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.

On Application for Stay of the Mandate of the United States Court of Appeals for the Second Circuit

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OPPOSITION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PURDUE PHARMA L.P., ET AL. TO APPLICATION FOR STAY OF THE MANDATE

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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) 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 affilated debtors; a trade creditor who is engaged in the development and manufacture of innovative drug delivery systems such as transdermal patches and oral thin films for the pharmaceutical industry; and 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

Nearly four years ago, Purdue Pharma L.P. and its affiliated debtors (the "Debtors" or "Purdue")—facing trillions of dollars' worth of opioid liability across thousands of civil actions—filed the chapter 11 cases giving rise to the U.S. Trustee's ("UST") appeal. Over the ensuing months, a vast body of differently situated non-federal public creditors (such as States, political subdivisions, public school districts, and tribes), private creditors (such as adults, children exposed to Purdue's products in utero, hospitals, and third-party payors), the U.S. Department of Justice ("DOJ") and certain federal agencies, the Official Committee of Unsecured Creditors, the Debtors, and the Debtors' shareholders (the Sackler family) engaged in extensive negotiations that resulted in a series of compromises and the confirmation of a plan of reorganization (the "Plan") in 2021. Supported at unprecedented levels by virtually every creditor constituency, the Plan will provide billions of dollars to abate the opioid crisis and compensate victims. But to date, not a dollar of those life-changing and life-saving funds has been distributed, largely due to the UST's decision to challenge decades-old circuit precedent upholding nonconsensual third-party releases generally and now the release at issue here ("Release") specifically.

The UST concedes, as it must, that "the opioid epidemic *** has plagued and continues to plague this country." Appl. 1. The UST also acknowledges that the Plan "involves billions of dollars and affects a vast number of claimants." *Id.* at 2. The UST further appreciates that "continuing to litigate th[e] *** question" of whether nonconsensual third-party releases are permissible will "delay the implementation of the reorganization plan, with its concomitant benefits to States, municipalities, and individual opioid victims." *Id.* at 29. Yet even after the Second Circuit determined that approval of the Release is entirely consistent with the Bankruptcy Code, paved the way for the Plan to go into effect by "decid[ing] all pertinent issues necessary to confirm the Plan," and denied the UST's motion to stay the mandate, Appl. App. 2a, 44a, the UST continues to seek a stay that would forestall the work necessary to distribute funds for at least three more months—and potentially another year if certiorari is granted. Tragically, the only party that will benefit from the stay will be the Sacklers.

This Court should not only reject the UST's stay application (which the UST asks this Court to treat as a petition for a writ of certiorari), but also deny certiorari outright, as it has repeatedly done in cases involving nonconsensual third-party releases over the past 30-plus years. Any divide in circuit authority is nowhere near as direct or entrenched as the UST posits. The minority position (at best) is drawn mostly from stale rulings—some of which distinguish mass torts, others of which have been refined in ways that avoid any conflict, and none of which grapple with the provisions of the Bankruptcy Code that the Second Circuit relied upon below. In addition, the UST's interpretation of those provisions cannot be squared with this Court's precedent or well-established bankruptcy law principles that bind all creditors to a reorganization plan that fairly and equitably distributes a finite pool of funds. Indeed, in light of the overwhelming support of the Plan and the subsequent settlement with the small group of creditors who lodged timely objections to the

Release in the bankruptcy court, this case hardly involves a "nonconsensual" third-party release.

Even more importantly, further delay of Plan implementation—either on account of a stay or a grant of certiorari—will unquestionably cause substantial and irreparable harm to individuals, families, and communities across the United States. More than 100 people die from opioid overdose every day, while a baby is born with neonatal abstinence syndrome ("NAS") every 24 minutes. Countless others continue to suffer from opioid use disorder or become embroiled in opioid use, with those around them suffering the effects as well. Consequently, the cost of the opioid crisis and the harm that the UST would impose through its application must be measured in not just dollars, but in the real and pressing impact on human lives.

The UST—lacking any concrete interest (economic or otherwise) in the outcome of this appeal, and thus lacking Article III standing to proceed—criticizes the Plan as not exacting enough retribution from the Sacklers and downplays the inevitable harms from delay. As approved by the bankruptcy court, however, the Release pertains only to civil claims against the Sacklers that are legally and factually related to the Debtors' conduct or claims asserted against the Debtors; it does not release every conceivable type of opioid-related civil claim or any criminal claims. Similarly, the Release does not allow the Sacklers to escape tort liability; they are paying billions of dollars into the Plan, in order to settle (intertwined) claims held by creditors, as well as fraudulent conveyance and other estate claims held by the Debtors.

