NO. 23-124

In the Supreme Court of the United States

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

Petitioner,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

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

BRIEF FOR THE RESPONDENTS SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.

PARTIES TO THE PROCEEDING

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

Respondents (appellants and cross-appellees below) are Purdue Pharma, L.P., Purdue Pharma Inc., Purdue Transdermal Technologies L.P., Purdue Pharma Manufacturing L.P., Purdue Pharmaceuticals L.P., Imbrium Therapeutics L.P., Adlon Therapeutics L.P., Greenfield BioVentures L.P., Seven Seas Hill Corp., Ophir Green Corp., Purdue Pharma of Puerto Rico, Avrio Health L.P., Purdue Pharmaceutical Products L.P., Purdue Neuroscience Company, Nayatt Cove Lifescience Inc., Button Land L.P., Rhodes Associates L.P., Paul Land Inc., Quidnick Land L.P., Rhodes Pharmaceuticals L.P., Rhodes Technologies, UDF LP, SVC Pharma LP, SVC Pharma Inc. (Purdue), 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Legislative materials:

Rules

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OPINIONS BELOW

The court of appeals' opinion (J.A. 839-914) is reported at 69 F.4th 45. The district court's opinion (J.A. 632-809) is reported at 635 B.R. 26. The bankruptcy court's opinion (J.A. 297-418) confirming Purdue's plan of reorganization (J.A. 191-296) is reported at 633 B.R. 53.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1-13.

JURISDICTION

The court of appeals entered its judgment on May 30, 2023. On July 28, 2023, the Petitioner filed an application to stay the mandate (No. 23A87), requesting the Court to treat the application as a petition for a writ of certiorari. On August 10, 2023, this Court granted the application, recalled, and stayed the mandate, and granted the petition. J.A. 920. This Court has jurisdiction under 28 U.S.C. 1254(1).

INTRODUCTION

This case concerns one of the "most controversial issues in Chapter 11 bankruptcy": whether the Bankruptcy Code permits "third-party releases," a device employed in reorganization plans to involuntarily extinguish claims of nondebtors against other nondebtors. Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079, 1106 (2022). Wealthy individuals and blue-chip companies abuse these nonconsensual third-party releases to absolve themselves of mass-tort liabilities without entering bankruptcy themselves.

The sweeping third-party release at issue in this case is among the most abusive ever devised. It was demanded by the Sackler family, Purdue's former owners, in exchange for giving back a fraction of the funds they raided from the company to fund its reorganization plan. The release covers hundreds—possibly thousands—of individuals and entities, including Purdue's officers and directors, along with generations of Sacklers born and unborn. The release prohibits anyone, anytime, anywhere in the world from maintaining opioid-related claims against these released parties, immunizing them from responsibility for directing, assisting, and facilitating the misconduct that drove Purdue into bankruptcy. And the release extinguishes *all* claims against the released parties, including those involving fraud and intentional misconduct, which cannot be discharged for individuals under the Code, see

11 U.S.C. 523(a)(2), (4), (6). Those released therefore obtain more relief than if they had entered bankruptcy themselves.

This release was foisted upon opioid claimants without compensation and without consent. Yet none of those released sought bankruptcy protection themselves. And most of the Sacklers' fortune lies beyond creditors' reach. And claimants get next to nothing on their claims—around $7,000 for an individual claimant. Bankr. Ct. Doc. 2983, at 11 (June 3, 2021).

Such third-party releases violate the *quid pro quo* that lies at bankruptcy's heart, allowing nondebtors to obtain bankruptcy's litigation-halting protections without subjecting themselves to its creditor-protecting burdens, including the obligation to stake substantially all their assets to satisfy debts. It would take extraordinary clarity and specificity to suggest that Congress authorized any such releases, much less allow those as extraordinarily abusive as the Sackler release. But outside a limited exception allowing third-party releases in asbestos bankruptcies, 11 U.S.C. 524(g), nothing in the Code permits their use—and several things affirmatively prohibit them. The court below nevertheless held that bankruptcy courts may impose them through their "residual power" as "courts of equity" embodied in 11 U.S.C. 105(a) and 1123(b)(6). J.A. 876-877 (quoting *United States* v. *Energy Resources Co., Inc.*, 495 U.S. 545, 549 (1990)). But both text and precedent confirm that the residual equitable powers embodied in these provisions cannot be stretched so far as to allow third-party releases.

The Court should reverse the court of appeals' contrary decision and hold that, outside circumstances absent here, the Bankruptcy Code does not authorize third-party releases in Chapter 11 plans.

STATEMENT

A. Legal background

Congress created bankruptcy to provide a "fresh start" for the "honest but unfortunate debtor," *Grogan* v. *Garner*, 498 U.S. 279, 286, 287 (1991) (internal quotation omitted)—the "last resort" for those lacking other options, H.R. Rep. No. 109-31, pt. 1, at 4 (2005). To fulfill that basic purpose, the Bankruptcy Code maintains a singular focus on debtors and their relationships with creditors.

That focus finds roots in bankruptcy's constitutional foundations in the Bankruptcy Clause, 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). And it is reflected in the bankruptcy court's traditional *in rem* jurisdiction, which is "premised on the debtor and his estate, and not on the creditors." *Tenn. Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 447 (2004).

That debtor-centered focus likewise appears in the Code's "meticulous" and "detailed" system of protections, *Law* v. *Siegel*, 571 U.S. 415, 424 (2014) to adjust and extinguish the debtor's liabilities. The debtor's bankruptcy filing automatically stays all debt-collection efforts (11 U.S.C. 362) and authorizes discharge of the debtor's liability on most debts (11 U.S.C. 524(a), 727(a), 1141(d)(1)(a)), providing a mechanism for "releas[ing]" debtors from "personal liability with respect to any discharged debt." *Hood*, 541 U.S. at 447.

But these bankruptcy benefits come with a host of burdens designed to protect creditors. The debtor must place its assets under court supervision (11 U.S.C. 541) and make regular disclosures about its financial affairs, 11 U.S.C. 521(a). It must obtain bankruptcy court approval for certain transactions. See 11 U.S.C. 363. The debtor must honor the Code's priority system for distributing estate assets, 11 U.S.C. 507, 1129(b)(2), "in which the claims of all creditors are considered fairly, in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor." H.R. Rep. No. 996, 102d Cong., 2d Sess. 13 (1992). And absent individual creditors' consent (11 U.S.C. 1129(a)(7)) and with certain narrow exemptions (see 11 U.S.C. 522), the debtor must apply all its assets to the satisfaction of its creditors' claims.

This is the Code's *quid pro quo*. And it is reserved for the debtor. Section 524(e) provides 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). So only the debtor may obtain a discharge—bankruptcy's core protection—because only the debtor bears bankruptcy's burdens. And that basic bargain permeates the Code. Indeed, outside a narrow exception for bankruptcies arising from the manufacture or sale of asbestos (11 U.S.C. 524(g)), nothing in the Code's hundreds of provisions affects the obligations of those outside of the relationship between the "'debtor and his creditors.'" *Cent. Va. Cmty. College* v. *Katz*, 546 U.S. 356, 371 (2006) (quoting *Wright* v. *Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-514 (1938)).

And even the Code's protections for debtors have limits: Certain debts, like those relating to property obtained under "false pretenses, a false representation, or actual fraud" cannot be discharged. 11 U.S.C. 523(a)(2)(A). This system is not compatible with third-party releases like the one in this case.

B. Factual background

The prescription opioid epidemic is one of the "largest public health crises in this nation's history." J.A. 841. At its center is Purdue Pharmaceuticals, the closely held drug maker that developed OxyContin, which it aggressively promoted as a safe, effective, and non-addictive painkiller that actually turned out to be highly addictive. J.A. 648-651.

Purdue's lies produced incalculable devastation. Hundreds of thousands of people die annually from opioid-related overdoses. J.A. 652. Hundreds of thousands more remain addicted. *Ibid.* And the fallout has spread beyond the victims and their families, 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. J.A. 653 (citing DHHS, *Addressing Prescription Drug Abuse in the United States*, <https://bit.ly/3pL54Lf>).

At the center of Purdue's wrongdoing is the Sackler family. 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 countries. J.A. 645. These entities include MNP Consulting Limited (MNP), which is owned by Sackler family trusts and largely staffed with Sackler family members as directors. J.A. 645-646. MNP "operated as an advisory board" for Purdue entities "worldwide" enabling the Sackler family to remain "heavily involved" in the aggressive marketing that drove OxyContin sales and opioid addiction worldwide. J.A. 645, 667.

Immediately after one Purdue entity and senior Purdue executives pleaded guilty to misbranding OxyContin in 2007 as "non-addictive," the Sacklers knew they faced staggering liability. J.A. 633, 664. The entire marketing facade that had made OxyContin "the most prescribed brand-name narcotic medication" in the U.S., was based on a lie—a lie that had killed or harmed millions. J.A. 651. The Sacklers soon faced thousands of lawsuits. J.A. 664-677.

