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 RESPONDENT THE MULTI-STATE GOVERNMENTAL ENTITIES GROUP

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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.

RULE 29.6 STATEMENT

The Multi-State Governmental Entities Group ("**MSGE Group**") is comprised of approximately 1,300 cities, counties, tribal nations, hospital districts, independent school districts, and other local governmental entities.[1] As a creditor group formed in connection with the *Purdue Pharma* bankruptcy cases, the MSGE Group does not have a parent corporation and has no stock owned by any publicly traded company.

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[1] The entities comprising the MSGE Group are set forth in the Second Amended Verified Statement of the Multi-State Governmental Entities Group Pursuant to Fed. R. Bankr. P. 2019, *In re Purdue Pharma L.P.*, No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 9, 2020), Bankr. ECF No. 1794 ("**Rule 2019 Statement**").

TABLE OF CONTENTS

Question Presented i

Rule 29.6 Statement ii

Statement 1

Summary of Argument 6

Argument 11

I. The Bankruptcy Code Authorizes Courts to Approve Nonconsensual, Third-Party Releases with Supermajority Support in Connection with Chapter 11 Plans 11

A. Section 1123(b)(6) of the Bankruptcy Code, in Tandem with § 105(a), Grants the Courts Broad Residual Authority to Approve Third-Party Releases with Supermajority Support 12

B. The Shareholder Releases Are an "Appropriate Provision" in the Debtors' Plan Because They Have Supermajority Support and Function in Aid of Settlement and Maximizing Estate Value 18

C. Third-Party Releases with Supermajority Support Are Consistent with Other Bankruptcy Powers or Remedies Designed to Maximize Estate Values and Creditors' Recoveries 23

1. Sales of Estate Property Free and Clear of Encumbrances 23

2. Equitable Doctrine of Marshaling ... 24

3. The Authority to Approve Third-Party Releases with Supermajority Support Is Corollary to the Power to Approve Marshaling and Free-and-Clear Sales 25

D. Shareholder Releases with Supermajority Support Are "Not Inconsistent with the Applicable Provisions" of the Bankruptcy Code........ 27

1. Section 524(e) Does Not Bar the Shareholder Releases in the Plan ... 27

2. The Shareholder Releases Do Not Conflict with § 523(a) Because They Are Not a De Facto Bankruptcy Discharge 29

3. Congress Did Not Intend to Prohibit Third-Party Releases with Supermajority Support Outside the Asbestos Context When It Enacted § 524(g) 32

II. Shareholder Releases with Supermajority Support Do Not Contravene This Court's Bankruptcy Jurisprudence 35

A. Purdue's Reorganization Differs from Cases Where Certain Procedures or Remedies Violated Express Code Provisions 35

B. This Court's Decisions Curtailing Equitable Relief Are Inapposite 37

III. Because the Bankruptcy Code Authorizes Shareholder Releases with Supermajority Support Without Raising Constitutional

Questions, There Is No Basis for Invoking the Constitutional-Avoidance Canon of Statutory Interpretation 41

A. Due Process Does Not Require an "Opt-Out" Provision Where There Is Supermajority Support 42

B. Creditors Whose Claims Are Covered by the Shareholder Releases Received Due Process 44

Conclusion 48

TABLE OF AUTHORITIES

Page(s)

Cases

In re A.H. Robins Co.,
880 F.2d at 700 .... 25, 26, 34

Abrego Abrego v. Dow Chemical Co.,
443 F.3d 676 (9th Cir. 2006)............................ 34

In re American Cartage, Inc.,
656 F.3d 82 (1st Cir. 2011) 20

In re BCD Corp.,
119 F.3d 852 (10th Cir. 1997).......................... 22

In re Brook Valley VII, Joint Venture,
496 F.3d 892 (8th Cir. 2007)............................ 22

Callaway v. Benton,
336 U.S. 132 (1949).............................. 39, 40, 41

Case v. Los Angeles Lumber Products Co.,
308 U.S. 106 (1939).. 20

Celotex Corp. v. Edwards,
514 U.S. 300 (1995).. 40

Commodity Futures Trading Commission v. Weintraub,
471 U.S. 343 (1985).................................... 16, 22

Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery,
330 F.3d 548 (3d Cir. 2003) 22

Czyzewski v. Jevic Holdings Corp.,
137 S. Ct. 973 (2017)........................10, 35, 36, 37

In re Diplomat Construction, Inc.,
454 B.R. 917 (Bankr. N.D. Ga. 2011)............... 30

In re Dow Corning Corp.,
280 F.3d 648 (6th Cir. 2002)....................... 38, 44

In re Drexel Burnham Lambert Group, Inc.,
960 F.2d 285 (2d Cir. 1992) 34

Edwards Family Partnership, L.P. v. Dickson,
821 F.3d 614 (5th Cir. 2016)............................. 28

In re Energy Resources Co.,
59 B.R. 702 (Bankr. D. Mass. 1986)..... 12, 13, 14

In re Energy Resources Co.,
871 F.2d 223 (1st Cir. 1989), *aff'd sub nom. United States v. Energy Resources Co.*, 495 U.S. 545 (1990) 14, 15

In re Ferrante,
51 F.3d 1473 (9th Cir. 1995)............................. 22

Grogan v. Garner,
498 U.S. 279 (1991)... 31

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999)..................................... 37, 38

In re Johns-Manville Corp., 552 B.R. 221 (Bankr. S.D.N.Y. 2016), *aff'd*, 623 B.R. 242 (S.D.N.Y. 2020), *aff'd*, No. 20-3693-BK, 2022 WL 4487889 (2d Cir. Sept. 28, 2022) 43

In re Johns-Manville Corp., 97 B.R. 174 (Bankr. S.D.N.Y. 1989)........... 21, 22

In re Joint Eastern & Southern District Asbestos Litigation, 982 F.2d 721 (2d Cir. 1992), *op. modified on other grounds on reh'g*, 993 F.2d 7 (2d Cir. 1993).. 42, 43

Law v. Siegel, 571 U.S. 415 (2014).............................. 10, 35, 36

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)... 41

MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988) 24

Martin v. Wilks, 490 U.S. 755 (1989)... 43

In re Moore, 608 F.3d 253 (5th Cir. 2010)............................. 22

Morissette v. United States, 342 U.S. 246 (1952)... 34

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950).................................... 44, 45

National Heritage Foundation, Inc. v. Highbourne Foundation,
760 F.3d 344 (4th Cir. 2014)............................ 44

In re Newport Offshore, Ltd.,
75 B.R. 919 (Bankr. D.R.I. 1987) 12, 13, 14

Pennsylvania Trust Co. of Pittsburgh v. McElroy,
112 F. 509 (3d Cir. 1901) 28

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012).............................. 10, 35, 36

In re Richard Potasky Jeweler, Inc.,
222 B.R. 816 (S.D. Ohio 1998).......................... 33

In re SCBA Liquidation, Inc.,
451 B.R. 747 (Bankr. W.D. Mich. 2011)........... 30

In re Seaside Engineering & Surveying, Inc.,
780 F.3d 1070 (11th Cir. 2015)......................... 44

In re Smart World Technologies, LLC,
423 F.3d 166 (2d Cir. 2005) 19, 20, 22

In re Taxman Clothing Co.,
49 F.3d 310 (7th Cir. 1995)............................... 22

Taylor v. Sturgell,
553 U.S. 880 (2008)... 43

United States v. Energy Resources Co.,
495 U.S. 545 (1990)......................7, 12, 15, 16, 18

United States v. First National City Bank,
379 U.S. 378 (1965)... 38

United States v. Hansen,
143 S. Ct. 1932 (2023)....................................... 34

United States v. Inslaw, Inc.,
932 F.2d 1467 (D.C. Cir. 1991)......................... 19

United States v. Whiting Pools, Inc.,
462 U.S. 198 (1983)... 19

Van Huffel v. Harkelrode,
284 U.S. 225 (1931)..................................... 23, 24

In re WBQ Partnership,
189 B.R. 97 (Bankr. E.D. Va. 1995) 24

Wright v. Vinton Branch of Mountain Trust Bank,
300 U.S. 440 (1937)... 24

Zacarias v. Stanford International Bank, Ltd.,
945 F.3d 883 (5th Cir. 2019)............................. 20

Statutes, Rules, and Constitution

11 U.S.C.
§ 105(a) 6, 7, 8, 11, 12, 15, 19, 22, 26, 27, 34, 36, 38, 39
§ 323(b) 20
§ 363(e) 24
§ 363(f) 23
§ 363(k) 36
§ 507 37
§ 507(a)(4) 36
§ 522(k) 35
§ 523(a) 9, 27, 29, 30, 31, 32
§ 524(e) 9, 27, 28, 29
§ 524(g) 9, 27, 28, 29, 32, 33, 34, 45
§ 524(g)(2)(B)(ii)(IV)(bb) 46
§ 541(a) 19
§ 541(a)(1) 19
§ 541(a)(6) 19
§ 725 37
§ 726 37
§ 1106(a) 20
§ 1123(a)(4) 46
§ 1123(b)(3)(A) 20
§ 1123(b)(5) 7, 15
§ 1123(b)(6) 6, 7, 8, 11, 12, 15, 16 19, 21, 22, 26, 27, 34
§ 1125(b) 42
§ 1126(c) 42, 45
§ 1129(a)(7) 42
§ 1129(a)(8) 42
§ 1129(b) 37, 45
§ 1129(b)(2)(A)(ii) 36
§ 1141(a) 47
§ 1141(d) 31

