No. 23A___

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

PURDUE PHARMA L.P., ET AL.

APPLICATION FOR A STAY OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Applicant (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 State of Washington, State of Maryland, District of Columbia, 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, 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)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicant William K. Harrington, United States Trustee for Region 2, respectfully applies for a stay of the mandate of the United States Court of Appeals for the Second Circuit associated with its May 30, 2023 judgment (App., infra, 3a-99a), pending the consideration and disposition of the government's forthcoming petition for a writ of certiorari and any further proceedings in this Court.

This case concerns the reorganization in bankruptcy of Purdue Pharma L.P. and its affiliates, stemming from their role in fueling the opioid epidemic that has plagued and continues to plague this country. In approving Purdue's Chapter 11 reorganization plan, the decision below validated a sweeping nonconsensual release of nondebtors' claims against nondebtor third parties. By holding that the bankruptcy court had authority to approve that release, the court of appeals pinned itself firmly on one side of a widely acknowledged circuit split about an important and recurring question of bankruptcy law that "would benefit from nationwide resolution by [this] Court." App., infra, 87a-88a (Wesley, J., concurring). A stay is necessary for two reasons: (1) to prevent piecemeal implementation of Purdue's massive reorganization plan, which involves billions of dollars and affects a vast number of claimants; and (2) to avoid potential disputes about the equitable-mootness doctrine that could complicate this Court's resolution of the important question whether the Bankruptcy Code authorizes non-consensual third-party releases.

Until recently, Purdue was controlled by members of the Raymond and Mortimer Sackler families. Members of those families, who withdrew approximately $11 billion from Purdue in the eleven years before the company filed for bankruptcy, App., infra, 19a, have now agreed to contribute up to $6 billion to fund Purdue's reorganization plan, id. at 40a, but only on the condition that the Sacklers and a host of other individuals and entities -- who have not themselves sought bankruptcy protection -- receive a release from liability that is of exceptional and unprecedented breadth. The plan's release "absolutely, unconditionally, irrevocably, fully, finally, forever[,] and permanently release[s]" the Sacklers from every conceivable type of opioid-related civil claim

-- even claims based on fraud and other forms of willful misconduct that could not be discharged if the Sacklers filed for bankruptcy in their individual capacities. Id. at 25a (quoting C.A. SPA 920). The Sackler release extinguishes the claims of all opioid claimants except the United States, and therefore applies to an untold number of claimants who did not specifically consent to the release's terms.

The Sackler release is not authorized by the Bankruptcy Code, constitutes an abuse of the bankruptcy system, and raises serious constitutional questions by extinguishing without consent the property rights of nondebtors against individuals or entities not themselves debtors in bankruptcy. The Bankruptcy Code grants courts unusual powers specifically authorized by the Constitution for addressing true financial distress. Allowing the court of appeals' decision to stand would leave in place a roadmap for wealthy corporations and individuals to misuse the bankruptcy system to avoid mass tort liability. That is not what Congress enacted the Bankruptcy Code to accomplish. And if such abuses are permitted, the gamesmanship that is sure to follow will only amplify the harms to victims by redistributing bargaining power to tortfeasors. Given the substantial legal problems and serious threat to the public interest posed by nonconsensual third-party releases, the Solicitor General has determined to seek review of the court of appeals' decision in this Court and will file a certiorari petition by August 28, 2023 -- nearly two months before the petition's due date and, if no extensions are granted for the filing of responses to the petition, in time for the Court to consider the petition at its October 27 conference.

This case is a clear-cut candidate for this Court's review. The courts of appeals are sharply and intractably divided on the question whether nonconsensual third-party releases are lawful. Likewise, the practical and legal importance of the question both in this case and for the bankruptcy system cannot seriously be disputed. Indeed, Judge Wesley's concurrence below specifically recognized that the question presented here "would benefit from nationwide resolution by the Supreme Court." App., infra, 87a-88a. The result reached by the court of appeals is also incorrect. No provision of the Code authorizes the sweeping power of releasing nonconsenting third parties' claims against nondebtors, and this Court has repeatedly rejected the premise at the heart of the court of appeals' reasoning: that courts sitting in bankruptcy may take virtually any action not expressly forbidden by the Bankruptcy Code. In addition, that interpretation of the Code would raise serious constitutional questions by extinguishing private property rights without providing an opportunity for the rights holders to opt in or out of the release.