Yet they quickly formulated a "global solution" to their mounting litigation problems. J.A. 686. In May 2007, the Sacklers consulted bankruptcy lawyers, although the Debtors were not then "in debt" or "at risk of bankruptcy." J.A. 679 (citations omitted). Then they mounted an "'aggressive'" campaign to step up monetary distributions to themselves (J.A. 679 (internal quotation omitted)), that eventually drained Purdue by $10.4 billion, "substantially deplet[ing]" their "solvency cushion," J.A. 678-679 (citing Bankr. JX-2481, JX-0431, p. 77, Fig. 10). And "[o]ver half of that money" was secreted offshore where the Sacklers believed it could not be touched "in places like the Bailiwick of Jersey." J.A. 637.

That left Purdue with insufficient funds to craft any confirmable reorganization plan when it filed for Chapter 11 protection in 2019. And the Sacklers used their leverage over the depleted debtor to demand complete immunity for themselves, their families, and their associated entities from any opioid-related liabilities, without ever having to file bankruptcy themselves, in exchange for providing cash for the reorganization.

Purdue itself did not engage in sales and distribution of OxyContin in Canada; those functions were undertaken by a separate set of non-bankrupt Sackler-owned entities called Purdue Canada, which the Sacklers controlled through MNP.[1] 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 21 people per day. *Opioid- and Stimulant-related Harms in Canada* (Sept. 2022), https://bit.ly/3CVtYOL.

The opioid crisis has also been devastating for the native Canadian First Nations, Metis and Inuit 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

[1] J.A. 675 n.29 (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.").

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.

C. Procedural history

The Canadian Creditors are municipalities and First Nations that were harmed by opioids manufactured, marketed, and sold in Canada. They filed lawsuits in Canada against various opioid-related manufacturers, distributors, pharmacies, and related parties, including MNP and Purdue Canada, for claims related to drug sales in Canada. They brought suit both individually and on behalf of all Canadian municipalities and First Nations. See Proofs of Claim Nos. 145592, 144535, 144455, 144366, 144514, 144475, and 144465 (stating claims against Purdue Canada); see also *Seventh Amended Statement of Claim* (filed April 27, 2023) and *Order for Service Ex Juris* (pronounced June 2, 2023) (Applications Judge Farrington) [Alberta King's Bench, Court File No. 2001-07073] (adding claims against MNP).

One of the Canadian Creditors—the Lac La Ronge Band—also brought suit against the Sacklers in New York state court. *Complaint, Lac La Ronge Indian Band* v. Sackler, No. 160667-2022 (N.Y. Sup. Ct. Dec. 14, 2022), Doc. No. 1.

Purdue has sought to minimize the Canadian Creditors' claims by emphasizing that the Canadian class actions are not yet certified. See Debtor's Stay Opp. 20 n.5. But there should be no mistake: The Canadian Creditors lawsuit will definitively resolve the claims of all municipalities and First Nations against Purdue Canada, the Sacklers, and MNP, owing to unique differences between the Canadian and U.S. class-action systems. While a plaintiff's mass tort lawsuit might become merely one among many in the United States, likely to be transferred into a Multi-District Litigation containing hundreds, if not thousands of similar suits, the Canadian Creditors' class actions are likely to be the only ones of their kind.

Unlike the U.S., Canada exhibits a "strong preference" for mass tort class actions. *Das v George Weston Limited*, 2017 ONSC 4129 (Ont. S.C.J.), ¶640 [Add-45]. And that preference is reflected in the Canadian standards for class certification, which are far more lenient than in the United States. A court can certify a class proceeding if the case involves any "claims [that] raise a common issue, whether or not the common issue predominates over" individual issues, Class Proceedings Act, SA 2003, c C-16.5, s 5(1)(c), inverting the predominance requirement of Fed. R. Civ. P. 23. And once a class action commences, the class action is given preferential treatment, so later-filed individual lawsuits are often stayed while the first-filed class action proceeds, discouraging follow-on suits. *Wright* v. *Air Canada*, 2021 ABPC 61, 62 CPC (8^{th}) 97; *McColl* v. *Air Canada*, 2021 ABPC 120, 73 CPC (8^{th}) 201; *Hamm* v. *Canada (Attorney General)*, 2021 ABCA 329, [2021] 12 WWR 703. That is why, since the current round of litigation began in 2007, the Canadian Creditors are the only municipalities or First Nations to have brought class-action suits against Purdue, Purdue Canada, MNP, or the Sacklers in any forum. Accordingly, the Canadian Creditors' lawsuit is the only shot that all Canadian municipalities and First Nations will have in obtaining justice against Purdue Canada, the Sacklers, and MNP.

Yet the Sackler release poses a threat to the Canadian Creditors' claims against all these entities. The Sacklers, Purdue Canada, and MNP are all among the released parties covered under the Sackler release in Section 10.7(b) of Purdue's reorganization plan, which include all "Sackler Family Members" from both sides of the Sackler family, their descendants, current and former spouses, their estates—and six other broad categories encompassing potentially hundreds of individuals and entities, including MNP and the non-Sackler members of its board. J.A. 274; C.A. JA-3457. The releases extinguish, without compensation, all direct opioid causes of action against those released parties if Purdue's conduct is "legally relevant" or a "legal cause" of the claim. J.A. 275.

And pursuant to the Canadian Provinces' request when they withdrew their claims from the bankruptcy, Bankr. Ct. Doc. 3572, at 47-48 (Aug. 9, 2021), that release was made subject to a specific carve-out for Canadian claims. That carve-out is laid out in the Plan's definition of "Excluded Claims," which is defined to include:

> (v) any <u>Cause of Action</u> (including, without limitation, any such Cause of Action held by holders of Settled Canadian Patient Claims or by other Canadians) against any non-Debtor Person (including, without limitation, Purdue Pharma, a Canadian limited partnership, Purdue Pharma Inc., a Canadian corporation and/or Purdue Frederick Inc., a Canadian corporation (collectively, "***Purdue Canada***") or any other Shareholder Released

> Party) that (x) arises out of or relates to the conduct of any corporations, companies, partnerships and other entities formed under the laws of Canada or its provinces affiliated or associated with any of the Debtors, including, without limitation, Purdue Canada and (y) is not based upon any conduct of the Debtors, including any Opioid-Related Activities of the Debtors.

J.A. 199 (emphasis added). Under subpart (x) of this provision, a "Cause of Action" against one of the enumerated "Shareholder Released Part[ies]" survives and falls outside Section 10.7(b)'s release if it "arises or relates to the conduct" of the Debtors' Canadian affiliates, including "Purdue Canada." But the exemption is not complete, because a recapture provision in subsection (y) provides that claims are not "Excluded Claims," and fall back into the release, if they are "based upon any conduct of the Debtors." *Ibid.* That language is not clear. But the Sacklers, who will be enforcing the release, insist that "many of the [Canadian Creditors'] claims, if not all the claims against Purdue Canada, even being asserted in Canada, are really being asserted as based upon claims of the conduct of Purdue US." C.A. JA-1216–1217. Accordingly, the Sacklers themselves contend that the Canadian Creditors will be among the tens of thousands of personal-injury claimants who did not consent to the release's terms but will nonetheless be irrevocably barred from bringing claims against the Sacklers and other released parties by the broad third-party release provision in Purdue's reorganization plan.

But the Sacklers themselves will remain in high station. Even after their $6 billion contribution to the bankruptcy, the Sacklers will remain among the richest families in the country and are likely to see their collective fortunes rise to $14.574 billion by 2030 despite the plan payments. Bankr. Ct. Doc. 3469, at 6 (Aug. 6, 2021).

Making matters worse, the Canadian Creditors receive absolutely nothing in exchange for the draconian release, faring even worse than others under Purdue's reorganization plan. As the district court explained, under the plan, *no* claimants obtain any recovery based on their claims against the released parties. J.A. 704. S*ome* claimants, including U.S. domestic government entities and domestic Native American Tribes, receive the right to obtain distributions from trusts which were seeded with the Sackler's $6 billion contribution (J.A. 223-225 [Plan §§ 4.4, 4.5]) but these funds are offered only to satisfy claims against *Purdue*. See J.A. 704.

And recipients under the trusts will receive only a pittance on their claims. For example, the average payout on a personal injury claim will be $7,000. Bankr. Ct. Doc. 2983, at 11 (June 3, 2021). Purdue itself estimates this to be about 2% of the value those claims would obtain if they were litigated to judgment through the tort system (*id.* at 8), not even enough to cover the cost of the average funeral in the United States. Nat'l Funeral Directors' Ass'n, *Member General Price List Study* (Nov. 4, 2021) (estimating the average cost of a funeral to be $7,848 in 2021).