26 U.S.C.
§ 6672 13
§ 7402(a) 38

28 U.S.C.
§ 1334(b) 40
§ 1651(a) 38

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) 33

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) 43

Fed. R. Bankr. P. 9019(a) 20

Fed. R. Civ. P. 23 43

U.S. Const. amend. V 41

Other Authorities

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 33

Black's Law Dictionary (11th ed. 2019) 24, 25

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STATEMENT

On September 15, 2019, the Debtors petitioned for relief under Chapter 11 of the Bankruptcy Code. They did so after numerous States, local governments, Native American tribes, and tort victims had named them as defendants in over 2,600 lawsuits throughout the United States for damages arising from the manufacture, marketing, and sale of their highly addictive, opioid-based painkillers, most notably, OxyContin. JA364, 431, 457, 681. Many of the lawsuits against the Debtors also named the Sacklers as defendants, asserting claims against them that are substantially similar, and often identical, to the claims asserted against the Debtors. JA375, 742-43, 874.

The MSGE Group was formed at the outset of these bankruptcy proceedings to represent the interests of the non-federal and non-state governmental creditors that comprise the MSGE Group's membership: approximately 1,300 cities, counties, tribal nations, hospital districts, independent school districts, and other local governmental entities collectively representing a constituency of more than 60 million Americans across 37 States and territories of the United States.[2] Members of the MSGE Group are creditors of the Debtors, and many filed prebankruptcy lawsuits against them for their role in fostering the nationwide

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[2] Rule 2019 Statement, *supra* note 1.

opioid crisis—an epidemic causing hundreds of deaths each day.[3]

From the start, the MSGE Group has been active in these bankruptcy proceedings, helping to negotiate (including as an official mediation party) the settlements and compromises forming the basis of the Chapter 11 plan of reorganization for the Debtors ("**Plan**").[4] Contrary to the unsupported suggestions of some objectors,[5] the Sacklers did not manipulate or drive the Debtors' Chapter 11 cases or the multiparty negotiations that culminated in the Plan. Instead, the MSGE Group stood shoulder-to-shoulder with other creditor groups *against* the Sacklers, maximizing the ultimate recovery from them. JA349.

After the Debtors entered Chapter 11, intensive and "hard-fought" arm's-length negotiations and mediation sessions occurred between and among several creditor groups (including the MSGE Group) and the Debtors. JA38-48, 341. These negotiations and mediation sessions dealt with a host of complex issues, such as

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[3] *Provisional Drug Overdose Death Counts*, Centers for Disease Control and Prevention: Nat'l Ctr. for Health Stat., https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (Feb. 15, 2023).

[4] The "**Plan**" specifically refers to the Twelfth Amended Joint Chapter 11 Plan. JA191.

[5] *E.g.*, Br. for Resp'ts Supp. Pet'r 23, Sept. 20, 2023 (suggesting that the Sacklers "get to choose which creditors to pay, [and] how much they should receive") ("**Can. Br.**"); Br. for Ellen Issacs as Resp't Supp. Pet'r 6, Sept. 20, 2023 ("In addition to picking the judge, the Sacklers picked the crucial party in the proceeding that gave them immunity – their own company.").

the allocation of the Debtors' funds among the States, their political subdivisions, Native American tribes, hospitals, ratepayers, and individual victims. JA44-48, 850. After two years of negotiation and mediation, numerous settlements among the stakeholders were achieved and formed the basis of the Plan.[6]

The Plan provides for billions of dollars in funding to be channeled to trusts established thereunder, which would compensate opioid victims and provide grant money to communities in need to abate the opioid crisis. JA223-24.[7] The lion's share of the funding would be dedicated to opioid abatement. JA343-44.

The intercreditor settlements that are the bedrock of the Plan would not have been possible without the settlement reached with the Sacklers ("**Shareholder Settlement**"). JA77-78. As the Bankruptcy Court found, the Shareholder Settlement "was clearly and unmistakably the product of arm's-length bargaining conducted in two separate mediations by three outstanding mediators." JA355. The participants in these mediations included the Sacklers on the one hand and the creditors' representatives (including the MSGE Group) and

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[6] Declaration of John S. Dubel ¶¶ 43-46 (Bankr. ECF No. 3433); Declaration of Michael Atkinson in Support of the Statement of the Official Committee of Unsecured Creditors in Support of Confirmation of the Sixth Amended Joint Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors ¶¶ 12, 24 (Bankr. ECF No. 3460).

[7] *See also* C.A. SPA850-61.

Purdue Pharma's special committee of independent directors on the other. JA696-97.

In addition, negotiation over the Shareholder Settlement was informed by the massive volume of documents that the Sacklers produced. JA50-65. The Bankruptcy Court required "that the Sacklers and their related entities … provide discovery beyond even the normally extensive discovery in bankruptcy cases as a condition to retaining the continued benefit" of the preliminary injunction shielding the Sacklers from opioid lawsuits. JA356. In total, "approximately ten million documents were produced, comprising almost 100 million pages, an almost unfathomable record that … teams of lawyers for the creditor groups … pored through to find anything suggesting a claim against the shareholder released parties." *Id.*

The Shareholder Settlement provides for the compromise and resolution of claims and causes of action held by the Debtors and their bankruptcy estates against the Sacklers[8] and, in exchange, for aggregate payments by the Sacklers totaling between $5.5 billion and $6 billion. JA87-115, 810-38, 865-66.[9] These settlement dollars would be funneled to various trusts established under the Plan to compensate eligible opioid victims and abate the opioid scourge across the nation.[10] Indeed, the billions of settlement

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[8] C.A. JA3457-550 (JX-1625, Bankr. ECF No. 3711).

[9] This includes the additional $1.175 billion to $1.675 billion the Sacklers agreed to provide while the appeals in this case were pending. JA866.

[10] C.A. SPA874-76.

dollars that the Sacklers would pay under the Shareholder Settlement makes them the *principal* source of funding that would be dedicated to opioid abatement under the Plan.[11]

In exchange for these substantial settlement payments and other consideration to be provided by the Sacklers, the Plan provides for: (1) the consensual release of the claims held by the Debtors' bankruptcy estates against the Sacklers; and (2) the "nonconsensual" release of third-party civil claims against the Sacklers. JA265-70. These nonconsensual releases are often referred to as "nondebtor releases" or "third-party releases." Under the Plan, they are defined as the "**Shareholder Releases**." JA218.

The Plan would effectuate the Shareholder Releases through a permanent channeling injunction that would prohibit any party from commencing an action against the Sacklers on account of any released claim ("**Channeling Injunction**"). JA194, 279-85. Through the Channeling Injunction, the released claims against the Sacklers, together with the discharged claims against the Debtors, would be channeled to the various opioid trusts formed under the Plan. JA223-33.

An overwhelming majority of creditors voted in favor of the Plan containing the Shareholder Releases. As the Bankruptcy Court found, 96.87% of the non-federal voting governmental entities, and over 95% of the aggregate creditor vote, supported the

[11] C.A. JA5915 ¶ 9 (JX-2761).

Plan. JA303, 447. As the Bankruptcy Court reminded all the parties, the Plan "is not a 'Sackler plan' but a plan agreed to by … well over 96 percent of the non-state governments, and actively supported by … ad hoc committees [including the MSGE Group], notwithstanding the incredible harm that the Debtors' products have caused their constituents." JA350. By a supermajority vote, every class of claims eligible to vote supported the Plan and the Shareholder Releases contained therein. JA303.

After a contested six-day hearing on confirmation of the Plan, which included testimony from 41 fact and expert witnesses and "a courtroom full of exhibits," the Bankruptcy Court announced on September 1, 2021, that it would confirm the Plan. JA299, 354, 632, 699.

Before confirming the Plan, the Bankruptcy Court required the Debtors to make certain changes to it. Among other changes, the Debtors were required to narrow the scope of the Shareholder Releases so that the releases would affect only claims "as to which any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." JA275, 397. After the Debtors made the required changes, the Bankruptcy Court entered the order confirming the Plan on September 17, 2021. JA297, 419. This prompted the appeals that ultimately brought these cases before this Court.

SUMMARY OF ARGUMENT

Section 1123(b)(6) of the Bankruptcy Code coupled with § 105(a) provides courts with authority

to approve third-party releases and equivalent channeling injunctions, outside the asbestos context, when those releases and injunctions are integral to the restructuring of the debtor-creditor relationship and the success of the reorganization and have the super-majority support of affected creditors. The Shareholder Releases and the Channeling Injunction satisfy these requirements.

