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 MORTIMER-SIDE INITIAL COVERED SACKLER RESPONDENTS

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QUESTION PRESENTED

Faced with a flood of litigation over its marketing and sale of the prescription opioid OxyContin, Purdue Pharma L.P. filed for bankruptcy under Chapter 11. After extensive negotiations, Purdue proposed a plan of reorganization that relied on several complex and interdependent settlements, including an agreement under which Purdue and others with potential claims against members of the Sackler family related to Purdue's conduct would release those claims in exchange for a contribution of billions of dollars to Purdue's bankruptcy estate, which would then be used to compensate victims of the opioid crisis and fund opioid abatement programs. After a six-day confirmation hearing, the bankruptcy court issued a detailed ruling confirming the plan of reorganization, explaining that the releases were supported by an overwhelming majority of Purdue's creditors, were integral to the success of the plan, and were otherwise appropriate. The Second Circuit affirmed the bankruptcy court, holding that the releases were authorized by the Bankruptcy Code and justified by the bankruptcy court's findings.

The question on which this Court granted certiorari is:

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.

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INTRODUCTION

The fundamental goal of the bankruptcy system is to maximize the value available for stakeholders by avoiding a destructive race to seize the debtor's assets. Congress gave bankruptcy courts numerous important tools to accomplish that objective, including the automatic stay and exclusive jurisdiction over the debtor and its assets. At the same time, Congress understood that it could not foresee all the extraordinarily complex issues that might arise in a particular bankruptcy, and that bankruptcy courts should have the flexibility to tailor solutions to the circumstances of each case. To that end, Congress provided bankruptcy courts broad authority to "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), and to confirm plans of reorganization that may include "any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]," *id.* §1123(b)(6). Under that explicit and capacious statutory text, bankruptcy courts may issue any order and approve any appropriate plan provision that does not contravene specific limitations in the Code.

As the Second Circuit correctly held below, that broad statutory authority enables bankruptcy courts in appropriate cases to confirm plans that include nonconsensual third-party releases of claims that are directly related to potential claims against the debtor itself and that facilitate settlements that provide the funds necessary to ensure a successful reorganization. It is a tool that bankruptcy courts have historically employed to efficiently and fairly resolve mass-tort litigation that would otherwise destroy value for debtors and creditors alike. Approving such releases in appropriate cases falls comfortably within the authority that the Code explicitly confers, and is not inconsistent with any other applicable Code provision. Moreover, as both the bankruptcy court and the Second Circuit recognized, this is a paradigmatic case for the use of those tools, as the releases here are supported (indeed, demanded) by an overwhelming majority of Purdue's creditors, integral to ensuring a successful reorganization, and necessary to unlock the vast bulk of the funds the plan uses to compensate opioid victims and fund opioid abatement programs.

The Trustee does not focus on disputing whether the details of the third-party releases here are appropriate, an issue that would hardly have warranted this Court's review. Instead, the Trustee takes the categorical position that nonconsensual third-party releases are *never* allowed outside the asbestos context, no matter how necessary or appropriate they may be for a particular reorganization. Nothing in the Code or common sense supports the Trustee's attempt to eliminate a tool that bankruptcy courts nationwide have used successfully for decades to resolve challenging reorganizations. The Trustee cannot point to any actual conflict between the third-party releases here and the provisions of the Code, or any other reason why such releases should be categorically banned. On the contrary, given the bankruptcy court's careful findings and the Second Circuit's decision approving those findings, the releases here were plainly appropriate. This Court should affirm.

STATEMENT OF THE CASE

A. Factual Background

1. Purdue and Its Shareholders and Directors

Purdue is a privately held pharmaceutical company owned by trusts for the benefit of two sides of the Sackler family—the Dr. Mortimer D. Sackler family, known as "Side A," and the Raymond Sackler family, known as "Side B." JA841 n.1. Purdue's Board of Directors consisted of certain family members from Side A, certain family members from Side B, and, after 2009, eminent outside directors with expertise in the pharmaceutical industry, including a leading drug development specialist, a dean of an acclaimed medical school, and a former CFO of a leading pharmaceutical company. *See, e.g.*, Bankr.Dkt.2488 at 41-42. The last Sackler family member left the Board by January 2019. JA848.

2. The Development of OxyContin and Litigation Years Later

In 1995, the FDA approved OxyContin, a prescription medication used to treat chronic pain. From its launch, OxyContin was classified by the FDA as a Schedule II controlled substance, i.e., a "drug[] with a high potential for abuse, with use potentially leading to severe psychological or physical dependence."[1] Since 2001, OxyContin's FDA-approved label has carried a "black box" warning of

[1] DEA, *Drug Scheduling*, https://www.dea.gov/drug-information/drug-scheduling (last visited Oct. 15, 2023).

the risks of abuse and addiction inherent in all opioid medications. *See* CA2.App.4907.

In 2007, Purdue pled guilty to one count of misbranding OxyContin based on the conduct of certain unidentified supervisors and employees from 1995 through mid-2001, and three executives pled guilty to a strict liability misdemeanor. Purdue also entered into settlement agreements in 2007 with 26 states and the District of Columbia, and Purdue and its shareholders, officers, and directors received releases for pre-2007 conduct in connection with these agreements. Plea Agreement, *United States v. Purdue Frederick Co.*, No. 07-cr-29 (W.D. Va. May 10, 2007), Dkt.6-9; State Settlement Agreement and Release, Crim. Information Attach. M, *Purdue Frederick Co.*, No. 07-cr-29 (W.D. Va. May 10, 2007), Dkt.5.

Litigation against Purdue in state and federal courts, frequently brought by states and municipalities invoking novel theories of liability, began to proliferate starting around 2017. At the time of Purdue's Chapter 11 filing, it had been named as a defendant in more than 2,600 lawsuits arising out of its manufacturing and marketing of OxyContin. CA2.App.387. In 2018, the first complaints to name former Purdue directors as individual defendants were filed. *See, e.g.*, Complaint, *Camden Cnty. v. Purdue Pharma, L.P.*, No. CAM-L-000695-18 (N.J. Super. Ct., Camden Cnty. Feb. 21, 2018); Complaint, *Massachusetts v. Purdue Pharma, L.P*, No. 1884-cv-1808 (Mass. Super. Ct., Suffolk Cnty. June 12, 2018). Hundreds of plaintiffs have since sued some or all of Purdue's former directors, including many cases that were filed during the interval between the Chapter 11 filing in September 2019 and the issuance of the first preliminary injunction against such suits pursuant to 11 U.S.C. §105(a). Bankr.Dkt.2897. No plaintiff has ever alleged that any former Purdue director took any action with respect to opioids *outside* of their role at Purdue. Their claims are based entirely on theories that the former directors can be held responsible for their alleged role in Purdue's conduct. JA369-71, 397.

Given the overwhelming potential liability (and accompanying litigation costs) from the thousands of lawsuits against Purdue, it became apparent that bankruptcy was the only viable solution to preserve Purdue's value as a going concern and to achieve an equitable distribution of that value for the benefit of Purdue's many potential creditors. CA2.App.387. Indeed, the claims that were ultimately filed against Purdue in its bankruptcy proceedings asserted more than $40 trillion of liability, excluding one plaintiff who filed a proof of claim for $100 trillion. JA310. None of these claims against Purdue has ever been reduced to judgment, and they often rest on novel legal theories that have either been rejected by the courts or have never been adjudicated through final appeal. But as Purdue explained at the time of its Chapter 11 filing, it could not sustain legal-defense expenditures of more than $2 million per week and the immense burden on its personnel of responding to thousands of lawsuits. CA2.App.388. Purdue labored hard to achieve a global resolution of tort litigation in the civil system, but it found that global peace was "not achievable" due to the "diverse interests" among a myriad of tort plaintiffs. CA2.App.390. Purdue therefore determined it had no choice but to pursue a global resolution in bankruptcy. CA2.App.393.