By contrast, international claimants, including Canadian municipalities and First Nations, receive no access to trust funds under the plan. They are placed instead in the general unsecured class, leaving them with nothing beyond a pro rata share of the $15 million allotted to that class in exchange for claims worth hundreds of millions of dollars. J.A. 235. [Plan § 4.13]. Accordingly, despite being required to submit to the draconian release in Purdue's reorganization plan, the Canadian Creditors receive *virtually* nothing under the plan for their claims against Purdue, and *absolutely* nothing in exchange for the extinguishment of their claims against the Sacklers and other released parties.

The bankruptcy court confirmed the plan over the objections of, among others, the United States Trustee, eight States, the District of Columbia, and the Canadian Creditors, determining that it possessed constitutional authority, statutory authority, and jurisdiction to impose the Plan's non-debtor releases in Section 10.7(b). J.A. 375-418. And it rejected the Canadian Creditors' claims of sovereign immunity, assuming that they had waived immunity by appearing in the bankruptcy. Bankr. Ct. Doc. 3684, 122, 137 (Aug. 25, 2021).

The district court vacated the bankruptcy court's Confirmation Order. J.A. 640. The district court held that the bankruptcy court lacked "constitutional authority," under *Stern* v. *Marshall*, 564 U.S. 462 (2011), to impose the non-debtor releases, although it determined this only meant a "far less deferential" *de novo* standard of review for the bankruptcy court's "findings of fact." J.A. 727-728. The district court then held that the bankruptcy court possessed "subject matter jurisdiction" to impose the releases (*id.* 735-747) but lacked "statutory power" to do so (*id*. 748-803).

A divided panel of the court of appeals reversed the district court's decision. The majority agreed with the district court that the bankruptcy court had subject-matter jurisdiction to impose the release. J.A. 873-876. It likewise agreed that the claims encompassed by the third-party release are "non-core" matters under *Stern*. J.A. 868.

The majority disagreed with the district court, however, on whether the releases were statutorily authorized, determining that two provisions of the Bankruptcy Code, read together, authorize bankruptcy courts to approve nonconsensual third-party releases. J.A. 876. The first, 11 U.S.C. 105(a), 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. The second, 11 U.S.C. 1123(b)(6), states that a Chapter 11 plan of reorganization "may[] * * * include any other appropriate provision not inconsistent with the applicable provisions of" the Code.

The majority acknowledged that Section 105(a) itself does not confer independent authority on bankruptcy courts, requiring its use to be "tied to another Bankruptcy Code section." J.A. 876-877. (citation omitted). And the majority found the necessary authority by linking Section 105(a) to Section 1123(b)(6), interpreting that provision to permit courts sitting in bankruptcy to take any action not "expressly forbid[den]" by the Code, based on this Court's decision in *United States* v. *Energy Resources Co., Inc.*, 495 U.S. 545 (1990). J.A. 877-878. The majority therefore held that the Code's refusal to grant any express authority to allow third-party releases granted bankruptcy courts discretion to impose releases of any scope, finding this conclusion to be consistent with circuit precedent approving third-party releases in other contexts. J.A. 881-885.

The majority then adopted a seven-factor balancing test to guide bankruptcy courts in issuing 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 the 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. J.A. XX. 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. J.A. 886-890.

The majority also rejected the argument that due process barred the releases. J.A. 896-899. The majority acknowledged that the extinguished claims constituted property interests protected under the Due Process Clause but held that the bankruptcy court did not violate due process by terminating nondebtors' opioid claims against other nondebtors without consent, saying that those affected were not entitled to anything beyond "adequate notice and a meaningful opportunity to be heard" before their rights were extinguished. J.A. 898 (citation omitted).

The majority also rejected the argument that the releases violated the Canadian Creditors' sovereign immunity, concluding that it was not "clear that sovereign immunity is even implicated by the release[]"—because the release does not impose "monetary damages or any affirmative relief," J.A. 989-900 (quoting *Hood*, 541 U.S. at 450), and that the Canadian Creditors had "waived" immunity, J.A. 900.

Judge Wesley "reluctantly concur[red]." J.A. 903. He agreed with the majority that circuit precedent authorized third-party releases but wrote separately to express concern that such releases were "without any basis in the Code." J.A. 904. He concluded that "[t]he Bankruptcy Code is silent on the matter" of third-party releases (J.A. 909) and that "more than simple statutory silence" is required if "Congress were to intend a major departure from the Code" (J.A. 913 (quoting *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 465 (2017)) and its "central focus" on the "adjustment of the debtor-creditor relationship," J.A. 909-910 (quoting *Wright*, 304 U.S. at 513–514. The "independent obligations" of "third-party nondebtors" were outside that relationship, and therefore "are, simply, a nonconcern." J.A. 910.

Judge Wesley also criticized the majority's attempt to overcome the Code's refusal to allow third-party releases by invoking bankruptcy courts' "residual equitable authority" as embodied in 11 U.S.C. 105(a) and 1123(b)(6). J.A. 910. Judge Wesley noted that *Energy Resources* held that the powers conveyed by Section 1123(b)(6) extend only to the "authority to modify *creditor-debtor relationships*." J.A. 911 (citing 495 U.S. at 549) (emphasis in original). He therefore concluded that the bankruptcy court's "well" of residual authority was not "so bottomless" as to permit "[r]eleasing nondebtors from their own liability—provided for under state law" and "extinguish[ing] an individual's claims against a non-debtor without their consent, and without providing any value in return." J.A. 911, 912. Judge Wesley noted that the Sackler release was broader than Congress made "available to a debtor in bankruptcy." J.A. 906. He concluded that the authority necessary to impose third-party releases was unlike "anything traditionally recognized at equity" and that if Congress "intended so extraordinary grant of authority, it should say so." J.A. 913.

SUMMARY OF THE ARGUMENT

Judge Wesley got it exactly right. As the traditional tools of statutory interpretation all confirm, bankruptcy courts lack statutory authority to impose third-party releases as broad as the Sackler release outside the limited (and inapplicable) context of asbestos bankruptcies.

Nothing in the Bankruptcy Code permits bankruptcy courts to impose such third-party releases. And the deployment of this potentially abusive device anywhere outside the strict confines of asbestos cases, where Congress has explicitly provided for them, violates bedrock bankruptcy principles recognized throughout the Code and throughout our nation's history. These principles reserve bankruptcy's most extraordinary bargain-breaking, rights-extinguishing powers for modifying or extinguishing only one kind of relationship: the relationship between debtor and creditor. Those principles also reserve the core protections of bankruptcy—like halting litigation and obtaining discharge from liability—for debtors, and for debtors alone. Those debtor protections come with a host of responsibilities designed to protect creditors that the debtor cannot escape, among them the obligation to stake one's assets for the satisfaction of debts. And those burdens cannot be escaped by anyone who would seek the extraordinary relief of a discharge. This is bankruptcy's *quid pro quo*: Bankruptcy's debtor benefits cannot be severed from bankruptcy's burdens. The bitter comes with the sweet.

These principles are so firmly rooted in the Bankruptcy Code's fabric that this Court's precedent demands an extraordinary expression of Congressional intent to overcome them. Something as express, clear, and specific as the "requirements" Congress has imposed in the area of asbestos bankruptcies in Section 524(g). Congress's refusal to provide that clear authorization outside the asbestos bankruptcy context dooms its imposition in any other context. But it is not merely Congress's *silence* that dooms third-party releases outside the asbestos context—it is Congress's *express condemnation* of their use outside that limited context. Third-party releases violate Section 524(e)'s prohibition against non-debtor discharges. They deny claimants the right to trial by jury in violation of 28 U.S.C. 1411(a). And the particular release at issue here violates the bar against discharge of non-dischargeable debts in 11 U.S.C. 523(a)(2)(A). Accordingly, text structure, history, precedent, and purpose all confirm that the Code does not permit broad, nonconsensual third-party releases outside of asbestos cases—especially releases of the breadth and scope of the Sackler release.

That strict, express prohibition against third-party releases cannot be overcome through the limited residual equitable authority Congress has vested in bankruptcy courts. It would take an extraordinarily clear and specific textual authorization to convey authority to impose such extraordinary relief, because this Court will not infer from silence any intent to displace fundamental bankruptcy boundaries like its *quid pro quo* balancing of interests and its exclusive focus on adjustment of the debtor-creditor relationship.

The "residual" equitable authority Congress has provided to bankruptcy courts in Sections 105(a) and

1123(b)(3) is clearly not up to the task. *United States* v. *Energy Resources Co., Inc.*, 495 U.S. 545, 549 (1990). These general provisions say nothing about third-party releases specifically. Yet the court of appeals concluded that these provisions authorize bankruptcy courts to impose releases anyway, interpreting them to convey a vast power allowing bankruptcy courts to take *any* action not "expressly forbid[den]" by the Code. J.A. 878. That would be an extraordinary power indeed—dangerous even. But even the vast powers the court below imagined bankruptcy courts to possess are *still* not broad enough to authorize third-party releases, because third-party releases *expressly* violate several provisions of the Code.

