No. 23-124

IN THE

Supreme Court of the United States

WILLIAM K. HARRINGTON,

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 *AMICI CURIAE* BANKRUPTCY LAW PROFESSORS IN SUPPORT OF 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 non-debtor third parties, without the claimants' consent.

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INTEREST OF *AMICI CURIAE*[1]

Amici, whose names and affiliations are set forth in alphabetical order on Appendix A, are law professors who study the United States' bankruptcy system. They have published in some of the nation's leading academic journals on corporate reorganization issues, including the case *sub judice.* They write solely based on their concern about the effect that the opinion below will have on this system.

SUMMARY OF ARGUMENT

Petitioner argues that the decision of the Second Circuit Court of Appeals in this case should be reversed because the United States Bankruptcy Code does not permit the nonconsensual nondebtor release ("NDR") of the Debtors' owners (the Sackler family) and hundreds of others (the "Sackler Release").

Petitioner is correct for the reasons asserted in its brief. In addition, Amici here argue that the Court of Appeals should be reversed for four related reasons:

1. *A nonconsensual "release" is functionally a discharge of debt*.

Congress created two basic pathways to eliminate debt through bankruptcy: (i) forcibly, through the discharge; or (ii) consensually, through contract. A nonconsensual nondebtor release "operate[s] as a bankruptcy discharge arranged without a filing and without the safeguards of the Bankruptcy Code." *Deutsche Bank A.G. v. Metromedia Fiber Network,*

[1] No counsel for a party authored this brief in whole or in part, and no persons or entities other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Inc., (*In re Metromedia Fiber Network, Inc*.), 416 F.3d 136, 142 (2d Cir. 2005).

The Second Circuit here permitted the Sackler Release because it viewed it as part of a "settlement." But because a settlement is a contract, this Court has long recognized that "[a] voluntary settlement . . . cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement." *Martin v. Wilks*, 490 U.S. 755, 768 (1989).

While the Debtors' plan of reorganization ("Plan") could settle the *estate's* claims, the forced "settlement" of third party claims is simply a discharge by another name. Unless this Court wishes to recognize an uncodified exception to this general rule, the opinion below must be reversed.

2. *The discharge cannot be granted for abusive debts or debtors.*

Courts below have long worried that the discharge-like effect of an NDR "lends itself to abuse." *See, e.g., Metromedia Fiber Network*, 416 F.3d at 142. With the exception of asbestos debts, the discharge is available only to debtors, and only for debts and debtors not considered "abusive." Congress carefully enumerated in 11 U.S.C. §§ 523 & 727 the types of debts and debtors excluded from discharge on grounds of abuse. These include debts arising from fraud, willful and malicious injury, and fraudulent transfer.

The beneficiaries of the Sackler Release stand credibly accused of these and related forms of misconduct. The Sackler Release therefore discharges debts and debtors considered abusive by Congress. As Judge Wesley said bluntly in his separate opinion below: the Sackler Release "enjoins a broader swath of claims than a debtor himself could seek to discharge

under the Bankruptcy Code, and it does so without providing any compensation to the claimholders, who must abide by its terms whether they like it or not." *Purdue Pharma*, 69 F.4th at 88 (Wesley, J., concurring).

Concerns about the abuse inherent in the Sackler Release were dismissed by the bankruptcy judge, who "was handpicked by Purdue to serve as the judge for the case, possibly because of his past rulings on nonconsensual third-party releases." Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1082 (2022)). *See also* Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 67 (2023) ("it appears that the Sacklers, acting as shareholders of Purdue Pharma's New York general partner, authorized the company to change its registered corporate agent to White Plains, New York" to enable selection of the bankruptcy judge) [hereinafter, "Lipson, *Rule of the Deal*"].

The abusive nature of the underlying allegations requires reversal of the Second Circuit's decision.

3. *The amorphous standards created by the opinion below invite further abuse.*

The Second Circuit insisted that it was not creating a "blueprint" to immunize misconduct. *In re Purdue Pharma L.P.*, 69 F.4th 45, 80 (2d Cir. 2023). It asserted that the new, seven-factor test it announced would limit NDRs to "rare" cases, where the releases were "fair," "equitable" and "necessary." *Id.* at 77, 79-82.

But the lower court was wrong. Virtually any corporate debtor could satisfy those tests if, like the Debtors and the Sacklers, they handpicked a judge inclined to grant such releases.

This Court has warned that vague, judge-made standards created by bankruptcy courts "threaten[] to turn a 'rare case' exception into a more general rule." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 469 (2017).

That is exactly what has happened with nonconsensual nondebtor releases. While *Purdue Pharma* is an extraordinary case in many ways, and the liabilities in question unusually troubling, NDRs have become endemic in the system, appearing in "[a]lmost every proposed Chapter 11 Plan that I receive," one bankruptcy judge recently reported. *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) (Wiles, B.J.).

The amorphous standards articulated by the Second Circuit will invite more litigation to forcibly eliminate abusive debt through assertions that doing so is "fair," "equitable," and "necessary."

4. *The Sackler Release easily could have been made consensual, preserving individuals' right to a 'day in court' on the merits of allegations of serious misconduct while maximizing creditor recoveries.*

The Sackler Release easily could have been made consensual, and thus non-abusive, simply by allowing individual creditors to elect whether to grant the release on the ballot they used to vote on the Plan. Bankruptcy courts often condition nondebtor releases on such evidence of assent.