Although the bankruptcy court confirmed the reorganization plan on September 17, 2021, no steps have been taken to implement that plan since the district court vacated the confirmation order on December 16, 2021. The court of appeals issued its decision reversing the district court's judgment on May 30, 2023, thirteen months after hearing oral argument. But, on July 25, 2023, the court of appeals denied the government's motion to stay the issuance of its mandate pending this Court's disposition of the government's forthcoming petition for a writ of certiorari. In light of that ruling, the mandate will issue on August 1, 2023, which necessitates stay relief from this Court. See Fed. R. App. P. 41(b).

Maintaining the status quo is necessary to prevent piecemeal implementation of a massive reorganization plan that will impose obligations involving billions of dollars, lasting for more than a decade, and directly affecting a vast number of claimants, including all fifty States and the District of Columbia. The plan's proponents have continually represented that the nonconsensual third-party Sackler release is a key component of the plan, and there should be certainty about its legal viability before the plan is permitted to take effect. A stay would, at a minimum, avoid potentially wasteful implementation steps that would siphon resources from the estate in the event that this Court ultimately upholds the district court's order vacating the plan.

A stay of the court of appeals' mandate would also preserve this Court's ability to review the government's forthcoming petition for a writ of certiorari without needing to address any threshold questions about the validity and applicability of the equitable-mootness doctrine, a bankruptcy-specific practice applied by some lower courts, under which a court may dismiss an appeal from an unstayed order confirming a reorganization plan because the plan has already been substantially consummated. If the court of appeals' mandate in this case is not stayed, the plan proponents may act swiftly to consummate the plan before this Court can issue a merits decision and thereby (in their view) render equitably moot the government's appeal of the Sackler release. Indeed, although the proponents have taken varying positions about what actions might constitute substantial consummation of the plan, there is no dispute that, absent a stay, the plan is likely to be substantially consummated before this Court would have an opportunity to issue a merits decision in this case. The government would dispute the applicability of the equitable-mootness doctrine, which this Court has not endorsed. But a stay would ensure that this Court's review would be unencumbered by any need to consider equitable mootness. And if the Court were ultimately to deem the doctrine applicable here, a stay would prevent the validity of the Sackler release from evading this Court's review.

Because substantial consummation cannot occur in a matter of days, the Court need not resolve this stay application by the August 1 issuance of the court of appeals' mandate. But recalling and staying the mandate relatively soon after that date would ensure that no substantial steps occur and would further serve the public interest by providing legal certainty before piecemeal and potentially wasteful implementation steps proceed. See, e.g., Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 5 (2018) (recalling and staying court of appeals' mandate pending the timely filing and disposition of a petition for a writ of certiorari).

In light of the benefits of prompt resolution of this case, the Court may wish to construe this application as a petition for a writ of certiorari presenting the question 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. Cf. Nken v. Mukasey, 555 U.S. 1042 (2008). Granting review of that question while also granting a stay would facilitate expedited review that would either confirm the legal viability of the Sackler release or restore third parties' property rights and pave the way for the negotiation and confirmation of a lawful plan without a nonconsensual release. Otherwise, the Solicitor General will file a petition for a writ of certiorari -- which is due on October 23, 2023 -- on or before August 28, 2023.

STATEMENT

A. Background

Purdue Pharma L.P. manufactured, sold, and distributed OxyContin and other medications that contributed to the opioid epidemic. See App., infra, 17a. Until recently, Purdue was controlled by members of the Raymond and Mortimer Sackler families. Id. at 16a-17a. Under the Sacklers' leadership, Purdue aggressively marketed OxyContin to doctors and pain patients while downplaying the risks of addiction. Id. at 17a. But many patients who had been prescribed OxyContin became addicted to the drug. C.A. SPA 16. Many other people began using OxyContin recreationally. Ibid. Nearly 247,000 people in the United States died from prescription-opioid overdoses between 1999 and 2019. C.A. SPA 18.

