No. 23A87

In the Supreme Court of the United States

WILLIAM K HARRINGTON, UNITED STATES TRUSTEE, REGION 2,

Applicant,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

ON 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

RESPONSE OF THE CANADIAN RESPONDENTS IN SUPPORT OF THE GOVERNMENT'S APPLICATION FOR A STAY OF THE MANDATE OF THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

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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, 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 25, 2023) (denying motion for stay of mandate)

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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Respondents 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 Peoples, the Peter Ballantyne Cree Nation, and the Lac La Ronge Indian Band (the "Canadian Respondents") respectfully file this response in support of the Government's application for a stay of the mandate of the United States Court of Appeals for the Second Circuit associated with its judgment issued on May 30, 2023.

This case concerns the reorganization in bankruptcy of the closely held pharmaceutical company Purdue Pharmaceuticals, and the misconduct of its owners, the

Sackler family, in fueling one of "largest public health crises in this nation's history"—the prescription opioid crisis. Stay Application, App. 12a. Managing the fallout from that crisis, which has decimated individuals and communities around the world, has made the Purdue case "perhaps the most socially important bankruptcy case in Chapter 11 history." Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 102, 103 (2022). And the challenge that both the Government and the Canadian Respondents plan to raise from the confirmation of the plan of reorganization in Purdue's bankruptcy concerns one of the "most controversial issues in Chapter 11 bankruptcy," *id.* at 128: the permissibility of "third-party releases"—an increasingly popular device in reorganization plans whereby non-debtors are forced to give up their claims against other non-debtors. Wealthy individuals and blue-chip companies have abused these nonconsensual third-party releases to absolve themselves of mass-tort liabilities without entering bankruptcy themselves. And the sweeping third-party release in Purdue's reorganization plan is among the most abusive ever employed, prohibiting anyone, anywhere, anytime, from filing an opioid-related claim against thousands of individuals and entities—including generations of Sackler family members born and unborn, along with officers, directors, trustees and others for Purdue and its related entities—for their roles in directing, assisting, and facilitating Purdue's misconduct. This release was foisted upon opioid claimants without compensation and without consent. Yet none of the released people and entities ever filed for bankruptcy themselves.

The question whether such third-party releases are permitted under the Bankruptcy Code and the Constitution is the subject of a square, entrenched split among the circuits that has existed for decades and was acknowledged by the court below. And Judge Wesley, who sat on the panel that decided this case, observed that the issue "would benefit from nationwide resolution by [this] Court." Stay Application, App. 87a-88a (Wesley, J., concurring). Judge Wesley is correct. And while the Court considers this essential question, a recall and stay of the court of appeals' mandate, which issued August 1, 2023, would be in the interest of all parties.

Absent such a stay, Purdue will very soon begin implementing its plan of reorganization (Stay Application 27)—although effective and substantial implementation will take more than a decade. The Court will not be able to resolve this case before that implementation begins. Allowing Purdue to begin that plan implementation would unnecessarily complicate the Court's resolution of the case by opening the door for distracting arguments about "equitable mootness." And if the Court reverses the confirmation of that plan, unwinding Purdue's piecemeal implementation will create disruptive administrative headaches that could affect the rights of thousands of claimants.

Accordingly, a stay of the mandate will best facilitate the Court's consideration of the important statutory and constitutional issue surrounding bankruptcy courts' use of non-consensual third-party releases. And to facilitate this Court's review—as well as to minimize any delays occasioned by a stay—the Canadian Respondents support the Government's invitation for the Court to consider its application to stay the mandate as a petition for writ of certiorari and grant plenary review while granting the stay.

Application 7. The Canadian Respondents would then file a brief on the merits as a respondent in support of the petitioner, pursuant to Rule 12(6) of the Rules of the Court. But if additional cert-stage briefing is required, the Canadian Respondents are willing to commit to raising their own challenge to the judgment below on the same schedule as the Government's challenge, so that the Court might take it up at the October 27 Conference.

