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

AMICUS CURIAE BRIEF OF THE INSOLVENCY LAW COMMITTEE OF THE BUSINESS LAW SECTION OF THE CALIFORNIA LAWYERS ASSOCIATION IN SUPPORT OF NEITHER PETITIONER NOR RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Insolvency Law Committee ("ILC") is a committee of the Business Law Section ("BLS") of the California Lawyers Association ("CLA"). CLA is the statewide voluntary bar association for all California attorneys. CLA's mission is promoting excellence, diversity, and inclusion in the legal profession and fairness in the administration of justice and the rule of law. CLA has various sections and committees that focus on a wide range of subjects.

ILC is comprised of attorneys with expertise in bankruptcy and insolvency-related matters. ILC's membership is diverse, with attorneys representing debtors, creditors, trustees, receivers, and assignees in a mix of consumer and commercial matters, primarily but not exclusively in California. This *amicus curiae* brief does not necessarily reflect the views of all members of CLA, BLS, or ILC.

ILC submits this brief in support of neither Petitioner nor Respondents. The specific type of releases at issue in this case – non-consensual releases of third-party claims against nondebtors – differs from various other types of releases that are not at issue here, some of which are noncontroversial. ILC believes the Court's decision in this case should be narrowly drafted to avoid inadvertently impacting other types of releases that are not at issue here.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* ILC affirms that no counsel for a party authored this brief in whole or in part, and that no person other than ILC or its counsel contributed any money to fund the preparation or submission of this *amicus curiae* brief.

INTRODUCTION

As set forth in the decision below, from 2007 to 2018, Purdue Pharma L.P. marketed OxyContin while its shareholders and their affiliates (the "Sacklers") withdrew more than $10 billion from Purdue. *In re Purdue Pharma L.P.*, 69 F.4th 45 (2d Cir. 2023) (*Purdue*). In 2019, Purdue, its general partner, and 22 subsidiaries ("Debtors") filed chapter 11 petitions in the United States Bankruptcy Court for the Southern District of New York. By then, Debtors' remaining assets had a total estimated value of approximately $1.8 billion, and Debtors were subject to an estimated $40 trillion in claims. *Id.* at 58–60.

Debtors proposed a chapter 11 plan in 2021. The plan included nonconsensual releases of third-party claims against the Sacklers, who are nondebtors. The plan provided that, during a nine-year period, the Sacklers would pay approximately $4.5 billion (later increased to $6 billion) toward the plan. The Sacklers' wealth was estimated to be $11 billion and was believed to be held in spendthrift trusts and offshore accounts. *Id.* at 60–61.

The bankruptcy court decided that the Bankruptcy Code authorized the plan's nonconsensual releases of third-party claims against nondebtors and approved the plan. *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021). The district court disagreed,

ruled that the Bankruptcy Code did not authorize those releases, and vacated the confirmation order. *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021). Debtors, the Sacklers, and others appealed to the Second Circuit Court of Appeals.

The Second Circuit, in a divided opinion, concluded that the nonconsensual releases of third-party claims against nondebtors were permitted and reversed. Citing 11 U.S.C. § 1123(b)(6) and *United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990) (*Energy Resources*), the majority wrote, "as the Court's language in *Energy Resources* indicates, § 1123(b)(6) is limited only by what the Code expressly forbids, not what the Code explicitly allows." *Purdue*, 69 F.4th at 73–74. Judge Wesley "reluctantly" concurred in the judgment, which he viewed as compelled by the circuit's precedent, and expressed several concerns in a concurring opinion. *Id.* at 85 (Wesley, J., concurring). Judge Wesley doubted that the Code authorized the releases, stating, "nowhere . . . does the Code authorize" nonconsensual releases, except in asbestos-related bankruptcies. *Id.* at 85-86. Judge Wesley wrote: "At bottom, if Congress intended so extraordinary a grant of authority, it should say so." *Id.* at 90 (citing *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) (*Jevic*)).

The Court granted certiorari to decide the following issue, as framed by the Solicitor General: "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."