In any event, the "residual" equitable powers Congress has actually reposited in Sections 105(a) and 1123(b)(6) are considerably more modest, designed to work within bankruptcy's traditional boundaries, not trample them. Section 105(a) simply provides bankruptcy courts with the general power to issue orders, providing no substantive powers concerning the kinds of orders those courts might issue. And Section 1123(b)(6), a catchall tucked at the tail-end of a list of items that may be included in a Chapter 11 reorganization plan, expressly forbids bankruptcy courts from acting unless "appropriate" and whenever "inconsistent" with the Code, not merely when expressly forbidden by it. Further, as this Court has already explained, Section 1123(b)(6) only permits modifications of debtor-creditor relationships. Modifications of other relationships, like those between one nondebtor and another, simply lie beyond its reach. There are sound reasons, grounded in text, precedent, constitutional considerations, and plain common sense, why those boundaries should remain fixed in place. And in no event should these boundaries be replaced by the atextual and amorphous "factors" the court of appeals identified to guide courts in approving third-party releases under Sections 105(a) and 1123(b)(6). J.A. 886.

Finally, this Court has jurisdiction to hear this challenge to the Sackler release because at least one party before the Court has standing to pursue it: the Canadian Creditors. There is no legitimate question that the Canadian Creditors are injured by the bankruptcy court's illegal imposition of the Sackler release because that release will have a direct and tangible effect on their claims. While the Sackler release contains a carve-out for claims brought by Canadians, the carve-out's amorphous language leaves it unclear what claims actually survive through the carve-out, and which are extinguished through the carve-out's recapture provision. While the Canadian Creditors believe and plan to argue that the release does not capture all of their claims, there is a reasonable chance that it extinguishes *some* of their claims. And the Sacklers themselves believe it extinguishes *all* of them. Even if the Sacklers are dead wrong, protracted litigation on that question is inevitable and will cost the Canadian Creditors time, effort, and tangible expense. That injury is sufficient to convey standing under Article III.

The Court therefore can and should reverse the judgment of the court of appeals.

ARGUMENT

I. The Bankruptcy Code does not authorize third-party releases outside of the asbestos context.

The release approved by the bankruptcy court in this case "conclusively, absolutely, unconditionally, irrevocably, fully, finally, forever[,] and permanently release[s]" the

Sacklers and hundreds (if not thousands) of other non-debtors from virtually all opioid-related liability. J.A. 265. The release extinguishes all such liabilities without consent, and without compensation, including those relating to claims of fraud that are not dischargeable in bankruptcy. And neither the Sackers nor any other released party entered bankruptcy themselves.

But Congress intended bankruptcy's "fresh start" to be reserved for the "debtor," and *only* the debtor. *Grogan*, 498 U.S. at 286 (internal quotation omitted.) And the Code's text, structure, history, and purposes all confirm that Congress did not mean for bankruptcy to be used as a convenience for well-heeled individuals and blue-chip companies to shed liabilities without entering bankruptcy themselves through nonconsensual third-party releases.

A. Congress has prohibited third-party releases outside the limited context of asbestos bankruptcies.

Nothing in the Bankruptcy Code expressly permits third-party releases outside of the asbestos context. And this inherently abusive device violates both bankruptcy's fundamental boundaries and the Code's express terms.

1. Third-party releases violate the Code's fundamental boundaries.

a. Third-party releases violate the fundamental *quid pro quo* that lies at the very heart of the Bankruptcy Code, which reserves bankruptcy protections solely for the debtor. The jurisdiction of the bankruptcy court is "premised on the debtor and his estate." *Tenn. Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 447 (2004).

The debt-collection-halting automatic stay extends only to "the debtor" and the "property of the estate." 11 U.S.C. 362(a)(1)-(8), (b)(1), (b)(2)(C). Only "the debtor" may obtain a bankruptcy "discharge." 11 U.S.C 727(a); *see also id.* 524(a), 1141(d)(1)(A). And the only debts that are subject to "settlement or adjustment" in a Chapter 11 reorganization plan are those "belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3)(A).

The creditor-protecting burdens of bankruptcy likewise fall on debtors. Debtors cannot choose how much to pay on their debts but must apply substantially all of their assets to the satisfaction of creditors. See 11 U.S.C. 1129(a)(7). Nor can debtors choose which creditors to pay, or how much they should receive. Those questions are decided exclusively by bankruptcy's priority system for distributing estate funds to creditors. 11 U.S.C. 507, 1129(b)(2). Debtors must also submit the mundane details of their daily lives and business operations to bankruptcy courts' exacting scrutiny and reluctant approval. See 11 U.S.C. 363, 521(a), 1129(b). By the Code's express terms, the protections of bankruptcy therefore extend only to debtors. They do not extend to nondebtors. And they cannot be enjoyed on *anyone* who seeks to avoid the debtor's responsibilities.

Yet with third-party releases, nondebtors seek to discard the bitter of bankruptcy while retaining the sweet—obtaining a discharge of liabilities while evading bankruptcy's creditor protections and retaining the bulk of their assets for themselves. They get to choose which creditors to pay, how much they should receive, and otherwise go about their lives free from supervision and absolved of further liability on those debts.

b. Only once has Congress seen fit to authorize such a dramatic deviation from bankruptcy's *quid pro quo*: in 11 U.S.C. 524(g), which allows for "channeling injunctions," the third-party release's close cousin, to deal with special problems of disease latency endemic in asbestos cases. Section 524(g) followed the "unprecedented" injunction entered "in connection with the bankruptcy of the nation's leading asbestos manufacturer, the Johns Manville Corporation." J.A. 754. Section 524(g) sets up a detailed scheme under which bankruptcy courts may enjoin actions by creditors against "third part[ies]" and "channel" them to a trust funded by those third parties. 11 U.S.C. 524(g)(4)(A)(i).

Congress recognized that the Manville trust provided a vital solution to a "unique problem posed by asbestos-related bankruptcies"—the fact that "symptoms of asbestos-related illness may not manifest until decades after exposure," raising the risk that "potential claimants against an asbestos manufacturer's bankruptcy estate may not know of their claims until years after the estate has been depleted by other claimants." *Pfizer, Inc.* v. *Law Offices of Peter G. Angelos (In re Quigley Co., Inc.)*, 676 F.3d 45, 58 (2d Cir. 2012). Channeling injunctions directing all claims against nonbankrupt third parties to a trust funded by those third parties provided a means for orderly distributions "to both present and future claimants." *Id.* at 48.

Congress attached a series of express, detailed, and carefully drawn "requirements" to the use of channeling injunctions in asbestos cases. 11 U.S.C. 524(g)(2)(A) & (B). There are requirements governing (1) how the trusts must be structured, funded, and dedicated to "pay claims and demands" (in subpart (2)(B)(i)(II)-(IV)); (2) limiting the universe of those who might benefit from the injunction to those with four specific legal relationships to the debtor (in subpart (4)(A)(ii); (3) imposing a detailed set of findings that the bankruptcy court must make to justify such extraordinary relief (in subpart (2)(B)(ii)); and (4) requiring appointment of a "representative" to speak for those with as-yet unmanifested asbestos-related diseases (in subpart (4)(B)(i)). And last, but certainly not least, under Section 524(g), channeling injunctions are only available for debtors faced with liabilities related to "the presence of, or exposure to, asbestos or asbestos-containing products." 11 U.S.C. 524(g)(2)(B)(i)(I).

The singular exception of Section 524(g) overwhelmingly proves the rule. Where Congress desires to permit third-party releases, it says so clearly, explicitly, and in extraordinarily detailed fashion through "a comprehensive scheme" that "deliberately targeted specific problems with specific solutions." *Varity Corp.* v. *Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting). Congress has directed considerable attention to the obvious risks of abuse that attend third-party releases and has erected statutory boundaries designed specifically to address the problems associated with their use.

The existence of this exacting, comprehensive statutory scheme suggests that it provides the exclusive path for obtaining a third-party release. The relief provided in Section 524(g), a "precisely drawn, detailed statute[,] preempts" any attempt to obtain such relief through *any* other means. *Hinck* v. *United States*, 550 U.S. 501, 506-507 (2007) (holding tax court jurisdiction exclusive, "despite Congress's failure explicitly" to say so, under "well-established principle" that "a precisely drawn, detailed statute preempts more general remedies" (internal quotation marks omitted)); see also *United States* v. *Fausto*, 484 U.S. 439, 453-455 (1988) (holding that Congress's decision in the Civil Service Reform Act to provide judicial review of adverse personnel actions only for certain federal employees impliedly forbade other employees from seeking review under more general remedies predating CSRA).