Even setting aside those mischaracterizations, the UST's arguments cannot surmount the reality that the flow of funds under the Plan is desperately needed *now*. No amount of money can erase the devastation caused by the Debtors and the Sacklers, particularly for those who have lost loved ones or whose lives have been forever altered. The question in this bankruptcy case is instead how best to address the fallout from the Debtors' and the Sacklers' related actions.

As the statutory fiduciary appointed by the UST itself to represent the interests of all unsecured creditors—virtually the entire creditor body (likely the largest ever), comprising essentially every person affected in some way by the Debtors' opioid products—the Official Committee has been focused singularly on maximizing the value of the Debtors' estates and allocating it fairly among numerous creditor constituencies. To that end, the Official Committee spent the better part of two years investigating potential claims against the Sacklers and, along with the Debtors and various stakeholders, negotiating the series of settlements embodied in the Plan that will allow billions of dollars to be distributed to creditors and communities around the country. It is the only viable reorganization plan that ensures a just and timely distribution of significant funds for opioid abatement and victim compensation.

Critically, it was Purdue's *creditors* that insisted on a Release of all claims against the Sacklers with no opt-outs, thereby preventing hold-out litigants from jumping the line, depleting the *res*, and imperiling payments due under the Plan. Accordingly, while the Sacklers certainly bear responsibility for creating and perpetuating the opioid crisis, it is patently incorrect to claim that the Release—which creditors helped craft and voted for at an overwhelming rate—was forced upon creditors by the Sacklers.

Nor can the UST saddle the Sacklers with responsibility for any stay-related delay in Plan implementation. To state the obvious, it is the UST—not the Sacklers and certainly not the creditors—that continues to appeal the issue of nonconsensual third-party releases and seeks to stay the mandate. Notably, the DOJ has abandoned objections to such releases in other cases, even where both the tortfeasor contribution and the creditor support have been substantially less. Given the UST's lack of any concrete interest in this case, the creditors' overwhelming alignment in favor of the Plan, and the Second Circuit's approval of the Release under a rigorous seven-factor test meant to weed out the very abuse of the bankruptcy system that the UST invokes, the UST's alarmist claims about the need to stop this Plan are unavailing.

At this point, *all* creditors—apart from three *pro se* individuals that raised unrelated grievances about the Plan, and a small group of Canadian creditors who do not represent any certified class—urge implementing the Plan as soon as practicable. In fact, no creditor who voted against the Plan and timely objected to the Release in the bankruptcy court will file a petition for a writ of certiorari. As such, no facts support the notion that the UST's stay application, much less a grant of certiorari, serves creditors or the public interest.

All of the foregoing demonstrates that the UST is not entitled to the extraordinary relief of a stay of the mandate and that this case is an exceptionally poor vehicle for resolving the question presented. It is well past time that the creditors be permitted to implement the Plan and utilize the billions of dollars it provides to address the worst man-made public health crisis in this Nation's history. This Court should deny the UST's stay application and deny certiorari now as well.

ARGUMENT

I. THE UST CANNOT SHOW THAT THE EQUITIES WARRANT EXTRAORDINARY STAY RELIEF

Staying a mandate pending the filing of a petition for a writ of certiorari is "extraordinary relief." *Hollingsworth v. Perry*, 558 U.S. 183, 197 (2010) (per curiam); *see Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Because "[a] lower court judgment, entered by a tribunal that was closer to the facts than [a] single Justice, is entitled to a presumption of validity," an applicant for a stay "must meet a heavy burden." *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). Specifically:

> [T]he applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay. In addition, in a close case it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (second alteration in original) (citation and internal quotation marks omitted).

For the reasons set forth at length by the Debtors, the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants, and the Multi-State Governmental Entities Group, the UST fails to demonstrate a reasonable probability that four justices will vote to grant certiorari, much less a fair prospect that five justices will vote to reverse the Second Circuit's judgment. The Official Committee herein emphasizes that the balance of equities weighs decidedly *against* staying the mandate. The cost of delaying implementation of the Plan will be measured, most poignantly, in human lives ravaged by the ongoing opioid crisis.

By comparison, the UST—a non-creditor with no financial interest in the outcome of this appeal—can claim only the speculative risk of equitable mootness. There is no dispute that the Plan will not be substantially consummated before January 2024 at the earliest, and that this Court will decide well before then whether to grant certiorari. It is also undisputed that, assuming the UST's petition is granted, it can seek the same relief as it (needlessly) does now. The UST's inability to satisfy the demanding standard for extraordinary stay relief is thus not a close call.

A. Delaying Implementation Of The Plan Will Irreparably Harm Creditors And The Public Interest

1. A stay will delay the distribution of an unprecedented amount of critical funds for opioid abatement and victim compensation.