SUMMARY OF ARGUMENT

The opinion below states, "§ 1123(b)(6) is limited only by what the Code expressly forbids, not what the Code explicitly allows." *Purdue*, 69 F.4th at 73–74 (citing *Energy Resources*). Regardless of the outcome in this case, this Court should not adopt the Second Circuit's reasoning in this regard. A chapter 11 plan provision that is proposed under § 1123(b)(6) must be both appropriate and consistent with the Code, as stated in the text of § 1123(b)(6) itself.

The question on which certiorari was granted does not present a binary choice between deciding that the Bankruptcy Code authorizes or prohibits all nonconsensual releases of third-party claims against nondebtors. Plan provisions regarding such nonconsensual releases are varied. For example, some plans permit opt-outs, while others do not. Some require the claimant to accept fair payment, while others ensure full or substantially full payment. The claims subject to the nonconsensual releases may or may not be vested in the debtor's bankruptcy estate. The releases may or may not attempt to provide for discharges within the scope of 11 U.S.C. § 524(e).

The Court's decision in this case should be limited to addressing whether the Code authorizes nonconsensual releases of third-party claims against nondebtors

where: (a) the claims are not vested in the bankruptcy estate; (b) no opt-out right is provided to nonconsenting claimants; and (c) the chapter 11 plan does not ensure full or substantially full payment of the released claims but instead ensures no more than fair payment.

The Court need not and should not decide the validity of other types of nonconsensual releases of third-party claims against nondebtors.

ARGUMENT

I. Regardless of the outcome in this case, the Court should not adopt the Second Circuit's reasoning that § 1123(b)(6) is limited only by what the Bankruptcy Code expressly prohibits.

The Second Circuit decided that 11 U.S.C. §§ 105(a) and 1123(b)(6), in tandem, authorize nonconsensual third-party releases. Section 105(a) states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Citing this Court's opinion in *Energy Resources*, 495 U.S. 545, the Second Circuit majority stated, "§ 1123(b)(6) is limited *only* by what the Code expressly forbids, not what the Code explicitly allows." *Purdue*, 69 F.4th at 73–74 (emphasis added). Regardless of the outcome of this case, the Court should not adopt this reasoning for three reasons.

First, § 1123(b)(6) is not limited "only" by what the Bankruptcy Code expressly forbids. Instead, the text of § 1123(b)(6) reflects that a chapter 11 plan provision is not authorized by § 1123(b)(6) unless the plan provision is both "appropriate" and "not inconsistent" with the applicable provisions of Title 11. Section 1123(b)(6) provides that, "[s]ubject to subsection (a) of this section, a plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title."

Second, *Energy Resources*, 495 U.S. 545, did not decide that the Bankruptcy Code authorizes whatever it does not prohibit. *Energy Resources* decided that "a bankruptcy court has the authority to order the Internal Revenue Service (IRS) to treat tax payments made by chapter 11 debtor corporations as trust fund payments where the bankruptcy court determines that this designation is necessary for the success of a reorganization plan." *Id*. at 546. In *Energy Resources*, the third parties' liability to the IRS was reduced only to the extent that it was actually paid. The third parties' liability was not released except to the extent that the debtor paid the trust fund taxes for which the third parties were liable to the IRS as responsible parties under 26 U.S.C. § 6672. *Energy Resources*, at 550 ("As the Government concedes, § 6672 remains both during and after the corporate Chapter 11 filing as an alternative collection source for trust fund taxes."); *see In re Energy Resources Co.*, 871 F.2d 223, 233 (1st Cir. 1989) ("And, so long as there is a 'trust fund' tax debt outstanding, nothing, including our opinion today, legally

restrains the IRS from attempting to collect 'trust fund' taxes from responsible individuals.") (affirmed by this Court in *Energy Resources*).

Third, in *Jevic*, 580 U.S. 451, this Court decided that the general authorizations in 11 U.S.C. §§ 349 and 1112 were impliedly limited by the Code's priority scheme. The Court stated: "Congress . . . does not, one might say, hide elephants in mouseholes." *Jevic*, at 465 (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). Citing *Jevic*, Judge Wesley stated in his concurring opinion: "At bottom, if Congress intended so extraordinary a grant of authority, it should say so." *Purdue*, 69 F.4th at 90. In view of *Jevic*, a correct analysis of § 1123(b)(6) requires determining whether its general authorization is impliedly limited by other Code provisions, including the Code's specific provisions defining the property vested in the bankruptcy estate and the liabilities that are excepted from discharge. *See*, *e.g.*, 11 U.S.C. §§ 363(b), 523(a)(2), 524, 541, 544, 547-550, and 1123(b)(3)(A).