If, as the court below insisted, there was "overwhelming" support for the Plan, *Purdue Pharma*, 69 F.4th at 82, the vast majority of creditors should have been willing to release their direct claims against the Debtors' insiders contractually. Allowing some claimants the opportunity to litigate elsewhere would

preserve an aggregate solution to mass harm while also safeguarding individuals' rights' to a "day in court" to determine the merits of allegations of serious misconduct.

To uphold the court below is not merely to approve an uncodified effort to discharge abusive debt; unchecked, it will invite more mass tortfeasors to use the chapter 11 process to "silence victims." Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. (forthcoming 2023), at 9, https://ssrn.com/abstract=4365005. This would be an abuse of bankruptcy, and would threaten fundamental protections in our system.

The decision below must be reversed.

I. CASE HISTORY.

A. Pre-Bankruptcy Misconduct.

Purdue Pharma, L.P. and its debtor affiliates ("Purdue Pharma" or the "Debtors") are privately-held entities owned and, until shortly before bankruptcy, controlled by members of the Sackler family, the principal beneficiaries of the Sackler Release.

In the 1990s, the "Debtors introduced to market, and promoted as non-addictive, OxyContin, a controlled-release semisynthetic opioid analgesic." *In re Purdue Pharma L.P.*, 69 F.4th 45, 56 (2d Cir. 2023). In the years following, "OxyContin has been blamed for significantly contributing to one of the largest public health crises in this nation's history: the opioid epidemic." *Id.*

In 2007, Purdue Pharma—while under the control of the Sackler family—pleaded guilty to a federal felony arising from the marketing, labeling and sale of OxyContin. *In re Purdue Pharma, L.P.*, 635 B.R. 26,

47 (S.D.N.Y. 2021). Prosecutors did not charge any members of the Sackler family.

Purdue and the Sacklers were not chastened by the 2007 criminal plea, however. Instead, despite a "corporate compliance agreement" entered into pursuant to the 2007 plea, Purdue Pharma (under the Sacklers' ownership and control) allegedly sought to "[t]urbocharge" the opioid market.[2]

In 2020, the Department of Justice accepted Purdue Pharma's plea to a second set of drug-marketing crimes. *See* Mot. of Debtors Pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. P. 9019 Authorizing and Approving Settlements Between the Debtors and the United States, *In re Purdue Pharma* (No. 19-23649-RDD), ECF No. 1828, ¶¶ III.10 & III.8.f (Bankr. S.D.N.Y. 2020) ("Purdue-DOJ Settlement").

Although no individuals have been charged in connection with the Debtors' second set of confessed drug-marketing crimes, the company itself conceded that the Sacklers were Purdue's "de-facto CEO," *id.*, and the lower courts found they were "factually and legally intertwined" with the company. *In re Purdue Pharma L.P.*, 69 F.4th 45, 80 (2d Cir. 2023).

"[A]lmost as soon as the ink was dry" on the 2007 criminal plea, "the [Sackler] family began what one member described as an "'aggressive[ ]' program of withdrawing money from Purdue":

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[2] Press Release, Committee on Oversight and Accountability Democrats, Maloney and DeSaulnier Release Documents Following DOJ Settlement with Purdue and Sackler Family (Oct. 27, 2020), https://oversightdemocrats.house.gov/news/press-releases/maloney-and-desaulnier-release-documents-following-doj-settlement-with-purdue [https://perma.cc/4B7Y-P9T6].

> The Sacklers upstream[ed] some $10.4 billion out of the company between 2008 and 2017, which, according to their own expert, substantially reduced Purdue's "solvency cushion." Over half of that money was either invested in offshore companies owned by the Sacklers or deposited into spendthrift trusts that could not be reached in bankruptcy and off-shore entities located in places like the Bailiwick of Jersey.

In re Purdue Pharma, L.P., 635 B.R. 26, 36 (S.D.N.Y. 2021).[3] *See also* 69 F.4th at 59 ("This represented an increase in the distribution pattern from years prior and 'drained Purdue's total assets by 75% and Purdue's 'solvency cushion' by 82%" during that same time period.'" (citation omitted)). The funds so upstreamed would appear, at least in part, to be proceeds of Purdue Pharma's confessed drug-marketing crimes.

B. The Bankruptcy Case and Appeals.

The fallout from the opioid crisis "led to a veritable deluge of litigation against both Purdue and individual members of the Sackler family." *Purdue Pharma*, 69 F.4th at 56. By 2019, there were "almost 3,000 actions against Purdue and over 400 actions against the Sacklers concerning liability for OxyContin." *Id*. at 60.

In March of 2018, certain members of the Sackler family negotiated a framework for a "global settlement" with certain litigants. *See* Lipson, *Rule of the*

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[3] The Sacklers "vehemently deny any suggestion that any of these transfers would qualify as fraudulent conveyances," but the "fact of these extensive transfers of money out of Purdue and into the family coffers is not contested." *Purdue Pharma,* 635 B.R. at 58.

Deal, supra at 64. The Sacklers "made it clear well before the Debtors filed for chapter 11 bankruptcy that they would contribute toward Purdue's bankruptcy estate only if they received blanket releases that would put 'all of the litigation behind them.'" *Purdue Pharma*, 635 B.R. at 59.

To that end, in their roles as directors and shareholders, the Sacklers selected restructuring counsel and directors for the Debtors who would implement the global settlement they sought. Lipson, *Rule of the Deal, supra* at 64-65.