While the cascading volume of the claims against Purdue was a certainty, the chances that the claims against Purdue would succeed were far less certain.[2] And claims against Side A former directors, who emphatically dispute all allegations of wrongdoing against them, face all the same hurdles and additional challenges, including the possibility of dismissal for lack of personal jurisdiction or personal involvement in Purdue's actions. While the Trustee notes that three motions to dismiss such claims have been denied (under standards assuming the truth of the allegations), U.S.Br.4 (citing JA669), he fails to mention that the only case in which a finding of personal jurisdiction was appealed resulted in the

[2] In fact, Purdue had strong causation defenses and a long track record of prevailing in personal injury litigation. *See, e.g.*, *United States v. Purdue Frederick Co.*, 495 F.Supp.2d 569, 575 (W.D. Va. 2007) ("Courts have consistently found that despite extensive discovery, plaintiffs were unable to show that Purdue's misbranding proximately caused their injuries."); *State ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *11 (N.D. Dist. Ct. May 10, 2019) (dismissing action against Purdue because the claims were preempted and the plaintiff failed to prove causation); *New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990 (Conn. Super. Ct. Sept. 30, 2020) (dismissing claims brought by local governments against Purdue for lack of standing); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021) (holding that the sale of lawful prescription drugs could not give rise to a public nuisance); *California v. Purdue Pharma L.P.*, 2021 WL 5227329, at *7 (Cal. Super. Ct. Nov. 1, 2021) (ruling for opioid manufacturers and holding that their marketing statements were not false). Even the Trustee underscores the risks that tort claimants would face in such litigation, acknowledging that many of the personal injury claimants here would not be able to come forward with an OxyContin prescription. U.S.Br.5.

issuance of an extraordinary writ *reversing* a finding of personal jurisdiction as to the only Side A former director sued. *Sackler v. Utah Div. of Consumer Prot.*, No. 190905862, at 10 (Utah Dist. Ct. Oct. 10, 2019) (extraordinary writ dismissing claim against Side A former director because the individual had not personally engaged in Purdue's conduct and did not have separate contacts with Utah).

3. Distributions from Purdue

Much of the Trustee's factual background is devoted to a misleading characterization of certain transfers from Purdue to its shareholders, which is largely irrelevant given that the estate's fraudulent transfer claims were *voluntarily* settled and released. To be clear, it is Purdue's estate, not any individual creditor, that has the exclusive standing to pursue claims based on allegedly fraudulent transfers—and Purdue settled those claims and provided a *voluntary* release, JA461-62, which is a part of the confirmation order that the Trustee does not challenge here.

The Trustee's description of the transfers at issue also omits critical factual context. Because Purdue is a pass-through entity for tax purposes, more than half of those transfers (approximately $4.6 billion) were tax distributions to pay taxes owed on Purdue's earnings to federal, state, local, and foreign governments. Bankr.Dkt.654-1 at 25. And because Side A's interest in Purdue is held through a foreign trust, Side A's federal tax distributions were paid directly to the IRS. CA2.App.6132. Of the remainder, from 2008 to 2016, Purdue distributed approximately $4.3 billion for the benefit of Purdue's shareholders and $1.6 billion for investment in certain independent associated companies beneficially owned by the Sackler family. CA2.App.5268. Thus, the settlement consideration to be provided under the plan equals 97% or more of the non-tax distributions, and under the plan, the independent associated companies are to be sold with the proceeds paid to the estate.

Distributions from Purdue to its shareholders increased beginning in 2008 coinciding with favorable developments in connection with OxyContin patent litigation. In 2004, OxyContin revenues dropped dramatically after a district court declared Purdue's OxyContin patents invalid, allowing generic competitors to enter the marketplace. *Purdue Pharma L.P. v. Endo Pharms. Inc.*, 2004 WL 26523 (S.D.N.Y. Jan. 5, 2004). Purdue regained the OxyContin patents and the associated revenues in early 2008, following a decision on remand after the Federal Circuit vacated the invalidation of its patents. *See Purdue Pharma L.P. v. Endo Pharms., Inc.*, 438 F.3d 1123 (Fed. Cir. 2006); *In re OxyContin Antitrust Litig.*, 530 F.Supp.2d 554, 559 (S.D.N.Y. 2008). Revenues more than doubled after the ruling. CA2.App.5268.

Purdue distributed larger amounts beginning in 2008 following these developments, but it also developed a large cash cushion that increased consistently from 2009 onwards. *Id.* By 2014, Purdue's cash reserve exceeded $1 billion, and by the time of Purdue's Chapter 11 filing, it had reached $1.36 billion. *Id.*; Bankr.Dkt.3 at ¶40. In other words, far from being drained of cash, from 2008 until its bankruptcy, Purdue kept greater cash reserves than in previous years.

On top of all that, the vast majority of the non-tax distributions the Trustee criticizes took place at a time when Purdue's OxyContin marketing activities were under intense review by the Department of Health and Human Services' Office of the Inspector General, as a result of a 2007 corporate integrity agreement that Purdue entered into in connection with its guilty plea. *See* JA370; CA2.App.5268. Purdue complied with all of the agreement's requirements for its opioid marketing, and successfully completed the agreement in early 2013. CA2.App.5713. Purdue's Board was advised throughout this period that the independent review organization appointed under the agreement and the Office of the Inspector General were fully satisfied with Purdue's efforts. *See, e.g.*, CA2.App.4555, 5708.

The history of the Side A family explains why their trusts are located abroad. Dr. Mortimer D. Sackler moved to Europe in the 1970s and became an Austrian citizen in 1974. CA2.App.6125. As a result, a significant majority of Side A of the Sackler family was born and reside abroad. *See id.* Side A's ownership interest in Purdue has been held in a trust based in Jersey since before Purdue even launched OxyContin. CA2.App.6122. A senior Side A trustee-director provided uncontested testimony before the bankruptcy court confirming that the Side A trusts were established for legitimate purposes and explaining that Jersey law prohibits establishing trusts for the purpose of hiding assets from creditors. CA2.App.6124-25. The same trustee-director also testified that, having worked for the Dr. Mortimer D. Sackler family since the 1990s, he had never heard anyone in the family suggest that the trusts should be used to hide assets. CA2.App.6125.

As the bankruptcy court recognized, even if the estate were to prevail on the merits of contested litigation seeking to recoup distributions made by Purdue, it would face significant costs, delays and risks in obtaining and enforcing a decision in its favor. JA361-64. If the estate were to seek to recover Side A's share of the distributions, it would have to bring separate actions against each of eight family groups and numerous trusts for their benefit. JA361, 364. Many of these trusts are domiciled in Jersey, and the bankruptcy court credited the unrebutted testimony of a leading Jersey practitioner that the estate or any creditor would face significant litigation costs and risks in seeking to enforce a foreign judgment against such trusts, all of which were avoided by the settlement and associated releases. JA362-64.

4. The Plan of Reorganization

The plan of reorganization that was confirmed by the bankruptcy court and later affirmed by the Second Circuit was the product of extensive process: years of discovery, multiple rounds of intense arm's-length negotiations, and a six-day confirmation hearing. JA354, 406-07, 419, 902. The plan provides for Purdue's reorganization into a not-for-profit public benefit company, the resolution of all claims related to opioids (including claims against related parties), and an orderly and equitable distribution of the estate's assets.

