the general welfare. “No one doubts” that a sovereign “has a cognizable interest in the continued enforceability of its

laws that is harmed by a judicial decision” precluding their enforcement. *Hollingsworth v. Perry*, 570 U.S. 693, 709-710 (2013) (citation and internal quotation marks omitted); see, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (recognizing the federal government’s “sovereign interest in the execution of federal law”).

The United States regularly participates as a party in an array of cases—most obviously criminal prosecutions, but also civil cases—to vindicate its sovereign interest in the enforcement of federal law, even in the absence of any pecuniary interest. There is a long tradition of such participation even when—unlike here—there is no express statutory authorization. For instance, this Court considered the SEC’s standing to appeal in a case where the SEC alone petitioned for certiorari to enforce its interest in the proper application of a pre-Code bankruptcy law. *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 458-460 (1940). The Court held that, notwithstanding the SEC’s lack of a “personal, financial or pecuniary interest,” it had standing to intervene in the case and to appeal to vindicate “the public interests which the Commission was designated to represent.” *Id.* at 459-460; see *id.* at 460 (citing cases); see also, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597, 605 (1966) (holding that the court of appeals had jurisdiction over the FTC’s request for an injunction to protect its ability to block a merger if it later determined the merger would violate federal law).

Nor does this case present any risk—as when Congress authorizes an unharmed private party to sue—of “infring[ing] on the Executive Branch’s Article II authority.” *TransUnion*, 141 S. Ct. at 2207. To the contrary, in challenging the lawfulness of the Sackler re-

lease under the Bankruptcy Code, the U.S. Trustee, who is subject to removal by the Attorney General, 28 U.S.C. 581(c), is permissibly exercising the Executive’s authority.

As a result, this Court’s cases already “establish” that Congress may “confer[] standing upon” the United States, acting through a federal officer or agency, to “pursue the public’s interest” “without infringing Article III of the Constitution.” *Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-133 (1995). That is what Congress did when it enacted Section 307. As a result, the U.S. Trustee has both statutory and Article III standing to challenge the lawfulness of the Sackler release.

II. THE BANKRUPTCY CODE DOES NOT AUTHORIZE NONCONSENSUAL THIRD-PARTY RELEASES

A. The Statutory Text, Context, Purposes, And History Establish That Nonconsensual Third-Party Releases Are Not Authorized

The traditional tools of statutory interpretation establish that the nonconsensual release of nondebtors’ opioid-related claims against other nondebtors cannot be reconciled with the Bankruptcy Code.

1. *Bankruptcy law generally addresses the relations between debtors and their creditors, not between nondebtors*

“Congress’ power under the [Constitution’s] Bankruptcy Clause contemplates an adjustment of a failing debtor’s obligations” and the distribution of “the property of the debtor among his creditors.” *Railway Labor Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 466 (1982) (brackets, citations, and internal quotation marks omitted). Thus, this Court has explained that bankruptcy is

the “subject of the relations between a[] * * * debtor and his creditors, extending to his and their relief.” *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-514 (1938) (citation omitted). The Bankruptcy Code’s intricate provisions are intended to give the honest but unfortunate debtor a “fresh start” while ensuring the maximum possible “equitable distribution” to creditors by exercising “jurisdiction over all of the debtor’s property.” *Central Va. Community College v. Katz*, 546 U.S. 356, 363-364 (2006); see *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

The Code therefore establishes a basic *quid pro quo*. A debtor seeking bankruptcy relief must shoulder a host of obligations. Those include the debtor’s obligation to disclose all its creditors, its assets and liabilities, its current income and expenditures, and matters relating to its financial affairs. 11 U.S.C. 521(a). Absent the consent of individual creditors, 11 U.S.C. 1129(a)(7), a Chapter 11 debtor must then apply all its assets (with certain narrow exemptions for individual debtors, see 11 U.S.C. 522) to the satisfaction of its creditors’ claims. In exchange, the debtor may receive a discharge of its debts, except for those that Congress deemed nondischargeable as a matter of public policy, such as an individual debtor’s debts “for money * * * to the extent obtained by[] * * * fraud.” 11 U.S.C. 523(a)(2)(A); see 11 U.S.C. 1141(d).

Consistent with that framework, the Code grants the benefit of a discharge only to a debtor who has assumed bankruptcy’s burdens. The Code “releases *a debtor* from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt and by operating as an injunction to prohibit creditors from attempting to collect or to recover the debt.”

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (emphasis added). The discharge that a debtor can obtain is powerful: It “voids any judgment * * * , to the extent that such judgment is a determination of *the personal liability of the debtor*” with respect to a discharged debt; “operates as an injunction against” any action “to collect, recover or offset any such debt as *a personal liability of the debtor*”; and, with certain exceptions, “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, [certain] property of *the debtor* * * * acquired after the commencement of the case.” 11 U.S.C. 524(a) (emphases added).

Critically, with the exception of a single, narrow provision addressing liability related to asbestos exposure, 11 U.S.C. 524(g)—which is undisputedly inapplicable here—the Code provides no express authority to release nondebtors from personal liability to other nondebtors. Such authorization would extend the benefits of a fresh start without requiring those nondebtors to file for bankruptcy and undertake the various obligations applicable to debtors.

2. *The residual equitable powers in Sections 105(a) and 1123(b)(6) do not include the power to authorize non-consensual third-party releases*

No provision in the Code specifically authorizes a release of non-asbestos claims against a nondebtor. But rather than rely on an authorization that speaks directly to the issue, plan proponents and the court of appeals claim to find that vast power—one that, in many respects, dwarfs the powers specifically given to courts under the Code—in 11 U.S.C. 105(a) and 1123(b)(6), provisions that preserve bankruptcy courts’ residual

equitable authority. Neither of those provisions authorizes a release like the one approved for the Sacklers.

a. Section 105(a) provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code],” and then explains that a reference to “the raising of an issue by a party in interest” does not “preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.” 11 U.S.C. 105(a). As the court of appeals itself recognized, “§ 105(a) alone cannot justify the imposition of third-party releases” unless “at least one other provision of the Bankruptcy Code * * * provide[s] the requisite statutory authority.” J.A. 877; see *Collier* ¶ 105.01[1], at 105-6 (Apr. 2019) (“[The statutory text] suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective.”).

b. Section 1123(b)(6), however, does not provide the requisite authority. Section 1123 sets out various provisions that a plan “shall” include (Section 1123(a)) as well as provisions that it “may” include (Section 1123(b)). 11 U.S.C. 1123. The latter set includes plan terms that direct “the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor,” “the settlement or adjustment of any claim or interest belonging to the debtor or to the estate,” or “the sale of all or substantially all of the property of the estate,” 11 U.S.C. 1123(b)(2), (3)(A), and (4), as well as terms that “modify the rights” of claimants in their capacity as claimants of the debtor or the estate, 11 U.S.C. 1123(b)(5). Paragraph (6) is a catchall, which states that

“a plan may * * * include any other appropriate provision not inconsistent with the applicable provisions of this title.” 11 U.S.C. 1123(b)(6).

The structure of Section 1123 indicates that its final provision does not extend to the resolution of claims between nondebtors. Because the preceding paragraphs specifically address the settlement and adjustment of claims “belonging to the debtor or to the estate,” 11 U.S.C. 1123(b)(3)(A), and modification of the rights of those who hold secured or unsecured claims against the debtor, 11 U.S.C. 1123(b)(5), Section 1123(b)(6) cannot be read as granting authority to order the involuntary settlement and adjustment of claims that *nondebtors* have *against third parties*.

This Court addressed a similar question in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 643-644 (2012). In that case, a debtor proposed a plan that provided that the debtor’s assets would be sold at an auction at which the debtor’s main creditor would not be permitted to “credit-bid”—that is, to submit a bid that relied on the amount of the debtor’s debt to offset some or all of the purchase price. *Id.* at 641. The relevant provision authorized several alternative ways to proceed, and the debtor contended that the plan was lawful because the provision it invoked “d[id] not expressly foreclose the possibility of a sale without credit-bidding.” *Id.* at 644. The Court rejected that argument, explaining that where “a general authorization and a more limited, specific authorization exist side by side,” the “well established canon” that “the specific governs the general” prevents “a specific provision” from being “swallowed by the general one.” *Id.* at 645.

The same conclusion follows from a distinct principle of statutory interpretation: Section 1123(b)(6) is a

catchall, allowing the inclusion of “any other appropriate provision not inconsistent” with the Code’s other limits. 11 U.S.C. 1123(b)(6). And under the familiar rule of *ejusdem generis*, “when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.” *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); see, e.g., *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163-164 (2012). The specific items in Section 1123(b) all address provisions for adjusting the relationship between the debtor and its creditors. Indeed, this Court has previously interpreted Section 1123(b)(6)—then located at Section 1123(b)(5)—as embodying the “traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify *creditor-debtor relationships*.” *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990) (emphasis added). For that reason, the plan proponents and the court of appeals err in reading Section 1123(b)(6) as granting the power to modify relationships *between nondebtors*—a power of a fundamentally different character from that of the preceding, specific examples.

3. *Nonconsensual third-party releases conflict with other limits on powers under the Code*

The broader statutory context supplies strong additional support for the U.S. Trustee’s reading of Sections 105(a) and 1123(b)(6). Even where a general provision might authorize a bankruptcy court’s action, the action is “unauthorized if it contravene[s] a specific provision of the Code,” *Law v. Siegel*, 571 U.S. 415, 422 (2014), and the Sackler release conflicts with several express limitations on courts’ powers under the Code.

a. Interpreting Section 1123(b)(6) to authorize third-party releases circumvents the Code's express discharge provisions by granting the functional equivalent of a discharge to nondebtors. The Code repeatedly provides that a discharge of obligations incurred before bankruptcy is available only to the debtor. "The court shall grant *the debtor* a discharge" under certain conditions. 11 U.S.C. 727(a) (emphasis added); see also 11 U.S.C. 727(b) ("a discharge under subsection (a) of this section discharges *the debtor* from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim" meeting certain criteria) (emphasis added). The order confirming a reorganization plan "discharges *the debtor* from any debt" meeting certain criteria, 11 U.S.C. 1141(d)(1)(A) (emphasis added), except that the confirmation "does not discharge *a debtor*" if other circumstances are present, 11 U.S.C. 1141(d)(3) (emphasis added). And a plan "may" provide for "the settlement or adjustment of any claim or interest belonging *to the debtor or to the estate.*" 11 U.S.C. 1123(b)(3)(A) (emphasis added). By "explicitly including" such provisions allowing for the discharge of the debtor and adjustment of claims belonging to the estate, "Congress implicitly excluded a general * * * rule" that would conflict with that framework's limitations. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

Indeed, the Code expressly states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. 524(e). Again, that makes sense: A nondebtor has not assumed the many duties and obligations specified by the Code, so it should not be permitted to reap the Code's rewards.

Here, however, the Sackler release “permanently and forever stay[s], restrain[s] and enjoin[s]” “all persons” “from taking any action” to collect a payment on a covered claim. J.A. 279. In that way, it operates just like a bankruptcy discharge, which serves as an “injunction against * * * an action” to collect a debt. 11 U.S.C. 524(a)(2). Because the Sackler release authorizes the functional equivalent of a discharge for a nondebtor, it is not authorized by the Code.

b. Reading Section 1123(b)(6) as an implicit authorization for third-party releases like the Sackler release would also conflict with the Code’s specific limitations on individual bankruptcies.

If the Sacklers themselves had filed for bankruptcy, they would not have been able to shield billions of dollars from their creditors because—absent individual creditor consent, 11 U.S.C. 1129(a)(7)(A)—debtors must devote substantially all assets to the payment of creditors and may be held to account for any fraudulent or constructively fraudulent transfers they may have made. See 11 U.S.C. 522, 541, 548. Yet the Sacklers obtained a release of virtually all Purdue-related opioid causes of action—including claims for fraud—*not* by declaring bankruptcy, but by stripping billions of dollars from Purdue in the years before its bankruptcy and then offering to reinfuse only a portion of their assets into the estate. See Bankr. Ct. Doc. 3469, at 6 (Aug. 6, 2021) (opining that the Sacklers’ net worth, estimated at \$10.707 billion in 2019 and 2020, was expected to *rise* to \$14.574 billion by 2030, even after accounting for proposed plan payments). By permitting the Sacklers, who would otherwise have faced claims asserting trillions of dollars in damages, see J.A. 895, to obtain full repose while keeping billions of dollars that they drained from

Purdue in the years before these Chapter 11 proceedings, the plan violates the basic tradeoff of bankruptcy that, in exchange for a fresh start, a debtor must commit essentially all assets to satisfying claims against it.

The release also violates specific provisions of the Code by providing far broader repose than the Code permits. When debtors filed for bankruptcy, the Sacklers and other released individuals were defendants in hundreds of civil actions alleging causes of action including fraud. None of those individual defendants would have been able to discharge all of those claims had they filed for bankruptcy themselves. See 11 U.S.C. 523(a)(2), (4), and (6) (forbidding the discharge of debts for fraud, breach of fiduciary duty, and willful and malicious injury in individual bankruptcies when creditors have timely objected); *Archer v. Warner*, 538 U.S. 314, 321 (2003) (“[The Code] ensure[s] that all debts arising out of fraud are excepted from discharge[] no matter what their form.”) (citation and internal quotation marks omitted). But the release extinguishes *all* opioid-related claims against the Sacklers and others where debtors’ conduct is a legally relevant factor—expressly including claims arising out of fraud. J.A. 193, 274 (settling “any and all Causes of Action” which include present and future claims based on “fraud” and “willful misconduct”); see J.A. 636, 785, 870-871.

To take another example, Congress has provided that “[the Bankruptcy Code] do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.” 28 U.S.C. 1411(a). In light of that requirement, the plan here allows claimants with personal-injury or wrongful-death claims *against debtors* to pursue their claims before a jury. See, e.g., J.A.

560, 589-590, 607-608 (allowing personal-injury claimants “to liquidate” their claims “in the tort system rather than pursuant to the [plan’s] streamlined procedures”); J.A. 592-603 (setting out procedures for liquidation and pro-rata payment). By contrast, the Sackler release would extinguish claimants’ personal-injury and wrongful-death claims against the Sacklers and other nondebtors without preserving their jury rights. See J.A. 279 (prohibiting “all Persons” from taking any action to collect the claim, including commencing “any suit * * * in any forum”). It is illogical to read the Code, which so carefully circumscribes the discharge available to a debtor, as granting authority to release the debts of a nondebtor free of those core limitations.

c. This Court’s cases interpreting the Code further confirm that analysis. The Court has emphasized that “more than simple statutory silence” is required to conclude that Congress “intend[s] a major departure” from a “basic underpinning” of bankruptcy law. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464, 465 (2017). At its foundation, bankruptcy provides for restructuring “the relations between a[] * * * debtor and his creditors,” *Wright*, 304 U.S. at 513-514 (citation omitted), rather than a forcible restructuring of relations between nondebtors. Permitting a release that goes far beyond what the Sacklers could obtain as debtors would allow the Code’s residual authorization for “appropriate provision[s],” 11 U.S.C. 1123(b)(6), to swallow its “more limited, specific authorization[s],” *RadLAX*, 566 U.S. at 645.

This Court has repeatedly rejected efforts to give general provisions of the Code such sweeping reach, holding instead that a bankruptcy court may not rely on general grants of residual equitable authority to reach

outcomes incompatible with the structure and purposes of the Code. See *Czyzewski*, 580 U.S. at 465; *Law*, 571 U.S. at 423-424; *RadLAX*, 566 U.S. at 645. In *Czyzewski*, a bankruptcy court dismissed a case on the condition that the estate distribute its assets in a manner that prioritized general unsecured creditors over certain mid-priority creditors who would have been entitled to payment first had the bankruptcy court approved a plan of reorganization or liquidation. 580 U.S. at 454-455. The bankruptcy court determined that, “in light of the dire circumstances facing the estate and its creditors,” “[a] confirmable Chapter 11 plan” would otherwise be “unattainable.” *Id.* at 461 (citation and internal quotation marks omitted). The debtors defended the dismissal order by arguing that the Code gives bankruptcy courts broad authority to condition dismissal orders on particular distribution mechanisms. *Id.* at 466; see 11 U.S.C. 349(b). The debtors further emphasized that the Code “does not explicitly state what priority rules—if any—apply to a distribution” upon dismissal. *Czyzewski*, 580 U.S. at 457.

This Court rejected all of those arguments. The Court acknowledged that, by its terms, the Code’s priority system governs Chapter 7 liquidations and Chapter 11 reorganizations rather than structured dismissals. *Czyzewski*, 580 U.S. at 464. But it noted that the priority system “has long been considered fundamental to the Bankruptcy Code’s operation.” *Id.* at 465. The Court accordingly held that “some affirmative indication of intent” was necessary for a court to conclude that “Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of non-consensual priority-violating final distributions” that are not permissible in Chapter 7 liquidations and Chap-

ter 11 reorganizations. *Ibid.* And it rejected the debtors' reliance on a provision under which a bankruptcy court may, "for cause, order otherwise," *id.* at 466 (quoting 11 U.S.C. 349(b)) (brackets omitted), determining that the provision "is too weak a reed upon which to rest so weighty a power" as authorizing distributions that would be "flatly impermissible in a Chapter 7 liquidation or a Chapter 11 plan," *ibid.*

This Court reached a similar conclusion in *Law*. There, a bankruptcy trustee obtained an order "surcharging" a debtor's homestead exemption as a sanction on the debtor for committing fraud. *Law*, 571 U.S. at 420. The surcharge made "those funds available to defray * * * attorney's fees." *Ibid.* The Bankruptcy Code does not expressly state that bankruptcy courts lack discretion to surcharge a homestead exemption as an equitable remedy for a debtor's misconduct. See *id.* at 423-424. But given the Code's "carefully calibrated exceptions and limitations," the Court rejected the argument that courts retain "a general, equitable power * * * to deny exemptions based on a debtor's bad-faith conduct" in circumstances not expressly authorized by the Code. *Id.* at 424-425. And just as a court "may not contravene express provisions of the Bankruptcy Code" by using its equitable authority to allow an exemption not expressly authorized by the Code's text, *id.* at 427-428, it may not contravene the express provisions limiting discharges to the debtor, see pp. 25-26, *supra*, by using its residual authority to allow discharges of non-debtors. Each of those decisions confirms that a bankruptcy court cannot rely on general grants of residual authority to reach outcomes incompatible with the structure and purposes of the Code.

d. That conclusion finds further support in this Court's refusal to find that the Bankruptcy Act of 1898 included any power to permanently enjoin third-party claims. In *Callaway v. Benton*, 336 U.S. 132 (1949), the debtor was a railway company that sought to acquire properties of a third-party lessor as an important element of its proposed reorganization. *Id.* at 134-135. Some of the lessor's shareholders brought suit in state court to enjoin the acquisition, alleging that state law required unanimous shareholder approval. *Id.* at 135-136. The district court permanently enjoined the dissenting shareholders from pursuing their state-court litigation, ordering the equivalent of a third-party release of the shareholders' claim. See *id.* at 136. The district court reasoned that, by seeking to prevent the acquisition of property important to the plan, the suit served as "an attempt * * * 'to prevent the consummation of the [railway's reorganization] plan.'" *Id.* at 137.

This Court disagreed. Although the Bankruptcy Act of 1898, as amended, allowed federal agencies and courts to override state law when effectuating a reorganization plan, the Court reasoned that the Act did not authorize courts to determine the rights of the third-party shareholders. See *Callaway*, 336 U.S. at 141. "The statute does not," the Court explained, "give the [regulatory agency] or court the right to require acceptance by a lessor *not in reorganization* of an offer for the purchase of its property." *Ibid.* (emphasis added); see *id.* at 147 ("The purchase of formerly leased properties does not involve rights asserted *against the debtor*["]) (emphasis added). Allowing a court sitting in bankruptcy to preclude third parties from pursuing their state-law rights against nondebtors in state courts would, the Court explained, "leave to individual judges

the question of whether state laws should be accepted or disregarded,” *id.* at 141, eliminating state-law rights whenever state law might affect “the prospects of acceptance by the offeree” of an offer important to the plan’s success, *ibid.* Put otherwise, although eliminating the state-law cause of action against a nondebtor would be beneficial to the reorganization plan, the Bankruptcy Act did not authorize such a release.¹

The Sackler release permanently enjoins state-law claims by nondebtor third parties against other nondebtors. Given this Court’s rejection of such a power under pre-Code bankruptcy law, it is all the less plausible that, in enacting the Code, Congress intended “to grant the debtor the broad new remedy” of permanently enjoining third parties’ state-law claims “without the new remedy’s being mentioned somewhere in the Code itself.” *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992).

¹ The *Callaway* Court also held that the district court did not have jurisdiction under the Bankruptcy Act to adjudicate the shareholders’ suit merely because it affects the debtor’s estate. 336 U.S. at 142; see *id.* at 141-151. The Code subsequently expanded the jurisdiction of bankruptcy courts. See 28 U.S.C. 157(a), 1334(b); *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 & n.5 (1995). But the critical point here is that the Code did not add statutory authority to extinguish state-law claims held by nondebtors against other nondebtors. For that reason, the jurisdictional language in the second part of the *Callaway* opinion does not undermine the import of the Court’s statutory holding in the first part of that opinion, nor of the statutory analysis about the Bankruptcy Act’s substantive scope in the second part of that opinion. Cf. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (clarifying that the reach of a federal statute “is a merits question,” not a question of “[s]ubject-matter jurisdiction”).

4. Congress's narrow allowance for asbestos trusts in Section 524(g) illustrates the impermissible breadth of the Sackler release

Although the Bankruptcy Code contains hundreds of provisions addressing the relationship between a debtor and its creditors, only one actually authorizes enjoining nondebtors' claims against other nondebtors. Section 524(g) expressly states that, in the context of asbestos claims, such releases—subject to many limitations and conditions—are permitted, “[n]otwithstanding the provisions of section 524(e),” 11 U.S.C. 524(g)(4)(A)(ii).

The specific and carefully circumscribed authorization in Section 524(g) provides a dramatic contrast to the Sackler release. Section 524(g)'s authorization for the injunction of claims between nondebtors applies solely to bankruptcies involving claims based on asbestos exposure, and only covers claims that allege liability for “the conduct of, claims against, or demands on the debtor” by reason of four specified types of legal relationships with the debtor, 11 U.S.C. 524(g)(4)(A)(ii). The Sackler release is not so cabined; it extinguishes “all civil claims * * * that relate in any way to the operations of Purdue,” J.A. 637, and it reaches third parties' direct claims against nondebtors based on those nondebtors' *own* conduct, including fraud and willful misconduct. See p. 27, *supra*.

Significantly, Section 524(g) provides substantive protection for the value of released claims by conditioning the release of claims on the creation of a trust that “will value, and *be in a financial position to pay*, present claims and future demands that involve similar claims in substantially the same manner.” 11 U.S.C. 524(g)(2)(B)(ii)(V) (emphasis added). By contrast, the Sackler release provides no compensation specific to

the direct claims against the Sacklers and other third parties. See J.A. 562-563, 704; see also J.A. 911 (Wesley, J., concurring in the judgment).

Section 524(g) also incorporates stringent procedural requirements for the protection of affected claimants, such as requiring the court to “appoint[] a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands” covered by the release. 11 U.S.C. 524(g)(4)(B)(i); see 11 U.S.C. 524(g)(2)(B)(ii)(IV), (4)(A)(ii), (4)(B), and (5) (specifying additional protections). No such representative was appointed here. See J.A. 478.²

When it enacted Section 524(g), Congress included a “rule of construction,” which stated that “[n]othing in [Section 524(g)], or in the amendments made by [its addition to the Bankruptcy Code], shall be construed to modify, impair, or supersede any other authority the

² When the House Judiciary Committee recommended the enactment of Section 524(g) in 1994, it explained that asbestos-related bankruptcies had posed a unique problem because of the “long latency period” of asbestos-related diseases, which created a need to address large numbers of claims “against the emerging debtor company” by future claimants whose “disease had not yet manifested itself.” H.R. Rep. No. 835, 103d Cong., 2d Sess. 40 (1994) (1994 House Report). The Committee recognized that “two pioneering cases” involving asbestos manufacturers Johns-Manville and UNR had established a trust that could pay future claims and enjoined certain suits by future claimants after the debtor emerged from bankruptcy, but that the legal validity of that mechanism was uncertain. *Id.* at 41. The Committee “concluded” that “creating greater certitude regarding the validity of the trust/injunction mechanism must be accompanied by explicit requirements” that satisfy “high standards with respect to regard for the rights of claimants, present and future.” *Ibid.* As discussed above, the Sackler release does not satisfy the high standards included in Section 524(g).

court has to issue injunctions in connection with an order confirming a plan of reorganization.” Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4117 (11 U.S.C. 524 note). Congress thus cautioned against reading the provision as either a rejection or a ratification of any separate authority under the Code to enjoin some third-party actions. But the inherently narrow nature of the “trust/injunction mechanism” that Congress adopted, 1994 House Report 41, is conspicuous. The failure of the Sackler release to comply with several of Section 524(g)’s substantive and procedural requirements, along with the absence of any express exception to Section 524(e) outside the context of asbestos trusts, supports the conclusion that the Code does not authorize the Sackler release.

B. The Court Of Appeals Misread This Court’s Decision In *Energy Resources* And Misconstrued The Limits On Traditional Equitable Authority

The court of appeals concluded that Sections 105(a) and 1123(b)(6), taken together, mean that the equitable power of a court sitting in bankruptcy to approve other plan provisions “is limited only by what the Code expressly forbids, not what the Code explicitly allows.” J.A. 878. Under that approach, a court could grant habeas relief to corporate officers in prison, grant an easement on the real property of the debtor’s neighbors, or rewrite a property settlement agreement in a divorce pending in state court, so long as it found such actions to be “appropriate” in ensuring the debtor’s successful reorganization. 11 U.S.C. 1123(b)(6). That sweeping interpretation cannot be justified.

1. Rather than undertaking the textual or structural analysis discussed in Part II.A, *supra*, the court of appeals rested its interpretation almost exclusively on this

Court's description of Section 1123(b)(6) as "grant[ing] bankruptcy courts a 'residual authority.'" J.A. 877 (quoting *Energy Resources*, 495 U.S. at 549) (emphasis omitted). The quoted case, *Energy Resources*, involved a plan provision directing that a debtor's payments to the Internal Revenue Service (IRS), one of its creditors, be applied, by the IRS, against one tax liability of the debtor rather than another. 495 U.S. at 548. In determining that the Code authorized the plan provision, this Court did describe Section 1123(b)(6) as reflecting "residual authority" of the bankruptcy courts. *Id.* at 549. But it was careful to note that the statutory provision was "consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Ibid.* That residual power to approve plan provisions that "modify creditor-debtor relationships," *ibid.* (emphasis added), provides no justification for approving provisions that modify relations between nondebtors and other nondebtors. See J.A. 911 (Wesley, J., concurring in the judgment) ("[*Energy Resources*] says nothing about a nondebtor's obligations under the Bankruptcy Code whatsoever.").

In addition, the Court in *Energy Resources* determined that ordering the IRS as creditor to categorize the debtor's payment in a specific manner was "wholly consistent" with the Code and applicable tax statutes and therefore did not "transgress[] any limitation on the[] broad power" to modify creditor-debtor relationships. 495 U.S. at 551. Accordingly, the decision offers no support for the invocation of residual authority to alter relationships in a way that would conflict with the Code's text, context, purposes, and history—including by terminating claims for fraud that could not be dis-

charged had the Sacklers individually filed for bankruptcy. See p. 27, *supra*.

2. Even apart from its disregard for that key limitation, the court of appeals separately erred in interpreting Section 1123(b)(6) as a “bottomless” well of residual authority. J.A. 911 (Wesley, J., concurring in the judgment). A court’s equitable authority in bankruptcy is not “unlimited”; it instead “incorporate[s] the traditional standards in equity practice.” *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019); see *Energy Resources*, 495 U.S. at 549 (invoking residual authority “consistent with the traditional understanding” of the role of bankruptcy courts “as courts of equity”). But, as Judge Wesley pointed out, the court of appeals “majority d[id] not liken the equitable authority [it] recognized * * * to anything traditionally recognized at equity.” J.A. 913.

That omission is revealing: As this Court explained when considering a permanent injunction of a state-law suit brought by a group of nondebtors, exercising power “over a solvent [entity] not in reorganization” requires “an extension of [a court’s] traditional powers” in bankruptcy. *Callaway*, 336 U.S. at 148. “To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a default rule not of flexibility but of omnipotence.” *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999) (citation and internal quotation marks omitted).

That is particularly so because, in traditional equity practice, injunctions did not control the rights of nonparties. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 421 (2017); see also, *e.g.*, *Scott v. Donald*, 165 U.S.

107, 115 (1897) (rejecting as contrary to “well-settled principles of equity procedure” a decree that “enjoins persons not parties to the suit”). Equity eventually developed a limited exception to the principle against resolving third parties’ rights, allowing a precursor to the modern class action. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-833 (1999). Even then, however, binding a nonparty without its consent required a limited fund “with a definitely ascertained limit”; demanded that “the whole of the inadequate fund” be distributed to the claimants; and applied only to the nonparty’s rights against a particular body of property while “[leaving] unaffected the personal claims of nonappearing members against the debtor.” *Id.* at 839, 841, 844 n.21 (citation omitted); see *id.* at 836-841. The release here—which applies to *in personam* claims and does not require the Sacklers and other released individuals to dedicate their entire estate to satisfying the third parties’ claims—contravenes those historical requirements. Under this Court’s “traditionally cautious approach to equitable powers,” the “substantial expansion of past practice” that would be necessary to allow the Sackler release should be left “to Congress.” *Grupo Mexicano*, 527 U.S. at 329.

The startling breadth of the power inferred by the court of appeals majority also cuts against its reading. Indeed, “the idea that bankruptcy courts can order the involuntary release of direct claims against nondebtors is an extraordinary thing that is different from what courts ordinarily do.” J.A. 913 (Wesley, J., concurring in the judgment) (citation, ellipsis, and internal quotation marks omitted). “Even when sitting as a court in equity, [courts] have no authority to craft a ‘nuclear weapon’ of the law.” *Grupo Mexicano*, 527 U.S. at 332;

see 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 19, at 21 (1836) (rejecting the view that a court of equity in England possessed “unbounded jurisdiction” to “superced[e] the law” and “free[] itself from all regard to former rules and precedents,” because that would “place the whole rights and property of the community under the arbitrary will of the Judge”). In reaching the contrary conclusion, the court of appeals mistook the bounds of bankruptcy courts’ equitable authority.

3. The court of appeals recognized that third-party releases pose a “heightened potential for abuse,” and it therefore purported to allow them ““only in rare cases.”” J.A. 885-886 (citation and internal quotation marks omitted). In fact, however, the seven-factor test adopted by the court of appeals would *lower* the standards set by other circuits that have allowed nonconsensual releases. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir.) (finding authority to issue nondebtor injunction where plan “provi[ded] for payment in full” for the claimants affected by the injunction), cert. denied, 493 U.S. 959 (1989). The court of appeals explicitly rejected a requirement that nondebtors be fully compensated for the released claims against the Sacklers, requiring only a “fair resolution of the enjoined claims.” J.A. 889. It then found that the Sackler release reflects a “fair” resolution, J.A. 895-896, even though it would extinguish individuals’ claims “without providing them any value in return,” J.A. 911 (Wesley, J., concurring in the judgment); see pp. 33-34, *supra*.

The court of appeals’ test includes factors such as whether “the scope of the releases is appropriate” and whether the nondebtors “contributed substantial assets to the reorganization.” J.A. 888. Those amorphous re-

quirements are insufficient to replace the guardrails supplied by specific statutory limits. And they jettison the limits on traditional equitable authority, replacing them with the individual “notions and conscience” of the judge deciding the bankruptcy case. 1 Story, *Commentaries on Equity Jurisprudence* § 19, at 21. Further underscoring the malleable nature of its test, the court did not specify the weight to be given to any factor, nor what a court should do if it determines that some factors are not satisfied. See J.A. 887-890. And the court suggested that “there may even be cases in which all factors are present, but the inclusion of third-party releases in a plan of reorganization should not be approved.” J.A. 889. The fact that “it is difficult to give precise content” to many of the court’s factors “threatens to turn a ‘rare case’ exception into a more general rule.” *Czyzewski*, 580 U.S. at 469; see *id.* at 470.

In any event, “Congress did not authorize a ‘rare case’ exception,” *Czyzewski*, 580 U.S. at 471, to the principle that only a debtor’s debts may be discharged under the Code. And the error of the court of appeals’ approach is well illustrated by its decision to craft a multifactor test, entirely unmoored from the Code’s text, to determine which nonconsensual third-party releases are permissible. Where Congress specifically authorized the discharge of claims against nondebtors, it provided detailed limits on that power. See pp. 33-35, *supra*. The court of appeals’ judicial freewheeling to place ostensible limits on the “extraordinar[y]” power, J.A. 904 (Wesley, J., concurring in the judgment), that it inferred from the Code’s residual provisions is no substitute for Congress’s reticulated judgments.

C. Constitutional Avoidance Counsels Against Nonconsensual Third-Party Releases

1. Even if Section 1123(b)(6) were susceptible to the court of appeals' interpretation (and it is not), it does not provide a sufficiently clear authorization to support nonconsensual third-party releases in light of the serious constitutional questions raised by that interpretation. "[A] cause of action is a species of property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). And if Congress "wishes to significantly alter * * * the power of the Government over private property," it must "enact exceedingly clear language." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-1850 (2020). The Sackler release extinguishes third parties' causes of action. That nonconsensual extinguishment has res judicata effect. See *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151-154 (2009). It thus unquestionably effectuates an alteration in the government's power over private property. But neither Section 105(a) nor Section 1123(b)(6) contains the exceedingly clear language required to sustain that result.

This Court will not "construe the [Code] in a manner that could in turn call upon the Court to resolve difficult and sensitive" constitutional questions if a construction that would avoid those questions is "fairly possible." *United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982) (citations omitted). Yet the Sackler release permanently extinguishes Purdue-related opioid claims against the Sacklers and other nondebtors without the affirmative consent of the affected claimants and without an opportunity for an objecting claimant to opt out of the release. In that way, it contravenes the "deep-rooted historic tradition that everyone should have his

own day in court.” *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (citation omitted).

Even in the context of class actions, which are specifically designed to facilitate the mass resolution of claims, “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). And even when considering a limited-fund theory, this Court has recognized the “serious constitutional concerns that come with any attempt to aggregate individual tort claims” without the claimants’ consent, which caused it to adopt a narrow reading of the Federal Rule of Civil Procedure authorizing mandatory limited-fund class actions. *Ortiz*, 527 U.S. at 845; see *id.* at 845-848.

2. In approving the Sackler release, the court of appeals took the view that constitutional requirements were satisfied by notice of the bankruptcy court’s hearing about plan confirmation and an opportunity to be heard, even “without an ability to opt-out.” J.A. 898; see J.A. 896-899. But the mere opportunity to voice an objection to a release that will nonetheless extinguish one’s claims even in the absence of consent does not resolve constitutional concerns. Cf. *Ortiz*, 527 U.S. at 849 & n.27 (recognizing that “a fairness hearing” in the class-action context does not resolve concerns about the rights of individual class members who are “‘presented with what purports to be a binding *fait accompli*, with the only recourse a likely futile objection’”) (citation omitted).

For their part, debtors have suggested (Stay Opp. 57) that any constitutional-avoidance argument is defeated by 11 U.S.C. 524(g), which specifically authorizes a limited release of claims against certain nondebtors

related to asbestos exposure. But the analysis for Section 524(g) is different in important ways. As an initial matter, the key point is that substantial *questions* about constitutionality exist, requiring a clear statement from Congress to authorize nonconsensual third-party releases. Section 524(g) expressly and clearly authorizes releases in narrow circumstances, making the constitutional-avoidance canon inapposite.

Moreover, there are significant substantive differences between the narrow releases authorized by Section 524(g) and the sweeping Sackler release. Section 524(g), which aims to address the long latency of asbestos disease that prevents all claimants from being identified at the time of the bankruptcy, channels future claims to a trust that is designed to provide similar value to current and future claimants. See 1994 House Report 40-41. Channeling property rights in that way is a different proposition than extinguishing some claimants' property rights for the benefit of others. In addition, Section 524(g) releases only claims against the debtor or claims "for" the debtor's conduct, which typically belong to the estate, reducing its effects on non-debtors' property rights. See p. 33, *supra*; see also, *e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004) (interpreting Section 524(g) to "limit[]" the third-party injunction to situations "where a third party has derivative liability for the claims against the debtor"). And Section 524(g) imposes stringent procedural requirements to protect the rights of absent parties. It is therefore "a special remedial scheme" that "*expressly* forecloses successive litigation by nonlitigants" and so may "terminate preexisting rights if the scheme is otherwise consistent with due process." *Martin*, 490 U.S.

at 762 n.2 (emphasis added); see *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008).

In short, the existence of Section 524(g)'s tailored release power does not eliminate "substantial doubt," *Security Indus. Bank*, 459 U.S. at 78, about the constitutionality of extinguishing third-party rights without Section 524(g)'s protections, without express Congressional approval, and in a far broader array of circumstances. Because neither Section 105(a) nor Section 1123(b)(6) "must necessarily be applied" in a manner that authorizes the Sackler release, the court of appeals' construction of those provisions to allow third-party releases must be rejected. *Ibid.*

D. Policy Considerations Support The U.S. Trustee's Reading

In the lower courts and at the stay stage in this Court, the plan proponents raised an array of policy arguments in support of the Sackler release. But this Court has repeatedly rejected attempts to stretch Bankruptcy Code provisions based on general notions that a certain result would be "in the best interests of all creditors and debtors." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); see, e.g., *Czyzewski*, 580 U.S. at 471.

To the extent they are relevant, however, considerations of the public interest weigh strongly in favor of the U.S. Trustee's reading of the Bankruptcy Code. As this case reveals, nonconsensual third-party releases enable tortfeasors to obtain legal immunity from the claims of their victims, including for claims that could not be discharged if the tortfeasors underwent bankruptcy, and to do so without subjecting themselves to the obligations imposed by the Bankruptcy Code. The court of appeals' decision is a roadmap for corporations and

wealthy individuals to misuse the bankruptcy system to avoid mass-tort liability. Such releases deprive tort victims of their day in court without consent. And they erode public confidence in the bankruptcy system, which Congress established to restructure a debtor's relationship with its creditors in a case of true financial distress—not to resolve mass-tort liability against non-debtors by terminating claims belonging to other non-debtors.

Equally troubling, nonconsensual third-party releases permit tortfeasors to choose what portion of their non-exempt assets to give up in exchange for full repose (including repose from claims based on fraud), defying the basic *quid pro quo* at the heart of the Code. The history of this case illustrates that problem. The bankruptcy court initially confirmed the plan with a \$4.325 billion contribution from the Sacklers, an amount that was touted by plan proponents as “the best available” to creditors “by a very wide margin,” D. Ct. Doc. 151, at 36 (Nov. 15, 2021)—despite the fact that it left billions of dollars in the Sacklers' hands and included less than half of the amount that the Sacklers had siphoned from Purdue in the years before these Chapter 11 proceedings. But after the district court concluded that the Code does not authorize the Sackler release and vacated the order confirming the plan, the Sacklers reached a new agreement with debtors, eight objecting States, and the District of Columbia to pay up to an additional \$1.675 billion (*i.e.*, 39% more) in exchange for those objectors' agreement not to oppose the release. See States of California et al. Stay Resp. 1; pp. 7-8, *supra*. Basic principles of fairness forbid nonconsenting claimants from being forced to forgo their claims against the Sacklers while the Sacklers retain much of their for-

tune. Cf. *Ortiz*, 527 U.S. at 821 (holding that certification of a mandatory settlement class on a limited-fund theory requires a showing “that the fund is limited by more than the agreement of the parties”).

Indeed, a decision endorsing the legality of the Sackler release would predictably make the terms of subsequent releases even less favorable to tort victims by further redistributing bargaining power to deep-pocketed tortfeasors participating in bankruptcy proceedings from the sidelines. Before now, “perceived legal uncertainty” created some “incentives” to protect the rights of claimants, 1994 House Report 41—as shown by the additional \$1.675 billion that the Sacklers agreed to pay *after* the district court’s vacatur. If this Court holds that nonconsensual releases are unavailable, tortfeasors will have to continue to provide substantial compensation to claimants in exchange for consensual releases. By contrast, if this Court authorizes the extinguishment of some nondebtors’ claims by a vote of other nondebtors, the amounts paid by nondebtor tortfeasors in future bankruptcies will likely be lower—with a commensurate reduction in benefits to future bankruptcy estates.

The third-party releases authorized by the decision below further threaten the public interest because they permit courts to extinguish rights in private property that is not part of the bankruptcy estate. And the power to terminate claims without consent goes beyond claims belonging to private citizens to those held by sovereigns, including States, Indian Tribes, and the federal government. One bankruptcy court recently confirmed—over the objections of the U.S. Trustee, the SEC, and the United States—a reorganization plan purporting to exculpate nondebtors from future civil

and even criminal claims belonging to the United States. See *In re Voyager Digital Holdings, Inc.*, 649 B.R. 111 (Bankr. S.D.N.Y. 2023), appeal pending, No. 23-cv-2171 (S.D.N.Y. June 8, 2023). In defending that ruling, the plan proponents in that case have already invoked the decision below, relying specifically on its expansive reading of Section 1123(b)(6). See Debtors Citation of Supplemental Authority at 1, *In re Voyager Digital Holdings, Inc.*, No. 23-cv-2171 (S.D.N.Y. June 8, 2023).

Nor have the plan proponents presented a compelling need for such releases. They have pointed to the challenges associated with resolving mass-tort litigation. See, *e.g.*, Debtors Stay Opp. 29. But there is little reason to think that nonconsensual third-party releases are the only solution. In a prominent recent example, a bankruptcy court rejected another effort to use the bankruptcy system to resolve mass-tort liability, and the parties promptly reached a tentative settlement to resolve over 300,000 lawsuits through the tort system itself. See Jef Feeley & Ryan Beene, Bloomberg Law News, *3M Agrees to Pay More Than \$5.5 Billion Over Military Earplugs* (Aug. 27, 2023); see also *In re Aearo Techs. LLC*, No. 22-2890, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023); Canadian Creditors Stay Resp. 11-12 (discussing the *Aearo* case).

Similarly, when mass-tort-related bankruptcies have arisen in circuits that do not permit nonconsensual non-debtor releases, some debtors have still included third-party releases with the consent of the releasing claimants. See, *e.g.*, Bankr. Ct. Doc. 6353, at 37-38, *In re PG&E Corp.*, No. 19-30088 (Bankr. N.D. Cal. Mar. 17, 2020) (providing for consensual releases from claim holders who opted in to granting releases to third par-

ties). In the case of a consensual release, “it is the parties’ agreement that serves as the source of the court’s authority” to enter provisions binding on the agreeing parties. *Lawyer v. Department of Justice*, 521 U.S. 567, 579 n.6 (1997) (citation omitted); see *Sturgell*, 553 U.S. at 893 (“[A] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement.”) (citation omitted). Cf. *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 674 (2015) (“[L]itigants may validly consent to adjudication by bankruptcy courts.”). Here, too, the Sacklers were able to obtain consent from the holders of some of the most significant direct claims against them—those brought by the States and the District of Columbia—by providing sufficient compensation that those claimants viewed consenting to the release to be in their interest. There is therefore no compelling policy-based argument to infer the power to impose nonconsensual third-party releases in contravention of the Code’s text, context, purposes, and history.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 11 U.S.C. 105 provides:

Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such con-

(1a)

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ference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

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2. 11 U.S.C. 307 provides:

United States Trustee

The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

3. 11 U.S.C. 523(a) provides:

Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

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(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than \$500¹ for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than \$750¹ that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

¹ See Adjustment of Dollar Amounts notes below.

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(ii) for purposes of this subparagraph—

(I) the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

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(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or non-profit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in

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which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5)

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that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

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(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(19) that—

(A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney

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fee, cost, or other payment owed by the debtor;
or

(20) for injury to an individual by the debtor relating to a violation of chapter 77 of title 18, including injury caused by an instance in which the debtor knowingly benefitted financially, or by receiving anything of value, from participation in a venture that the debtor knew or should have known engaged in an act in violation of chapter 77 of title 18.

For purposes of this subsection, the term “return” means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

4. 11 U.S.C. 524 provides in pertinent part:

Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employ-

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ment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * * * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

* * * * *

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the pur-

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pose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such

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plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties

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pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to

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any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such in-

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junction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term “related party” means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

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- (aa) the debtor;
- (bb) a past or present affiliate of the debtor; or
- (cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term “demand” means a demand for payment, present or future, that—

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(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

* * * * *

5. 11 U.S.C. 727 provides:

Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

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(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

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(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

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(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

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(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

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(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

6. 11 U.S.C. 1123 provides:

Contents of plan

(a) Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

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(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

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(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

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(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;
or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide

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for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

7. 11 U.S.C. 1141 provides:

Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, eq-

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uity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

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(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;

(ii) modification of the plan under section 1127 is not practicable; and

(iii) subparagraph (C) permits the court to grant a discharge; and

(C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) may be applicable to the debtor; and

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- (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B);

and if the requirements of subparagraph (A) or (B) are met.