The Plan is critical to addressing the ongoing opioid epidemic, which has seen more than a half-million American lives lost already. With the emergence of new and more dangerous waves of synthetic opioids, like fentanyl, that number continues to grow. As one State Attorney General has pointed out in stark terms, deaths from opioid overdoses alone are equivalent to the loss of life from "a plane going down every day of every week of every month of every year."[1] Similarly, the Centers for Disease Control and Prevention have reported that a child is born with NAS due to opioid exposure in utero every 24 minutes.[2]

The Plan combats this ongoing crisis by providing at least $6 billion for opioid abatement. Those funds will be used to finance key public programs and community organizations that offer (among other things) counseling, peer support, harm reduction, education, services relating to opioid use disorder, medication-assisted treatment centers, clean syringe centers, aid to children born with NAS, hospital programming, and special needs programs in public school districts.

The Plan also provides $700-750 million to compensate victims of the opioid epidemic directly, helping them support their daily needs and rebuild lives and families devastated by opioid addiction. Notably, that amount is more than *twice* the amount that has been provided or agreed upon for victim compensation in the three other opioid manufacturer bankruptcy cases (Insys Therapeutics, Inc., Mallinckrodt plc, and Endo International plc) *combined*. *See* Appl. App. 75a. And that compensation is all the more necessary given that the recent, well-publicized non-bankruptcy settlements between public entities and opioid defendants—such as

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[1] Michael Van Schoik, *Mo. Attorney General Discusses Advances on $500 Million Opioid Settlement, Plus Steps Still Needed to Secure Funding*, KY3 NEWS, Sept. 24, 2021, https://www.ky3.com/2021/09/25/ky3-exclusive-mo-attorney-general-discusses-advances-500-million-opioid-settlement-plus-steps-still-needed-secure-funding/.

[2] *Data and Statistics About Opioid Use During Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2023), https://www.cdc.gov/pregnancy/opioids/data.html.

McKesson Corp., Johnson & Johnson, and CVS—have provided no money whatsoever to private claimants.

The need for those funds *now* cannot be overstated. If the UST obtains a stay, it will mean at least a three-month delay[3] before the Debtors and other parties can resume even setting up the trusts and other structures necessary to effectuate the Plan. And if this Court grants certiorari, victims of the opioid crisis will face at least another year's delay (on top of the two years since Plan confirmation) before they obtain any relief from the upwards of $7 billion available under the Plan.

None of that can be swept aside as "limited additional delay," least of all in the context of this case. *Contra* Appl. 30. Any delay will have dire, real-world consequences for those desperately waiting for the Plan's aid. Each day that funds are held back means another day that abatement programs will not be funded, overdose reversal medicine will not be distributed, community centers will not receive needed funding, children born with NAS will be left to suffer unnecessarily, those alive will be unable to pay for medical and other essential services, and victims and their families will not be compensated. In short, delay means one thing: lives that could have been bettered or saved instead will be imperiled or lost.

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[3] Based on default briefing deadlines, this Court will consider a petition filed on August 28, 2023, at its October 27, 2023 conference. *See* U.S. SUPREME COURT, *Case Distribution Schedule (Summer)—October Term 2023*, https://www.supremecourt.gov/casedistribution/casedistributionschedule2023summer.pdf.

2. *The UST's attempts to minimize the harms from delay overlook the life-or-death impact on individuals, families, and communities.*

The UST asserts (on page 29 of its 31-page application) that it is "sensitive" to the harms associated with granting a stay. That is cold comfort. The stay sought by the UST undoubtedly will exacerbate those life-or-death harms, and the "justifications" offered by the UST for doing so ring hollow.

First, for all of the UST's focus on the Sacklers, it cannot avoid a simple truth: a stay *will* delay the flow of funds for opioid abatement and victim compensation. That is not "delay *** of the Sacklers' own making"; it is the *UST* that is "continuing to litigate." Appl. 29.

That delay, moreover, inures to the benefit of only the Sacklers. As the UST notes, the Sacklers "were worth approximately $11 billion as of June 2021." Appl. 9. Since plan confirmation two years ago, the Sacklers have yet to part with any of that net worth. Meanwhile, the opioid crisis and the number of lives it claims continues to grow.

The UST nonetheless reasons (Appl. 29-30) that the Sacklers have forced the UST's hand by "cho[osing]" and "insist[ing]" on a Release with no opt-outs. In doing so, however, the UST inaccurately relegates the Official Committee and others to a mere supporting role in crafting the Plan. The *creditors* demanded such a Release as the only way to achieve an equitable distribution of funds.