United States v. Energy Resources Co., 495 U.S. 545 (1990), is an analogous decision where the Court approved a bankruptcy court's order extinguishing the right of a nondebtor to bring a claim against a third party. The Court found that a bankruptcy court order that had the intended effect of ending the IRS's right to collect from nondebtors was permissible under the "broad authority" available under 11 U.S.C. §§ 105(a) and 1123(b)(5) (later recodified as § 1123(b)(6)). The same "broad authority" supports the Shareholder Releases that would foreclose the pursuit of certain civil opioid claims against the nondebtor Sacklers.

While this Court ruled that the broad residual authority is exercised in the context of modifying debtor-creditor relationships, the modification of such relationships includes a debtor-in-possession's duty to preserve and maximize the value of estate property to boost creditors' recoveries. Here, only creditors of Purdue are affected by the Shareholder Releases, which makes the Shareholder Releases integral to the modification of debtor-creditor relationships under the Plan. These same creditors supported the Plan with supermajority support.

The Shareholder Releases are appropriate—and therefore authorized under §§ 105(a) and 1123(b)(6)—because they have supermajority support and are in aid of settling the Debtors' claims against the Sacklers, in exchange for a cash contribution from the Sacklers in the range of $5.5 billion to $6.0 billion that would fund compensation to opioid victims and abate the opioid scourge ravaging communities. And, as the Bankruptcy Court found, the Debtors cannot reorganize without them, which makes them key to the restructuring of the debtor-creditor relationship.

Moreover, without the Shareholder Releases, the Debtors' bankruptcy estates would face a tragic collective-action problem—a value-destructive race to the courthouse among creditors holding claims against the Sacklers. That race would generate escalating legal and collection costs that would destroy the Debtors' estates, saddle those estates with potential indemnification claims by the Sacklers, and diminish the bankruptcy estates' recoveries from the Sacklers even if the estates prevailed on their claims against them. This in turn would diminish the recoveries of creditors holding claims against the Debtors and the Sacklers, to the detriment of such creditors, as the trier of fact found. It is thus unsurprising that the Plan received overwhelming creditor support.

The Shareholder Releases resolve the collective-action problem and thereby benefit all opioid creditors with the Sacklers' cash contributions in the billions of dollars. In this respect, the Shareholder Releases enable the Debtors to fulfill their duties as debtors-in-possession to preserve and maximize the value of estate assets. And this is

crucial in a case where the opioid liabilities are estimated to be in the tens of trillions of dollars and thus far outstrip the Debtors' or the Sacklers' worth.

The Shareholder Releases are not inconsistent with other provisions of the Bankruptcy Code. While a discharge in bankruptcy may be a form of release for debtors, not all releases are bankruptcy discharges. And this is certainly the case here. The Shareholder Releases apply only to certain civil opioid claims tethered to the Debtors' misconduct. A bankruptcy discharge has a far broader reach, subject, of course, to the types of claims excepted from the discharge for individual debtors and enumerated in 11 U.S.C. § 523(a). A bankruptcy discharge provides a fresh start to a debtor. Third-party releases with supermajority support help debtors and their estates address the collective-action problem, for the material benefit of creditors. Because third-party releases differ from a bankruptcy discharge in both scope and purpose, the Shareholder Releases are not a *de facto* bankruptcy discharge. Accordingly, they do not run afoul of Code provisions that define the parameters of the bankruptcy discharge, most notably, 11 U.S.C. §§ 523(a) and 524(e).

Additionally, when Congress enacted § 524(g) to authorize channeling injunctions and third-party releases in the asbestos context, it clearly and unambiguously legislated that nothing in § 524(g) could be construed to impair or supersede any other authority of the courts to approve such injunctions and releases in other circumstances. Aware that releases were being used in various contexts, Congress did not intend to authorize channeling injunctions and third-party releases only in the

asbestos context, to the exclusion of all other types of mass-tort bankruptcies.

The Shareholder Releases also do not conflict with this Court's line of cases holding that bankruptcy procedures or remedies cannot violate express provisions of the Bankruptcy Code. The Court's decisions in *Czyzewski v. Jevic Holdings Corp.*, 137 S. Ct. 973, 980 (2017), *Law v. Siegel*, 571 U.S. 415, 422 (2014), and *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012), all rejected procedures or remedies that clashed with express Code provisions. None of these cases involved third party releases, much less with supermajority support, and there is no Code provision barring third-party releases. To the contrary, the Shareholder Releases are consistent with the Code.

The objectors' reliance on decisions in which this Court rejected remedies that went beyond the courts' traditional equitable powers is misplaced. The courts in those cases did not have the benefit of the broad residual authority available under the current Bankruptcy Code or were operating under a narrower version of bankruptcy jurisdiction that does not exist today. In addition, far from exceeding the traditional equitable powers of a bankruptcy court, the Shareholder Releases are consistent with the long-standing equitable doctrines of marshaling and free-and-clear sales recognized by this Court.

The Trustee contends that the Court should construe the Bankruptcy Code in a manner that does not authorize the Shareholder Releases to avoid serious constitutional questions. But the constitutional questions raised by the Trustee pertain

to procedural due process in class actions, not bankruptcies. Class actions are not a suitable analogue because they do not have the same procedural safeguards required in bankruptcy, such as enabling impaired creditors to vote on a Chapter 11 plan and requiring a supermajority vote by creditors in favor of third-party releases or a channeling injunction. In addition, all creditors affected by the Shareholder Releases received the requisite notice and the opportunity to be heard on the Shareholder Releases, which is all that due process requires.

In sum, the Shareholder Releases neither implicate nor raise serious constitutional questions. Accordingly, this Court should affirm the judgment of the Second Circuit.

ARGUMENT

I. The Bankruptcy Code Authorizes Courts to Approve Nonconsensual, Third-Party Releases with Supermajority Support in Connection with Chapter 11 Plans

Section 1123(b)(6), working in tandem with § 105(a), vests bankruptcy courts with authority to approve third-party releases and equivalent channeling injunctions when those releases and injunctions are integral to the restructuring of the debtor-creditor relationship and to the success of a Chapter 11 plan, and have the super-majority support of creditors. Third-party releases are also consistent with the equitable powers historically granted to bankruptcy courts. In addition, such releases enable Chapter 11 debtors to fulfill their duty to maximize

the value of bankruptcy estate property while also foreclosing a value-destructive race to the courthouse.

A. Section 1123(b)(6) of the Bankruptcy Code, in Tandem with § 105(a), Grants the Courts Broad Residual Authority to Approve Third-Party Releases with Supermajority Support

Section 105(a) provides in relevant part that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of … [the Bankruptcy Code]." § 105(a).

Among the Code provisions that "any order" under § 105(a) may "carry out" is § 1123(b)(6), which provides that a Chapter 11 plan "may … include any other appropriate provision not inconsistent with the applicable provisions of … [the Bankruptcy Code]." "These [two] statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Energy Res. Co.*, 495 U.S. at 549 (citations omitted). In *Energy Resources*, this Court found that § 1123(b)(6), in conjunction with § 105(a), vested bankruptcy courts with broad "residual authority" to grant relief that included the release of nondebtors. *See id.*

Energy Resources had its origins in two bankruptcy cases that were later consolidated on appeal. *See In re Newport Offshore, Ltd.*, 75 B.R. 919 (Bankr. D.R.I. 1987); *In re Energy Res. Co.*, 59 B.R. 702 (Bankr. D. Mass. 1986). In each case, the estates sought authority, over the objection of the Internal

Revenue Service and contrary to IRS rules, to compel the IRS to accept the repayment of withholding (or "trust fund") taxes first from the debtors' estates. If a debtor-employer fails to pay withholding taxes, the IRS can collect, as a penalty, an equivalent sum directly from certain nondebtor employees. *See* 26 U.S.C. § 6672. The *Newport Offshore* plan provided that all tax claims would be paid by deferred cash payments and directed that the IRS first credit payments against the principal and interest due for the trust fund taxes, and only thereafter against the non-trust fund taxes. *Newport Offshore*, 75 B.R. at 920. The *Energy Resources* plan established a liquidation trust and provided the liquidation trustee with discretion over when to pay the trust fund taxes owed. *Energy Res.*, 59 B.R at 703. Thus, the effect of the bankruptcy courts' orders was to foreclose the IRS's rights to collect from the nondebtor employees.

Using the authority granted under its bankruptcy plan, the liquidation trustee prepaid $78,000 in taxes, and designated it to be credited against the trust fund taxes. *Id.* The trustee argued that the prepayment allowed the trust to "implement a settlement" with a former officer who paid $14,000 into the estate in exchange for the trustee's agreement to prepay trust fund taxes to "forestall personal liability assessed by the IRS against the former officers." *Id.* at 703-04. The IRS argued that the plan's attempt to force it to credit payments to trust fund taxes improperly benefited third parties by relieving them of their own direct tax liability to the IRS. *Newport Offshore*, 75 B.R. at 923. In each case, the bankruptcy court overruled the objection and directed that the IRS allocate the payment to trust

fund taxes, thereby overriding IRS rules. *Newport Offshore*, 75 B.R. at 923; *Energy Res.*, 59 B.R. at 707.