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

- (i) made a fraudulent return; or
- (ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

No. 23-124

IN THE

Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES
TRUSTEE, REGION 2

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**AMICI CURIAE BRIEF OF MARTIN J.
BIENENSTOCK AND DANIEL S. DESATNIK IN
SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

Amici curiae, Martin Bienenstock and Daniel Desatnik, are two practitioners of bankruptcy law at Proskauer Rose LLP. Martin Bienenstock also teaches corporate reorganization at Harvard Law School, University of Michigan Law School, and University of Pennsylvania Carey Law School. This brief represents only the views of amici, and not the views of any of their employers.

Amici and their law firm have no client or other direct or indirect interest in the outcome of this case, other than amici's interest in the practice and development of business bankruptcy law to which they have devoted their entire respective careers to date, forty-six and eight years.

Amici submit this brief pursuant to Supreme Court Rule 37.1 to bring to the Court's attention highly relevant matter in respect of whether the Bankruptcy Code authorizes coerced releases of claims held by nondebtors against other nondebtors.

Specifically, amici discuss why the question presented is controlled by and must be analyzed in the context of whether the Constitution grants Congress the bankruptcy power to authorize coerced releases, and if so, whether they violate the fundamental right to sue, procedural and substantive due process, and the separation of powers principle. For whatever reason, each of these issues has been totally ignored or given short shrift by the lower courts and litigants in

¹ No attorney for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to its preparation or submission.

this case and in the other jurisprudence and literature addressing coerced releases. Each of these issues independently demonstrates coerced releases are unconstitutional. Therefore, the constitutional avoidance canon corroborates the most plausible interpretation of the Bankruptcy Code, namely that it does not authorize coerced releases.

SUMMARY OF ARGUMENT

It is common ground that if the Bankruptcy Code authorizes coerced releases, section 1123(b)(6)² is the section that does so. It provides a chapter 11 plan may include any “appropriate provision not inconsistent with the applicable provisions of” the Bankruptcy Code. The Bankruptcy Code conditions the granting of discharges on an elaborate set of requirements in both chapter 7 (liquidation) and chapter 11 (reorganization) cases. Coerced releases satisfy none of them.

For instance, chapter 7 and 11 debtors must file under oath statements of all their assets, liabilities, and pre-bankruptcy transfers. That way, creditors and the court can determine if a debtor’s assets are accounted for and fairly distributed in accordance with the Bankruptcy Code’s distribution scheme and the Constitution. In contrast, coerced releases allow the released persons, without filing such disclosures, to retain unknown and unlimited assets for themselves and to pay their personal creditors in full. But their creditors who are also the debtor’s creditors only receive value constituting undetermined fractions of their claims. Moreover, even though the debtor’s creditors have independent state law claims against the Sackler family, the chapter 11 plan forces the debtor’s creditors to share value from the Sacklers in the same proportion as their claims against the debtor, rather than in proportion to their claims against the Sacklers. While Bankruptcy Code section 502(a) allows any creditor to object to other creditors’ claims against

² 11 U.S.C. § 1123(b)(6).

the debtor, no creditor is allowed to litigate their own or other creditors' claims against the Sackler family. So whether the value allocation of the Sackler family payment is even rough justice is unknown.

That just scratches the surface of the list of inconsistencies, which is why the district court below ruled the Bankruptcy Code does not authorize coerced releases.³ That should end the inquiry, except the court of appeals below and other courts of appeal have ruled to the contrary without considering the inconsistent provisions. Some say a release is not a discharge. That is the ultimate distinction without a difference.

The bulk of this brief is devoted to explaining how the constitutional avoidance canon clinches the answer by corroborating the most plausible interpretation of the Bankruptcy Code, namely that it does not authorize coerced releases.

As a threshold matter, the inquiry as to whether the Bankruptcy Code authorizes coerced releases must start with whether the Constitution grants Congress the bankruptcy power to enact bankruptcy laws authorizing the coerced releases at issue here. It does not. This Court has already ruled the bankruptcy power cannot violate fundamental rights, and acknowledged the right to sue is a fundamental right. The courts holding bankruptcy jurisdiction includes power to order coerced releases erroneously start their analyses with 28 U.S.C. § 1334(b) granting subject matter jurisdiction over all civil proceedings "related

³ *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023).

to” the case.⁴ This Court has observed the choice of those words “suggests a grant of some breadth.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). Not realizing Congress cannot grant courts power not granted to it by the Constitution, leads some courts to treat bankruptcy courts as having virtually unlimited power thinking they can order anything “related to” the case.

Coerced releases also violate other Constitutionally protected rights. In violation of the Fifth Amendment’s just compensation requirement, they take an entity’s claim without a valuation of the claim and without a valuation of what the entity receives for it.

Coerced releases also violate procedural due process by allowing the released Sacklers to retain assets and to pay their personal creditors in full, while paying other creditors fractionally, thereby creating an unfair and unreasonable distribution scheme not otherwise allowed by the Bankruptcy Code or the Constitution.

And, coerced releases violate the separation of powers principle in several ways. Congress would be authorizing the judicial branch to jettison creditors’ rights to outcomes determined by trial by jury and

⁴ For instance, *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 624-26 (9th Cir. 1989), ruled that while the bankruptcy court has subject matter jurisdiction to impose third party releases because they are related to the chapter 11 case, they do not have the power pursuant to Bankruptcy Code section 105(a) to grant a release of a creditor’s guarantor because that would run afoul of Bankruptcy Code section 524(e). *In re Am. Hardwoods, Inc.*, 885 F.2d at 627.

common law, and to impose novel, non-common law remedies. Neither the legislative nor the judicial branch can do this, even with consent of the judicial branch.

ARGUMENT

I. THE BANKRUPTCY POWER DOES NOT AUTHORIZE CONGRESS TO ENACT LAWS ALLOWING COERCED RELEASES.

Article I, Section 8, Clause 4 of the United States Constitution authorizes Congress to establish “uniform laws on the subject of Bankruptcies throughout the United States,” and is referred to herein as the “Bankruptcy Power.” If Congress is empowered to authorize coerced releases in the Bankruptcy Code, the authorization must come from its Bankruptcy Power. Article I, Section 8 of the Constitution does not grant Congress any other power even remotely enabling Congress to authorize coerced releases.

The decision below,⁵ neither identifies nor considers the rights the coerced releases take away (the “Lost Rights”). The legality of coerced releases, how-

⁵ *Purdue Pharma, L.P. v. City of Grande Prairie (In re Purdue Pharma L.P.)*, 69 F.4th 45 (2d Cir. 2023), cert. granted, *Harrington v. Purdue Pharma L.P.*, No. 23-124, 2023 WL 5116031 (2023) (“*Purdue Pharma*”).

ever, can only be ascertained by determining the constitutionality of extinguishing each Lost Right. The Lost Rights include:

1. Loss of the right to sue the released party for money damages.
2. Loss of the right to a judgment determined by the common law.
3. Loss of the right to enforce the judgment against the released party.
4. Loss of the right to discover the released party's assets in enforcement proceedings.
5. Loss of the judicial branch' right and power to determine a creditor's common law claims against the released party and to determine the common law remedy.
6. Loss of the right to jury trial.
7. Forfeiture to the judicial branch of the legislative branch' power to legislate rules governing coerced releases.⁶

⁶ We attribute this brief's identification of the Lost Rights and issues to a chemistry lab teacher in at Horace Mann School in 1967. Dr. Albert J. Kroner handed a short candle to each student and instructed them to write lists of all possible observations. Most wrote ten to twenty observations. Dr. Kroner identified thirty six.

Loss of the first five Lost Rights is loss of the fundamental right to sue. This Court made clear in *Crandall v. Nevada*⁷ and the *Slaughter-House Cases*⁸ that “every citizen of the United States . . . is entitled to free access . . . to its judicial tribunals . . . in every State in the Union.”⁹ Intuitively, this makes sense because no right, whether a property right or liberty right, has meaning if it cannot be judicially enforced.¹⁰ Likewise, the Constitution’s Privileges and Immunity clause¹¹ expressly grants citizens of every state the privileges and immunities of citizens of the other states, which includes the right to sue in each state’s courts.

In 1823, in response to a claim made under the Privileges and Immunity clause, the circuit court in

⁷ *Crandall v. Nevada*, 73 U.S. 35, 48 (1867).

⁸ *Slaughter-House Cases*, 83 U.S. 36, 79 (1873).

⁹ *Crandall*, 73 U.S. at 48 (quoting unopposed *dicta* from Chief Justice Taney’s dissent in the *Passenger Cases*, 48 U.S. 283, 492 (1849)).

¹⁰ When Chief Justice Marshall, in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), was confronted with the issue whether a person commissioned by the president of the United States as a justice of peace had a remedy if the signed commission was not delivered to him, Marshall declared the power of the judiciary branch over the legislative and executive branches. He started by quoting Blackstone’s statement of the law in England, saying “it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

¹¹ U.S. Const., art. IV, § 2, cl. 1 (“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”).

Corfield v. Coryell ruled the privileges and immunities of citizens in all states were “fundamental; which belong, of right, to the citizens of all free governments.”¹² Alongside the right of *habeas corpus*, the circuit court identified as a fundamental right protected by the Privileges and Immunity clause, the right “to institute and maintain actions of any kind in the courts of the state”¹³ The right to sue and defend is fundamental because it is the alternative to force and lies at the foundation of orderly government.¹⁴ This Court has cited *Corfield* with approval

¹² See *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (issue was whether right of state’s residents to oysters from state’s waters was a privilege and immunity of citizens of all states, and court ruled it was not because it was not a fundamental right to share in the property collectively owned by citizens of another state); *Ward v. Maryland*, 79 U.S. 418, 430 n.12 (1870), cites with approval Professor Thomas Cooley’s treatise, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. Boston: Little, Brown & Co. 1871), which cites *Corfield* for the proposition in the text.

¹³ *Corfield*, 6 F. Cas. at 551-52. This Court cites these pages of *Corfield* as “describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, §2, as those ‘fundamental’ rights ‘which have, at all times, been enjoyed by the citizens of the several states.’” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 n.22 (2022).; see *Slaughter-House Cases*, 83 U.S. at 75-76 (refers to *Corfield* as leading case on Privileges and Immunities issue).

¹⁴ *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

and articulated and reaffirmed this fundamental principle several times,¹⁵ and confirmed these fundamental rights are protected by the Constitution.¹⁶ Fundamental rights and liberties are “deeply rooted in this Nation’s history and tradition.”¹⁷ The United States has a “deep-rooted historic tradition that everyone should have his own day in court.”¹⁸ This Court has ruled the right to enjoy property without unlawful deprivation is a personal right no less than liberty rights such as the rights to speak and travel.¹⁹ As a practical matter, no property or other legal right has substance if its owner cannot enforce it in court or with legal self-help. This Court concludes personal rights to liberty and personal rights in property have no meaning without each other.²⁰

This brief would end here if Congress has no power to intrude on the people’s fundamental rights, including the right to sue, protected by the Constitution. But, it does. Chief Justice John Marshall, ruled Congress can impact fundamental rights when acting

¹⁵ See, e.g., *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990) (quoting *McKnett v. St. Louis & S.F. R. Co.*, 292 U.S. 230, 232 (1934)); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 560 (1920).

¹⁶ *Jones v. Helms*, 452 U.S. 412, 418-19 (1981).

¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977)).

¹⁸ *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981)).

¹⁹ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

²⁰ *Id.*

pursuant to a power expressly given for national purposes, or a power clearly incidental²¹ to some power expressly given.²² Indeed, it is virtually unchallenged that bankruptcy courts can *temporarily* enjoin creditors and shareholders from suing third parties needed to effectuate a reorganization.²³ Thus, the question becomes whether the Bankruptcy Power or a power incidental to it includes the power to deprive persons *permanently* of their fundamental right to their day in court.

This Court has articulated neither every component of the Bankruptcy Power granted to Congress

²¹ U.S. Const. art. I, § 8, cl. 18 (Congress has the power “[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”).

²² *Gibbons v. Ogden*, 22 U.S. 1, 203-04 (1824); *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819) (“When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.”).

²³ See, e.g., *Caesars Ent. Operating Co. v. BOKF, N.A. (In re Caesars Ent. Operating Co.)*, 808 F.3d 1186 (7th Cir. 2015); *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1094-95 (9th Cir. 2007); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5th Cir. 1995); *In re W. Real Est. Fund, Inc.*, 922 F.2d 592, 601-02 (10th Cir. 1990);

nor every limitation on the Bankruptcy Power²⁴ consistent with Article III, Section 2 of the Constitution providing the judicial power of the United States only extends to actual cases and controversies, not to advisory opinions.²⁵

But, this Court has consistently ruled fundamental rights are protected in bankruptcy. It has ruled “Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law.”²⁶ Here, the chapter 11 plan did exactly what the Bankruptcy Power cannot do – discharged the Sacklers without providing trials of creditors’ claims against them. This Court has explained that while English law does not generally constrain the Constitution, English law’s protections of fundamental

²⁴ See, e.g., *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-516 (1938) (footnotes omitted) (“The subject of bankruptcies is incapable of final definition. The concept changes. It has been recognized that it is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution. An adjudication in bankruptcy is not essential to the jurisdiction. The subject of bankruptcies is nothing less than ‘the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.’ This definition of Judge Blatchford, afterwards a member of this Court, has been cited with approval here.”); *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 186 (1902).

²⁵ See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation*, 454 U.S. 464, 475-76 (1982); *Camreta v. Greene*, 563 U.S. 692, 701 (2011).

²⁶ *Hanover Nat’l Bank*, 186 U.S. at 192.

rights continue to protect the fundamental right to trial:

Certainly, these rules [English law] have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring v. Clarke, supra*), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the *Sixth* and *Seventh Amendments*, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted.²⁷

Consistent with protecting the fundamental right to trial, the Supreme Court has shown the Bankruptcy Power is subject to the constitutional right to

²⁷ *Cont'l Ill. Nat'l Bank & Tr. Co. v. Chicago, R. I. & P. R. Co.*, 294 U.S. 648, 669 (1935). Trial by jury requires trial by jury as understood in 1789 under English law when the Judiciary Act was enacted (citing *Patton v. United States*, 281 U.S. 276, 288, 301 (1930) “(1) [t]hat the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.”)).

jury trial in instances where it applied in England in 1789.²⁸ The Bankruptcy Power has never been held to allow violation of fundamental rights.

In 1949, this Court confronted the issue as to whether the United States district court sitting in bankruptcy could determine whether the owner of tracks formerly leased to the debtor-railroad was validly authorized by its shareholders to sell its tracks to the debtor which the debtor had negotiated to purchase so it could stay in business post-reorganization.²⁹ Some of the track owner's shareholders contended the sale required unanimous shareholder consent, not simply majority consent. This Court ruled the Bankruptcy Power unquestionably gives the bankruptcy court power over the debtor, its property, and all rights asserted against it, but the debtor's purchase of formerly leased property from a non-Title 11 debtor does not involve rights asserted against the debtor and therefore the relief requested was outside the Bankruptcy Power and governed by state law, and the district court lacked jurisdiction to order the sale.³⁰ The Supreme Court went on to observe the jurisdiction over the debtor's dispute with the solvent lessor asserted by the district court presiding over the debtor's railroad reorganization was "an extension of

²⁸ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) ("*Granfinanciera*"). With consent of the litigant, government, and court, the jury trial right can be waived because it is not jurisdictional. *Patton*, 281 U.S. at 301.

²⁹ *Callaway v. Benton*, 336 U.S. 132 (1949) ("*Callaway*").

³⁰ *Id.* at 147.

these traditional powers not justified by any provisions of the Bankruptcy Act.”³¹

The bankruptcy court in *Purdue Pharma* distinguished *Callaway* on the ground the bankruptcy court’s jurisdiction was then narrower than it is today under 28 U.S.C. § 1334(b).³² While it may have been narrower, the jurisdiction included jurisdiction to “[B]ring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy.”³³ Therefore, had the Supreme Court believed the Bankruptcy Power was broad enough to resolve the track owner’s intra-shareholder disputes, the grant of statutory subject matter jurisdiction was not an impediment. Put differently, even if Congress were to grant bankruptcy subject matter jurisdiction over creditors’ actions against shareholders, there is no basis in the jurisprudence to believe the Bankruptcy Power in the Constitution authorizes that jurisdictional grant. Additionally, the U.S. Court of Appeals for the Third Circuit ruled in *Combustion Engineering* that parties cannot create subject matter jurisdiction over a third party’s actions by rendering a reorganization plan dependent on the third party’s contributions.³⁴

³¹ *Id.* at 148.

³² *In re Purdue Pharma LP*, 633 B.R. 53, 98 (Bankr. S.D.N.Y. 2021), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021).

³³ Former Bankruptcy Act, 1898 Act § 2a(6) (1938).

³⁴ *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 228-29 (3d Cir. 2004) (“a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that

Significantly, this Court's rulings defining aspects of the Bankruptcy Power have not encompassed anything remotely akin to coerced releases or related disputes with third parties not involving the debtor's property. Rather, the rulings have focused on the relation between the debtor and creditor. Early on, this Court approved a lower court's attempt to describe the Bankruptcy Power:

“it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject -- distribution and discharge -- are in the competency and discretion of Congress.”³⁵

Thus, when discharge entails impairing contractual obligations with the debtor, the Bankruptcy Power authorizes impairment.³⁶ The Bankruptcy

it depended upon third-party contributions . . . by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.” (quoting *In re Resorts Int'l, Inc.*, 372 F.3d 154, 161 (3d Cir. 2004)).

³⁵ *Hanover Nat'l Bank*, 186 U.S. at 186 (quoting Justice Catron in *In re Klein*, decided in the Circuit Court for the District of Missouri, and reported in a note to *Nelson v. Carland*, 1 How. 265, 277 (1843)).

³⁶ *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982).

Power “would clearly encompass a federal statute defining the mortgagee’s interest in the rents and profits earned by property in a bankrupt estate.”³⁷ This Court has concluded the framers of the Constitution understood the Bankruptcy Power included more than simple adjudication of rights in the *res* of the debtor’s estate, as shown by the first bankruptcy statute authorizing the bankruptcy commissioner appointed by the district court to imprison a person in possession of estate property.³⁸ Indeed, the Bankruptcy Power encompasses the power to punish bankruptcy by death, and the framers of the Constitution did not carve out that aspect of the Bankruptcy Power because they trusted Congress not to abuse it.³⁹

Notably, the Bankruptcy Power “is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution,” and “[a]n adjudication in bankruptcy is not essential to the jurisdiction.”⁴⁰ Thus, the fact the shareholders obtaining coerced releases were not debtors in bankruptcy cases is not what renders the coerced releases unconstitutional. That Congress can render any class of unfortunate and meritorious debtors eligible for bankruptcy, even though English law restricted bankruptcy eligibility to traders, “is really not

³⁷ *Butner v. United States*, 440 U.S. 48, 54 (1979).

³⁸ *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370-71 (2006).

³⁹ *Hanover Nat’l Bank*, 186 U.S. at 187.

⁴⁰ *Wright*, 304 U.S. at 513.

open to discussion.”⁴¹ Similarly, the Bankruptcy Power authorizes Congress to allow debtors to invoke bankruptcy law voluntarily, and not only at the instance of creditors.⁴² As shown above, it is their destruction of fundamental rights that shows coerced releases are not countenanced by the Bankruptcy Power and insulated from constitutional challenges. Coerced releases have no history of having been part of bankruptcy practice in England or in the United States until being invented in the twentieth century. We have found no reported decisions suggesting the Bankruptcy Power incorporates coerced releases. *Purdue Pharma* does not mention the Bankruptcy Power.

In 1935, Charles Warren, a historian of United States legal history, authored his book, *Bankruptcy in United States History*, which describes the Bankruptcy Power deployed to that time and nowhere mentions any power to determine disputes between two entities not in bankruptcy.⁴³ This Court considered Charles Warren a “competent scholar” and attributed its landmark decision in *Erie R. Co. v. Tompkins*,⁴⁴

⁴¹ *Hanover Nat’l Bank*, 186 U.S. at 187.

⁴² *Id.* at 185.

⁴³ CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 95-159 (Harvard University Press 1935).

⁴⁴ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

overturning *Swift v. Tyson*,⁴⁵ to Warren's new research⁴⁶ of the Federal Judiciary Act of 1789⁴⁷ which *Erie* and *Swift* interpreted.⁴⁸

If the shareholders receiving coerced releases had commenced their own bankruptcy cases, the creditors would have had their day in court. They would be allowed to file and prove their claims against the shareholders' estates based on the common law and obtain fair distributions from them. The bankruptcy court trials would be nonjury trials because in England in 1789 bankruptcy was handled in the equity courts,⁴⁹ not the law courts. There is nothing in bankruptcy jurisprudential history remotely suggesting creditors can constitutionally be deprived of their fundamental trial right and liberty interest to sue the debtors' shareholders in state or federal court and to enforce whatever judgments they procure under state or federal law.

⁴⁵ *Swift v. Tyson*, 41 U.S. 1 (1842).

⁴⁶ Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

⁴⁷ 28 U.S.C. § 725 (1789).

⁴⁸ *Erie R. Co.*, 304 U.S. at 72-73.

⁴⁹ *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 689-90 (2015) (Roberts, CJ and Thomas, J., dissenting).

II. THE CONSTITUTIONAL VIOLATIONS IMPOSED BY COERCED RELEASES CORROBORATE PURSUANT TO THE CONSTITUTIONAL AVOIDANCE CANON THAT THE BANKRUPTCY CODE SHOULD NOT BE INTERPRETED TO AUTHORIZE COERCED RELEASES

If not for several appellate decisions ruling or implying the Bankruptcy Code authorizes coerced releases in various circumstances,⁵⁰ it would be easy to conclude the Bankruptcy Code does not, as shown below. Although *Millennium*⁵¹ proclaims “[t]he Bankruptcy Court indisputably had ‘core’ statutory authority to confirm the plan,”⁵² another circuit court disagrees the statute grants power to compel nonconsensual non-debtor releases.⁵³

⁵⁰ See, e.g., *In re American Hardwoods Inc.*, 885 F.2d at 624-26; *In re Ingersoll, Inc.*, 562 F.3d 856, 863 (7th Cir. 2009); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *Gillman v. Cont’l Airlines (In re Cont’l Airlines)*, 203 F.3d 203, 212 (3d Cir. 2000); *Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 66 (2d Cir. 2008), *rev’d and remanded on other grounds, Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195 (2009); *In re Drexel Burnham Lambert Grp., Inc.*, (“*Drexel*”), 960 F.2d 285, 293 (2d Cir. 1992).

⁵¹ *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019) (“*Millennium*”).

⁵² *Millennium*, 945 F.3d at 137. *Millennium*’s proclamation is easily explained and illustrates a perilous way to determine statutory authority in bankruptcy cases. Because 28 U.S.C. § 1334(b) grants federal courts subject matter jurisdiction of civil

The only sections of the Bankruptcy Code arguably authorizing coerced releases outside asbestos cases⁵⁴ are Bankruptcy Code sections 1123(b)(6) and 105(a). Section 1123(b)(6) provides a plan may include any appropriate provision not inconsistent with the applicable provisions of title 11 of the United States Code. Bankruptcy Code section 105(a) provides the court can issue any order necessary or appropriate to carry out the Bankruptcy Code.

A straight forward application of the words of Bankruptcy Code sections 105(a) and 1123(b)(6) shows they do not authorize coerced releases because the release of shareholders from creditors' claims is inconsistent with many Bankruptcy Code provisions.

proceedings “related to cases under title 11,” if one ignores that Congress can only grant jurisdiction it has from the Bankruptcy Power, it is easy to conclude coerced releases in a chapter 11 plan are “related to” plan confirmation, and therefore subject matter jurisdiction exists to approve coerced releases in a chapter 11 plan.

⁵³ *Bank of N.Y. Tr. Co., NA v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252-53 (5th Cir. 2009), held the release of entities from liability (other than for willfulness and gross negligence) for proposing, implementing, and administering a chapter 11 plan must be struck from the plan, except for the release and exculpation of the creditors' committee and its members because they have “qualified immunity for actions within the scope of their duties.” *Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419, 434-38 (5th Cir. 2022) (cert. petition pending), followed *Pacific Lumber*.

⁵⁴ Coerced releases in asbestos cases are unconstitutional for the same reasons provided in this brief, but their legality is not before the Court.

For example, Bankruptcy Code section 523(a)(2)(A) renders nondischargeable an individual debtor's debts for fraud. But, as the concurring opinion in *Purdue Pharma* explains, the Purdue Pharma chapter 11 plan releases the individual Sackler family members from "any claim 'of any kind, character[,] or nature . . . so long as the Debtors' 'conduct, omission, or liability' is . . . a legally relevant factor."⁵⁵ As a result, the concurrence concludes the Sacklers sought "a release broader than that which Congress decided was wise to make available to a debtor in bankruptcy."⁵⁶ Moreover, Bankruptcy Code section 727(a)(2)(A) deprives individual debtors of discharges if within a year of bankruptcy they transferred property with intent to hinder, delay, or defraud creditors. This Court has ruled that when a person transfers his own assets into his wholly owned corporation, the transfer is a fraudulent transfer if done to hinder and delay creditors.⁵⁷ *Purdue Pharma* acknowledges the shareholders transferred assets to spendthrift trusts and offshore accounts.⁵⁸

If a shareholder becomes a chapter 11 debtor under the Bankruptcy Code it cannot procure a discharge of claims against it without assuring creditors they receive at least what they would receive if all the shareholder's assets were liquidated in a chapter 7

⁵⁵ *Purdue Pharma*, 69 F.4th at 86 (Wesley, CJ, concurring in judgment).

⁵⁶ *Id.* at 87.

⁵⁷ *Shapiro v. Wilgus*, 287 U.S. 348 (1932).

⁵⁸ *Purdue Pharma*, 69 F.4th at 63.

case.⁵⁹ This requires disclosure and proof of the shareholder's assets and liabilities and the allowed amount of each creditor's claim. A coerced release comes with no such disclosure or proof. Curiously, one of the Second Circuit decisions opining a coerced release is authorized in rare situations, concedes "it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."⁶⁰ The concession shows coerced releases neither carry out nor are consistent with the Bankruptcy Code. Indeed, the basics of bankruptcy administration require every debtor (other than municipality debtors) to disclose its assets and liabilities within fourteen days of voluntary filings,⁶¹ which is well before a discharge is granted. The court may not grant a discharge to an individual debtor who fails to disclose all assets.⁶² The notion that courts, on an *ad hoc* basis, can issue releases to shareholders without such disclosure fosters inconsistencies with the Bankruptcy Code in violation of sections 105(a) and 1123(b)(6) and thwarts many constitutional protections including the principle that Congress may enact only uniform bankruptcy laws.⁶³

⁵⁹ 11 U.S.C. § 1129(a)(7).

⁶⁰ *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005).

⁶¹ Fed. R. Bankr. P. 1007(b)(1)(A), 1007(c).

⁶² 11 U.S.C. §§ 727(a)(3), 1141(d)(3)(C).

⁶³ This Court ruled the uniformity requirement applies to substantive and administrative bankruptcy laws. *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022).

Purdue Pharma contends that while the court’s power to release shareholders of certain claims derives from its discharge power, the releases are not discharges because they do not provide the umbrella protection of discharges.⁶⁴ Eighteen years earlier, the same appellate court had reasoned: “In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code.”⁶⁵ When it comes to individuals, their discharges in bankruptcy cases are limited by a multitude of nondischargeable claims, just as the Sacklers are released from the debtors’ creditors’ claims, but not their personal creditors’ claims.⁶⁶ Besides, the use of the discharge power to release shareholders from the only claims they are not paying in full does not rescue coerced releases from being inconsistent with the Bankruptcy Code.

Given the constitutional violations described in this brief, the interpretation of Bankruptcy Code sections 105(a) and 1123(b)(6) should also be guided by the substantive⁶⁷ constitutional-doubt canon under which a “statute should be interpreted in a way that

⁶⁴ *Purdue Pharma*, 69 F.4th at 70-71 (citing *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91 (2d Cir. 1988)).

⁶⁵ *Metromedia Fiber Network, Inc.*, 416 F.3d at 142.

⁶⁶ See 11 U.S.C. §§ 523(a)(1)-(19), 1141(d)(2).

⁶⁷ “Substantive canons are rules of construction that advance values external to a statute.” *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (footnote omitted) (Barrett, J., concurring).

avoids placing its constitutionality in doubt.”⁶⁸ Under that canon the statutes would not be interpreted to allow coerced releases.

A. Coerced Releases Violate the Fifth Amendment’s Just Compensation and Due Process Requirements

Just Compensation. This Court consistently rules the Bankruptcy Power is subject to the Fifth Amendment’s takings clause⁶⁹ in cases in which the bankruptcy statute authorizes takings of property interests after⁷⁰ the bankruptcy case commences.⁷¹ Justice Brandeis ruled: “The bankruptcy power, like the

⁶⁸ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247 (2012).

⁶⁹ U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”).

⁷⁰ There is a split of authority as to whether the Fifth Amendment bars postpetition discharge of prepetition takings claims. Compare *Cobb v. City of Stockton (In re City of Stockton)*, 909 F.3d 1256, 1268 (9th Cir. 2018) (rejects argument that takings claim “has protected status because it was originally founded as a constitutional claim”) and *Poinsett Lumber & Mfg. Co. v. Drainage Dist. No. 7*, 119 F.2d 270, 272–73 (8th Cir. 1941), with *Fin. Oversight & Mgmt. Bd. for P.R. v. Cooperativa de Ahorro y Credito Abraham Rosa (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 41 F.4th 29, 41 (1st Cir. 2022) (“we move on to assessing whether the Fifth Amendment precludes the impairment or discharge of prepetition claims for just compensation in Title III bankruptcy [under PROMESA]. For the following reasons, we conclude that it does.”), *cert. denied*, 143 S. Ct. 774 (2023).

⁷¹ See, e.g., *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935). *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 162 (1974) (Douglas, J., dissenting).

other great substantive powers of Congress, is subject to the Fifth Amendment.”⁷² While takings in bankruptcy cases frequently take the form of allowing the debtor to use or consume a creditor’s collateral as opposed to allowing the government to outright acquire for itself property such as a railroad, the Fifth Amendment’s taking clause can still apply.⁷³ The rationale is that the government has enacted a bankruptcy statute authorizing takings of property in one way or another to serve the public purposes of bankruptcy.⁷⁴ Those purposes are to equalize distributions among creditors holding claims of equal rank, and to foster employment, fresh start, and recovery by stakeholders.⁷⁵

Although there are exceptions to the rule that the Bankruptcy Power is subject to the takings clause,⁷⁶

⁷² *Louisville Joint Stock Land Bank*, 295 U.S. at 589.

⁷³ *Sec. Indus. Bank*, 459 U.S. at 78.

⁷⁴ See, e.g., *Louisville Joint Stock Land Bank*, 295 U.S. at 602 (public interest required legislation taking mortgagee’s collateral to relieve mortgagors during the Great Depression).

⁷⁵ H.R. Rep. No. 95-595, at 16, 177-78, 200 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 5977-78, 6137-39, 6179; *Young v. Higbee Co.*, 324 U.S. 204, 210 n.8 (1945).

⁷⁶ When 11 U.S.C. § 547 compels a creditor to disgorge, as a voidable preference, money it received validly in payment of a lawful debt, a clear taking of the creditor’s property for the public purpose of an equitable distribution occurs. Before the Constitution was ratified the bankruptcy power was known to compel creditors to disgorge moneys the debtor had paid them shortly before bankruptcy, without any requirement that creditors be paid just compensation for the disgorged property. See *Schoenthal v. Irving Tr. Co.*, 287 U.S. 92, 94 (1932). Thus, it is unsurprising the

there is no historical exception applicable to the claims taken in the context of coerced releases.

Coerced releases patently violate the just compensation requirement. No creditor is allowed to prove the amount and value of its claims against the Sacklers, and there is no determination of the value each creditor receives for losing each claim. Conversely, in eminent domain proceedings, the person losing his or her property is entitled to a valuation of the property and just compensation for its value. Indeed, since the Sacklers are paying in settlement billions less than they took out of the debtor, it is possible they are paying creditors nothing for their released claims and only partially making whole the debtor's estate.

Supreme Court has signaled the bankruptcy power's claw back of voidable preferences is not subject to the Fifth Amendment's just compensation requirement: "Bankruptcy proceedings constantly modify and affect the property rights established by state law. A familiar instance is the invalidation of transfers working a preference, though valid under state law when made." *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. at 517. In *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911), Justice Holmes, writing for the unanimous court, observed: "We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system." *Id.* Other exceptions to the Fifth Amendment built into the bankruptcy law are (a) the law's taking from creditors of the right to the discharged debtor's future earnings, *Hanover Nat'l Bank v. Moyses*, 186 U.S. at 188, and (b) the law's taking from creditors the value of their valid, but unperfected security interests by granting the debtor a hypothetical lien senior to the unperfected interest in 11 U.S.C. § 544(a).

Due Process. No legal training is needed to discern unfairness if a billionaire runs up billions of debt and is allowed to discharge the debt without paying all of it while keeping the balance of his or her fortune and paying in full personal creditors. Our bankruptcy laws have never allowed discharges unless creditors receive the value of the debtor-estate's non-exempt assets and they share the value on a fair basis. Unsurprisingly, this common sense has constitutional underpinning.

The Fifth Amendment's due process clause (no person shall "be deprived of life, liberty, or property, without due process of law") requires that when the debtor receives a discharge, the debtor's assets must be distributed in a manner "consonant with a fair, reasonable, and equitable distribution of those assets."⁷⁷ The Bankruptcy Power allows courts to confirm chapter 11 plans distributing value in a manner rejected by classes of creditors and shareholders. But, the Bankruptcy Power requires that "the creditor gets all

⁷⁷ *Kuehner v. Irving Tr. Co.*, 299 U.S. 445, 452 (1937); accord *ACC Bondholder Grp. v. Adelpia Commc'ns Corp. (In re Adelpia Commc'ns Corp.)*, 361 B.R. 337, 358 n.98 (S.D.N.Y. 2007) (citing *Kuehner*). Fair distribution has also been a hallmark of bankruptcy legislation. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors.").

the value of his lien and his share of any free assets.”⁷⁸ To satisfy the fair, reasonable, and equitable distribution requirement, the debtor’s assets and liabilities must be known. When they are unknown and creditors cannot prove the claims they make, due process is violated.⁷⁹

Here, the distribution scheme approved below requires the Sacklers to pay an unknown fraction of their creditors’ claims, allows the Sacklers to retain billions for themselves, from which they pay their personal creditors in full to stay out of personal bankruptcy—the opposite of a fair, reasonable and equitable distribution, as shown by 11 U.S.C. § 1129(b) requiring the owner or debtor to keep nothing if a class of creditors’ claims rejects the plan.

In *Ortiz v. Fibreboard Corp.*,⁸⁰ this Court explained that for a limited fund class action settlement to be approved under Fed. R. Civ. P. 23(b)(1)(B), it must satisfy certain conditions making it equitable to bind class members to a fund insufficient to pay them in full: (a) the maximum size of the fund must be less than the maximum claims, (b) the entire fund must go to the claimants, and (c) the claims must share a common theory of liability.⁸¹ Additionally, this Court

⁷⁸ *Reconstruction Fin. Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495, 533 (1946).

⁷⁹ *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 655 (E.D. Va. 2022).

⁸⁰ 527 U.S. 815 (1999).

⁸¹ *Id.* at 840-42.

opined there must be a necessity to deprive the claimant of his day in court and his jury trial.⁸² Here, the Sacklers are retaining billions, and the creditors have claims based on different state statutes and common law. This Court also opined the existence of a negotiated settlement does not eliminate the need for proof the fund is less than the claims.⁸³

B. Coerced Releases Violate the Separation of Powers Principle by the Executive and Legislative Branches Allowing the Judicial Branch to Deprive Itself and Creditors of Judicial Cognizance over Common Law Claims

The separation of powers principle permeates the Federalist Papers which explain why the Constitution adopts it to preserve liberty. In short, the early Americans did not want a government in which the same actor would have the executive, legislative, and judicial powers. The Federalist No. 47 explains: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”⁸⁴

⁸² *Id.* at 858-60.; *see Wilks*, 490 U.S. at 762.

⁸³ *Ortiz*, 527 U.S. at 821.

⁸⁴ The Federalist No. 47 (James Madison).

The Supreme Court's four decisions⁸⁵ the last forty-two years discussing Article III's application in bankruptcy cases identify the key issue—separation of powers—but that issue is not mentioned in most lower courts' jurisprudence discussing coerced releases, including *Purdue Pharma*. In the four decisions most of the Lost Rights were not at stake. A chapter 11 debtor or bankruptcy trustee was suing a third party for money damages. There was no dispute the debtor could sue, the court would apply the common law, and the debtor could procure and enforce a judgment. To satisfy the separation of powers, this Court only had to determine whether Article III judicial power or a jury was required.

So, the bankruptcy court's decision in *Purdue Pharma* and the Third Circuit's decision in *Millennium*, treated the need for an Article III judge as the sole constitutional issue. Reasoning backwards from *Stern* (which did not involve a coerced release), the courts determined a non-Article III judge can order a coerced release. If that had really been the only issue, the court would have been right for the wrong reason. Releasing shareholders derives from the discharge

⁸⁵ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Granfinanciera*, 492 U.S. 33 ; *Langenkamp v. Culp*, 498 U.S. 42 (1990); and *Stern v. Marshall*, 564 U.S. 462 (2011) ("*Stern*").

power.⁸⁶ In 1789 in England, the bankruptcy commissioner in the equity courts granted discharges,⁸⁷ so Article III judges would not be required if coerced releases were otherwise constitutional.

But, as the Lost Rights show, the need for an Article III judge or jury is not the only variable required to carry out the separations of powers principle. In *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856), this Court ruled when a matter is within the executive power and determined as a “public right,” it is not subject to the judicial power.⁸⁸ This Court established the rule religiously followed today:

“To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either 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; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.”⁸⁹

⁸⁶ *Purdue Pharma*, 69 F.4th at 70-71.

⁸⁷ *See Sharif*, 575 U.S. at 689-90 (Roberts, C.J., Scalia, J., and Thomas, J., dissenting).

⁸⁸ *Murray*, 59 U.S. at 284.

⁸⁹ *Id.*

When applied to coerced releases, there is no dispute the creditors' common law tort actions against the shareholders were quintessentially subject to judicial cognizance at common law. Therefore, without violating the separation of powers principle, Congress as the legislative branch cannot constitutionally withdraw common law claims from judicial cognizance or authorize any Article III or non-Article III judge to do so. "The Constitution's division of *power* among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."⁹⁰ Therefore, it does not cure the coerced release's violation of the separation of powers principle if one or all Article III judges order the coerced release. Because bankruptcy judges lack lifetime tenure during good behavior⁹¹ and an irreducible compensation,⁹² they are not Article III judges. As non-Article III judges, their elimination of the creditors' entitlement to a trial based on settled law would be an act of the executive branch snatching power from the judicial branch while depriving creditors of their fundamental rights, and most certainly a separation of powers violation.

⁹⁰ *New York v. United States*, 505 U.S. 144, 182 (1992) (even if State officials consent, Congress may not exercise power reserved to the States); *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976) (Congress cannot infringe on President's appointment power even if President consents); *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (legislative veto violates the separation of powers even if President consents).

⁹¹ See 28 U.S.C. §§ 152(a)(1), 152(e).

⁹² See 28 U.S.C. § 153(a).

In authorizing coerced releases, Congress would more egregiously usurp judicial power than Congress usurped judicial power with legislation this Court has already struck down. In *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995), and *United States v. Klein*, 80 U.S. 128 (1871), this Court struck statutes imposing judicial outcomes for preexisting common law disputes. Authorizing coerced releases eliminates common law outcomes and leaves to the judge's imagination the formulation of substitute outcomes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted

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No. 23-124

In The
Supreme Court of the United States

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

Petitioner,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

*On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit*

**BRIEF FOR RESPONDENT THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS
OF PURDUE PHARMA L.P., ET AL.**

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QUESTION PRESENTED

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.

RULE 29.6 STATEMENT

The Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. is an independent fiduciary, appointed by the U.S. Trustee pursuant to statute, that represents the interests of all unsecured creditors in this case. The Official Committee's membership comprises eight dedicated members, including individuals who are themselves (or whose loved ones are or sadly were) victims of the opioid epidemic; caregivers to children born with neonatal abstinence syndrome; representatives of a trade association for 35 independent health insurance companies collectively insuring 110 million members; a member of one of the largest hospital systems in the United States; the Pension Benefit Guaranty Corporation (the federal entity responsible for insuring defined benefit pension plans);* a co-defendant in opioid litigation that has asserted indemnification claims against Purdue Pharma L.P. and its affiliated debtors; and a trade creditor engaged in the development and manufacture of innovative drug delivery systems such as transdermal patches and oral thin films for the pharmaceutical industry; as well as three *ex officio* members that represent, respectively, political subdivisions, tribes, and public school districts.

* The Pension Benefit Guaranty Corporation, as an executive branch agency, abstains from this filing.

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INTRODUCTION

This bankruptcy case concerns an effort by Purdue Pharma L.P. (“Debtors”) and its creditors, comprising countless victims of the opioid epidemic, to address thousands of civil actions asserting trillions of dollars’ worth of claims. Appreciating that the Debtors would have at most a billion or so dollars to distribute to a creditor body encompassing essentially every person affected in some way by the Debtors’ opioid products, a broad array of stakeholders including the Official Committee of Unsecured Creditors (“Official Committee”)—appointed by petitioner U.S. Trustee (“Trustee”)—painstakingly negotiated a reorganization plan (“Plan”) that maximizes the value of the estates and allocates it fairly among numerous creditor constituencies.

Central to the Plan is a settlement in which the Debtors’ shareholders (the Sacklers) will contribute at least \$5.5 billion to the bankruptcy estates for opioid abatement and victim compensation, in exchange for a tailored release (“Release”) of certain civil claims against the Sacklers that are inextricably intertwined with the Debtors’ conduct. A historic number of creditors voted in favor of the Plan—with 95% support in the aggregate—against the backdrop of two indisputable facts: (i) the *creditors* insisted on a release binding all creditors of Purdue (and only creditors of Purdue) to ensure that no creditor could recover disproportionately at the expense of others; and (ii) in the absence of the Release, the Plan would unravel and almost all creditors (except the federal

government) would be left with substantially less (if anything) years later (if ever).

Far from categorically prohibiting so-called nonconsensual third-party releases, the Bankruptcy Code supports them. Under this Court's precedents, courts have comprehensive power to deal efficiently and expeditiously with all matters connected to the bankruptcy estate—including the ability to enjoin third-party suits that would impede a reorganization. In chapter 11 proceedings specifically, 11 U.S.C. § 1123(b)(6) imbues courts with a flexible power to approve “any” plan provision that is “appropriate” and “not inconsistent” with applicable provisions of the Code. At a minimum, a release is “appropriate” where (as here) the overwhelming majority of creditors agrees (and the court finds) that it presents the *only* viable path to a fair, meaningful, and timely recovery.

Unable to identify any Code provision prohibiting such releases, the Trustee—joined by a small group of Canadian creditors and a single individual—invokes the specter of third parties misusing the bankruptcy system. The record in this case refutes that policy concern. As the court of appeals held, and the Trustee no longer disputes, *all* the factors used to scrutinize releases and guard against their abuse confirm the appropriateness (*i.e.*, necessity) of the Release.

The Trustee is simply wrong that the Plan reaches beyond the Code or otherwise permits the Sacklers to engage in gamesmanship. Make no mistake: the Official Committee and the creditor constituencies whose interests it represents—personal injury victims (including babies diagnosed with

neonatal abstinence syndrome), hospitals, insurance ratepayers, third-party payors (including employer and government-sponsored health insurance plans), states, municipalities, tribes, public school districts, and the United States—have no love lost for the Sacklers. But those most harmed by the Debtors and by the Sacklers have made the considered choice to support the Plan as the only means of getting billions of dollars in life-changing and live-saving funds from the Debtors and the Sacklers that are desperately needed *today*.

Absent the Release, there is no chance of fair allocation of the limited assets in this extraordinary case. Almost all claimants will be worse off as a select few creditors, competing with the Debtors' more valuable estate claims, drain whatever money can be extracted from the Sacklers. Indeed, without the Sackler settlement (which, as the bankruptcy court found, depends on the Release), the federal government's \$2 billion superpriority claim is likely to gobble up the readily available estate assets. That result is the antithesis of the equitable-distribution principle at the heart of bankruptcy law. Nothing in the Release prevents the United States from using other means—including federal criminal prosecution—to seek “justice” against the Sacklers. Blowing up the Plan, however, accomplishes no such thing; it only deprives victims of the funds they need to survive and foments victim-versus-victim disputes over competing claims.