The Debtors then commenced these chapter 11 bankruptcy cases in September 2019, shortly after the Sacklers lost "at least three" motions to dismiss lawsuits asserting direct liability on consumer fraud and related theories. *Purdue Pharma,* 635 B.R. 51.

In October 2019, the Bankruptcy Court issued a broad preliminary injunction shielding the Sacklers from litigation outside the Bankruptcy Court. *See* Order Pursuant to 11 U.S.C. § 105(a) Granting, In Part, Mot. for Preliminary Injunction, *Purdue Pharma L.P. v. Commonwealth of Massachusetts*, Adv. Pro. No. 19-08289, ECF No. 82 (Bankr. S.D.N.Y. Oct. 11, 2019), *aff'd Dunaway v. Purdue Pharm. L.P.* (*In re Purdue Pharm. L.P.*), 619 B.R. 38 (S.D.N.Y. 2020). That injunction has been extended thirty-three times, to the present. *See id.* ECF No. 432 (collectively, "Preliminary Injunction").

In September 2021, the Bankruptcy Court for the Southern District of New York confirmed Purdue Pharma's plan of reorganization. *In re Purdue Pharma, L.P.*, 633 B.R. 53, 59 (Bankr. S.D.N.Y. 2021). The Plan contains the Sackler Release, which "permanently enjoins third parties from pursuing their current

claims against" the Sacklers arising from Purdue Pharma's marketing, labeling and sale of opioids. *In re Purdue Pharma*, 635 B.R. 26, 67 (S.D.N.Y 2021) (citing Plan § 10.7(b)). The Sackler Release would enjoin, among others, direct claims "arising under various unfair trade practices and consumer protection laws that make officers, directors and managers who are responsible for corporate misconduct personally liable for their actions." *Id*. at 70.

In December of 2021, the United States District Court, sitting in an appellate capacity, reversed the Bankruptcy Court on grounds that the Bankruptcy Code provides no statutory authority for such releases. *Id.*

On May 30, 2023, Judge Eunice Lee, writing for herself and Judge Jon O. Newman (Judge Wesley concurring), reversed the District Court and reinstated the Sackler Release. *Purdue Pharma*, 69 F.4th 45. Shielding the Sacklers, and Purdue's other insiders was, the panel reasoned, "fair," "equitable," and "necessary." *Id.* at 79-82.

The Court below conceded that no express provision of the Bankruptcy Code permitted the Sackler Release. Instead, it found authority for the release in two "residual" provisions of the Bankruptcy Code, sections 11 U.S.C. §§ 105(a) and 1123(b)(6). *Id.* at 57.

Section 105 provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). Section 1123(a)(6) states that "a plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6).

As Judge Wesley wrote separately, "[t]hose provisions of the Bankruptcy Code say nothing about nondebtor releases." *Purdue Pharma*, 69 F.4th at 86. (Wesley, J., concurring).[4]

Lacking statutory authority, the court below instead articulated a seven-factor test which, the court found, the Debtors' and their Plan had satisfied. *Id.* at 57.

This appeal followed. *In re Purdue Pharma L.P.*, 69 F.4th 45, 82 (2d Cir. 2023), *cert. granted sub nom. Harrington v. Purdue Pharma L.P.*, No. (23A87), 2023 WL 5116031 (U.S. Aug. 10, 2023).

ARGUMENT

I. THE SACKLER RELEASE IS, IN EFFECT, AN ABUSIVE DISCHARGE OF DEBT.

The court below insisted that it was "conscious of the 'heightened' 'potential for abuse'" posed by nondebtor releases. 69 F.4th at 77. Yet, it ignored evidence that the Sackler Release forcibly eliminates otherwise nondischargeable debts for conduct Congress considered abusive, as that term has been understood in bankruptcy.

A. Nonconsensual Nondebtor Releases are the Functional Equivalent of the Discharge of Debt.

Although the court below recognized that the Sackler Release was "in effect" a permanent injunc-

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[4] Judge Wesley concurred only because he thought he was bound by Second Circuit precedent. He repeatedly noted that the Bankruptcy Code was silent as to nondebtor releases, and that such releases were "far afield" from the Bankruptcy Code's *raison d'etre*. *Purdue Pharma*, 69 F.4th at 90 (Wesley, J., concurring).

tion, *Purdue Pharma*, 69 F.4th at 60, it nevertheless insisted that nonconsensual NDRs were not a discharge. *Id.* at 75.

The court below was wrong.

1. ***The Nonconsensual Nondebtor Release Effects a Discharge of Debt.***

Black's Law Dictionary (11th ed. 2019) defines "discharge" as "[a]ny method by which a legal duty is extinguished; esp. the payment of a debt or satisfaction of some other obligation." Lower courts, including the Second Circuit, have long recognized that a nonconsensual nondebtor release "operate[s] as a bankruptcy discharge arranged without a filing and without the safeguards of the Bankruptcy Code." *See, e.g., Deutsche Bank A.G. v. Metromedia Fiber Network, Inc.,* (*In re Metromedia Fiber Network, Inc*.), 416 F.3d 136, 142 (2d Cir. 2005); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico,* No. 22-1092, 2023 WL 5365926, at *11 (1st Cir. Aug. 22, 2023) ("there is no third-party release, as the Plan does not purport to discharge any third parties of liabilities they may owe Suiza.").

Ignoring these unambiguous definitions and precedents, the court below summarily stated that, while "[t]he bankruptcy court's ability to release claims at all *derives* from its power of discharge," the Sackler Releases "do not constitute a discharge of debt for the Sacklers because the releases neither offer umbrella protection against liability nor extinguish all claims." *Purdue Pharma*, 69 F.4th at 71 (emphasis supplied).