STATEMENT

Purdue Pharmaceuticals, the closely held drug maker that developed OxyContin, is at the very center of the opioid crisis that has devastated this country and many others. Purdue aggressively promoted Oxycontin to both the medical community and the general public as a safe, effective, and non-addictive painkiller, which actually turned out to be highly addictive.

Purdue's lies produced incalculable devastation. Hundreds of thousands of people have died from OxyContin overdoses in the United States. Application. C.A. SPA-18. Hundreds of thousands more remain addicted. *Ibid.* And the fallout from the crisis has spread beyond the victims and their families. It has ravaged entire communities, leaving the U.S. government, states, provinces, municipalities and native tribes with stratospheric healthcare, first-responder, abatement, and societal costs—$53–72 billion per year in the U.S. alone. *Id.* & n.16 (citing DHHS, *Addressing Prescription Drug Abuse in the United States*, <https://bit.ly/3pL54Lf>). And this cycle of devastation continues.

At the center of Purdue, and Purdue's wrongdoing, is a single family, the Sacklers. Since acquiring Purdue, they have controlled its entire pharmaceutical empire, first as Purdue's officers and directors, and then through a complex web of related non-debtor

companies, advisory boards, and trusts operating in dozens of other countries. C.A. SPA-11–SPA-13. This includes MNP Consulting Limited ("MNP")—an entity wholly owned by Sackler family trusts and largely staffed with Sackler family members as directors. C.A. SPA-11. MNP "operated as an advisory board" for Purdue entities "worldwide." *Ibid.* Through MNP, the Sackler family was "heavily involved" in the aggressive marketing activity that drove OxyContin sales and opioid addiction worldwide. C.A. SPA-28.

Purdue itself did not engage in sales and distribution of OxyContin in Canada; those functions were undertaken by a separate set of Sackler-owned entities that are not in bankruptcy called Purdue Canada.[1] And the Sacklers effectively controlled Purdue Canada through entities like MNP. Accordingly, the Sacklers' aggressive and deceptive tactics that drove Purdue U.S. to increase drug sales, addictions, and deaths in the United States had similar effects in Canada.

The results of this campaign of deception have been devastating for Canadians, producing skyrocketing rates of addiction, overdose, and death. Since 2016, the number of Canadians dying from opioid overdose has tripled—now reaching 21 people per day. *Opioid- and Stimulant-related Harms in Canada* (Sept. 2022), https://bit.ly/3CVtYOL. That is higher than the death rate from car accidents, and enough for Prime Minister Trudeau to declare the opioid crisis a "national public emergency."[2]

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[1] C.A. SPA-35 (explaining that "Purdue Canada" consists of Bard Pharmaceuticals (1990) Inc., Elvium Life Sciences GP Inc., Elvium Life Sciences Limited Partnership, Elvium ULC, Purdue Frederick Inc. (Canada), Purdue Pharma Limited Partnership (Canada), Purdue Pharma Inc. (Canada), and Purdue Pharma ULC.").

[2] David Baxer, *It's been called a national crisis, so why isn't opioid abuse an election discussion*, Global News, Oct. 4, 2019, <https://bit.ly/3XAV1YW>.

The opioid crisis has also been particularly devastating for the native Canadian First Nations and Metis peoples. Indigenous Canadians are five times more likely than the average Canadian to be prescribed an opioid and three times more likely to die of an overdose. Jennifer Lavalley, *et al.*, *Reconciliation and Canada's overdose crisis: responding to the needs of Indigenous Peoples*, CANADIAN MED. ASS'N JOURNAL 190.50 (2018): E1466-E1467. This tragic death toll has also been accompanied by an irreplaceable cultural loss, as some members leave their tribal communities to get closer to drugs, and others are lost through disease, abuse of other drugs, or simple lethargy, depriving the community of active members to keep their culture, customs, traditions, knowledge, language, and aboriginal practices alive.