More than four years into this case, creditor opposition to the Release is virtually nonexistent. Although the Trustee continues to forge ahead, he is a

non-creditor with no stake (financial or otherwise) in the case. (For its part, the United States' claims are carved out of the Release—and it is the only party in this case that has actually received money from the Sacklers, through a separate settlement of civil liability.) Meanwhile, the Canadian creditors—comprising a handful of municipalities or First Nations proceeding on behalf of an uncertified class—have yet to identify a claim the Release will affect and waived any categorical objection to the Release below (as did the lone individual claimant filing in support). That raises a threshold question as to whether this Court should even hear this challenge.

Regardless, approval of the Release, which affects only creditors of Purdue and adds billions to their recovery, is entirely in keeping with the core bankruptcy goal of facilitating the fair allocation of the estates' value. That is the epitome of an “appropriate” plan provision. The Trustee spurns that conclusion, insisting that the Code flatly prohibits third-party releases so long as a single creditor objects—even if it means that hundreds of thousands of other creditors will recover far less. But bankruptcy law has always authorized courts, facing difficult situations, to bind all creditors to an equitable resolution. There is no reason to take a different approach to third-party releases, which courts have used effectively yet sparingly where (as here) imperative to a reorganization and supported by a supermajority of creditors.

STATEMENT OF THE CASE

A. Factual Background

1. Beginning in the mid-1990s, the Debtors developed and aggressively marketed OxyContin, a controlled-release semisynthetic opioid analgesic that is highly addictive. JA845. While the Debtors promoted the drug as non-addictive and downplayed the risk of abuse, prescription and illegal use of OxyContin soared—fueling “one of the largest public health crises in this nation’s history.” JA841, 845-846. The human toll has been devastating, causing more than a half-million deaths, ruining countless other lives, and leaving thousands of children suffering from fetal opioid exposure. JA32.

2. For decades, the Debtors have been wholly owned (indirectly through trusts) and largely controlled by one family: the Sacklers. JA845. The Debtors entered into an agreement in 2004 to indemnify their officers and directors (including the Sacklers). JA846-847. The protections conferred “were expansive and had no immediate time limit.” JA847. The Debtors’ obligation covers “amounts paid or incurred in satisfaction of or as part of settlements, judgments, fines, penalties, [or] liabilities” relating to any “civil, criminal, administrative, arbitrate or investigative” actions connected to the Debtors (with a “bad-faith carveout”), and advances “costs and expenses (including attorneys’ fees and expenses)” associated with defending any such actions. JA846-847.

Beginning in 2008, the Debtors distributed a significant proportion of revenue—roughly \$10.4

billion in total—to the Sackler family. JA637. Approximately 40% of those distributions, around \$4.6 billion, “went to pay taxes associated with Purdue” to the federal government and states. JA367, 681. The Sacklers placed many of the remaining assets “into ‘purportedly spend-thrift trusts,’ including in offshore locations like the Bailiwick of Jersey.” Tr. Br. 3-4 (quoting JA711-712). By 2019, before Purdue filed for chapter 11, all Sacklers had stepped down from the board of directors. JA848.

3. In 2019, the Department of Justice (“DOJ”) brought criminal and civil charges against the Debtors. JA848. In exchange for DOJ’s pledge not to “initiate any further criminal charges against Purdue,” the Debtors pleaded guilty to violations of the federal anti-kickback statute. *Id.* To resolve their civil liability, the Debtors agreed to a forfeiture judgment of \$2 billion, deemed an allowed superpriority administrative claim in the event of a bankruptcy distribution. *Id.* DOJ stipulated that it would forgo \$1.775 billion of that \$2 billion claim if a future reorganization plan met certain requirements, including establishment of a public benefit corporation and distribution of the funds to states, municipalities, and tribes for abatement of the opioid crisis. JA849.

Separately, the Sacklers agreed to pay \$225 million in damages to the United States to resolve the family’s civil False Claims Act liability. JA360. DOJ has never charged the Sacklers criminally.

4. A “veritable deluge of litigation” from individuals, states, and localities could not be resolved as easily. JA841. By mid-2019, around 3,000 opioid-

related actions had been filed against the Debtors, while over 400 were pending against the Sacklers. JA849. Because the latter actions “ultimately derive from the Debtors’ conduct,” JA403, there was “no way for [claimants] to pursue the allegations against [the Sacklers] without implicating [the Debtors],” JA743. Moreover, the Sacklers would likely “seek indemnification,” “insurance coverage[,] or contribution” from the Debtors. JA875 & n.16. Simply put, the claims against the Debtors and the Sacklers are “factually and legally intertwined.” JA891.

In September 2019, facing claims estimated in the trillions, estates estimated at approximately \$1.8 billion, and no reasonable alternative to resolving the pending litigation, the Debtors declared bankruptcy. JA849-850.

B. Procedural History

1. Shortly after the chapter 11 cases commenced, the bankruptcy court enjoined all civil litigation against the Debtors and the Sacklers. JA849. The Trustee also immediately appointed the Official Committee as the fiduciary body to represent the interests of all unsecured creditors, 11 U.S.C. § 1102(a)(1), which comprise the entire creditor body (including all public and private claimants) given the Debtors’ lack of secured debt. JA27, 37. Creditors’ claims are related almost exclusively to far-reaching harm caused by the Debtors’ opioid products. JA298. Consequently, the Official Committee owes fiduciary duties to a wide range of victims of the opioid epidemic, from personal injury claimants, families who have lost loved ones, and children born with neonatal

abstinence syndrome; to states, tribes, and municipalities shouldering the burden of responding to the crisis; to schools and hospitals educating and caring for those harmed by the Debtors. JA33-34. Altogether, the creditor body—not just those who filed “roughly 618,000 claims” in the bankruptcy court, but also “the people who could arguably be said to be represented by their local and state governments and by the United States”—is widely considered to be the largest in U.S. bankruptcy history. JA298.

From the outset, the Official Committee has pursued three goals: (i) maximizing value for those harmed by the Debtors’ and the Sacklers’ past conduct; (ii) allocating such value fairly among creditor constituencies; and (iii) improving public health in the wake of the ongoing opioid crisis. To those ends, the Official Committee conducted an extensive investigation into claims against the Debtors and the Sacklers. JA40.

That “rigorous and exhaustive” process involved, *inter alia*: (i) evaluating the strength of claims against the Sacklers, including with respect to the Debtors’ pre-petition transfers to the family (representing the estates’ most valuable assets, by far); (ii) determining the magnitude of the value recoverable from the Sacklers; and (iii) assessing the likelihood of successfully collecting such value given the “complex array of domestic and foreign trusts” holding the family’s assets. JA48-50, 63. The Official Committee reviewed close to 100 million pages of documents from the Debtors, the Sacklers, more than 100 Sackler entities, insurance brokers, financial institutions, non-Sackler directors, and various long-time advisors to

the Debtors and the Sacklers. JA57-58. Additionally, the Official Committee conducted 16 depositions—oftentimes pursuant to court-ordered compulsion—of the Sacklers; additional directors, executives, and advisers of the Debtors; and other key personnel. JA59.

“[T]he number and scope of issues considered by the [Official Committee] *** was vast, its analysis thorough and the time spent immense,” JA85, yielding more extensive discovery than “any court in bankruptcy ha[d] ever seen,” JA355. That “unprecedented” investigation confirmed the “concerns” the Official Committee (and several states) expressed over the initial settlement the Debtors and a subset of parties had attempted to reach. JA36, 65. Instead of signing off on that early compromise, the Official Committee and various creditor constituencies engaged in adversarial mediation amongst themselves and with the Debtors and the Sacklers for nearly two years. JA850-852.

2. The resulting Plan, structured around at least 20 interlocking hard-fought compromises, allocates value fairly and efficiently among the diverse set of opioid claimants, avoids value-destructive litigation, and abates the opioid crisis. Central to the Plan is an “imperfect, but entirely necessary” settlement with the Sacklers, JA78, in which the creditors demanded that the Sacklers: contribute \$4.325 billion in cash to compensate victims and abate the opioid crisis—a sum later increased to at least \$5.5 billion (and up to \$6

billion), JA894;¹ establish a public repository with millions of documents to shed light on the root causes of the epidemic, JA238-263; exit the opioid business worldwide and restrict naming rights, JA352; and yield any continuing ownership interest in the Debtors, which will reorganize as a public benefit company committed to public health, JA701-702.

In return, the Plan provides a release to the Sacklers for civil opioid-related claims—but not criminal claims—“premised as a legal matter on a meaningful overlap with the [D]ebtor[s]’ conduct.” JA396. The Release is not only critical consideration for the Sacklers’ concessions; it is essential to *the creditors’* goal of maximizing and fairly allocating value. “Without the *** settlement in place to restrain litigation against the Sacklers,” the Official Committee explained in a public letter supporting the Plan, “the Sacklers are likely to exhaust their collectible assets fighting and/or paying only the claims of certain creditors with the best ability to pursue the Sacklers in court.” JA76 (emphasis omitted). Moreover, it is the *estates’* claims against the Sacklers that are most valuable in this case, but settlement of those claims—and creditors’ insistence that no claimant precede any others—required the concurrent release of the less valuable, but far more numerous, direct claims. JA299. Ultimately, based on its extensive investigation, and with members “[h]aving experienced first-hand” the devastating

¹ The Sacklers increased their financial contribution as part of a further settlement with then-remaining holdout states during the pendency of the Second Circuit appeal.

effects of the opioid epidemic, the Official Committee determined that the Plan (including the Release) “represent[s] the only viable conclusion to the Chapter 11 Cases.” JA75, 85-86. Absent the Release, the various interlocking agreements that “provide value to the creditors who need it” promptly would “fall apart.” JA75, 77.

3. Notice of the bankruptcy case was “unprecedentedly broad” and “carefully tailored” “through various types of media aimed especially at people who may have been harmed by the Debtors’ products.” JA300-301. Widespread notice of the “bar date” reached 98% of adults in the United States, with an average frequency of four exposures per person. JA300.

A subsequent notice of the confirmation hearing explained the nature of the Release “in plain English.” JA302. It reached an estimated 87% of adults in the United States, with an average frequency of five exposures per person. JA300. The Official Committee supplemented those efforts to ensure that creditors had necessary information, including by establishing a website, responding to hundreds of inquiries, and disseminating widely a letter that included a detailed explanation of why the Official Committee supported the Release. JA24-86.

Creditors cast more than 120,000 votes, and each voting class “overwhelmingly” supported the Plan. JA852. “In the aggregate, the vote was over 95 percent in favor of confirmation.” JA303.

4. Following lengthy confirmation proceedings that included live testimony from 41 fact and expert

witnesses, the bankruptcy court issued a 159-page opinion confirming the Plan. JA297-418; JA852. As approved, the Release covers only (i) claims by creditors of the Debtors (ii) that affect the *res*.

Specifically:

- beyond settling parties, the released claims must be held by “holders of Claims *** against *** the Debtors” or holders of specifically channeled “opioid-related personal injury or similar opioid-related” claims “based on or relating to, or in any manner arising from *** the Debtors, *** the Estates or the Chapter 11 Cases,” JA200, 215, 275;
- the defined set of “Shareholder Released Parties” includes only those persons and entities related to the Sacklers that are necessary for the creditors and Debtors to receive their bargained-for protection from collateral attacks on the Plan, JA216-218; and
- the Release is further limited to claims “as to which any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor,” JA275.

Moreover, the Release expressly excludes several categories of claims, such as actions for conduct occurring after the Plan’s effective date and states’ ability to prosecute the Sacklers for criminal or tax liability. JA198-200. “Special Provisions” also expressly carve out the United States’ ability to “assert[] or enforc[e], outside the Bankruptcy Court,” claims involving “any liabilities” of the Sacklers

“arising under the [Internal Revenue Code], the environmental laws, the criminal laws, the civil laws or common law.” JA287-295.

The bankruptcy court made extensive factual findings on why the Release is appropriate under longstanding precedent authorizing such releases in rare circumstances. The evidence made “clear” that there was “no other reasonably conceivable” way to resolve these “unique” cases, which were “the most complex” the court had ever encountered. JA299, 400. Absent the Release, various “interrelated” settlements “would not be achievable,” “the plan would unravel and the Debtors’ cases would likely convert to cases under Chapter 7,” and “unsecured creditors would probably recover nothing from the Debtor[s]’ estates.” JA351, 405. In addition, claims against the Sacklers would require “extraordinarily expensive and time-consuming” and uncertain contests on the merits, face “inevitable competition” among claimants (and the estates) in a “litigation race” that would “dilute[]” any recovery, and encounter “serious collection issues.” JA404-406. For all those reasons, claimants’ “aggregate net recovery on their claims against the Debtors *and* the shareholder released parties would be materially less than their recovery under the plan.” JA406.

In light of “misleading” characterizations, the bankruptcy court reiterated the “crystal clear” reality that “this is *not* the Sacklers’ plan.” JA348. On the contrary, the Plan was “driven” by the Official Committee and other “well-represented ad hoc committees” representing “the interests of all creditors

of these Debtors”—every one of which supports the Plan. JA348, 350.

5. The district court vacated the bankruptcy court’s confirmation order. Although finding “undoubted subject matter jurisdiction to enter the challenged releases,” the district court held that “the Bankruptcy Code does not authorize such non-consensual non-debtor releases.” JA638, 640.

6. The Second Circuit reversed. As a threshold matter, it agreed that the bankruptcy court properly exercised subject-matter jurisdiction, consistent with the limitation that “a bankruptcy court may only enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.” JA873 (internal quotation marks omitted).

On the merits, the Second Circuit held that “[t]he ultimate authority for the imposition of nonconsensual releases of direct third-party claims against non-debtors is rooted—as it must be—in the Bankruptcy Code, specifically 11 U.S.C. §§ 105(a) and 1123(b)(6).” JA876. It rejected the argument that approval of the Release violated due process, based on the “detailed findings” that notice was “clear[]” and “widespread,” and that the bankruptcy court afforded claimants a “meaningful opportunity to be heard.” JA898.

Even so, the Second Circuit rigorously scrutinized the Release—applying a multi-factor test to the “thorough” findings the bankruptcy court had grounded in “extensive discovery”—to guard against the “potential for abuse.” JA886. Given the unique circumstances presented—including that, absent the Release, “many victims of the opioid crisis would go

without any assistance and face an uphill battle of litigation (in which a single claimant might disproportionately recover) without fair distribution,” JA892—the Second Circuit agreed with the bankruptcy court that this is one of the rare cases in which a third-party release is appropriate.

SUMMARY OF ARGUMENT

I. This Court should dismiss the writ. The (non-creditor) Trustee has neither a financial stake in the outcome of this case nor authority to regulate plan confirmation. His asserted “injury” is his view that the law should prohibit nonconsensual third-party releases—a view contrary to one the federal government has advanced elsewhere, but pressed here despite virtually unanimous creditor support for the Release.

The small group of Canadian creditors and a single individual creditor cannot cure that standing defect. They forfeited a categorical objection to third-party releases by arguing below that such releases are permitted in certain circumstances or by failing to object at all. Moreover, the Canadian creditors contend that the Release does not reach their claims, which concern harm in Canada caused by non-debtor “Purdue Canada.”

II. Since the founding era, Congress has granted federal courts comprehensive power to effectuate the settlement and distribution of a debtor’s estate, including by enjoining third-party matters that would impede a reorganization. Consistent with that history, the Code states that a chapter 11 reorganization plan may include “any *** appropriate

provision not inconsistent with the applicable provisions of this title.” 11 U.S.C. § 1123(b)(6). That purposefully broad text authorizes courts to approve plan provisions that are necessary to a successful reorganization, even if not explicitly authorized elsewhere in the Code, subject to specified limits.

An “appropriate” nonconsensual third-party release fits easily within that framework. Where (as here) a release concerns fundamentally overlapping claims that a creditor holds against both the debtor and a third party, the release necessarily affects the estate. And given the additional requirements that a release must facilitate a fair recovery through a substantial contribution, win overwhelming creditor approval, and be essential to the reorganization, such a mechanism undeniably furthers the Code’s core purposes.

The Trustee’s resistance to nonconsensual third-party releases is tethered to the idea that the Code reaches *only* debtors and creditors, not third parties. The text of section 1123(b)(6), and everyday applications of the Code more broadly, refute that premise. In any event, third-party releases *do* modify the debtor-creditor relationship. Critically, the Trustee cannot square his condemnation of nonconsensual releases with his endorsement of consensual releases. Courts routinely approve the latter under section 1123(b)(6), even though the released third parties are not subject to the same benefits and burdens that the Code imposes on debtors.

The Trustee can point to no “applicable provisions” of the Code “inconsistent with” third-party releases. That leaves the Trustee to invoke purportedly competing bankruptcy principles on a level of generality that falls far short of section 1123(b)(6)’s limitations. And concerns over the need for constitutionally protected creditor opt-out rights, which run counter to the fundamental operation of bankruptcy proceedings, cannot justify a bar on third-party releases.

The Trustee’s policy arguments over alleged abuses of third-party releases fare no better. Third-party releases emerged as a tool to aid creditor recoveries in exceptional cases—most notably, those involving mass torts—when class-action suits and multi-district litigation proved inadequate. Far from resulting in the abuses the Trustee fears, use of such releases in limited circumstances over the past decades has benefitted countless victims.

So too here. Although the Trustee advances a Sackler-focused narrative, *creditors* insisted on, and voted overwhelmingly in favor of, the Release (which limits the claims of creditors only). In return, victims of the opioid crisis are spared years of difficult litigation and ensured a fair, equitable, and timely distribution. The Code does not bar that life-saving result.

ARGUMENT

I. THE COURT SHOULD DISMISS THE WRIT

Tellingly, both the Trustee and the Canadian creditors broach the threshold issue of standing. The Trustee’s lack of standing and the inability of his supporting respondents to remedy that defect demand dismissal of the writ either for lack of jurisdiction or as improvidently granted.

A. The Trustee Lacks Standing

It is a “fundamental restriction on [this Court’s] authority” that “a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.” *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013). “To demonstrate th[at] personal stake, [a litigant] must be able to sufficiently answer the question: What’s it to you?” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (internal quotation marks omitted).

The Trustee cannot do so. As the Second Circuit noted, the main challenge to the Release “is not by creditors, but by the Trustee—a government entity without a financial stake in the litigation.” JA895. Because the Trustee does not hold a claim against either the Debtors or the Sacklers, he has no concrete interest necessary to establish Article III standing. Meanwhile, creditors that do hold claims subject to the Release—whose interests the Trustee appointed the Official Committee to represent as fiduciary—overwhelmingly support the Plan. JA895.

Faced with that threshold hurdle, the Trustee invokes (Br. 15-17) his authority to “raise and ***

appear and be heard on any issue in any case or proceeding under *** title [11].” 11 U.S.C. § 307. The exercise of that *statutory* right, however, plainly contemplates an existing “case or proceeding” in which the Trustee may make his view known. It does not permit the Trustee to *create* a “case or proceeding,” either in the bankruptcy court or in this Court. See *Director, Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132 (1995) (holding that Director’s authority to provide legal assistance “does not evidence the duty and power, when the claimant is satisfied with his award, to contest the award on her own”).

In any event, “[t]his Court has rejected the proposition that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” *TransUnion*, 141 S. Ct. at 2205 (internal quotation marks omitted). That principle is no less applicable to federal officials. Indeed, the Court has previously rejected federal officials’ attempts to litigate a question of federal law when they had “alleged no injury to themselves as individuals,” despite having explicit statutory authority to sue. *Raines v. Byrd*, 521 U.S. 811, 815-816, 829-830 (1997). Otherwise, the Trustee could secure advisory opinions at his caprice.

The Trustee’s reliance (Br. 17-18) on the distinct power to *enforce* federal laws (criminal or civil) is misplaced. For starters, criminal prosecution is inherently a sovereign function. Of course, DOJ has declined to exercise that “most obvious[]” and

“regularly” employed means of holding the Sacklers accountable. Tr. Br. 18.

The Trustee then invokes the unremarkable proposition that a federal agency may litigate in its capacity as a *regulator*. In *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940), the SEC intervened and appealed a district court’s approval of an arrangement under Chapter XI of the Bankruptcy Act of 1898. The SEC justified its involvement on the ground that *it*—not the district court—had exclusive jurisdiction to approve the arrangement under Chapter X of the Act; the SEC sought to “forestall the impairment of its own functions under that chapter by an unauthorized or improper resort by respondent to Chapter XI.” *Id.* at 444-445. Accepting that reasoning, the Court held that the SEC had “a sufficient interest” in “prevent[ing] reorganizations, which should rightly be subject to *its* scrutiny, from proceeding without it.” *Id.* at 460 (emphasis added); *see id.* at 448 n.6 (recognizing that Chapter X is “administered by the [SEC]”); *accord FTC v. Dean Foods Co.*, 384 U.S. 597, 599, 605 (1966) (upholding court of appeals’ authority to temporarily enjoin merger “until the Commission determined the legality of the[] merger” under Clayton Act).

Those precedents do not help the Trustee. The Code does not give the Trustee *any* authority over the Plan (though it gives him approval power over other ancillary bankruptcy determinations). *See* 28 U.S.C. § 586(a)(3)(B) (specifying that Trustee’s plan-related “[d]ut[y]” consists of “monitoring plans” and “filing with the court *** comments with respect to such plans”); 11 U.S.C. § 345(b)(1)(B) (providing for Trustee

approval of certain corporate sureties). Nor would one expect Congress to have afforded such roving executive enforcement power to an advisory “watchdog” lacking Presidential appointment or Senate confirmation. The Trustee is not the SEC or FTC.

To the Official Committee’s knowledge, except in the isolated circumstance of defending the constitutionality of fees payable to the Trustee (*i.e.*, where he was himself a party with a direct financial interest), this is the only case in which the Trustee has served as petitioner in this Court. *See, e.g., Office of the U.S. Tr. v. John Q. Hammons Fall 2006, LLC*, Nos. 21-1078, 22-1238 (U.S.). That is unsurprising: “Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes.” *Director*, 514 U.S. at 132. Allowing the Trustee to proceed simply in the name of “the public interest that private entities comply with the law” would contravene this Court’s precedents. *TransUnion*, 141 S. Ct. at 2206.

B. The Unaffected Canadian Creditors Forfeited A Categorical Objection To The Release

The participation of the Canadian creditors as respondents cannot cure the jurisdictional defect. *Contra* Tr. Br. 15. The Canadian creditors long ago forfeited any challenge to the Release as categorically precluded under the Code. While they try to recharacterize their sovereignty-focused Plan objection (Br. 51 n.3), they plainly *accepted* that “[g]iven a proper balancing, under certain

circumstances in certain type of cases,” the “hurdles” to approval of nonconsensual third-party releases “may not be insurmountable for a Debtor.” Bankr. Doc. No. 3275, at 9-12. That is the *opposite* of the position the Trustee advances in this Court.²

Forfeiture aside, the Canadian creditors’ own brief calls into question their relationship to the Release: “[T]he Sackler release contains a carve-out for Canadian claims” for harm suffered in Canada that “‘arise[] out of or relate[]’ to conduct of ‘Purdue Canada’” and not “‘the Debtors’—Purdue U.S.” Br. 48 (quoting JA199). The Debtors “did not engage in sales and distribution of OxyContin in Canada; those functions were undertaken by a separate set of non-bankruptcy Sackler-owned entities called Purdue Canada.” *Id.* at 8.

In a not-so-subtle attempt to manufacture standing, the Canadian creditors assert that the effect of the Release is “uncertain” and “tangential[]” to them. Br. 48-49. That conjectural fear of future harm is not enough. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408-422 (2013). Indeed, the Canadian creditors ultimately “dispute that the[ir] claims are released,” Br. 48-49, and the bankruptcy court found that “there

² Ellen Isaacs, the only other party supporting the Trustee, likewise forfeited any challenge. As the bankruptcy court recounted, she “had the opportunity to object to confirmation of the Plan and did not do so.” Bankr. Doc. No. 3769, at 2. And much like her present brief, which does not discuss the Code, her emergency request for an immediate injunction to halt the bankruptcy proceedings around the time of confirmation was limited to other grievances. See Bankr. Doc. No. 3582; JA861 (summarizing objections).

has been no indication by these claimants that the shareholder released parties would be liable to them based on their conduct related to the U.S. Debtors,” JA326 & n.3; *see* JA321 n.2.

Accordingly, given their forfeiture and own dubious standing, the Canadian creditors cannot supply the Court with Article III jurisdiction that the Trustee’s petition failed to confer. After years of resource-depleting litigation, there is not a single proper creditor still challenging the Release. Conspicuously, of the thirteen *amicus* briefs filed in support of the Trustee or neither party, not one was authored on behalf of victims of the opioid crisis in this country. Article III does not permit the Trustee to stand in their shoes. The correct course is to dismiss the writ.

II. THE CODE AUTHORIZES THIRD-PARTY RELEASES, AT LEAST WHERE THE RELEASE IS TIED TO THE *RES* AND ESSENTIAL TO ITS EQUITABLE DISTRIBUTION

The Bankruptcy Code does not categorically bar the approval of nonconsensual third-party releases; to the contrary, the broad terms of section 1123(b)(6) comfortably authorize them in certain circumstances. Properly limited, such releases can be an “appropriate” component of chapter 11 plans critical to fulfilling the Code’s central purposes. The Court need go no further than permitting third-party releases (subject to judicial scrutiny) that are limited to creditor claims inextricably intertwined with a debtor’s conduct and the *res*, in exchange for

contribution to the *res* that allows the same creditors an equitable recovery under a plan they overwhelmingly support. Those features are undisputedly present here.

A. The Text And Structure Of The Code Authorize Nonconsensual Third-Party Releases When Appropriate

1. *Congress granted courts comprehensive power over matters connected to the bankruptcy estate.*

“Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction.” *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006). That said, “[t]he Framers would have understood that laws ‘on the subject of Bankruptcies’ included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res*.” *Id.* at 370. In particular, “courts adjudicating disputes concerning bankrupts’ estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications.” *Id.*

Indeed, it was “impossible to doubt” that early bankruptcy legislation gave federal district courts “complete jurisdiction *** to begin, continue, and end, all such proceedings as might be necessary and proper, in an equitable view, to accomplish the entire settlement and final distribution of the bankrupt’s estate.” *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (Story, Circuit Justice, C.C.D. Me. 1843). As this Court observed in reference to the Bankruptcy Act of 1841:

[I]t is manifest that the purposes so essential to the just operation of the bankrupt system, could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required the end, they should at the same time have withheld the means by which alone it could be successfully reached.

Ex parte Christy, 44 U.S. (3 How.) 292, 312-313 (1845).

The same is true today. In enacting the Code, Congress “grant[ed] comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). To that end, 28 U.S.C. § 1334(b) states: “the district courts”—having the power to refer bankruptcy matters to bankruptcy judges—“shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b); *see id.* § 157(a).

That provision is expansive. In particular, “the ‘related to’ language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.” *Celotex*, 514 U.S. at 308. Such jurisdiction extends to injunctions to prevent suits that “might impede the reorganization process,” “would affect administration

of [a] debtor's reorganization plan," or "would interfere with [a] debtor's reorganization." *Id.* at 310-311. That conclusion, the Court explained, was "in accord with representative recent decisions of the Courts of Appeals"—all of which concerned nonconsensual third-party releases. *See id.* (citing *In re American Hardwoods, Inc.*, 885 F.2d 621, 623 (9th Cir. 1989); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988); *In re A.H. Robins Co.*, 828 F.2d 1023, 1024-1026 (4th Cir. 1987)).

Although this Court did not reach the merits in *Celotex*, it made clear that "[m]uch of [its] discussion dealing with the jurisdiction of the Bankruptcy Court under the 'related to' language of §§ 1334(b) and 157(a) is likewise applicable in determining whether or not" an injunction barring execution of a judgment against a third-party surety "has only a frivolous pretense to validity." *Celotex*, 514 U.S. at 312 (emphasis omitted) (internal quotation marks omitted). Indeed, the Court rejected the dissent's position that the injunction was improper because the proffered connection between the third-party action and the debtor's estate was implausible. *See id.* at 312 n.9; *id.* at 325-326 (Stevens, J., dissenting). All of that informs the analysis of court authority to approve third-party releases.

2. *The Code authorizes “any *** appropriate” plan provision, which encompasses third-party releases necessary to a chapter 11 reorganization.*

Against that backdrop, it should be no surprise that the expansive grant of power to effectuate a successful reorganization under the Code includes the authority to approve nonconsensual third-party releases. *Celotex* itself concerned injunctions of third-party suits under 11 U.S.C. § 105(a), which states generally that bankruptcy courts 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); *see Celotex*, 514 U.S. at 310-311. In chapter 11 proceedings, section 1123(b)(6)—the key provision at issue here—supplies targeted but broad authority to approve “any *** appropriate [plan] provision not inconsistent with the applicable provisions of this title.” 11 U.S.C. § 1123(b)(6).

Section 1123(b)(6) is unmistakably capacious. It begins by using the word “any,” which “has an expansive meaning,” to describe allowable plan provisions. *United States v. Gonzales*, 520 U.S. 1, 5 (1997). The balance of the provision specifies only that the plan provision be (i) “appropriate,” a term that vests courts with considerable discretion, *see Michigan v. EPA*, 576 U.S. 743, 752 (2015); and (ii) not “inconsistent” with an “applicable provision” of the Code.

This Court’s reasoning in *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), tracks the text of

section 1123(b)(6) perfectly. In that case, this Court affirmed a bankruptcy order requiring the IRS to apply tax payments in a way that offset certain of the debtor's tax obligations "where [the court] concludes that this action is necessary for a reorganization's success." *Id.* at 551. Although "[t]he Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments" for offset in that manner, the Court grounded such authority in section 1123(b)(6). *Id.* at 549. The Court also concluded that such action does "not transgress[] any limitation on [bankruptcy courts'] broad power," even though the Code protects the IRS's ability to collect delinquent taxes by granting special priority to specific tax claims and making those tax debts nondischargeable. *Id.* at 549-551.

At bottom, the Code evinces "the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Energy Res.*, 495 U.S. at 549. Or as the leading bankruptcy treatise explains, "*Energy Resources* confirmed the equitable nature of the bankruptcy power," the origins of which "suggest substantial leeway to tailor solutions to meet the diverse problems facing bankruptcy courts"—much in the same way that *Celotex* confirms the comprehensive reach of bankruptcy jurisdiction, including over third parties when necessary to ensure a successful reorganization. 2 COLLIER ON BANKRUPTCY ¶ 105.01[2] (16th ed. 2023) ("*Celotex* follows the Court's lead in *Energy Resources*").

Appropriate nonconsensual third-party releases—like the Release here—fall well within that

equitable authority. As the bankruptcy court found after presiding over the case for two years, the third-party claims covered by the Release “directly affect the *res* of the Debtors’ estates, including insurance rights, the shareholder released parties’ rights to indemnification and contribution, and the Debtors’ ability to pursue the estates’ own closely related, indeed fundamentally overlapping, claims.” JA381. Without the Release, “the plan would unravel” and creditors (except the federal government) would recover a small fraction (if anything) of what they would under the Plan. JA405.

3. *Neither section 1123(b)(6) nor the Code more generally excludes third-party releases that necessarily affect the creditor-debtor relationship.*

The Trustee offers two responses to *Energy Resources*: (i) section 1123(b)(6) specifically, and the equitable power of bankruptcy courts generally, should not be construed to reach third parties; and (ii) nonconsensual third-party releases conflict with various Code provisions. Neither has merit.

a. The Trustee argues that the text of section 1123(b)(6) is not explicit enough. In his view (Br. 21), Congress must have provided “express authority” by singling out third-party releases. But *Energy Resources* forecloses that very argument. Consistent with the traditional “broad authority” of bankruptcy courts proceeding in equity, section 1123(b)(6) expressly permits the approval of “any” appropriate plan provision—even if “[t]he Bankruptcy Code does not explicitly authorize” it separately. 495 U.S. at 549;

cf. West v. Gibson, 527 U.S. 212, 217-218 (1999) (holding that “appropriate remedies” include unenumerated remedies).

The structure of section 1123(b) buttresses that conclusion. Section 1123(b)(6) appears as a catchall at the end of a list of five broad categories of discretionary plan provisions permitting impairment of claims and interests, treatment of executory contracts and unexpired leases, settlements and enforcement of claims and interests, sales of estate property, and modification of creditors’ rights. 11 U.S.C. § 1123(b)(1)-(5). “When faced with analogously structured provisions in other contexts, [this Court] ha[s] noted their all-encompassing scope,” describing them as “unmistakably broad.” *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1696 (2023). Or as the federal government argued successfully in *Lac du Flambeau*—under a clear-statement-rule standard, no less—a “lengthy list” followed by a “broad catchall *** demonstrates comprehensiveness.” U.S. Br. at 8, 134 S. Ct. 1689.

The Trustee’s invocation (Br. 23) of *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012), misses the mark. That case concerns the “general/specific canon,” under which a more specific provision must be complied with even though a broader provision might otherwise apply. *Id.* at 645. Here, however, the Trustee does not assert that the provisions of section 1123(b) preceding the catchall govern third-party releases. So there is neither “contradiction” nor “superfluity” implicating the canon. *Id.* at 645-646.

The Trustee’s reliance (Br. 24) on the *ejusdem generis* canon is equally off base. Application of that canon requires distinguishing between (i) “a list of specific items separated by commas and followed by a general or collective term,” which gives rise to the “inference *** that Congress remained focused on the common attribute”; and (ii) a “clause that [i]s ‘one of *** several distinct and independent’” provisions. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008) (second ellipsis in original) (quoting *United States v. Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part)). Section 1123(b)(6) falls into the latter category. To borrow Justice Scalia’s example: unlike a list of “fishing rods, nets, hooks, bobbers, sinkers, and other equipment” (limited to fishing paraphernalia), each provision of section 1123(b) is directed to a different facet of a plan and so section 1123(b)(6)’s catchall stands on its own. *Aguilar*, 515 U.S. at 615.

For the same reason, “it is not apparent what common attribute connects the specific items in” section 1123(b). *Ali*, 552 U.S. at 225. The Trustee posits that all of the enumerated categories are meant to “adjust[] the relationship between the debtor and its creditors.” Br. 24. But at least one category refers to a “claim or interest belonging to the debtor or to the estate” that could also involve non-creditor third parties (as exemplified here by the Debtors’ estate claims against the Sacklers). 11 U.S.C. § 1123(b)(3); see Brief of *Amicus* American College of Bankruptcy (“Bankruptcy College Br.”) at 14-17 (discussing section 1123(b)(3) authority to approve settlements of estate claims that bar creditors’ state-law claims that

otherwise could be asserted against third parties); JA871 (acknowledging release of derivative third-party claims pursuant to section 1123(b)(3)(A)). It follows that section 1123(b)(6) need not be restricted to creditors and debtors either.

b. In any event, an “appropriate” nonconsensual third-party release (as here) *does* modify creditor-debtor relationships. Under the Second Circuit’s decision, which rigorously applies factors courts have used for decades, a release cannot be approved unless it accomplishes the creditor-debtor-centric Code purposes the Trustee touts: “distribution of ‘the property of the debtor among his creditors’” in a manner that “ensur[es] the maximum possible ‘equitable distribution’ to creditors by exercising ‘jurisdiction over all of the debtor’s property.’” Br. 19-20 (quoting *Railway Labor Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 466 (1982); *Katz*, 546 U.S. at 363-364).

To begin, “courts should consider whether there is an identity of interests between the debtors and the released third parties, including indemnification relationships, *such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate.*” JA887 (emphasis added) (internal quotation marks omitted). Relatedly, the “claims against the debtor and nondebtor” should be “factually and legally intertwined,” such that “the debtors and the released parties share common defenses, insurance coverage, or levels of culpability.” JA888. Both of those factors guarantee that the third-party claims subject to a release are inextricably bound up with the debtor’s and creditors’ interests in the bankruptcy proceeding. The only persons whose

claims are released are the debtor's creditors, who will recover more in bankruptcy.

Other factors place special emphasis on the ultimate outcome in bankruptcy. The release must be “essential to the reorganization” and no broader than “necessary to the [p]lan.” JA888. That means the settlement of third-party claims paves the way for “the *res* to be allocated.” *Id.* It also “must be the case that, without the releases, there is little likelihood of [a plan’s] success.” *Id.* (alteration in original) (internal quotation marks omitted).

Finally, the factors account for the realities of litigating the third-party claims. A court is to “consider whether the non-debtor contributed substantial assets to the reorganization,” and whether that contribution results in a plan that “provides for the fair payment” and “permits the fair resolution of the enjoined claims.” JA888-889. And given that the creditors must “overwhelmingly vote[] in support of the plan,” the creditors essentially have final say over whether a release should be approved—*i.e.*, it cannot be approved simply by judicial fiat. *Id.* at 889 (internal quotation marks omitted).

In sum, an “appropriate” third-party release within the meaning of section 1123(b)(6) has everything to do with the creditor-debtor relationship: it must be tied to the *res* (such that claims of the debtor/creditors only are released) and “essential” to an equitable distribution to creditors. As discussed below (pp. 52-54, *infra*), the Release in this case is a prime example: (i) the released claims are limited to those that directly implicate the Debtors’ conduct and

threaten to deplete the *res*, such that the *only* people or entities whose claims against the Sacklers will be released are creditors of Purdue, *see* JA215 (“Releasing Parties”); and (ii) the Release is “both needed for the distribution of the *res* and to ensure the fair distribution of any recovery for claimants,” JA891-894, as it unlocks the value from the much more valuable estate causes of action. It is thus wrong to characterize the Release as “prohibit[ing] anyone, anytime, anywhere in the world from maintaining opioid-related claims” against the Sacklers. Can. Br. 2; *see* JA396 (holding that Release, *e.g.*, does not cover “a claim against one of the Sacklers, some of whom are doctors, for negligently prescribing OxyContin to a patient”). And in the end, *creditors* “voted overwhelmingly to approve the Plan.” JA895.

Unable to dispute the close connection between the Release and the creditor-debtor relationship, the other side resorts to a parade of horrors. As they see things, if section 1123(b)(6) authorizes nonconsensual third-party releases, bankruptcy courts could justify all sorts of relief, *e.g.*, “[t]hrow[ing] people in jail.” Can. Br. 33; *see* Tr. Br. 35. Those farfetched hypotheticals, however, are just that. They do not grapple with all the ways in which courts have measured the appropriateness of third-party releases in terms of their impact on creditors, debtors, and the estate.

The Trustee’s further criticism of the multi-factor framework as “judicial freewheeling” is perplexing. Br. 39-40. Complex chapter 11 cases where billions of dollars are at stake are not cookie-cutter proceedings; they require courts to make numerous equitable

determinations, subject to the safeguard of appellate review. *See, e.g.*, 11 U.S.C. § 1112(b)(1) “(best interests of creditors”); *id.* § 1129(b)(1) (“fair and equitable”); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 389 (1993) (“[B]ankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization.”). Oftentimes multi-factor tests, developed in case law, govern those determinations. *Pioneer*, 507 U.S. at 395 (agreeing with “factors identified by the Court of Appeals” and “conclud[ing] that the determination is at bottom an equitable one, taking account of all relevant circumstances”).

Revealingly, the United States—in its capacity as a creditor—has welcomed that type of flexibility in real-world situations when beneficial to its interests. Just two years ago, it argued that “[t]he hallmarks of permissible non-consensual releases” are “fairness, necessity to the reorganization, and specific factual findings,” taking into consideration “various factors.” U.S. Br. at 23-25, *In re Exide Holdings, Inc.*, No. 1:20-cv-1402-RGA, 2021 WL 3145612 (D. Del. July 26, 2021), ECF No. 59. In defending a third-party release, the United States highlighted the fact that “the success of the debtors’ reorganization *bears a relationship* to the release of the non-consensual parties,” insofar as “the releasees have provided a critical financial contribution to the debtor’s plan that is necessary to make the plan feasible.” *Id.* at 25-27 (emphasis added).

Those statements are powerful evidence, supplied by the United States when it was an actual

creditor navigating an actual bankruptcy, that a third-party release can be an “appropriate” plan provision—even under the Trustee’s view that section 1123(b)(6) entails modification of creditor-debtor relationships. That is enough to rebuff this *categorical* challenge.

c. The fact that an “appropriate” release, while inextricably intertwined with the creditor-debtor relationship, *also* affects a third party is of no moment. The other side takes an untenable position: “bankruptcy courts can *only* adjust the relations between debtors and creditors,” with no impacts on third parties. Can. Br. 26; *see* Tr. Br. 19. That restrictive view would be news to the Framers and Congress. As already explained (pp. 24-29, *supra*), from the earliest bankruptcy legislation to the Code, federal courts have been equipped with all the tools necessary to deal with bankruptcy estates. Today, in a variety of contexts, courts routinely affect the rights of third parties when there is a sufficient connection to the estate and such relief is essential to a plan’s success.

The National Bankruptcy Review Commission’s 1997 study of the Code underscored the extent of that established practice: “The effects of bankruptcy *inevitably* go beyond direct relationships between the bankruptcy estate and its creditors. In a complex Chapter 11 case, *several third party relationships are affected.*” COLLIER ON BANKRUPTCY app. pt. 44, ch. 2, ¶ 1.1[II] (16th ed. 2023) (emphases added). *Amici* in this case have stressed the point specifically with respect to third-party releases. *See* Bankruptcy College Br. 3 (“Certain types of third-party releases are commonplace, important to the bankruptcy

system, and broadly accepted by the courts and practitioners as necessary and proper.”); Brief of *Amicus* Insolvency Law Committee at 11-13 (“There are many types of third-party releases[.]”).

The Court need look no further than *consensual* third-party releases. “Courts will generally approve provisions in a plan that provide for the release of third parties, so long as such release is consensual.” 8 COLLIER ON BANKRUPTCY ¶ 1141.02[5][b] (16th ed. 2023). By definition, consensual third-party releases are not limited to the creditor-debtor relationship. Yet they “continue to be an integral part of modern chapter 11 practice.” *Id.* Nor are they expressly provided for in the Code. Yet “[r]elying on 11 U.S.C. 1123(b)(6), courts typically allow such consensual third-party releases to be included in a plan because they serve to facilitate final resolution of the case and a fresh start for the debtor, while also enhancing creditors’ recoveries.” Bankruptcy College Br. 7; *see, e.g., In re Conseco, Inc.*, 301 B.R. 525 (Bankr. N.D. Ill. 2003).

The Trustee embraces the availability of *consensual* third-party releases between two non-debtors, but fails to explain how the Code authorizes a court to approve such releases while prohibiting approval of *nonconsensual* third-party releases. Quoting a non-bankruptcy case involving consent decrees, the Trustee asserts that “[i]n the case of a consensual release, ‘it is the parties’ agreement that serves as the source of the court’s authority’ to enter provisions binding on the agreeing parties.” Br. 48 (quoting *Lawyer v. Department of Just.*, 521 U.S. 567, 579 n.6 (1997)). That inapt citation does not reconcile the Trustee’s view that bankruptcy law does not reach

third parties absent Congress's explicit blessing. If section 1123(b)(6) empowers courts to approve consensual releases, even though they stretch beyond the debtor-creditor relationship, the same Code provision empowers courts to approve nonconsensual releases. As a statutory matter, due process aside (*see* pp. 42-44, *infra*), the two types of third-party releases are indistinguishable.

The Trustee's argument (Br. 12, 25-26) that a third-party release is "the functional equivalent of a discharge" in bankruptcy runs into the same problem. Third parties granted consensual releases receive "full repose" (*id.*), backed by a court injunction, just like debtors. *See* Bankruptcy College Br. 9. But they have not provided the same *quid pro quo* as debtors, any more than third parties that are granted nonconsensual third-party releases. The Trustee fails to reconcile that conflicting position.

Beyond consensual third-party releases approved under section 1123(b)(6), the Code is replete with provisions that extend to third parties in everyday practice. *See, e.g.*, 11 U.S.C. § 363(f)-(h) (providing for nonconsensual sales of debtor's assets "free and clear" of rights, including nondebtor rights); *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 83 (2d Cir. 2019) ("Once [the debtor] entered bankruptcy, the creditors' avoidance claims [against third parties] were vested in the federally appointed trustee et al. 11 U.S.C. § 544(b)(1). *** A disposition of [the trustee's] claim extinguishes the right of creditors to bring state law, fraudulent conveyance claims."); 2 COLLIER ON BANKRUPTCY ¶ 105.04 (cataloging examples of bankruptcy courts using section 105(a) "to examine,

under traditional equitable guidelines, the desirability of enjoining some nondebtor actions”). As such, the other side’s declaration that “the Code contains *only one* provision, Section 524(g), devoted to relations between nondebtors,” Can. Br. 26 (emphasis added), is misplaced.

d. Despite the Trustee’s invocation, *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017), affords no license to disregard the broad terms of section 1123(b)(6). This is not a case involving “simple statutory silence” filled in a way that marks a “‘major departure’ from a ‘basic underpinning’ of bankruptcy law.” Tr. Br. 28 (quoting *Czyzewski*, 580 U.S. at 464-465). Rather, it is a case in which the text, structure, and purpose of the Code provide “affirmative indication” that nonconsensual third-party releases—at least when tied to the *res* and presenting the only path to an equitable distribution of that *res*—can be a permissible part of a chapter 11 plan. *Id.* at 29 (quoting *Czyzewski*, 580 U.S. at 465).