This is obviously an error. No discharge of debt under the Bankruptcy Code offers (or has ever offered) "umbrella protection" or extinguishes "all claims." *See generally* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge,* 65 AM. BANKR. L.J.

325 (1991). Indeed, as explained here, Congress carefully excepted from discharge those debts which it—not bankruptcy judges—considered to be abusive or otherwise problematic.

This error was critical because it enabled the panel to avoid considering "whether the Sacklers are worthy of receiving the benefit of the releases." *Purdue Pharma*, 69 F.4th at 80. It therefore enabled the panel to ignore the question whether the Sackler's conduct or liabilities were "abusive" as that term has been understood in bankruptcy.

2. *To Avoid Abuse, the Discharge is Limited to 'Honest but Unfortunate Debtors'.*

The discharge of debt is bankruptcy's "greatest power" because it can forcibly eliminate otherwise lawful and enforceable debts. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902) (bankruptcy's "greatest" power "is the discharge of a debtor from his contracts."); Jonathan C. Lipson, *Debt and Democracy: Towards A Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 612 (2008).

The broad discharge has led to corresponding concerns about "abuse" of the bankruptcy system. *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23; Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy,* 91 FORDHAM L. REV. 361, 370 (2022) (discussing lower court opinions in *Purdue Pharma*).

The Bankruptcy Code creates two general paths to the discharge of a debtor's debt: (i) through a vote on a debtor's chapter 11 plan of reorganization; or (ii) forcibly, through a discharge in liquidation under chapter 7 of the Bankruptcy Code. With one

exception—for asbestos debts, not in issue here[5]—the Bankruptcy Code makes no provision for discharging or eliminating the debts of nondebtors.

The discharge has thus been reserved to the "honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'") (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991)).

There has been no showing that the debts or the individuals shielded by the Sackler Release are honest or unfortunate. Indeed, the available record indicates the contrary.

B. Debts for 'Reprehensible' Conduct Are Nondischargeable.

Congress determined who is and who is not "honest but unfortunate" for these purposes in categories of debt and debtors that may be excepted from discharge, or denied a discharge entirely. This Court has stated that "[t]he various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweighs the debtors' interest in a complete fresh start.'" *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) (quoting *Grogan,* 498 U.S. at 287). Those exceptions include debts incurred for fraud and willful and malicious injury.

The exception for fraud requires a showing of actual or intentional fraud. 11 U.S.C. § 523(a)(2)(A)-(B). The exception for willful and malicious injury requires a showing that the alleged injury be both willful and malicious. 11 U.S.C. § 523(a)(6). In both cases, Con-

[5] 11 U.S.C. §§ 524(f)-(g).

gress was concerned about deterring "reprehensible conduct." Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 117 (2017) ("Some . . . exceptions to discharge are based on reprehensible conduct by a debtor, such as embezzlement or fraud.") (footnotes omitted).

In *Bartenwerfer v. Buckley*, the Court recently held that the fraud exception to discharge must be read broadly, so that even innocent spouses cannot discharge liability for the fraud of a spouse or partner. Writing for the Court, Justice Barrett reasoned that nondischargeable debts from fraud "must result from someone's fraud, but Congress was 'agnosti[c]' about who committed it." *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 670-72 (2023) (citation omitted). The Court explained that the common law of fraud "has long maintained that fraud liability is *not* limited to the wrongdoer." *Id.* at 672. Rather, "courts have traditionally held principals liable for the frauds of their agents." *Id.*

Here, key beneficiaries of the Sackler Release were the Debtors' principals, and so may be jointly and severally liable for the Debtors' confessed frauds.[6]

C. To Deter Abuse, Congress Limited the Discharge to Debtors.

Congress did not simply enumerate debts that were abusive, and thus excepted from discharge. It also

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[6] Respondents may argue that the exceptions to discharge in section 523 apply largely to individuals, not entities, and so are not relevant to the Sackler Release. The obvious responses are that the Sacklers and many other beneficiaries of the Sackler Release *are* individuals, and in any case, if Respondents wish to recruit the power of discharge for nondebtors, then they should be held to the same normative standards as other debtors.

specifically said 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) (emphasis supplied).

Courts are divided about whether this expressly forbids nonconsensual nondebtor releases. The court below relied on the Seventh Circuit's opinion in *Airadigm*, which stated that section 524(e) "'does not purport to limit the bankruptcy court's powers to release a non-debtor from a creditor's claims.'" *In re Purdue Pharma L.P.*, 69 F.4th 45, 74 (2d Cir. 2023) (*quoting Airadigm Commc'ns, Inc. v. FEC* (*In re Airadigm Commc'ns, Inc*.), 519 F.3d 640, 656 (7th Cir. 2008)).

But the panel below erred by failing to recognize that *Airadigm* is readily distinguishable in ways that highlight the abusive nature of the Sackler Release. In *Airadigm*, the release applied only to conduct by the financer of the case—not the debtor's principals or shareholders—and only for negligence (or similar problems) during the case.[7] The release in *Airadigm* did not extinguish nondebtor liability for "willful misconduct," and did not exonerate those most directly responsible for the debtor's failure.[8]

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[7] *In re*: Airadigm Communications, Inc., Appellant, Cross-Appellee, v. Federal Communications Commission, Appellee, Cross-Appellant., (No. 07-2212) 2007 WL 2604862 (C.A.7) (debtor's brief argued that "The 2006 Plan provides that [the plan funder] will be released from certain liabilities *related solely to the 2006 Case and the 2006 Plan*, but not from liability for its willful misconduct. (App. 77 at § 8.1(b).)). (unpaginated original; emphasis supplied).