In an opinion by then-Judge Stephen G. Breyer, the First Circuit held that the bankruptcy courts had the power to direct the IRS to apply any plan payments to the trust fund taxes and affirmed the plan. The court held that "Congress has granted bankruptcy courts broad equitable powers, including those powers 'expressly or by necessary implication conferred by Congress.'" *In re Energy Res. Co.*, 871 F.2d 223, 230 (1st Cir. 1989), *aff'd sub nom. United States v. Energy Res. Co.*, 495 U.S. 545 (1990). In explaining why such an order was appropriate in certain circumstances, then-Judge Breyer stated:

> Suppose, for example, that certain third parties that included "responsible" individuals were willing to advance enough money to rehabilitate the corporation only if the court would assure them that the reorganized corporation would pay its "trust fund" tax debts first. That assurance would diminish the likelihood that the third parties would have to pay the debts personally; without it they might prefer immediate liquidation, which could mean total payment of all tax debt, and "a guarantee[] that no tax penalty will be assessed against them personally."

Id. at 230 (alteration in original) (citations omitted).

The First Circuit recognized that, even though the order would in effect release claims against third

parties, such an order could be appropriate where "by … [shielding third parties from certain debts] and thereby keeping the firm alive, the bankruptcy court would also increase the chances that the debtor will pay something to its general unsecured creditors." *Id.* Thus, the First Circuit recognized that it was granting an order that would have the effect of altering the rights between third parties and that doing so was necessary and appropriate to achieve a value-maximizing reorganization, an opinion fully upheld by this Court. *Energy Res. Co.*, 495 U.S. at 551.

On appeal to this Court, in an argument echoed by the Trustee, the IRS maintained that the bankruptcy courts could not compel the IRS, a third-party, to take such an action because "[t]here is no provision in the Bankruptcy Code or elsewhere that expressly confers upon the bankruptcy court authority." Brief for the United States at 28, *United States v. Energy Resources Co.*, 495 U.S. 545 (1990) (No. 89-255), 1989 WL 428936, at *28. This Court nevertheless found that the order was permissible under the "broad authority" available under §§ 105(a) and 1123(b)(5) (later recodified as § 1123(b)(6)). *Energy Res. Co.,* 495 U.S. at 549.

This Court acknowledged that the Code "does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments," but held this was irrelevant given the "residual authority to approve reorganization plans including 'any … appropriate provision not inconsistent with the applicable provisions of this title'" and the authority to "issue any order … necessary or appropriate to carry out the provisions"

of the Code. *Id.* (quoting §§ 105(a) and 1123(b)(6)). The bankruptcy courts appropriately exercised this "broad authority" to direct the IRS to apply the payments to trust fund liability where "the bankruptcy court[s] determine[d] that this designation … [was] necessary to the success of a reorganization plan." *Id.* Because the court orders at issue were "appropriate" under the facts of the cases and "not inconsistent" with the Code, the bankruptcy courts had the statutory authority to enter them. *Id.* at 549-50.

Similarly, the Shareholder Releases have the effect of foreclosing the pursuit of certain civil opioid claims against the nondebtor Sacklers. And, as the Bankruptcy Code did not expressly authorize the bankruptcy courts in *Energy Resources* to dictate how the IRS would apply the payments it received, there is no specific Code provision for the Shareholder Releases here. Nevertheless, the "broad authority" that this Court recognized in *Energy Resources* similarly supports the Shareholder Releases.

The Trustee and other objectors argue that the broad authority recognized in *Energy Resources* is confined to only the modification of "creditor-debtor" relationships and therefore cannot affect the claims of nondebtor, third parties against other nondebtors. *E.g.*, UST Br. 13; Can. Br. 35. This argument lacks merit for two reasons.

First, the modification of creditor-debtor relationships in bankruptcy includes a debtor-in-possession's duty to preserve and maximize the value of estate property to boost creditors' recoveries. *See Commodity Futures Trading Comm'n*

v. Weintraub, 471 U.S. 343, 352 (1985) (noting that a bankruptcy trustee (or debtor-in-possession) "has the duty to maximize the value of the estate"). As explained below, the Shareholder Releases are necessary to preserve and maximize the value of the Debtors' claims against the Sacklers. *See infra* part I.B. Without the Shareholder Releases, the Debtors' estates will suffer value-destruction leading to substantially diminished recoveries, if there are any recoveries at all, for unsecured opioid creditors. *See id.* As the evidence below demonstrated, without the Shareholder Releases, "the plan would fail, the Debtors would likely liquidate, and the objectors would collect materially less money from the Debtors and the shareholder released parties in the aggregate." JA414. With the Shareholder Releases, the Sacklers' contribution of up to $6 billion will enlarge the Debtors' bankruptcy estate and increase creditors' recoveries. This is exactly the scenario where, in Judge Breyer's view, it is appropriate for a bankruptcy court to exercise its broad equitable powers.

Second, the nondebtor third parties whose claims would be subject to the Shareholder Releases "are *also creditors of the Debtors*." JA299 (emphasis added); *see also* JA383 (stating that "only holders of claims against the Debtors are being deemed to grant the shareholder release"). This is because of "the significant overlap in third-party claims against both the Debtors and the Sacklers." JA859. Both sets of claims "derive[] from the Debtors' conduct." *Id.* Moreover, "to the extent that one or more of the Sacklers could be said to have directed that conduct, or to have possessed the knowledge and power to do

so, the Sacklers' and Debtors' defenses would be the same." JA859-60 (citation omitted). The Bankruptcy Court reinforced this point when it narrowed the scope of the Shareholder Releases to apply only to claims "as to which any conduct, omission or liability *of any Debtor* or any Estate is the legal cause or is otherwise a legally relevant factor." JA275 (emphasis added).

The Trustee and other objectors appear to gloss over this fundamental point by consistently referring to those creditors holding claims against the Sacklers as "nondebtors" or "third parties." *E.g.*, UST Br. 2, 8; Can. Br. 16. But neither the Trustee nor any other party objecting to the Shareholder Releases has identified any person holding an opioid-related claim against the Sacklers but not one against the Debtors. These same creditors, moreover, expressed near unanimous support for the Shareholder Settlement.

For these reasons, the Shareholder Releases are a part of—indeed, integral to—the modification of creditor-debtor relationships in the Debtors' reorganization. Accordingly, *Energy Resources* speaks to the question presented, and its holding supports the Second Circuit's decision below.

B. The Shareholder Releases Are an "Appropriate Provision" in the Debtors' Plan Because They Have Supermajority Support and Function in Aid of Settlement and Maximizing Estate Value

The Shareholder Releases are an "appropriate provision" in the Debtors' Plan—and therefore satisfy

§ 1123(b)(6)—because they function in aid of settlement of the Debtors' claims against the Sacklers, which is the bedrock of all the intercreditor settlements embodied in the Plan and which enjoyed supermajority support. The Shareholder Releases also enable the Debtors to fulfill their duty to maximize the value of estate assets and ensure greater recoveries for opioid creditors. The Bankruptcy Court thus had ample authority under § 105(a) to "carry out" § 1123(b)(6) and approve the Shareholder Releases.

When the Debtors entered Chapter 11, all of their assets—both tangible and intangible—became property of their bankruptcy estates. *See* 11 U.S.C. § 541(a). The Bankruptcy Code defines property of the estate broadly to include "all legal or equitable interests of the debtor … as of the commencement of the case." § 541(a)(1). This broad definition brings into the estate all causes of action held by the Debtors. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 & n.9 (1983); *see also United States v. Inslaw, Inc.*, 932 F.2d 1467, 1471 (D.C. Cir. 1991) (stating that property of the estate "encompasses causes of action that belong to the debtor"). It also brings in all "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." § 541(a)(6).

Additionally, when the Debtors entered Chapter 11, they became debtors-in-possession and had authority "to take control of the estate's property in order to 'assure an equitable distribution of the property among creditors.'" *In re Smart World Techs., LLC*, 423 F.3d 166, 174 (2d Cir. 2005) (citation omitted). As debtors-in-possession, the Debtors assumed the duties of a bankruptcy trustee and

became "accountable for all property [of the estate] received" and assumed the power to sue on behalf of their respective estates. *See* 11 U.S.C. §§ 1106(a), 323(b).