The asbestos-related provisions of the Code do not resolve this question. Section 524(g) of the Code expressly authorizes injunctions against third-party claims in asbestos cases. Congress enacted § 524(g) as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). Section 111(b) of that law includes a provision entitled "Rule of Construction," which provides: "Nothing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection an order confirming a plan of reorganization." *See* Pub.

L. No. 103-394, § 111(b), 108 Stat. 4106, 4117; *see also Purdue*, 69 F.4th at 76 (quoting § 111(b)). The Rule of Construction precludes any inference from § 524(g)'s asbestos-related provisions that Congress was legislating with respect to other industries.

II. The decision in this case should be limited to the validity of the type of third-party releases involved here.

A. The Court should decide whether the Bankruptcy Code authorizes a court to confirm a chapter 11 plan that contains non-opt-out releases of creditors' direct claims that are not property of the bankruptcy estate and where the plan does not provide for full payment.

To provide needed clarity and avoid issues not presented, the Court's decision should make three distinctions about the type of nonconsensual third-party release at issue here.

First, third-party claims against nondebtors should be distinguished from claims belonging to or vested in the debtor's bankruptcy estate. Section 1123(b)(3)(A) of the Code expressly authorizes a chapter 11 plan provision that provides for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."

The Second Circuit majority opinion identified fraudulent transfer claims as a type of claim that "typically" belongs to the debtor's bankruptcy estate.

Purdue, 69 F.4th at 70. It is undisputed that the Debtors' plan legitimately provided for nonconsensual releases of the bankruptcy estate's fraudulent transfer claims against the Sacklers.

In distinguishing between direct and derivative claims, the Second Circuit majority opinion also stated: "We need not define the exact claims which fall under the umbrella of direct claims but note that certain state law claims under consumer protection acts likely do." *Purdue*, 69 F.4th at 70 n.15. The majority opinion also stated that "direct claims are causes of action brought to redress a direct harm to a plaintiff caused by a non-debtor third party." *Id.* at 70. In any event, when a creditor's claim is a derivative claim that is vested in the debtor's bankruptcy estate, then § 1123(b)(3)(A) expressly authorizes the plan to provide for a settlement of the claim.

Second, the releases at issue here should be distinguished from releases where the creditor is given a right to opt out. Opt-out issues must be decided in the context that creditors' causes of action against third parties are a cognizable property interest. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs"). The deprivation of that property interest sometimes requires a right to opt out. *See id.* at 812 ("due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court").

Some courts regard a release of a third-party claim as consensual only if the creditor affirmatively consents to the release, while others regard such a release as consensual if the claimant has an opportunity to opt out but fails to do so. *See In re Astria Health*, 623 B.R. 793, 803 (Bankr. E.D. Wash. 2021). The Court need not resolve that split of authority because the creditors had no opportunity to opt out of the releases at issue here.

Third, a plan that requires the released third parties to make a "fair payment" (as in this case) should be distinguished from a plan that requires full or substantially full payment (as in *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (requiring that "[t]he plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction")).

In *Purdue*, the Second Circuit declined to require full payment. *Purdue*, 69 F.4th at 79 ("[W]e are concerned with the fairness of the payment, as opposed to the final amount of the payment."). A plan that provides for full payment of the creditor's claim does not require the creditor to release its claim so much as to await full payment. A full payment by or on behalf of a third party to the creditor may not result in the third party's discharge of the type that is prohibited by 11 U.S.C. § 524(e). The issue of a court's power to grant temporary stays of collection is not presented by this case.

B. The validity of other types of third-party releases and nonconsensual releases should not be decided.

There are many types of third-party releases, a few of which are discussed here. The Court should limit its decision to the types of releases presented in this case.