The opioid crisis spawned a flood of litigation against both Purdue and the Sacklers. To protect themselves from potential money judgments, the Sacklers withdrew approximately $11 billion from Purdue and transferred a significant portion of their wealth overseas. App., infra, 19a, 28a. Purdue then filed for bankruptcy relief. The Sacklers did not. Instead, the Sacklers negotiated a separate settlement with Purdue and a subset of plaintiffs, which Purdue implemented in its proposed plan of reorganization. Under the plan, Purdue would reinvent itself as a public-benefit company dedicated to abating the opioid crisis. The estate's remaining funds would be used to pay administrative expenses before being distributed to various creditor trusts, with the bulk of the distributions to be used for abatement. Under that distribution scheme, an opioid victim -- even one who suffered catastrophic injuries -- is likely to receive between $3,500 and $48,000, with payments to some victims to be spread out over ten years. See C.A. J.A. 1695, 1697, 1800, 1805, 1812; see also C.A. SPA 640 ("[I]t may take years before you receive all of your Award.").

The bankruptcy estate does not hold sufficient assets to fund the plan, in part because the Sacklers "drained Purdue's total assets by 75%" and reduced Purdue's "'solvency cushion' by 82%." App., infra, 19a (citation omitted). The Sacklers -- who were worth approximately $11 billion as of June 2021, C.A. J.A. 1852 -- initially agreed to fund the plan by contributing $4.325 billion through payments spread over nearly a decade. App., infra, 24a. In exchange, the plan would extinguish virtually all opioid-related claims against the Sacklers and against hundreds if not thousands of associated nondebtors without the consent of all affected claimants. Although the plan attracted overwhelming support from those creditors who voted, several States and more than 2,600 personal-injury claimants who voted opposed confirmation. See C.A. J.A. 6258, 6260. And hundreds of thousands of claimants failed to vote at all; 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.

B. Proceedings Below

1. The bankruptcy court confirmed the plan over the objections of, among others, the United States Trustee, eight States, and the District of Columbia. See 633 B.R. 53, 53-115; see also 11 U.S.C. 307 (authorizing the United States Trustee to "raise" and "appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code). On appeal, the district court vacated

the confirmation order, concluding that the Bankruptcy Code does not authorize courts to extinguish direct claims held by nondebtors against nondebtors. See 635 B.R. 26, 26-118. Debtors and several plan proponents appealed.

While the appeals were pending before the court of appeals, the objecting States and the District of Columbia reached an additional deal with debtors and the Sacklers. App., infra, 40a-41a. Under that deal, the Sacklers again increased their proposed contribution, agreeing to pay a further "$1.175 billion in guaranteed payments" and "up to $500 million in contingent payments." C.A. J.A. 1542, 1565-1570. The States and the District of Columbia agreed "not [to] oppose" the pending appeals, C.A. J.A. 1543, but reserved their right to file "amicus briefs only at the merits stage in the Supreme Court should the Supreme Court grant certiorari," C.A. J.A. 1551. The State of Connecticut (which was one of the objecting States) has already indicated that it "will firmly stand behind" the district court if certiorari is granted because "[n]on-consensual third-party releases are wrong, and * * * the law should not[] and does not permit them." Office of the Attorney General, Conn., Attorney General Tong Statement on Appeals Court Decision Enabling Purdue Settlement to Proceed (May 30, 2023), https://perma.cc/52MQ-BM3D.

2. a. On May 30, 2023, a divided panel of the court of appeals reversed the district court's order. At the threshold, the majority held that the bankruptcy court had subject-matter

jurisdiction over third-party direct claims against nondebtors. App., infra, 49a. It further held that the claims encompassed by the 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, must enter final judgment. App., infra, 41a-42a. On the merits, the majority held that two provisions of the Bankruptcy Code, read together, authorize courts sitting in bankruptcy to approve nonconsensual third-party releases. Id. at 52a-58a. 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 provision 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 any independent authority on bankruptcy courts; any invocation of Section 105(a) must instead be "tied to another Bankruptcy Code section." App., infra, 54a (citation omitted). But the majority interpreted Section 1123(b)(6) to permit courts sitting in bankruptcy to take any action not "expressly forbid[den]" by the Code. Id. at 55a. The majority concluded that, because the Code does not expressly prohibit the approval of nonconsensual third-party releases in bankruptcy, such releases are authorized by both Section 105(a) and Section 1123(b)(6). That conclusion, the majority explained, was consistent with prior decisions of the court of appeals approving such releases in other contexts. Id. at 58a-64a.

As to the government's constitutional arguments, the majority acknowledged that the extinguished claims were a species of property interest. App., infra, 78a. But the majority held that affected claimants had been afforded constitutionally sufficient notice. Id. at 79a-80a. The majority also held that the bankruptcy court did not violate due process by terminating nondebtors' opioid claims against other nondebtors without consent. Id. at 80a-81a.