The power to prosecute estate-held claims includes the derivative power to settle them. *Smart World Techs., LLC*, 423 F.3d at 174-75; *see also* Fed. R. Bankr. P. 9019(a) (providing that, on "motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement"). And such settlements need not be standalone. Under the Bankruptcy Code, a Chapter 11 plan "may … provide for … the settlement … of any claim … belonging to the debtor or to the estate." § 1123(b)(3)(A). Settlements and compromises are "a normal part of the process of reorganization." *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939). They are also "looked upon with favor in bankruptcy proceedings." *In re Am. Cartage, Inc.*, 656 F.3d 82, 91 (1st Cir. 2011). Here, the Shareholder Settlement falls within the ambit of § 1123(b)(3)(A) and is an essential component of the Plan supported by a supermajority of the creditors.

Without the Shareholder Settlement, of which the Shareholder Releases are a necessary part, the Debtors' estates and their creditors would encounter a collective-action problem in the form of a "disorderly race to the courthouse [between the Debtors and their creditors against the Sacklers] … resulting in inefficiency as assets are dissipated in piecemeal and duplicative litigation" and "latecomers will be left empty-handed." *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 896 (5th Cir. 2019) (describing collective-action problem in context of bar orders

entered to enjoin third-party claims as part of settlement of federal equity receiver's claims). Indeed, the Bankruptcy Court found that "substantial" litigation costs and delay would be inflicted on the Debtors' estates without the Shareholder Settlement "as it is reasonable to infer that the hundreds of prepetition lawsuits naming the Sacklers would resume and proceed alongside prosecution of the estates' claims against the Sacklers and related entities." JA364. The benefits of avoiding the collective action problem are evidenced by the overwhelming creditor support for the Shareholder Settlement.

Shareholder Releases are thus an "appropriate provision" under § 1123(b)(6) to avoid the value destruction that would ensue as the Debtors' assets are consumed by the litigation costs of pursuing the Sacklers in competition with other creditors, the potential costs of indemnifying the Sacklers, and the risk that the Debtors' estates and their creditors would receive little to no recovery on their claims against the Sacklers. *See In re Johns-Manville Corp.*, 97 B.R. 174, 178 (Bankr. S.D.N.Y. 1989) (noting that the injunction of third-party claims against nondebtors may be necessary to prevent "the inequitable, piece-meal dismemberment of the debtor's estate"—i.e., Manville's settled insurance). Indeed, as the Bankruptcy Court found, without the Shareholder Releases, the Debtors likely would face liquidation under Chapter 7 of the Bankruptcy Code, which would result in no recovery by unsecured creditors from the Debtors' estates. JA365.

The Shareholder Releases are also necessary for the Debtors to realize a maximized "settlement

premium" on their claims. JA341. Without the protection from creditors' claims, the Sacklers would be unwilling or unable to contribute up to $6 billion to compensate opioid victims and abate the opioid crisis. JA457. In this respect, the Shareholder Releases enable the Debtors to fulfill their "duty to maximize the value of the estate" and the recoveries of their creditors. *Weintraub*, 471 U.S. at 352;[12] *see also Johns-Manville Corp.*, 97 B.R. at 178 (noting that the injunction of third-party claims against nondebtors can "help to maximize the amounts which will be available for ultimate payment to … claimants by preventing the 'onslaught of crippling law suits [which] could jeopardize the entire reorganization effort'" (quoting *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988))).

For these reasons, the Shareholder Releases are necessary and appropriate to carry out a settlement of the Debtors' claims against the Sacklers—a settlement that would benefit all opioid creditors and enjoy nearly universal creditor support. The Shareholder Releases are therefore authorized under §§ 105(a) and 1123(b)(6).

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[12] *Accord, In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010); *In re Brook Valley VII, Joint Venture*, 496 F.3d 892, 900-01 (8th Cir. 2007); *Smart World Techs., LLC*, 423 F.3d at 175; *Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003); *In re BCD Corp.*, 119 F.3d 852, 859 (10th Cir. 1997); *In re Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir. 1995); *In re Ferrante*, 51 F.3d 1473, 1477 (9th Cir. 1995).

C. Third-Party Releases with Supermajority Support Are Consistent with Other Bankruptcy Powers or Remedies Designed to Maximize Estate Values and Creditors' Recoveries

The Shareholder Releases also constitute an "appropriate provision" in the Plan because they are consistent with other equitable powers or remedies not expressly authorized by statute, most notably, (1) the authority of bankruptcy courts to approve sales of estate property free and clear of encumbrances, and (2) the longstanding equitable doctrine of marshaling.

1. Sales of Estate Property Free and Clear of Encumbrances

In *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931), this Court recognized the power of bankruptcy courts to approve sales of estate property free and clear of encumbrances, even though the 1898 Bankruptcy Act did not expressly confer that power on the courts. *Id.* at 227 ("We think it clear that the power was granted by implication.").[13] The purpose

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[13] Justice Brandeis further noted that the "lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by section 2 of the [former] Bankruptcy Act (11 USCA § 11) to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto." *Van Huffel*, 284 U.S. at 227-28. The courts' power to approve sales free and clear of encumbrances was later expressly provided for in the current Bankruptcy Code. *See* § 363(f)).

of this power is plain: by removing the encumbrances on estate property through a sale, the sale price—and thus the value of estate property—is maximized, which can lead to increased creditor recoveries. *See In re WBQ P'ship*, 189 B.R. 97, 108 (Bankr. E.D. Va. 1995) (explaining that the purpose of the power to sell estate property free and clear of encumbrances "is to maximize the value of the asset, and thus enhance the payout made to creditors"). The holders of the encumbrances, in turn, are protected because those encumbrances attach to the sale proceeds. *See* 11 U.S.C. § 363(e).

In the *Johns-Manville* bankruptcy, the Second Circuit found the authority to issue a channeling injunction protecting nondebtors from asbestos claims—the equivalent of a third-party release—to be "a corollary to the power to dispose of assets free and clear and to channel claims to the proceeds." *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988).

2. Equitable Doctrine of Marshaling

This Court has also recognized the doctrine of marshaling assets in the context of bankruptcy, even though marshaling is not expressly authorized by statute. *See Van Huffel*, 284 U.S. at 226; *see also Wright v. Vinton Branch of Mountain Tr. Bank*, 300 U.S. 440, 470 (1937). Marshaling is an "equitable doctrine that requires a senior creditor, having two or more funds to satisfy its debt, to first dispose of the fund not available to a junior creditor." *Rule of Marshaling Assets*, Black's Law Dictionary (11th ed. 2019). The doctrine's purpose is to prevent "the inequity that would result if the senior creditor could

choose to satisfy its debt out of the only fund available to the junior creditor and thereby exclude the junior creditor from any satisfaction." *Id.* In other words, marshaling enables the junior creditor to receive a greater recovery than it would have, had the doctrine not been invoked.

In *A.H. Robins Co.*, the Fourth Circuit upheld a Chapter 11 plan that required "the injunction of suits that have connection to the Dalkon Shield, against certain entities other than … [the debtors]." 880 F.2d 694, 700 (4th Cir. 1989). The Fourth Circuit reasoned that the channeling injunction was within the bankruptcy court's power to issue because it was analogous to the equitable doctrine of marshaling:

> We think the ancient but very much alive doctrine of marshalling of assets is analogous here. A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors.

Id. at 701.

3. The Authority to Approve Third-Party Releases with Supermajority Support Is Corollary to the Power to Approve Marshaling and Free-and-Clear Sales

The circuit courts' comparison of channeling injunctions (or third-party releases) with marshaling

and free-and-clear sales is apt with respect to the related claims against the Sacklers. As with marshaling, creditors whose claims are subject to the Shareholder Releases essentially have rights against two funds: the Debtors and the Sacklers. And, as the Fourth Circuit observed, a "creditor has no right to choose which of two funds will pay his claim." *Id.* Through the Shareholder Releases, the creditors' claims are being channeled to one fund: the bankruptcy *res*.

As with free-and-clear sales, the Shareholder Releases enable the Debtors to maximize the value of their estate property for the benefit of their creditors. And, as with the holders of encumbrances in a free-and-clear sale, the creditors' claims against the Sacklers would be protected under the Plan because they would be channeled to an enhanced bankruptcy *res* (i.e., the post-reorganization trusts formed under the Plan for the benefit of opioid creditors), to the tune of at least $5.5 billion, as a result of the Sackler contributions made under the Shareholder Settlement. This benefits all creditors, as their supermajority support in every voting class demonstrated here.

In these respects, the Shareholder Releases follow form with marshaling and free-and-clear sales as equitable tools, long recognized by this Court in bankruptcies, to maximize estate-property values and enhance creditor recoveries. For these reasons, the Shareholder Releases constitute an "appropriate provision" under § 1123(b)(6), and the Bankruptcy Court had authority to approve them and grant the corresponding Channeling Injunction under § 105(a).

D. Shareholder Releases with Supermajority Support Are "Not Inconsistent with the Applicable Provisions" of the Bankruptcy Code

In addition to being an "appropriate provision," the Shareholder Releases with supermajority support are "not inconsistent with the applicable provisions" of the Bankruptcy Code, thus satisfying § 1123(b)(6). Contrary to the Trustee's assertions, the Shareholder Releases are consistent with §§ 523(a), 524(e), and 524(g) of the Bankruptcy Code, for the reasons explained below.