At the core of the plan is an interlocking set of litigation settlement agreements between and among Purdue, private and public creditor groups, and members of the Sackler family and trusts for their benefit. CA2.App.3903. The process of reaching the allocation agreements among Purdue and its creditor groups—a process in which the Sacklers did not participate—was a lengthy and challenging one. JA348-50. But by their express terms, the allocation arrangements among the creditors dissolve unless the Sacklers make the settlement payments that have been agreed to in exchange for the releases in the plan. CA2.App.3532-33; *see* JA400. Under the plan as it stands today, members of the Sackler family (including trusts for their benefit) will make a payment of $5.5 to $6 billion, in addition to relinquishing their ownership interests in Purdue. In turn, they will receive two sets of releases: (i) releases for claims that could be brought by Purdue, including all claims for fraudulent conveyance and alter ego theories of liability; and (ii) releases for related claims by the creditors. JA478, 857, 865-66. Notably, if a released party fails to make a required payment, the ability to bring released claims "snaps back" and the defaulting family member and associated individuals, trusts and entities are subject to litigation. CA2.App.3532-33; *see* JA352.

The releases for related claims by the creditors, which the Trustee never quotes in full, are narrowly constructed. They cover only claims (i) brought by Purdue creditors (ii) against the specific released parties (iii) relating to Purdue's opioid business or the estate (iv) for which "any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." JA275. The bankruptcy court found that those releases affected only claims by creditors that, if litigated, would adversely impact Purdue's estate. JA376. For its part, the district court issued an invitation for any objector to identify any claim subject to the release that would not affect Purdue's estate; no one could. Dist.Ct.Dkt.75 at 2.

Both the challenged releases and Purdue's voluntary release are critical to the offshore trusts' ability to authorize contributions. From Side A's perspective, its participation in the settlement requires the support of Side A family members and trusts for the benefit of some or all of the descendants of Dr. Mortimer D. Sackler. Pursuant to an order from the Royal Court of Jersey, which has supervisory authority over these trusts, the trustees of those trusts are authorized to participate in this settlement if and only if the releases cover claims against the trusts, their fiduciaries, and their beneficiaries. CA2.App.5929-30. The Royal Court has confirmed that the settlement here satisfies this requirement. CA2.App.7174-75.

B. Procedural Background

Purdue's voluntary petition for Chapter 11 reorganization was filed on September 15, 2019. JA849. The decision to file for bankruptcy was made by a special committee of independent directors; as later confirmed by an examiner appointed by the bankruptcy court, no member of the Sackler family had any role in that decision. JA348, 463, 478. Shortly thereafter, Purdue moved in the bankruptcy court to supplement the automatic stay (which stayed pending actions against Purdue itself) with an injunction under 11 U.S.C. §105(a) to halt all pending actions against Purdue's former or current owners, directors, officers, and other associated entities, including members of the Sackler family. Bankr.Dkt.No.74 at 25, 30. The bankruptcy court granted Purdue's motion, and the district court affirmed, recognizing that the bankruptcy court had jurisdiction to issue the injunction because the claims against Purdue and its former directors were intertwined, such that litigation against the former directors therefore could affect the estate. *In re Purdue Pharm. L.P.*, 619 B.R. 38, 48-49 (S.D.N.Y. 2020).

With litigation outside the Chapter 11 proceedings on hold under §105(a), Purdue and its stakeholders negotiated an intricate settlement under which members of the Sackler family and trusts for their benefit would provide a contribution of what eventually became between $5.5 billion and $6 billion to the estate in exchange for releases of claims against the Sacklers by the estate and creditors. *See* JA865-66. That process involved a protracted negotiation and subsequent mediation with diverse creditor interests, which was supported by extensive discovery totaling almost 100 million pages. JA349, 356.

The complex negotiations eventually produced Purdue's plan of reorganization, which garnered overwhelming support from creditors. JA303, 852. Ninety-five percent of the voting creditors, including over ninety-six percent of the personal injury creditors, voted in favor of the plan, including the releases at issue here. JA303, 359-60. After a six-day confirmation hearing, the bankruptcy court found that the plan complied with all the requirements of the Bankruptcy Code and confirmed it. JA860, 898.

The district court vacated the bankruptcy court's confirmation decision. JA861. The district court agreed that the bankruptcy court had subject matter jurisdiction, but held that the Code does not allow a plan of reorganization to include a nonconsensual release of claims against third parties. JA632-809. Purdue, the Official Committee of Unsecured Creditors, the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants, the Ad Hoc Group of Individual Victims of Purdue Pharma, the Multi-state Governmental Entities Group, and both Side A and Side B of the Sackler family appealed that decision to the Second Circuit.

The Second Circuit reversed, holding that the Bankruptcy Code authorizes the third-party releases at issue here and that the bankruptcy court's findings supported confirmation of the plan. JA869-99. The Second Circuit concluded that 11 U.S.C. §§105(a) and 1123(b)(6) grant bankruptcy courts authority that includes the ability, in appropriately narrow circumstances, to release third parties from liability to settle claims on terms that generate substantial resources for the estate and allow for the confirmation of a plan of reorganization. JA878-85. The Second Circuit further found that the bankruptcy court's thorough findings supported its approval of the particular third-party releases here. JA886-96.

SUMMARY OF ARGUMENT

Under the plain text of the Bankruptcy Code, the bankruptcy court acted well within its authority by confirming the plan of reorganization here, including the challenged releases. Consistent with its overriding purposes and the flexible and equitable nature of bankruptcy, the Code authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. §105(a), and to confirm plans of reorganization that include "any other appropriate provision *not inconsistent with* the applicable provisions of this title," 11 U.S.C. §1123(b)(6) (emphasis added). That straightforward text and this Court's precedents confirm that the Code provides bankruptcy courts with ample authority to confirm a plan that includes appropriate third-party releases. Indeed, §1123(b)(6) makes clear that the burden is on the Trustee to point to some applicable provision in the Code that is affirmatively inconsistent with a power that has long been usefully exercised by bankruptcy courts to facilitate settlements, maximize the value of the estate, and confirm plans.

The challenged releases are plainly "appropriate" in light of the circumstances here. Indeed, the Trustee makes little effort to dispute that if the Code permits such releases at all, then the bankruptcy court could properly approve these releases. As the bankruptcy court found (and the Trustee cannot dispute), those releases are integral to the plan of reorganization as a whole. They affect only claims that are closely intertwined with potential claims against Purdue itself, and are provided in connection with a settlement that secures contributions of $5.5 to $6 billion to the estate—equal to or exceeding all of the total non-tax cash distributions that members of the Sackler family received from Purdue in the 12 years before its bankruptcy filing. Without the challenged third-party releases, the estate would lose those billions of dollars in contributions, which would in turn destroy the negotiated distribution of assets under the plan. Moreover, without the closure brought by the releases, creditors would have incentives to pursue claims of dubious validity without regard to the carefully structured settlement allocations reflected in the plan. The releases are thus central to the plan's ability to protect the estate and keep creditors from cannibalizing each other's recoveries—which is precisely why all the major creditor groups themselves independently insisted on the releases.

The Trustee cannot carry his burden of showing that the releases are inconsistent with any applicable provision of the Code. The Trustee argues that because the Code expressly provides for discharges of only debtors, it implicitly forecloses releases of third parties. But as the Second Circuit explained, a discharge and a release are two entirely different things. Authorizing the former for debtors does not remotely imply prohibiting the latter for non-debtors who settle legal claims by the estate and creditors in exchange for substantial sums used to fund the plan. Approving such releases comes well within the "broad authority" the Code provides bankruptcy courts to issue orders that the Code "does not explicitly authorize" to accommodate circumstances that may arise in particular cases. *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990). Nor do third-party releases conflict with 11 U.S.C. §524(e), which simply makes clear that the discharge of a debtor in bankruptcy does not by *itself* affect the liability of any non-debtor. That does not limit a bankruptcy court's ability to use its *other* powers under the Code to settle claims and approve releases that affect the liability of a non-debtor in order to forge an optimal plan.