The majority then adopted a seven-factor balancing test to govern the approval of such releases. These factors are: (1) whether there is an identity of interests between debtors and released parties; (2) whether the released claims are factually and legally intertwined with claims against the debtor; (3) whether the breadth of release is necessary to the plan; (4) whether the releases are essential to the reorganization; (5) whether the released nondebtors contributed substantial assets to the reorganization; (6) whether the impacted claimants expressed overwhelming support for the plan; and (7) whether the plan provides for the fair payment of enjoined claims. App., infra, 66a-69a. Concluding that the Sackler release satisfies this test, the majority affirmed "the bankruptcy court's approval of the Plan" and remanded the case to district court for further proceedings. Id. at 85a.

b. Concurring in the judgment, Judge Wesley "reluctantly" agreed with the majority's conclusion that a bankruptcy court has authority to approve nonconsensual third-party releases in light of "binding" Second Circuit precedent. App., infra, 86a. But he expressed considerable skepticism of the court's reasoning in its earlier cases, which he viewed as being "without any basis in the Code." Id. at 87a. He urged this Court to resolve the question, which, he observed, "has divided the courts of appeals for decades." Ibid.

3. The government filed a motion to stay the court of appeals' mandate, explaining that the Solicitor General had decided to seek certiorari. On July 24, 2023, the court of appeals denied a petition for rehearing filed by a creditor. On July 25, the court denied the government's motion for a stay of the mandate. App., infra, 1a-2a. Without a stay from this Court or the Circuit Justice, the court of appeals' mandate will issue on August 1.

ARGUMENT

An applicant for a stay pending certiorari must establish (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," and (3) that the applicant "would likely suffer irreparable harm absent the stay" and "the equities" otherwise support relief. Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). Those requirements are satisfied here.

I. THIS COURT IS LIKELY TO GRANT THE GOVERNMENT'S PETITION FOR CERTIORARI

A. The court of appeals in this case upheld a sweeping nonconsensual third-party release protecting the Sacklers, who significantly contributed to the Nation's opioid crisis, in one of the highest-profile bankruptcies in recent years. As both the panel majority and Judge Wesley's concurrence acknowledged, the decision below squarely conflicts with the decisions of several other courts of appeals. See App., infra, 57a (recognizing that the Fifth, Ninth, and Tenth Circuits have interpreted the Code as "bar[ring] * * * third-party releases"); id. at 98a ("[T]he majority's [decision] pins this Circuit firmly on one side of a weighty issue that, for too long, has split the courts of appeals.").

The decision below directly conflicts with decisions by three other courts of appeals that have held that the Bankruptcy Code does not authorize courts to approve nonconsensual third-party releases. See In re Pacific Lumber Co., 584 F.3d 229, 252 (5th Cir. 2009) (holding that the Code "only releases the debtor" and citing prior cases that "seem broadly to foreclose non-consensual non-debtor releases"); In re Lowenschuss, 67 F.3d 1394, 1401-1402 (9th Cir. 1995) (holding that "the bankruptcy court lacked the power to approve the provision which released claims against non-debtors" without consent, and "reject[ing] the argument * * * that the general equitable powers bestowed upon the bankruptcy court by

11 U.S.C. § 105(a) permit the bankruptcy court to discharge the liabilities of non-debtors"); In re Western Real Estate Fund, Inc., 922 F.2d 592, 600 (10th Cir. 1990) (per curiam) (rejecting a non-consensual release because "[o]bviously, it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections; Congress did not intend to extend such benefits to third-party bystanders"), modified sub nom. Abel v. West, 932 F.2d 898 (10th Cir. 1991). Had Purdue sought bankruptcy protection in one of those circuits, the Sackler release would not have been approved.

On the other side of the ledger, six circuits, including the court of appeals in this case, have held that nonconsensual third-party releases are permissible in at least some circumstances. See App., infra, 52a-70a (2d Cir.); In re Millennium Lab Holdings II, LLC, 945 F.3d 126, 139 (3d Cir. 2019); In re A.H. Robins Co., 880 F.2d 694, 701-702 (4th Cir. 1989); In re Dow Corning Corp., 280 F.3d 648, 656-660 (6th Cir. 2002); In re Airadigm Commc'ns, Inc., 519 F.3d 640, 655-657 (7th Cir. 2008); In re Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1075-1079 (11th Cir. 2015).