1. Section 524(e) Does Not Bar the Shareholder Releases in the Plan

Section 524(e) provides that the "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." Section 524(e) ensures that there is no *automatic* discharge of a nondebtor from a debt on which it is co-liable with the debtor. But this does not foreclose relief under §§ 105(a) and 1123(b)(6) to grant a release of creditors' claims against nondebtors in exchange for settlement consideration that will benefit the bankruptcy estate and those creditors. And, in any event, the "such debt" requirement of § 524(e) is, by definition, not implicated where the Sacklers have separate liability.

Further, as the Second Circuit explained, the text of § 524(e) is descriptive of the boundaries of a bankruptcy discharge, not proscriptive of what a court can otherwise do. JA880. But the effect of the discharge is not what is at issue here. Moreover, if

§ 524(e) curtailed a court's power to release a claim against a nondebtor, Congress "would have used the mandatory terms 'shall' or 'will' rather than the definitional term 'does.'" *Id.* (quoting *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2009)). Congress also "would have omitted the prepositional phrase 'on, or … for, such debt,' ensuring that the 'discharge of a debt of the debtor *shall* not affect the liability of another entity'—whether related to a debt or not." *Id.* (quoting *Airadigm Commc'ns*, 519 F.3d at 656).

Certain Canadian municipal and tribal entities ("**Canadian Objectors**") contend that, if § 524(e) were interpreted to "merely reiterate that a borrower remains liable after its co-borrower goes into bankruptcy," the statute would be reduced to "mere throat-clearing surplusage." Can. Br. 30. This argument lacks merit. Section 524(e) overrides the general rule outside bankruptcy that, if "the principal underlying obligation is extinguished, … the guarantor's obligation is also extinguished." *Edwards Fam. P'ship, L.P. v. Dickson*, 821 F.3d 614, 617 (5th Cir. 2016) (citation omitted); *see also, e.g.*, *Pa. Tr. Co. of Pittsburgh v. McElroy*, 112 F. 509, 512 (3d Cir. 1901) (stating "it is … an accepted principle that where the primary obligation is satisfied or extinguished this will operate to release a guarantor"). Thus, § 524(e) is not surplusage at all because by its terms it covers, and is needed to cover, instances where a debtor and nondebtor are co-liable on the same debt.

The Canadian Objectors also argue that § 524(e) must prohibit third-party releases outside the asbestos context because § 524(g) specifies that a

court may grant a channeling injunction shielding nondebtors from asbestos claims, "[n]otwithstanding the provisions of section 524(e)." Can. Br. 33 (quoting § 524(g)(4)(A)(ii)). But the "notwithstanding" clause in § 524(g) is intended to address those instances where the debtor and nondebtor, most notably an insurer, are liable for the *same* asbestos-related obligation. As the District Court found, "when Congress was considering § 524(g), it had before it a specific situation" that arose in the *Johns-Manville* case: "the claims being released were against non-debtor insurance companies whose liability was premised on the conduct of their insureds that fell within the terms of the policies they had issued." JA787. Since "§ 524(e) was obviously implicated" where the asbestos-related "debts owed by … [a debtor] and its insurers were the same debts," Congress inserted the "notwithstanding" clause so that asbestos insurers (and other similarly placed nondebtors) could have the protection of a § 524(g) channeling injunction. JA787-88.

Here, the claims that would be released by the Shareholder Releases "are not claims on which the Sacklers are jointly liable with Purdue." JA787. Because the Sacklers and Purdue are not liable for the same debt, § 524(e) is not implicated and poses no barrier to the Shareholder Releases.

2. *The Shareholder Releases Do Not Conflict with § 523(a) Because They Are Not a De Facto Bankruptcy Discharge*

The Trustee asserts that the Shareholder Releases are unduly broad because they would shield

the Sacklers from opioid-related fraud and other claims that would be non-dischargeable in bankruptcy under § 523(a). UST Br. 28. The argument is without merit. Section 523(a) defines the contours and limits of an individual debtor's bankruptcy discharge. *See* § 523(a) (providing that a bankruptcy discharge "does not discharge an individual debtor" from certain types of debt). Section 523(a) does not prevent a debtor-in-possession from releasing the estate's claims against a nondebtor as part of a settlement of those claims, including claims for fraud. *See, e.g.*, *In re Diplomat Constr., Inc.*, 454 B.R. 917, 919, 924 (Bankr. N.D. Ga. 2011) (approving Chapter 7 trustee's proposed settlement of the estate's claims for alleged fraud and misappropriation of trade secrets); *In re SCBA Liquidation, Inc.*, 451 B.R. 747, 750, 752 n.3 (Bankr. W.D. Mich. 2011) (approving settlement that included release of estate-held claims, including those for fraud and misrepresentation). It matters not that the nondebtor being released of an estate's fraud claims in the settlement would be unable to discharge those claims if the nondebtor had filed for bankruptcy. Similarly, § 523(a) does not prevent a bankruptcy court from approving the release of creditors' fraud claims when that release is necessary to achieve a global resolution in a Chapter 11 plan and to maximize the settlement value of the estate's fraud claims and when the Chapter 11 plan containing the release enjoys the super-majority support of creditors affected by the release.

Moreover, a bankruptcy discharge affects more claims and is far greater in scope than the Shareholder Releases. A bankruptcy discharge in a

Chapter 11 reorganization "discharges the debtor from any debt that arose before the date of … [plan] confirmation," unless the debt falls within limited categories of debt excepted from discharge. 11 U.S.C. § 1141(d). By contrast, the Shareholder Releases do not remotely release the Sacklers from all claims that would be dischargeable in their individual bankruptcies.

Before confirming the Plan, the Bankruptcy Court narrowed the scope of the Shareholder Releases so that they would apply only to claims "as to which any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." JA275, 397. As the Bankruptcy Court noted, the Shareholder Releases would not release a claim against a Sackler physician for negligently prescribing OxyContin, even though a discharge in that physician's individual bankruptcy would do so. JA396. For these reasons, the Shareholder Releases are not the functional equivalent of a bankruptcy discharge and therefore are not inconsistent with § 523(a).

In addition, the Shareholder Releases and a bankruptcy discharge serve different purposes. A bankruptcy discharge grants a "fresh start" to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). The Shareholder Releases, on the other hand, benefit the *victims* of Purdue and the Sacklers by addressing the collective-action problem that would engender a race to the courthouse against the Sacklers and lead to the dissipation and value-destruction of the Debtors' estate assets. *See supra* part I.B. The Shareholder

Releases are also designed to maximize the value of estate property (i.e., the Debtors' claims against the Sacklers), consistent with a debtor-in-possession's duty to do so. *See id.* In sum, the Shareholder Releases are not a non-bankruptcy version of a bankruptcy discharge and are consistent with § 523(a).

3. Congress Did Not Intend to Prohibit Third-Party Releases with Supermajority Support Outside the Asbestos Context When It Enacted § 524(g)

The enactment of § 524(g) did not foreclose the use of channeling injunctions or third-party releases in non-asbestos cases. Quite the contrary, Congress was well aware of, and did not shut down or even signal a scintilla of displeasure with, third-party releases outside the asbestos context. When it added § 524(g) to the Bankruptcy Code, Congress specifically enacted a "rule of construction" or saving clause providing that § 524(g) was not to be read to abridge the courts' existing authority to grant channeling injunctions (or equivalent third-party releases) in connection with plan confirmation:

> RULE OF CONSTRUCTION.—Nothing in subsection (a) [i.e., the provision enacting § 524(g)] or in the amendments made by subsection (a), 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.[14]

The saving clause in section 111(b) "was intended by Congress to avoid any conjecture that, absent cases involving asbestos, bankruptcy courts lacked the power to issue permanent injunctions." *In re Richard Potasky Jeweler, Inc.*, 222 B.R. 816, 827 n.19 (S.D. Ohio 1998) (citations omitted); *see also* Janet A. Flaccus, *A Potpourri of Bankruptcy Changes*: *1994 Bankruptcy Amendments*, 47 Ark. L. Rev. 817, 846 (1994) (explaining that, through the saving clause, Congress left the law free to develop in "other areas" by ruling out "the negative implication … that [§ 524(g) means] the injunction-trust mechanism can not be used for other types of mass torts").

"Legal drafters have the power … to limit the implication of their terms—which means that … a statute can exclude a canon of construction," such as the negative-implication canon. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 232 (2012). This is precisely what Congress did when it specified that "*[n]othing*" in § 524(g) "shall be construed" to "impair" or "supersede any *other* authority the court has" to approve channeling injunctions or third-party releases outside the asbestos context. Thus, through the saving clause, Congress itself foreclosed the very arguments made by the Trustee and other objectors here.

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[14] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106 (1994).