The Trustee gets the analysis backwards. The Code’s baseline is not to eschew third parties, but to include them in the bankruptcy process when necessary to ensure fair distribution of the estate. Because chapter 11 bankruptcies often involve unique and complex features requiring judicial flexibility, Congress understandably vested courts with broad powers to resolve them, including approval of a plan provision under section 1123(b)(6). Congress should not be expected to enumerate every such scenario. On the contrary, one would expect Congress to single out third-party releases only if it had wanted to prohibit them categorically or condition their use in specific

contexts. With one exception, which all parties agree is inapplicable here, Congress has not done so. *See* Tr. Br. 34 n.2 (explaining that Congress enacted 11 U.S.C. § 524(g) because “asbestos-related bankruptcies had posed a unique problem”); *see* pp. 41-42, *infra*.

Nor does *Callaway v. Benton*, 336 U.S. 132 (1949)—a case the Trustee never cited in the bankruptcy court, district court, or court of appeals—pose a barrier to third-party releases. As the Trustee admits (in a footnote), changes have overtaken *Callaway*, which was decided under the more circumscribed Bankruptcy Act of 1898. “The Code subsequently expanded the jurisdiction of bankruptcy courts” to encompass third parties, Tr. Br. 32 n.1, and since that time, courts have used their broad powers to approve appropriate third-party releases (both consensual and non-consensual). *See Celotex*, 514 U.S. at 310-311. The Trustee’s response—that Congress afforded only jurisdiction, not corresponding substantive authority—“would be a matter of extreme surprise.” *Ex parte Christy*, 44 U.S. (3 How.) at 312-313.

e. Given the foregoing, the Trustee is left to hang his hat on the last clause of section 1123(b)(6): to show that otherwise “appropriate” third-party releases are “inconsistent with” an “applicable” Code provision. 11 U.S.C. § 1123(b)(6). None of the cited provisions comes close.

To avoid duplication, the Official Committee joins (rather than repeats) the fulsome responses of the Debtors (Br. 33-39) and the Ad Hoc Committee of Governmental Claimants (Br. 33-38) on those specific

provisions. It bears emphasis, however, that even neutral *amici* recognize that 11 U.S.C. § 524(e) (which the Trustee describes imprecisely as “limiting a discharge to the debtor,” Br. 12) says nothing about whether third parties can receive the “functional equivalent of a discharge” (whatever that means) through a separately approved release. *See* Bankruptcy College Br. 6 n.3 (“Section 524(e) is agnostic as to third-party releases.”). Otherwise, consensual third-party releases, which must also be approved pursuant to section 1123(b)(6) and are backed by a court’s injunctive order, would be prohibited as well. *See* pp. 37-38, *supra*.

The Trustee repeatedly casts third-party releases as end-running 11 U.S.C. § 523(a)(2)(A), which provides an exception to a general discharge for fraud claims. But the Trustee ignores the fact that the provision simply provides a baseline. Debtors are free to settle fraud (and other “nondischargeable”) claims. *See, e.g., Guevoura Fund Ltd. v. Sillerman*, No. 1:15-cv-07192, 2019 WL 6889901 (S.D.N.Y. Dec. 18, 2019). It is therefore untrue that third-party releases afford relief that would be unavailable “[i]f the [the third parties] themselves had filed for bankruptcy.” Tr. Br. 12, 27, 36-37.

Section 524(g)’s authorization of nonconsensual third-party releases for asbestos claims also “do[es] not address the bankruptcy court’s ability to” approve releases in other contexts. *Energy Res.*, 495 U.S. at 550. Indeed, the Trustee concedes that in a rule of construction, “Congress *** cautioned against reading the provision as either a rejection or a ratification of any separate authority under the Code to enjoin some

third-party actions.” Br. 35; see 11 U.S.C. § 524 note. Congress thus forbid precisely the inference the Trustee invites this Court to draw.

4. *Courts can (and do) guard against due process concerns.*

The Trustee’s invocation of constitutional avoidance, based on overblown due process concerns, cannot be used to limit section 1123(b)(6). See *Salinas v. United States*, 522 U.S. 52, 59-60 (1997) (“[T]his interpretative canon is not license for the judiciary to rewrite language enacted by the legislature.”).

a. Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action” and an “opportunity to present *** objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). That was amply provided here. The bankruptcy court made extensive findings, based on “uncontroverted and credible” testimony, that “holders of claims received sufficient notice of the proposed release” through “unprecedentedly broad” programs. JA300-302, 382-384; see JA898; p. 11, *supra* (detailing noticing programs).

In addition, the Official Committee worked proactively to ensure creditors had the information they needed throughout the process, including by obtaining approval to establish a website (www.kccllc.net/PurdueCreditors) for making non-confidential and non-privileged information available and easily accessible. The Official Committee also responded to hundreds of inquiries, and disseminated publicly a 25-page letter “[t]o all unsecured creditors”

that walked through the Plan’s major provisions and the role of the Release. JA24-86.

Following that rigorous notice effort and the opportunity to vote on the Plan, the bankruptcy court held a six-day confirmation hearing during which parties (including *pro se* individuals) presented their objections. JA852, 898.

b. Rather than challenge those facts, the other side argues that nonconsensual third-party releases contravene the “tradition that everyone should have his own day in court,” Tr. Br. 41-42 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)), and that the court must provide an “opt-out right,” Can. Br. 40. Whatever the merit of those contentions in other contexts, they cannot prevail in bankruptcy proceedings. In a system designed to distribute inadequate funds to creditors equitably, a bankruptcy court—after affording notice of a plan, an opportunity to vote “no,” and an opportunity to participate in a confirmation hearing—must be able to operate without unanimity. See 11 U.S.C. §§ 1125, 1126, 1128. Dissenting creditors may be “crammed down” under the Code; they do not have the ability to opt out on the hope of retaining their claim and securing a greater recovery against the estate outside bankruptcy. See *id.* § 1129(b).

Nonconsensual third-party releases come with greater procedural protections. To be appropriate, courts have insisted that third-party releases provide creditors with a “fair resolution” endorsed by an “overwhelming[]” majority of creditors. JA889. On top of that, because third-party releases must be

confirmed as part of a plan, all the usual notice, voting, objection, and hearing procedures apply. If the Trustee is correct that the absence of an additional right to pursue a claim on an individual basis raises due process concerns, much of chapter 11 would grind to a halt.

Appreciating that their argument may prove too much, the Trustee asserts (Br. 43) that constitutional avoidance is not a relevant consideration when Congress explicitly authorizes a nonconsensual third-party release—as it chose to do for asbestos claims. *See* 11 U.S.C. § 524(g). Although a lack of ambiguity makes the canon inapplicable, it does not mean the (alleged) due process infirmity ceases to exist. The Trustee states that section 524(g) “imposes stringent procedural requirements to protect the rights of absent parties.” Br. 43. The same is true, however, for third-party releases under the Second Circuit’s test. *See* JA889 (requiring creditor approval to surpass threshold in section 524(g)). And neither provides an opt-out right. Accordingly, if section 524(g) raises no constitutional concerns, *a fortiori* approval of nonconsensual third-party releases does not either—at least with the sort of protections afforded creditors here.

B. Permitting Third-Party Releases In Appropriate Circumstances Furthers The Purposes Of The Code

1. *Third-party releases can maximize and facilitate fair distribution of estate value.*

Consistent with the Official Committee’s value-maximizing, fair-allocation, and public-health objectives, JA40, nonconsensual third-party releases can, in appropriate circumstances, further the “[c]ritical features” of bankruptcy. *Katz*, 546 U.S. at 363-364.

Pursuant to the bankruptcy court’s “exclusive jurisdiction over all of the debtor’s property,” *Katz*, 546 U.S. at 363-364, third-party releases are an important tool to “maximiz[e] property available to satisfy creditors,” *Bank of Am. Nat’l Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 453 (1999). Such releases may bring into the estate significant assets—including a “settlement premium’ paid to obtain a comprehensive result,” JA341—that would not be immediately available even if the third parties were to file for bankruptcy. The global resolution the releases facilitate also prevents the estate (and its creditors) from expending substantial funds in piecemeal, protracted, uncertain litigation involving the third parties—and spares “the costs and impediments to collecting on any eventual judgment against them.” JA326.

With proper safeguards, third-party releases also promote “the equitable distribution of [estate] property among the debtor’s creditors.” *Katz*, 546 U.S.

at 364. Where claims against third parties and the debtor “intertwine[],” JA891, and total liabilities far exceed total assets, any recovery against the former “dilut[es]” (or completely depletes) recovery from the latter, JA406; *see* JA873-874 (“A direct claim brought against non-debtors *** that nevertheless poses the specter of direct impact on the *res* of the bankrupt estate may just as surely impair the bankruptcy court’s ability to make a fair distribution of the bankrupt’s assets as a third-party suit alleging derivative liability.”) (internal quotation marks omitted). Without a mechanism for centralized settlement of those claims, diffuse litigation driven by a “race to the courthouse” would arbitrarily shift recovery among creditors to the rapid and well-resourced. Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 998 (2023) (“*Chapter 11 for Mass Torts*”).

2. *Third-party releases are often essential to resolving mass-tort claims.*

Nonconsensual third-party releases have been particularly effective in resolving extraordinary mass-tort litigation involving defendants in financial distress, where traditional mechanisms of claim aggregation are poor fits.

Class actions are “ordinarily not appropriate” in “mass tort cases,” given the differences in individual members’ injuries and the multiplicity of laws establishing their actions. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 624-628 (1997). Moreover, “[t]he original concept of [Rule 23’s] limited fund class

does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 843 (1999).

Nor is multi-district litigation a reliable solution to the collective-action problems presented by insolvent defendants facing complex mass-tort claims. Because only “pretrial proceedings” are consolidated, 28 U.S.C. § 1407, multi-district litigation is as susceptible to variation in judgment as individual litigation—and subject to the same risk that a subset of claimants will deplete defendants’ limited funds. See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL’Y 541, 559-560 (1992) (describing “strong, persistent pattern of disparate outcomes in similar cases” when mass torts are subject to piecemeal litigation). “Holdouts can disrupt the entire settlement.” *Chapter 11 for Mass Torts*, *supra*, at 981. Even where settlement may be achieved, the process is “unburdened by exacting judicial scrutiny or jurisprudential constraints” to ensure fair distributions. Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 541 (2013).³

³ Of course, there may be circumstances where multi-district litigation yields a fair resolution of mass-tort claims—for example, where the defendant is not in financial distress, there are no valuable estate causes of action, there are no creditors seeking a bankruptcy allocation, and claimants do not face substantial collection challenges. See Tr. Br. 47 (discussing

“The use of bankruptcy to resolve aggregated claims was a response to the failure of both [multi-district litigation] and the class action.” Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1395 (2019). Even the primary case the Trustee has cited for a purported “direct[] conflict[],” Stay App. 14, recognizes that “non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets,” *In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009). Indeed, both as a historical fact and a present reality, such releases have been “essential” to resolving complex mass-tort bankruptcies and promoting “substantial justice” across a range of contexts. *MacArthur*, 837 F.2d at 94.

Well-documented examples prove the point (including outside the asbestos context). “[T]he entire reorganization” in *In re A.H. Robins Co.*—which provided fair compensation to nearly 200,000 women (or their successors) for the tragic design flaw in a contraceptive device that resulted in traumatic infections, miscarriage, infertility, and death—“hinge[d] on the debtor being free from indirect claims *** against parties who would have indemnity or contribution claims against the debtor.” 880 F.2d 694, 702 (4th Cir. 1989). Such releases ensured that holdout creditors would “not be permitted to interfere

tentative settlement of 3M’s liability for allegedly defective earplugs). That does not reduce the “compelling need” (*id.*) for releases when “essential to the bankruptcy,” including when the “reason for the inclusion of [the] release [goes beyond] the non-debtor’s financial contribution to a restructuring plan” because the *creditors* insist on the release “to ensure the fair distribution of any recovery.” JA893-894.

with the reorganization and thus with all the other creditors.” *Id.*

Similarly, in *In re Dow Corning Corp.*, after a multi-district litigation settlement “collapsed” when “hundreds of thousands more women than anticipated filed claims” alleging that silicone gel breast implants “cause[d] auto-immune tissue diseases,” 280 F.3d 648, 653 (6th Cir. 2002), third-party releases negotiated in bankruptcy enabled payment to the victims, 287 B.R. 396, 415 (E.D. Mich. 2002). The “essential” releases were the linchpin of settlements with shareholders, subsidiaries, affiliates, and insurers that ultimately provided the debtor “immediate access” to critical assets and eliminated third-party “claims for contribution [that] would have diminished the size of the estate as well as the Debtor’s ability to resolve its liabilities and proceed with reorganization.” *Id.* at 402-416.

Today, third-party releases remain indispensable in limited circumstances to resolve intractable mass-tort litigation and provide otherwise unavailable compensation to victims. Beyond this case, such releases are a “necessary and integral part” of “ensuring that Opioid Claimants receive recoveries far in excess of what they could obtain through continued litigation.” *In re Mallinckrodt PLC*, 639 B.R. 837, 873 (Bankr. D. Del. 2022). Likewise, third-party releases have been the “foundation” of reorganizations stemming from mass claims of sexual abuse, without which “[s]urvivors—many of whom have been waiting decades to receive a meaningful recovery”—would have to endure a “death trap of litigation with minimal recoveries in sight.” *In re Boy Scouts of Am. & Del.*

BSA, LLC, 650 B.R. 87, 139 (D. Del. 2023) (approving “fair” releases for third-party entities—including insurance companies, churches, schools, and civic organizations—whose contributions “would not have been possible” otherwise); *see also, e.g.*, Confirmation Order at 15-16, *In re USA Gymnastics*, No. 18-09108-RLM (Bankr. S.D. Ind. Dec. 16, 2021), ECF No. 1776 (“[R]esolution of this Chapter 11 Case would not have been possible without the Plan’s releases” of insurers and the U.S. Olympic and Paralympic Committee).

3. *Barring appropriate third-party releases would harm victims, not prevent abuses.*

Those cases belie the suggestion that third-party releases are inherently for “corporations and wealthy individuals to misuse the bankruptcy system,” Tr. Br. 44-45—or, stated more bluntly, “special protection for billionaires,” Isaacs Br. 2-3. Countless *victims* of mass torts would not have received the same (or any) compensation absent this critical bankruptcy power. There was no “abuse” in the cases cited above: the released parties (*e.g.*, schools, churches, and others that do not fit the billionaire-villain narrative) made substantial contributions to reorganizations, the creditors overwhelmingly approved the settlements, and the courts scrutinized their fairness and necessity. It is thus little surprise that, despite a discussion of “[p]olicy [c]onsiderations” that spans pages, the Trustee identifies (Br. 44-48) no case involving a third-party release in which a court permitted a third party

to “manipulat[e] the process to its own advantage” and to the detriment of victims. JA888.⁴

Instead, the Trustee speculates that allowing for nonconsensual third-party releases will somehow cause a “reduction in benefits to future bankruptcy estates.” Br. 46. The history discussed above, including in circuits that have long permitted such releases, rebuts that conjecture. *See, e.g., In re Dow Corning*, 287 B.R. at 404-405 (finding shareholder releases and contributions provided for plan value “vastly greater” than Dow Corning’s prior offers, “on a much more accelerated basis” and without requiring women to prove their “silicone exposure caused any of the diseases claimed”). Far from yielding greater “compensation” for creditors as a body, Tr. Br. 46, categorically barring courts from ever binding all creditors to a carefully tailored release would favor the small number of holdouts (and their contingency-fee lawyers) who prefer to recover disproportionately at the expense of others—an inequitable result that bankruptcy law eschews precisely because it contradicts “basic principles of fairness,” Tr. Br. 45.

⁴ At best, the Trustee exaggerates (Br. 46-47) the purported threat of nonconsensual third-party releases by citing an inapposite exculpation provision of a reorganization plan in which “there are no nonconsensual third-party releases.” *In re Voyager Digit. Holdings, Inc.*, 649 B.R. 111, 130 (Bankr. S.D.N.Y. 2023). To be clear, “criminal claims belonging to the United States” (Tr. Br. 47) are not subject to the Release here. For their part, the Canadian creditors seek (Br. 45-46) to obscure the question presented by reference to “bankruptcy abuse[]” via the “Texas two-step,” obviously nowhere at issue in this case where the Debtors are indisputably insolvent.

C. This Case Illustrates Why The Code Does Not Categorically Bar Third-Party Releases

The factbound question of whether the Release satisfies the Second Circuit’s stringent standard falls outside the scope of the question presented. But the undisputed record here illustrates the importance of respecting court authority to approve appropriate third-party releases under the Code—and the dire consequences of the categorical bar the Trustee seeks.

The asserted multi-trillion-dollar valuation of the released claims “far exceeds the total funds available, as well as the Sacklers’ personal wealth.” JA895. There is no scenario in which those claims can be satisfied in full. In the absence of the Release, the Debtors would “be required to litigate indemnity and contribution claims brought against them by the Sacklers, which would likely deplete the *res*, no matter the ultimate outcome of those claims.” JA892. Regardless, “the government would recover its \$2 billion [superpriority claim] first, thereby depleting the *res* completely.” JA892. The result? “[U]nsecured creditors would probably recover *nothing* from the Debtors’ estates.” JA405 (emphasis added).

Victims of the opioid epidemic “would go without assistance” and those creditors whose claims do not belong to the estates would face years of protracted and expensive litigation with the Sacklers. JA892. Even if favorable creditor judgments were ultimately obtained, the Sacklers’ “widely scattered” assets (JA855) are primarily held in “purportedly spendthrift trusts,” including in offshore locations like

the Bailiwick of Jersey” that pose harsh impediments to collection. Tr. Br. 3-4 (quoting JA711-712). The few claimants able to recover first in a race to the courthouse would do so “disproportionately,” JA892, at the expense of the vast majority who would be left with “materially less,” if anything at all, JA406. Indeed, inter-creditor competition, both in terms of competing suits against the Sacklers and allocation of the estates, would leave the Sacklers as the only victors.

Faced with that daunting reality—made apparent through “tens of millions of documents produced” and depositions taken in the Official Committee’s “rigorous and exhaustive” investigation, JA51, 57-59, 890—the Official Committee and various ad hoc creditor groups engaged in contentious negotiations to bring in upwards of \$5.5 billion from the Sacklers. That contribution to the reorganization—“substantial” by any measure and perhaps “the largest contribution in history,” JA894-895—will afford victims and their communities life-changing funds. Although the Trustee downplays the amount of direct compensation to personal injury victims, that view is not shared by the victims themselves and overlooks the benefits of billions in abatement funds.

Critically, the Release provided in exchange was demanded “as much, if not more,” by the Official Committee and other creditor groups exercising fiduciary duties, JA348, to prevent the Sacklers from “exhaust[ing] their collectible assets fighting and/or paying only the claims of certain creditors with the best ability to pursue the Sacklers in court,” JA76 (emphasis omitted). It was not “foisted upon opioid

claimants” by the Sacklers, Can. Br. 3, and “anyone who contends to the contrary is *** simply misleading the public: this is *not* the Sacklers’ plan.” JA348. Without the Release’s creditor-driven protection, there could be no fair distribution “for the benefit of *all* creditors.” JA76; JA894-896. And in the wake of a “public health and safety catastrophe caused in part by [the Debtors’] past conduct,” which makes “the costs of delay [here] *** far more severe than in most chapter 11 cases,” any recovery would be years away. JA68. Appreciating that reality, over 95% of creditors voted in favor of the Plan. JA895.

Notably, many third-party claims at issue here—including all held by personal injury victims—are derivative of those held by the Debtors’ estates. *See* JA870-871. And it is undisputed “that a bankruptcy court may approve *** third-party releases of derivative claims because those claims really belong to the estate of the debtor.” JA871. Allowing the small subset of claims that have not been settled to doom the Release would have devastating consequences for all creditors: “the [P]lan would unravel” because the interlocking settlements that hinge on the Release “would fall apart”; “the Debtors’ cases would likely convert to cases under Chapter 7”; and creditors would receive only a fraction of what they would have recovered under the Plan. JA352, 405. The many other hard-fought commitments the creditors have secured (*e.g.*, “abatement trusts, the public document archive, and divestment of the Sacklers from the opioid business worldwide,” JA896) would be lost.

* * *

The Trustee and supporting parties try to make this case about “billionaire justice” and retribution against the Sacklers. Nobody has more reason for such retribution than the victims of the opioid crisis whose interests the Official Committee represents. But that is what the criminal code is for, and DOJ remains free to prosecute the Sacklers to the full extent of the law. (Why has it not done so? The Solicitor General is silent.)

The Bankruptcy Code, by contrast, is about maximizing creditor recovery and fair distribution of the estate. As the bankruptcy court found—a factual finding grounded in the record and ignored by the Trustee—the Plan does precisely that. That is why the overwhelming percentage of individual victims and other creditors support the Plan and the accompanying release of their claims.

The Trustee offers no viable alternative. Based on its years of efforts on behalf of victims, the Official Committee can attest (something it does not do lightly): more people will die without this Plan. The Code does not compel that tragic outcome.

CONCLUSION

This Court should dismiss the writ of certiorari or affirm the judgment of the court of appeals.

Respectfully submitted.

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October 20, 2023

No. 23-124

IN THE
Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

**AMICUS BRIEF IN SUPPORT OF
RESPONDENTS BY CERTAIN FORMER
COMMISSIONERS OF THE AMERICAN
BANKRUPTCY INSTITUTE'S COMMISSION
TO STUDY THE REFORM OF CHAPTER 11**

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INTEREST OF AMICI CURIAE¹

The American Bankruptcy Institute (“ABI”) is a national organization with nearly 10,000 members from all sectors of the restructuring community. In 2012, the ABI formed and funded a commission (the “Commission”) to evaluate and propose possible changes to reorganization laws, especially chapter 11 of the Bankruptcy Code. After over two years of intensive study by the Commission and multiple advisory committees, including gathering testimony at field hearings throughout the United States, and input from experts from all sides of various issues, the Commission issued a formal report containing its findings and recommendations (the “Report”).² Counsel for amici curiae (the “Amici”) co-chaired the Commission. Four additional former commissioners join in this brief.³

Included in the Commission’s purview was a review of the use of nonconsensual third-party releases in chapter 11 plans of reorganization. After careful study and discussion, the Commission recommended their continued

1. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Sup. Ct. R. 37(6).

2. AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012-2014 FINAL REPORT AND RECOMMENDATIONS (2014), <http://commission.abi.org/full-report> [hereinafter, the “REPORT”].

3. The Amici include: D.J. Baker, Geoffrey L. Berman, Jack Butler, Robert J. Keach, Albert Togut, and Deborah D. Williamson. The Amici emphasize that they do not speak or write for or on behalf of the ABI, and that this brief is filed in their individual capacity and does not constitute the views of the ABI.

use as an essential tool in certain chapter 11 cases, subject to a multi-factor balancing test. *See* REPORT, *supra* note 2, at 252.

The issues raised in this appeal are of interest to the Amici because the position advocated by the Petitioner, if adopted by this Court, will have a destructive effect on the entire chapter 11 restructuring process. The Petitioner's contention that, under the Bankruptcy Code, bankruptcy courts have only the authority specifically and precisely enumerated is contrary to the basic construction and text of the Bankruptcy Code and Congressional intent. Congress knew it could not possibly foresee all plan provisions and structures needed to successfully restructure complex business organizations in industries not contemplated when the Bankruptcy Code was passed or anticipate the countless challenges future bankruptcy courts would need to meet. Congress provided, in numerous provisions of the Bankruptcy Code, judicial authority and discretion to achieve reorganizations that balanced the interests of all constituencies. Congress' wisdom spawned needed innovation and creativity in restructuring businesses that made chapter 11 a model for restructuring statutes throughout the world. Petitioner's constricted view of the bankruptcy court's authority is simply contrary to what Congress intended.

The availability of third-party releases drives settlements essential to complex reorganizations, particularly in, but not limited to, mass tort cases. Barring such releases will curtail, if not end, such global settlements to the great detriment of claimants. If nonconsensual third-party releases are prohibited, tort victims will suffer the most. A tiny minority of holdouts

could destroy a settlement beneficial to and favored by the vast majority of claimants.

For these reasons, the Commission warned in the Report that a blanket prohibition on nonconsensual third-party releases was inadvisable and recommended their continued use under certain conditions. In particular, the Commission included in the Report this recommendation:

In reviewing a proposed third-party release included in a chapter 11 plan, the court should consider and balance each of the following factors: (i) the identity of interests between the debtor and the third party, including any indemnity relationship, and the impact on the estate of allowing continued claims against the third party; (ii) any value (monetary or otherwise) contributed by the third party to the chapter 11 case or plan; (iii) the need for the proposed release in terms of facilitating the plan or the debtor's reorganization efforts; (iv) the level of creditor support for the plan; and (v) the payments and protections otherwise available to creditors affected by the release. In a case involving the application of third-party releases to creditors and interest-holders not voting in favor of the plan, the court should give significant weight to the last of these factors.

REPORT, *supra* note 2, at 252. In the Commission's view, balancing these factors makes third-party releases available only in appropriate cases, while ensuring that the recipients of releases pay adequate consideration for them, and that the parties releasing claims receive as much or

more than they would receive through nonbankruptcy litigation, and likely receive that consideration far sooner. This balancing test prevents overuse of this critical tool; the test is exacting and stringent, requiring a particularized factual basis and substantial and credible evidence.

Bankruptcy Judge Robert D. Drain confirmed a plan in the case below that, while consented to by the overwhelming majority of affected claimants, contained nonconsensual third-party releases applicable to only a tiny number of holdouts. *See In re Purdue Pharma L.P.*, 633 B.R. 53, 61, 115 (Bankr. S.D.N.Y. 2021). Judge Drain relied upon the established statutory basis in the Bankruptcy Code for confirmation of plans containing such releases and assiduously applied the multi-factor test adopted by the Commission (and the majority of circuit courts) with relevant findings backed by substantial evidence. *See id.* at 85-95.

The Second Circuit properly affirmed. *See In re Purdue Pharma L.P.*, 69 F.4th 45, 56-57 (2d Cir. 2023). The Second Circuit's stringent seven-factor test is entirely consistent with, and perhaps an improvement upon, the Commission's proposal. As the Second Circuit found, use of the multi-factor test, along with exacting standards for notice to all affected parties, also ensures that the due process rights of victims are protected and imposition of nonconsensual releases cannot constitute an uncompensated taking or otherwise run afoul of constitutional limitations. The Second Circuit found, in unity with a majority of circuit courts, statutory authority for approval of plans containing nonconsensual third-party releases in sections 1123(b)(6) and 105 of the Bankruptcy Code. *Id.* at 72-73.

Judge Drain's decision below, in confirming the debtors' plan and authorizing the third-party releases essential to the plan's implementation, proceeded with appropriate caution, properly balanced each of the factors suggested by the Commission (and the seven factors later adopted by the Second Circuit), and supported essential factual findings for each by reference to considerable and irrefutable evidence. No party disputes the bankruptcy court's factual findings. The appellants raised no challenge to the bankruptcy court's determination that all parties-in-interest, including those with claims against the released parties, would be worse off if the plan were not confirmed, and if they pursued non-bankruptcy remedies. The parties with actual claims against the released parties clearly agreed, not just by their overwhelming vote in favor of the plan but also by not joining this appeal; the Petitioner, of course, has no claim and no economic stake.

Statutory authority in the Bankruptcy Code empowered Judge Drain to so rule. The Second Circuit properly affirmed Judge Drain's decision confirming Purdue Pharma's plan, a plan supported by nearly all affected claimants and parties-in-interest. The Amici support affirmance of the Second Circuit's decision, a decision consistent with the Commission's recommendation and more than forty years of case law in the clear majority of circuits.

PRELIMINARY STATEMENT

In confirming the plan below, Judge Drain properly noted the following:

Bankruptcy cases present a unique and perhaps the only means to resolve the collective problem presented by an insolvent debtor and a large body of creditors competing for its insufficient assets, including especially when there are mass claims premised on products to which, as here, massive harm is attributed.

In re Purdue Pharma L.P., 633 B.R. at 58. Further, and premised on the overwhelming evidence presented to him, Judge Drain found that the plan was the only “reasonably conceivable” way to resolve the issues in the case, *id.* at 59, and, as the Second Circuit found, “in doing so, grounded [his] opinion on the principle that, in bankruptcy, courts ‘focus the solution away from individual litigations to a fair collective result subject to the unique ability under bankruptcy law to bind holdouts under well-defined circumstances who could not otherwise be bound under bankruptcy law,’” *In re Purdue Pharma L.P.*, 69 F.4th at 62 (quoting *In re Purdue Pharma L.P.*, 633 B.R. at 58). Judge Drain recognized, as has this Court, that bankruptcy, and chapter 11 in particular, constitutes a “special remedial scheme . . . [capable of] expressly foreclosing successive litigation by nonlitigants” in appropriate circumstances. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (distinguishing bankruptcy from “mandatory” class action settlements). The bankruptcy court properly framed the issue as one regarding the primacy, in reorganization cases, of a collective result, concluding that a small number of holdouts could be bound to the comprehensive settlement embodied in the plan. *In re Purdue Pharma L.P.*, 633 B.R. at 97-98. So did the Second Circuit. *In re Purdue Pharma L.P.*, 69 F.4th at 77-85.

The Second Circuit emphasized that Judge Drain twice reduced the scope of the proposed releases, a critical fact ignored by the Petitioner. The plan's releases were limited to claims of creditors of the debtors against third parties where "the Debtors' conduct must be a legal cause or legally relevant factor of any released cause of action against the Sacklers." *Id.* at 61. In addition, "the [bankruptcy] court narrowed the Release even further to cover only those claims that directly affect the *res*" of the debtors' bankruptcy estates. *Id.* at 63-64. The claims covered by the narrowed releases, being "legally intertwined with the Debtors' conduct . . . are appropriately subject to settlement under both statutory and common law frameworks." *Id.* at 64 (citing *In re Purdue Pharma L.P.*, 633 B.R. at 103-05). Limiting the releases to claims overlapping and intertwined with like claims against the chapter 11 debtor and affecting its estate makes their approval and extension to holdout parties (all but the Petitioner creditors of the chapter 11 debtor) a natural extension of what the Bankruptcy Code expressly provides as to plan confirmation: a class of claims may accept a plan if requisite majorities in number and dollar amount vote to accept, but the confirmation of the plan binds not only the claimants voting to accept, but those voting to reject as well. 11 U.S.C. §§ 1126, 1141(a). With respect to claims that affect the *res* of the estate, this is what plan confirmation does: holdouts are bound to the settlement accepted by the majority in favor of a necessary collective result. Confirmation of the plan below did nothing radical, but was a natural extension of what typically happens in chapter 11.

Judge Drain's assessment of chapter 11's efficacy as a tool for collective outcomes in mass liability cases

was correct, as was the Second Circuit’s agreement with that assessment. Since passage of the Bankruptcy Code, debtors and creditors have used chapter 11 to craft solutions to intractable problems in cases requiring a “global settlement of massive liabilities against . . . debtors and co-liable parties.” *In re Continental Airlines*, 203 F.3d 203, 212-13 (3d Cir. 2000) (describing a “central focus” of three recent reorganizations before appellate courts). As Judge Drain and the Second Circuit agreed, chapter 11 orients a debtor, its creditors, and other stakeholders—parties with disparate and often conflicting interests and goals—towards a *collective* solution. See *In re Purdue Pharma L.P.*, 633 B.R. at 58. In mass tort cases, reaching such a solution depends on the unique tools available to a bankruptcy court based on the broad authority provided by the Bankruptcy Code. One such essential tool, used after careful scrutiny and only if premised on sufficient evidence and acceptance by the clear majority of affected claimants, is the nonconsensual release of inevitably intertwined claims the debtor’s creditors hold against non-debtors. In these cases, a nonconsensual third-party release is critical in reaching a global settlement with creditors and, thus, an essential element of a debtor’s plan of reorganization. As the narrowed scope of the releases in *Purdue* demonstrates, mass tort cases involve third-party claims not easily distinguished from the claims of and against the chapter 11 debtor, an absence of black and white distinctions between claims against the debtor and third parties, and, rather, a massive amount of gray area.

In the mass tort context, use of third-party releases permits and drives settlements that distinctly benefit tort claimants; without such releases, and the third-party contributions they incentivize, debtors lack sufficient

assets to compensate victims. *And those victims would receive far less via litigation.* Tellingly, Judge Drain found, based on days of testimony, that victims would undoubtedly receive a far greater recovery as a result of the reorganization plan at issue than they would receive by fully litigating their alleged claims against the Sacklers, and they would receive that amount far faster. *See In re Purdue Pharma L.P.*, 633 B.R. at 109 (“I therefore conclude that if I denied confirmation of the plan, the objectors’ aggregate net recovery on their claims against the Debtors and the shareholder released parties would be materially less than their recovery under the plan.”). A chapter 11 plan incorporating such settlements—grounded in nonconsensual releases as to any settlement holdouts—is often the only possible rational solution to value-destructive years of uncertain litigation.

History is the best teacher. Before the use of chapter 11 to resolve mass tort crises, such cases precipitated a chaotic race to the courthouse with often unfair results. Early-filing plaintiffs were covered by limited insurance that, once exhausted, left remaining claimants with no source of recovery as the underlying business, besieged with litigation, failed and liquidated. Judgment amounts varied greatly. Courts were swamped with these actions, often tens of thousands of them, severely taxing the tort system, with attendant, years-long delays. Future claimants were often left with no remedy.

Once companies with mass tort exposure filed for chapter 11 relief, starting most notably with the Johns-Manville Corporation in 1982, greater order and fairness was achieved. Equality of treatment, required under the

Bankruptcy Code, occurred. A centralized forum for adjudication of all claims was created, often via claims processes designed by the tort claimants' counsel. All relevant assets came under the supervision and control of the bankruptcy court, including valuable insurance rights. *See* 11 U.S.C. §§ 365(f), 541(a). The rights of future claimants (those whose diseases would manifest after the bankruptcy) were protected through the appointment of future claims representatives. *See, e.g., In re Johns-Manville Corp.*, 600 F.3d 135, 140 (2d Cir. 2010) (describing the appointment of a future claims representative early in that case, in 1984, to represent future asbestos claimants). Critically, potentially co-liable third parties were incentivized to contribute to the settlements because they could be protected by third-party releases. *Id.* at 142. This was a seminal change in the resolution of mass tort crises.

The list of successful mass tort chapter 11 cases involves varying factual contexts: defective airbags in cars,⁴ wildfires,⁵ sexual abuse,⁶ ground water

4. *See In re TK Holdings Inc.*, No. 17-11375 (BLS), 2018 WL 1306271 (Bankr. D. Del. Mar. 13, 2018).

5. *See In re PG & E Corp.*, 617 B.R. 671 (Bankr. N.D. Cal. 2020).

6. *See Findings of Fact, Conclusions of Law, and Order Confirming the Second Am. Chapter 11 Plan of Reorganization of Catholic Diocese of Wilmington, Inc.*, *In re Catholic Diocese of Wilmington, Inc.*, No. 09-13560 (CSS) (Bankr. D. Del. July 28, 2011), ECF No. 1471; Findings of Fact, Conclusions of Law, and Order Confirming the Modified Third Am. Joint Chapter 11 Plan of Reorganization Proposed by USA Gymnastics and the Additional Tort Claimants Committee of Sexual Abuse Survivors,

contamination,⁷ and opioids⁸ to name a few. The plans in each rely upon nonconsensual third-party releases. Numerous new mass tort cases are currently in progress involving previously unforeseen and disputed causes. These historical and current dynamics lead to the Commission's recommendation.

SUMMARY OF ARGUMENT

Pursuant to the plain meaning of relevant provisions of the Bankruptcy Code, and Supreme Court and circuit court case law interpreting them, bankruptcy courts have statutory authority to approve and enforce nonconsensual third-party releases contained in chapter 11 plans.

That authority resides in sections 1123 and 105 of the Bankruptcy Code, as held by the majority of the circuit courts. This Court's decision in *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), provides an unequivocal roadmap for the construction of Bankruptcy Code sections 1123(b)(6) and 105(a) working in tandem. An appropriate plan provision, such as one providing

In re USA Gymnastics, No. 18-09108 (RLM) (Bankr. S.D. Ind.), ECF No. 1764.

7. Findings of Fact, Conclusions of Law and Order Confirming the Fourth Am. Chapter 11 Plan of Reorganization for Met-Coil Systems Corp., *In re Met-Coil Sys. Corp.*, No. 03-12676 (MFW) (Bankr. D. Del. Aug. 16, 2004), ECF No. 1216.

8. *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); Findings of Fact, Conclusions of Law, and Order Confirming the Second Am. Joint 11 Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors, *In re Insys Therapeutics, Inc.*, No. 19-11292 (KG) (Bankr. D. Del. Jan. 16, 2020), ECF No. 1115.

for properly narrowed nonconsensual third-party releases, may be approved by the court confirming the plan in the absence of a clear and specific prohibition in the Bankruptcy Code (or coequal federal law) barring inclusion and enforcement of the plan provision. There is no clear and specific bar on nonconsensual third-party releases in the Bankruptcy Code. The majority of the circuit courts have rejected section 524(e) as a prohibition on releases in plans, given the plain meaning and limited scope of that provision.

Bankruptcy courts exercise this authority with great care and only in appropriate circumstances, and subject to strict guidelines. While articulation of their approaches varies, courts in almost all of the circuits employ a stringent, multi-factor balancing test, understanding that a tool like the nonconsensual third-party release should not be employed lightly. *See, e.g., In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (“Our precedents regarding nonconsensual third-party releases and injunctions in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest that courts considering such releases do so with caution.”).

This Court’s construction of section 1123(b)(6) is consistent with Congressional intent to provide bankruptcy courts with considerable authority and discretion in reorganization cases. Numerous Bankruptcy Code sections provide similarly broad authority to the courts to determine the appropriateness and fairness of plan provisions, settlements, and other outcomes.

The vast majority of the claimants below consented in some fashion to the narrowed releases in the confirmed plan. Thus, the bankruptcy court properly considered whether the plan releases could be imposed on a tiny minority of holdouts to achieve a beneficial collective result that far exceeded in value what could be achieved outside of chapter 11. The bankruptcy court properly concluded that it had statutory authority to impose the releases on the nonconsenting minority, and that doing so was necessary and appropriate.

In total agreement that the Bankruptcy Code provided authority to approve the third-party releases included in the Purdue plan, and that it was appropriate to exercise that authority after careful consideration of seven factors, the Second Circuit affirmed. This Court should similarly affirm.

ARGUMENT

I. The Majority of Circuit Courts Interpret the Bankruptcy Code as Providing Authority to Approve Nonconsensual Third-Party Releases in Chapter 11 Plans.

Beginning with *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988), the vast majority of circuit courts have endorsed the use of nonconsensual third-party releases in plans under appropriate circumstances. These circuits include at least the First, Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. *See Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983-84 (1st Cir. 1995); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005); *In re Lower Bucks Hosp.*, 571 Fed.

Appx. 139, 144 (3d Cir. 2014); *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078-79 (11th Cir. 2015).

Within these circuits, courts employ multi-factor balancing tests to determine whether third-party releases should be approved. *See, e.g., In re Tribune Co.*, 464 B.R. 126, 176-180 (Bankr. D. Del. 2011) (summarizing the Third Circuit's approach and applying a four-factor test); *Dow Corning*, 280 F.3d at 658 (enumerating a seven-factor test, which has been applied by the Fourth and Eleventh Circuits). *But see Airadigm*, 519 F.3d at 657 (permitting third-party releases but eschewing the multi-factor approach and favoring an analysis that "is fact intensive and depends on the nature of the reorganization"). Although the factors applied by these courts vary slightly from circuit to circuit, each approach involves examining whether the nonconsensual release is necessary to the success of the reorganization, whether the non-debtor releasee contributed assets to the reorganization, whether the plan provides a mechanism for the payment of the claims of the class affected by the release, and whether the settlement, including the use of third-party releases, is supported by the majority of the affected claimants.

Similarly, a bankruptcy court within the Eighth Circuit has approved nonconsensual third-party releases using a balancing test that considers: (1) the "identity of interest between the debtor and the third-party non-debtor, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate"; (2) whether

“[t]he non-debtor has contributed substantial assets to the reorganization”; (3) whether “[t]he injunction is essential to reorganization”; (4) whether “[a] substantial majority of the creditors agree to such injunction”—specifically, whether “the impacted class or classes have ‘overwhelmingly’ voted to accept the proposed plan treatment”; and (5) whether “[t]he plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.” *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994). No one factor is dispositive, and the list is neither exclusive, nor conjunctive; in all instances, the inquiry is fact driven. *See, e.g., In re Charles St. African Methodist Episcopal Church of Bos.*, 499 B.R. 66, 100 (Bankr. D. Mass. 2013) (explaining that it would apply the factors from *Master Mortgage* and noting that the factors are a “useful starting point,” but they are “neither exclusive or conjunctive requirements”) (quoting *In re Washington Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011). The test in *Master Mortgage*, with clarification as to the final factor, was the model for the Commission’s recommendation precisely because it is flexible enough to accommodate different factual contexts and stringent enough to ensure that nonconsensual releases will be the exception. Particular emphasis is placed on the last two factors: acceptance by the majority of claimants and ensuring the existence of mechanisms to facilitate adequate payment to affected creditors. *See* REPORT, *supra* note 2, at 256.

A small minority of circuits have held in particular cases (none mass tort cases) that nonconsensual releases are inappropriate.⁹ *See In re Pac. Lumber Co.*, 584 F.3d

9. These holdings are premised on the argument that section 524(e) of the Bankruptcy Code—which simply explains the scope

229, 252-53 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Est. Fund*, 922 F.2d 592, 600 (10th Cir. 1990). The Fifth Circuit, however, stated that third-party releases can be appropriate in mass tort cases. *See, e.g., Pac. Lumber*, 584 F.3d at 252 (explaining that third-party “non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets”); *Feld v. Zale Corp.*, 62 F.3d 746, 760-61 (5th Cir. 1995) (distinguishing its holding from *Drexel Burnham*, 960 F.2d at 293, on the factual basis that the *Drexel Burnham* court approved an injunction of third-party claims because it channeled those claims to allow recovery from separate assets, whereas the “the injunction at issue in this case provided no alternative means . . . to recover from [the third party insurer]”). At least one court within the Tenth Circuit found that the alleged bar on third-party releases attributed to the holding in *Western Real Estate Fund* was not absolute, noting that section 524(e) does not preclude such releases. *See In re Midway Gold US, Inc.*, 575 B.R. 475, 505 (Bankr. D. Col. 2017). And a recent Ninth Circuit decision suggested that release of third-party claims could be imposed in a plan. *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1081-85 (9th Cir. 2020); *see also Purdue Pharma*, 633 B.R. at 101-02 (explaining the recent movement of

of a debtor’s discharge—necessarily precludes nonconsensual third-party releases. This interpretation of section 524(e) has been soundly refuted, as the scope of a debtor’s *discharge* has nothing to do with authority to allow a *release* of a non-debtor, and the section contains no language supporting a bar on third-party releases. *See, e.g., Dow Corning*, 280 F.3d at 657. The Second Circuit, citing its sister circuits, also rejected section 524(e) as a basis for barring nonconsensual releases. *See In re Purdue Pharma L.P.*, 69 F.4th at 74-75.

the minority circuits away from an absolute ban on third-party releases).

In sum, while a (modest and diminishing) split among the circuits may remain, the clear and long-standing majority support for use of nonconsensual third-party releases is not an accident. The Bankruptcy Code—and Supreme Court precedent interpreting the specific provisions undergirding nonconsensual third-party releases—offer solid statutory authority sufficient to warrant this Court’s affirmance of the Second Circuit’s decision below.

II. Supreme Court and Circuit Court Cases Recognize and Define a Statutory Basis Authorizing Bankruptcy Court Approval of Third-Party Releases.

The Second Circuit held that the “ultimate authority for the imposition of nonconsensual releases of direct third-party claims against non-debtors is rooted—as it must be—in the Bankruptcy Code, specifically 11 U.S.C. §§ 105(a) and 1123(b)(6).” *In re Purdue Pharma L.P.*, 69 F.4th at 72. Section 1123(b)(6) provides that a plan may “include any other appropriate provision not inconsistent with the applicable provisions of this title.” 11 U.S.C. § 1123(b)(6). Section 105(a) provides, in relevant part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” *Id.* § 105(a). Thus, within certain limits not relevant here, under the plain language of §1123(b), plans may incorporate provisions, such as third-party releases, even if nonbankruptcy law would bar them, unless a *specific* provision of the Bankruptcy Code prohibits

inclusion of such a provision. The bankruptcy court then, given section 105, has the power to approve and enforce those plan provisions.

This Court—in a decision that standing alone articulates statutory authority for the approval and enforcement of third-party releases¹⁰—has instructed lower courts precisely how to interpret this particular combination of Bankruptcy Code provisions. *See Energy Res. Co.*, 495 U.S. 545.