The Trustee's argument that nonconsensual third-party releases violate the "basic tradeoff" of bankruptcy is both irrelevant and wrong. The relevant question is whether the challenged releases are inconsistent with "applicable provisions" of the Code, 11 U.S.C. §1123(b)(6); asserted tension with some abstract "basic tradeoff" that the Trustee says animates bankruptcy policy is beside the point. Regardless, there is no tension, as the releases here do not grant the broad discharge from prepetition debt or "fresh start" that is the hallmark of the bankruptcy tradeoff; instead, they affect the released parties' liability with respect to only a specific set of claimants who are also Purdue creditors and a specific set of claims that are inextricably intertwined with potential claims against Purdue itself, in exchange for substantial payments that made the plan acceptable to creditors.

The Trustee's attempts to invent conflicts between third-party releases and other statutory provisions are equally unpersuasive. The limitations in §523(a) apply to *discharges*, not releases; they do not categorically prohibit the release (or even discharge) of the claims they cover; and they do not even apply in a corporate Chapter 11 reorganization. The Trustee forfeited any argument under 28 U.S.C. §1411(a), and in any event that provision does not preclude settlements and releases. As to §524(g), the Trustee attempts to do what Congress explicitly warned against: There is no negative inference to be drawn from Congress' express endorsement of third-party releases in the asbestos context. Indeed, the Trustee's bright-line position would have prevented bankruptcy courts from approving the kind of releases Congress endorsed.

The Trustee's remaining arguments likewise lack merit. The Trustee contends that §105(a) and §1123(b)(6) confer only the power to "modify creditor-debtor relationships," not "relationships between non-debtors." But that is a false dichotomy and contradicts well-established practice. Orders that modify creditor-debtor relationships can also affect non-debtor relationships, and vice versa. In fact, bankruptcy courts routinely enter orders that target non-debtors in order to benefit the debtor and its creditors, such as by going beyond the automatic stay and enjoining litigation among non-debtors pursuant to §105(a) to enhance the prospects of a successful reorganization.

The releases here likewise plainly do modify creditor-debtor relationships, as they are intricately intertwined with claims against Purdue and are integral to the overall plan of reorganization. After all, the underlying settlements here are not just between Purdue and its creditors and the released parties, but also *among* the creditors, whose agreed-upon outcomes are dependent on receipt of the shareholder contribution and the distribution of those funds pursuant to the plan. If a minority of creditors were free to hold out and seek recovery outside of these arrangements, the carefully negotiated allocation deal would be in jeopardy, the shareholder contribution would not be forthcoming, and enormous litigation expenses would deplete the value of the estate.

Finally, the Trustee's due process arguments go nowhere, as the claimants here received more than adequate notice and ample opportunity to be heard. This Court should reject the Trustee's invitation to hamstring bankruptcy courts in dealing with some of the most challenging mass-tort bankruptcies and affirm.

ARGUMENT

I. Sections 105(a) And 1123(b)(6) Authorize Third-Party Releases In Appropriate Cases.

The plain text of the Bankruptcy Code authorizes bankruptcy courts to approve third-party releases whenever appropriate and not inconsistent with applicable provisions of the Code. Under that clear text, the bankruptcy court was well within its authority to confirm the releases at issue here.

1. While the Trustee begins with the Bankruptcy Code's "framework," U.S.Br.20, the proper place to start is with its text. Section 105(a) provides that bankruptcy courts "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a). Section 1123(b)(6) provides in turn that a reorganization plan may "include any other appropriate provision *not inconsistent with* the applicable provisions of this title." 11 U.S.C. §1123(b)(6) (emphasis added). These provisions "are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Energy Res.*, 495 U.S. at 549. More to the point, these provisions put the burden on the Trustee to identify particular Code provisions—not just vague general policies, but specific "applicable

provisions" of the Code, 11 U.S.C. §1123(b)(6)—that foreclose the use of third-party releases as a plan term in appropriate cases. The Trustee does not and cannot come close to shouldering that burden.

The broad authority afforded under the sweeping language of §105(a) and §1123(b)(6) encompasses the power to confirm plans that include third-party releases in appropriate circumstances. Section 105(a) authorizes bankruptcy courts to issue "*any* order" that is "necessary *or* appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. §105(a) (emphasis added). Nothing in that text excludes third-party releases from the authority conferred on the bankruptcy court. On the contrary, the authorization to issue "any" necessary or appropriate order carries an "expansive meaning" that encompasses orders "of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008); *see also Michigan v. EPA*, 576 U.S. 743, 752 (2015) (interpreting "appropriate and necessary" broadly).

That statutory text readily covers third-party releases, which can be necessary and appropriate in particular cases to carry out the provisions of the Code. Here, for instance, there is no real dispute that including the challenged third-party releases in the plan is critical to unlocking the contributions that form the bulk of the assets available for distribution to creditors and the only path forward to a successful reorganization. When a third-party release "is necessary for a reorganization's success," *Energy Res.*, 495 U.S. at 551, it is likewise necessary "to carry out the provisions" of the Code that authorize the creation, acceptance, confirmation, and implementation of a feasible plan of reorganization. *See, e.g.*, 11 U.S.C. §§1121, 1123, 1126, 1129, 1142. Indeed, achieving a successful reorganization and preventing liquidation is the entire point of Chapter 11. *See, e.g.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

It is telling in this regard that the Trustee does not challenge bankruptcy courts' authority under §105(a) to enjoin litigation against non-debtors on a temporary basis where necessary to ensure a successful reorganization. That authority was employed here, as it often is, to prevent litigation against non-debtors who are sufficiently closely related to the debtor that litigation not covered by the debtor-specific automatic stay still threatens an efficient reorganization. *See, e.g.*, JA849-50; *Celotex Corp. v. Edwards*, 514 U.S. 300, 306-10 (1995). The Trustee does not provide any explanation for what in the Bankruptcy Code he believes allows third-party litigation to be halted but not settled through an appropriate release.

Section 1123(b)(6) likewise authorizes bankruptcy courts to confirm plans that include third-party releases in appropriate circumstances. Its language regarding the provisions that may be included in a plan of reorganization is even broader than §105(a): So long as a plan provision is "appropriate" and "not inconsistent" with any applicable provision of the Bankruptcy Code, a bankruptcy court may confirm a plan that includes it (and that meets the other requirements for confirmation). Nothing in that text purports to exclude third-party releases as a categorical matter; on the contrary, like §105(a), it broadly and deliberately allows plans to include "*any*" appropriate terms that are not inconsistent with particular "applicable provisions" of the Code, 11 U.S.C. §1123(b)(6) (emphasis added)—meaning plan terms "of whatever kind" that do not contravene specific applicable Code provisions. *Ali*, 552 U.S. at 219. And as in §105(a), Congress' use of the expansive term "appropriate" in §1123(b)(6) underscores the breadth of the power that the provision affords. *See Michigan*, 576 U.S. at 752.