As detailed in the Official Committee's public letter in support of the Plan,[4] ceding the exclusive right to continue litigation against the Sacklers to a small number of holdout creditors would be unfair and unjust. If litigation by those dissenting creditors were allowed to proceed, recovery under the Plan could be jeopardized by massive damages awards that would deplete the *res*. It would also result in a handful of creditors doing better than the overwhelming majority of others. The Release thus accomplishes a core bankruptcy goal by facilitating the fair and agreed allocation of billions of dollars that cannot possibly cover the trillion-dollar universe of potential claims, even if the Sacklers were to hand over all of their wealth. *See* Appl. App. 76a-77a ("As Appellees concede, the valuation of the claims—estimated at $40 trillion—far exceeds the total funds available, as well as the Sacklers' personal wealth"; "it is not possible to require the full payment of all claims"; and UST "has not alleged any unequal treatment of claimants, and no party gives us reason to disturb the bankruptcy court's findings that the settlements and allocations were 'fair and equitable.'").

Relatedly, although the UST tries to tie the Plan as a whole to the Sacklers, it is the *creditors'* Plan and reflects the *creditors'* priorities. That is why the Plan calls for the vast majority of distributions to be used solely for purposes of abating the opioid crisis and compensating personal injury victims. That is also why the Plan is structured around at least 20 interlocking compromises that allocate value among a

[4] *See* Plan Support Letter, *In re Purdue Pharma L.P.*, No. 19-23469-rdd (Bankr. S.D.N.Y.), ECF No. 3460, Ex. A, https://restructuring.ra.kroll.com/purduepharma/Home-DownloadPDF?id1=MTI3NzU4NQ==&id2=-1.

diverse set of opioid claimants in order to avoid extensive, value-destroying litigation between creditor groups. Creditors took a lead role in formulating this outcome by, among other things: (i) mediating the allocation of value among themselves; (ii) performing a thorough investigation of Purdue and the Sacklers; (iii) negotiating not only an economic settlement with the Sacklers but one that also limits their naming rights and prohibits their involvement in the opioid business; (iv) establishing a framework for reorganizing Purdue as a public benefit corporation, as envisioned by its plea agreement with the DOJ; (v) mandating the creation of a document repository with millions of documents, including thousands of privileged documents; and (vi) setting the rules for the use of the money for claimants, including entirely new and bespoke rules for abatement, monitoring, and reporting.

Second, the UST attempts to downplay the Plan's benefits and the harm of further delay on distributing much-needed funds. In particular, the UST notes (Appl. 8) that under the Plan most opioid victims will receive "between $3,500 and $48,000" in direct payments, implying that those sums are insubstantial. But as the Official Committee recognizes, and the UST apparently does not, every single dollar matters to those whose lives have been shattered by the opioid crisis. Even a few thousand dollars can be the difference (literally) between life and death.

The UST's argument also gives short shrift to the Plan's substantial funding of critical abatement programs, which assist not just individuals but entire communities that are likewise in desperate need. *See* pp. 8-9, *supra*. All of that is part of the compromise that the *creditors* reached in this case. The creditors' acceptance of the Plan's terms, not the UST's view of what those creditors *should* receive, is the relevant data point.

Having misapprehended the Plan's benefits, it is unsurprising that the UST also misapprehends the immediacy of its impact. The UST wrongly suggests (Appl. 30) that a stay will cause little harm when viewed "in context" because the Plan would not result in the imminent distribution of benefits on a large scale. To the contrary, on the effective date of the Plan, well in excess of $1 billion will be distributed, with nearly a half-billion dollars more to be distributed within six months thereafter. Setting aside any abstract debate about how much is enough, it is indisputable that a stay would delay any payments whatsoever.

The UST's passing suggestion (Appl. 30) that the parties can make up for any delay by renegotiating an accelerated payment schedule with the Sacklers is rank speculation. Even if that were so—and the UST offers no reason to believe that it is—it could not make up for the lives that would be devastated or even lost in the meantime.

Third, the UST attempts (Appl. 9) to undermine support for the Plan by observing that fewer than 20% of the claimants entitled to vote did so. But votes not cast are just that; they are not presumed to be votes *against* the Plan. What counts in a bankruptcy are those who choose to make their voices heard. *See* 11 U.S.C. § 1126(c)-(d) (providing thresholds for confirmation based on those "that have accepted or rejected such plan"); 7 COLLIER ON BANKRUPTCY ¶¶ 1126.04-1126.05 (16th ed. 2023) ("[O]nly creditors that actually voted count in determining whether the requisite majorities in number and amount are met."). On that score, following an extensive notice program that "reached 98% of adults in the United States and 86% of adults in Canada," each voting class in this case "voted overwhelmingly to approve the Plan," with "[o]ver 95% of the personal injury classes vot[ing] to accept." Appl. App. 24a, 76a; *see also id.* at 78a-81a (rejecting due process claim).