[8] *Id.*

The Sackler Release, by contrast, deliberately does both. It expressly enjoins litigation asserting non-debtor liability for "willful misconduct," 69 F.4th at 90, n.9 (Wesley, J, concurring), and shields the Sacklers and other insiders who were "factually and legally intertwined with" the Debtors. *Id.* at 80.

D. Fraudulent Transfers Are a Classic Form of Abuse.

Acts taken "'in contemplation of' bankruptcy ha[ve] long been, and continue[] to be, associated with abusive conduct." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 240 (2010). Hiding assets from creditors—a "fraudulent transfer"—is the prototypical act "in contemplation of bankruptcy" and a "primordial" form of abuse. Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1586-1593 (2008).

Fraudulent transfers are abusive because they reduce creditor recoveries. They also threaten the legal system because they enable defendants to evade public accountability through processes such as execution on a judgment. *See* Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern, *Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161 (2013).

Here, there is little question that the Sacklers took billions of dollars out of the Debtors starting shortly after the 2007 criminal plea, some of which would be considered fraudulent transfers. *Purdue Pharma*, 635 B.R. 52-54. Fraudulent transfer can, in turn, be grounds to deny a discharge entirely, 11 U.S.C.

§ 727(a)(2), again on grounds that those who do so have abused the legal system.

The Debtors, under control of agents designated by the Sacklers before bankruptcy, chose not to sue the Sacklers to recover these transfers. But they are not somehow made less abusive because the Sacklers held out the possibility of returning half of their ill-gotten gains in exchange for the Sackler Release. Indeed, this is exactly the sort of "'conditioning of financial participation by non-debtors'" that earlier courts characterized as "abusive." *In re Johns-Manville Corp*., 517 F.3d 52, 66 (2d Cir. 2008), *rev'd & remanded sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009) (quoting *In re Karta Corp*., 342 B.R. 45, 55 (S.D.N.Y. 2006)).

E. The Debtors Foreclosed Efforts to Determine the Merits of These Allegations.

Proponents of the Sackler Release may object that there has been no determination on the merits of any of the assertions about the beneficiaries of the Sackler Release.

That is true—and that is the problem. The Sacklers and Purdue "handpicked" the bankruptcy judge in this case because they believed he would likely support the Sackler Release. Levitin*, supra* at 1082. *See also* Joint App. at 3 (corporate certificate of change of address by Sacklers). They also chose corporate agents and professionals who would implement the settlement they wanted. Lipson, *Rule of the Deal, supra* at 64-66.

The bankruptcy judge, in turn, stated early in the case, before the Plan was even proposed, that he would

support the Sackler Release.[9] He foreclosed all efforts to test the merits of the claims being released in other courts through the Preliminary Injunction, *supra*. And, he berated those who (like Petitioner) challenged the Sackler Release.[10]

There was, in short, no realistic opportunity to determine whether the beneficiaries of the Sackler Release are honest or unfortunate, despite compelling evidence—in the form of two pleas for drug-marketing crimes and massive asset-stripping—that they are

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[9] At a hearing in September 2020, Bankruptcy Judge Robert Drain stated: "[I]t appears to me to have always been the case and will continue to be the case, that a plan in which [the Sacklers] do make a material contribution that satisfies the [S]econd [C]ircuit's test in *In re Metromedia* [*Fiber Network*]*, Inc.* is not only possible but the most likely outcome in this case." Transcript of Sept. 30, 2020, Hr'g at 79, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD, Adv. No. 19-08289-RDD), ECF No. 2054 (citation omitted)

[10] By way of example, the bankruptcy judge had the following colloquy with counsel to Petitioner during the Plan confirmation hearing:

> THE COURT: Mr. Schwartzberg, how do you propose to measure overwhelming support except by how everyone measures an election, which is based on those who actually vote? . . . . You would poll the man on the street?
>
> MR. SCHWARTZBERG: We're not talking about polling, Your Honor. We're not talking about –
>
> THE COURT: No, you're not talking about counting at all. Just move on from this point. I think the politicians who are objecting to this plan at least understand how elections work.

See Transcript of Aug. 23, 2021, Hr'g at 146-147, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y 2021) (No. 19-23649-RDD), ECF No. 3659. As explained below, a plan is a contract, not an election.

neither. The most that can be said is that the Sacklers' "good faith" is "'hotly disputed.'" *Purdue Pharma*, 635 B.R. 52-54 (quoting 635 B.R. at 88)).

Judge Wesley's concurrence recognized the abusive nature of the Sackler Release. He observed that it "enjoins a broader swath of claims than a debtor himself could seek to discharge under the Bankruptcy Code, and it does so without providing any compensation to the claimholders, who must abide by its terms whether they like it or not. The [Sackler] Release encompasses a potentially wide range of claims and cloaks the Sacklers with blanket immunity." *Purdue Pharma*, 69 F.4th at 88 (Wesley, J., concurring).

Even academic supporters of NDRs avoided endorsing them in this case. Instead, as amici in the court below, they took "no position on the appropriateness of the third-party releases *in this case* or whether such releases were sufficiently supported by contributions to the bankruptcy estate to be justified." *See* Br. of Amici Curiae Law Professors in Supp. of Appellants, at 1, *In re Purdue Pharma L.P.*, 69 F.4th 45 (2d Cir. 2023) (No. 22-110-bk), ECF No. 403-3 (emphasis supplied).