Unsurprisingly, courts have taken §1123(b)(6) at its word, relying on that grant of authority to approve plans including all manner of provisions that are not expressly authorized by the Code (and not inconsistent with any applicable provisions of the Code). For instance, bankruptcy courts regularly rely on §1123(b)(6) as authority for "other customary provisions" in plans of reorganization, including provisions governing distributions, procedures for resolving disputed claims, provisions for modification of the plan, and provisions for retention of jurisdiction. *In re Carbonyx, Inc.*, 2021 WL 3540436, at *2 (Bankr. E.D. Tex. Aug. 11, 2021); *see, e.g.*, *In re Jess Hall's Serendipity, LLC*, 2023 WL 3635068, at *4 (Bankr. N.D. Tex. May 24, 2023); *In re Maremont Corp.*, 601 B.R. 1, 19-20 (Bankr. D. Del. 2019); *see also In re Mallinckrodt, Inc.*, 639 B.R. 837, 906-07 (Bankr. D. Del. 2023) (payment of attorneys' fees for non-estate professionals); *In re Astria Health*, 623 B.R. 793, 798 (Bankr. E.D. Wash. 2021) (exculpation for post-petition acts); *In re City of Detroit*, 524 B.R. 147, 276 (Bankr. E.D. Mich. 2014) (exit financing). This case provides additional examples, as the confirmed plan here includes numerous unchallenged provisions that cover a wide range of matters the Code does not otherwise address, illustrating the breadth and flexibility of the power §1123(b)(6) affords to include plan terms that are critical to a particular reorganization, but neither expressly authorized nor forbidden by other Code provisions. *See, e.g.*, JA238-63 (creation and terms of the document repository, which includes documents from the Sackler families as well as Purdue); Bankr.Dkt.3726 at 70-72 (establishment of a new not-for-profit corporation run entirely for public benefit and funding of opioid relief efforts); Bankr.Dkt.3726 at 24, 80-82; Bankr.Dkt.2737-1 at 3-12, 17-29 (extensive abatement program providing for treatment, education, and social supports); Bankr.Dkt.3726 at 23, 31, 63; Bankr.Dkt.3787-3 at 3 (provision of overdose reversal medication as part of distribution of value to creditors).

This Court has taken the same view, interpreting both §105(a) and §1123(b)(6) to provide bankruptcy courts with authority to approve a wide range of appropriate plan provisions, constrained only by the specific limitations elsewhere in the Code. In *Energy Resources*, for example, the Court considered whether a bankruptcy court "has the authority to order the Internal Revenue Service (IRS) to treat tax payments made by Chapter 11 debtor corporations as trust fund payments where the bankruptcy court determines that this designation is necessary for the success of a reorganization plan." 495 U.S. at 546. The Court acknowledged that the Bankruptcy Code "does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments as either trust fund or nontrust fund." *Id.* at 549. Nevertheless, the Court concluded, the Code does empower bankruptcy courts to confirm such a plan under §105(a) and what is now §1123(b)(6) (then codified at §1123(b)(5)). *Id.*

Those provisions, the Court explained, grant bankruptcy courts a well of "residual authority" that is "consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Id.* The provisions together made the *absence* of any provision affirmatively precluding the treatment of tax payments as trust fund payments *empowering*; as doing so did not "transgress[] any limitation on [the bankruptcy court's] broad power" under the Code, the court could permissibly "order the IRS to apply tax payments to offset trust fund obligations" where doing so was "necessary for [the] reorganization's success." *Id.* at 550-51.

Energy Resources is particularly apposite here, in fact, because the effect of the order approved there *was* to release third parties from claims by a non-debtor. By ordering the IRS to apply debtor tax payments first to "trust fund" taxes rather than other taxes, the bankruptcy court reduced the liability of the debtors' officers and employees, because the IRS can collect the former but not the latter "directly from the officers or employees of the employer who are responsible for collecting the tax." *Id.* at 547. Just as in this case, the plan provision at issue in *Energy Resources* was the result of a settlement agreement between the debtor and a former officer, who agreed to contribute to the trust established under the bankruptcy plan in exchange for an agreement that the trustee would designate debtor tax payments in a way that would "forestall personal liability" against the debtors' former officers. *In re Energy Res. Co.*, 59 B.R. 702, 704 (Bankr. D. Mass. 1986). This Court's holding in *Energy Resources* thus confirms that bankruptcy courts have authority under §105(a) and §1123(b)(6) to approve plans of reorganization that operate to relieve certain non-debtors of liability to other non-debtors, where doing so is necessary for a successful reorganization. *Energy Resources* further underscores that the absence of a provision specifically authorizing a plan term is no obstacle to its use, as §105(a) and §1123(b)(6) allow the plan to include terms absent an "inconsistent" provision of the Code.

II. The Third-Party Releases In This Case Are Appropriate.

While the Trustee accuses the Second Circuit of "interpreting Section 1123(b)(6) as a 'bottomless' well of residual authority" and authorizing a "startling breadth of power," U.S.Br.37-38, that rhetoric has no basis in the Second Circuit's actual opinion. On the contrary, the Second Circuit emphasized that §105(a) and §1123(b)(6) require a context-dependent assessment under which third-party releases can be justified only in specific and limited scenarios—an approach that the United States itself has espoused in the past. *See* JA890 (emphasizing that courts "should exercise particular care when evaluating these types of releases"); *cf.* Br. of the United States at 23-27*, In re Exide Holdings, Inc.*, No. 20-1402 (D. Del. July 26, 2021), Dkt.59 (agreeing that nonconsensual third-party releases are permissible in "the most extraordinary cases," and analyzing relevant factors).

The Trustee nevertheless criticizes the case-specific approach to third-party releases adopted by the Second Circuit (and most other courts of appeals) as "judicial freewheeling" and "unmoored from the Code's text." U.S.Br.40. That context-sensitive assessment, however, follows directly from the statutory text. A third-party release can be ordered under §105(a) if it is "necessary or appropriate" to carry out the provisions of the Code, 11 U.S.C. §105(a), and can be included in a plan under §1123(b)(6) only if it is "appropriate." 11 U.S.C. §1123(b)(6). Those textual requirements demand the kind of contextual analysis that the Second Circuit prescribed to determine whether a release is permissible on the facts of a particular case. As this Court has explained, the "word 'necessary' … has always been recognized as a word to be harmonized with its context." *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944). Similarly, the word "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of *all the relevant factors*." *Michigan*, 576 U.S. at 752 (emphasis added). When a statute calls for an assessment of whether something is "appropriate," it necessarily envisions an analysis marked by the "flexibility" to consider and weigh all the relevant factors. *Id.* That flexibility makes particular sense in light of the reality that §1123(b)(6) authorizes bankruptcy courts to include a wide range of "appropriate" provisions in plans on everything from document repositories to releases. *See supra* pp.22-23. The statutory text thus strongly supports the Second Circuit's context-sensitive approach.

The Trustee does not argue that the Second Circuit considered any factors that it should not have in deciding whether the third-party releases here were appropriate, nor that it misapplied any of the factors that it identified as relevant, nor that it failed to consider any other factors that should have influenced its analysis. Indeed, the Trustee makes little effort to dispute that if the Code authorizes third-party releases at all, then the bankruptcy court acted within its discretion in approving the third-party releases in this case. Instead, the Trustee argues that the Code affords bankruptcy courts *no* power to approve nonconsensual third-party releases under *any* circumstances, regardless of how necessary or appropriate those releases might be on the facts of a particular case.

That uncompromising categorical position is about the only position that the Trustee *can* take here, because this case provides a quintessential example of the narrow circumstances in which third-party releases are necessary and appropriate. After holding a six-day trial, taking testimony from 41 witnesses, reviewing thousands of exhibits, and listening to two days of oral argument, the bankruptcy court found that the third-party releases here provide the *only* "reasonably conceivable means" for Purdue to emerge from bankruptcy. JA299. No settlement is possible without the releases, and no confirmable plan is possible without the settlement payments. Without the releases (and the settlement payments in exchange for those releases), the "plan would unravel, including the complex interrelated settlements that depend upon the payments being supplied under the settlement in addition to the non-monetary consideration under it." JA400.