That conflict is as entrenched as it is deep, and therefore requires this Court's review. The decision below recognized the conflict in the circuits yet expressly rejected the reasoning of the Fifth, Ninth, and Tenth Circuits. App., infra, 56a-58a. On the other side of the split, the Fifth Circuit has observed that its "firm[] * * * opposition to such releases" "is not universally shared by our sister circuits." In re Vitro S.A.B. de CV, 701 F.3d 1031, 1061, 1062 (2012). Other circuits have acknowledged the split before choosing to follow one side or the other. See, e.g., Seaside Eng'g & Surveying, 780 F.3d at 1077 ("Other circuits are split as to whether a bankruptcy court has the authority to issue a non-debtor release."); Dow Corning, 280 F.3d at 657 ("[S]ome courts have found that the Bankruptcy Code does not permit enjoining a non-consenting creditor's claims against a non-debtor."). As Judge Wesley recognized in his concurrence, "a nondebtor's ability to be released through bankruptcy turns on where a debtor files," and that intractable and practically significant circuit conflict would "benefit from nationwide resolution by the Supreme Court." App., infra, 87a-88a, 98a.

B. Certiorari is also warranted because this case concerns an important and recurring issue of nationwide significance. The question whether nonconsensual third-party releases are lawful arises with some regularity. See, e.g., In re Boy Scouts of America & Delaware BSA, 650 B.R. 87, 135-143, 185 (D. Del. 2023) (approving release of sexual abuse claims against third parties in case with more than 80,000 claimants); In re Aegean Marine Petroleum Network Inc., 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) (observing that "[a]lmost every proposed Chapter 11 Plan that [the court] receive[s] includes proposed releases"); Patterson v. Mahwah Bergen Retail Grp., 636 B.R. 641, 654 (E.D. Va. 2022) (noting that a bankruptcy court in that district "regularly approves third-party releases"). But the question of the validity of nonconsensual third-party releases is rarely presented cleanly for this Court's review either because of factual complications or because of complications like equitable mootness, which can allow the validity of a confirmed plan to evade effective appellate review. Suitable vehicles presenting the question will become even more rare if the decision below is permitted to stand: In light of the flexible venue rules applicable to bankruptcy cases, most large debtors who seek to confirm a plan with such a release will be able to file their petitions within the Second Circuit. See 28 U.S.C. 1408. Particularly given the Second Circuit's expansive application of equitable mootness, the clear circuit precedent authorizing such releases would make it difficult to obtain appellate review. See In re BGI, Inc., 772 F.3d 102, 108 (2d Cir. 2014).

Moreover, the question has great practical significance in this case. The underlying bankruptcy stems from Purdue's role in fueling the opioid epidemic that has plagued and continues to plague this country. The plan of reorganization confirmed by the bankruptcy court purports to resolve hundreds of thousands of claimants' claims against Purdue, including those held by individual victims of the opioid crisis and by governmental entities. Those claims are worth an estimated $40 trillion. App., infra, 22a. By its terms, however, the plan does not compensate claimants for the value of their separate claims against the Sacklers or against other released nondebtors. At the confirmation hearing, debtors did not analyze those claims and disclaimed any need to value them, stating that they did not "feel that it was possible to adequately or accurately estimate" the claims' value. C.A. J.A. 1199; see C.A. J.A. 806, 1197-1199. Yet the Sackler release extinguishes all those separate claims in their entirety, including those belonging to the tens of thousands of personal-injury claimants who did not consent to the release's terms. In light of the deep and acknowledged circuit conflict and vast legal and practical significance of this question, there is a strong likelihood -- far more than the required "reasonable probability" -- that this Court will grant review. Merrill, 142 S. Ct. at 880 (Kavanaugh, J., concurring).

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

A. There is also more than a "fair prospect that the Court would reverse" if it granted review. Merrill, 142 S. Ct. at 880 (Kavanaugh, J., concurring). The traditional tools of statutory interpretation confirm that the Sackler release cannot be reconciled with the Bankruptcy Code. Congress enacted the Bankruptcy Code under the Bankruptcy Clause of the U.S. Constitution, which vests Congress with power to "adjust[] * * * a failing debtor's obligations." Railway Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982) (citation omitted). 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). To balance those relations, the Code establishes a basic quid pro quo. A debtor seeking bankruptcy relief must shoulder a host of obligations -- such as the 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), the debtor must then apply all its assets (with certain narrow exemptions, see 11 U.S.C. 522) to the satisfaction of its creditors' claims. In exchange, the debtor receives 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).