In *Energy Resources*, this Court held that sections 105(a) and 1123(b)(6)¹¹ in combination conferred broad authority upon bankruptcy courts to approve and enforce plan provisions necessary to the implementation of the plan of reorganization. *Id.* at 549. Absent a provision of the Bankruptcy Code or a coequal federal statute *clearly, specifically, and unequivocally* barring the otherwise appropriate plan provision at issue, the bankruptcy court had the statutory authority to approve and enforce the provision. *Id.* at 549-50. In *Energy Resources*, the subject plans contained provisions providing that payments to the IRS would be first applied to the reduction of trust fund taxes (thus eliminating first the possible liability of non-debtor officers as “responsible” persons); outside of

10. See Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEVS. J. 13 (2006).

11. The Court in *Energy Resources* cites to section 1123(b)(5), but the Bankruptcy Code has since been amended, and the provision to which the Court referred is now codified at section 1123(b)(6).

bankruptcy, pursuant to IRS regulations and decisions, the opposite result would have pertained, and the IRS claims against non-debtor parties would be preserved until all debtor federal taxes had been paid in full. *Id.* at 247-48. The Supreme Court held that the combination of sections 105(a) and 1123(b)(6) provided authority to approve and enforce against the IRS the subject plan provision unless the provision *was specifically barred* by another Bankruptcy Code provision or coequal federal law. *Id.* at 549-50. Scouring the sections of the Bankruptcy Code on tax priority and the provisions of the tax laws on trust fund taxes and responsible person liability, the court found no specific and express bar to the plan provisions at issue. *Id.* at 550 (“It is evident that these restrictions on a bankruptcy court’s authority do not preclude the court from issuing orders of the type at issue here, for those restrictions do not address the bankruptcy court’s ability to designate whether tax payments are to be applied to trust fund or non-trust-fund tax liabilities.”). Accordingly, the Court held, the bankruptcy court had authority to approve and enforce the subject plan provisions, and properly exercised that authority. *Id.* at 550-51. Thus, the bankruptcy court in *Energy Resources* had authority to ensure that the first payments funded to the IRS from whatever the source resulted in the release of potentially responsible third parties before other, non-trust fund tax obligations were funded, despite the IRS’s lack of consent.

This Court’s holding in *Energy Resources* that section 1123(b)(6) provides broad authority and discretion to the bankruptcy court to approve appropriate plan provisions not expressly prohibited is consistent with Congressional intent. Throughout the Bankruptcy Code, bankruptcy courts are provided with such authority and

discretion. Regarding plan confirmation, bankruptcy courts are empowered to confirm plans over the objection of a nonconsenting class of creditors (a so-called “cram down”), provided the court finds that the plan “does not discriminate unfairly, and is fair and equitable” with respect to that class and generally. 11 U.S.C. § 1129(b). In section 524(g), the court may approve a plan enjoining third-party claims in asbestos-related cases, provided the court determines that doing so is fundamentally fair and equitable to such parties. *Id.* § 524(g)(4)(B). In numerous provisions, the bankruptcy court is tasked with determining matters based on considerations of fairness, the equities of the case, the best interests of various constituencies, and like considerations.¹² The Bankruptcy

12. Those provisions include, but are not limited to, the following (with emphasis supplied): 11 U.S.C. §1112(b)(1) (“[T]he court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, *whichever is in the best interests of creditors and the estate*, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is *in the best interests of creditors and the estate*.”); § 1114(g)(3) (“The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that . . . *such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably*, and is clearly favored by the balance of the equities”); § 365(d)(5) (“The trustee shall timely perform all of the obligations of the debtor . . . under an unexpired lease of personal property . . . unless the court, after notice and a hearing and *based on the equities of the case*, orders otherwise with respect to the obligations or timely performance thereof.”); § 502(j) (“A reconsidered claim may be allowed or disallowed *according to the equities of the case*.”); § 552(b)(1) (providing the court with discretion to invalidate after acquired property clauses in security agreements “*based on the equities of the case*” after notice and a

Code simply does not require that each element of the court's authority or discretion be specifically enumerated. Congress trusted the courts to do what was necessary and appropriate to accomplish the goals of the Code while balancing competing interests. As one bankruptcy court described this task, with reference to a decision of this Court:

The Bankruptcy Code should be interpreted in light of the policies underlying reorganization. “[R]eorganization, in its fundamental aspects, involves the thankless task of determining who should share the losses incurred by an unsuccessful business and how the value of the estate should be apportioned among creditors and stockholders.” Like all areas of the law, chapter 11 reorganization requires a balancing of the economic and social interests of those affected. There are three constituent groups in a reorganization—creditors, owners and those dependent upon the debtor such as

hearing); § 723(d) (“If the aggregate that the trustee recovers from the estates of general partners under subsection (c) of this section is greater than any deficiency not recovered under subsection (b) of this section, the court, after notice and a hearing, *shall determine an equitable distribution of the surplus* so recovered, and the trustee shall distribute such surplus to the estates of the general partners in such partnership according to such determination.”); § 1112(d) (“The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if . . . *such conversion is equitable*.”); § 1113(c) (“The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that . . . *the balance of the equities clearly favors rejection of such agreement*.”).

employees, suppliers and customers. Although creditors have a compelling interest as the prime beneficiaries of the bankruptcy estate, all these interests must be considered. The reorganization process is much more than a collective proceeding for the enforcement of rights held by creditors under state law.

In re Bjomes Realty Trust, 134 B.R. 1000, 1011 (Bankr. D. Mass 1991) (internal citations omitted) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203-04 (1983)).

The circuit courts, given this Court's guidance, find statutory authority for plan provisions imposing nonconsensual releases in sections 1123 and 105. In *Dow Corning*, a chapter 11 case precipitated by mass tort litigation, the Sixth Circuit rejected the bankruptcy court's finding that approval and enforcement of third-party releases was entirely grounded in the court's inherent authority as a court of equity, and therefore inhibited by limits on the exercise of that power. 280 F.3d at 657-58. "The district court rejected this argument on the grounds that the releases were authorized by 'sufficient statutory authority under the Bankruptcy Code.' . . . [W]e agree with the district court." *Id.* at 657 (quoting *In re Dow Corning Corp.*, 255 B.R. 445, 480 (E.D. Mich. 2000)). The circuit court held the combination of sections 105(a) and 1123(b) (6) provided specific statutory authority for the inclusion of third-party releases in plans and the court's approval and enforcement of such releases. *Id.* at 658. Moreover, no provision of the Bankruptcy Code or coequal federal law, including, without limitation, section 524(e) of the Bankruptcy Code, barred third-party releases. *Id.* at 657-58.

Similarly, following *Energy Resources*, the Seventh Circuit found authority to approve and enforce third-party releases in the provisions of the Bankruptcy Code. See *Airadigm*, 519 F.3d at 657-58. First, the circuit court rejected the argument that section 524(e) barred the inclusion of third-party releases in plans and the court's approval and enforcement of such releases. *Id.* at 656. Next, the court found the authority to approve and enforce third-party releases resided in the combination of sections 105(a) and 1123(b)(6):

The second related question dividing the circuits is whether Congress affirmatively gave the bankruptcy court the power to release third parties from a creditor's claims without the creditor's consent, even if § 524(e) does not expressly preclude the releases. A bankruptcy court "appl[ies] the principles and rules of equity jurisprudence," *Pepper v. Litton*, 308 U.S. 295, 304 [] (1939), and its equitable powers are traditionally broad, *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549 (1990). Section 105(a) codifies this understanding of the bankruptcy court's powers by giving it the authority to effect any "necessary or appropriate" order to carry out the provisions of the bankruptcy code. *Id.* at 549; 11 U.S.C. § 105(a). And a bankruptcy court is also able to exercise these broad equitable powers within the plans of reorganization themselves. Section 1123(b)(6) permits a court to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). In light of these provisions, we

hold that this “residual authority” permits the bankruptcy court to release third parties from liability to participating creditors if the release is “appropriate” and not inconsistent with any provision of the bankruptcy code.

Id. at 657.

The Eleventh Circuit, citing *Airadigm*, joined the majority view and “agree[d] that § 105(a) codifies the established law that a bankruptcy court ‘applies the principles and rules of equity jurisprudence.’” *See Seaside Eng’g*, 780 F.3d at 1078 (quoting *Airadigm*, 529 F.3d at 657).

Beyond the circuits discussed above, lower courts often attribute the source of bankruptcy court authority to approve third-party releases to specific sections of the Bankruptcy Code. *See, e.g., In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 584 (D. Del. 2018) (explaining that courts look to sections 1129(a)(1), 1123(b) (6), and 105 as sources of authority to approve third-party releases); *Charles St.*, 499 B.R. at 100 (citing sections 105 and 1123 as “statutory background” leading it to say that it “cannot conclude . . . that no third-party release, however well-tailored and justified, may ever be permitted in a plan of reorganization”); *see also Midway Gold*, 575 B.R. at 502 (explaining that “[c]ourts subscribing to the majority view” cite to sections 105(a) and 1123(b) when approving third-party releases in chapter 11 plans); *In re Kirwan Offs. S.à.r.l.*, 592 B.R. 489, 505, 511 (S.D.N.Y. 2018) (explaining that “the third-party releases contained in a confirmed plan are subject to 11 U.S.C. §§ 1129(a)(1), 1123(b)(5) & (6), 105, and 524(e)” and thus stem from a federal statutory scheme).

Thus, as directed by *Energy Resources*, the search is *not* for a specific provision *allowing* third-party releases; that authority resides in the broad statutory authority provided by section 1123(b)(6), unless a specific statutory provision expressly and unequivocally bans the exercise of that authority. That statute does not exist. No Bankruptcy Code provision bars third-party releases; the majority of circuits have rightly rejected section 524(e) as such a bar.

The Second Circuit decision below was thus grounded in this well-established precedent: “Although our case law has never expressly cited §1123(b)(6) to support the imposition of third-party releases, we now explicitly agree with these Circuits and conclude that §1123(b)(6), with §105(a), permit bankruptcy courts’ imposition of third-party releases.” *In re Purdue Pharma L.P.*, 69 F.4th at 74.

The Second Circuit expressly rejected the Petitioner’s argument that *Energy Resources* only speaks to the ability of bankruptcy courts to modify relationships between the debtor and the debtor’s creditors as such. Oddly, the Petitioner’s argument is premised on this Court’s statement in *Energy Resources* emphasizing the breadth of section 1123(b)(6): “These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships.” 495 U.S. at 549. The Second Circuit properly found this language expansive, not limited: “[A]s the Court’s language in *Energy Resources* indicates, §1123(b)(6) is limited only by what the Code expressly forbids, not what the Code explicitly allows.” *In re Purdue Pharma L.P.*, 69 F.4th at 73-74.

Seeking to limit this Court’s prior holding and the clear implication of its language in *Energy Resources*, the Petitioner contends that section 1123(b)(6) must speak only to debtor-creditor relationships because sections 1123(b)(1) through 1123(b)(5) are seemingly so constrained. Pet’r’s Br. 22-24. However, the actual application of those sections by bankruptcy courts reveals no such limitation. For example, section 1123(b)(5), which allows plan provisions that “modify the rights of holders of secured claims,” has provided the basis for a plan-based injunction against enforcement of a non-debtor’s guaranty of the debtor’s secured debt conditioned upon the debtor’s performance under the plan. *In re Seatco, Inc.*, 259 B.R. 279, 283-287 (Bankr. N.D. Tex. 2001).

The Petitioner’s argument indeed ignores the facts of *Energy Resources*, where the plan provision directly affected the IRS’s preservation of claims against non-debtor “responsible individuals” liable for unpaid trust fund taxes that would be first satisfied under the plan in defiance of the regulations applicable outside of bankruptcy. *See* 495 U.S. at 550-51.

The phrase “debtor-creditor relationship,” as used in the Bankruptcy Code, is simply not as limited as the Petitioner contends. Courts find injunctions against third parties to be well within the confines of that phrase, especially when third-party actions affect the administration of or the *res* of the bankruptcy estate. Title 28 U.S.C. § 157(b)(2)(O) provides that “core proceedings” include “other proceedings affecting the . . . adjustment of the debtor-creditor . . . relationship.” This language encompassed a proceeding by non-debtor banks to enjoin abusive conduct by a non-debtor in connection

with plan voting and confirmation. *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 284 & 303-04 (Bankr. W.D. Pa. 1990). The same language embraced a proceeding to establish “whether a nondebtor’s rights, as allegedly established in [a plan of reorganization], prevented his fellow shareholders from suing him derivatively.” *In re Birthing Fisheries, Inc.*, 300 B.R. 489, 501 (9th Cir. B.A.P. 2003); *see also In re U.S. Brass Corp.*, 301 F.3d 296, 306 n.33 (5th Cir. 2002) (holding that proceedings invoking the bankruptcy court’s authority to enter orders necessary for the consummation of a confirmed plan qualify as core proceedings “on the additional basis that it affects the adjustment of the debtor-creditor relationship” (citing 28 U.S.C. § 157(b)(2)(O)). Given that the releases within the Purdue Pharma plan were precisely limited to actions which affected the *res* of the bankruptcy estates and where the debtors’ conduct was at least a legally relevant factor in determining liability, the claims released were intertwined with the same creditors’ claims against the debtors’ estates and would have impacted the distribution to the debtors’ creditors’ claims. Thus, the plan provision imposing third-party releases unquestionably involved Purdue’s relationships with its creditors.

The Petitioner is left to resort to wild speculation, arguing that the majority of circuits’ reading of section 1123(b)(6) would give bankruptcy courts “unlimited” authority to approve abusive plan provisions affecting innocent third parties unconnected to the chapter 11 case. Pet’r’s Br. 37. But this appeal is not about what Judge Drain and the Second Circuit might have done, but what they did do. The nonconsensual releases were narrowly drawn. The Petitioner’s parade of horrors is just that, and the language of the Bankruptcy Code, considerations

of jurisdiction, and the multi-factor test mandated by the Second Circuit negate this imagined threat. As one district court noted, “it surely would be improper for a bankruptcy court to confirm a plan releasing third-party, non-debtor claims that were unrelated (or even only tangentially related) to the debtor or the bankruptcy case. A third-party release must be sufficiently related to the issues before the bankruptcy court in order for core jurisdiction to cover an order extinguishing that claim.” *In re Kirwan Offs.*, 592 B.R. at 505-06. As the court further elaborated, “[t]his conclusion also follows from the statutory requirement that a third-party release be ‘appropriate’ to include in a reorganization plan and not violate another provision of the Bankruptcy Code.” *Id.* at 506 (quoting 11 U.S.C. § 1123(b)(6)). Throughout the Bankruptcy Code, Congress placed trust in the bankruptcy courts to exercise such authority and discretion responsibly. The Petitioner’s attempt to constrain that authority defies, rather than furthers, the intent of Congress.

The narrowed releases in the confirmed plan in *Purdue Pharma* were limited to claims that were related to the debtors, the debtors’ estates, and the chapter 11 case. The confirmation of a plan binding holdout parties to such releases is not the exercise of unbridled power, but rather the natural and logical extension of what the Bankruptcy Code expressly provides; plan confirmation binds not only claimants voting to accept but also those voting to reject. 11 U.S.C. §§ 1126, 1141(a). These narrowly structured releases were thus “appropriate” provisions of the plan designed to protect the *res* of the bankruptcy estate and fit squarely within the types of provisions permitted under section 1123(b)(6) and enforceable through section 105(a).

The Purdue Pharma releases were consensual as to the vast majority of affected claimants. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, 23-10097 (CGT), 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023) (analyzing the body of case law on what constitutes a consensual third-party release). Claimants below who voted for the plan or received appropriate notice and failed to vote or object to the plan consented to the imposition of the releases as surely as if they had signed a release agreement; that is the way our system of justice operates.¹³

13. As Judge Goldblatt elaborated:

In this respect, the word “consensual,” when used to describe a third-party release, does not necessarily mean that every creditor who will be bound by the release has affirmatively agreed to it. As a descriptive matter, it may be just as likely that the creditor was careless, inattentive, or mistaken. Rather, the term “consensual” is used in the sense that a confirmation hearing in which no party-in-interest raises an objection is described as a “consensual” hearing. Can one be confident that every affected party has knowingly and voluntarily agreed to each provision in the plan? Of course not. But each affected party received notice and had an opportunity to be heard. No party availed itself of its procedural right to raise an objection. And in the absence of any objection, the Court entered a confirmation order that, in conjunction with § 1141(a) of the Bankruptcy Code, renders the plan binding on all creditors. Perhaps, as a technical matter, it would be more accurate to say that any objections to the third-party release were “forfeited,” rather than to say that the releases are “consensual.” The basic import, however, is the same.

In re Arsenal Intermediate Holdings, 2023 WL 2655592, at*7.

The analysis, therefore, circles back to Judge Drain's original framing below: Does the Bankruptcy Code authorize a court to confirm a plan embodying a collective settlement accepted by the overwhelming majority of affected parties and incorporating third-party releases, and to impose on the minority of nonconsenting holdout parties such releases? The text, history, and, indeed, the essence of the Bankruptcy Code, and the very nature of chapter 11 as a collective process generating collective outcomes, say it does.

CONCLUSION

For the foregoing reasons, this Court should uphold the Second Circuit's decision affirming the bankruptcy court's order confirming the Purdue Pharma plan. The Petitioner's narrow view of the bankruptcy court's authority is simply contrary to the intent of Congress. Congress trusted the courts to use judiciously the authority the Bankruptcy Code provides, and Judge Drain did just that, as the Second Circuit held. This Court should affirm.

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No. 23-124

In the Supreme Court of the United States

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

v.

PURDUE PHARMA L.P., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 23-124

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

v.

PURDUE PHARMA L.P., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

The plan proponents’ defenses of the Sackler release illustrate the radical nature of the power they would locate in a modest catchall provision of the Bankruptcy Code. The release here unequivocally involves direct claims against the Sacklers. Those claims are private property of those claimants, but the plan disposes of them as if they were property of the estate. The bankruptcy power to modify creditor-debtor relations does not include the nonconsensual restructuring of relations among nondebtors. Plan proponents make an equally fundamental error by conflating the subject-matter jurisdiction of courts sitting in bankruptcy—the authority to *hear* claims related to the estate—with the authority to deem those claims *resolved* for \$0 regardless of their merits under applicable state law. Plan proponents invoke necessity, but necessity cannot justify taking what is not theirs. Nor do plan proponents have any meaningful response to the reality that their interpretation

(1)

swallows the Code's other requirements, effectively permitting the Sacklers to circumvent key limitations that would apply if they filed for bankruptcy to resolve their own liabilities for the opioid crisis. The release should be invalidated.

I. THE U.S. TRUSTEE HAS STANDING

The Court should reject the suggestions to dismiss the writ of certiorari as improvidently granted based on standing arguments that were aired at the petition and stay stage, were overcome by the participation of additional parties, and were always legally flawed. See, *e.g.*, Debtors Br. 17, 44; Official Committee of Unsecured Creditors (UCC) Br. 18-23.

a. As an initial matter, this Court has jurisdiction regardless of the U.S. Trustee's standing because other parties are participating as respondents in support of petitioner. See Isaacs Br. 21; Canadian Creditors Br. 52. Ellen Isaacs, an individual victim whose son died from opioid addiction, and whose claims against the Sacklers were extinguished without her consent, plainly has standing to challenge the plan containing that release. See Isaacs Br. i.

Debtors contend (Br. 48) that she “lacks a concrete interest” in getting the release invalidated because she purportedly forfeited her objection. But at each stage, she objected passionately and specifically to the Sackler release. See, *e.g.*, Isaacs C.A. Br. 5-6, 18 (contending that “[t]he bankruptcy court did not have the authority to deprive victims of the opioid crisis of their right to sue the Sackler family” and asking the court not to allow the Sacklers “to buy their way out of justice”). Even if she *had* forfeited her argument, that would go only to the merits of her claim, not standing. See *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*,

576 U.S. 787, 800 (2015). In any event, because the court of appeals “passed upon” the question, she may seek the Court’s review. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted). The same is true of the Canadian Creditors. See Canadian Creditors Br. 47-51.

b. The arguments against the U.S. Trustee’s own standing are also wrong.

Debtors dispute (Br. 45-46) the Trustee’s statutory authority to appeal. But 11 U.S.C. 307 expressly authorizes the Trustee to “raise” and to “appear and be heard on any issue.” Given the plain meaning of “raise,” the Trustee may “bring up” issues, not just offer views on issues raised by others. See Gov’t Br. 16 (citation omitted). Although debtors cite cases about potential limitations in provisions applicable to other parties, Debtors Br. 45, debtors ignore that *every* court of appeals to consider the question has held that Section 307 authorizes the U.S. Trustee to appeal as a sole appellant without a pecuniary interest. See Gov’t Br. 17.¹

Debtors contend (Br. 44-47) that Section 307 violates Article III, but it is “establish[ed]” that there is no Article III obstacle to congressional authorization for a federal officer or agency to “pursue the public’s interest.” *Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-133 (1995); see Gov’t Br. 17-19. Debtors assert (Br. 46) that the U.S. Trustee “is not the United States.” But a government “must be able to designate agents to represent it in federal court.” *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). The

¹ This Court is currently considering the validity of some judicially created limits on a private party’s ability to object under 11 U.S.C. 1109(b). See *Truck Ins. Exch. v. Kaiser Gypsum Co.*, cert. granted, No. 22-1079 (Oct. 13, 2023).

U.S. Trustee is appointed by the Attorney General—the Executive’s archetypal representative in the courts, 28 U.S.C. 516-519—and acts under the Attorney General’s supervision. 28 U.S.C. 581(a), 586(c); see also *Ingalls Shipbuilding, Inc. v. Director*, 519 U.S. 248, 254, 264 (1997) (“Article III surely poses no bar” to an agency director’s “standing” to “participat[e] in the appeal”). Nor does *Raines v. Byrd*, 521 U.S. 811 (1997), help debtors because the individual legislators in that case were not authorized to represent their governmental bodies. See *id.* at 829. By contrast, the U.S. Trustee is indisputably acting in his “official capacit[y]” to represent the Executive, *Hollingsworth*, 570 U.S. at 709, and therefore has standing to vindicate the public interest in the proper application of the Bankruptcy Code.

II. PLAN PROPONENTS IDENTIFY NO STATUTORY AUTHORITY FOR NONCONSENSUAL THIRD-PARTY RELEASES

A. Plan Proponents Misconstrue Section 1123(b)(6)

Plan proponents attempt to locate the authority to extinguish third-party claims against nondebtors in 11 U.S.C. 1123(b)(6), which, after addressing the estate’s property and creditors’ rights against the debtor, allows a reorganization plan to include “any *other* appropriate provision.” 11 U.S.C. 1123(b)(6) (emphasis added). That interpretation untenably treats a catchall provision as granting a power of a fundamentally different character and scope than the enumerated provisions, though “there is no textually sound reason to suppose the final catchall term should bear such a radically different object.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612,

1625 (2018). It also swallows the Code’s more limited and specific authorizations. See Gov’t Br. 21-32.²

1. *Plan proponents cannot identify any power in Section 1123(b) similar to approving nonconsensual third-party releases*

a. Debtors first contend (Br. 23) that the power to approve nonconsensual releases is similar to other powers enumerated in Section 1123(b), asserting that it is a “natural adjunct” to the express authority to “settle[] or adjust[]” any claim “belonging to the debtor or to the estate.” 11 U.S.C. 1123(b)(3)(A); see Sackler Br. 45 (relying on the Section 1123(b)(2) power to act on certain contracts or leases “of the debtor”). But those examples authorize the exercise of power over the debtor’s *own property*. Reading Section 1123(b)(6) to grant the authority to forcibly “adjust[]” a claim *not* “belonging to the debtor or to the estate” violates the principle that the Code’s general authorizations cannot swallow its “more limited, specific authorization[s].” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Debtors offer no support for the extraordinary proposition that the authority to settle the estate’s own claims encompasses the ability to bargain away property rights that do not belong to the estate—here, claims that third parties hold against the Sacklers. That is akin to suggesting that if some of Purdue’s creditors owned valuable paintings that the Sacklers de-

² Some plan proponents, see, *e.g.*, Sackler Br. 19, attempt to get independent mileage from 11 U.S.C. 105(a). But as debtors and the court of appeals recognized, Section 105(a) authorizes orders that are needed “to carry out the provisions of [the Code],” 11 U.S.C. 105(a), and therefore cannot itself authorize the release. See Debtors Br. 19 n.5; J.A. 877; see also U.S. Br. 22.

sired, the estate could appropriate the paintings and give them to the Sacklers in exchange for an increased payment in resolution of Purdue's claims against the Sacklers. Debtors suggest that the release here is acceptable because the released claims *relate to* (or could have an effect on) estate property, but that does not alter debtors' fundamental mistake of appropriating and disposing of property that is not theirs.

b. Debtors suggest (Br. 24) that the claims that the Sacklers' victims hold against the Sacklers are similar to derivative claims. But derivative claims, which assert harm to the estate on behalf of all the creditors, belong to the estate, while direct claims, which assert plaintiffs' individual injuries on behalf of those plaintiffs, do not. See *In re Tronox Inc.*, 855 F.3d 84, 100, 104 (2d Cir. 2017). That difference is critical: A painting in a creditor's hands can be forcibly reclaimed and used as consideration in settling the debtor's claims if it actually belongs to the estate; a painting that belongs to the creditor cannot be. See 11 U.S.C. 1123(b)(3); 11 U.S.C. 541(a) (identifying property that composes the estate, "wherever located and by whomever held"). Even if the effect on the painting's possessor would be "functionally equivalent" in those scenarios, Debtors Br. 24, the power wielded to divest the painting differs greatly.

Some plan proponents incorrectly assert that all the claims held by the Sacklers' personal-injury victims are derivative, UCC Br. 54, while others sow confusion about which claims fall into which category, *e.g.*, Debtors Br. 24. The important point is that the Sackler release encompasses direct claims—that is, those that a claimant is "legally entitled to assert in its own right," J.A. 274. See J.A. 636. As the lower courts recognized, the dispute is whether releasing direct claims without

consent is permissible. J.A. 751-752; see J.A. 394, 872; see also J.A. 871 n.15 (rejecting plan proponent’s argument that all released claims are derivative).

Plan proponents suggest (*e.g.*, Debtors Br. 27) that the claims against the Sacklers are in the penumbra of the estate’s property because the debtors’ own conduct is a “legally relevant factor” in those claims. J.A. 275. But whatever that vague requirement means, even the bankruptcy court recognized that it captures direct claims belonging to individual claimants if they overlap factually with claims that could be asserted against debtors. J.A. 394. In fact, many claims based on the Sacklers’ own wrongdoing would likely involve, in a legally relevant way, Purdue’s own conduct, either because Purdue’s production of OxyContin would be part of a claimant’s case or because the Sacklers could point to Purdue’s actions (such as obtaining FDA approval for the OxyContin label) as a defense.

2. Section 1123(b)(6) does not confer authority beyond modifying creditor-debtor relationships

This Court has recognized that Section 1123(b)(6) grants courts “authority to modify creditor-debtor relationships.” *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990); Gov’t Br. 24. Plan proponents, however, contend that the power sweeps far more broadly, authorizing courts sitting in bankruptcy to do anything that *affects* creditor-debtor relationships. See, *e.g.*, Debtors Br. 25-27. That leap is legally untenable and practically unworkable.

a. Plan proponents assert that *Energy Resources* effectively allowed “a third-party release.” Debtors Br. 21-23; see, *e.g.*, UCC Br. 27-28; Sackler Br. 23-25. But the challenged plan provision at issue in *Energy Resources* specified the treatment of a debtor’s payment

to the IRS, one of its creditors. See Gov't Br. 36. It directed that the payment would be applied first to the debtor's tax liability, for which its officers and employees were jointly liable. *Energy Resources*, 495 U.S. at 547. That adjustment of creditor-debtor relations affected third parties, but only because the treatment it specified for the debtor's payment to a creditor resulted in *satisfying* the obligation on a jointly held debt. The provision did not purport to modify or extinguish any nondebtor's obligation itself. To the contrary, the Court emphasized that the plan "d[id] not prevent the [IRS] from collecting" any remaining debt from the officers and employees. *Id.* at 550. By contrast, the Sackler release squarely prohibits claimants from collecting on their independent claims against the Sacklers. *Energy Resources* offers no support for that result.

Debtors rely (Br. 26) on *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931). But that case also addressed only creditor-debtor relations, by allowing the interest of a lienholder (*i.e.*, a creditor) in the debtor's property to be transferred, without impairment, to the proceeds of that property's sale. The applicable Bankruptcy Act expressly authorized trustees to "cause the estates of bankrupts to be collected, reduced to money and distributed." Bankruptcy Act of 1898, ch. 541, § 2(7), 30 Stat. 546. That language granted "by implication" the power to sell the property "free from encumbrances," including "liens for state taxes." *Van Huffel*, 284 U.S. at 227-228. Again, however, even when addressing a creditor's rights against the debtor, the Court did not infer a power to extinguish the liens outright for the benefit of the estate. See *id.* at 226. Although the rights of the lienholder were "transferred to the proceeds of the sale," "there had been no suggestion [in *Van Huffel*]

that such a sale could be made to the prejudice of the lienor” or could “modif[y]” the lienholder’s “substantive right.” *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 583-584 (1935).

Plan proponents’ other examples fare no better. Contrary to the assertion of some, see, *e.g.*, Ad Hoc Comm. Br. 24, a fraudulent-conveyance suit—which the Code specifically authorizes, 11 U.S.C. 548—is a classic example of modifying creditor-debtor relations: It seeks to recapture property that rightfully belongs to the estate and would otherwise have been in the debtor’s hands and available for distribution to creditors. And while the UCC contends (Br. 37) that the power to enter consensual releases of third-party claims illustrates that Section 1123(b)(6) reaches beyond creditor-debtor relations, the source of a court’s authority to enter consensual releases instead comes from the parties’ agreement. Gov’t Br. 48.

b. Plan proponents also suggest that a court in bankruptcy has the power to resolve any claims that relate to the estate because it has jurisdiction over those matters under 28 U.S.C. 1334(b). See, *e.g.*, UCC Br. 24-26; Debtors Br. 25. That argument conflates a court’s subject-matter jurisdiction to *hear* a dispute that relates to the bankruptcy proceeding with the statutory authority to *resolve* that dispute in any manner it wishes. Even where a court sitting in bankruptcy has jurisdiction over a claim related to the estate, it still must apply the law that would otherwise govern when resolving that claim. See *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450 (2007); *Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15, 20 (2000). The court cannot—as the Sackler release requires—simply extinguish state-law claims held

against nondebtors without regard to the merits of those claims. Indeed, if a bankruptcy court could disregard the merits in that fashion, there is no reason to think it could not equally compel the Sacklers to pay the estate, say, \$15 billion, to resolve those claims. But forcing innocent victims to accept a \$0 resolution just because they also have claims against Purdue is no more “appropriate,” 11 U.S.C. 1123(b)(6), than forcing a \$15 billion payment that would provide creditors greater compensation.³

3. *The power that plan proponents read into Section 1123(b)(6) has no historical foundation in equity*

As *Energy Resources* makes clear, 495 U.S. at 549—and as debtors appear to accept, Br. 30—the authorization in Section 1123(b)(6) is limited by principles of equity. Gov’t Br. 27. Although plan proponents attempt to identify an analogue at equity, they come up empty-handed.

Debtors discuss (Br. 27-28) *Tiffin v. Hart*, a 1619 decision by Francis Bacon as Lord Chancellor. See John Ritchie, *Reports of Cases Decided by Francis Bacon* 161 (London 1932). That decision was not reported until John Ritchie extracted Bacon’s orders from Chancery documents and “ma[d]e short reports of them on the

³ Plan proponents again conflate the extent of a court’s jurisdiction with its power to act in their attempt to distinguish *Callaway v. Benton*, 336 U.S. 132 (1949), which held that the Bankruptcy Act of 1898 did not authorize a court sitting in bankruptcy to prevent suit by third-party shareholders to enjoin a transaction required by the plan. *Id.* at 141; see U.S. Br. 31. The *Callaway* Court also addressed limits on the court’s jurisdiction, which the Bankruptcy Code has since expanded. See Debtors Br. 28-29; Sackler Br. 47. But the Code did not expand substantive authority over state-law claims between nondebtors. U.S. Br. 32 n.1.

lines of modern law reports” in 1932. *Id.* at xiv. It could hardly amount to an accepted, enduring practice. And its substance provides no authority for the Sackler release. The case addressed the debts of two sons as sureties of their deceased father. The sons offered the creditors “the whole of their father’s estate” and “the whole of their own estates even to their very clothes to satisfy the creditors rateably.” *Id.* at 162. The Chancellor ordered dissenting creditors to accept that offer as to those two sureties, while directing that additional sureties (who served as sureties for some but not all of the debts) remained liable for the “principal debt only.” *Id.* at 164.

To the extent that debtors suggest (Br. 28) that *Tiffin* supports discharging the liability of a debtor’s sureties, that proposition is flatly contrary to the Code. 11 U.S.C. 524(e). Even if it were not, the decision would only underscore a distinction at equity between extinguishing claims against those who devote their entire estates to payment and those—like the Sacklers—who do not offer their very clothes but instead keep billions.

Debtors’ invocation (Br. 28) of equitable authority to distribute a “limited fund” fails for the same reason: The Sacklers retain much of their wealth under the proposed settlement, meaning that “the whole of the inadequate fund” is not “devoted to the overwhelming claims.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839 (1999); see Gov’t Br. 38.

4. Plan proponents cannot reconcile the release with the Code’s other limitations

Nonconsensual third-party releases not only depart fundamentally from the powers enumerated before the catchall in Section 1123(b)(6) but also conflict with several express limitations under the Code.

a. A discharge under the Code “operates as an injunction against” any action to collect a “[discharged] debt,” 11 U.S.C. 524(a)(2)—precisely what the Sackler release does as to debts based on the covered claims, J.A. 279. See Gov’t Br. 26. But the Code repeatedly makes clear that a discharge is available to a *debtor* rather than to third parties. Gov’t Br. 25-26.

Plan proponents nonetheless contend that the Sackler release comports with the Code, claiming that “the Sacklers [are] not receiving a discharge” because the release does not provide “‘umbrella protection’” from all liability. Debtors Br. 34-35 (citation omitted). But a discharge need not be, and usually is not, universal. The Code often speaks about the discharge of “a debt” or “any debt.” See, *e.g.*, 11 U.S.C. 523(a), 524(a) and (e). Certain debts are not eligible for discharge, meaning that both individual and corporate debtors undergoing bankruptcy often obtain discharges that fall short of full repose. See 11 U.S.C. 523, 1141(d)(6). And any distinction based on purported breadth is misplaced because the Sacklers are obtaining *broader* repose as to opioid-related liability than they would receive if they filed for bankruptcy. Gov’t Br. 26.

For their part, the Sacklers emphasize (Br. 31) that a release differs from a discharge because it is a “contractual device.” But that only underscores why it should not bind *nonconsenting* parties.

b. Plan proponents have no answer to the salient point that, had the Sacklers themselves filed for bankruptcy, they would (absent individual creditor consent) have been required to devote substantially all their assets to the payment of creditors. Gov’t Br. 26. It does not comport with the Code’s carefully calibrated framework, let alone with basic fairness, to force the Sacklers’

victims to give up their claims against the Sacklers without full compensation—indeed, without any compensation *at all*, Gov’t Br. 33-34—when the Sacklers are not contributing what they would need to pay to obtain discharge of those debts in bankruptcy (assuming they could be discharged).

Plan proponents appear to suggest that this is acceptable because the Sacklers’ victims are eligible for some compensation from debtors’ estate for their separate claims against debtors. See, *e.g.*, Debtors Br. 41 n.13. But the victims who could satisfy the stringent requirements to receive a payment from debtors’ estate will not receive much, even for the most catastrophic losses. See Gov’t Br. 5-6. By necessity, that minimal compensation satisfies *debtors’* obligations. But as the Code expressly provides, such partial compensation does not satisfy anyone else’s liability even on the *same* debt. 11 U.S.C. 524(e). Plan proponents disregard the basic operation of the Code by contending that the possibility of a partial payment from a debtor satisfies a non-debtor’s *different* debt based on a distinct legal injury.

c. Nor can plan proponents justify the release of fraud and willful-misconduct claims that the Sacklers would not be able to discharge in their own bankruptcy over the objection of their creditors. Gov’t Br. 27. Debtors point out (Br. 35) that the fraud exceptions do not apply to corporate debtors. But they do apply to individuals, and in this case *individuals*—the Sacklers (as well as hundreds of others)—are the ones obtaining relief from debts for claims involving fraud and willful misconduct. While the Sacklers’ creditors would be free to preserve those claims if the Sacklers had entered bankruptcy, 11 U.S.C. 523(c)(1), they are powerless to preserve those claims under the Sackler release. That

workaround is yet another stark illustration of how, by reading Section 1123(b)(6) to authorize the release here, plan proponents impermissibly convert that provision into a “backdoor means to achieve the exact kind of non-consensual [results] that the Code prohibits” in other contexts. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

d. As to the circumvention of the jury-trial right preserved in 28 U.S.C. 1411, the Sacklers—but not debtors—assert that the argument is “forfeited.” Br. 36. That is incorrect: The jury-trial provision is simply another example supporting the U.S. Trustee’s consistent position that the release is broader than would be allowed if the Sacklers themselves were the debtors. See *Lebron*, 513 U.S. at 379.

Debtors, for their part, suggest (Br. 38) that the conflict with Section 1411 is irrelevant because that provision is not in Title 11. But Section 1411 expressly applies to “title 11,” 28 U.S.C. 1411(a), and therefore cabins 11 U.S.C. 1123(b)(6). Debtors further contend (Br. 39) that Section 1411 is ambiguous. But the only ambiguity is about how far Section 1411 extends *beyond* the heartland application to “personal injury and wrongful death actions.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 n.3 (1989).

The Sacklers contend (Br. 36) that Section 1411(a) cannot apply here, because that would suggest that it also applies to asbestos trusts established under 11 U.S.C. 524(g). But Section 1411(a) *does* apply to such asbestos trusts, again illustrating how much broader the Sackler release is than anything specifically authorized by Congress. See, e.g., *In re W.R. Grace & Co.*, 475 B.R. 34, 172 (D. Del. 2012); *In re G-I Holdings, Inc.*, 323 B.R. 583, 616 (Bankr. D.N.J. 2005).

Plan proponents cannot explain why, under their view that Section 1411(a) is inapplicable, the plan makes sure to comply with that provision by guaranteeing a jury trial as to personal-injury claims *against the debtors*. Gov’t Br. 27-28. And debtors misread their own trust documents when they suggest that the jury-trial option is preserved as to claims against the Sacklers. Instead, the saved right to “litigate in court” applies only to claims “held against one or more Debtors.” J.A. 590; see also J.A. 203, 206, 209 (together defining a “PI Claim” as a “Claim against any Debtor”); J.A. 560 (limiting the right to litigate to “PI Claim[s]”); J.A. 593 (providing that a claimant may file a lawsuit “regarding only” claims against a debtor, and “including *no other parties as defendants*”) (emphasis added).

Similarly, while the Ad Hoc Group of Individual Victims touts the fact that the trust preserves victims’ ability to “voice their story concerning Purdue,” Br. 46, the key point is that the victims have no ability to voice their story about *the Sacklers*. Thus, the Sacklers float above the fray, still “emphatically disput[ing] all allegations of wrongdoing against them” without the risk of facing their victims in court. Sackler Br. 6.

5. *Plan proponents’ reading of Section 1123(b)(6) has no meaningful limits*

Debtors contend (Br. 30-31) that their approach is not limitless. But they identify no concrete limit that would prevent a court from entering a release where an estate is underfunded and someone offers to infuse money in exchange for a release of third-party claims—even if the estate is underfunded *because* the putative white knight had previously drained it of its assets in anticipation of the bankruptcy. See J.A. 848.

a. Plan proponents contend that, if held liable for the released claims, the Sacklers could conceivably bring indemnification and contribution claims against debtors. See, *e.g.*, Debtors Br. 9-10. But the court of appeals did not limit the release to such claims, and plan proponents overstate the effects that the released claims would have on the estate.

i. First, although some Sackler releasees have conceivable indemnification claims against the estate, debtors themselves admit (Br. 10 n.3) that the “indemnification agreement does not apply if a court determines the Sacklers ‘did not act in good faith.’” And even where the agreement applies, the Code permits courts to address such claims directly. A court could disallow indemnification or contribution claims by the Sacklers under 11 U.S.C. 502(e)(1)(B). And it could equitably subordinate the Sacklers’ claims against the estate, 11 U.S.C. 510(c)(1), which would ensure that the Sacklers, whose actions allegedly caused harms worth trillions of dollars, would not receive distribution ahead of their victims. Indeed, if, as plan proponents contend, courts sitting in bankruptcy are authorized to extinguish claims due to their potential downstream effect on the estate, it is unclear why a court would not be more justified in extinguishing the Sacklers’ indemnification or contribution claims against the estate directly.

To the extent that plan proponents rely on a concern that lawsuits against the Sacklers by “holdout creditors” would deplete the Sacklers’ funds and thereby endanger the Sacklers’ future contributions to the estate, Debtors Br. 25, that risk exists only because debtors intertwined their fortune with the Sacklers by structuring their settlement as a stream of payments over nearly

two decades instead of an up-front payment of equal present value.

ii. Second, despite its claimed modesty, the authority to extinguish claims against third parties that could lead those third parties to sue the estate produces a power of startling breadth. Some opioid distributors and manufacturers have been sued on theories that expressly allege concerted conduct with Purdue. See, *e.g.*, *In re National Prescription Opiate Litig.*, No. 17-md-2804, 2018 WL 6628898, *3-*11 (N.D. Ohio Dec. 18, 2018). And some state laws broadly authorize contribution claims by any person found liable under the State's drug laws against other participants in the same market. See, *e.g.*, *Dunaway v. Purdue Pharm. L.P.*, 619 B.R. 38, 42 (S.D.N.Y. 2020) (citing Tenn. Code Ann. § 29-38-112). In fact, a large group of opioid distributors and manufacturers filed proofs of claim in this case, asserting indemnification and contribution claims against debtors. See Bankr. Ct. Doc. 3306, at 5-6 (July 22, 2021); *id.* at Ex. A. Under plan proponents' theory, if Walmart or CVS offered \$6 billion to the Purdue estate in exchange for a release of claims by victims who were also Purdue's creditors, a court could approve that release as necessary to the confirmation of a Chapter 11 plan. That implication is particularly stark because suits against opioid manufacturers and distributors have led to settlements of over \$50 billion to date. Kerry Breen, *Opioid Crisis Settlements Have Totaled Over \$50 Billion. But How Is That Money Being Used?*, CBS News (Mar. 1, 2023), www.cbsnews.com/news/opioid-crisis-settlements-have-totaled-over-50-billion-how-is-that-money-being-used.

b. Nor can debtors mount any persuasive defense of the court of appeals' attempt to incorporate, in its multi-

factor test, aspects of the framework that Congress imposed in the one provision that authorizes injunctions of third-party claims, see 11 U.S.C. 524(g). Debtors seek support for that judicial freewheeling from *Michigan v. EPA*, 576 U.S. 743 (2015), but that decision cuts squarely against them, holding that Congress’s authorization for an agency to issue “appropriate” regulations did not allow the agency to issue regulations that entirely disregarded costs. *Id.* at 752. In just the same way, the court of appeals lacked authority to devise a test that disregards third parties’ property rights, as they are surely “an important aspect of the problem” at hand. *Ibid.* (citation omitted).

Debtors implausibly assert that third-party releases are “rarely used.” Br. 31; see also, *e.g.*, UCC Br. 4. But see, *e.g.*, *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) (“Almost every proposed Chapter 11 Plan that [the court] receive[s] includes proposed releases.”). In any event, this Court has already held that “Congress did not authorize a ‘rare case’ exception” to the Code’s requirements. *Czyzewski*, 580 U.S. at 471; see Gov’t Br. 40.

B. Plan Proponents Cannot Deflect The Serious Constitutional Questions Presented By The Release

Plan proponents have also failed to deflect the serious constitutional questions raised by their construction of Section 1123(b)(6). See Gov’t Br. 41-44.

Debtors contend (Br. 8, 41) that claims against the Sacklers—which are undisputedly property rights of the claimants—would not be extinguished but merely “channeled to the creditor trusts” “for resolution under detailed procedures.” But those detailed procedures provide no value for the claims against the Sacklers while deeming them satisfied in full. The trust proce-

dures specifically state that “[d]istributions * * * are determined only with consideration to” a claim against debtors “and not to any associated [claim] against a non-Debtor party.” J.A. 562-563. Those distributions are then “*deemed* to be a distribution in satisfaction” of the claim against the Sacklers. J.A. 563 (emphasis added); see J.A. 205-206. Accordingly, the district court specifically found that the “purportedly channeled third-party claims” are “effectively being extinguished for nothing.” J.A. 704-705; see also J.A. 867 (court of appeals recognizing that the claims against the Sacklers “are effectively finally resolved” by the release). The trust “channels” the claims against the Sacklers only in the sense of funneling them into an incinerator.

Debtors also suggest that all the claimants are parties to the proceeding by virtue of being Purdue’s creditors. Bankruptcy allows creditors who do not participate to be bound as to their claims against a *res*. But the Sackler release binds claimants as to their *in personam* claims against nondebtors, with *res judicata* effect, J.A. 867, and without regard for whether they appeared or otherwise participated in the bankruptcy proceeding. The ability to bind claimants in their third-party claims on the theory that those interests are “close enough” to the claimants’ interests in the estate, *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008), raises serious questions of constitutionality. Gov’t Br. 37, 41. Similarly, while debtors emphasize that a hearing preceded confirmation, Br. 41, that hearing neither addressed the merits of the extinguished claims, Bankr. Ct. Doc. 3572, at 68, 73 (Aug. 9, 2021), nor provided objecting claimants an opportunity to remove themselves from the class of released parties. See Gov’t Br. 42.