Of course, a significant majority of the releases under the plan, both in number and in value, are consensual—agreed to by Purdue as the holder of its fraudulent conveyance, alter ego and veil piercing claims, and by the overwhelming majority of creditors who support the plan as holders of the vast majority of the other released claims. The compulsory releases that the Trustee challenges, by contrast, make up a small part of the total universe of releases involved, but are nonetheless of critical importance because they solve the collective action problem that claimants would otherwise face by ensuring that a small group of hold-outs cannot lay claim to a disproportionate share of the overall pie. For that very reason, all of the major creditor groups *themselves* insisted on including the challenged releases in the plan. *See* JA405-06.

The bankruptcy court accordingly found (and the Trustee does not dispute) that absent the challenged releases, the plan would collapse, destroying Purdue and subjecting both it and the Sacklers to a wave of litigation over their alleged responsibility for Purdue's actions. JA380-81. As a result, "[u]nder the most realistic scenarios … there would literally be *no* recovery by unsecured creditors" from Purdue's estate, along with "the likely unraveling of the heavily negotiated and intricately woven compromises in the plan and the ensuing litigation chaos." JA365; *see* JA371 (recognizing "the catastrophic effect on recoveries that would result from pursuing [individual] claims and unravelling the plan's intricate settlements").

As the Second Circuit and the bankruptcy court explained, the third-party releases here are no broader than necessary to achieve Purdue's reorganization. JA400, 892-94. The releases apply only to creditors who have potential claims against Purdue and the released parties, and only to claims against the released parties that are inextricably intertwined with potential claims against Purdue—in particular, claims that are "(x) based on or relating to, or in any manner arising from … (i) the Debtors …, (ii) the Estates or (iii) the Chapter 11 Cases and (y) 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. As the Second Circuit observed, the bankruptcy court "limited the [r]eleases extensively" precisely "to ensure that the released claims related to the Debtors' conduct and the Estate." JA892. And contrary to what the Trustee suggests, the releases do not extend to an unusually broad set of parties; they employ standard language designed only to prevent attempts to circumvent the releases by suing closely related parties or entities. *Contra* U.S.Br.7.

Finally, the third-party releases here do not involve any purported "misuse [of] the bankruptcy system to avoid mass-tort liability," U.S.Br.45, as the overwhelming creditor support for those releases underscores. As the bankruptcy court recognized, the amount that the Sackler family will contribute toward the reorganization in exchange for the releases from Purdue and creditors substantially exceeds the total net recovery that the creditors would otherwise be likely to recover on their claims, given the "dilutive effect" of the "extraordinarily expensive and time-consuming" litigation that would be required to pursue those claims to possible judgment. JA405-06. And contrary to what the Trustee suggests, the procedures for distributions under the plan *do* provide compensation for the released claims, as those distributions represent compensation for claims both against Purdue itself and against released parties—a structure that ensures that creditors who suffered the same injuries are not treated differently based on the mere happenstance of which defendants they may have chosen to sue for those injuries. *See* JA562-63. More broadly, the Trustee's suggestion that the challenged releases work a dramatic realignment of the economics that somehow exceeds the bankruptcy court's authority ignores the fact that the vast majority of the releases under the plan are consensual and subject to no challenge, and that the challenged releases primarily operate to prevent hold-outs from obtaining disproportionate recoveries.

III. No Provision Of The Code Prohibits The Third-Party Releases In This Case.

Instead of confronting the specific circumstances that make the third-party releases here necessary and appropriate, the Trustee takes the categorical position that nonconsensual third-party releases are *never* permissible, because (he says) they "conflict with other limits on powers under the Code." U.S.Br.24. The Trustee is mistaken. While bankruptcy courts cannot exercise their powers under §105(a) and §1123(b)(6) to "contravene specific statutory provisions" of the Code, *Law v. Siegel*, 571 U.S. 415, 421 (2014), the Trustee cannot shoulder his burden of identifying any Code provision that is actually inconsistent with the third-party releases here, because no such provision exists.

1. The Trustee does not and cannot cite any "applicable provisions" of the Code, 11 U.S.C. §1123(b)(6), prohibiting a bankruptcy court from confirming a plan that includes nonconsensual third-party releases. Instead, the Trustee's lead argument relies on a false equivalence between discharges and releases and a complaint that third-party releases "circumvent[] the Code's express discharge provisions by granting the functional equivalent of a discharge to nondebtors," U.S.Br.25, in contravention of multiple (inapplicable) Code provisions limiting discharges to debtors, *see, e.g.*, 11 U.S.C. §§727(a), 727(b), 1141(d)(1)(A), 1141(d)(3), 1123(b)(3)(A).

That argument rests entirely on a false equivalence. Simply put, releases are not discharges. As the Second Circuit explained, the two concepts are entirely distinct. A discharge in bankruptcy is a statutory concept closely tied to the bankruptcy policy of giving debtors a fresh start. Accordingly, a discharge broadly frees a debtor from personal liability "with respect to any debt," absolving the debtor across the board from all of its prior obligations other than those specifically exempted from discharge by the Code or (in Chapter 11 cases) the plan of reorganization. JA871; *see, e.g.*, 11 U.S.C. §§524(a), 727(b), 1141(d). A release, by contrast, is a far narrower contractual device—usually (as here) forming part of the quid-pro-quo in a settlement—that frees the released party, in exchange for specific consideration, from liability as to only the particular released claims and releasing parties. *See, e.g.*, *Release*, Black's Law Dictionary (11th ed. 2019) (defining "release" as "the act of giving up a right or claim to the person against whom it could have been enforced," or the "relinquishment or concession of a right, title, or claim"). Unlike a discharge, a release does not purport to give the released party a "fresh start"; it "neither offer[s] umbrella protection against liability nor extinguish[es] all claims." JA872. Thus, all of the Trustee's handwringing about granting discharges to non-debtors or giving non-debtors the sweet of discharge without the bitter of the Code's impositions on debtors are inapposite.

Unlike the Trustee, the Canadian creditors do try to claim that a specific Code provision explicitly prohibits third-party releases. Canadian.Br.27-28. They point to section 524(e), which 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." 11 U.S.C. §524(e). But that provision simply underscores that discharges are different from releases and why third-party releases are sometimes necessary—namely, that the discharge of the debtor itself does not reduce the liabilities of third parties. No one has suggested otherwise, which presumably explains why the Trustee relegates that provision to two sentences, U.S.Br.25, and why the district court expressly disclaimed reliance on it, JA788 (explaining that the releases are "not inconsistent with §524(e)"). *Accord In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008); JA879-80.

2. The Trustee next claims that third-party releases are unlawful because they "violat[e] the basic tradeoff of bankruptcy that, in exchange for a fresh start, a debtor must commit essentially all assets to satisfying claims against it." U.S.Br.27. According to the Trustee, the third-party releases here violate that "tradeoff" because they permit members of the Sackler family to obtain "full repose" while keeping distributions that they received from Purdue in the years before the bankruptcy filing. U.S.Br.26-27.