In light of that basic structure, the Bankruptcy Code authorizes discharging the debtor from personal liability for any debts. 11 U.S.C. 524(a). But, with a narrow exception for bankruptcies arising from the manufacture or sale of asbestos, 11 U.S.C. 524(g), the Code provides no express authority to release nondebtors from personal liability. Illustrating the Code's focus on the debtor, Section 524(e) 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). 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.

The structure of the Code underscores that point. The Code contains hundreds of provisions addressing the relationship between a debtor and its creditors. By contrast, just one Code provision, Section 524(g), authorizes the discharge of claims against nondebtors. That specific and carefully circumscribed authorization applies solely to bankruptcies arising from the manufacture and sale of asbestos, authorizes the release only of a subset of asbestos-related claims against nondebtors who are in one of four specified types of legal relationships with the debtor, and does so only if the release satisfies stringent requirements. 11 U.S.C. 524(g). Section 524(g) expressly states that such releases are permitted "[n]otwithstanding the provisions of section 524(e)." 11 U.S.C. 524(g)(4)(A)(ii). The overwhelming number of Code provisions relating to the discharge of a debtor's liabilities, combined with the absence of any applicable Code provision relating to the discharge of a nondebtor's liabilities outside the asbestos context, confirms that Congress intended to authorize nondebtor releases in asbestos bankruptcies alone.

The Sackler release conflicts with the Code in other ways as well. When Purdue filed for bankruptcy, the Sacklers and other released individuals were defendants in hundreds of civil actions alleging causes of action such as fraud. None of those individual defendants would have been able to discharge such claims had they filed for bankruptcy themselves. See 11 U.S.C. 523(a)(2), (4), (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 omitted)).

The Sacklers also would not have been able to shield billions of dollars from their creditors because, absent individual creditor consent, 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. Yet the Sacklers obtained a discharge of virtually all opioid-related 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).

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). But, while the plan allows claimants with personal-injury or wrongful-death claims against Purdue to pursue their claims before a jury, C.A. SPA 633, 657-662, the release extinguishes claimants' personal-injury and wrongful-death claims against the Sacklers and other nondebtors without preserving their jury right, see C.A. SPA 922-924.

B. The court of appeals grounded its decision approving the release in two generic Code provisions, 11 U.S.C. 105(a) and 1123(b)(6). App., infra, 52a-55a. Those provisions embody the "traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." United States v. Energy Res. Co., 495 U.S. 545, 549 (1990) (emphasis added). The court interpreted those provisions to mean that the equitable power of a court sitting in bankruptcy "is limited only by what the Code expressly forbids, not what the Code explicitly allows." App., infra, 55a. That interpretation would permit the approval of bankruptcy plans containing all manner of other provisions that are not expressly forbidden by the Code -- granting habeas relief to corporate officers in prison, for example, or granting easements to the real property of the debtor's neighbors -- so long as the court found such actions to be "appropriate" in ensuring the successful reorganization of the debtor. See 11 U.S.C. 1123(b)(6).

The court of appeals erred in deriving such a vast power -- one that, in many respects, dwarfs the powers specifically given courts under the Code -- from general provisions preserving bankruptcy courts' residual equitable authority. This Court has recently emphasized that "were [Congress] to intend a major departure" from a fundamental principle of bankruptcy, "more than simple statutory silence" is required. Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 465 (2017). There is no principle more fundamental than that bankruptcy provides for restructuring "the relations between a[] * * * debtor[] and his creditors," Wright, 304 U.S. at 513-514 (citation omitted), rather than forcibly restructuring the relations between third parties and nondebtors. And by approving a release that goes far beyond what would be permitted if the Sacklers themselves underwent bankruptcy, the court of appeals impermissibly read the Code's general authorization to approve "appropriate provision[s]" to swallow its "more limited, specific authorization[s]." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645-646, 649 (2012).