Debtors (Br. 41) and the UCC (Br. 43) invoke the special remedial scheme of bankruptcy, which serves as an exception to certain due-process requirements. But bankruptcy provides an “express[]” remedial scheme, *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989), for resolving creditors’ claims against debtors, not for resolving claims between nondebtors. Creditors are bound as to their claims against the debtor, regardless of their consent, because the point of bankruptcy is to gather and equitably distribute the limited pool of a debtor’s assets. But that rationale does not apply and the Code’s extensive protections for creditors have no effect as to claims against third parties. See Wedoff Amicus Br. 24-28. And the fact that bankruptcy justifies deviations from normally applicable due-process requirements is all the more reason to proceed with caution before reading into the Code a novel power that extends beyond creditor-debtor relations, lest bankruptcy become an alternative justice system where substantive law and constitutional strictures do not apply to those who can generate some relationship to a creditor-debtor proceeding.

C. Plan Proponents’ Arguments About Necessity Do Not Justify The Sackler Release

Although debtors purport to disclaim policy arguments (Br. 44), their main argument is an appeal to policy: The Sackler release, they argue, is necessary to the confirmation of a desirable and popular plan. That reasoning is legally mistaken and factually dubious. If a debtor lacks sufficient assets for a Chapter 11 reorganization, it does not get to augment the estate by claiming for itself and bargaining away others’ property rights under cover of necessity.

As a factual matter, plan proponents’ contention that the release is necessary gives short shrift to the value

of the estate’s fraudulent-conveyance claims against the Sacklers. As the UCC explained in bankruptcy court, “[t]he Sacklers likely are liable to the Debtors (and thus to their creditors) in amounts far in excess of the Settlement Amount.” J.A. 76; see J.A. 35. And debtors’ assertion that the Sacklers’ agreed contribution reflects “more than 97% of the non-tax distributions” that the Sacklers withdrew from Purdue in anticipation of bankruptcy, Br. 34, fails to account for the time value of money. Indeed, the Sacklers’ payments under the plan are so drawn out that, even after they make all their payments, they will likely be worth billions *more* than before the bankruptcy. Gov’t Br. 26.

The claim of necessity also disregards the potential that, if this Court reverses the Second Circuit, the stakeholders can still negotiate a plan that includes a release of direct third-party claims, as long as that release is consensual, binding only those claimants who opt in. See, *e.g.*, Bankruptcy Law Professors Amicus Br. 28-30 (explaining how the release here could have been made consensual with an opt-in requirement). Previous alterations to the plan’s terms provide strong evidence that a renegotiation would be possible. Most conspicuously, plan proponents told the district court that a prior version of the plan was “the best available” to creditors “by a very wide margin.” D. Ct. Doc. 151, at 21 (Nov. 15, 2021). But after the district court vacated the confirmation order, the Sacklers reached an agreement to pay an additional \$1.675 billion—a 39% increase—in exchange for the affirmative consent of eight objecting States and the District of Columbia. Gov’t Br. 7-8, 45. That additional settlement demonstrates that requiring consent is important leverage that can lead to better outcomes; and the fact that plan proponents have

already secured the consent of all fifty States, likely the holders of the most valuable direct claims against the Sacklers, illustrates that the vast majority of the release's value is secure.

Plan proponents deny (*e.g.*, Debtors Br. 42) that the release is a good deal for the Sacklers. But that blinks reality. Both sides of the Sackler family are urging this Court to uphold the plan. See Sackler Br. 1-50; Raymond Sackler Letter 1. They presumably think the agreed contribution of up to \$6 billion is less costly than the litigation risk associated with the released claims. See Bankr. Ct. Doc. 3599, at 35 (Aug. 17, 2021) (testimony of David Sackler, describing “a release that is sufficient to get our goals accomplished” as an essential prerequisite to the Sacklers’ “willing[ness] to pay to help abate the opioid crisis”). Given the Sacklers’ previous responses in the face of that litigation risk, and their exposure to claims by the estate and by third parties, there is little reason to expect them to forgo a revised deal that would provide broader repose than they could obtain in their own bankruptcy, at far less cost, including a consensual release of claims by all fifty States and the District of Columbia for claims based on willful misconduct and fraud.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2023

No. 23-124

In the Supreme Court of the United States

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

Petitioner,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

*On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit*

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SUPPORTING PETITIONER**

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In the Supreme Court of the United States

No. 23-124

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

Petitioner,

v.

PURDUE PHARMA L.P., ET AL.

*On Writ of Certiorari
to the United States Court of Appeals,
for the Second Circuit*

**REPLY BRIEF FOR THE RESPONDENTS
SUPPORTING PETITIONER**

INTRODUCTION

Congress has given bankruptcy courts one true superpower: the authority to “modify the debtor-creditor relationship.” *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990). This authority to go beyond the traditional judicial powers of adjudicating, fixing, and protecting rights in that legal relationship, and actually *changing* that relationship by breaking bargains, altering debts, erasing claims, and extinguishing property rights, is what sets bankruptcy courts apart. It is what makes it possible for bankruptcy courts to provide a “fresh start” for the “honest but unfortunate debtor.” *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991) (internal quotation omitted).

Yet Congress has long recognized that this superpower must be fundamentally constrained, allowing modification of only one kind of legal relationship: that between debtor and creditor. And this Court held in *Energy Resources* that bankruptcy courts must exercise the “residual” equitable authority reposed in 11 U.S.C. 105(a) and 1123(b)(6) within the “traditional understanding” of those fundamental limits. 495 U.S. at 549.

No greater illustration exists of the dangers that arise when bankruptcy courts transgress those fundamental limits than the Sackler release, through which well-heeled billionaires have manipulated the bankruptcy process to avoid accountability for their role in fueling an opioid crisis that has killed millions and permanently altered the lives of even more—granting the Sacklers greater protection than if they had entered bankruptcy themselves. That obvious abuse makes the best possible case for reserving bankruptcy courts’ superpower for the protection of the debtor alone and preventing bankruptcy courts from extending its benefit to nondebtors through nonconsensual third-party releases imposed through freewheeling exercises of residual equitable authority.

Every attempt that Respondents make to suggest otherwise only demonstrates why the traditional limits on bankruptcy courts’ equitable authority should remain in place. Respondents insist that bankruptcy courts’ superpower is not really a superpower, that the unprecedentedly broad Sackler release involves no exercise of it, and that no true boundaries exist on that rights-destroying superpower other than the limits of the bankruptcy court’s jurisdiction and a bankruptcy judge’s personal notions of equity.

That argument is wrong on every level. But the Canadian creditors will not attempt to catalog every one of the errors in this position, instead adopting the arguments raised in the Trustee's more comprehensive reply. The Canadian Creditors will instead focus on the most salient of the problems with Respondents' position and its fundamental incompatibility with the proper exercise of bankruptcy courts' superpower.

ARGUMENT

I. The Bankruptcy Code does not authorize nonconsensual third-party releases outside the asbestos context.

Respondents spill substantial ink attacking the Court's holding in *Energy Resources* and the commonsense, firmly rooted principle it recognizes that bankruptcy is exclusively reserved for debtors and creditors and the only "relationship" that can be forcibly modified through bankruptcy courts' bargain-breaking, debt-destroying, judgment-erasing, and claim-eliminating superpower is that between debtor and creditor.

Respondents instead prefer a rule of proximity. To them, the traditional rule that bankruptcy is devoted to the relations between a "debtor and his creditors" *Central Virginia Community College v. Katz*, 546 U.S. 356, 371 (2006) (quoting *Wright v. Union Central Life Insurance Co.*, 304 U.S. 502, 513-514 (1938)) imposes no fixed boundary, and allows bankruptcy courts to modify any relationship that finds its way into their jurisdiction so long as the relationship is "sufficiently closely related to the debtor" (M. Sackler Br. 21) and the adjustment "serves

Chapter 11’s aims” in some amorphous sense, as measured against even more amorphous criteria, Debtors’ Br. 35; see also UCC Br. 34; M. Sackler Br. 9, 11.

But *Energy Resources*’ boundaries are not evaded so easily. And outside the conspicuous exception of asbestos cases, there is no degree of proximity that makes it possible for bankruptcy courts to modify nondebtors’ relationships with other nondebtors, especially through bankruptcy courts’ “residual power” as “courts of equity” embodied in 11 U.S.C. 105(a) and 1123(b)(6). 495 U.S. at 549.

A. Third-party releases violate fundamental bankruptcy principles.

1. Unlike the court of appeals, Respondents generally accept that *Energy Resources*’ holding that bankruptcy courts may only modify “creditor-debtor relationships” was not merely dicta. See J.A. 877. Yet there is dissention among their ranks on how to deal with the fatal incompatibility between that holding and the Sackler release. Purdue and the Sacklers paradoxically suggest that *Energy Resources* violates its own holding—mischaracterizing the case’s facts to suggest the Court approved a bankruptcy court’s modification of the relationship between a “nondebtor” and “another nondebtor.” Purdue Br. 21-22; see also M. Sackler Br. 24 (contending that *Energy Resources* involved a “release” of “third parties from claims by a non-debtor”).

But the other Respondents are not willing to follow Purdue and the Sacklers off that ledge. Indeed, the Ad Hoc Group of Governmental and Other Contingent Litigation Claimants (GOCLC) *expressly* disagrees—admitting (at 28) that no party “before the Court” in *Energy Resources* was “a nondebtor” or “noncreditor.” And that is

because the *taxes* in *Energy Resources* may have been those of the debtors' "officers" (Purdue Br. 21-22), but the "tax debts" on those taxes unquestionably belonged to the debtors. 495 U.S. at 546-48. They were the portion of the officers' "personal income and social security taxes" that were "with[held]" by their employers," which the debtors held in "trust," making them "tax liabilities" of the debtors and making the IRS a creditor. 495 U.S. at 546, 547-48. Accordingly, when the bankruptcy court allowed the debtors to pay those trust fund liabilities before the debtors' non-trust tax debts in a manner inconsistent with IRS regulations, the Court recognized that action to fall comfortably within the bankruptcy court's power to modify "creditor-debtor relationships." *Id.* at 549.

The remaining Respondents fare no better in dealing with *Energy Resources*. Some Respondents omit discussion of the opinion's key holding entirely. Others, like the GOCLC, contend (at 28) that the holding was merely "sufficient" to explain the result, rather than "necessary" to support it—leaving some question as to how the Court might handle modification of "noncreditor" or "non-debtor" relationships. But nothing indicates that *Energy Resources* regarded the "traditional" boundaries on bankruptcy courts' "residual" equitable authority to be so pliant that they would move to accommodate relationships outside that between debtor and creditor. On the contrary, *Energy Resources* went out of its way to explain that the modification at issue fell within the bankruptcy courts' "broad authority" to "modify creditor-debtor relationships" *only because* that is the only way the Court could approve a modification of that relationship. 495 U.S. at 549. Modifications of other relationships simply lie beyond reach of the bankruptcy court's superpower.

2.a. In any event, *Energy Resources* could hardly fail to recognize the “traditional understanding” of bankruptcy’s fundamental limits, and the hard boundaries on bankruptcy courts’ “residual” equitable power reposed in Sections 105 and 1123(b)(6). That traditional understanding merely reflects the boundaries Congress has long imposed in the Code (and within Section 1123(b) itself, see *Canadian Creditors Br.* 35-36), establishing that bankruptcy is devoted *solely* to the “subject of the relations between a *** debtor and his creditors.” *Katz*, 546 U.S. at 371. Those boundaries are reflected in the sheer tonnage of Code provisions devoted to debtor protection, coupled with the complete absence of similar protections for nondebtors. See *Canadian Creditors Br.* 20-21; *Trustee Br.* 19-21. Those boundaries are likewise reflected in bankruptcy’s basic *quid pro quo* requiring all those seeking to enjoy bankruptcy’s debtor-protecting benefits to bear its creditor-protecting burdens. See *Canadian Creditors Br.* 3, 5-6; *Trustee Br.* 20-21. And those structural limitations deprive nondebtors of the benefit of the Code’s debtor protections—including bankruptcy courts’ superpower modifications of creditor-debtor relationships. These are statements of fundamental bankruptcy principle. Not mere statutory silence. And they cannot be overcome through invocation of the bankruptcy court’s “residual” equitable power.

b. The sole exception to these otherwise-universal principles is Section 524(g)—the lone instance in which Congress has authorized bankruptcy courts to adjust nondebtors’ legal relationships with other nondebtors. See *Canadian Creditors Br.* 26; *Trustee Br.* 33-35. And Section 524(g)’s singular exception merely proves the rule. The contrast between its express, detailed, and carefully

drawn “requirements” for channeling injunctions in asbestos cases (11 U.S.C. 524(g)(2)(A) & (B)), combined with the complete absence of any remotely similar mechanism for non-asbestos cases, confirms that nonconsensual third-party releases cannot exist outside the asbestos context, see *Canadian Creditors Br.* 24-25; *Trustee Br.* 33-35.

c. Respondents seek to banish any mention of Section 524(g) from this case solely because of the “Rule of Construction” accompanying Section 524(g)’s enactment, which states that “[n]othing” in § 524(g) “shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.” Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (1994). Respondents insist that this interpretive aid for understanding Section 524(g) itself prohibits any kind of “negative inference” about the availability of third-party releases *outside* of Section 524(g). See *Purdue Br.* 16, 36; *M. Sackler Br.* 17-18, 37; *GOCLC Br.* 14; *MSGEG Br.* 33.

But Respondents dramatically overread the impact of this simple interpretive aid. Section 111(b)’s rule of construction speaks only of Congress’s intent to preserve bankruptcy courts’ powers to “issue injunctions” generally—as opposed to channeling injunctions or third-party releases specifically. 108 Stat. at 4117, § 111(b). It cannot be read as a declaration of intent by Congress to render the detailed statutory scheme it had just enacted obsolete and evadable at will. See *Canadian Creditors Br.* 29. Nor does it suggest even implicit endorsement of the “experimentation” with third-party releases outside the asbestos context that some courts had tried before Section 524(g)’s enactment in cases like *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989). See *M. Sackler Br.* 41 (quoting 140 Cong.

Rec. 27,692 (Oct. 4, 1994)); see also Purdue Br. 36; GOCLC Br. 36. After all, Congress pointedly declined to approve such experiments when it enacted Section 524(h), which ratified only injunctions before Section 524(g)’s enactment that had “previously been entered in *asbestos cases*,” not “any other kind of case.” *In re Purdue Pharma, L.P.*, 635 B.R. 26, 93 (S.D.N.Y. 2021) (emphasis added). See 11 U.S.C. 524(h) (providing that an “injunction of the kind described in subsection (g)(1)(B),” which refers to the trusts described in “paragraph (2)(B)(i)” —*i.e.*, trusts to assume liability “caused by the presence of, or exposure to, asbestos or asbestos-containing products” —would be “considered to meet” Section 524(g)’s requirements).¹

Indeed, Section 111(b)’s “Rule of Construction” does not even prohibit *all* “negative inferences” from Congress’s enactment of Section 524(g). 108 Stat. at 4117, § 111(b). It prohibits only *one* specific inference, barring courts from concluding that enactment of Section 524(g) did anything to “modify, impair or supersede” other authority that bankruptcy courts might possess to impose

¹ Indeed, the snippet of legislative history that Respondents use to suggest that Section 524(g)’s enactment constituted congressional endorsement of that “experimentation” goes on to clarify that the “Committee has decided to provide explicit authority [for channeling injunctions] in the asbestos area because of the singular magnitude of the claims involved” and it would use information about “how the new statutory mechanism works in the asbestos area” to judge “whether the concept should be extended into other areas.” 140 Cong. Rec. 27,692. So when Congress enacted Section 524(g), it expected extensions of the channeling injunction concept to come not from judicial “experimentation” with third-party releases through use of “residual” equitable power, but from future authorization from Congress. That authorization never came, suggesting Congress has opted against extending the concept to non-asbestos cases.

injunctions in conjunction with a plan. *Ibid.* Section 111(b) therefore prohibits courts from interpreting Section 524(g) to *take away* authority Congress provided elsewhere in the Bankruptcy Code to issue injunctions generally or third-party releases specifically.

Yet that rule of construction for interpreting Section 524(g) itself imposes no prohibition against interpreting the remainder of the Code *in light* of Section 524(g)'s enactment. And that inquiry is devastating to Respondents' case. The express, detailed, and specific requirements Congress provided for channeling injunctions under Section 524(g) demonstrates the level of "specificity" it deemed necessary to authorize a "major departure" from the fundamental limits on bankruptcy courts' bargain-breaking superpower. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017). Section 524(g)'s specificity also stands in marked contrast to the generality of the "residual" equitable authority reposed in Sections 105(a) and 1123(b)(6), suggesting that the latter cannot be interpreted to provide the same power as the former.

Section 524(g) also highlights the practical problems that Congress had to confront to enable channeling injunctions in the asbestos context and the specific statutory solutions it had to impose to address those problems. See Canadian Creditors Br. 24-26. Those detailed solutions to the practical problems of imposing channeling injunctions in the asbestos context suggests Congress would not allow anything similar in the non-asbestos context, where Section 524(g)'s specific requirements and controls are conspicuously absent.

Beyond calling attention to these practical barriers to the imposition of third-party releases, Section 524(g) also highlights the *statutory* obstacles that Congress had to

confront when it sought to provide a similar authorization in asbestos cases. This includes the bar against nondebtor discharge in Section 524(e), because Congress had to lift that bar with the “notwithstanding” clause.

Furthermore, despite what Respondents insist, Section 111(b) does not prohibit the Court from considering the “inherently narrow nature” of the Section 524(g) trust mechanism, or its “conspicuous” departure from the remainder of the Code. *M. Sackler Br. 38*. And it certainly does not bar any mention of the reasons behind Congress’s enactment of Section 524(g), which present an independent problem for Respondents. That is because Congress did not enact Section 524(g) merely to create “special rules for asbestos bankruptcies,” as Purdue insists. *Purdue Br. 37*. Rather, Congress enacted Section 524(g) to overcome “lingering uncertainty” about whether third-party releases could “withstand [legal] challenges” in *any* context. *M. Sackler Br. 40* (quoting H.R. Rep. No. 103-835 at 4 (1994)). Each of these inferences is entirely permissible and independently fatal to any attempt to identify authority to impose third-party releases outside the asbestos context—especially in the residual equitable authority provided in Sections 105(a) and 1123(b)(6).

3. By contrast, there is absolutely no support in the Code to suggest that mere *proximity* of nondebtors’ relationship to the debtor triggers bankruptcy courts’ superpower, permitting them to modify nondebtors’ relationships with other nondebtors. Respondents fail to identify a single line of the Bankruptcy Code that even mentions the idea. And Respondents’ purported examples of this supposed proximity phenomenon are anything but.

Respondents suggest that the breadth of bankruptcy courts' jurisdiction, which may encompass nondebtors' relationships with other nondebtors, suggests a power to modify those relationships. See UCC Br. 25-26. Not so. Certainly, Congress has provided bankruptcy courts with expansive jurisdiction, covering "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. 1334(b); *id.* 157(a). And "the 'related to' language of [Section 1334(b)] must be read to give *** bankruptcy court *** jurisdiction over more than simple proceedings involving the property of the debtor or the estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). But that does not mean bankruptcy courts can modify every relationship that happens to wander within their jurisdictional reach. Bankruptcy courts may fix and define relationships to the extent of adjudicating claims and resolving them on their factual and legal merits, but they do not have the power to *modify* legal relationships by extinguishing claims that would otherwise exist under the law that created them and would survive outside bankruptcy. The bankruptcy court is not "a roving commission to do equity." *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Rather, with regard to the majority of those relationships, bankruptcy courts can do no more than employ traditional juridical tools—adjudicating, fixing, and protecting the rights of those in them. But bankruptcy courts' superpower of forcible modification is reserved for those in the creditor-debtor relationship alone. Not those in mere proximity to the debtor.

Likewise, the fact that modifications to the creditor-debtor relationship, including dispositions of the debtor's property "free and clear" of liens under 11 U.S.C. 363(f), may sometimes have incidental effects on third parties

does not mean that these incidental effects give the court power to dispose of third-parties' rights and modify their relationships any time doing so will "affect" the debtor. See UCC Br. 36, 38. The permeability of those effects only goes one way. And despite what Respondents suggest, the bankruptcy trustee's assumption of creditors' "avoidance" rights does not involve modification of nondebtor-nondebtor relationships either. UCC Br. 38 (quoting *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 83 (2d Cir. 2019)). An avoidance action merely reclaims debtor property held by someone else because of a fraudulent transfer, so it does not have anything to do with destruction of third-party property rights. Accordingly, no relationship is modified when the creditors' avoidance claims "vest" in the trustee and the trustee's claim is "dispos[ed]." UCC Br. 38 (quoting 11 U.S.C. 544(b)(1)).

In the end, the only examples Respondents can locate in which bankruptcy courts routinely adjust nondebtors' relationships with each other by mere dint of those relationships' proximity to the debtor involve third-party releases themselves. See UCC Br. 36, 38-39; M. Sackler Br. 42. But third-party releases cannot justify themselves. And Respondents' circular logic cannot undermine the fundamental bankruptcy principle that bankruptcy is exclusively devoted to the relationship between a "debtor and his creditors." *Katz*, 546 U.S. at 371. Nor does it lend any support to Respondents' proximity rule. Close is simply not enough.

B. Third-party releases conflict with the Code's express terms.

But nonconsensual third-party releases like the Sackler release do not merely violate bankruptcy's fundamental boundaries—they also conflict directly with the Code's express terms. And Respondents' attempts to assuage those conflicts fall flat.

1. The first problem for Respondents comes from the multiple provisions of the Bankruptcy Code reserving bankruptcy courts' superpower of discharge for the “debtor”—and the debtor alone. 11 U.S.C. 727(a), 727(b), 1141(d)(1)(A), 1141(d)(3), 1123(b)(3)(A). And the Sackler release provides the “functional equivalent of a discharge.” Trustee Br. 12, 25-26. Respondents rejoin by insisting that the Sackler release does not provide the “full repose” of a discharge. UCC Br. 38 (quoting Trustee Br. 25-26); see also Purdue Br. 33; M. Sackler Br. 33. But this “hyperliteral” argument is “contrary to common sense,” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

The Sackler release provides the same repose as a discharge. A discharge “releases” debtors from “personal liability with respect to any discharged debt.” *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). A discharge therefore *is* a release. And vice versa. The two provide the same repose. And the modification of rights involved to provide that repose is just as absolute, total, and permanent as the discharge a debtor obtains in bankruptcy. The Sackler release therefore unquestionably invokes the bankruptcy court's superpower—it just trains it in the wrong direction.

In contending otherwise, Respondents insist the Sackler release does not offer the same “umbrella protection” as a discharge. Purdue Br. 34 (quoting J.A. 872). But Respondents are simply incorrect. Their contention that the Sackler release applies to only a “specific set of claimants” rings hollow when the list of claimants includes every person, company, and community in the world. M. Sackler Br. 34. And while the Sackler Release applies to only a “specific set of claims” (*ibid.*), that too is no differentiating factor, because discharges *also* only pertain to specific sets of claims. Discharges may be framed in absolute terms. See Purdue Br. 33 (explaining that debtors under Chapter 11 receive a discharge “from any debt” and debtors under Chapter 7 receive a discharge “from all debts.”) (quoting 11 U.S.C. 727(b), 1141(d)(1)(A)). But as bankruptcy expert amicus Adam Levitin has explained, these absolute-sounding discharges nonetheless contain numerous exceptions: “None of the various discharges offered by Chapter 7, 11, 12, and 13 offer umbrella protection against liability nor do they extinguish all claims.” Levitin Br. 8-9 n.16 (citing 11 U.S.C. 523(a) (general discharge exceptions), 727(a) (Chapter 7 discharge exceptions), 1141(d)(6) (Chapter 11 discharge exceptions for corporate debtors), 1228 (Chapter 12 discharge exceptions), 1328 (Chapter 13 discharge exceptions)). So there is no functional difference between a release and a discharge.

2. Respondents’ efforts to overcome Section 524(e)’s strict prohibition against nondebtor discharge are even less effective. Respondents insist that Section 524(e) merely describes that the discharge of one debtor does not extinguish other parties’ “co-liability for the debtor’s debts” and therefore does not prohibit bankruptcy courts from extinguishing nondebtor debts. Purdue Br. 33; see

also MSGEG Br. 28; UCC Br. 14, 33-34. Yet if Section 524(e) did no more than ensure that the debtor's discharge does not affect third-parties' liability on the same debt, then it would be entirely superfluous of the numerous Code provisions already making clear that the discharge affects only "the debtor." See Trustee Br. 25 (citing 11 U.S.C. 727(a), 727(b), 1123(b)(3)(A), 1141(d)(1)(A), 1141(d)(3)).

Respondents' entire textual argument for relegating Section 524(e) to complete redundancy hinges on the inapt suggestion that it might have been written differently. Building upon the Seventh Circuit's analysis in *In re Airadigm Communications, Inc.*, 519 F.3d 640 (2008), Respondents suggest that Section 524(e) *would* have limited bankruptcy courts' powers to grant nondebtor discharges if, instead of providing that the "discharge of a debt of the debtor does not affect the liability" of third parties, it stated that it "shall" not affect that liability. Purdue Br. 34 & n. 9; M. Sackler Br. 32; Englert Br. 34. That is because *Airadigm Communications* explains that the mandatory term "shall" places limits on court powers. 519 F.3d at 656-57. Yet Respondents admit (Purdue Br. 34 n.9) that Section 524(e)'s statutory predecessor *did* use the term "shall," providing: "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall* not be altered by the discharge of such bankrupt." 11 U.S.C. 34 (repealed Oct. 1, 1979) (emphasis added).

That change from "shall" to "does" was not substantive. The recodification that created Section 524(e) did involve one substantive change over its predecessor: to remove any implication that only "co-debtors," "guaran-

tors,” and “sureties” were prohibited from obtaining a discharge, not other sorts of co-liable parties, and ensure that Section 524(e) is not given an unduly narrow reach. *Report of the Commission on the Bankruptcy Laws of the United States*, House Document 93-137, Part II, at 142-143 (July 1973). But Section 524(e) otherwise “carried forward the provisions * * * of the existing Act.” On HR 31 & 32, Bankr. 78-LH 11 (Oct. 3, 1975) (testimony of attorney Benjamin L. Zelenko). So the language on which Respondents’ argument depends is entirely stylistic—an artifact of the drafting process.

3. Respondents’ interpretation of Section 524(e) also conflicts with Congress’s own interpretation of the term. Congress clearly interpreted Section 524(e) to prohibit bankruptcy courts from providing nondebtors with the functional equivalent of a discharge, which is why it found need to lift that prohibition with Section 524(g)’s “notwithstanding” clause to allow Section 524(g)’s obvious nondebtor discharge. Respondents insist that this “notwithstanding” clause “merely contemplates the *possibility* of a conflict” between Sections 524(e) and 524(g) without positively identifying one. *Purdue Br.* 37. But Congress’s use of “notwithstanding” in Section 524(g) did not address the mere possibility of conflict—it identified one specifically. When Congress states one provision controls “notwithstanding” another, it “indicates” with certainty “that the main clause that it introduces or follows derogates from the provision to which it refers.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012). The term acquires a tentative, “just-in-case” character only when used as a generic “catchall,” such as “[n]otwithstanding anything herein to the contrary”—because no specific conflict is indicated, and

“there may be nothing contrary anywhere in the document.” *Id.* at 127. But Section 524(g)’s “notwithstanding” clause is no catchall. It references Section 524(e) specifically and exclusively. Treating it as possessing a “just-in-case” uncertainty makes no sense. Respondents therefore cannot escape the conclusion that Congress itself has interpreted Section 524(e) as a barrier against nonconsensual third-party releases outside the asbestos context. And that interpretation is controlling.

C. The Sackler release expressly conflicts with the Code by discharging nondischargeable debts.

Yet even if the Code left some room for non-consensual third-party releases outside the asbestos context, releases like the Sackler release still cannot stand, because they discharge debts that Congress has deemed to be nondischargeable. The Sackler release covers all liabilities related to Purdue-manufactured opioids, making no exception for claims of fraud, malicious injury, or other claims that cannot be discharged in an individual bankruptcy. See *Canadian Creditors Br.* 28. That means the Sackler release provides the Sacklers more relief than if they had entered bankruptcy themselves. And the Respondents’ attempts to dispel the legal problems and obvious inequity that result from such a broad release only make things worse.

Some Respondents note that the bar against discharging nondischargeable debts is not absolute, and parties must take “affirmative steps” by filing a “complaint” to prevent their discharge. *Purdue Br.* 35 n.10; *Englert Br.* 37. Other Respondents emphasize that the bar against nondischargeable debts is merely a “baseline” that parties

can vary though “settlement.” UCC Br. 39, 41; M. Sackler Br. 35. True enough. But a waivable requirement is still a requirement. And Respondents’ insistence that the Sacklers’ creditors would possess avenues to preserve fraud and similar claims only highlights that there is no complaint to file, no procedure to follow, and no potential settlement that allows claimants to get around the Sackler release. It is completely unavoidable.

Respondents cannot wave-away these problems with the too-cute-by-half assertion that the prohibition against discharge of nondischargeable debts in Section 523(a) is inapplicable in corporate bankruptcies, and therefore is not “inconsistent with *** applicable provisions” so as to narrow a bankruptcy court’s options for equitable relief in this corporate bankruptcy. 11 U.S.C. 1123(b)(6); see Purdue Br. 35; Englert Br. 14. The Sacklers are individuals, not corporations, so the relevant question is whether the bar against nondebtor discharge would be “inconsistent with” the “applicable provisions” in any bankruptcy *they* would file. And the answer to that question is an unequivocal “Yes.”

D. The constitutional concerns with third-party releases require their issuance to be confined to bankruptcy’s fundamental limits.

Respondents also cannot dispel the constitutional problems demanding that third-party releases be confined to bankruptcy’s fundamental limits. Respondents spend substantial time addressing the due process problems arising from nonconsensual third-party releases, which have been comprehensively addressed by the Trustee. But no Respondent even mentions, let alone overcomes, the

sovereignty-based objections to such releases that the Canadian Creditors have raised, or the additional constitutional and jurisdictional barriers to imposition of third-party releases that amici have raised. See Canadian Creditors Br. 41-43; Brubaker, *et al.* Br. 4-33; “Texas Two-Step” Victims Br. 7-24. It should take the clearest possible authorization to suggest that Congress intended to provoke these serious concerns rather than avoid them. And that is yet another reason to conclude that Congress did not intend third-party releases to be imposed through free-wheeling application of the “residual” equitable authority Congress provided in Sections 105(a) and 1123(b)(6).

II. The Canadian Creditors have standing to challenge the Sackler release.

Finally, this Court has jurisdiction to hear this challenge to the Sackler release. The Trustee has standing. Ellen Isaacs has standing. The Canadian Creditors also have standing. And Respondents raise no persuasive argument to suggest otherwise.

1. Both the UCC and Purdue contend that the Canadian Creditors “waived” any argument that bankruptcy courts lack statutory authority to impose third-party releases. UCC Br. 21-23; Purdue Br. 47. Yet the Canadian Creditors expressly challenged the statutory validity of the Sackler release, “object[ing]” to Purdue’s reorganization plan in the bankruptcy court and “reserv[ing] [their] rights” as to the “nonconsensual,” “broad third-party” Sackler release for numerous reasons, including that it discharged “non-dischargeable debts.” Bankr. Ct. Doc. 3275, at 2, 9, 11 (July 19, 2021) (capitalization omitted); see *id.* at 9-12. Despite what these Respondents insist, this a “categorical” objection (Purdue Br. 47) and is plainly more

than “sovereignty-focused,” UCC Br. 21. And the Canadian Creditors have continue to assert this objection at every level of appeal.

Furthermore, any suggestion that the Canadian Creditors “forfeited a categorical objection” to the release because they “accepted that third-party releases are allowed in some circumstances” is completely off-base. UCC Br. 21 (internal quotation omitted); see also Debtor Br. 47. No one in this case suggests that third-party releases are categorically unavailable in all circumstances. At the very least, they are available in asbestos cases under Section 524(g) and by consent in other cases. And Second Circuit precedent that was binding in the lower courts suggested that third-party releases might be possible with “proper balancing.” UCC Br. 21-22. Admitting these realities did not cause the Canadian Creditors to forfeit their otherwise-preserved objections to the Sackler Release, which is why the District Court included them among those who categorically objected to the Plan’s “broad releases, not just of derivative, but of particularized or direct claims.” *Purdue Pharma, LP*, 635 B.R. at 36. In any event, waiver would go only to the merits of the Canadian creditors’ claims and has no bearing on their standing. See *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 800 (2015) (“[O]ne must not confuse weakness on the merits with absence of Article III standing.”) (alteration, citation, and internal quotation marks omitted).

2. Respondents’ contention that the Canadian Creditors are not “aggrieved in any concrete way” by the Sackler release is also meritless. *Purdue Br.* 3, 44, 47; see also UCC Br. 21. There are substantial questions about

whether, and to what extent, the Sackler release extinguishes the Canadian Creditors' claims. Respondents can contend otherwise only by ignoring the true bases for the Canadian Creditors' claims and the plain language of the release.

Both Purdue and the UCC contend that because the Canadian Creditors were injured by drugs sold in Canada by Purdue Canada, Purdue's non-bankrupt Canadian affiliate, their claims "arise[] out of or relate[]" solely to Purdue Canada" and therefore fall within the Sackler release's exception for Canadian claims. UCC Br. 22. These respondents simply ignore the release's recapture provision, which brings any claim back into the release if it is "based upon any Conduct of the Debtors." See Canadian Creditors Br. 48 (quoting C.A. JA-3457). These respondents likewise ignore that the Canadian Creditors have alleged that the Sacklers acted through Purdue U.S. to increase Canadian drug sales in numerous ways, including through corporate directives sent to multiple Purdue entities simultaneously and through misrepresentations made in the U.S. that reached Canada. See Canadian Creditors Br. 48-49. Through this selective reading, Purdue and the UCC entirely avoid confronting the difficult question of whether those claims have a close enough relationship to Purdue U.S. to be "based upon" its conduct, thereby falling within the recapture provision and becoming subject to the Sackler release. Accordingly, the self-

serving assurances by Purdue and the UCC that the Canadian Creditors' claims survive the release are meaningless.²

Indeed, those assurances ring especially hollow in light of the fact that neither Purdue nor the UCC will be asserting the releases in litigation. That would be the Sacklers. And while the Sacklers have addressed several of the arguments raised in the Canadian Creditors' brief, they have declined to give the release's uncertain language any definite meaning. They have likewise pointedly declined to address the release's impact on the Canadian Creditors' claims and any resulting effects on their standing. That

² The Bankruptcy Court's findings are likewise unhelpful to Purdue and the UCC. *See* UCC Br. 23 (citing J.A. 321 n.2; J.A. 326 n. 3). Those findings pertain only to the complaint that the Canadian Creditors attached to their proofs of claim, which raises "claims" against the "Debtors," "non-Debtor Purdue Canada," and certain other "non-Debtors." J.A. 321 n.2. Those findings therefore do not address the Canadian Creditors' claims against any released parties, which had not been added, and could not be added, when Purdue declared bankruptcy. Canadian Creditor Br. 9-10. The findings are also limited in scope, providing only that Purdue's reorganization plan preserved the Canadian Creditors' claims against "Purdue Canada" directly, and claims concerning released-parties' "conduct" as it "related to the [named] non-Debtors." J.A. 321 n.2. The Bankruptcy Court never promised that the Canadian Creditors' claims against the Sacklers related to Purdue Canada or the Debtors—under any theory—would survive. And in any event, neither the district court nor the court of appeals gave deference to the bankruptcy courts' findings, instead subjected them to de novo review under *Stern v. Marshall*, 564 U.S. 462 (U.S. 2011). J.A. 727-734, 867-868.

conspicuous silence can only mean that if the release survives this Court's review, the Sacklers will likely assert it as a basis to dismiss all of the Canadian Creditors' claims.

The Canadian Creditors certainly believe otherwise. But it does not really matter. The Canadian Creditors will inevitably be forced to expend considerable, time, effort, and money litigating the scope of that release to surmount this legal obstacle that the plan imposed on them over their objection. That is more than mere "conjectural fear of future harm." UCC Br. 22. It is tangible injury that is very likely to occur, and sufficient, at a minimum, to convey standing.

3. Finally, Respondents' sidelong attacks on the validity and significance of the Canadian Creditors' claims are both meritless and irrelevant. While Respondents lampoon the Canadian Creditors as a mere "handful of municipalities" and "First Nations proceeding on behalf of an uncertified class" (UCC Br. 4), they provide no reason to doubt the relative ease of obtaining class certification in Canada (see Canadian Creditors Br. 10) and identify no obstacle that could conceivably prevent class certification of the Canadian Creditors' claims. Those claims are substantial: the claim of Toronto alone—one of the putative class members, although not a named respondent—is worth \$277 million alone. See Claim No. 14211. And those claims are strong. Contrary to what Purdue suggests (Purdue Br. 47), the Sacklers have never given up control of Purdue's operations—but have continued to direct Purdue's global enterprise even after stepping down from their positions as Purdue's officers and directors through their control of MNP. See Canadian Creditors Br. 6, 8, 48. And the Canadian Creditors can hold the Sacklers liable for the misconduct they have perpetrated through their

control of Purdue under the Canadian Competition Act along with theories of common-law nuisance.

Respondents offer no reason to believe otherwise. They allude to unspecified “causation” problems and insist that the Canadian Creditors’ claims would “stretch public-nuisance doctrine beyond its limits” merely because the conduct originated in the United States. Purdue Br. 48 n.15. But cross-border nuisance claims are hardly unprecedented. See Michael I. Jeffrey, *Transboundary Pollution and Cross-Border Remedies*, 18 Canada-United States L. J. 173 (1992). And once again, the merits of the Canadian Creditors’ claims have nothing to do with their standing to challenge a release that might extinguish those claims. See *Arizona State Legislature*, 576 U.S. at 800.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 20, 2023

No. 22-1079

IN THE
Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,

Petitioner,

v.

KAISER GYPSUM COMPANY, INC., ET AL.,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Asbestos claims in state court have been plagued by rampant fraud, with claimants seeking inflated recoveries against some asbestos defendants by suppressing evidence of claims against other asbestos defendants. For nearly a decade, bankruptcy courts have sought to protect debtors and their insurers by requiring fraud-prevention measures—like ensuring access to claims information—before channeling the asbestos claims against the debtor to a trust. See 11 U.S.C. § 524(g).

In this case, a Chapter 11 debtor colluded with representatives for asbestos claimants to propose and confirm a plan that includes these fraud-prevention measures only for *uninsured* asbestos claims—not *insured* asbestos claims. Petitioner is the insurer who bears the financial burden of those 14,000 insured claims.

The Bankruptcy Code’s plain text empowers any “party in interest” to “raise” and “be heard on any issue” in a Chapter 11 proceeding. 11 U.S.C. § 1109(b). But the court of appeals refused to adjudicate petitioner’s objections to the fraud and collusion, relying on judge-made limitations engrafted onto the Code.

The question presented is:

Whether an insurer with financial responsibility for a bankruptcy claim is a “party in interest” that may object to a Chapter 11 plan of reorganization.

**PARTIES TO THE PROCEEDING AND
RULE 29.6 STATEMENT**

1. Petitioner Truck Insurance Exchange is the primary insurer of debtors Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc., was a party in interest in the bankruptcy court and district court, and was the appellant before the court of appeals.

Respondents Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. were debtors in the bankruptcy court and the district court and appellees before the court of appeals.

Respondent Lehigh Hanson, Inc. is the parent company of debtors Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc., was a party in interest in the bankruptcy court and the district court, and was an appellee before the court of appeals.

Respondents Official Committee of Asbestos Personal Injury Claimants and Future Claimants' Representative represent the asbestos claimants, were parties in interest in the bankruptcy and district courts, and were appellees before the court of appeals.

2. Petitioner Truck Insurance Exchange is not a publicly held corporation and has no parent corporations. No publicly held corporation owns 10% or more of its stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.4th 73. Pet. App. 1a. The district court’s findings of fact and conclusions of law and its order confirming the plan are unreported but are available at 2021 WL 3215102 and 2021 WL 3239513, respectively. Pet. App. 27a, 118a.

JURISDICTION

The court of appeals entered judgment on February 14, 2023. Pet. App. 2a. A petition for a writ of certiorari was timely filed on May 3, 2023, which this Court granted on October 13, 2023. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code (11 U.S.C. §§ 101, 524, 1109) are reproduced at Pet. App. 329a.

STATEMENT

The Bankruptcy Code empowers a “party in interest, including the debtor, the trustee * * * [or] a creditor” to “raise” and “appear and be heard on any issue” in a Chapter 11 reorganization. 11 U.S.C. § 1109(b).

Truck Insurance Exchange is the liability insurer of the debtors in this case—manufacturers of asbestos products who face 14,000 pending asbestos-liability claims. Because of its insurance obligations, Truck has the financial responsibility to pay the overwhelming majority of the claims subject to the district court’s bankruptcy jurisdiction. Truck objected to the Chap-

ter 11 plan jointly proposed by the debtors and the asbestos claimants. Echoing the United States Trustee in similar cases, Truck contended that the plan improperly facilitates fraudulent claims and in so doing greatly expands Truck's financial exposure in violation of multiple provisions of the Code.

Despite Truck's financial exposure and the broad participatory rights enshrined in Section 1109(b), the Fourth Circuit refused to consider Truck's objections on the merits, concluding that Truck isn't a party in interest and can't participate in the bankruptcy at all. Applying the so-called insurance-neutrality doctrine—a “judicially self-imposed limit on the exercise of federal jurisdiction” that courts have engrafted onto Section 1109(b), *In re Thorpe Insulation Co.*, 677 F.3d 869, 888 (9th Cir. 2012) (cleaned up)—the Fourth Circuit held that Truck had no interest in the proceeding because the plan purported to be “insurance neutral.”

That conclusion is wrong and should be reversed. The insurance-neutrality doctrine has no basis in the text of the Code, and the courts that developed it concede it's inconsistent with “a literal reading of section 1109(b).” *In re James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992). The Court should reject that judicially imposed prudential limitation. It should instead reaffirm that courts “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.” *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Applying that principle, the Court should make clear that the standard set by Congress in the text of Section 1109(b) is coextensive with Article III such that, once Article III standing is satisfied, no further barrier to participation exists.

I. Chapter 11 Framework.

1. Chapter 11 of the Bankruptcy Code provides a path for a debtor to obtain a comprehensive reorganization of its liabilities through negotiated resolution with its creditors. See *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 454-55 (2017). Congress “str[uck] a balance between a debtor’s interest in reorganizing and restructuring its debts and the creditors’ interest in maximizing the value of the bankruptcy estate.” *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). In this way, Chapter 11 helps “solve the incomplete contracting problem that accompanies financial distress” by “implement[ing] a renegotiation framework to facilitate ex post bargaining.” Anthony J. Casey, *Chapter 11’s Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 Colum. L. Rev. 1709, 1711, 1716 (2020).

Upon filing a Chapter 11 petition, the debtor obtains an “automatic stay of all collection proceedings” while it works with interested parties to “negotiate a plan that will govern the distribution of valuable assets from the debtor’s estate” to satisfy creditors’ claims while “keep[ing] the business operating as a going concern.” *Czyzewski*, 580 U.S. at 455-56 (citation omitted). The Code provides for a collaborative process, empowering “creditors and equity holders to engage in negotiations toward resolution of their interests” because they are “very often better judges of * * * their own economic self-interest than courts.” *Bank of America National Trust & Savings Ass’n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 458 n.28 (1999) (citation omitted). The process concludes with

a plan of reorganization, which must meet a variety of statutory requirements. 11 U.S.C. § 1129.

2. The Bankruptcy Code broadly invites participation in the proceeding before the court by providing:

A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b). Other Code provisions specifically invite participation by a party in interest in particular settings. For example, a party in interest may propose a plan for confirmation, object to confirmation of a plan, and object to claims. 11 U.S.C. §§ 502(a), 1121(c), 1128(b). Various provisions of Chapter 11 also direct the bankruptcy court to take certain actions “on request of a party in interest,” including appointing or removing a trustee, *id.* §§ 1104, 1105, 1183, removing a debtor in possession, *id.* § 1185, or converting a reorganization into a liquidation, *id.* § 1174.

Through each iteration of the bankruptcy laws, Congress has broadened rights of participation. See *infra* § I. Section 1109(b) is the culmination of that process—it “continues the pattern” and “tradition” of “permitting interested parties in bankruptcy cases the absolute right to be heard and to insure their fair representation.” *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985).