That argument is wrong on both the law and the facts. As to the law, the Code empowers bankruptcy courts to confirm a plan that includes any appropriate term that is "not inconsistent with the applicable provisions of this title." 11 U.S.C. §1123(b)(6). That statutory text requires the Trustee to identify "applicable provisions of this title," which is to say actual Code provisions, that are applicable to and inconsistent with the plan terms. Asserted tension with the Trustee's conception of the Code's "structure and purposes," U.S.Br.29-30, or even more abstract notions of bankruptcy's "basic tradeoff," U.S.Br.27, does not suffice. *Cf. Law*, 571 U.S. at 421 (explaining that §105(a) cannot "override *explicit mandates* of other sections of the Bankruptcy Code" (emphasis added)). While such abstract notions might be a basis for arguing that a particular bankruptcy plan is inappropriate, it is not nearly enough to rob bankruptcy courts of a valuable tool that has proven critical in forging countless successful reorganizations.

As to the facts, the Trustee's "basic tradeoff" argument rests on the same erroneous premise as his effort to equate releases and discharges. Third-party releases do *not* grant the released parties "full repose" or the kind of "fresh start" debtors receive from a discharge. *Contra* U.S.Br.26-27. On the contrary, as the bankruptcy court and the Second Circuit emphasized, the releases here affect the released parties' liability with respect to only a specific set of claimants who are also Purdue creditors and a specific set of claims that are inextricably intertwined with potential claims against Purdue itself. JA396. The released Sackler family members and their related entities are still just as liable (or not liable) as they were before on all other claims against them and all other debts they owe. And despite the Trustee's inflated rhetoric, the releases also do not somehow improperly allow members of the Sackler family to keep "billions of dollars that they drained from Purdue." U.S.Br.26-27. The payments here reflected a court-approved settlement of the estate's claims against members of the Sackler family and reflect a substantial recovery for those claims to the tune of more than 97% of the non-tax distributions the released parties received from Purdue in the nearly 12 years preceding the bankruptcy filing. JA865-66; *see* CA2.App.5268. Needless to say, there is no way to secure that kind of settlement absent a release, and disabling bankruptcy courts here and in every other non-asbestos bankruptcy from obtaining such settlements would do violence to the clear text of the Code and a great public disservice.

3. The Trustee's remaining attempts to identify "specific provisions of the Code" that supposedly contravene the third-party releases, U.S.Br.27, are even less persuasive. The Trustee first invokes

several provisions of the Code that limit the scope of a discharge in bankruptcy by excepting certain fraud claims from that discharge when creditors timely object. U.S.Br.27 (citing 11 U.S.C. §§523(a)(2), (4), and (6)); *see also* Canadian.Br.28 (same). But again, this case is not about the scope of any *discharge* in bankruptcy. And once it is acknowledged that releases are different from discharges, there is no coherent reason that limits on one would restrict the other, which is why multiple courts have approved third-party releases of fraud claims. *See, e.g.*, *In re Millenium Lab Holdings II, LLC*, 945 F.3d 126, 129, 132 n.4 (3d Cir. 2019); *In re Drexel Burnham Lambert Grp., Inc.*, 130 B.R. 910, 918, 926-28 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992). Indeed, where (as here) the claims being settled include alleged fraud claims, the idea that the release accompanying the settlement would not release fraud claims is nonsensical.

Not surprisingly, the Code plainly envisions that bankruptcy courts *can* confirm a plan that releases fraud claims against non-debtors in appropriate circumstances. For instance, the Code expressly authorizes bankruptcy courts to confirm plans that "provide for" the "settlement or adjustment of any claim or interest belonging to the debtor or to the estate," 11 U.S.C. §1123(b)(3)(A), including fraud claims against non-debtors. That is, the Code clearly permits a bankruptcy court to confirm a plan that includes a release of fraud claims *by the debtor* against non-debtors—undermining any contention that such releases are somehow categorically inconsistent with §523(a). *Contra* U.S.Br.27.

4. The Trustee next (belatedly) asserts that the challenged releases violate 28 U.S.C. §1411(a), which provides that the Bankruptcy Code "do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." 28 U.S.C. §1411(a); *see* U.S.Br.27-28; Canadian.Br.28. That argument is forfeited, as the Trustee never raised it below. Regardless, the reason that this argument did not occur to the Trustee is obvious, as the Trustee's categorical position is not limited to releasing claims that would be tried by juries and nothing in that "notoriously ambiguous" provision, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40 n.3 (1989), conflicts with the third-party releases in this case.

As an initial matter, the Trustee's argument proves too much and too little. If the third-party releases here violate §1411(a), then so do third-party releases under 11 U.S.C. §524(g), which expressly authorizes such releases for asbestos-related claims, *see infra* pp.37-41. The Trustee has no explanation for how §1411(a) could permit §524(g) releases but not the releases here. At the same time, the Trustee's categorical objection to third-party releases extends to equitable claims and other claims for which there is no jury-trial right.

In reality, §1411(a) does not conflict with third-party releases at all. That provision was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which clarified that "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate" are not "core" claims and therefore must be withdrawn to federal district court and finally decided there. *Id.* §104(a), 98 Stat. at 340 (codified at 28 U.S.C. §157(b)(2)(B)). But §1411(a) has nothing to do with the settlement or release of such claims. Instead, that statute just ensures that parties may request a jury trial when their personal injury and wrongful death claims are withdrawn from the bankruptcy court and decided in district court, as otherwise a person who filed such claims in bankruptcy court would waive his jury-trial right by "subjecting himself to the bankruptcy court's equitable power." *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990); *see, e.g.*, *In re Dow Corning Corp.*, 215 B.R. 346, 360 (Bankr. E.D. Mich. 1997). Nothing in 28 U.S.C. §1411(a) speaks to the entirely separate question of whether bankruptcy courts may approve third-party releases in appropriate cases as part of the process of settling and releasing claims.

5. Finally, the Trustee cannot resist the temptation to point to §524(g), which expressly authorizes certain third-party releases in the asbestos context. U.S.Br.33-35; *see also* Canadian.Br.24. But when Congress enacted §524(g), it included a rule of construction flatly prohibiting courts from using §524(g) to draw a negative inference about the power of bankruptcy courts outside the asbestos context. That provision states:

> Nothing in subsection (a), 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.

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §111(b), 108 Stat. 4106, 4117 (codified at 11 U.S.C. §524 note). As the House Judiciary Committee explained, that rule of construction was enacted "to make clear that [§524(g)] is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization." 140 Cong. Rec. 27692 (Oct. 4, 1994). That provision makes particular sense, because Congress was effectively endorsing the pioneering efforts of bankruptcy courts to approve appropriate third-party releases in asbestos cases. Thus, in endorsing those efforts in §524(g), Congress did not want to implicitly condemn the judicial efforts that pre-dated §524(g).

While the Trustee acknowledges that Congress "cautioned against reading [section 524(g)] as either a rejection or a ratification of any separate authority under the Code to enjoin some third-party actions," he then proceeds to do exactly what Congress prohibited, insisting in his *very next sentence* that "the inherently narrow nature of the 'trust/injunction mechanism' that Congress adopted" in §524(g) is "conspicuous" and "supports the conclusion that the Code does not authorize" the third-party releases here. U.S.Br.35. But the rule of construction that Congress included in Bankruptcy Reform Act is unequivocal: "[*n*]*othing*" in section 524(g) "shall be construed to modify, impair, or supersede any other authority" to approve third-party releases. 11 U.S.C. §524 note (emphasis added). That is a binding statement of law—passed by Congress and signed by the President—that the Trustee is not free to ignore.[3]

The Trustee's arguments fail even on their own terms. To begin, the Trustee vastly overstates the purported contrast between releases under §524(g) and the third-party releases in this case. The Trustee first suggests that §524(g) releases are narrower because that section "applies solely to bankruptcies involving claims based on asbestos exposure," U.S.Br.33, whereas (the Trustee says) the releases here apply to "all civil claims … that relate in any way to the operations of Purdue," *id.* (ellipsis in original) (quoting JA637). But that simply misstates the scope of the releases here, which explicitly apply only to claims for which some "conduct, omission or liability" of Purdue or the other debtors "is the legal cause or is otherwise a legally relevant factor." JA274-75.