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 v. Siegel, 571 U.S. 415, 423-424 (2014); RadLAX, 566 U.S. at 645. And the error of the court of appeals' approach is well illustrated by the court's decision to craft a seven-factor test, entirely unmoored from the Code's text, to determine which nonconsensual third-party releases are permissible. See App., infra, 66a-69a. Where Congress specifically authorized the discharge of claims against nondebtors, it provided specific limits on that power. The court of appeals' judicial freewheeling to place ostensible limits on the "extraordinar[y]" power, id. at 87a (Wesley, J. concurring), that it inferred from the Code's residual provisions is no substitute for Congress's reticulated judgments.

C. Even if the Code's residual-authority provisions were susceptible to the court of appeals' interpretation (and they are not), they do not provide a sufficiently clear authorization for nonconsensual third-party releases in light of the serious constitutional questions that interpretation raises. "[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." U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849-1850 (2020). The bankruptcy court's approval of the Sackler release extinguishing nondebtors' rights against other nondebtors unquestionably effectuates such an alteration. But neither Section 105(a) nor Section 1123(b)(6) contains the "exceedingly clear language" required to sustain that result. Ibid.

More generally, 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 contrary construction is "fairly possible." United States v. Security Indus. Bank, 459 U.S. 70, 78, 82 (1982) (citations omitted). Yet the Sackler release permanently extinguishes virtually all opioid-related claims against the Sacklers and other nondebtors without the consent of every affected claimant and without an opportunity for an objecting claimant to opt in or opt out of the release. 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, 812-813 (1985). For that reason, there is "substantial doubt" whether the Sackler release comports with due process. Security Indus. Bank, 459 U.S. at 78 (citations omitted). Because neither Section 105(a) nor Section 1123(b)(6) "must necessarily be applied in that manner," the court of appeals' construction must be rejected. Ibid.

III. THE EQUITIES FAVOR A STAY

Once the court of appeals' mandate issues, the district court will be required to enter final judgment consistent with the court of appeals' analysis.* At that point, debtors will be free to

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* The court of appeals correctly held that the Sackler release encompassed non-core claims that an Article III court must approve under Stern v. Marshall, 564 U.S. 462 (2011), and the court then proceeded to "decide all pertinent issues necessary to confirm the [p]lan." App., infra, 44a. Although the court indicated that it was affirming the bankruptcy court's approval of the plan, id. at 85a, the resolution required under Stern was a remand to the

take steps to substantially consummate the plan. The plan proponents have made clear that, once the plan is substantially consummated, they will seek dismissal of any challenge to the plan confirmation order under the judge-made doctrine of equitable mootness. See C.A. J.A. 2000 ("[A]bsent a stay pending appeal, * * * the Plan may be substantially consummated during the pendency of the appeal. Upon substantial consummation of the Plan, any appeal of the Confirmation Order may become equitably moot."); see also, e.g., No. 21-7532 D. Ct. Dkt. No. 66, at 7 n.3 (declining to "waive the right to argue * * * equitabl[e] moot[ness]"). This Court has never endorsed the equitable-mootness doctrine, but it has often been invoked by lower courts to dismiss appeals from confirmation orders, even when aspects of the underlying reorganization plans are, or may be, found to be unlawful. An exception may be made when "the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order." BGI, 772 F.3d at 108 (citation omitted).

The government would dispute the applicability of equitable mootness in this case. But any assertion of equitable mootness would require this Court to address questions about the validity and applicability of that doctrine alongside the important merits question presented here. Although the reorganization plan's proponents have taken varying positions as to what actions might

district court with instructions to enter final judgment approving the plan. See 564 U.S. at 502-503.

constitute substantial consummation of the plan, it is undisputed that, absent a stay of the court of appeals' mandate, the plan is likely to be substantially consummated before this Court would have an opportunity to issue a merits decision in this case. See, e.g., Purdue C.A. Opp'n to Stay Mot. 4, 11 (July 17, 2023) (contending that the earliest the plan is likely to be substantially consummated is December of this year, while appearing to recognize that a stay may be necessary to prevent substantial consummation if this Court grants review); Official Committee of Unsecured Creditors C.A. Opp'n to Stay Mot. 19-20 (suggesting that substantial consummation could occur seven days after Purdue's sentencing, i.e., potentially by late November). A stay is necessary to remove any question of the doctrine's potential application and to ensure this Court's ability to review the exceptionally important question at issue here.