The Code's larger structure only emphasizes the point. It is bankruptcy bedrock that the Bankruptcy Code is devoted to the "subject of the relations between a[] * * * debtor[] and his creditors, extending to his and their relief." *Cent. Va. Cmty. College* v. *Katz*, 546 U.S. 356, 371 (2006) (quoting *Wright* v. *Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-514 (1938)). The Code contains a "meticulous—not to say mind-numbingly detailed" —system, laid out in hundreds of statutory provisions, concerning that objective. *Law v. Seigel*, 571 U.S. 415, 424 (2014). But the Code contains only one provision, Section 524(g), devoted to relations between nondebtors.

The overwhelming number of Code provisions devoted to the former subject, combined with the single, isolated statute devoted to the latter, confirms that bankruptcy courts can *only* adjust the relations between debtors and creditors. And outside the limited asbestos bankruptcy context, nondebtors have no right to adjust their relationships with other nondebtors. "[W]ere [Congress] to intend a major departure" from the fundamental principles that bankruptcy exists solely to adjust the debtor-creditor relationship, and the burdens of bankruptcy must follow their benefits, "more than simple statutory silence" is required. *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 465 (2017). It takes some "affirmative indication of intent. *Ibid*. That alone dooms the Sackler release.

2. Third-party releases conflict with the Code's express terms.

But third-party releases do not simply violate fundamental boundaries reflected in the Code's text and structure. They also conflict with specific provisions of the Code.

a. The first is the prohibition against nondebtor discharge in Section 524(e). 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 provision is best read as a strict bar against discharge of debts and liabilities belonging to nondebtors. That, after all, is how Congress treated Section 524(e) when it included a clause in Section 524(g) making third-party releases available "[n]otwithstanding the provisions of section 524(e)." 11 U.S.C. 524(g)(4)(A)(ii). This statutory workaround would be necessary only if Congress interpreted Section 524(e) to generally prohibit nondebtor discharges, and believed the prohibition must be lifted in order to allow the specific nondebtor discharge permitted in Section 524(g). And there is evidence Congress enacted Section 524(g) specifically to respond to concerns raised in circuit decisions like *American Hardwoods, Inc.* v. *Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 625-626 (9th Cir. 1989), which held Section 524(e) to be an obstacle to channeling injunctions like the Manville trust. *Injunctions in Mass Tort Cases in Bankruptcy: Hr'g before the Subcommittee on Economic & Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 79 (Apr. 1, 1992) (noting that "no explicit authority exists for this procedure," and "*American Hardwood*" specifically highlights the problem); see also *The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 12 (1993).

b. Nonconsensual third-party releases like the Sackler release also violate 28 U.S.C. 1411(a), which prohibits the Code from "affect[ing] 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." Even if third-party releases like the Sackler release preserve claimants' personal injury and wrongful-death claims against *debtors*, J.A. 561, 590-591, they extinguish claimants' personal-injury and wrongful-death claims against nondebtors, JA 608-609.

c. The particular release at issue in this case also violates the prohibition against discharge of non-dischargeable debts. In Section 523(a) of the Code, Congress has forbidden the discharge of debts for fraud, breach of fiduciary duty, and willful and malicious injury in individual bankruptcies when creditors timely object. 11 U.S.C. 523(a)(2), (4), (6). But the Sackler release covers all liabilities related to Purdue-manufactured opioids, making no exception for claims of fraud, malicious injury, or other nondischargable claims. And that means the Sackler release provides released parties more relief than if they had entered bankruptcy themselves.

3. Attempts to overcome these conflicts are unavailing.

a. Both the court below and Respondents have made numerous attempts to overcome these statutory conflicts. But their efforts are unavailing.

Section 524(g). Attempting to smooth over the jarring contrast between Congress's express authorization of third-party releases in the asbestos context with its refusal to provide such authority in other contexts, the court of appeals declared Section 524(g)'s clear, express, extensive and painstakingly crafted "requirements" to be merely optional and avoidable at will. J.A. 883-884. For support, the court of appeals relied on an uncodified "rule of construction" included in the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994 Act), which added Section 524(g) to the Code. See J.A. 883-884 (citing 11 U.S.C. 524(g) (note)). That rule of construction states that nothing in the 1994 Act "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Pub. L. 103-394, 111(b).

But the court of appeals read too much into this simple rule of construction, which says nothing about third-party releases specifically, and cannot be read as a declaration of intent to render the detailed statutory scheme it had just enacted obsolete and evadable at will. Rather, the rule's present-tense expression of intent to preserve authority "the [bankruptcy] court *has*" to issue injunctions suggests that, with enactment of Section 524(g), Congress did not mean to displace other statutory mechanisms that courts had previously identified to justify releases in the special asbestos context—such as the power to sell property "free and clear" of liens in 11 U.S.C. 363(f)(4), which formed the basis for the Manville channeling injunction. See *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988). That rule cannot be read to suggest the existence of some free-floating power to issue third-party releases outside Section 524(g)'s strictures, let alone endorse the proposition that bankruptcy courts can exercise such power through general "residual" equitable powers that had never been interpreted to allow them before the enactment of Section 524(g). *Energy Resources*, 495 U.S. at 549. There is simply no way Congress, in enacting a provision to *facilitate* channeling injunctions in asbestos cases, would make them *harder* to obtain in asbestos cases than in other kinds of cases.

b. **Section 524(e).** The conflict between the court of appeals' position and the Code's plain language is even starker when it comes to Section 524(e)'s prohibition against nondebtor discharge and the court of appeals' attempt to explain away that conflict. The court of appeals concluded that Section 524(e) does not prohibit nondebtor discharges, but merely assures that a debtor's co-borrowers "remain[] liable notwithstanding the debtor's discharge of its obligation." J.A. 879. It arrived at that interpretation by positing that Congress might have used stronger language in Section 524(e) if it intended to prohibit nondebtor discharge. J.A. 880 (quoting *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008)) (noting that Congress "would have used the mandatory terms 'shall' or 'will' rather than the definitional term 'does'" if it intended for Section 524(e) to bar nondebtor discharges). But interpreting Section 524(e) to merely reiterate that a borrower remains liable after its co-borrower goes into bankruptcy reduces it to mere throat-clearing surplusage, entirely duplicative of 11 U.S.C. 1141(d)(1)(a) (not to mention the entire thrust of the Code), which already make clear that only "the debtor" gets a "discharge." See also 11 U.S.C. 524(a), 727(a). And in any event, this Court must interpret Section

524(e) "on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). And Congress itself thought that the statute it wrote in 524(e) prohibited nondebtor discharge—which is why it felt the need to lift that statute with Section 524(g)'s "notwithstanding clause" to allow the nondebtor discharge in Section 524(g).

Purdue has its own explanation for the "notwithstanding" clause—saying that its employment in Section 524(g) need not necessarily require a conflict between Sections 524(e) and 524(g) but might merely explain "which of two or more provisions prevails *in the event* of a conflict." Debtors' Stay Opp. 53 n.12 (emphasis added). That explanation might work in situations where a "notwithstanding" clause is used as a generic "catchall" before or after a long list of provisions, as in "[n]otwithstanding anything herein to the contrary." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012). This sort of "catchall" provision provides a "fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail." *Ibid.* And it makes sense to approach such catchall provisions with caution, to avoid upending a plain-text meaning in search of conflicts within a long list of items that may not exist. But Section 524(g)'s "notwithstanding" clause is no catchall. It references Section 524(e) specifically and exclusively. A "just-in-case" catchall serves no purpose. The Court cannot disregard a "notwithstanding" clause that serves such an obvious purpose.

The court of appeals next concluded that third-party releases do not violate Section 524(e) because they do not offer the "umbrella protection" of a discharge and usually relate only to "specific issues." J.A. 872 (quoting *MacArthur Co.*, 837 F.2d at 91). But a third-party release provides exactly the same protection of a discharge: "The discharge order *releases* a debtor from personal liability with respect to any discharged debt * * * and * * * operat[es] as an injunction to prohibit creditors from attempting to collect or to recover the debt." *Hood*, 541 U.S. at 447 (emphasis added). And while releases only concern *certain* issues, discharges only extinguish *some* debts because some debts are nondischargeable. There is no difference.

B. The residual equitable authority Congress provided in Section 105(a) and Section 1123(b)(6) cannot override the Code's prohibition against third-party releases.

The court of appeals recognized that nothing in the Code permits bankruptcy courts to impose third-party releases in Chapter 11 reorganization plans. Yet it permitted bankruptcy courts to impose them anyway in the exercise of their "residual" authority as "courts of equity." *Energy Resources*, 495 U.S. at 549.