Specifically, 120,000 votes were cast on the Plan, with over 115,000 in favor (more than any other case of which the Official Committee is aware), including by States, political subdivisions, tribes, public schools, hospitals, third-party payors—and, of course, individual victims as well as guardians ad litem and parents of children born with NAS. *See* Appl. App. 24a. In addition to the Official Committee, every ad hoc creditor group formed in this case supported the Plan. *See id.* at 22a n.6. And perhaps most importantly, in what the UST describes (Appl. 14) as "one of the highest-profile bankruptcies in recent years," no voting creditor is left objecting to the Plan other than two *pro se* victims (the third did not vote) and a small group of Canadian creditors—out of 620,000 creditors entitled to vote, accounting for approximately one thousandth of one percent. *See id.* at 34a-35a, 40a-41a, 76a. Accordingly, the factual record refutes the UST's attempt to conjure up a sense of broad opposition to the Release among creditors that simply does not exist.

For that reason, the UST's attempt to use this case to eliminate nonconsensual third-party releases is particularly inapt. Under the Second Circuit's (and other courts of appeals') precedent, such a release is appropriate only where there is a broad consensus in favor of the release, with only a very small set of holdouts. Appl. App.

66a & n.20, 68a. Here, there are basically no creditors "who wish to proceed outside of bankruptcy" against the Sacklers. *Contra* Appl. 28. That means the Release is all but consensual.

Finally, while predicting (Appl. 31) "that this Court is likely to vacate" the Second Circuit's judgment, the UST has conspicuously abandoned its suggestion below that there are "several alternative routes to confirm a reorganization plan." C.A. Mot. 4. For good reason: that unsubstantiated suggestion ignores that an overwhelming number of creditors—and every organized creditor group in this case—made the considered and hard-fought decision following years of collective efforts to choose *this* Plan as the best path forward because *there is no other alternative*. Indeed, if the creditors believed there was another route to confirm a supportable plan that would bring comparable value to claimants, they would have pursued it already.

Furthermore, the U.S. government—in its capacity as a creditor, distinct from the UST—holds a superpriority claim, with the ability to recover from the estate before any other claimant receives a penny. Appl. App. 21a. The U.S. government has agreed to relinquish the majority of its superpriority claim given the satisfaction of certain conditions, which the Plan meets. *Id.* Without the Plan, however, "the government would recover its $2 billion first, thereby depleting the *res* completely. As a result, 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," because the only estate asset remaining would be litigation claims against the Sacklers. *Id.* at 72a-73a.

The UST's position throughout this appeal, but especially in its attempt to stay the Court's mandate, discounts the real and difficult choices the vast unsecured claimant body has had to make. The UST has never been harmed by opioids, and it holds no claim based on an injury from opioids or the Sacklers. The UST's lip service to the serious harms caused by a delay of the mandate should not be accepted over the creditors' real-world experiences with the opioid crisis.

B. The Real-Life Harms From Delayed Implementation Of The Plan Dwarf The UST's Overblown Concern Over Equitable Mootness

For its part, the UST's only claimed harm (Appl. 25-27) in the absence of a stay of the mandate is the prospect that this Court would dismiss a further appeal under the doctrine of equitable mootness and thus lose this particular opportunity to decide the question presented. But the UST offers only speculation in support of that alleged harm.

Equitable mootness is applicable only after substantial consummation of a plan of reorganization and emergence from bankruptcy. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005). Although the UST asserts (Appl. 26-27) that the stay opponents "have taken varying positions as to what actions might constitute substantial consummation," that is untrue. All agree that, *at a minimum*, the Plan cannot be consummated until after Purdue is criminally sentenced. By agreement, the sentencing cannot occur for at least 75 days following entry of the confirmation order on remand to the district court, and consummation cannot take place until at least seven days after the sentencing. C.A. J.A.-4800. As the Official Committee underscored below (and the UST ignores), that is a "best case" scenario, which assumes that all of the trusts and other structures necessary to implement the Plan have been put in place, and that all regulatory and court approvals have been received. To avoid any confusion, the Official Committee agrees with the Debtors' representation that those tasks (even assuming no stay) will be completed in January 2024 at the earliest.

Regardless of the exact date of substantial consummation, one critical point remains undeniable: the lack of any possibility that substantial consummation will occur prior to consideration of a certiorari petition, filed no later than August 28, 2023, at the October 27, 2023 conference. As such, the UST's concern (Appl. 5, 26-27) for "this Court's ability to review the government's forthcoming petition *** without needing to address any threshold questions about the validity and applicability of the equitable-mootness doctrine" is illusory. Just as the UST here did not seek an administrative stay to prevent issuance of the mandate "[b]ecause substantial consummation cannot occur in a matter of days," *id.* at 6, a stay pending this Court's disposition of the UST's forthcoming petition is unnecessary because substantial consummation cannot occur over the next three months. Assuming certiorari is granted then, the Court can consider a stay at that time; any stay request prior to that development is premature (and entirely moot if this Court denies certiorari now or then).