The Canadian Respondents are municipalities and First Nations in Canada who were harmed by opioids manufactured, marketed, and sold in Canada. In June 2019, they filed lawsuits against various opioid-related manufacturers, distributors, pharmacies and related parties, including Purdue Canada, for claims related to sales of drugs in Canada. They brought suit both individually and on behalf of an uncertified class of all Canadian municipalities and First Nations. *Ibid.*

The only Purdue-related entity the Canadian Creditors named in their original lawsuit was Purdue Canada. The Canadian Creditors planned to add tort claims against the Sacklers individually, but they were prohibited from doing so by imposition of the Preliminary Injunction that was entered at the commencement of Purdue's Chapter 11

proceeding, and a related stay entered in Canada.[3] And if the Purdue's plan of reorganization goes into effect, the Canadian Respondents will be irrevocably barred from bringing certain claims against the Sacklers by the broad third-party release provision in Purdue's reorganization plan. C.A. SPA-920 [Plan 10.7(b)]. As a result of the release, opioid-related claims belonging to "tens of thousands of personal-injury claimants who did not consent to the release's terms" (Stay Application 18) will disappear against the Sacklers, their assets and trusts, MNP, and the many other non-debtors released under the Plan.

But the Sacklers themselves will remain in high station. Even after their contribution of $6.0 billion to Purdue's bankruptcy—which they conditioned upon the inclusion of the third-party releases in Purdue's reorganization plan—they remain "among the richest families in the country." *Purdue Pharma is Dissolved and Sacklers Pay $4.5 Billion to Settle Opioid Claims*, N.Y. Times, Sept. 17, 2021.

Making matters worse, unlike other claimants, the Canadian Respondents receive virtually nothing under Purdue's reorganization plan. The $6.0 billion that the Sacklers have agreed to contribute to the bankruptcy is earmarked to fund a series of trusts for opioid claimants, including U.S. domestic government entities and domestic Native American tribes. C.A. SPA-842. But Canadian municipalities and tribes have no access to trust funds under the plan. They are placed instead in the general unsecured class,

[3] On September 19, 2019, the Ontario Superior Court of Justice instituted a civil proceeding recognizing the Purdue Chapter 11 proceeding (Court File No. CV-19-627656-00CL), and on Monday, December 30, 2019, the court entered an order staying actions against the Debtors "directors," "officers," and "employees," and several Sackler family members.

leaving them with nothing more than a pro-rata share of the $15 million allotted to that class in exchange for claims worth hundreds of millions of dollars. C.A. SPA-847 [Plan § 4.13]. Accordingly, despite being required to submit to the draconian release in Purdue's reorganization plan, the Canadian Respondents receive virtually nothing under the plan for their claims against Purdue, and no additional compensation for the loss of their direct claims against the Sacklers and other released parties.

The Canadian Respondents objected to the release provisions in Purdue's plan, along with the plan's treatment of their claims. And they have been parties to both the appeals to the district court and the Second Circuit.

Now the Canadian Respondents join the Government in asking for a recall and stay of the mandate, which issued on August 1, 2023, to facilitate their challenge to the plan's third-party release in this Court.

ARGUMENT

The Court should grant that request. 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). All these requirements are satisfied here.

A. This Court is likely to grant review of the decision below.

1. The Canadian Respondents agree with the Government that there is a reasonable likelihood the Court will grant certiorari review on the question of the validity

of the plan's third-party release. As the Government argues, and both the majority and the concurrence in the court below agreed, there is a deep, intractable circuit split that has existed for decades on the question of the validity of third-party releases.

On one side of the divide, the Fifth, Ninth, and Tenth Circuits hold that the Bankruptcy Code does not authorize bankruptcy courts to approve nonconsensual third-party releases as part of a Chapter 11 reorganization plan. *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 nondebtors" without consent); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam) (rejecting a nonconsensual 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).