Bankruptcy courts possess no font of unenumerated equitable power. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Law*, 571 U.S. at 421 (internal quotation omitted). Yet the court of appeals held that two provisions, read together, provided sufficient equitable authority to allow third-party releases: 11 U.S.C. 105(a) and 1123(b)(6). J.A. 876.

Neither of these statutory provisions says anything about third-party releases, but the court of appeals concluded that they contain such vast power as to necessarily encompass them. Based on the Court's decision in *Energy*

Resources, this Court's only decision interpreting the "residual" equitable powers conferred by Section 1123(b)(6), the court below interpreted that provision to permit bankruptcy courts to do all but "what the Code *expressly* forbids." J.A. 878. That vision of bankruptcy power is startlingly broad: It allows bankruptcy courts, exercising mere "residual" equitable powers, to take virtually any action to facilitate a Chapter 11 reorganization plan, unless the Code contains some express prohibition against it. Throw people in jail. Transfer one person's business to a competitor. And of course, extinguish the legal rights of anyone, anywhere, in exchange for nothing.

And if the Sackler release—which, to the court of appeals, fell within this power's ambit—is any guide, this equitable power dwarfs the specific powers expressly granted under the Code. It would permit courts to discard section 524(g)'s "requirements" for third-party releases, discharge nondebtors, and extinguish unextinguishable debts.

Of course, even this dangerously broad version of bankruptcy courts' residual powers would *still* not be broad enough to permit third-party releases, which are in "express[]" conflict (J.A. 825) with several Code provisions—including Sections 523(a)(2), (4), (6) and 524(e), as well as non-Code provisions like 28 U.S.C. 1411(a). But more fundamentally, the vision of bankruptcy courts' "residual" equitable powers the court of appeals adopted bears no resemblance to reality. And no matter how broad these equitable powers might be, they cannot and should not be interpreted to authorize bankruptcy courts to impose third-party releases.

1. Neither Section 105(a) nor Section 1123(b)(6) authorizes bankruptcy courts to impose third-party releases.

a. The court of appeals correctly recognized that Section 105(a) alone cannot authorize third-party releases. Section 105(a) 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. This language merely empowers bankruptcy courts, creatures of statute lacking inherent powers, "to issue injunctions and take other necessary steps in aid of their jurisdiction." *United States* v. *Sutton*, 786 F.2d 1305, 1037 (5th Cir. 1986). Any invocation of Section 105(a) must therefore be "tied to another Bankruptcy Code section." J.A. 877 (citation omitted). See 2 *Collier on Bankruptcy* ¶ 105.01[1].

b. Section 1123(b)(6) cannot provide the necessary link. This catchall provision tucked at the end of Section 1123(b)'s list of permissible contents for Chapter 11 reorganization plans could hardly be interpreted to empower bankruptcy courts to take any action not "expressly forbid[den]" by the Code. J.A. 878. By its text, it simply authorizes bankruptcy courts to include "any other appropriate provision not *inconsistent* with" the Code. 11 U.S.C. 1123(b)(6) (emphasis added). That difference is significant, exhibiting Congress's intent to confine bankruptcy courts' equitable powers to matters *consistent* with bankruptcy's fundamental boundaries, such as the inherent *quid pro quo* of bankruptcy's benefits and burdens, as well as its exclusive focus on adjustment of the debtor-creditor relationship—even when those boundaries are not explicitly stated. Section 1123(b)(6) does not authorize bankruptcy courts to trample those boundaries by severing bankruptcy's litigation-halting benefits from its creditor-protecting burdens or allow adjustments of nondebtors' relationships with each other—as third-party releases inevitably do.

c. *Energy Resources* confirms, rather than undermines, this interpretation of Section 1123(b)(6). That case *insists* that bankruptcy courts obey bankruptcy's fundamental boundaries when exercising their residual equitable powers under that provision, by recognizing that Section 1123(b)(6) provides only the "authority to modify *creditor-debtor relationships*." 495 U.S. at 549 (emphasis added).

The court of appeals dismissed this statement as dicta (J.A. 877), but it was not only essential to the case's result, it is required to remain faithful to the Code. *Energy Resources* held that a bankruptcy court possessed power to order the IRS to modify the manner in which a debtor had to apply its payments on back taxes, even though the modification conflicted with IRS regulations and the Code did not explicitly permit it. 495 U.S. at 549. But crucially, the bankruptcy could only do so because the IRS tax debt at issue was owed by the *debtor* to a *creditor*, therefore falling neatly within the bankruptcy court's power to modify the debtor-creditor relationship. *Ibid.*

Energy Resources therefore had to recognize that Section 1123(b)(6) permits only modifications of debtor-creditor relationships in order to explain how the bankruptcy court's action was permissible. And that recognition is one the Code demands. After all, Section 1123(b)(6)'s catchall follows a list of items in Section 1123(b) that are—like the remainder of the Code—confined to matters involving the debtor's relationship with creditors. Under Section 1123(b), a plan can "impair or leave unimpaired any class of claims" *against the debtor*; "provide for the assumption, rejection, or assignment" of contracts "*of the debtor*," provide for "the settlement or adjustment of any claim or interest *belonging to the debtor* or the estate," provide for the "sale" of "property of the estate," or "modify the rights of holders of secured claims" or "unsecured claims" *against the debtor*. 11 U.S.C. 1123(b) (emphasis added). Claims against nondebtors are never mentioned. The residual equitable authority in Section 1123(b)(6) must therefore be exercised within those same confines.

Once the residual equitable powers in Sections 105(a) and 1123(b)(6) are corralled into their appropriate boundaries consistent with bankruptcy's fundamental limits, it is clear that third-party releases, which upend those norms, cannot be permitted. Bankruptcy courts' "well" of "residual authority" is simply "not so bottomless" as to allow it. J.A. XX (Wesley, J., concurring).

2. Bankruptcy courts cannot override fundamental bankruptcy principles through exercise of their residual equitable powers.

Yet even if the raw textual boundaries of Sections 105(a) and 1123(b)(6) were expansive enough to encompass third-party releases, those provisions still would not empower bankruptcy courts to impose them, because they say nothing *specific* about third-party releases.

a. This Court recognizes that Congress does not lightly displace "fundamental" bankruptcy boundaries respected throughout the Code's text and structure. To authorize a "major departure" from those fundamentals, "more than simple statutory silence" is required. *Jevic*, 580 U.S. at 465. The excessively generic grants of authority provided in Sections 105(a) and 1123(b)(6) therefore cannot provide the requisite specificity to suggest Congress permitted the massive departure of third-party releases. No matter how "inclusive may be the general language of [these] statute[s]," *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotation omitted), they are simply "too weak a reed upon which to rest so weighty a power," *Jevic*, 580 U.S. at 466.

b. This Court has acted numerous times to prevent bankruptcy courts from authorizing departures from the Code's fundamental limits through exercise of similarly generalized grants of equitable authority. In *Jevic*, it was the rules of priority, which determine "the order in which the bankruptcy court will distribute assets of the estate." 580 U.S. at 457. The Court held that these rules could not be discarded in a "structured dismissal" of a Chapter 11 bankruptcy under 11 U.S.C. 349(b), even though the Code provides bankruptcy courts with broad power, "'for cause'" to alter a Chapter 11 dismissal's "ordinary restorative consequences" to "protect rights acquired in reliance on the bankruptcy case." 580 U.S. at 456, 466 (quoting 11 U.S.C. 349(b)).

In *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 642 (2012) the Court was concerned with one of the bedrock creditor bankruptcy protections: a secured creditor's right to "credit-bid" in any auction of the debtor's secured assets, "using the debt it is owed to offset the purchase price." The Court held that this rule could not be discarded in a cramdown plan under 11 U.S.C. 1129(b)(2)(A), by offering the secured creditor the "indubitable equivalent" of the secured creditor's secured claim under the general catchall authority provided in Section 1129(b)(2)(A).

And in *Law* v. *Siegel*, 571 U.S. 415 (2014), the Court considered one of the most important debtor protections in individual bankruptcies—the "homestead exemption" protecting the equity in a debtor's residence. *Id.* at 418 (citing 11 U.S.C. 522(d)(1)). The Court held that a bankruptcy court's "inherent sanctioning powers" permitting it to discipline a debtor for misbehavior did not allow a bankruptcy court to impose a "surcharge" upon the homestead exemption—even to "defray" the "attorney's fees incurred" as the result of the misbehavior. *Id.* at 420, 421, 422. The Court decided that no such power could exist in light of the Code's "carefully calibrated exceptions and limitations." *Id.* at 424.

c. The bankruptcy's fundamental *quid pro quo* and strict refusal to permit modifications of nondebtors' rights against other nondebtors are no less fundamental than the barriers at issue in *Jevic*, *Radlax*, and *Law*—and just as "carefully calibrated." 571 U.S. at 424. It would therefore take some "express[]" statement of congressional intent before bankruptcy courts could transgress those boundaries to impose third-party releases through their exercise of residual equitable authority. *Jevic*, 566 U.S. at 645. Something as clear and specific as Congress has done in the area of asbestos bankruptcies in Section 524(g). Congress's tacit refusal to provide anything like that positive expression approving those releases therefore speaks as loudly as its express prohibitions against them. And just as the Court has acted to prevent "major departures" from bankruptcy's fundamental limits in *Jevic*, *Radlax*, and *Law*, it must act now to prevent those principles from being discarded entirely in this case.

