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, arbitrative 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 horribles. 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]

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[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

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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.

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[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 Sackers 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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