Indeed, when Congress enacted the saving clause, it did so knowing of at least two non-asbestos bankruptcies that involved the injunction of nondebtor claims against third-party nondebtors: *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285 (2d Cir. 1992) (involving securities litigation) and *In re A.H. Robins Co.*, 880 F.2d at 700 (upholding Chapter 11 plan that required injunction of suits that had connection to the Dalkon Shield against certain nondebtors). Congress is presumed to know the relevant legal landscape when it enacts legislation. *See United States v. Hansen*, 143 S. Ct. 1932 (2023); *Morissette v. United States*, 342 U.S. 246, 263 (1952); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) ("[W]e presume that Congress is aware of the legal context in which it is legislating." (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979))).

In sum, Congress recognized the practice of approving channeling injunctions and third-party releases in certain cases outside the asbestos context, and unquestionably left the door open for their continued approval, both by not closing it (which would have been very easy to do) and also through the saving clause. Accordingly, § 524(g) poses no obstacle to the Shareholder Releases. The Shareholder Releases are appropriate provisions not inconsistent with the Bankruptcy Code and are authorized under §§ 105(a) and 1123(b)(6).

II. Shareholder Releases with Supermajority Support Do Not Contravene This Court's Bankruptcy Jurisprudence

A. Purdue's Reorganization Differs from Cases Where Certain Procedures or Remedies Violated Express Code Provisions

The Shareholder Releases do not run afoul of this Court's decisional law holding that bankruptcy procedures or remedies cannot violate express provisions of the Bankruptcy Code. *See Jevic*, 137 S. Ct. at 980; *Law*, 571 U.S. at 422; *RadLAX*, 566 U.S. at 645. None of these three cases involved third-party releases. And, as established above, the Shareholder Releases are consistent with, and do not run afoul of, express Code provisions.

In *Law*, the bankruptcy court permitted the Chapter 7 trustee to "surcharge" property that a debtor had exempted from the bankruptcy estate to cover the trustee's attorneys' fees that had been incurred because of the debtor's misconduct. 571 U.S. at 422. The bankruptcy court's decision, however, ran afoul of 11 U.S.C. § 522(k), which provides in relevant part: "Property that the debtor exempts … is not liable for payment of any administrative expense …." Because a trustee's attorneys' fees are classified as estate administrative expenses, the Code expressly forbade the relief that the bankruptcy court ordered. *Law*, 571 U.S. at 422.

Thus, in *Law*, there was an express statutory prohibition against paying the estate administrative costs (in this case, attorneys' fees) from exempt

property. *Id.* And this Court concluded that § 105(a) could not be used to create an exception to this prohibition, even if the fees were incurred as a result of the debtor's misconduct. *Id.* at 422-23. Section 105(a) grants the authority to "carry out" the provisions of the Code, but as this Court noted, "it is quite impossible" to "carry out" Code provisions by "taking action that the Code prohibits." *Id.* at 421.

In *RadLAX*, the debtors sought to auction off their real property in bankruptcy under sale procedures that prohibited the secured lender from credit-bidding its claim at the auction. In this respect, the sale procedures contradicted 11 U.S.C. § 1129(b)(2)(A)(ii), which preserves a secured creditor's right to credit-bid at bankruptcy sales in accordance with § 363(k). *See* 566 U.S. at 643 (quoting 11 U.S.C. § 1129(b)(2)(A)). For this reason, this Court found the sale procedures to be improper and affirmed the lower courts' rejection of them. *Id.* at 645.

Jevic involved WARN Act claims that were acknowledged to have priority over general unsecured claims by dint of § 507(a)(4) of the Bankruptcy Code. 137 S. Ct. 973, 980 (2017). The problem in *Jevic* was the so-called "structured dismissal" that would have dismissed the Chapter 11 case without a confirmed plan while making final distributions to high-priority secured creditors and low-priority general unsecured creditors, but not to mid-priority WARN Act creditors. The skipped-over WARN Act creditors "would have been entitled to payment ahead of the general unsecured creditors in a Chapter 11 plan (or in a Chapter 7 liquidation)." *Id.* at 978.

This Court concluded that such an arrangement was contrary to the absolute priority scheme embodied in 11 U.S.C. §§ 507, 725, 726, and 1129(b). *See id.* at 986. The Bankruptcy Code expressly provided for absolute priority when addressing Chapter 11 plans and Chapter 7 liquidations, but with respect to the priority of creditors in the context of dismissals, the Code said nothing. Because "[t]he Code's priority system constitutes a basic underpinning of business bankruptcy law," the Court "expect[ed] more than simple statutory silence if, and when, Congress were to intend a major departure." *Id.* at 983-84. Accordingly, *Jevic* also involved relief that was granted contrary to express Code provisions, which makes it inapposite. Here, in contrast, no express Code provision forbids the Shareholder Releases.

B. This Court's Decisions Curtailing Equitable Relief Are Inapposite

The Shareholder Releases do not run afoul of this Court's prior rulings rejecting certain forms of injunctive relief.

Citing this Court's decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), some objectors argue that the Shareholder Releases constitute remedies that fall outside the courts' traditional equitable powers. *E.g.*, UST Br. 37-38. *Grupo Mexicano*, a nonbankruptcy case, involved a prejudgment asset-freeze order that this Court vacated because traditional equity jurisprudence in England did not allow such a remedy when Congress adopted the Judiciary Act of 1789. 527 U.S. at 318-19. Here, the Bankruptcy Court was

not relying solely on traditional and inherent equitable powers when it approved the Shareholder Releases. Rather, it looked to, among other Code provisions, § 105(a). JA397. And the Sixth Circuit, when it upheld the third-party releases in *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002), found the separate statutory grant of power under § 105(a) to be a crucial distinction that rendered *Grupo Mexicano* inapposite. *See Dow Corning Corp.*, 280 F.3d at 657-58.

Indeed, § 105(a)'s plain terms should disabuse the objectors of any suggestion that the powers granted under that section are confined to only equitable remedies existing in 1789. Section 105(a) vests the courts with authority to grant "*any* order … that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. § 105(a) (emphasis added). A § 105(a) order need only be "necessary or appropriate to carry out" Code provisions. Nothing in § 105(a) confines a court to equitable powers or remedies that existed in 1789.

Section 105(a)'s plain terms stand in marked contrast to the All Writs Act, which authorizes courts to "issue all writs necessary or appropriate … *and agreeable to the usages and principles of law*." 28 U.S.C. § 1651(a) (emphasis added). This Court in *Grupo Mexicano* indicated that the "agreeable to the usages" language tethered the authority under the All Writs Act to the courts' traditional equitable powers. 527 U.S. at 326 n.8. By contrast, in *United States v. First National City Bank*, 379 U.S. 378, 380, 385 (1965), this Court *upheld* a prejudgment asset-freeze order issued under 26 U.S.C. § 7402(a), which authorizes courts to "render such judgments and

decrees as may be necessary or appropriate for the enforcement of the internal revenue laws"—that is, language substantially similar to the plain terms of § 105(a).

This Court's decision in *Callaway v. Benton*, 336 U.S. 132 (1949)—involving a railroad reorganization under the former Bankruptcy Act—does not undercut the courts' authority to approve third-party releases. In *Callaway*, a nondebtor railroad company had been leasing property to the debtor railroad company. The reorganization plan for the debtor provided that the leased property would be sold to the debtor or the lease would be rejected in the reorganization and the property returned to the nondebtor-lessor. *Id.* at 134. Certain of the nondebtor's shareholders obtained a state-court injunction temporarily blocking the sale on the basis that the nondebtors' shareholders had not unanimously approved it. *Id.* at 135-36. After the federal district court overseeing the reorganization became aware of the state court's ruling, it granted a "permanent injunction restraining further prosecution of the state action and declared the state court's temporary injunction null and void." *Id.* at 136.

The Court in *Callaway* held that the district court could not issue the permanent injunction, but *Callaway* is inapposite for two reasons. First, the *Callaway* plan provided two options: sale of the leased property or "disaffirmance of the lease." *Id.* at 149. Thus, the Court found that the plan could be "effectively consummated," whether there was a sale of the property or not. *Id.* at 150. In other words, this Court found the permanent injunction unnecessary to

the success of the *Callaway* plan. Here, however, the Shareholder Releases *are* necessary components of the Plan. Based on the uncontroverted evidence at the confirmation hearing, including that provided by creditors, the Bankruptcy Court found, *inter alia*, that the Shareholder Releases "are an integral and necessary part of the Plan. The Plan, and the global resolution embodied in the Plan and Plan Settlements, would not be possible without the … [Shareholder] Releases." JA457.

Second, this Court in *Callaway* found the permanent injunction to be outside the limited jurisdictional grant that existed under the former Bankruptcy Act. In *Callaway*, a court sitting in bankruptcy only had "exclusive jurisdiction of the debtor and its property wherever located." 336 U.S. at 142. "There can be no question," noted this Court, "that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." *Id.* Because the nondebtor-lessor's reversionary interest in the property was "not part of the property of the debtor, … the district court's assertion of exclusive jurisdiction was error." *Id.* at 143.