3. The constitutional concerns with third-party releases also require their issuance to be confined to bankruptcy's fundamental limits.

There are also constitutional reasons to confine third-party releases within bankruptcy's fundamental limits. 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 less troublesome construction is "fairly possible." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982) (citations omitted). And third-party releases raise such serious constitutional problems that the Court should look for the clearest possible authority before approving their use and decline to interpret bankruptcy courts' "residual" equitable authority to authorize that use. *Energy Resources*, 495 U.S. at 549.

a. Third-party releases like the Sackler release, which extinguish claims without consent and without compensation, deprive non-debtors of 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."). They do so without consent, without compensation, without providing the affected claimants their "day in court" *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (quotation omitted), and without affording those claimants any opportunity to opt in or out of the release.

That falls well short of what due process requires. Normally, "'[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.'" *Martin*, 490 U.S. at 770). It may be possible for a court to summarily adjudicate the rights of non-parties "'[w]here a special remedial scheme exists'" to adjudicate those rights in a manner "'consistent with due process.'" *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin*, 490 U.S. at 762 n.2). But even in the special remedial scheme of class actions, which are specifically designed to facilitate the mass resolution of non-parties' 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). The bankruptcy court's failure to provide that opt-out right alone makes the third-party release in this case constitutionally dubious, raising substantial questions whether Congress would have ever authorized them, and making any interpretation of the Code to allow them constitutionally suspect.

b. The court of appeals dismissed the release's constitutional failings because it was entered "[i]n bankruptcy." J.A. 898. But due process rights cannot be dismissed merely by declaring "Bankruptcy!" The reason bankruptcy is the paradigm case of a remedial scheme that permits adjudication of non-parties' property rights (see *Martin, supra*) is that Congress has provided a "mind-numbingly detailed" scheme for protecting creditors' rights in the Code. *Law*, 571 U.S. at 424.

But third-party releases deny affected parties access to that scheme by design. By refusing to declare individual bankruptcy themselves, the Sacklers did not have to subject themselves to bankruptcy court oversight to prevent dissipation of assets. 11 U.S.C. 521(a). They avoided giving creditors the right to challenge their actions through the process of "proof allowance, and distribution" of claims, *Gardner*, 329 U.S. at 574, "in which the claims of all creditors are considered fairly, in accordance with established principles." H.R. Rep. No. 996, at 13.

Avoiding bankruptcy also allowed the Sacklers to evade bankruptcy's priority scheme (11 U.S.C. 507, 1129(b)(2)), instead allowing them to decide which creditors to pay, and how much, while keeping the bulk of their fortune for themselves. And avoiding bankruptcy gave the Sacklers unchallengeable authority to offer nothing to their own affected creditors as compensation for the forced extinguishment of their claims. Their $6 billion contribution is earmarked to pay *Purdue*'s debts. J.A. 704. And many claimants, like the Canadian Creditors, have no access to those trust funds, being allotted nothing more for the extinguishment of their rights than a pro rata share of the $15 million reserved for general unsecured claims. J.A. 235. The Sacklers even managed to evade Section 524(g)'s detailed scheme assuring fairness for affected parties in asbestos channeling injunctions, which does much to protect the rights of claimants affected by the release. After so thoroughly denying claimants access to any part of bankruptcy's remedial scheme, that scheme cannot be held up as justification to allow summary adjudication of claimants' property rights. And because such evasions are intrinsic in third-party releases, it is hard to imagine how they could be squared with due process in any non-asbestos context.

c. Third-party releases also threaten the sovereignty of many governmental bodies who would otherwise enjoy immunity from being involuntarily hailed into our courts. *Hood*, 541 U.S. at 450 (noting that "affirmative relief" obtained against "unwilling" sovereigns" through "a coercive judicial process" is an assertion of personal jurisdiction and a violation of sovereign immunity). That impacts the Canadian Creditors because they all enjoy sovereign immunity. The First Nation creditors enjoy immunity because "As separate sovereigns pre-existing the Constitution," Indian tribes have long been recognized to have the immunity from suit "traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56, 58 (1978). The immunity enjoyed by the Canadian municipalities, by contrast, comes from the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq*. ("FSIA"), which includes the "political subdivision[s]" of a state, which includes "all government units beneath the central government, including local governments," among the entities that are "immune from the jurisdiction of the courts of the United States." *Id.* 1603(a), 1604; H.R. Rep. No. 94-1487, at 15 (1976).

While sovereign immunity is not infringed when courts exercise the "*in rem*" jurisdiction, deciding matters relating to the estate "*res*," they act *in personam*, and in violation of sovereign rights, when they adjudicate matters between nondebtors and other nondebtors bearing only indirect and tangential relationships to the res. *Hood*, 541 U.S. at 446, 453.[2]

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[2] While Congress waived sovereign immunity in Section 106(a) of the Code, and *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Coughlin*, 143 S. Ct. 1689 (2023) held that this abrogation applies to native tribes, that abrogation is not complete, and does not apply to an attempt to release nondebtors' claims against nondebtors under 1123(b)(6). That provision is not among the laundry list of provisions in 11 U.S.C. 106(a)(1) concerning which "sovereign immunity is abrogated." And it likewise does not concern the waiver of immunity

And for many—if not most—of those affected, the release creates foreign policy tensions—because, like the Canadian Creditors, many of the sovereigns released are *foreign* sovereigns. That includes all of the Canadian creditors. Those tensions are exacerbated by the fact that foreign sovereigns fare worse than domestic non-sovereigns, because they are denied access to trust funds under the Plan.

It should take the clearest possible authorization from Congress to suggest it intended to provoke, rather than avoid these concerns. Accordingly, because there is "substantial doubt" whether the Sackler release comports with constitutional protections, and neither Section 105(a) nor Section 1123(b)(6) "must necessarily be applied" in a manner that would raise these concerns, the Court must adopt the less problematic construction and hold that these provisions do not permit imposition of third-party releases. *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982) (citations omitted).

4. *Third-party releases are too inherently abusive to assume Congress would authorize their imposition through residual equitable powers.*

That holding is also required by common sense. It scarcely bears mentioning that Congress would scarcely recognize the startlingly broad vision of bankruptcy courts' residual equitable powers that the court of appeals adopted. But *any* interpretation of those powers broad enough to permit third-party releases is not one Congress would endorse.

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for "claims" or "offsets" against the sovereign's claims that are "property of the estate." 11 U.S.C. 106(b) & (c).

a. Third-party releases are exceedingly risky. "Observers say they are 'lawless'" and "a 'grift.'" Johnathan C. Lipson, *"Special": "Remedial Schemes in Mass Tort Bankruptcies*, 101 Tex. L. Rev. 1773, 1775 (2023) (quoting Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154, 1188-1191 (2022), Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960, 961-962 (2022)). Even the court below acknowledged it is "a device that lends itself to abuse," because the possibility of obtaining "a bankruptcy discharge arranged without a filing and without the protections of the Code" allows wealthy individuals and corporations to avoid liability while keeping their money shielded from creditors. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). That is exactly why Congress has not seen fit to permit them outside the strict confines of Section 524(g).

b. The non-dispositive "factors," found nowhere in the Code, that the court of appeals adopted to confine third-party releases to use "'only in rare cases'" are no substitute for Section 524(g)'s "requirements." J.A. 885, 886 (quoting *Metromedia*, 461 F.3d at 1). Congress's prohibition against issuing third-party releases absent satisfaction of those requirements admits no "'rare case' exception" because courts "cannot alter the balance struck by the [Code], not even in 'rare cases.'" *Jevic*, 580 U.S. at 471 (internal citations and quotations omitted).

The amorphous, malleable, and impermissibly subjective factors the court of appeals adopted are also particularly unhelpful in curbing abuses of third-party releases. Those factors do not incorporate Section 524(g)'s mandates on structuring, funding, and dedicating trusts to payment of claims. See 11 U.S.C. 524(g)(2)(B)(i)(II)-(IV).