II. Procedural Safeguards In Asbestos-Related Bankruptcies.

1. In the late 1970s, asbestos litigation began to overwhelm the tort system, engendering “the longest-running mass-tort litigation in the United States.” Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation* 21-24 (2005). Yet “a just and efficient resolution of asbestos claims has often eluded [the] standard legal process.” *In re Combustion Engineering, Inc.*, 391 F.3d 190, 200 (3d Cir. 2004). That’s in part because asbestos litigation spawned “grow[ing]” dockets, “long delays” in trials, “liti-gat[ion] over and over” of the “same issues,” transaction costs “exceed[ing] victims’ recovery,” and the “exhaustion of assets.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (citation omitted). These difficulties were exacerbated by “a segment of the plaintiffs’ bar” trying “to capitalize on the asbestos-litigation boom by seeking settlements for plaintiffs with no known diseases.” Lloyd Dixon et al., RAND Inst. for Civil Justice, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 2 (2010).

Attempts to resolve asbestos liability through class actions proved inadequate. Class actions were ill equipped to resolve the tension between compensating known tort claimants, on one hand, with the uncertain prospect of “future claimants” whose “disease had not yet manifested,” on the other. H.R. Rep. No. 103-835, at 40 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3348; accord Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. 973, 977, 998-99 (2023); see generally *Amchem*, 521 U.S. 591; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

Instead, Chapter 11 became “a viable alternative” for mass tort resolution. S. Elizabeth Gibson, Fed. Judicial Ctr., *Judicial Management of Mass Tort Bankruptcy Cases* 1-2 (2005). Chapter 11 offered companies the ability to “bring a halt to lawsuits,” “facilitate a global resolution of [their] liabilities, and free [themselves] from further responsibility.” *Id.* at 1. It became “the only generally recognized legal vehicle” for obtaining “finality” for asbestos liability. Dixon, *supra*, at 5 (citation omitted).

2. In 1986, a federal district court in New York “pioneered” a new model for asbestos bankruptcies that became the basis for the current Code. H.R. Rep. No. 103-835, at 40. The court approved a reorganization plan that allowed Johns Manville—a large asbestos insulation manufacturer—to emerge from bankruptcy through the creation of a novel trust to which all asbestos liabilities (present and future) were channeled. Dixon, *supra*, at 3, 5-7. The trust “arrangement was straightforward:” Johns Manville’s financial assets (like cash, stock, and insurance rights) were “transferred to the trust,” the trust took on the responsibility of “processing and paying” claims, and claimants were barred from suing Johns Manville. *Id.* at 5-6; see also H.R. Rep. No. 103-835, at 40.

The Johns Manville trust inspired the procedures now codified at Section 524(g), which strives to balance the need to “protect the future asbestos claimants” with the need to allow defendants to shed liabilities “to generate stock value and profits * * * to satisfy claims.” H.R. Rep. No. 103-835, at 40-41. Congress designed Section 524(g) to treat present and future claims equitably and give companies a “fresh start.” *Id.* at 40; Pet. App. 4a.

Congress adopted a twin “trust” and “injunction” procedure akin to the Johns Manville arrangement. Under Section 524(g), all asbestos claims—present and future—are channeled to the trust, which offers claimants a settlement (subject to judicial review) based on individualized factors. See 11 U.S.C. § 524(g)(2)(B)(ii)(V); *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 360 & n.12 (3d Cir. 2012). In turn, the reorganized company obtains an injunction barring all past and future lawsuits against it (and often its affiliates and insurers). See 11 U.S.C. § 524(g)(1); Dixon, *supra*, at 3, 5-7.

Beyond the basic structure of the Johns Manville trust, Congress also set out strict requirements a 524(g) trust must meet. In addition to the requirements that apply to all Chapter 11 plans, a Section 524(g) trust must:

- Assume the debtors’ past and future asbestos liabilities, 11 U.S.C. § 524(g)(2)(B)(i)(I);
- Be funded by the reorganized debtors’ securities or debt, *id.* § 524(g)(2)(B)(i)(II);
- Control the reorganized debtors, *id.* § 524(g)(2)(B)(i)(III); and
- Pay present and future claims equitably, *id.* § 524(g)(2)(B)(i)(IV), (ii)(V), (4)(B).

See also Pet. App. 4a-5a. Finally, any Section 524(g) trust must be approved by three-quarters of the asbestos creditors, 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb)—a supermajority requirement that exceeds the normal threshold for creditor voting, see, e.g., *id.* § 1126(c), giving asbestos creditors unusual influence over the plan. As with any Chapter 11 reorganization, a Section 524(g) plan must be “proposed in good faith.” *Id.* § 1129(a)(3).

3. Although Section 524(g) trusts proved effective in resolving asbestos claims, early plans were drafted in ways that facilitated fraudulent recoveries. That's because asbestos claimants suffered exposure to asbestos-containing products from many companies (often dozens). Given the intervening years between exposure to asbestos and manifestation of injury, it's virtually impossible to trace the asbestos injury to any single exposure. The tort system can solve this problem through liability apportionment, but only if the full scope of plaintiffs' exposures is known and factored into the apportionment. If a claimant's exposures from other defendants' products aren't identified, his claim against a particular defendant is likely to be inflated if the harmful effects of the claimant's aggregate exposure are attributed to that defendant.

Early Section 524(g) trusts, however, had no requirement that claimants disclose other exposures or recoveries. See Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1099-1101 (2014); J.A.215-19. Trustees couldn't independently obtain such information because claimants' counsel often negotiated requirements that trusts keep that information confidential and resist subpoenas. See U.S. Gov't Accountability Off., GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 26-28 (2011); J.A.216-17. So plaintiffs could "double-di[p]" their recoveries by delaying filing against any trust until their tort claims against solvent companies were resolved—"suppress[ing] evidence of trust-related exposures" in the meantime—and then filing separate claims against "multiple" trusts (without disclosing the multiple submissions) to receive "multiple" payments. Mark A. Behrens & William F. Northrip, *Department of Justice Combats Asbestos Trust Abuse*, 86 Def. Couns. J. 1, 4-

5 (2019). This scheme facilitated hundreds of millions of dollars in inflated recoveries, if not more. See *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71, 84-87 (Bankr. W.D.N.C. 2014); J.A.219. This fraud was difficult to police because, in Chapter 11 bankruptcies, “dominant stakeholders are able to essentially operate as a cartel, colluding to restrict access to, and raise the price of, restructuring outcomes.” Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 B.Y.U. L. Rev. 759, 816.

4. In 2014, a watershed bankruptcy proceeding revealed this scheme and the financial toll it took on asbestos debtors and trusts. *Garlock*, 504 B.R. at 84-87. In *Garlock*, a bankruptcy court ordered targeted discovery into select cases against the debtor and found that, in their tort suits, plaintiffs on average disclosed just two exposures; post-settlement, those same plaintiffs filed an average of nineteen claims against Section 524(g) trusts. *Ibid.* Limited discovery into a larger sample of cases confirmed that these initial results weren’t aberrations—nearly half of the debtor’s high-dollar settlements involved plaintiffs who misrepresented their exposures. *Id.* at 85-86.

Such “manipulation of exposure evidence,” the court concluded, “had a profound impact” by “inflat[ing]” plaintiffs’ recoveries. *Garlock*, 504 B.R. at 82. As a result of its findings, the bankruptcy court rejected the plaintiffs’ estimate of \$1-1.3 billion in total mesothelioma liability and concluded \$125 million—one-tenth of the amount sought by plaintiffs—accurately reflected the debtors’ “liability for present and future mesothelioma claims.” *Id.* at 97.

To safeguard the trust against fraudulent claims, the *Garlock* court implemented fraud-prevention

measures requiring claimants submitting claims to the trust to:

- Disclose all other claims that relate in any way to the alleged asbestos injuries;
- Authorize the trust to obtain a claimant's submissions to other asbestos trusts; and
- Authorize audits to ensure the accuracy of information provided to and claims paid by the trust.

Garlock Claims Resolution Procedures § 6.8, C.A.J.A.1084-86. Submitting a fraudulent claim subjects a claimant and his counsel to sanctions—and the audit provision ensures that the availability of sanctions isn't just an empty threat. *Id.* §§ 11.1, 11.3, C.A.J.A.1096-97.

Since *Garlock*, nearly every Section 524(g) trust has included almost identical fraud-prevention measures to protect debtors and their insurers (who often fund the trusts). Asbestos claimants receive the recovery to which they're entitled, while the trusts (and the debtors and insurers that fund them) are protected from fraudulent and duplicative bankruptcy claims.

The United States Trustee—charged with acting as the “bankruptcy watch-do[g] to prevent fraud, dishonesty, and overreaching in the bankruptcy arena,” H.R. Rep. No. 95-595, at 88 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6049—has objected to plans that *lack* these measures. The Trustee has repeatedly argued that both Section 524(g) and Section 1129(a)(3)'s good-faith standard *require* the type of fraud-prevention measures found in the *Garlock* plan. See, e.g., Obj. of U.S. Tr. to Disclosure Statement and Joint Prepackaged Plan of Reorganization at 1-2, 10-

18, *In re Maremont Corp.*, No. 19-10118 (Bankr. D. Del. Feb. 14, 2019), ECF No. 112. The Western District of North Carolina, where Kaiser's petition was filed, has no United States Trustee.

III. The Present Controversy.

1. Respondents Kaiser Gypsum Company and Hanson Permanente Cement, Inc. (together, "Kaiser") manufactured construction materials containing asbestos. Pet. App. 5a. Before the cascade of asbestos litigation—and before courts interpreted insurance policies "to impose a 'continuous trigger' of insurance coverage," *Federal-Mogul Global*, 684 F.3d at 358 n.4—Kaiser obtained insurance from Truck that now requires Truck to defend and pay asbestos-related claims, J.A.538. Truck is financially responsible for virtually every dollar owed to Kaiser's asbestos claimants up to a per-claim limit of \$500,000 (minus a small, fixed per-claim deductible, typically \$5,000)—with no aggregate limit. E.g., C.A.J.A.790, 839, 4507.

In the tort system, Truck paid hundreds of millions of dollars on Kaiser's behalf in over 38,000 lawsuits nationwide. J.A.163-64; Pet. App. 5a. Kaiser's corporate representative has conceded that Kaiser wasn't "treated fairly" in the tort system and acknowledged that it was "suspicious that it was the subject of misconduct" and "fraud" in these cases. J.A.106. In a sample of 857 tort plaintiffs who sued Kaiser *before* filing claims against other companies' Section 524(g) trusts, those plaintiffs "extracted more than 60% higher amounts from Kaiser than those who resolved their Kaiser claims after filing with [Section 524(g)] trusts." J.A.194. The takeaway is that plaintiffs' ability to conceal the breadth of their exposures matters.

2. After the *Garlock* bankruptcy court revealed widespread fraud and pioneered trust procedures to

counter it, Kaiser and Truck discussed a reorganization for Kaiser. J.A.297-300.

a. Kaiser and Truck discussed plans for a pre-negotiated plan of reorganization to negotiate a fair resolution of Kaiser's asbestos liabilities using the method for valuing asbestos claims, designed to exclude fraudulent inflation, developed in the *Garlock* bankruptcy. But Kaiser "unilateral[ly]" "abort[ed]" that plan and filed for bankruptcy without a pre-negotiated plan in place. J.A.301.

Still, Truck offered to bear the "great majority of the bankruptcy costs," so long as there was a "consensual resolution that benefitted all parties, including Truck." J.A.300. But Kaiser excluded Truck from all negotiations with claimants' representatives. J.A.301.

The plan jointly proposed by Kaiser and the asbestos claimants radically departed from the post-*Garlock* standard. It provided for a Section 524(g) trust that lacked the now-standard fraud-prevention measures and created a two-track system for insured and uninsured claims. Pet. App. 7a.

Kaiser and its parent company would fund (through a one-time capital transfer and assignment of insurance rights) a small Section 524(g) trust for *uninsured* claims and deductible payments. Pet. App. 6a-8a. In exchange, Kaiser, its parent, and various affiliates, officers, and directors were protected against any future lawsuits. Pet. App. 6a-8a, 286a-87a. Kaiser's parent had its equity interests reinstated and retained ownership of the reorganized debtors. Pet. App. 216a. *Insured* claims—for which Kaiser practically speaking bore almost no financial responsibility—wouldn't be resolved through the trust claims process, even though Kaiser's insurance rights

were transferred to the trust. Instead, those claims would be resolved in the tort system with no requirement that they be first presented to the trust (and subject to the trust's fraud-prevention measures). Pet. App. 227a.¹ All 14,000 claims pending at the time of bankruptcy were insured. J.A.328, 332-34.

b. Truck objected to the plan based on the lack of fraud-prevention measures. Kaiser didn't dispute that the plan exposed Truck to fraudulent claims; it remarked that all "that matters" was that the plan protected Kaiser. J.A.106. In light of Truck's objections, however, the bankruptcy court questioned whether a Section 524(g) plan that lacked the now-standard fraud-prevention measures was confirmable. J.A.121-23. Kaiser and the claimants amended the proposed plan to add those measures, but only for the *uninsured* claims resolved by the trust—not for the 14,000 known insured claims for which Truck bears nearly exclusive financial responsibility. Pet. App. 226a-27a; J.A.327, 332-34. Kaiser's representative admitted it had delegated "the rights to decide what's in the trust" to claimants' counsel who in turn "oppose[d]" including the insured claims in the trust (along with its fraud-prevention measures). J.A.340.

Kaiser also amended the plan to include an express finding by the district court that Kaiser's actions in the bankruptcy—including ceding control to opposing counsel and refusing to seek exposure information for insured claims—didn't violate its coverage obligation to cooperate with and assist Truck. J.A.338, 546, 549-51. Truck objected to confirmation of the plan and

¹ Once a verdict or settlement is reached, the plaintiff could then obtain the deductible from the trust. J.A.416-24, C.A.J.A.5921-22.

to the express finding purporting to resolve the cooperation coverage defense. Pet. App. 991, 143a-46a.

c. Truck identified two fundamental ways in which the plan violated Chapter 11. First, it failed to comply with various provisions of Section 524(g) because (among other things) the trust didn't "assume the liabilities of [the] debtor," instead mandating that 14,000 asbestos claims against Kaiser be resolved in the tort system without the fraud-prevention measures set out in the trust. 11 U.S.C. § 524(g)(2)(B)(i)(I); Pet. App. 144a. Second, the plan wasn't "proposed in good faith" because it took no measures to prevent fraud in the bankruptcy claims that were insured. 11 U.S.C. § 1129(a)(3).

3. The bankruptcy court nonetheless recommended that the district court confirm the plan, J.A.536, and the district court did so without meaningfully addressing Truck's objections to the Section 524(g) trust and channeling injunction, Pet. App. 27a-328a. Instead, the district court first concluded that Kaiser's policies required cooperation only in individual tort suits, such that Kaiser's collusion in bankruptcy didn't violate any duty. Pet. App. 94a, 107a-15a.

The district court next concluded that Truck couldn't otherwise object to the rest of the plan because it wasn't a party in interest and so lacked bankruptcy standing to object because the plan purported to be "neutral" as to Truck's rights and liabilities. Pet. App. 94a-97a, 102a-04a; see 11 U.S.C. § 1109(b). The court concluded that neither Truck's status as a creditor nor the plan's mandate that insured claims be resolved in the tort system without fraud-prevention measures rendered Truck a party in interest. Pet. App. 95a-96a, 98a-99a, 103a n.25.

4. The Fourth Circuit affirmed without addressing the merits of Truck's objections to the Section 524(g) trust and channeling injunction. Pet. App. 26a. It too decided that Truck couldn't object to the plan because it wasn't a "party in interest" under Section 1109(b). Pet. App. 24a.

The court recognized that an insurer like Truck is a party whose interest "could be affected" by proceedings. Pet. App. 15a-16a. But it denied Truck party-in-interest status based on an additional requirement not stated in the Code: The court adopted the "insurance-neutrality" doctrine, applied by some other circuits, which excludes an insurer from participating unless the plan "increase[s] the insurer's pre-petition obligations or impairs the insurer's pre-petition policy rights." Pet. App. 16a. Because, in the court's view, Truck had the same contractual exposure to fraud before and after the plan, confirmation didn't "sufficiently affect[t]" Truck. Pet. App. 16a, 23a-24a. To the Fourth Circuit, even the district court's "preclusive" finding that Kaiser didn't violate its cooperation obligations left Truck's contractual rights unaltered, and didn't allow Truck to object to any other part of the plan. Pet. App. 17a-22a & n.9.

The court also held that Truck couldn't object to the plan in its capacity as a creditor. Pet. App. 24a-26a. Although the court recognized that the plain text of Section 1109(b) states that a "creditor" may be heard on "any issue," the court determined that Truck's creditor status permitted it only to raise objections that "relate to its status as a creditor." Pet. App. 24a-25a (emphasis omitted).

The Fourth Circuit didn't consider any of Truck's substantive objections, including whether the plan

complied with Section 524(g) or Section 1129's good-faith requirement. Pet. App. 26a.

SUMMARY OF ARGUMENT

I. The text, context, and history of Section 1109(b) confirm that it grants a broad right allowing parties with Article III standing to participate in Chapter 11 proceedings.

A. Section 1109(b) allows a “party in interest” to raise “any issue” in a Chapter 11 proceeding. The plain meaning of these terms invites those who are “concerned or affected, esp. with respect to advantage, personal or general,” to take part in the proceeding. *Webster’s New International Dictionary* 1294 (2d ed. 1943).

This broad right is confirmed by this Court’s interpretation of “party in interest” under other statutes before the enactment of Section 1109(b). In those cases, this Court repeatedly held that a complainant was a “party in interest” if it could show the proceeding “may directly and adversely affect the complainant’s welfare.” *Western Pacific California Railroad Co. v. Southern Pacific Co.*, 284 U.S. 47, 51-52 (1931). In *Western Pacific* and other “party in interest” cases, the Court expressly relied on Article III principles. Those principles include the distinction between a party who “suffers in some indefinite way in common with people generally” and one who “has sustained or is immediately in danger of sustaining some direct injury” as a result of the challenged action. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). When Congress “transplant[s]” “a statutory term *** from another legal source,” as it did with Section 1109(b)’s party-in-interest standard, “it brings the old soil with it.” *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted).

B. The Bankruptcy Code’s statutory history reinforces that in Section 1109(b) Congress sought to expand the rights of participation to the limits of Article III. Under the “equity receivership” model that existed before the 1930s, participation in corporate reorganizations was extremely restricted, with even creditors and equity holders generally excluded. 7 Collier on Bankruptcy ¶ 1109.LH[2][a] (16th ed. rev. 2022). In successive enactments in the 1930s, Congress allowed creditors and stockholders the right to be heard on specific issues, Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 912, 917 (formerly codified at 11 U.S.C. § 207 (1934)) (repealed 1938), and later “on all matters” in a reorganization, Chandler Act, ch. 575, § 206, 52 Stat. 883, 894 (1938) (formerly codified at 11 U.S.C. § 606 (1976)) (repealed 1979).

Section 1109(b) is the culmination of this process of expansion. Congress enacted Section 1109(b) when it adopted the Bankruptcy Code in 1978. Unlike prior statutes, Congress used a general term, “party in interest,” followed by a *non-exclusive* list of specific parties in interest. And it broadly allowed a party in interest to be heard on “any issue.” Section 1109(b)’s historical context further demonstrates that it’s designed to allow all stakeholders to be heard.

II. Truck is a party in interest as Kaiser’s insurer and as a creditor.

A. As Kaiser’s insurer, Truck plainly qualifies as a party in interest because it has the near-exclusive obligation to pay the asbestos bankruptcy claims. The confirmed plan fails to extend to these insured claims any of the fraud-prevention measures that have become standard since the *Garlock* reorganization. This failure to protect against fraud violates multiple pro-

visions of the Code and renders the plan unconfirmable, as the United States Trustee has argued in other asbestos reorganizations. The parties disagree over Truck's entitlement to those safeguards on the merits, but the potential harm that withholding them would inflict on Truck—and thus its interest in whether the plan is confirmed—should be beyond dispute: Depriving Truck of those procedures exposes Truck to hundreds of millions of dollars in liability beyond what Truck would face under a plan that complied with the Code and included adequate fraud-protection measures. That direct pocketbook harm is more than adequate to demonstrate that the proceeding “may directly and adversely affect [Truck's] welfare” and render Truck a “party in interest.” *Western Pacific*, 284 U.S. at 51-52.

B. Truck is also a party in interest as a creditor. Section 1109(b) allows “a creditor” to be heard on “any issue,” without limitation. The Fourth Circuit erred in concluding that, in its capacity as a creditor, Truck could raise only arguments that “relate to its status as a creditor.” Pet. App. 25a (emphasis omitted). This restriction had no basis in Section 1109(b) or in Article III. Truck satisfies the requirements of Article III because the relief it seeks—amendment or reversal of an unconfirmable plan and the introduction of fraud-prevention measures for all claims—will alleviate a pocketbook injury that is particular to Truck. And Truck is a party in interest that has a statutory right to participate because it's a creditor, regardless of whether its status as an insurer independently renders it a party in interest. No more is required.

III. The Fourth Circuit erred in applying the judge-made insurance-neutrality doctrine to exclude Truck from being heard in the bankruptcy.

A. The insurance-neutrality doctrine embraced by the Fourth Circuit is a “judicially self-imposed limit on the exercise of federal jurisdiction” that some courts have impermissibly engrafted onto Section 1109(b). *In re Thorpe Insulation Co.*, 677 F.3d 869, 888 (9th Cir. 2012) (cleaned up). These courts have candidly acknowledged that the doctrine is inconsistent with “a literal reading of section 1109(b)” and have described their holdings as a prudential choice, not a statutory or constitutional mandate. *In re James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992). That prudential choice is grounded in those courts’ assessment that “other limitations on standing” not present in the Code’s text promote the speed and efficiency of bankruptcy proceedings. *Ibid.* But that is a call for Congress—not courts—to make.

Courts may not demand that a litigant surmount hurdles to standing that aren’t present in the text Congress enacted “merely because ‘prudence’ dictates.” *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Instead, courts must determine the scope of statutory rights according to the text of the particular statute, using “traditional tools of statutory interpretation.” *Bank of America v. City of Miami*, 581 U.S. 189, 197 (2017). Once the scope of Congress’s choice is clear, courts have “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

As a result, once Article III standing is established, the only relevant question is whether “Congress has authorized” a litigant to be heard. *Lexmark*, 572 U.S. at 128. That’s enough to reject the judge-made “insurance-neutrality” doctrine applied below.

Congress has authorized a broad class of parties to be heard in bankruptcy—a class that certainly includes an insurer with near-exclusive financial responsibility for claims against the debtor.

B. The court of appeals’ approach frustrates Congress’s design in Chapter 11 bankruptcies and silences the only party with a stake in raising crucial requirements of the Code. Section 1109(b) promotes the just resolution of bankruptcies by carrying into effect Congress’s policy choice to “broaden the rights * * * to participate in corporate reorganization proceedings,” not restrict them. *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985) (citation omitted). This broad participation is beneficial because courts are statutorily obligated to ensure compliance with the Code, and hearing from all interested parties enhances courts’ ability to fulfill that duty. 11 U.S.C. § 1129(a). The Fourth Circuit’s approach, in contrast, hinders courts’ ability to enforce the Code’s requirements by excluding from participation the only parties that have an interest in seeing those requirements respected. Its approach disserves Congress’s objectives, increases the already heavy burdens on courts, and magnifies the risk that collusive and unlawful plans will evade review.

ARGUMENT

I. Section 1109(b) Grants A Right To Be Heard To A Party With Article III Standing.

Section 1109(b) authorizes a “party in interest” in a bankruptcy proceeding to be heard on “any issue” in that proceeding. The plain meaning of Congress’s words, this Court’s prior interpretation of the same language in other statutes, and the statutory history of the bankruptcy laws all confirm that the right to be

heard afforded to a “party in interest” in Section 1109(b) is coextensive with the traditional standard for Article III standing. That standard is satisfied whenever a party can show “a personal stake in the case”—in other words, when it’s “able to sufficiently answer the question: ‘What’s it to you?’” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citations omitted).

A. Text, history, and precedent confirm that the scope of Section 1109(b) is coextensive with Article III.

1. Discerning Section 1109(b)’s scope starts “with the text of the statute.” *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) (citation omitted). It provides:

A party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b).

The right Section 1109(b) confers to “appear” and “be heard” extends to anyone who is a “party in interest.” Although Section 1109(b) enumerates various parties who qualify automatically, Congress’s use of “including” makes clear that the list is illustrative rather than exhaustive. “[T]he term ‘including’” ordinarily indicates “that the specifically mentioned [items] are not exclusive.” *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9 (1985). And the Code’s rules of construction confirm that “including” is “not limiting.” 11 U.S.C. § 102(3). So the critical question

is who is a “party in interest”—illuminated, but not limited, by the parties listed in the statute itself. See *United States Bank National Ass’n v. Village at Lakeridge, LLC*, 583 U.S. 387, 390 (2018) (“including” in the Code denotes “non-exhaustive” list encompassing others similar to the listed terms).

Because “party in interest” is nowhere defined in the Bankruptcy Code, construing it begins with the words’ ordinary meaning. See *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011). The word “party” as used in this context is best understood as “one concerned in an affair.” *Webster’s New International Dictionary* 1784 (2d ed. 1943). Although in other contexts “party” can refer to plaintiffs and defendants *already* involved in litigation, it cannot naturally bear that meaning here because Section 1109(b) governs who is *eligible* to appear and be heard in Chapter 11 proceedings. And “interest” denotes “[c]oncern, or the state of being concerned or affected, esp. with respect to advantage, personal or general.” *Webster’s Second, supra*, at 1294.

So a “party in interest” is a person that is concerned or affected by the proceeding at hand. Such a person may “raise,” “appear,” and “be heard on” “any issue” in the Chapter 11 case, 11 U.S.C. § 1109(b) (emphasis added)—and thus is entitled to present an argument “of whatever kind.” *United States v. Gonzalez*, 520 U.S. 1, 5 (1997) (citation omitted); see *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-20 (2008).

2. That ordinary meaning is reinforced by judicial interpretations that had previously been given to the same term at the time Congress engrafted it into

Section 1109(b) in 1978. It's well established that "when a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). This Court has applied that principle to the Bankruptcy Code on many occasions. See, e.g., *ibid.*; *Field v. Mans*, 516 U.S. 59, 69-70 (1995). By making "party in interest" the touchstone for the right to appear and be heard in Section 1109(b), Congress borrowed a term it had used in many other statutes where its meaning was settled by this Court's precedent as effectively coextensive with Article III standing.

a. When the Bankruptcy Code was enacted in 1978, this Court had already expounded on the meaning of "party in interest" many times in interpreting the Transportation Act of 1920 (Esch-Cummins Act), Pub. L. No. 66-152, ch. 91, sec. 400, § 1(20), 41 Stat. 456, 478 (formerly codified at 49 U.S.C. § 1(20) (1970)) (repealed 1976). The Transportation Act provided that "[a]ny construction, operation, or abandonment" of railroad lines contrary to certain statutory requirements "may be enjoined by any court of competent jurisdiction at the suit of * * * any party in interest." *Ibid.*

In *Western Pacific California Railroad Co. v. Southern Pacific Co.*, this Court held that "party in interest" under the Transportation Act included a competitor railroad "directly and adversely affect[ed]" by the challenged construction. 284 U.S. 47, 51-52 (1931). The Court rejected the argument that a "party in interest" must have "some clear legal right for

which it might ask protection under the rules commonly accepted by courts of equity.” *Id.* at 51. At the same time, Congress had “no purpose to permit any individual so inclined to institute such a proceeding.” *Ibid.* “The complaint,” the Court explained, “must possess something more than a common concern for obedience to law.” *Ibid.*

Western Pacific relied, in part, on one of the Court’s seminal standing cases, *Frothingham v. Mellon*, 262 U.S. 447 (1923). In *Mellon*, the Court held a plaintiff must “show, not only that the statute” being challenged “is invalid, but that he has or is immediately in danger of sustaining some direct injury as the result of its enforcement.” *Ibid.* Showing “merely that he suffers in some indefinite way in common with people generally” is insufficient to invoke the Court’s jurisdiction. *Ibid.* Applying those principles, *Western Pacific* held that, because the competitor railroad had shown that the proceeding “may directly and adversely affect [its] welfare,” it had “the standing of a ‘party in interest’ within intendment of the act.” 84 U.S. at 52; see also *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 390 (1932) (applying *Western Pacific* and holding that a competitor ferry company was a “party in interest”).

The Court subsequently applied the same standard in *L. Singer & Sons v. Union Pacific Railroad Co.*, 311 U.S. 295 (1940). It reiterated *Western Pacific*’s holding that an individual doesn’t qualify as a “party in interest” “unless he ‘possesses something more than a common concern for obedience to law.’” *Id.* at 304. That led the Court to reject the claim of fruit sellers who sought to challenge an extension of a rail

line in a neighboring city—where they did no business—on the theory that the line would service a market where other merchants offered their wares. *Id.* at 301-04. That connection was too attenuated to allow suit because the fruit sellers’ “welfare cannot be directly, but only indirectly and consequentially, affected” by the extension. *Id.* at 301. But this Court reaffirmed that “[a]n individual [with] some special and peculiar interest which may be directly and materially affected by alleged unlawful action” counts as a “‘party in interest’ within the meaning of the statute.” *Ibid.*

The Court has applied the same reading of “party in interest” in other contexts as well. For example, in *Alton Railroad Co. v. United States*, 315 U.S. 15 (1942), the Court held that under the Motor Carrier Act of 1935, Pub. L. No. 74-255, ch. 498, § 205(h), 49 Stat. 543, 543, 550 (formerly codified at 49 U.S.C. § 305(g) (1976)) (repealed 1978)—which extended “the same right of relief in court by any party in interest” under the Transportation Act to orders of the Interstate Commerce Commission—railroad companies in competition with a motor-vehicle carrier approved by the Commission were “parties in interest.” *Alton*, 315 U.S. at 18-20. The railroads “clearly ha[d] a stake as carriers in the transportation situation which the order of the Commission affected,” as they compete with the motor vehicle carrier “for automobile traffic in territory served by him.” *Id.* at 19.

So by the time Congress adopted Section 1109(b) in 1978, “party in interest” had acquired a well-understood meaning. Congress’s decision to use that term in the Bankruptcy Code carried that meaning forward. As a result, when Congress incorporated the

phrase “party in interest” in Section 1109(b), it brought along with it the old-soil meaning of any individual “directly and adversely affect[ed]” by the reorganization. See *Western Pacific*, 284 U.S. at 51-52.

b. That standard is effectively coextensive with the demands of Article III standing. *Western Pacific* made this connection clear by grounding its interpretation of “party in interest” in *Mellon*, which recognized that plaintiffs who are “immediately in danger of sustaining some direct injury as the result of” the challenged action have Article III standing. 262 U.S. at 488; see *Western Pacific*, 284 U.S. at 51-52.

By 1978, the Court had long held that Article III requires the plaintiff to establish that he “has sustained, or is immediately in danger of sustaining, a direct injury as a result of [the challenged] action” and it excludes plaintiffs who assert nothing but “a general interest common to all members of the public.” *Ex parte Levitt*, 302 U.S. 633, 636 (1937) (per curiam); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (plaintiff must be “‘directly’ affected” by the challenged action) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). By interpreting “party in interest” in *Western Pacific* and other cases to include one who is “directly and adversely affect[ed]” by the challenged action, this Court put it on the same footing as Article III. The right Section 1109(b) confers to raise “any issue” also aligns with Article III, which allows a party to present any *argument* in support of the “form of *relief* that is sought.” *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citation omitted; emphasis added); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (inquiry is whether “the *injury* * * * entitle[s] the plaintiff] to seek a remedy”) (emphasis added).

3. Section 1109(b)'s broad language conferring that participation right was no accident or afterthought. If Congress had intended to restrict participatory rights in Chapter 11 proceedings more narrowly than Article III, "it easily could have drafted language to that effect." *Gallardo ex rel. Vassallo v. Marstiller*, 596 U.S. 420, 429 (2022) (citation omitted). Indeed, in prior bankruptcy provisions and other statutes, Congress used language to *restrict* participation. See, e.g., 11 U.S.C. § 67(c) (1976) (repealed 1979) (restricting appellate rights to "person[s] aggrieved" by a specific order); 42 U.S.C. § 2000e-5(b), (f) (allowing "person claiming to be aggrieved" to file Title VII action); 18 U.S.C. § 1964(c) (allowing only person "injured in his business or property" to bring claim).

Courts have interpreted the restrictive language in those statutes to require a showing of more than Article III standing alone. See *In re Technicool Systems, Inc.*, 896 F.3d 382, 385 (5th Cir. 2018) ("person aggrieved" standard in bankruptcy is "more exacting than the test for Article III standing") (citation omitted); *Thompson v. North American Stainless, LP*, 562 U.S. 170, 177 (2011) ("person aggrieved" in Title VII "must be construed more narrowly than the outer boundaries of Article III"); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 266 (2d Cir. 2006) (18 U.S.C. § 1964 is "more rigorous" than Article III).²

² In other contexts, this Court has suggested that similar "person aggrieved" language "showed a congressional intention to define standing as broadly as is permitted by Article III," *Bank of America Corp. v. City of Miami*, 581 U.S. 189, 197 (2017) (citation omitted), leaving some room for debate as to the scope of a person aggrieved standard. But Congress chose to depart from the old

Congress eschewed such limitations in Section 1109(b), and its “choice to depart from the model of * * * closely related statute[s] is a choice [this Court] may [not] disregard.” *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). Section 1109(b)’s plain text and surrounding context thus demand that any party with Article III standing be allowed to “raise” and “be heard” on “any issue.”

B. Statutory history confirms that Section 1109(b)’s right to appear and be heard is coextensive with Article III.

This Court interprets provisions of the Bankruptcy Code in light of their “broader statutory history”—including corresponding statutory provisions in predecessor statutes like the Bankruptcy Act. *Fidelity Financial Services, Inc. v. Fink*, 522 U.S. 211, 220 (1998). Courts properly consider the “history of the law as previously existing” in “construing any act of legislation.” *United States v. Wong Kim Ark*, 169 U.S. 649, 653-54 (1898); accord *BNSF v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (“the record of *enacted* changes Congress made to the relevant statutory text over time” is “the sort of textual evidence everyone agrees can sometimes shed light on meaning”). “[A] change in the language of a prior statute presumably connotes a change in meaning.” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012). Here, the statutory history of Section 1109(b) powerfully confirms the natural meaning of the text: Section 1109(b) represents the culmination of Congress’s expansion

Bankruptcy Act’s “person aggrieved” limitation altogether in Section 1109(b).

over several decades of the right to appear and be heard in a Chapter 11 case.

1. Before the 1930s, the primary method of reorganizing corporations unable to keep up with their debts was the “equity receivership.” *United States v. Key*, 397 U.S. 322, 329 (1970). The equity receivership was a “judge-made device [that] was designed to preserve the debtor business as a going concern by cancelling claims against it, in return for which cancellation the claimants received debt or equity interests in the new organization, which then acquired the assets of the old corporation in a judicial sale.” *Ibid.*

Under the equity-receivership model, the right of intervention was “extremely limited,” and the privilege of intervention “uncertain of attainment.” SEC, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, Part VIII, at 191 (1940), available at tinyurl.com/4au6rxbt. A key premise was the legal fiction that non-parties’ interests were adequately represented by others. Stockholders, for example, were deemed represented by the officers and directors of their corporation, while creditors were “theoretically represented by the receiver.” *Id.* at 184-84. Both were ordinarily denied a right to participate in the proceedings. *Ibid.* As a result, while equity receiverships didn’t technically “foreclose individual participation,” they rarely allowed for it in practice. 7 Collier on Bankruptcy ¶ 1109.LH[2][a] (16th ed. rev. 2022).

2. In the decades since, Congress gradually abandoned that limited-participation framework. See *In re Keystone Realty Holding Co.*, 117 F.2d 1003,

1005 (3d Cir. 1941) (discussing Congress’s expansion of “the right to be heard”). In 1934, when Congress adopted the first true corporate-reorganization statute, it provided that the debtor had the right to be heard on all questions, while any creditor or stockholder had “the right to be heard on the question of the permanent appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan.” Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 912, 917 (formerly codified at 11 U.S.C. § 207 (1934)) (repealed 1938).

In 1938, Congress overhauled the corporate reorganization laws and further broadened the right of participation. 7 Collier, *supra*, § 1109.LH[2][c]; see Chandler Act, ch. 575, § 206, 52 Stat. 883, 894 (1938) (formerly codified at 11 U.S.C. § 606 (1976)) (repealed 1979). Congress provided that “[t]he debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter.” *Ibid.* This gave creditors, stockholders, and indenture trustees—in addition to debtors—complete participatory rights, without any limitation on the substantive issues on which they could be heard. But parties beyond those expressly named in the statute were still excluded.³

3. That changed when Congress adopted Section 1109 as part of the new Bankruptcy Code. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1109, 92 Stat. 2549, 2629. In Section 1109(b), Congress enshrined even more expansive participatory rights

³ The Chandler Act allowed a “party in interest” to intervene “for cause shown,” but not as of right. § 207, 52 Stat. at 894.

when it moved from an exclusive list of who could be heard to the general term “party in interest” followed by a non-exclusive list illustrating who fit that description.

In sum, the statutory history confirms what text, context, and structure make plain. “When Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-59 (2004) (citation omitted). Congress’s deliberate choice to replace an exclusive list with the more general term “party in interest” followed by a non-exclusive, illustrative list had consequences on participatory rights. By using a term that was well understood at the time to encompass any directly and adversely affected party, Congress made plain its intent to expand such rights to the limits of Article III.

II. Truck Is A Party In Interest Under Section 1109(b) With The Right To Appear And Be Heard On Any Issue.

Under the text Congress enacted, Truck is a party in interest twice-over. First, because the financial burden of the claims (including fraudulent claims facilitated by the plan’s failure to comply with the Code) falls almost entirely on Truck as Kaiser’s insurer; and second, because Truck is a creditor—a group Congress expressly designated a party in interest.

A. Truck is a party in interest as an insurer because it’s responsible for paying the bankruptcy claims.

As Kaiser’s insurer, Truck will suffer a direct pocketbook injury as a result of the plan’s unlawful

withholding of fraud-prevention measures only for insured claims, while extending such measures for uninsured claims. That amply qualifies Truck as a “party in interest” within the plain meaning of Section 1109(b) and the Article III principles that it embodies.⁴

1. Truck has a sufficient stake in this reorganization to be a party in interest because the plan will cause Truck harm that participation would redress. Kaiser’s bankruptcy proceeding “may directly and adversely affect” Truck’s “welfare,” *Western Pacific*, 284 U.S. at 51, because Truck has a financial obligation to pay claims—even fraudulent claims—of Kaiser’s asbestos creditors. That is a classic “pocketbook harm.” *FEC v. Cruz*, 142 S. Ct. 1638, 1646 (2022).⁵ As this Court observed in holding that another party had standing to challenge the resolution of a bankruptcy proceeding, “[f]or standing purposes, a loss of even a small amount of money is ordinarily an injury.” *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) (citation omitted). Here, as in *Czyzewski*, “[t]he ruling [below] could well have cost petitioners considerably more.” *Ibid.*

That injury is traceable to Kaiser’s bankruptcy proceeding and the confirmed plan. That proceeding presented a crucial opportunity for Kaiser and Truck

⁴ The Fourth Circuit didn’t examine Truck’s Article III standing as an insurer—its Article III holding was limited to Truck’s standing as a creditor. Pet. App. 25a-26a.

⁵ The fact the insurance policies provide coverage for fraudulent claims doesn’t, as the Fourth Circuit mistakenly reasoned, eliminate this injury. Pet. App. 23a. That Truck has agreed to defend fraudulent claims doesn’t mean that Truck agreed to be defrauded.

to protect themselves from fraudulently inflated claims while ensuring adequate payment for all bona fide claims. Truck’s merits arguments—which, “[f]or standing purposes,” this Court “accept[s] as valid,” *Cruz*, 596 U.S. at 298—posit that the bankruptcy court cannot confirm the plan as proposed without *Garlock*-style fraud-prevention measures. As Truck showed at length in the courts below, a plan without these measures fails to comply with Section 524(g)’s requirements and the good-faith requirement of Section 1129. E.g., Pet. C.A. Br. 33-55. For present purposes, the key point is that the withholding of these safeguards will cause Truck concrete harm.

Kaiser’s bankruptcy not only could, but *did*, adversely affect Truck’s welfare—in two ways. First, the confirmed plan failed to protect against fraudulent bankruptcy claims against Kaiser—claims for which Truck will be responsible. An insurer indisputably has an interest in the determination of a covered liability. See, e.g., *California Department of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1085-86 (9th Cir. 2022) (“insurers easily satisfy the requirements of constitutional standing” to intervene in liability action).

Second, the plan’s channeling injunction “permanently and forever stay[s], restrain[s] and enjoin[s],” Pet. App. 286a, any action against Kaiser, Kaiser’s parent company, all of Kaiser’s current and former directors and shareholders, and any “[e]ntities, other than * * * Insurers, that are * * * directly or indirectly liable” for Kaiser’s asbestos claims, Pet. App. 201a. Truck now stands alone in carrying the financial burden of these claims. And “when a federal court gives its approval to a [bankruptcy] plan that allows a

party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed." *In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 204 (3d Cir. 2011).

In *Global Industrial Technologies*, for instance, the Third Circuit held that insurers were parties in interest because they were "funding sources who will have to address the liabilities" of the debtor even though the plan "preserve[d] their coverage defenses." *Id.* at 212; see also *In re Congoleum Corp.*, 414 B.R. 44, 57 (D.N.J. 2009) ("each [of seven] successive and different court[s] has found that the insurers have standing to challenge the Plan due to their fundamental stake in the outcome of the bankruptcy proceedings").

For similar reasons, the relief Truck seeks—a plan that includes the fraud-prevention measures now standard in Section 524(g) plans following *Garlock*, which already apply to *uninsured* claims under Kaiser's plan—would sufficiently redress the financial injury it faces. The bankruptcy proceeding offered a one-time opportunity to prevent fraudulent claims through claims procedures that are standard in other plans. Had the bankruptcy court ordered those procedures for all claims, insured and uninsured alike—it would have substantially reduced the value of the bankruptcy claims, and thus Truck's liability for those claims. See J.A.135; C.A.J.A.5221 (showing hundreds of millions of dollars in Kaiser payments to asbestos claimants before bankruptcy); *In re Garlock Sealing Technologies*, 504 B.R. 71, 94-95 (Bankr. W.D.N.C. 2014) (concluding that valuation of present and future asbestos claims based on past resolutions should be

reduced by over 90% due to fraudulent withholding of exposures).

Crucially, Truck wasn't required to demonstrate that a bankruptcy conducted in conformity with the Code was *certain* to improve its position. "Article III's strictures are met not only when a plaintiff complains of being deprived of some benefit, but also when a plaintiff complains that she was deprived of a chance to obtain a benefit." *Robertson v. Allied Solutions, LLC*, 902 F.3d 690, 697 (7th Cir. 2018); *Teton Historic Aviation Foundation v. U.S. Department of Defense*, 785 F.3d 719, 724 (D.C. Cir. 2015) (per curiam) ("a plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* * * * even though the plaintiff may not be able to show that it was *certain to receive* that benefit") (citation omitted). Here, Truck was deprived of "a chance to obtain" the benefit of having claims against its insured—which its insured brought into bankruptcy—resolved subject to key fraud-prevention measures. *Czyzewski*, 580 U.S. at 464.

2. The Fourth Circuit reached the opposite conclusion only by disregarding Truck's obvious financial stake in the reorganization. The court reasoned that Truck "was not entitled to [fraud-prevention] measures before the bankruptcy," Pet. App. 23a, and therefore suffered no harm from the absence of those measures in Kaiser's plan. But that analysis proceeds from the wrong baseline—i.e., Truck's position "before the bankruptcy." *Ibid.* Once Kaiser filed its Chapter 11 petition, the Code's requirements became controlling: At that point, Truck was entitled to the fraud-prevention measures that the Code requires for any confirmable Section 524(g) plan. That is, once Kaiser

filed its petition, Chapter 11 became the benchmark for Truck's rights, and Section 1109(b) authorized Truck to raise and be heard on any departure from that benchmark that it alleged would likely cause it harm.

The respondents disagree with Truck's position on what the Code required. See Claimants' Br. in Opp. 19-21. But whether Truck's argument that it was entitled to particular procedures is sound is of no moment for present purposes. In assessing Truck's *standing* to participate in this Chapter 11 proceeding, the courts below were required to assume the validity of Truck's claim on the merits. *Cruz*, 596 U.S. at 298.

In one respect, even the Fourth Circuit recognized that Truck's insurer status rendered it a party in interest. But it nevertheless refused to hear Truck on "any issue." Pet. App. 24a-25a. The Fourth Circuit accepted that Truck could challenge the insurance finding (rejecting Truck's coverage defense) on the merits and undertook a detailed discourse on the contours of California insurance law. Pet. App. 17a-22a. But, notwithstanding its recognition that the finding "was prospectively binding on Truck" and barred Truck from asserting "a coverage defense in individual suits," Pet. App. 22a n.9, the Fourth Circuit concluded the plan didn't alter Truck's rights. Having considered Truck's merits arguments on this finding, the Fourth Circuit offered no justification for disregarding Truck's other challenges to the plan. If Truck has the ability to challenge the plan finding as a party in interest, Section 1109(b) permits Truck to be heard "on *any* issue" in the Chapter 11 case. See *infra* § II.B.