On the other side of that divide, the Second Circuit joins five other circuits in holding that nonconsensual third-party releases may be permissible. 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). As Judge Wesley recognized in his concurrence, "a nondebtor's ability to be

released through bankruptcy turns on where a debtor files," which is why he counseled that the issue would "benefit from nationwide resolution by the Supreme Court." App., *infra*, 87a-88a, 98a. The entitlement to a third-party release should not turn on geography and should not be susceptible to forum-shopping.

2. The propriety of third-party releases is one of the "most controversial issues in Chapter 11 bankruptcy," Levitin, *supra*, at 128, with parties routinely requesting them and some bankruptcy courts routinely granting them. (*See* Stay Application 16-17) This case provides an excellent vehicle to resolve this issue. 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 legal impediments like equitable mootness, which can allow the validity of a confirmed plan to evade effective appellate review.

And this case presents a compelling set of facts to address the validity of third-party releases. The sheer size of the Sacklers' opioid-related liabilities, which have been raised in thousands of lawsuits seeking trillions in damages, along with the extensive breadth of the releases of those claims—which "absolutely, unconditionally, irrevocably, fully, finally, forever[,] and permanently release" the Sacklers from every conceivable type of opioid-related civil claim (Stay Application, App. 25a (quoting C.A. SPA 920))—make the propriety of those releases an issue of nationwide significance, and impose an imperative to establish whether the releases rest on firm legal foundations.

The case for close examination of the validity of the Sackler release is made even stronger by the sheer egregiousness of the Sacklers' conduct in obtaining it: When the Sacklers recognized that Purdue's liabilities for creating the opioid crisis would swamp

the company, and would extend to them personally, they stripped the company of assets that could be used to pay claims, sent the money overseas to hard-to-penetrate trusts, and then demanded that all opioid claimants be forced to release them from liability in exchange for giving a portion back to Purdue to fund a trust that would pay those injured by their wrongdoing a miniscule fraction of their claims' true value. *See* Stay Application 8-9. But the Sacklers never entered bankruptcy themselves and stand to retain the bulk of their multi-billion-dollar fortune. If such an abusive release remains standing, it will provide a template that will be followed in virtually every mass-tort bankruptcy in a myriad of equally abusive ways.

Furthermore, the Purdue Bankruptcy stands at the forefront of a nationwide slew of bankruptcy abuses requiring this Court's attention. Through dubious interpretations of the Code never contemplated by Congress, numerous financially healthy corporations and those that control them have invented elaborate loopholes enabling them to pick and choose among the debt-discharging benefits of bankruptcy without having to subject themselves to its creditor-protecting burdens—and without ever declaring bankruptcy themselves. And these well-heeled individuals and entities use these tactics to avoid liability for products that kill or harm thousands of people, to shield billions in assets from creditors, and to force victims to accept pennies on the dollar for their claims.

For instance, 3M, a multi-billion-dollar company, has sought to manipulate one of the most "fundamental debtor protections provided by the bankruptcy laws," the automatic stay, S. Rep. No. 95-989, at 54-55 (1978)), to avoid liability for over 200,000 claims that the Combat Arms Earplugs it provided to American servicemen and women

are dangerously defective and caused hearing loss. *See In re Combat Arms Earplug Products Liability Litig.*, MDL No. 2885 (N.D. Fla.). 3M induced Aearo, the corporate affiliate from which it purchased its earplug business, to enter bankruptcy, and then attempted to use its corporate relationship with Aearo to justify a stay of all earplug litigation against 3M—even though 3M would never enter bankruptcy itself. *See In re Aearo Techs. LLC*, Nos. 22-02890-JJG-11 *et al.*, 2023 WL 3938436 (S.D. Ind. June 9, 2023).