And they contain nothing like Section 524(g)(4)(A)(ii)'s limitations on the universe of those who can benefit from a release—beyond recommending some identify of interest between third-party and debtor and some "factual" and "legal overlap" between the claims raised against each. J.A. 887, 891. The factors place no absolute limit on the breadth of permissible releases, but simply require whatever breadth they possess to be "necessary" for confirmation. J.A. 888. And they place no requirements on how much the third-party must contribute to the bankruptcy, beyond vague considerations about whether the contribution is "substantial" and provides "fair" compensation to claimants—whatever that means for those who will only receive pennies on the dollar for their claims and may receive nothing at all. J.A. 888-889.

But worst of all, these factors do nothing to counter the essential aspect of the Sackler release that makes it abusive: the fact that the Sacklers bought the releases using funds they obtained by spurring the company's implosion. And the factors themselves give rise to a problem at the heart of these releases: How can releases be "essential" to resolution of a bankruptcy when they are only available when they can be bought by providing a "substantial contribution" to the reorganization? J.A. 888. If these questions go unaddressed and a release as abusive as the Sackler release remains standing, it will provide a template for future corporate raids that will be followed in virtually every mass-tort bankruptcy and will be elaborated upon in a myriad of equally abusive ways.

c. Furthermore, the Purdue bankruptcy stands at the forefront of a nationwide slew of bankruptcy abuses requiring this Court's attention. Taking inspiration from the Sacklers, numerous financially healthy corporations and those who control them have invented elaborate loopholes —beyond third-party releases—never contemplated by Congress, enabling them to pick and choose among the debt-discharging benefits of bankruptcy without having to subject themselves to its creditor-protecting burdens. These include the abuse of the automatic stay by 3M, a multi-billion-dollar company, to avoid liability for over 200,000 claims regarding the defective Combat Arms Earplugs it provided to American servicemen and women. 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," the elaborate corporate reshuffling that Johnson & Johnson, a $200 billion Delaware-based company, famously employed in hopes of shedding liability for cancer-causing asbestos in talcum powder products designed for babies by reincorporating in a debtor-friendly jurisdiction. See *In re LTL Mgmt., LLC*, No. 23-12825 (MBK), 2023 WL 4851759 (Bankr. D.N.J. July 28, 2023).

Like the Sacklers, these well-heeled individuals and entities have used these abusive tactics in an effort 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 a fraction of the value of their claims. 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 prevent the Sackler release from inspiring further bankruptcy abuses and ensure that all bankruptcy courts adhere to the text enacted by Congress and to confine their authority to its proper boundaries.

d. Moreover, there is no compelling reason for the bankruptcy system to endure these abuses. Supporters of the third-party release device insist that mass-tort bankruptcies are impossible without nonconsensual third-party release. See Debtors' Stay Opp. 29. But "plenty of large, complex mass torts cases resolved without nonconsensual nondebtor releases." Adam Levitin, *Nondebtor Releases and the Future of Mass Torts*, Credit Slips: A Discussion on Credit, Finance, and Bankruptcy (Aug. 18, 2023)<https://bit.ly/3Pk1DY3>. PG&E, for example, successfully employed an opt-in release. *Ibid.* And 3M, after its early attempts to manipulate the automatic stay were rejected, managed to successfully settle its Combat Arms claims without any third-party release. See Brendan Pierson, *3M agrees to pay $6 bln to settle lawsuits over US military earplugs*, Reuters, Aug. 29, 2023 https://bit.ly/3ZpruCz.

And even if the Court determines that bankruptcy courts lack residual equitable powers under Sections 105(a) and 1123(b)(6) to impose third-party releases, courts will not lack options to issue third-party releases in more limited circumstances. Courts will be free to issue consensual, opt-in, and opt-out releases. Channeling injunctions will of course remain available in asbestos reorganization cases under Section 524(g). With these other avenues available, there is hardly any need to stretch bankruptcy courts' equitable residual authorities beyond the breaking point.

II. The Canadian creditors have standing to challenge the Sackler release.

A. Finally, this Court has jurisdiction to hear this challenge to the Sackler release. While Purdue has questioned whether either the United States Trustee or the Canadian Creditors possess standing to challenge the release, the existence of one litigant with standing to seek a particular form of relief alone satisfies Article III requirements. See *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2365 (2023). At the stay stage, the U.S. Trustee explained why he has standing. The Canadian Creditors unquestionably have standing too.

Article III standing requires a party to have suffered "a concrete and particularized" injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Canadian Creditors satisfy both Article III and statutory requirements (see 11 U.S.C. 1109(b)) to challenge the Sackler release because they are adversely affected pecuniarily by the bankruptcy court's order.

While the Sackler release contains a carve-out for Canadian claims, which allows any cause of action against the released parties that "arises out of or relates" to conduct of "Purdue Canada," the release also contains a recapture provision that brings any claim back into the release if it is "based upon any Conduct of the Debtors"—Purdue U.S. J.A. 199. The exact meaning of the operative phrases in both the carve-out and recapture provisions is elusive, and those clauses' effect on the Canadian Creditors' claims is therefore uncertain. But there is meaningful risk that it will affect at least some of the Canadian Creditors' claims against Purdue Canada, the Sacklers, and MNP, all of whom are released parties under the plan. C.A. JA-3457.

The Canadian Creditors have maintained two actions against these entities: one in Canada against Purdue Canada and MNP, and one in New York state court against the Sacklers. See *supra*, at 9. And they have maintained two sets of claims against these parties. The first are nuisance claims sounding in tort, which relate to the Sacklers' aggressive and deceptive tactics to drive opioid sales in Canada through their control over MNP. And those claims at least tangentially involve Purdue. Through MNP, the Sacklers gave direction to the entire Purdue enterprise, including Purdue Canada—often without differentiating between the actions of different Purdue entities. C.A. JA-6613 [JX-3275 at 79]. This enterprise-wide management structure ensured that many, if not most of the directives that the Sacklers gave to Purdue U.S. affected the Purdue-related entities worldwide.

The second set of claims are statutory claims for damages under the Canadian Competition Act, RSC 1985, c C-34, which prohibits individuals and companies from making "false or misleading representations" during "promotional activities." It allows "any person who has suffered loss or damage as a result of" those representations to maintain a claim for damages. *Ibid.* This claim too involves Purdue. The Canadian Creditors allege that the Sacklers initiated misrepresentations in the United States, often with Purdue's involvement, that crossed borders. At Richard Sackler's direction, Purdue made donations to patient advocacy groups to facilitate the deceptive promotion of opioid use in the United States. C.A. JA-6437 [Weinberger Decl. 13]. And those misrepresentations initiated through Purdue permeated the highest reaches of the Canadian medical establishment.

Both sets of claims therefore bear some relationship to Purdue's conduct. Of course, the Canadian Creditors would dispute that the claims are released. But what matters is that the Sacklers, who will be the ones enforcing the release, maintain that the release extinguishes all of the Canadian Creditors' claims because they believe "many of the claims, if not all the claims against Purdue Canada, even being asserted in Canada, are really being asserted as based upon claims of the conduct of Purdue

US." C.A. JA-1216–1217. If the Sacklers prevail, then the Canadian Creditors will lose valuable property rights to some or all of these claims. At a minimum, the Canadian Creditors will expend time, effort, and tangible costs litigating the release's application and face a real risk that at least some of their claims will be barred by the release's illegal imposition. For that reason they are adversely affected pecuniarily by the appellate judgment affirming the release's validity.

B. Purdue has also questioned whether the Canadian Creditors' claims will eventually succeed, but the merits of those claims have no bearing on the Canadian Creditors' standing. *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) ("[O]ne must not confuse weakness on the merits with absence of Article III standing.") (alteration, citation, and internal quotation marks omitted). And the merits arguments Purdue has raised are unavailing.

While the common law prohibits civil actions by foreign governments to enforce penal laws or to recover penalties in U.S. Courts (see *Pasquantino* v. *United States*, 544 U.S. 349, 361 (2005)), the only remedies the Canadian Creditors seek are civil and compensatory. This includes their claim under the Competition Act, which may have been enacted under the Canadian government's constitutional authority to enact "criminal laws," but the remedies it provides are nonetheless civil, remedial, and available to both private parties and governments alike. *Canada (Director of Investigation & Research) v Hoffmann-La*

Roche Ltd. (1987) 60 OR (2d) 161 (C.A.).[3] Accordingly, there is no reason to question the Canadian Creditors' standing.

[3] Both Purdue and its Unsecured Creditors' Committee have challenged whether the Canadian Creditors properly preserved an objection to the release's statutory validity. (UCC Stay Opp. 22 n.5.) But in their objections to confirmation of Purdue's plan of reorganization, the Canadian Creditors specifically challenged the validity of the release, "object[ing]" and "reserv[ing] [their] rights" as to the "non-consensual," "broad third-party releases" in the plan for numerous reasons, including that they discharged "non-dischargeable debts." Bankr. Ct. Doc. 3275, at 2, 9, 11 (July 19, 2021) (capitalization omitted); see *id.* at 9-12.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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