* * * * *

Lest the trees obscure the forest, Truck's interest in this proceeding is unmistakable. Truck has the near-exclusive responsibility as Kaiser's insurer to pay for the asbestos claims against Kaiser. When Kaiser filed for bankruptcy, those claims became bankruptcy claims subject to the power of the bankruptcy court. Truck argues, as the U.S. Trustee has argued elsewhere, see *infra* § III.B, that the Code requires certain measures in the plan that protect against fraud in those asbestos bankruptcy claims. Withholding those measures means Truck's liability remains inflated. Because resolving the claims through the plan may directly affect Truck's financial liability, Truck is a party in interest.

B. Truck is a party in interest because it's a creditor.

Truck is also a party in interest because, as the Fourth Circuit recognized, Truck is a *creditor* of Kaiser. Section 1109(b) expressly includes a "creditor" as an example of a "party in interest," so Truck has the right to "appear and be heard on any issue" for that reason, too. See 11 U.S.C. § 1109(b).

Despite recognizing Truck's creditor status, the Fourth Circuit held that Truck couldn't be heard on its objections to the plan in that capacity because its objections "in no way relate to its status *as a creditor*." Pet. App. 25a. In effect, the Fourth Circuit rewrote Section 1109(b) to allow a creditor only "to assert that interest with respect to any issue to which it pertains." Pet. App. 24a-25a (quoting *In re James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992)).

That invented limitation is untenable. It defies Section 1109(b)’s plain text, which expressly permits parties in interest—expressly including “a creditor”—to appear and be heard on “*any* issue.” 11 U.S.C. § 1109(b) (emphasis added). The Fourth Circuit erroneously attempted to ground this requirement—that a creditor must match each argument with an injury in its capacity as a creditor—in Article III. Pet. App. 25a. That limitation has no basis in Article III.

Article III requires plaintiffs to establish standing “separately for each *claim* that they press and each *form of relief* that they seek”—not for every *argument* that they make to support a claim for relief. *Cruz*, 596 U.S. at 299 (emphases added); see *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (standing to challenge statutory removal restrictions where injury related to a particular agency action); *DaimlerChrysler*, 547 U.S. at 353 (relevant Article III question is whether “th[e] injury * * * entitle[s] [the plaintiff] to seek a remedy”). Here, Truck seeks only one form of relief—an order vacating confirmation of the plan—and that relief would directly redress its pocketbook injury.

The Fourth Circuit reasoned that Truck, as a creditor, was impermissibly trying to assert the rights of third parties. Pet. App. 25a. Not so. Truck asserts its own right to be heard, and does so to protect its own financial interests. The statute means what it says—that “a creditor” may raise “any issue” in a Chapter 11 proceeding. That’s exactly what Truck seeks to do here. So Truck’s creditor status is an independent reason that it’s a party in interest under Section 1109(b).

III. The Insurance-Neutrality Doctrine Has No Statutory Basis And Should Be Discarded.

The Fourth Circuit, following some other courts, rejected a straightforward application of Section 1109(b) based not on anything in the statute but by embracing the so-called “insurance-neutrality” doctrine—“a judicially self-imposed limit on the exercise of federal jurisdiction” that some courts have engrafted onto Section 1109(b). *In re Thorpe Insulation Co.*, 677 F.3d 869, 888 (9th Cir. 2012) (cleaned up); compare *Global Industrial Technologies*, 645 F.3d at 211 (“Article III standing and standing under the Bankruptcy Code are effectively coextensive”), with *In re C.P. Hall Co.*, 750 F.3d 659, 660-61 (7th Cir. 2014) (injury that “suffices for Article III standing” is insufficient for party-in-interest status). That doctrine has no sound basis and should be rejected.

The insurance-neutrality doctrine, as applied in the decision below and in some other circuits, undisputedly conflicts with “a literal reading of section 1109(b).” *James Wilson Associates*, 965 F.2d at 169. This Court has made clear that courts cannot impose restrictions on the right to be heard that have no basis in statutory text “merely because ‘prudence’ dictates.” *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). That precedent—along with the plain text of the statute—requires rejecting the insurance-neutrality doctrine applied below.

A. The insurance-neutrality doctrine has no basis in Article III or the Code.

Some courts have supplanted Congress’s policy choice with their own view of what constitutes an “expeditious” and “efficient reorganization” of a Chapter 11 debtor. *In re Refco Inc.*, 505 F.3d 109, 118 (2d Cir. 2007) (citation omitted) (suggesting that “lenient” standing rules under Section 1109(b) would “thwar[t] the goal of a speedy and efficient reorganization”). These courts apply a restrictive “insurance-neutrality” doctrine. Under that doctrine, courts ask not whether a bankruptcy proceeding may directly affect an insurer’s interests, but instead whether a specific plan “increase[s] the insurer’s pre-petition obligations or impair[s] the insurer’s pre-petition policy rights.” Pet. App. 16a. That rule lacks any basis in Article III or the Code. It’s therefore illegitimate and should be rejected.

1. Judge-made limitations on participation in federal-court litigation beyond what Article III and applicable statutes require cannot be reconciled with “the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.” *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (citing *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922)). Once Congress has afforded a litigant a statutory right to be heard, courts “are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends.” *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893). This “obligation” to “exercise the ju-

risdiction given them” is “virtually unflagging.” *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976); see *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (similar).⁶ In short, this Court has made clear that courts may not demand that a litigant surmount hurdles to standing that aren’t present in the text Congress enacted.

To be sure, courts have sometimes described federal jurisdiction as having both “constitutional” and “prudential” limits. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation omitted). The prudential gloss on standing—“more than an intuition but less than a rigorous and explicit theory”—was based on a set of judicial policy concerns. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11-12 (2004) (citation omitted). In rare cases, the Court sometimes elected “to stay its hand” where a party lacked “prudential standing” even if that party had constitutional standing and a cause of action. *Id.* at 17-18.

But this Court interred that approach in *Lexmark*, reaffirming the centrality of Congress’s role in determining who can invoke the judicial power of federal courts. 572 U.S. at 128. Applying “traditional principles of statutory interpretation,” courts must ask not whether, in the court’s “judgment[,] Congress *should* have authorized” the participation of a party in federal court, “but whether Congress in fact did so.” *Ibid.* “Just as a court cannot apply its independent policy

⁶ The narrow doctrines of federal-court abstention in matters of “state-federal relations” aren’t at issue here, where a party in interest seeks merely to appear and be heard in an already pending federal bankruptcy proceeding. See, e.g., *Colorado River Water District*, 424 U.S. at 818.

judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.” *Ibid.* (citation omitted).

Indeed, the term “prudential standing” is “misleading, for the requirement at issue is in reality tied to a particular statute. The question is whether the statute grants the plaintiff the cause of action that he asserts.” *City of Miami*, 581 U.S. at 196-97. *Lexmark* clarified that limitations on standing based on what courts may once have called “prudence” must be based on the statute—the “zone-of-interests” test, for instance, is properly understood as a question of the statute’s reach, not the court’s assessment of how broadly a statute *should* be construed. 572 U.S. at 129 (citing *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). The court’s role is to use “traditional tools of statutory interpretation” to determine whether Congress has authorized a party to seek redress from a federal court. *City of Miami*, 581 U.S. at 197 (citation omitted).

2. The insurance-neutrality doctrine is a judge-made rule with no foundation in Article III or the Code that cannot survive under *Lexmark*.

Although cloaked in the terminology of Article III standing, the doctrine is an impostor. It doesn’t embody any Article III principle, and in practice it excludes parties even when they satisfy Article III, and even when events in the bankruptcy have a direct financial impact on them. In *Hall*, for example, the Seventh Circuit concluded that an excess insurer wasn’t a party in interest and couldn’t object to a settlement between the debtor and its primary insurer

even though the excess insurer faced “an imminent threat to its financial assets” that was “traceable to the settlement and could have been eliminated by the bankruptcy court’s enjoining the settlement.” 750 F.3d at 660-61.

Nor is insurance neutrality rooted in the Code. Courts have recognized that “the concept of [i]nsurance [n]eutrality is not found in the Bankruptcy Code.” *In re Diocese of Camden*, 653 B.R. 309, 356 (Bankr. D.N.J. 2023). Indeed, some courts have candidly admitted that the point of the judicially crafted concept is “to prevent insurance companies from objecting to confirmation.” *In re Boy Scouts of America and Delaware BSA, LLC*, 642 B.R. 504, 667 (Bankr. D. Del. 2022). But it isn’t for courts to override plain statutory text with judicial concerns about speed and efficiency. Instead, courts must attend to the text of the particular statute, using “traditional tools of statutory interpretation.” *City of Miami*, 581 U.S. at 197 (citation omitted). Once the scope of Congress’s choice is clear, courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

That’s enough to reject the judge-made insurance-neutrality doctrine applied below. Article III poses no impediment. And the plain text of the statutory provision at issue authorizes broad participation of parties that certainly include an insurer and creditor with near-exclusive financial responsibility for claims against the debtor. This Court has made clear that courts aren’t free to impose prudential restrictions where Congress has conferred the right to be heard.

The insurance-neutrality doctrine represents just the kind of judicial “policy choice” that is the preserve of Congress, not the courts. *United States v. Noland*, 517 U.S. 535, 543 (1996). Here, the court below applied a judge-made standing limitation to preclude Truck’s objections to the plan from being heard. Pet. App. 24a. The court acknowledged that this was the *sole* basis for its decision. *Ibid.* In the Fourth Circuit’s view, it didn’t matter whether Truck’s interests could be affected by the bankruptcy proceedings. Pet. App. 23a-24a. All that mattered was the wooden before-and-after assessment of Truck’s insurance policies under the insurance-neutrality doctrine. Pet. App. 16a, 23a-24a.

B. Section 1109(b)’s right to be heard promotes rigorous and considered bankruptcy outcomes.

Applying the broad right to be heard that Congress enacted in Section 1109(b) vindicates the participatory structure of Chapter 11 and promotes conformity to the demands of the Code. The experience of other courts that have long applied a plain-text reading of Section 1109(b)—including the Third Circuit, which is home to many major bankruptcies—demonstrates that the scheme Congress designed hardly sacrifices workability. See *Congoleum*, 414 B.R. at 57 (collecting seven “successive and different” courts holding “insurers have standing to challenge the Plan”).

1. As many courts have recognized, Chapter 11 invites participation by any party that “holds a financial stake in the outcome of the proceeding such that the participant has an appropriate incentive to partic-

ipate in an adversarial form to protect his or her interests.” *Thorpe*, 677 F.3d at 887 (quoting 7 Collier, *supra*, ¶ 1109.04). Through Section 1109(b), Congress has, in effect, allowed any party within the bounds of Article III standing to be heard. To shut interested parties, like insurers, *out* of the process “certainly does not comport with the notion of fair play that * * * underlies § 1109.” *In re Congoleum Corp.*, 2005 WL 712540, at *2 (Bankr. D.N.J. Mar. 24, 2005) (citing *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3d Cir. 1994)); *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Committee*, 321 B.R. 147, 158 (D.N.J. 2005) (collecting cases and observing “that parties with potential responsibility to pay claims against debtors regularly have standing to participate in bankruptcy cases”).

Moreover, shutting crucial stakeholders out of a bankruptcy proceeding undermines the value of the Chapter 11 process as a means of resolving all claims fairly. In the mass tort context, in particular, full participation is essential to resolve “the * * * holdup and collective action problems” that exist outside Chapter 11. Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. 973, 977, 1000 (2023). Indeed, “long-established principles of bankruptcy should lead judges to focus not on how these [restructuring] agreements affect what each party receives, but rather on how they can interfere with the flow of information needed to apply chapter 11’s substantive rules.” Douglas G. Baird, *Bankruptcy’s Quiet Revolution*, 91 Am. Bankr. L.J. 593, 593 (2017)

Giving effect to Section 1109(b) “preserves the vitality of the adversarial process by assuring” that parties with “an actual * * * stake in the outcome” can present these issues “in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

Indeed, where “the bulk of the funding for the plan [is] to be provided by the Insurers,” it strains text, context, and common sense not to conclude that those insurers “easily” have standing to object to the plan. *In re Congoleum Corp.*, 362 B.R. 167, 173-74 (Bankr. D.N.J. 2007). This is particularly so where the insurer wishes to object to “the unfairness of a plan which binds them contractually and which directly impacts their financial interests, unfairness which is traceable to conflicts of interest among Claimants’ counsel”—precisely Truck’s objection here. *Congoleum Corp.*, 414 B.R. at 57 (citation omitted) (holding that insurers “have standing to challenge the Plan due to their fundamental stake in the outcome of the bankruptcy proceedings”); *Global Industrial Technologies*, 645 F.3d at 211 (holding that Section 1109(b) and Article III are coextensive).

2. In contrast, the Fourth Circuit’s approach frustrates the proper functioning of the bankruptcy process. Bankruptcy courts have a statutory obligation to determine whether a proposed plan complies with the requirements of the Code. 11 U.S.C. § 1129; see also *American United Mutual Life Insurance Co. v. City of Avon Park*, 311 U.S. 138, 146 (1940) (court must undertake “scrutiny of the circumstances” to

“exercise the ‘informed, independent judgment’ which is an essential prerequisite for confirmation of a plan”) (citation omitted). By granting a broad right to be heard that encourages parties interested in the proceeding to raise arguments, Congress has promoted that aim while lessening the burden on courts to conduct their own independent inquiry. Silencing interested parties through prudential rules like the insurance-neutrality doctrine does just the opposite.

Permitting Truck to raise its objections to a plan that it will write the checks to fund accords with basic principles of bankruptcy, whose fundamental purpose is to “provid[e] a collective forum where parties can coordinate to resolve multiparty disputes.” Anthony J. Casey & Joshua C. Macey, *The Bankruptcy Tribunal*, 96 Am. Bankr. L.J. 749, 750 (2022). This is particularly so in asbestos bankruptcies because Section 524(g) requires a supermajority of claimants to vote in support of a plan. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

As a result, debtors often coordinate with asbestos claimants to design the plan before filing a petition. This can produce plans that disadvantage insurers and create an incentive for both the debtor and claimants to “use standing objections as a sword” to “neutraliz[e]” the “insurers’ objections” to a plan that saddles them with liability. Leonard P. Goldberger, *Last Man Standing: Insurers’ Participation in Plan Confirmation Process*, Am. Bankr. Inst. J., Nov. 2008, at 30, 31, 45; see also Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. Ann. Surv. Am. L. 271, 288 (2006) (cataloguing collusive use of “pre-pack” plans of asbestos

reorganizations to craft “settlements * * * to be borne primarily by insurers—who are not afforded any role in negotiation”).

That is all the more reason why the plain text of Section 1109(b) should control—and why the judge-made insurance-neutrality doctrine be discarded. Insurers responsible for these liabilities must have a seat at the table to ensure that courts are provided all of the facts and arguments necessary to make an informed decision whether the Code’s criteria have been satisfied. Courts have an affirmative obligation under Section 1129 and Section 524(g) to make confirmation findings—they can’t simply turn a blind eye and rubber stamp a result. But the insurance-neutrality doctrine “freezes * * * out of the process” parties other than the debtor’s insiders and allies. Baird, *supra*, at 616.

The misinterpretation of Section 1109(b) applied below and elsewhere can result in there being *no* party with an incentive to raise these important arguments. In the *Maremont* and *Sepco* asbestos bankruptcies, for example, it fell to the United States Trustee to object to trusts that failed to include fraud-prevention measures. See Obj. of U.S. Tr. to Disclosure Statement and Joint Prepackaged Plan of Reorganization at 1-2, 10-18, *In re Maremont Corp.*, No. 19-10118 (Bankr. D. Del. Feb. 14, 2019), ECF No. 112; Obj. of U.S. Tr. at 10, 14-20, *In re Sepco Corp.*, No. 16-50058 (Bankr. N.D. Ohio Aug. 7, 2019), ECF No. 620. But here, the bankruptcy court is in one of six districts that have no United States Trustee.

Even in districts with a Trustee, the insurance-neutrality doctrine undermines the Trustee's important role. The Trustee's authority to participate in bankruptcy cases is governed by a provision whose text mirrors Section 1109(b). 11 U.S.C. § 307 (“[T]rustee may raise * * * any issue”). If a party in interest can raise only arguments that redress an injury to that party, it would imperil the Trustee's role as a “bankruptcy watch-do[g] to prevent fraud, dishonesty, and overreaching in the bankruptcy arena.” H.R. Rep. No. 95-595, at 88 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6049.

So if the only party with a financial incentive to guard against fraudulent claims is shut out, there will be no one to raise these objections. This case proves the point. No appellate review of the plan's compliance with the Code has ever been undertaken because the only litigant with any incentive to object to the plan's failure to comply with the Code—Truck—was shut out of the process.

Far from harming efficiency, permitting Truck to raise and be heard on its objections to the plan would have *helped* the bankruptcy court discharge its own duty to ensure compliance with the Code and prevent fraudulent claims against Kaiser in the bankruptcy.⁷ The Code permits a court to confirm a bankruptcy plan “only if” the plan “complies with the applicable provisions” of the Code and was “proposed in good

⁷ Nor does the insurance-neutrality doctrine advance efficiency interests. In the decision below, for example, the doctrine caused a lengthy dispute—unrelated to the plan's compliance with the Code—over the extent to which California insurance law permitted or prohibited Kaiser's conduct in the bankruptcy. See Pet. App. 17a-22a.

faith.” 11 U.S.C. § 1129(a). And the bankruptcy court has an obligation to disallow claims that are “unenforceable *** under *** applicable law.” *Id.* § 502(b)(1). Disallowance “will be ordered where” claims “are fictitious or a sham.” *Pepper v. Litton*, 308 U.S. 295, 310 (1939). It makes no difference that the insured claims will be adjudicated in state courts—resolving claims through a trust or state court litigation “does not mean that th[e bankruptcy court] does not have jurisdiction over these claims, nor that it can allow facially invalid or fraudulent claims to be paid out.” *Diocese of Camden*, 653 B.R. at 360-61.

Section 1109(b) expands, rather than contracts, the right to be heard. The insurance-neutrality doctrine applied below and in other courts defies the plain text and “frustrate[s] the purpose of § 1109(b)” in defiance of the “tradition” that Chapter 11 reorganizations demand “greater participation” by all potentially affected parties. *Global Industrial Technologies*, 645 F.3d at 211 (citation omitted).

* * * * *

The insurance-neutrality doctrine is contrary to the text of Section 1109(b), defies this Court’s precedents regarding prudential standing rules, and undermines the collaborative design of Chapter 11. This Court should reject it and apply the plain text of Section 1109(b), recognizing that the provision is coextensive with Article III.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 22-1079

IN THE
Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,

Petitioner,

v.

KAISER GYPSUM COMPANY, INC., ET AL.,

Respondents.

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

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QUESTION PRESENTED

In the Chapter 11 bankruptcy below, the debtors proposed a reorganization plan that the bankruptcy court, district court, and Fourth Circuit agreed would neither increase the obligations nor impair the rights of the debtors' insurer. The insurer nevertheless sought to object that the plan did not *increase* its rights, demanding a provision that would mandate special disclosure requirements for asbestos claimants in post-bankruptcy tort litigation. The courts below each determined that the insurer lacked a right to object under 11 U.S.C. § 1109(b): Because the plan left the insurer no worse off, it was not a "party in interest" authorized to object to the plan.

This Court granted certiorari to resolve:

"Whether an insurer with financial responsibility for a bankruptcy claim is a 'party in interest' that may object to a Chapter 11 plan of reorganization." Pet. i.

RULE 29.6 STATEMENT

Kaiser Gypsum Company, Inc., Hanson Permanente Cement, Inc., and Lehigh Hanson, Inc. (now known as Heidelberg Materials US, Inc.), are all indirect, wholly owned subsidiaries of publicly traded Heidelberg Materials AG, a German company.

Heidelberg Materials AG owns HeidelbergCement International Holding GmbH, which owns Heidelberg Materials Holding S.à.r.l., which owns Heidelberg Materials UK Holding Limited, which owns Lehigh UK Limited, which owns Hanson Limited, which owns HeidelbergCement UK Holding II Limited, which owns Lehigh B.V., which owns Heidelberg Materials US, Inc. (f/k/a Lehigh Hanson, Inc.), which owns Hanson Devon Designated Activity Company (Hanson Devon). Hanson Devon owns Essex NA Holdings LLC, which as the general partner, holds a 1% partnership share, of HNA Investments. Hanson Devon is also a limited partner, and owns the remaining 99% partnership share, of HNA Investments. HNA Investments owns HBMA Holdings LLC, which owns KH 1 Inc., which owns Hanson Permanente Cement, Inc., which owns Kaiser Gypsum Company, Inc.

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INTRODUCTION

When Congress enacted 11 U.S.C. § 1109(b), under which a “party in interest” may object to a Chapter 11 reorganization plan, it did not break new ground. From the enactment of the first federal bankruptcy act in 1898 until now, Congress has tied various rights in a bankruptcy to “party in interest” status. And both historically and today, that term has been understood to cover a limited universe of entities—those whose rights or obligations are directly affected by the bankruptcy, like debtors and creditors.

Truck Insurance Exchange seeks to upend this consensus. Urging this Court to break with over a century of bankruptcy law, Truck redefines “party in interest” to mean anyone “with Article III standing.” Pet. Br. 28. In doing so, Truck does not mention, let alone rebut, the presumption against extending a statutory right to be heard to the fringes of Article III. It barely engages with the traditional understanding of “party in interest” in bankruptcy, relegating the use of the term in Chapter 11’s immediate predecessor to a one-sentence footnote. Pet. Br. 30 n.2. Instead, Truck insists its revisionist reading is necessary to “effect Congress’s policy” of “broad participation.” Pet. Br. 20. But crafting bankruptcy policy is a job for Congress, and Truck’s purpose-based approach in any event fails on its own terms. As this Court has explained, the focus of Chapter 11 is aiding debtors and their creditors, not the cornucopia of characters that may fear a collateral injury from a reorganization plan. Indeed, given that Article III requires only but-for causation, the roster of possible Chapter 11 hecklers under Truck’s theory is virtually endless.

Ultimately, Truck seeks to collapse Section 1109(b) into Article III because only that framework would give it a shot at qualifying as a “party in interest.” Having long ago written insurance policies with no aggregate cap on coverage, Truck now finds itself required to indemnify Kaiser Gypsum Company and Hanson Permanente Cement (the Debtors) against every covered asbestos claim. So when the Debtors sought Chapter 11 relief, Truck saw a chance to get a better deal. Invoking Section 1109(b), it objected to the Debtors’ reorganization plan—not on the ground that it made Truck any worse off, but because it did not create *new* procedures Truck thought might limit its exposure in future tort suits. All three courts below saw through this ploy, agreeing that Truck could not attack a reorganization plan that left its position *unchanged*. Truck therefore invokes Article III cases to contend that it has lost “a chance to obtain” a “benefit.” Pet. Br. 35. But by such logic, Section 1109(b) would also allow any Truck *employee* to intervene, based on a fear of losing his job because the plan lacks measures to mitigate Truck’s large financial exposure. That cannot be the law.

Joining the fray, the United States instead insists that not even Article III standing is necessary to object; rather, all that is required is some ongoing contract with the debtor. But while entities have long been treated as “parties in interest” if a plan *rejected* (breached) their executory contracts (making them *creditors*), the mere *existence* of such a contract—something held by every one of a debtor’s employees, among many others—has never been a ticket into a reorganization. This Court should reject these novel theories and affirm.

STATEMENT OF THE CASE

A. Legal Background

1. Chapter 11 of the Bankruptcy Code (11 U.S.C.) “strikes a balance between a debtor’s interest in reorganizing and restructuring its debts and the creditors’ interest in maximizing the value of the bankruptcy estate.” *Fla. Dep’t of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). To that end, it provides a vehicle for the debtor and its creditors “to negotiate a plan that will govern the distribution of valuable assets from the debtor’s estate” while usually keeping the debtor’s business operating. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 455 (2017).

The Chapter 11 process begins with the filing of a petition, which “creates a bankruptcy estate” that consists “of all the debtor’s assets and rights” and provides “the pot out of which creditors’ claims are paid.” *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019). The debtor then negotiates with its creditors as well as its equity-security holders toward the goal of “confirmation of a reorganization plan.” *Piccadilly Cafeterias*, 554 U.S. at 37 n.2. The plan specifies how the creditors and equity-security holders will be treated and, if confirmed, discharges the debtor from its pre-confirmation debts. 11 U.S.C. §§ 1123-29, 1141(d)(1).

To be confirmed, a plan must satisfy the Code’s demands, which generally contemplate acceptance by “every affected class of creditors.” *U.S. Bank Nat’l Ass’n ex rel. CWC Capital Asset Mgmt. v. Vill. at Lakeridge*, 583 U.S. 387, 389 (2018); see 11 U.S.C. § 1129. By contrast, a debtor need not secure the buy-in of unimpaired creditors—such as those with claims

satisfied under the plan—as they are “conclusively presumed to have accepted.” 11 U.S.C. § 1126(f); *see* 7 Collier on Bankruptcy ¶ 1124.03 (16th ed. 2024) (Collier) (creditor not “impaired” if plan “provides that the debtor will fulfill the prepetition obligation”).

2. Section 524(g) authorizes a special Chapter 11 plan allowing a debtor “to establish a trust” to which it “may channel future asbestos-related liability.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 n.34 (1999). Specifically, a debtor can “obtain a channeling injunction that diverts all asbestos claims, current and future, to a trust established by the debtor’s reorganization plan and funded by the debtor.” Pet.App.4a; *see* 11 U.S.C. § 524(g)(1)-(2).

This relief addresses “two related problems” flowing from “the long latency period of asbestos disease.” *In re W.R. Grace & Co.*, 13 F.4th 279, 283 & n.1 (3d Cir. 2021). *First*, it allows “the debtor, who would otherwise face an unknown but potentially large number of future claims, to emerge from bankruptcy as an economically viable entity.” Pet.App.4a. *Second*, it protects claimants, who would be “ill-served” if companies facing asbestos liability were “forced into liquidation” and thus could not “satisfy claims.” H.R. Rep. No. 103-835, at 41 (1994). That is especially true for “future claimants,” who “may not know of their claims until years after the bankruptcy.” Pet.App.4a.

To safeguard the interests of all “claimants,” as well as “asbestos companies” seeking a “fresh start,” the Code sets “high standards” for Section 524(g) relief. H.R. Rep. No. 103-835, at 40-41. These include 75% supermajority approval by current claimants, court appointment of a representative for future

claimants, and plan approval from the district court (not just the bankruptcy court). 11 U.S.C. § 524(g)(2), (4). For a variety of reasons, these demands often lead to “years of contentious negotiations and litigation” before a plan is confirmed. *In re W.R. Grace & Co.*, 729 F.3d 311, 315 (3d Cir. 2013) (10 years); *see, e.g., Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 518 B.R. 307, 312-14 (W.D. Pa. 2014) (13 years).

3. Although the focus of a Chapter 11 case is aiding debtors and their creditors, the Bankruptcy Rules provide that a “court may permit any interested entity to intervene” if “cause” is shown. Fed. R. Bankr. P. 2018(a). The court may restrict intervention to a “specified matter.” *Id.*

In addition to this permissive-intervention provision, the Bankruptcy Rules and Code contain various mandatory-intervention provisions. One permits the U.S. Trustee to “raise,” “appear,” and “be heard on any issue in any case or proceeding under” the Code. 11 U.S.C. § 307. Others address the intervention of entities ranging from labor unions, Fed. R. Bankr. P. 2018(d); to state commissions, 11 U.S.C. § 1164; to the SEC, *id.* § 1109(a).

Most relevant here, Section 1109(b) provides that a “party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.” Along with granting automatic entry into a case, with no need for a motion and no opportunity for judicial discretion, “party in interest” status confers a wide range of “important” powers. Collier ¶ 1109.02[3][a].

Among other things, a party in interest may object to a plan's confirmation (or seek to undo a plan), propose its own plan, pursue the removal of a debtor-in-possession and request the appointment (or removal) of a trustee, and move to convert the reorganization into a liquidation or dismiss it. 11 U.S.C. §§ 1104-05, 1112, 1121(c), 1128(b), 1144, 1185.

B. Procedural History

1. By 2016, the Debtors were facing an onslaught of asbestos-related lawsuits. They had been named in over 38,000 since 1978, with 14,000 pending and untold future ones waiting in the wings. Pet.App.5a. On top of these suits (and the punitive-damage awards they threatened), the Debtors were staring down liabilities from a host of environmental claims as well. Pet.App.43a-45a. They accordingly filed for Chapter 11 relief that year. Pet.App.5a.

After four years of negotiations with creditors, government actors, insurers, and the court-appointed fiduciaries for current and future asbestos claimants, the Debtors filed a proposed Plan of Reorganization. Pet.App.5a. It would settle all non-asbestos-related liabilities, such as the environmental claims (for about \$70 million). Pet.App.8a. It also would fully satisfy all claims of general unsecured creditors, such as the unpaid deductibles owed to the Debtors' insurers. *Id.* The only impaired creditors remaining would be the asbestos claimants. *Id.* For them, the Plan would create a \$50 million Section 524(g) trust funded by the Debtors and their parent, along with a channeling injunction to protect the Debtors from future claims, including efforts to obtain punitive damages. Pet.App.5a-6a.

In addition, the Debtors would assign to the trust their rights under insurance policies issued by petitioner Truck, their primary insurer from the 1960s to 1983. Pet.App.6a, 42a-43a. These policies, as confirmed by nearly 20 years of litigation, require Truck to defend and indemnify the Debtors in all asbestos-related personal-injury cases arising from this period, even “groundless, false, or fraudulent” ones, and even if the Debtors become bankrupt or insolvent. Pet.App.6a, 17a, 42a-43a; J.A.539, 547. And although the policies generally cap coverage at \$500,000 per claim, after deductible, and exclude punitive damages, they lack *aggregate* limits. Pet.App.6a. Accordingly, Truck had obligated itself to defend and indemnify the Debtors against *every* covered asbestos claim, giving them the unusual asset of “effectively unlimited insurance.” Pet.App.63a; J.A.384.

Under the Plan, the trust would pay the deductibles for insured claims on which there was liability. Pet.App.6a-7a. Claimants, however, would continue to sue in the tort system to first determine liability and recover insurance proceeds. Pet.App.7a, 234a. Insured claims “would still be subject to all” of Truck’s “pre-petition coverage defense rights,” and the Debtors would remain bound to their duties under the policies, which included a standard “assistance and cooperation” clause. Pet.App.16a-18a, 95a, 230a-231a. For any claim on which there was liability, Truck, per its policies, would not have to pay any portion over \$500,000 (which excess-insurance policies covered and a claimant could pursue with the trust). *See* Pet.App.6a n.2; J.A.431. In short, the Plan would keep “Truck in its pre-petition position.” Pet.App.24a.

The Plan further provided that any holders of uninsured claims could pursue relief directly from the trust through an administrative process without involving the tort system. Pet.App.7a; *see* J.A.333. As part of that process, each claimant would submit to the trust certain disclosures and authorizations, which, for a defined set of “extraordinary” claims, could include information about their claims against other asbestos trusts. Pet.App.7a; *see* J.A.427-31 (describing disclosure requirements). Although the Plan had not initially included these requirements, the Debtors added them after the bankruptcy court agreed with the United States that such measures might be necessary for confirmation. *See* Pet.App.7a n.3; Bankr. Ct. Dkts. 1299, 1364. Once they were added, the government did not object to confirmation or otherwise further participate.

2. The Plan won approval from 100% of the asbestos claimants (the only creditors who could vote) and had “the unanimous support” of all other entities involved in the bankruptcy (including excess insurers), “save one.” Pet.App.8a. The lone holdout was Truck, which had proposed its own plan. *Id.*; *see* J.A.1-103. Truck’s plan, which no one else supported, included provisions such as a channeling injunction for Truck alone and new annual caps on its payments. J.A.30-31, 48-53. The bankruptcy court rejected this as “patently unconfirmable,” “not proposed in good faith,” and inconsistent with “the 524(g) standards.” J.A.119.

While pressing its alternative, Truck sent the Debtors a letter asserting that the Plan appeared to be “in violation of the Debtors’ duty to cooperate and assist.” Pet.App.9a (cleaned up). Truck took issue with

the Plan's lack of a requirement for "holders of *insured* claims ... to provide the same disclosures and authorizations" in the tort system demanded of certain "holders of *uninsured* claims" in the administrative process. Pet.App.8a. Insisting this difference was a "collusive" invitation for "fraudulent" claims, Truck threatened to refuse coverage for every asbestos lawsuit going forward. J.A.549-51.

Because Truck's threat would subvert the Plan's confirmation by sabotaging a key asset of the trust, the Debtors amended the Plan to include a finding that their conduct in bankruptcy did not violate their Truck policies. Pet.App.9a. Upon plan confirmation, this "Plan Finding" would be preclusive, so Truck could not relitigate the issue in each post-bankruptcy lawsuit. *See* Pet.App.22a n.9.

3. At the confirmation hearing, Truck made three primary objections: (1) the Plan Finding would impermissibly alter Truck's policy rights; (2) the Plan was not filed in good faith as 11 U.S.C. § 1129(a)(3) commands, including for the reasons alleged in Truck's letter; and (3) the trust did not satisfy Section 524(g)'s requirements. Pet.App.9a-10a. Unpersuaded, the bankruptcy court recommended that the district court confirm the Plan. Pet.App.10a-11a.

The bankruptcy court ruled Truck could not raise these objections because it was not a "party in interest" under Section 1109(b). J.A.387. Although Truck had been "a creditor" due to unpaid deductibles, the Plan ensured it would "be paid a hundred cents on the dollar" on that claim. J.A.375. Instead, Truck's objections stemmed from its role "as an insurer." *Id.* And from that perspective, Truck "gains no

advantages under this plan, but it also loses nothing,” as the Plan “returns” it to the tort system with “all of its rights and defenses intact.” J.A.388. Truck’s contrary view was “based on a false premise” that the policies gave it control over the Debtors’ conduct in their own bankruptcy. J.A.376-77. In truth, Truck was here “because decades ago [it] improvidently wrote an unlimited insurance policy” and, “having paid out huge sums of money based on that decision,” would like “to improve that deal and use this case to limit its financial exposure.” J.A.387-88.

In the alternative, the court held Truck’s objections to the Plan failed on the merits. J.A.382-86. For example, Truck’s charge of bad faith was a mixture of “conjecture,” “assumption,” and “speculat[ion] as to future events” in state tort proceedings. J.A.385.

4. On *de novo* review, the district court adopted the bankruptcy court’s findings and conclusions and confirmed the Plan. Pet.App.11a. It agreed Truck was not a “party in interest,” because the Plan “neither increases Truck’s obligations nor impairs its prepetition contractual rights.” Pet.App.95a. Rather, it “simply restores Truck to its position immediately” before the petition, “as if the Debtors’ bankruptcy had never occurred.” *Id.* The court likewise rejected Truck’s objections on the merits “in their entirety.” Pet.App.96a. And it denied Truck’s request to stay the confirmation order pending appeal. Pet.App.11a.

5. The Fourth Circuit also denied a stay. *Id.* While the appeal was pending, the Plan was substantially consummated, with the Debtors fully paying Truck’s claim for deductibles. C.A. Dkt. 58-2, at 4.

The Fourth Circuit then affirmed, agreeing Truck was not a “party in interest.” Pet.App.26a. Drawing on Section 1109(b)’s list, the court determined that “party in interest” encompasses those with “a legally protected interest that could be affected by a bankruptcy proceeding.” Pet.App.15a. Under that framework, “a debtor’s insurer” could qualify if the plan “sufficiently affects” its “rights.” Pet.App.16a. And to do that, the plan had to “increase the insurer’s pre-petition obligations or impair [its] pre-petition policy rights.” *Id.* Otherwise, the plan would be “insurance neutral,” and the insurer would be unable “to challenge” it. *Id.*

Applying this framework, the court agreed the Plan did not affect Truck’s legal rights as an insurer but merely left it “in the same position as it was pre-bankruptcy.” *Id.* The court first rejected Truck’s argument that the Plan Finding altered its purported “contractual rights” to have the Debtors agree to a plan with its desired disclosure measures. Pet.App.17a. As the court explained, those rights “never existed” under the policies “in the first place.” *Id.* Rather, under state contract law, the assistance-and-cooperation clause only required the Debtors’ assistance in individual tort suits. Pet.App.17a-22a.

The Fourth Circuit likewise rejected Truck’s theory that the Plan’s lack of its desired measures governing litigation of claims harmed its rights as an insurer by facilitating “fraudulent claims ... in the tort system.” Pet.App.23a. Again, Truck “was not entitled to those measures before the bankruptcy proceeding.” *Id.* The Plan therefore did not alter the “pre-bankruptcy” status quo but “merely retain[ed] Truck’s decades-old pre-petition coverage obligations (and defenses).” *Id.*

In other words, the gravamen of Truck’s objection was not that the Plan *harmed* it, but that the Plan did not *help* it. That the Plan did not seek to newly “limit Truck’s potential liability exposure in the tort system,” however, “provide[d] no basis” to make Truck a party in interest. *Id.* Otherwise, Truck would be able to use the bankruptcy to try to “expand the Debtors’ obligations under the policies.” *Id.*

Finally, the Fourth Circuit refused to allow Truck to fall back on its status as a creditor “prior to confirmation of the Plan.” Pet.App.24a. Given that Truck’s “only claim” (for unpaid deductibles) had been “fully satisfied,” it lacked “Article III standing to press its objections” to the Plan “as a creditor” on appeal. Pet.App.25a. Truck thus could not combine its alleged “interests as an *insurer*” (as to whether the Plan altered its policy rights, which it had “Article III standing to raise ... on appeal”) with its prior “status *as a creditor*.” Pet.App.17a n.7, 25a.

SUMMARY OF ARGUMENT

I. In bankruptcy law, the term “party in interest” has traditionally covered those whose rights or obligations are directly affected by a proceeding. That was true under the first federal bankruptcy act; it was true under the first general corporate-reorganization statute; and it was true under Chapter 11’s immediate predecessor. It was also how this Court understood the term elsewhere in the U.S. Code. When Congress enacted Section 1109(b) against this background in 1978, its use of “party in interest” presumably carried forward this settled meaning.

Statutory context confirms this understanding. Limiting “party in interest” to those whose rights or obligations are directly affected by a reorganization both tracks Section 1109(b)’s examples and avoids rendering various provisions of the Code superfluous.

II. Truck nevertheless insists anyone with Article III standing is a “party in interest.” But this Court presumes that Congress does not extend a statutory right to be heard to the outer bounds of Article III, and nothing suggests Section 1109(b) is the rare exception. Truck does not rebut that presumption through its generalist dictionaries, cases undercutting its position, tendentious readings of statutory history, and appeals to policy.

The government, by contrast, does not key “party in interest” to Article III, which it claims poses no barrier to objecting to a plan. Rather, the government contends that any party to an executory contract with the debtor qualifies. But while there is a party in interest—a *creditor*—if the plan *rejects* such a contract, the sheer *presence* of an agreement does

nothing to trigger Section 1109(b). After all, virtually any corporate debtor will enter bankruptcy with a vast assortment of ongoing contracts, with everyone from its attorneys down to its internet service provider. If any one of those entities is a “party in interest,” the term might as well mean anyone with Article III standing.

III. Truck is not a “party in interest,” because the Plan leaves it in the same spot it was before the Debtors’ bankruptcy. The Plan neither impairs its rights nor increases its obligations; it just fails to *improve* Truck’s position from the *status quo ante*. But that is no basis for butting into another’s bankruptcy, any more than the possibility that a law someday may benefit an individual means he can intervene to defend it.

Nor can Truck meddle in this Chapter 11 case just because it was creditor of the Debtors *before* they paid its claim for deductibles under the Plan. Truck’s status as a *former* creditor gives it no basis under Section 1109(b) or Article III to seek reversal of the judgment below. And in any event, other provisions of the Code would preclude Truck from objecting to the Plan regardless of its party-in-interest status.

ARGUMENT**I. SECTION 1109(B) GRANTS A RIGHT TO OBJECT TO A PLAN ONLY TO THOSE WHOSE RIGHTS OR OBLIGATIONS ARE DIRECTLY AFFECTED BY THE PLAN.**

Truck accepts (Pet. Br. 19, 42) that, to object to the Plan's confirmation, it must show that "Congress has authorized" it to be heard. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). In particular, it seeks to invoke the rights of a "party in interest" under 11 U.S.C. § 1109(b). Only those "with a direct stake" in a reorganization, however, qualify for this role. Collier ¶ 1109.02[3][b].

A. Section 1109(b) retains the traditional understanding of "party in interest."

Although the Code never defines "party in interest," the term's lineage stretches back to at least the "first Federal Bankruptcy Act," from 1898. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 123 (2016). Over the next 80 years, courts and commentators understood this term to mean an entity whose rights or obligations were directly affected by a case, a view that tracked this Court's reading in another context. When Congress enacted Section 1109(b) in 1978, "the term presumably carried forward the same meaning," for "if a word is obviously transplanted from another legal source ... it brings the old soil with it." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018).

1. The term "party in interest" has a considerable pedigree in bankruptcy law. The 1898 Act, for example, directed that "parties in interest" could object to the "allowance" of "claims." Pub. L. No. 55-541, § 57(d), 30 Stat. 544, 560 (1898). Under this

provision, which was read to refer “to those who have an interest in the res,” it was “not enough” that one’s “rights may be incidentally affected by the proceeding.” *In re Sully*, 152 F. 619, 620 (2d Cir. 1907). Instead, party-in-interest status was reserved for those with “a direct interest in the administration of the bankrupt’s estate.” *Bankruptcy—Parties in Interest*, 20 HARV. L. REV. 570, 570-71 (1907). Thus, “alleged debtors of the bankrupt” could not object, even if the bankruptcy might harm “their defense” in a later suit by the trustee. *Sully*, 152 F. at 620.

That understanding extended to the Nation’s first general corporate-reorganization statute: Section 77B, added to the Bankruptcy Act in 1934. Pub. L. No. 73-296, 48 Stat. 911. Section 77B(f), for example, authorized “any party in interest” to propose “changes and modifications” to a plan. 48 Stat. at 919. That term “plainly refer[red] to creditors, stockholders, or other persons having claims against, or interests in, the company or its property.” *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 827 (S.D.N.Y. 1935), *rev’d on other grounds*, 85 F.2d 596 (2d Cir. 1936). A risk that a plan could “imperil” one’s interests, by contrast, did not make one “a proper party to the reorganization.” *Com. Cable Staffs’ Ass’n v. Lehman*, 107 F.2d 917, 919, 921 (2d Cir. 1939) (L. Hand, J.). Thus, a creditor “of a debtor’s subsidiary” was “not a party in interest.” 6 Collier on Bankruptcy ¶ 9.25, at 1709 n.2 (14th ed. 1977) (1977 Collier) (citing *Commercial Cable*).

2. This understanding of the term “party in interest” continued in Section 77B’s successor—Chapter X of the Chandler Act, enacted in 1938 and in force for 40 years. Pub. L. No. 75-696, ch. X, 52 Stat. 840, 883-905 (1938); *see* U.S. Br. 26. In particular,

Section 207 allowed a court “for cause shown” to “permit a party in interest to intervene generally or with respect to any specified matter.” 52 Stat. at 894.

Yet “virtually all parties in interest” were already listed in the immediately preceding section, 206. Jacob I. Weinstein, *The BANKRUPTCY LAW OF 1938*, at 229 (1938); see *In re South State St. Bldg. Corp.*, 140 F.2d 363, 366-67 (7th Cir. 1943) (Minton, J.) (similar); *Brown v. Gerdes*, 321 U.S. 178, 185 n.7 (1944) (citing Weinstein). Under Section 206, “[t]he debtor, the indenture trustees, and any creditor or stockholder of the debtor” had “the right to be heard on all matters in a proceeding under this chapter.” Ch. X, § 206, 52 Stat. at 893-94. The “parties in interest” listed in Section 206 thus encompassed parties to “executory contracts of the debtor” that were “reject[ed]”—because “rejection” was a post-petition breach, leaving the “injured” counterparty a “creditor.” *Id.* §§ 116(1), 202, 52 Stat. at 885, 893-94; see 1977 Collier ¶ 9.24, at 1705 n.5. They further included a creditor or stockholder acting through a committee or other representatives, including an indenture trustee. See Ch. X, §§ 106(8), 209, 52 Stat. at 883, 895.

In short, “actual parties in interest” beyond the debtor consisted almost entirely of the “creditors and stockholders” listed in Section 206. Weinstein, *supra*, at 192. And because Section 206’s “right to be heard” was “substantially indistinguishable” from a “right to intervene,” those it covered had no reason to seek to intervene under Section 207. 1977 Collier ¶ 9.23, at 1695 n.24; see *In re Flour Mills of Am., Inc.*, 27 F. Supp. 559, 561 (W.D. Mo. 1939) (vacating § 207 intervention orders for creditor committees, because § 206 covered them).