Consensual releases. There is no dispute that consensual third-party releases are permitted and are not at issue. *See Purdue*, 69 F.4th at 70; *see also In re PG&E Corp.*, 617 B.R. 671, 683-84 (Bankr. N.D. Cal. 2020).

Derivative claim releases. The validity of releases of derivative claims is not at issue in this case. *Purdue*, 69 F.4th at 70; *see*, *e.g.*, *In re Pac. Gas & Elec. Co.*, 304 B.R. 395, 418 n.26 (Bankr. N.D. Cal. 2004) (confirming chapter 11 plan that released "only claims which were held by, assertable on behalf of, or derivative of the debtor" where the confirmation order contained "language acknowledging that the plan did not release claims which may be asserted directly by third parties against nondebtors").

Exculpation clause releases. In the Ninth Circuit, a bankruptcy court may approve a chapter 11 plan's exculpation clause, provided it does not release the exculpated party from pre-petition claims or post-petition claims for willful misconduct or gross negligence. *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020) ("[W]e hold that § 524(e) does not prohibit the Exculpation Clause at issue, because the Clause covers only liabilities arising from the

bankruptcy proceedings and not the discharged debt."); *In re Astria Health*, *supra*, 623 B.R. at 802 (stating that *Blixseth* "has clarified and corrected" the "misguided conventional wisdom" that the Ninth Circuit prohibits all third-party releases). *Astria Health* explains that § 524(e) as construed in *Blixseth* only applies when the third party is co-liable with the debtor for the debt that is the subject of the proposed release. *See Astria Health*, 623 B.R. at 802, 803.

Other statutorily-authorized releases of claims. Certain non-bankruptcy laws authorize nonconsensual releases of third-party claims and may be available in bankruptcy cases. The validity of those statutorily authorized releases is not at issue in this case. For example, 15 U.S.C. § 78u-4, which is part of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 73, authorizes nonconsensual releases of claims for indemnity and contribution in federal securities litigation. That aspect of § 78u-4 resembles Cal. Code Civ. Proc. § 877.6, which authorizes nonconsensual releases of claims for indemnity and contribution under specified circumstances under California law. *See In re Heritage Bond Litig. v. U.S. Trust Corp.*, 546 F.3d 667, 677–82 (9th Cir. 2008) (PSLRA and Code Civ. Proc. § 877.6 authorize bar orders of claims for indemnity and contribution by non-settling defendants but do not authorize orders barring independent claims of non-settling parties); *see also* Cal. Code Civ. Proc. § 877(a) (a release given in good faith to a joint tortfeasor "shall not discharge" the other joint tortfeasors, "but it shall reduce the claims

against the others in the amount stipulated by the release" or "in the amount of consideration paid for it, whichever is greater").

Another example is interpleader. The federal interpleader statutes grant a nonconsensual statutory discharge to a stakeholder who deposits the entire disputed fund or asset. *See* 28 U.S.C. §§ 1335, 2361; *see In re Millenium Multiple Emplr. Welfare Benefit Plan*, 772 F.3d 634, 639 (10th Cir. 2014) ("The statute requires the interpleader plaintiff to deposit the disputed property into the registry of the court or post a bond with the court."). In addition, class action settlements are available in bankruptcy cases because Fed.R.Civ.P. 23 is incorporated by Fed.R.Bankr.P. 7023.

Validity of third-party releases against collateral attack by noticed parties. This case does not present a challenge to the settled rule that third-party releases in a confirmed reorganization plan are not subject to collateral attack by parties who received adequate notice. *Travelers Indem. Co. v. Bailey*. 557 U.S. 137, 152, 155 (2009); *In re FFS Data, Inc.*, 776 F.3d 1299, 1306–09 (11th Cir. 2015) (third-party release of debtor's guarantor in chapter 11 plan had *res judicata* effect); *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269–70 (2010) (order confirming chapter 13 plan that unlawfully discharged student loan was not void); *In re Le Ctr. on Fourth, LLC*, 17 F.4th 1326 (11th Cir. 2021) (applying *Espinosa* in chapter 11 case).

CONCLUSION

Amicus curiae ILC takes no position on the ultimate disposition of this case but encourages the Court to consider the concerns raised in this brief in reaching its decision.

Respectfully submitted,

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