Equally abusive is the "Texas two-step," a maneuver that Johnson & Johnson, a $200 billion Delaware-based company, famously employed in hopes of shedding liability for cancer-causing asbestos in its talcum powder product designed for babies. It did so through a labyrinthine corporate reshuffling that involved reincorporating in Texas, dividing in two, and then shunting its talc-related liabilities into the newly formed company whose sole purpose was to reincorporate in another jurisdiction so that it might declare bankruptcy in a favorable jurisdiction. Thankfully, the Third Circuit rejected this attempted evasion, concluding that the bankruptcy of Johnson & Johnson's debt-laden affiliate must be dismissed because it was not filed in good faith. *See LTL Mgmt., LLC* v. *John & Jane Does 1-1000 (In re LTL Mgmt. LLC)*, 64 F.4th 84 (3d Cir. 2023). But the Third Circuit's decision was not the end of that saga. Johnson & Johnson is trying again. *See In re LTL Mgmt., LLC*, No. 23-12825 (MBK), 2023 WL 4851759 (Bankr. D.N.J. July 28, 2023). These abusive tactics, and the dubious readings of the Bankruptcy Code on which they depend, are proliferating, and if left unchecked, will only accelerate. It therefore falls to this Court to demand adherence to the text enacted by Congress and to confine bankruptcy courts' authority to its proper boundaries. The importance of this

issue, and the intractable conflict it has produced among the lower courts, makes clear that there is at least a "reasonable probability" that this Court will grant review. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring).

B. The challenges posed by the Government and the Canadian claimants are likely to succeed on the merits.

1. The challenges to the Sackler releases raised by the Government and the Canadian Respondents are also likely to succeed on the merits, because the court of appeals' interpretation of the Code rests on unsound statutory foundations. As the Government has already explained (Application at 18-26), there is no authority in the Code that allows for nonconsensual third-party releases—and many provisions of the Code are completely incompatible with them. The court of appeals' conclusion that such authority could be divined from provisions providing bankruptcy courts general equitable powers and general authority to take actions not forbidden by the Code conflicts with the fundamental principle that bankruptcy courts' broad equitable authority extends only to the modification of "creditor-debtor relationships"—not the modification of non-debtors' relationships with each other. *United States* v. *Energy Res. Co.*, 495 U.S. 545, 549 (1990). And for "[Congress] to intend a major departure" from such a fundamental bankruptcy principle, "more than simple statutory silence is required." *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

2. The constitutional problems surrounding third-party releases also undermine their validity. Third-party releases deprive non-debtors of their valuable property rights—their causes of action against other non-debtors. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property."). And

they do so without consent, without compensation, and without affording those affected by the releases any opportunity to opt in or out of the release. But even in the context of class actions, which are specifically designed to facilitate the mass resolution of claims of non-parties, "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). That alone makes the third-party release in this case constitutionally dubious—raising substantial questions whether Congress would have ever authorized them—and making court of appeals' interpretation of the Code to allow them suspect.

The constitutional problems with the release at issue in this case are heightened for the Canadian Respondents—not only because the releases deprive foreign sovereigns of their property without compensation, but because the Plan places these sovereigns in a lower status than the non-sovereigns who are already being mistreated in Purdue's reorganization plan. It is bad enough that, as the Government suggests, "the plan does not compensate claimants for the value of their separate claims against the Sacklers or against other released nondebtors"—the funds provided by the trusts are given in exchange for claimants' claims against Purdue. (Application at 18) But the Canadian Respondents fare even worse than these other claimants. The Canadian Respondents receive no share of the $6.0 billion the Sacklers have injected into the bankruptcy, which is earmarked to fund a series of trusts for the benefit of specific creditors, including for domestic governments and Native American tribes in Class 5 of the Plan. Instead, they are placed in Class 11(c) of the Purdue's reorganization plan, among Purdue's many general unsecured creditors. Thus, while domestic governments and Native American

tribes would receive access to more than $6 billion in funds for abatement, Canadian municipalities and First Nations receive nothing beyond a small pro rata share of the $15 million alotted to the general unsecured class. That makes the Canadian Respondents' deprivation of property rights even more extreme—and makes the Sackler release all the more incompatible with due process. Accordingly, "exceedingly clear language'" would be necessary to suggest Congress actually meant to authorize such a draconian release. *Logan*, 455 U.S. at 428. There is therefore "substantial doubt" whether the court of appeals' interpretation of the Bankruptcy Code to allow third-party releases comports with due process. *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982) (citations omitted). And that means there is far more than a "fair prospect that the Court would reverse." *Merrill*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J. concurring.).