With the enactment of the 1978 Bankruptcy Code, a bankruptcy court's jurisdictional reach is broader than it was when this Court decided *Callaway*. Today, bankruptcy jurisdiction extends to, *inter alia*, "civil proceedings … related to cases" under the Bankruptcy Code (28 U.S.C. § 1334(b))—that is, controversies that affect the bankruptcy estate. *See, e.g.*, *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) (observing that "related to" jurisdiction includes "suits between third parties which have an

effect on the bankruptcy estate" (citation omitted)). All three courts below determined that there was subject-matter jurisdiction to approve the Shareholder Releases because of the potentially adverse effect that creditors' litigation against the Sacklers would have on the estates' assets. JA381, 747, 873-76. *Callaway*, on the other hand, was decided on a much narrower jurisdictional grant and is therefore inapposite.

III. Because the Bankruptcy Code Authorizes Shareholder Releases with Supermajority Support Without Raising Constitutional Questions, There Is No Basis for Invoking the Constitutional-Avoidance Canon of Statutory Interpretation

The Trustee contends that the Bankruptcy Code does not provide sufficiently clear authorization for nonconsensual third-party releases with supermajority support in light of the "serious constitutional questions" that interpretation raises. UST Br. 41. In particular, the Trustee asserts that the due process rights of creditors are violated because the Shareholder Releases are "extinguishing" their claims against Sacklers without the consent of every affected claimant and without giving objecting claimants the opportunity to opt in or opt out of the releases. *Id.* at 41-42. These arguments are unavailing.

To be sure, a cause of action is a species of property. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). And no person may "be deprived of … property, without due process of law." U.S. Const. amend. V. As the Court of Appeals noted, "the

Due Process Clause does not absolutely protect against the deprivation of property; it instead ensures that a deprivation does not occur without due process." JA898. According to the Bankruptcy Court's extensive findings, based on uncontroverted evidence at the Plan confirmation hearing, the due process afforded to the creditors affected by the Shareholder Releases was more than sufficient.

A. Due Process Does Not Require an "Opt-Out" Provision Where There Is Supermajority Support

Due process does not require a right to "opt out" of a third-party release where the release has supermajority support. The Trustee insists that an implied "opt out" requirement exists based on the procedures applicable to certain class actions. UST Br. 42. But class actions are not an appropriate analogue for determining due process requirements in bankruptcy cases as "bankruptcy law provides numerous safeguards not contained in class action procedures." *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 736 (2d Cir. 1992), *op. modified on other grounds on reh'g*, 993 F.2d 7 (2d Cir. 1993). For example, a Chapter 11 plan must be put to a vote of all members of impaired classes of creditors. *See* 11 U.S.C. §§ 1126(c), 1129(a)(8). The vote on the plan is taken only after the creditors receive a solicitation based on a detailed description of the plan that contains "adequate information." 11 U.S.C. § 1125(b). Finally, a plan may not be imposed against the wishes of creditors voting against the plan, who would fare better in a liquidation under Chapter 7 of the Bankruptcy Code. *See* § 1129(a)(7); *see also Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 736.

In contrast, Federal Rule of Civil Procedure 23 does not contain the same level of protections found in the Bankruptcy Code. For example, Rule 23 allows named representatives of a class to consent to a settlement that binds all the members of the class without a vote of the class members. *See Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 736. Further, "there is no option for those who would fare better under liquidation than under settlement of the class action followed by reorganization to insist on liquidation." *Id.*; *see also In re Johns-Manville Corp.*, 552 B.R. 221, 243-44 (Bankr. S.D.N.Y. 2016) (criticizing claimant for "arguments [that] are based on a line of reasoning developed in a class action case decided under Federal Rule of Civil Procedure 23" and distinguishing bankruptcy proceedings), *aff'd*, 623 B.R. 242 (S.D.N.Y. 2020), *aff'd*, No. 20-3693-BK, 2022 WL 4487889 (2d Cir. Sept. 28, 2022). Indeed, the bankruptcy safeguards described above are part of the "special remedial scheme" that enables bankruptcy proceedings to foreclose "successive litigation by nonlitigants" and "terminate preexisting rights if the scheme is otherwise consistent with due process." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *accord*, *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008).

Moreover, this case imposed additional protections for creditors because *each class of creditors* approved the plan by a supermajority vote. JA635. The Second Circuit held a 75% threshold of creditor approval "to be the bare minimum, and instead express[ed] approval for requiring

overwhelming approval of the plan." JA889. This is consistent with other circuits that have approved third-party releases, which have consistently found that supermajority support from creditors is a key element in whether a plan should be approved. *See Dow Corning Corp.*, 280 F.3d at 658 (stating that, to approve a third-party release a court should consider whether "[t]he impacted class, or classes, has overwhelmingly voted to accept the plan"); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1079 (11th Cir. 2015) (same); *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014) (same).

B. Creditors Whose Claims Are Covered by the Shareholder Releases Received Due Process

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted). Here, the Bankruptcy Court found, based on uncontroverted evidence, that the Plan and releases contained therein to be "more than sufficient for due process purposes" because of, among other things, the extensive and far-reaching notice program that the Debtors undertook. JA384.

The Bankruptcy Court found that the "most widespread" of the Debtors' notices stated "in plain English that the plan contemplated a broad release of the Sacklers and their related entities … including

claims against them held by third parties." JA302. Moreover, the Bankruptcy Court found that the Debtors' notices reached at least 87% of all U.S. adults with an average frequency of message exposure of five times, served over 3.6 billion impressions online, and resulted in over 3,400 news mentions around the world. JA300.

The evidentiary record from the confirmation hearing provides ample support for the Bankruptcy Court's finding that interested parties were given sufficient notice of the Plan and the Shareholder Releases contained therein. JA300-02, 383-84. In addition, the parties were afforded "the opportunity to present their objections" to the Shareholder Releases (*Mullane*, 339 U.S. at 314)—and a few of them did object, which led to the ensuing appeals in these Chapter 11 cases now before this Court.

Furthermore, the confirmation process provided the procedural safeguards mentioned above, including the right of impaired classes of creditors (including classes of opioid creditors) to vote on the Plan. For a Chapter 11 plan that does not contain third-party releases or channeling injunctions, a class of creditors will have accepted that plan if the creditors vote by more than 50% in number and by at least two-thirds in claim amounts in favor of the plan. *See* § 1126(c). For classes of creditors that do not meet these voting thresholds for plan acceptance, the plan may be imposed on them over their objections only if the strict fairness standards under the "cram down" provisions are met. *See* § 1129(b). In addition to these voting thresholds, a § 524(g) channeling injunction cannot be granted in the asbestos context unless current asbestos claimants vote, by at least

75% of those voting, in favor of the plan that provides for the injunction. *See* § 524(g)(2)(B)(ii)(IV)(bb).

Here, the requisite voting thresholds for opioid creditors were surpassed by a substantial margin. As the Bankruptcy Court found, 96.87% of the non-federal voting governmental entities, and over the 95% of the aggregate creditor vote, supported the Plan. JA303, 447. Given the creditors' overwhelming support of the Plan, terms such as "nonconsensual" or "coerced" to describe the Shareholder Releases are largely misnomers.

The Bankruptcy Code does not require opt-outs or unanimity in order for a Chapter 11 plan to bind all creditors. Indeed, given that bankruptcy reorganizations normally occur when there are insufficient assets to pay creditors in full, the Bankruptcy Code contemplates that there will be dissenters and holdouts in almost every reorganization. Allowing a single individual or a small number of objectors to block reorganization plans, or to opt out and pursue actions that undercut what should have been a global resolution of the case, would be inconsistent with the purpose and structure of the Bankruptcy Code. It also would provide incentives for individual holdouts to seek undue benefits and favoritism in exchange for approval—a result that is inconsistent with the established priority system and the core principle of bankruptcy that similarly situated creditors be treated the same. *See* § 1123(a)(4) (requiring "the same treatment for each claim … of a particular class" unless a claimant "agrees to less favorable treatment"); Richard A. Posner, *Economic Analysis of Law* 444 (5th ed. 1998) ("If unanimous consent of creditors were required for

the reorganization to be approved, it would pay each creditor to hold out for favored treatment ….").

So long as due process is afforded, and the requirements of plan confirmation are met, including the procedural safeguards discussed above, a Chapter 11 plan is binding on "any creditor … whether or not such creditor … has accepted the plan." § 1141(a). Likewise, when due process in the form of notice and an opportunity to be heard is afforded, and the requirements of plan confirmation are met (including the procedural safeguards mentioned above, such as a super-majority of creditors voting in favor of the plan), third-party releases should be binding on all creditors, including objecting creditors, when those releases are integral to, and essential components of the plan, as the Shareholder Releases are here. For these reasons, no serious constitutional questions are raised by the Bankruptcy Court's approval of the Shareholder Releases, and the Bankruptcy Code thus provides ample authority for them.

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CONCLUSION

For the reasons explained above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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