The government and the public interest would be harmed if the panel's decision were to evade this Court's review. As this case reveals, nonconsensual third-party releases enable wealthy and powerful tortfeasors to obtain legal immunity from tort victims -- and to do so for a far broader array of claims than could be discharged by declaring bankruptcy themselves, without ever having to subject themselves to scrutiny under the procedures set forth by the Bankruptcy Code. Such releases permit tortfeasors to choose what portion of their non-exempt assets to give up in exchange for full repose (including for claims based on fraud), defying the basic quid pro quo at the heart of the Code. Those 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 -- not to resolve mass-tort liability against nondebtors by terminating claims belonging to other nondebtors who wish to proceed outside of bankruptcy.

Indeed, the Second Circuit's endorsement of the legality of the Sackler release threatens to make subsequent releases even less favorable to tort victims by further redistributing bargaining power to tortfeasors. To insulate themselves from the risk of an adverse decision in the Second Circuit, the Sacklers agreed to pay up to an additional $1.675 billion to obtain the consent of the objecting States and the District of Columbia. App., infra, 40a-41a. If nonconsensual releases are unavailable, tortfeasors will have to continue to provide substantial compensation for claimants in exchange for their consent. By contrast, if the claims of some claimants could be extinguished by a vote of other claimants, the amounts paid by nondebtor tortfeasors in future bankruptcies will likely be lower -- with a commensurate reduction in benefits to future estates.

The decision below further threatens the public interest because it permits courts to extinguish private property rights over a claimant's objection. 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 has relied on similar reasoning to confirm -- over the United States' objection -- a plan of reorganization 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). The plan proponents in that case have already invoked the court of appeals' decision in the appeal to the district court. See Debtors' Citation of Supplemental Authority, In re Voyager Digital Holdings, Inc., No. 23-cv-2171 (S.D.N.Y. June 8, 2023).

The government is sensitive to the fact that continuing to litigate this important and recurring question could delay the implementation of the reorganization plan, with its concomitant benefits to States, municipalities, and individual opioid victims. But that delay is of the Sacklers' own making. Faced with numerous opportunities to allow opioid claimants to decide whether to be bound by the third-party release, the Sacklers instead insisted on pursuing a nonconsensual release that violates the Bankruptcy Code. Although that proposal obtained the support of the Official Committee of Unsecured Creditors and other plan proponents, it was the Sacklers who chose to condition their contributions on a nonconsensual release. See, e.g., C.A. J.A. 665 (declaration by David Sackler that the Sacklers were "only willing to support and fund this Shareholder Settlement as part of a resolution in which we receive the broad releases contemplated by the proposed Plan”).

It is also important to put the cost of delay in context. The current plan provides for payments to be made over many years. See, e.g., C.A. SPA 640. And while some of the funding would come from Purdue, the plan allows the Sacklers to stagger their initial $4.325 billion contribution over ten years, with only $300 million (less than 7% of that total) required to be paid upon the effective date of the plan. See C.A. J.A. 3490 (establishing schedule for required minimum payments by the Sacklers). The additional contribution that the Sacklers negotiated with the eight objecting States and the District of Columbia will not commence until June 2031 and will be spread over time through June 2039. C.A. J.A. 1570. And those timelines will already have to be renegotiated due to the time that these appeals have been pending in the Second Circuit -- meaning that Purdue and the Sacklers could compensate for any additional period of this Court’s review by agreeing to an accelerated payment schedule. See Bankr. Ct. Doc. 3711, at 4 (Aug. 31, 2021) (representing that the shareholder settlement agreement “may be amended, modified[,] or supplemented from time to time by the Debtors in accordance with the Plan”).

For those reasons -- and in light of the serious harm to the public interest, nonconsenting claimants in this case, and future mass tort victims of forgoing review -- the Court should not deny review simply because it will create limited additional delay.

And because this case so readily meets the criteria for certiorari, denying the stay would harm the public interest by creating uncertainty about the plan's current status, leading the plan proponents to incur costs in implementing a plan that this Court is likely to vacate, serving only to reduce the amount of estate resources available to pay creditors and other victims of the opioid crisis. In these circumstances, the equities strongly support a stay.

CONCLUSION

The Court should grant a stay of the court of appeals' mandate (and recall that mandate, if necessary), pending the consideration and disposition of the forthcoming petition for a writ of certiorari and any further proceedings in this Court. In addition to granting the stay, the Court may wish to construe this application as a petition for a writ of certiorari and grant certiorari.

Respectfully submitted.

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