C. The equities favor a stay.

1. Finally, the equities favor a stay. It is imperative that the Court have the opportunity to resolve the important questions of the Sackler releases' statutory and constitutional validity—to ensure justice for those who will be denied recovery under those releases, to provide clarity on the validity of third-party releases more generally, to protect the interests of sovereignty and international comity, and to send the message to others that abuses of the bankruptcy system and devices without foundation in the Bankruptcy Code will not be tolerated.

2. But as the Government has explained, if no stay is entered, the proponents of Purdue's plan of reorganization will attempt to frustrate this Court's review of that important question. The Debtors and other plan proponents have made clear that in the

absence of any stay, they will seek to implement Purdue's reorganization plan. That process could begin long before the Court could render a decision on the merits in this case. And once that process begins, at least some plan proponents will likely assert that any appeal of the Sackler release must be dismissed under the doctrine of "equitable mootness," contending that this doctrine prevents appeal of any plan that has been "substantially consummated." Application at 26 (citing C.A. J.A. 2000).

This Court has never endorsed the doctrine of equitable mootness. And there are reasons to doubt its validity. One justice of this Court has criticized it as conflicting with federal courts' "'virtually unflagging obligation'" to consider cases properly before them, *In re Continental Airlines*, 91 F.3d 553, 568 (3d Cir. 1996) (Alito, J., dissenting) (quoting *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 817 (1976)), and has raised concern that the doctrine "can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans," thus imbuing bankruptcy judges with excessive power, *Nordhoff Investments* v. *Zenith Electronics*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring). And the plan proponents have taken varying stances on whether challenges to the Sackler release will actually become equitably moot once plan implementation begins. But there is no question that if a stay is not entered, this Court's review of the important question of the validity of third-party releases will be encumbered by a time-consuming and distracting sideshow about the existence and applicability of the equitable mootness doctrine. A stay is therefore 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.

3. A stay halting implementation of Purdue's plan of reorganization will not only facilitate this Court's review, it will also protect claimants while that review is ongoing. While the process of implementing the plan might begin soon, it will take more than a decade to complete, as various trusts are created, the Sacklers liquidate various assets (including Purdue Canada) over a period of years to gather the billions of dollars necessary to fund the trusts, and trust funds are distributed to claimants. App., *infra*, 24a. There is no way that process will be complete before this Court resolves this case. And if the Court reverses the court of appeals' decision—and a key component of Purdue's reorganization plan is invalidated—the plan's piecemeal implementation may have to be unwound, creating considerable risk that that claimants will be harmed in the process. Accordingly, a stay not only benefits those who are challenging the plan, it also benefits those who are depending upon the plan's implementation.

4. Yet the Canadian Respondents are cognizant of the need to resolve this important issue while minimizing the delay until a lawful plan can be implemented. Accordingly, the Canadian Respondents agree with the Government's request that the Court treat its application to stay the mandate as a petition for writ of certiorari, which would pave the way for the quickest resolution of the case. And if further cert-level briefing is necessary, the Canadian Respondents are also willing to commit to the same schedule as the Solicitor General, wherein all petitions for certiorari will be filed by August 28, so that they can be heard at the Court's October 27 Conference—assuming no extensions will be granted for response briefs.

CONCLUSION

For the foregoing reasons, the Canadian Respondents respectfully request that the Court grant the Government's request to recall and stay the court of appeals' mandate or treat the Government's request as a petition for writ of certiorari and grant it.

August 4, 2023

Respectfully submitted,

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