"Of course," Professors Casey and Macey have conceded in a more general defense of NDRs, "debtors and managers can abuse the third-party release." *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 977 (2023). Thus, they argue, "courts should be aggressive in demanding disclosures regarding the released parties' roles in the firm's affairs, in requiring strong proof about the value of assets and liabilities, [and] in policing fraudulent transfers and preventing managers from funneling assets to their preferred stakeholders." *Id.* at 978.

These are laudable goals, but unfortunately little of that happened in *Purdue Pharma*.

II. PURDUE PHARMA'S PLAN CANNOT 'SETTLE' THE CLAIMS OF THIRD PARTIES AGAINST NONDEBTORS.

Respondents would dodge the question of abuse here because they would have this Court believe that the Sackler Release is not a discharge, but a "settlement." The court below accepted this argument because "claimants voted overwhelmingly to approve the Plan." *In re Purdue Pharma L.P.*, 69 F.4th 45, 82 (2d Cir. 2023).

But the vote on the plan has no bearing on the claims of third parties against nondebtors. Plans of reorganization are not elections—they are contracts—and assent to a contract must be informed and voluntary. *See* Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631, 634 (2018)(reorganization plans are "a cross between a consent decree and a contract"); *Official Creditors Comm. of Stratford of Tex., Inc. v. Stratford of Tex., Inc. (In re Stratford of Tex., Inc.)*, 635 F.2d 365, 368 (5th Cir. 1981) (a reorganization plan "represents a kind of consent decree which has many attributes of a contract").

The vote on the Plan here—even if "overwhelming"—was neither informed nor a voluntary expression of assent to the Sackler Release. Thus, any effort to infer assent to it by reference to the vote on the Plan must also fail.

A. The Plan Could Not 'Settle' Third Party Claims Nonconsensually.

This Court long has held that two parties cannot forcibly "settle" claims of third parties. "A voluntary settlement in the form of a consent decree cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement," the Court said in *Martin v. Wilks,* 490 U.S. 755, 768 (1989). "Of course," the Court has admonished, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party's agreement." *Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986). *See also Randon v. Toby*, 52 U.S. 493 (1850) ("A release by an agent of all notes and accounts held by him against a third party does not discharge such party from liability to the agent's principal on an instrument in the hands of the agent, unless such discharge be authorized by the principal.") (headnote).

There is no doubt that the estate could settle *its* fraudulent transfer claims against the Sacklers, and would do so pursuant to the Plan. But the direct claims of third parties against the Sacklers and others were not the estate's to settle. Under well-established precedent, direct and particularized creditor claims are not property of the estate—they are property of the creditor—and cannot be asserted or settled by the estate. *See, e.g., Caplin v. Marine Midland Grace Tr. Co. of New York*, 406 U.S. 416, 434 (1972).

Moreover, any claim that the Plan can be justified as a settlement reflecting the "overwhelming" will of creditors is belied by the facts of this case because the vote was uninformed and coerced.

B. The Vote Was Uninformed.

For a settlement to be consensual, it must be informed. The vote on the Sackler Release was not informed for at least three reasons.

First, creditors knew little about the merits of the underlying allegations against the Sacklers. As a result of the preliminary injunction granted early in this case—which remains in force, *see* Preliminary Injunction, *supra*—all litigation against the Sacklers has been stayed for nearly four years. Thus, creditors could not know the strength of the claims the Plan would enjoin, and so they could not know what they were giving up.

Second, the Plan was supported by a Disclosure Statement which said almost nothing about the merits of those claims. To solicit votes on a plan, the bankruptcy court must first approve a "disclosure statement" which contains "adequate information" to enable creditors to make an informed decision whether to vote for or against it. 11 U.S.C. § 1125(a) & (b). *See* Disclosure Statement for Fifth Am. Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma, L.P.,* 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD), ECF No. 2983 ("Disclosure Statement").

Here, the Disclosure Statement devoted about forty pages to discussions of the *estate's* claims against the Sacklers (e.g., for fraudulent transfers), investigations of those claims undertaken by both debtor's counsel and counsel to the Official Committee of Unsecured Creditors (UCC), and why the Sacklers were difficult collection targets (having offshored about half of the funds they'd stripped out of the company before bankruptcy).

But the Disclosure Statement gave creditors only two pages on the third-party direct claims in issue here, and focused almost entirely on why pursuing such claims would be futile due to the Sacklers' efforts to offshore assets. Notably, it appears that the Disclosure Statement does *not* contemplate the sort of consumer fraud-types of claims that were in fact asserted in the direct actions, but instead a generic tort analysis.[11]

Rather than providing a meaningful assessment of the "released" claims, the Disclosure Statement assumed, confusingly, that their value was "unknowable" and then booked those claims at $0. Disclosure Statement at 5 & App'x B at 8 ("The Liquidation Analysis assumes that all opioid-related claims asserted against the Debtors are asserted solely against Debtor PPLP.").

Obviously, they could not be both $0 and "unknowable." More importantly, they had to be worth more than $0 or they would not have engendered the dispute currently on appeal.