The UST's further concern (Appl. 6, 27) that "the plan proponents may act swiftly to consummate the plan before this Court can issue a merits decision" is both non-responsive and unfounded. Again, assuming this Court grants certiorari, the UST can seek stay relief at that juncture.

Trying another tack, the UST for the first time claims (Appl. 5, 31) that a stay is necessary to avoid the harm of piecemeal implementation of the Plan. It is unclear how the UST can claim any harm related to the use of estate funds when it is not a creditor that will receive a Plan distribution. In any event, the most that the UST can say is that a stay would "avoid *potentially* wasteful implementation steps *** *in the event* that this Court ultimately upholds the district court's order vacating the plan." Appl. 5 (emphases added). But those qualifiers all but concede that the denial of a stay will not lead to irreparable harm. At the same time, the UST cannot dispute that if this Court were to deny certiorari (or uphold the Release), steps taken now to implement the Plan pending those rulings would beneficially accelerate the flow of funds to those in desperate need. This Court should reject the UST's willingness to risk delaying such distributions in the name of potentially safeguarding estate resources—enormous amounts of which have gone into confirming the current Plan.

II. THE COURT SHOULD CONSTRUE THE APPLICATION AS A PETITION FOR A WRIT OF CERTIORARI AND DENY CERTIORARI OUTRIGHT

Citing the need for "certainty" and "the benefits of a prompt resolution of this case," the UST invites (Appl. 7, 31) this Court to construe the stay application as a petition for a writ of certiorari. Given that implementation of the Plan has waited nearly two years for the UST's appeal to run its course, the Official Committee supports an expeditious decision on certiorari. Certiorari should be denied forthwith.

A. There Is No Circuit Conflict Over The Second Circuit's Correct Treatment Of 11 U.S.C. §§ 105 And 1123(b)(6)

The Official Committee joins in other parties' arguments explaining why the alleged circuit conflict is nowhere near as direct or entrenched as the UST submits, and why the Second Circuit's decision is correct on the merits. Tellingly, the courts of appeals that have considered the import of 11 U.S.C. §§ 105(a) and 1123(b)(6)—the Bankruptcy Code provisions that the Second Circuit relied upon below—uniformly *agree* that they authorize nonconsensual third-party releases, consistent with this Court's explication of those provisions in *United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990). *Contra* Appl. 18-24 (discussing purportedly conflicting decisions, none of which mentions section 1123(b)(6)). The UST's fallback constitutional-avoidance argument (*id.* at 24-25) is undermined by the fact that its criticisms are equally applicable to other bankruptcy mechanisms. *See* Appl. App. 80a-81a ("The Trustee's argument would essentially call into question all releases through bankruptcy, including bankruptcy discharges (which are one of the most important features of bankruptcy). We decline to so undermine such a critical component of bankruptcy.").

B. This Case Is Not An Appropriate Vehicle For Resolving The Question Presented

Even assuming the question presented otherwise warranted this Court's review, this case is an exceptionally poor vehicle for resolving it—including for the compelling equitable reasons discussed above. Based on settled circuit precedent that permits nonconsensual third-party releases, the largest creditor body in the history of federal bankruptcy law came together after years of hard-fought negotiations to support a Plan with a reticulated Release of certain opioid-related civil claims against the Sacklers that overlap sufficiently with claims that may be brought against the Debtors. The *creditors*—not the Sacklers, who had no vote on the Plan—made that considered decision out of recognition that it was the *only* pathway to distribute fairly and equitably a limited amount of funds to claimants, the vast majority of whom (including individual victims) would otherwise likely receive nothing following years of protracted litigation. Given that the creditors have overwhelmingly aligned behind the Release and the implementation of the Plan, and "the main challenge to this appeal is not by creditors, but by the Trustee—a government entity without a financial stake in the litigation"—this is hardly the case to address the UST's concerns over the supposed abuses of third-party releases. Appl. App. 76a.

1. The UST lacks Article III standing.

As a threshold matter, there is a serious question whether the UST can pursue further review in this Court. 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). Rather, "[t]o demonstrate their personal stake, plaintiffs 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). As a non-creditor with no financial interest in this case, the UST lacks a "sufficiently concrete interest in the outcome of the issue in dispute." *Hollingsworth*, 570 U.S. at 708.