Third, notice of the Sackler Release was incomprehensible. Even Richard Sackler, for many years Purdue Pharma's leader and thus a key beneficiary of them, admitted that he did not understand them.[12]

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[11] Disclosure Statement *supra* at 173, ("[S]ignificant legal hurdles in proving the elements of their claims and collecting on any judgments. Notably, third-party creditors would need to specifically prove that individual members of the Sackler Families and Sackler Entities engaged in conduct that would give rise to personal liability and that such conduct caused the harms allegedly sustained by such third parties.").

[12] Dr. Richard Sackler testified that although he tried to read the prior iteration of the Sackler Release, they were so "extremely

Respondents may argue that these concerns were addressed in a so-called "Plan Support Letter" sent by the Official Committee of Unsecured Creditors (UCC), urging creditors to vote for the Plan. *See* Joint App. at 26. But the Plan Support Letter—which was not approved as part of the Disclosure Statement—devotes one paragraph to the UCC's investigation of the third-party claims at issue here, Joint App. at 64-65, and concedes that "[t]his letter is not the appropriate forum to address each of these issues regarding . . . third-party claims." *Id.* at 85.[13]

C. The Vote was Not Assent to the Sackler Release.

For a settlement to be consensual, it must also be voluntary. But the vast majority of creditors expressed no opinion one way or the other, and this Court cannot infer assent from silence.

It is true that the Plan was supported by the majority of creditors who *voted*. *In re Purdue Pharma*, 633 B.R. 53, 60-6 (Bankr. S.D.N.Y 2021). But the vast majority of the Debtors' creditors cast no ballot at all. Fewer than 20% of the 618,194 claimants entitled to vote—and fewer than 50% of the subset of claimants with personal-injury claims—actually voted on the

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dense," and would take such "an enormous amount of time to fully understand," that he gave up. Transcript of Aug. 18, 2021 Hr'g., at 133, *In re Purdue Pharma*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD), ECF No. 3614.

[13] Nor does it help Respondents that an examiner was appointed in these cases. *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD), ECF No. 3048. The examiner's mandate was narrow, limited to investigating whether the Sacklers interfered with a special committee of the Debtors' board after they had resigned. *Id*. at 2. His budget was miniscule, $200,000. *Id.* The examiner's findings do not cleanse the abusiveness of the Sackler Release.

Plan.[14] The United States, in its capacity as the largest (and first priority) creditor, submitted no ballot.[15]

Nor is this surprising. Debtors in chapter 11 reorganizations have the exclusive right to propose a plan of reorganization for the first 120 days, 11 U.S.C. § 1121(b), a right which the bankruptcy judge in this case extended to the maximum allowable time. *See* Fourth Ord. Extending Excl. Period Within Which to File a Ch. 11 Plan, *In re Purdue Pharma L.P.,* 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD) ECF No. 2433.

Here, management of the Debtors, their counsel, and the bankruptcy judge were identified and selected by the Sacklers before bankruptcy. *See* Lipson, *Rule of the Deal, supra* at 46-47. It would have been naïve for anyone to expect the Debtors' Plan to do anything other than that which the Sacklers sought. While some creditors doubtless do support the Sackler Release, it is in the Debtors' Plan. And although creditors were able to negotiate some improvements to it, no other plan could have been proposed.

An election in which no other candidates could run is neither free nor fair. A vote—or failure to vote—in such election cannot show assent to its outcome. Thus, the vote in favor of the Plan tells us nothing about claimants' willingness to release the Sacklers.

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[14] *See* Final Decl. of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes & Tabulation of Ballots Cast on the Fifth Am. Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD), ECF No. 3372 (the "Tabulation"), at 5 & Ex. A (Bankr. S.D.N.Y.).

[15] *See* Tabulation, *supra*.

III. THE SECOND CIRCUIT'S UNCODIFIED 'FACTORS' INVITE FURTHER ABUSE.

The Second Circuit insisted that NDRs are to be granted only in "rare" cases, and purported to cabin them in a seven-factor test.[16] But this Court cautioned against "rare case" exceptionalism in its recent opinion in *Jevic,* and should be especially wary of such justifications here, where the Second Circuit's test was made of whole cloth, deviating even from the loose standards articulated by other lower courts, to produce factors that virtually any corporate debtor could satisfy.

A. 'Rare Case' Exceptions Invite Abuse.

In *Jevic*, the Court rejected an attempt to deviate from "absolute priority" in final distributions under a so-called "structured dismissal." The Third Circuit there had approved this statutory deviation because it believed it was permissible in "'rare case[s]' in which courts could find 'sufficient reasons' to disregard priority." *Czyzewski v. Jevic Holding Corp.,* 580 U.S. 451, 469 (2017) (quoting 787 F.3d at 175, 186). This Court rejected that reasoning because "it is difficult to

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[16] These factors are (1) identity of interests between the debtors and released third parties, including indemnification relationships; (2) whether claims against the debtor and nondebtor are factually and legally intertwined, including whether the debtors and the released parties share common defenses, insurance coverage, or levels of culpability; (3) whether the scope of the releases is appropriate; (4) whether the releases are essential to the reorganization; (5) whether the non-debtor contributed substantial assets to the reorganization; (6) whether the impacted class of creditors "overwhelmingly" voted in support of the plan with the releases; and (7) whether the plan provides for the "fair payment" of enjoined claims. *Purdue Pharma*, 69 F.4th at 78-79 (citations omitted).

give precise content to the concept "'sufficient reasons.'" *Jevic,* 580 U.S. at 469.