Plainly aware of that (fatal) vehicle problem, the UST includes a bare citation to 11 U.S.C. § 307, which provides that "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title." 11 U.S.C. § 307; Appl. 9. But the ability to "appear and be heard" does not cure an Article III standing defect in the "case or proceeding." *See TransUnion,* 141 S. Ct. at 2205 ("[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.") (internal quotation marks omitted); *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

Indeed, the Official Committee is aware of no case in which the UST has independently petitioned for certiorari, let alone one in which this Court has ever granted review, except in the isolated circumstance of defending the constitutionality of fees payable to the U.S. Trustee itself. *See Office of the U.S. Tr. v. John Q. Hammons Fall 2006, LLC*, Nos. 21-1078, 22-1238 (U.S.); *William K. Harrington, United States Tr., Region 2 v. Clinton Nurseries, Inc.*, No. 21-1123 (U.S.). In that circumstance, unlike here, the UST's concrete financial interest was at stake.

The Official Committee is also not aware of, and the UST does not cite, any authority holding that the UST's Article III standing can be based on a generalized public interest—particularly in light of this Court's clarification of the difference between "prudential" or "statutory" standing and the "irreducible constitutional minimum" required by Article III. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-128 (2014); *cf. TransUnion*, 141 S. Ct. at 2206 ("[T]he public interest that private entities comply with the law cannot be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.") (internal quotation marks omitted). Even if such authority existed (or this Court were to accept such a novel theory of Article III standing), the UST could not make any such public-interest claim here, given that it essentially stands alone against widespread public and private creditor support of the Plan. *See* Appl. App. 76a; pp. 13-15, *supra*.[5]

2. There is no pressing need to resolve the question presented in this particular case.

This Court will also have plenty of other chances to resolve the question presented in a more appropriate case. *See* Appl. 16-17 (stating that nonconsensual third-party releases are a "recurring issue" that "arises with some regularity" in bankruptcy proceedings). Indeed, the UST cites (Appl. 29) another appeal in which

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[5] Reliance on the participation of other potential petitioners—none of which have sought stay relief—would be equally suspect. Two of the *pro se* individuals who participated in the appellate proceedings below did not object to the Plan in the bankruptcy court. The remaining *pro se* individual (who did not cast a vote on the Plan) and the small group of Canadian creditors did not challenge the Release in the bankruptcy court. Hence, any objections to the Release by creditors who might file petitions have been waived.

the U.S. government has objected to a nonconsensual third-party release in its capacity as a creditor.

The UST surmises that the question is rarely presented cleanly for this Court's review because of factual or equitable-mootness complications. Yet the UST does not identify a single case in which particular facts or equitable-mootness considerations may have led this Court to deny certiorari when asked to take up the subject of nonconsensual third-party releases over the past three decades. *See, e.g.*, *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019), *cert. denied sub nom. ISL Loan Tr. v. Millennium Lab Holdings II, LLC*, 140 S. Ct. 2805 (2020); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir.), *cert. denied sub nom. Vision-Park Props., LLC v. Seaside Eng'g & Surveying, LLC*, 577 U.S. 823 (2015); *National Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344 (4th Cir. 2014), *cert. denied*, 574 U.S. 1076 (2015); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir.), *cert. denied sub nom. Class Five Nev. Claimants v. Dow Corning Corp.*, 537 U.S. 816 (2002); *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), *cert. denied sub nom. Lowenschuss v. Resorts Int'l, Inc.*, 517 U.S. 1243 (1996).

Faced with that track record, the UST singles out the decision below as opening the floodgates for bankruptcy filings seeking third-party releases in the Second Circuit. But the decision below does not change the Second Circuit's position on the issue any more than it alters the balance of any (purported) circuit conflict. Rather, it simply maintains the status quo by confirming what the Second Circuit has held for at least thirty years: "In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan." Appl. App. 59a (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992), *cert. denied sub nom. Hart Holding Co. v. Drexel Burnham Lambert Grp., Inc.*, 506 U.S. 1088 (1993)). In doing so, the decision below does not create any "difficult[ies] to obtain[ing] appellate review"—either alone or in combination with venue rules or the equitable-mootness doctrine that the UST discusses in the same breath—much less make "[s]uitable vehicles presenting the question [presented] *** even more rare." Appl. 17.

At bottom, nonconsensual third-party releases have been permitted for decades, in not just the Second Circuit but most courts of appeals, without upending the bankruptcy system. And as explained next, by integrating the factors those courts have used to scrutinize third-party releases into a comprehensive test, the decision below imposes an especially demanding standard for approval that heads off potential abuse.