The *Jevic* Court correctly understood the potential for abuse in rare-case exceptionalism. The "consequences" of deviating from the statutory framework, the majority recognized, were "potentially serious" because they threatened abuses such as "departure[s] from the protections Congress granted particular classes of creditors"; "changes in the bargaining power of different classes of creditors"; "risks of collusion"; and "making settlement more difficult to achieve" due to the uncertainty of uncodified exceptions. *Id.* at 470-71.

B. Virtually Any Corporate Debtor Could Satisfy the Seven-Factor Test Developed Below.

The Second Circuit's seven-factor test here is just as amorphous as the "rare case" exceptionalism rejected in *Jevic*. Indeed, one of the "key facts," the court below found, was the presence of an indemnification agreement between the Debtors and the Sacklers. *Purdue Pharma*, 69 F.4th at 81. But it is hard to see how that fact could be "key": virtually every well-advised corporation indemnifies its officers and directors.

Worse, the Second Circuit opinion significantly relaxed a critical factor from prior precedent. In *Dow Corning,* the Sixth Circuit Court of Appeals rejected nondebtor releases on, among others, grounds that the plan there did not provide an alternative opportunity for plaintiffs to recover "full payment" outside the bankruptcy. *In re Dow Corning Corp*., 280 F.3d 648, 659, 656-57 (6th Cir. 2002). Instead, it remanded to

the lower court to make factual findings on whether the court's exacting criteria were met. *Id.*

The Second Circuit here cited *Dow Corning* approvingly, but twisted its requirement for "full payment" into one of "fair payment." *Purdue Pharma*, 69 F.4th at 79. "Because *the amount of the payment does not necessarily indicate its fairness*," the majority below reasoned, "the determinative question is not whether there is full payment, but rather whether the contributed sum permits the fair resolution of the enjoined claims." *Id.* (emphasis supplied).

But if the amount of the payment does not determine its "fairness," what does? Other than vague assertions that the Plan is a "fair," "equitable" and "necessary" settlement, the opinion below does not say, which will invite further litigation to obtain the nonconsensual "release" of potentially abusive debts.

IV. THE SACKLER RELEASE COULD EASILY HAVE BEEN MADE CONSENSUAL.

The Sackler Release, coupled with the Preliminary Injunction, eliminates all other courts from any role in the adjudication of the serious civil allegations against the Sacklers and the Debtors' other insiders. It erases "opportunities for would-be plaintiffs to litigate their claims against defendants like the Sacklers," thus "silencing litigation." Foohey & Odinet, *supra* at 4. Purdue Pharma's bankruptcy and the Sackler Release would deprive claimants of their right to a "day in court" with the Sacklers and other individuals and entities potentially liable for the Debtors' misconduct.

This Court has long recognized the "'deep-rooted historic tradition that everyone should have his [or her] own day in court.'" *Martin v. Wilks*, 490 U.S. 755, 762 (1989)(quoting 18 C. WRIGHT, A. MILLER, & E.

COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, p. 417 (1981)). That, however, is what the Sackler Release would take from survivors of the opioid crisis. *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1194 (2022) ("victims want a day in court").

The tragedy of the *Purdue Pharma* bankruptcy is that the Plan could easily have preserved claimants' right to a day in court against nondebtors while also permitting aggregate resolution of most claims, simply by including a line-item in the ballot accompanying the plan on which creditors would (or would not) agree to release nondebtors who sought the benefit of a release.

Bankruptcy courts often condition the release of nondebtors through a plan of reorganization on such *consensual* mechanisms. *See, e.g., In re PG & E Corp*., 617 B.R. 671, 683-84 (Bankr. N.D. Cal. 2020), *appeal dismissed sub nom. Int'l Church of the Foursquare Gospel v. PG&E Corp*., No. 20-CV-04569-HSG, 2020 WL 6684578 (N.D. Cal. Nov. 12, 2020) (approving as "consensual" opt-in releases contained in chapter 11 plan); *In re Bainbridge Uinta, LLC*, No. 20-42794, 2021 WL 2692265, at *3 (Bankr. N.D. Tex. June 28, 2021) (approving "opt-out" form in plan solicitation materials).

Even the plan of reorganization for The Weinstein Company gave survivors of sexual assault the option to "have their day in court" with Harvey Weinstein, by withholding a release.[17] Not so for *Purdue Pharma* and the Sackler Release.

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[17] Fifth Amended Joint Chapter 11 Plan of Liquidation, *In re* The Weinstein Company Holdings LLC, No. 18-10601 (MFW) (Jan. 20, 2021), at 3, [Bankr. ECF 3182] ("The definition of Released Parties does not include Harvey Weinstein.").

To be sure, a consensual release may require the Sacklers to defend themselves in other courts. But if there is in fact "overwhelming" support for the Plan, then few creditors should refuse the release. Moreover, if the Sacklers acted "lawfully in all respects," as they have long maintained,[18] they should have little to fear from a "day in court." And survivors of the opioid crisis and their families who want a neutral adjudication of the merits of direct claims against those most plausibly responsible for the Debtors' astounding misconduct would retain the opportunity to do so.

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[18] *See* Mediator's Fourth Interim Report at 18, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649-RDD), ECF No. 4409 (Sackler family stating that ". . . the [Sackler] families have acted lawfully in all respects. . . .").

CONCLUSION

The opinion below should be reversed for the reasons stated by Petitioner. In addition, the lower court should be reversed because the nonconsensual Sackler Release is "abusive" as that term is understood in bankruptcy. Any other outcome merely invites more abuse.

Respectfully submitted,

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September 27, 2023

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List of *Amici*[*]

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