3. *The UST's concerns over gamesmanship are not borne out by this case.*

Contrary to the UST's assertion (Appl. 3) that this case lays out a "roadmap" for "misus[ing] the bankruptcy system," the Second Circuit took pains to ensure courts' continued vigilance in evaluating nonconsensual third-party releases—the approval of which remains anything but a foregone conclusion. Citing a decision *rejecting* such a release, the Second Circuit "wholeheartedly endorse[d] the view that 'third-party releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring,' nor are they 'a participation trophy' or 'gold star for doing a good job.'" Appl. App. 65a (quoting *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726-727 (Bankr. S.D.N.Y. 2019)). The Second Circuit thus articulated a seven-factor test, "informed by th[e] risk" of "abuse posed by such releases." *Id.* (internal quotation marks omitted). And it emphasized that "there may even be cases in which all factors are present, but the inclusion of third-party releases in a plan of reorganization should not be approved." *Id.* at 69a.

None of that permits tortfeasors to take advantage of creditors, as the UST fears (Appl. 27-28). In particular, demanding the type of overwhelming creditor support present here ensures that tortfeasors cannot target a slim majority of creditors and obtain a nonconsensual third-party release. Creditors continue to hold bargaining power in choosing to release their claims *en masse* in exchange for a substantial contribution, thereby binding a small number of holdouts that would prefer to disproportionately recover at the expense of others—an inequitable result that bankruptcy law eschews.

The UST accuses (Appl. 23-24) the Second Circuit of "judicial freewheeling." The Bankruptcy Code, however, is replete with examples in which objectors must abide by creditor consensus, with bankruptcy courts policing the fairness of the compromises reached with the debtor and among themselves. And more broadly, all circumstances in which bankruptcy courts exercise equitable powers require a balancing of interests. *See* Appl. App. 69a ("[A]s with any term in a bankruptcy plan, a provision imposing releases of claims like that at issue here must be imposed against a backdrop of equity."). Recognizing as much, the U.S. government has recently taken the position that nonconsensual third-party releases are "permissible," endorsing the same types of "legal and factual standards" as the Second Circuit did here. Br. of United States at 23-27, *In re Exide Holdings, Inc.*, No. 1:20-cv-1402-RGA, 2021 WL 3145612 (D. Del. July 26, 2021), ECF No. 59.

To the extent the UST's concern (Appl. 28-29) is that the Second Circuit failed to confine nonconsensual third-party releases to private citizens or civil claims, those are especially odd distinctions for the UST to press here. The Release does *not* extinguish the claims of the U.S. government or criminal claims. *See id.* at 3. And after the additional settlement with the once-objecting states, all 48 states that did not settle in advance of the bankruptcy case, together with the District of Columbia and every participating Territory of the United States, now support the Plan. Appl. App. 40a-41a. That means "the main challenge to this appeal is not by creditors, but by the Trustee—a government entity without a financial stake in the litigation." *Id.* at 76a. Accordingly, the UST's views are actually *at odds* with those of government entities, which have made the real-world decision on behalf of their constituencies to support the Plan.

In the end, the UST misunderstands the origins and terms of the Release at issue. Contrary to the UST's characterization that a sweeping release was widely opposed by creditors and foisted upon the parties by the Sacklers, who will evade mass tort liability by contributing nothing of value to the reorganization (Appl. 2-3), it bears repeating that:

- the already carefully defined Release, crafted by the creditors and other stakeholders, has been further narrowed by the bankruptcy court to reach only those third-party claims that overlap sufficiently with claims against the Debtors, consistent with settled jurisdictional limits that the UST does not contest;

- obtaining the Sacklers' contribution through a settlement is unmistakably favorable to tort victims, because in its absence the value of the Debtors' estates other than Sackler litigation claims would be wiped away by (ironically) the United States' $2 billion superpriority claim, and recovery against the Sacklers would involve a free-for-all in piecemeal litigation in which a single claimant might be disproportionally compensated relative to others that receive nothing;

- because the asserted value of claims at $40 *trillion* far exceeds the total funds available, as well as the Sacklers' personal wealth of approximately $11 billion, "it is not possible to require full payment of all claims";

- "[f]ive and a half billion dollars—purportedly the largest contribution in history for such releases—is a significant sum";

- notice of the Plan reached 98% of adults in the United States and 86% of adults in Canada, creditors voted overwhelmingly to accept the Plan, and the bankruptcy court held a six-day confirmation hearing at which it provided objectors (including *pro ses*) the opportunity to be heard.

Appl. App. 24a, 70a-81a.

Given those unrebutted findings, it should be clear that the UST's fear over the abuse of nonconsensual third-party releases is inapt here. This Court should deny the petition outright and bring an end to years of appeals that have sidelined a near-universally supported Plan that will make historic inroads into the Nation's opioid crisis.

CONCLUSION

This Court should deny the UST's application for a stay of the mandate, construe the application as a petition for a writ of certiorari, and deny certiorari.

Respectfully submitted.

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