The Trustee also points out that §524(g) applies only to claims that arise by reason of "four specified types of legal relationships with the debtor." U.S.Br.33. But two of those specified relationships are "the third party's ownership of a financial interest in the debtor" and "the third party's involvement in the management of the debtor," 11 U.S.C. §§524(g)(4)(A)(ii)(I)-(II)—mirroring the basis for the released claims here, which assert liability against the

[3] Contrary to the suggestion of the Canadian creditors (at 29), the rule has no less force just because it is codified in a statutory note. *See, e.g.*, *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); Office of the Law Revision Counsel, Detailed Guide to the United States Code §VI(F) (2023) ("A provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note.").

released parties based on their involvement with Purdue. *See* JA375 ("The third-party claims that the plan would release and enjoin are very closely related on the facts to the estates' claims for alter ego, veil piercing, and breach of fiduciary duty/failure to supervise settled under the plan."); JA403 (same). The Trustee also cites the various substantive and procedural "protections" required under §524(g), *see* U.S.Br.33-34, but ignores that those protections exist for the benefit of *future claimants*, and that the bankruptcy court found without contradiction that "there are no viable future claims" here, JA478.

Even setting all that aside, the Trustee's attempt to import the requirements of §524(g) into other contexts makes little sense. Congress enacted §524(g) to address a very specific problem: "how to deal with future claimants" in the asbestos context who "were not yet before the court" because "their diseases had not yet manifested itself." H.R. Rep. No. 103-835, at 40 (1994). Bankruptcy courts had devised a very specific solution to that problem by channeling all present and future asbestos-related claims into a trust funded by the debtors' stock, a portion of their future profits, and contributions from their insurers, while enjoining present and future claims against the emerging debtor company and related third parties. *Id.* Congress codified that solution in §524(g) to dispel any "lingering uncertainty" as to whether such injunctions would "withstand all challenges," ensuring that the emerging company would not face litigation risks that could undermine its ability to obtain a fresh start and the trust's ability to generate value for future claimants. *Id.*

At the same time, Congress was aware that courts were "beginning to experiment with similar mechanisms" in other contexts, and did not want to suggest that they lacked authority to do so. 140 Cong. Rec. at 27692. For that very reason, Congress explicitly provided by statute that nothing in the specific provisions that Congress enacted to address the unique problems of the asbestos context should be construed to "modify, impair, or supersede any other authority the court has" to grant third-party releases in other contexts. 11 U.S.C. §524 note. Congress thus expressly preserved the existing authority of bankruptcy courts to develop appropriate solutions to the different problems that might arise in other contexts—a decision that cannot be reconciled with the Trustee's attempt to reinterpret the requirements of §524(g)'s asbestos-specific solution as necessary prerequisites for all third-party releases.

IV. The Trustee's Remaining Arguments Lack Merit.

The Trustee's remaining arguments are equally unpersuasive.

1. First, the Trustee asserts that §105(a) and §1123(b)(6) cannot authorize third-party releases because they confer only the power to "modify creditor-debtor relationships," not "relationships between nondebtors." U.S.Br.24 (emphasis omitted); *see also* Canadian.Br.35. That is a false dichotomy and false in all events. Orders that modify creditor-debtor relationships will often also modify the rights of non-debtors, and vice versa, and bankruptcy courts routinely exercise unchallenged authority under the Code to enter orders directed at non-debtors in an

effort to facilitate the ultimate modifying of creditor-debtor relationships.

For instance, courts have enjoined creditors from pursuing claims against the debtors' insurers, guarantors, partners, and co-defendants when doing so was necessary to protect the *res* and to enhance the prospects of a successful reorganization. *See* 2 Collier on Bankruptcy §105.04 (16th ed. 2023) (collecting cases). Along similar lines, bankruptcy courts regularly exercise their §105(a) authority to enjoin litigation against other non-debtors while Chapter 11 proceedings are pending to enhance the prospects of a successful reorganization. *See* 2 Collier §105.04; *Celotex*, 514 U.S. at 306-10. Those injunctions can and do immediately modify relationships among non-debtors, but the close relationships between certain non-debtors and the debtors justify the relief. Indeed, the Trustee does not appear to dispute that such injunctions are permissible—leaving the Trustee in the odd position of asserting that bankruptcy courts have the power under §105(a) to put third-party claims against non-debtors on an indefinite hold to improve the chances of a successful reorganization, but not to approve a final resolution of those claims so that the reorganization can actually happen. That makes little sense, and only illustrates the impossibility of reconciling longstanding practice with the Trustee's assertion that bankruptcy courts are narrowly limited to orders that specifically modify creditor-debtor relationships.

This Court's decision in *Energy Resources* likewise shows that a bankruptcy court's authority under §105(a) and §1123(b)(6) is not restricted to orders that modify only creditor-debtor relationships. After explaining that sections 105(a) and 1123(b)(6) "are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships," this Court in *Energy Resources* went on to approve the confirmation of a plan that directed the IRS to apply certain payments to trust fund tax liabilities rather than nontrust fund liabilities—an order directed to the IRS with the effect of reducing claims by a non-debtor against third parties. 495 U.S. at 549-51; *supra* pp.23-25. In short, the actual holding of *Energy Resources* demonstrates that the Trustee is overreading the one phrase he relies on from that opinion as the basis for his position.

This case further demonstrates that there is no clear divide between orders affecting creditor-debtor relationships and orders affecting third parties, as the challenged third-party releases here implicate Purdue's relationships with its creditors in multiple ways. To begin with, of course, the global settlement leading to those releases was in large part a settlement of *Purdue's own* claims against members of the Sackler family on fraudulent transfer, alter ego, veil-piercing, and other theories, which were a main asset of the estate. *See supra* pp.11, 28. Moreover, as the bankruptcy court found (and the Trustee does not dispute), the challenged third-party releases are inextricably intertwined with potential claims against Purdue, as the releases apply only to claims for which Purdue's conduct is a "legal cause or is otherwise a legally relevant factor." JA275; *see, e.g.*, JA375, 396-97, 403. In addition, under Purdue's indemnification agreements with its former directors and officers—

which were signed in 2004, years before anyone contemplated Purdue might face bankruptcy, JA893—any claims against members of the Sackler family arising from their management of Purdue would lead to a parallel indemnification claim against Purdue itself. And even beyond those indemnification agreements, any litigation against members of the Sackler family on the released claims—which by definition relate to Purdue's conduct—would necessarily impose additional litigation expenses on Purdue to respond and ensure its own interests would be protected. The third-party releases here accordingly have the direct effect of resolving potential claims against the estate and avoiding litigation expenses for the estate—not to mention obtaining billions of additional dollars for the estate in the form of settlement payments. *See* JA842, 874-75. Finally, the third-party releases are also integral—in fact, "critical"—to Purdue's entire plan of reorganization, which is all about restructuring creditor-debtor relationships. JA400; *see supra* pp.27-30.

2. The Trustee asserts that the canon of *ejusdem generis* requires restricting a bankruptcy court's power under §1123(b)(6) to "adjusting the relationship between the debtor and its creditors," because (the Trustee says) that is what the other powers in §1123(b)(1)-(5) address. U.S.Br.23-24. As just described, the releases here *do* adjust the relationship between Purdue and its creditors (as well as the relationships among those creditors). But the Trustee is wrong in all events, as §1123(b) contains several provisions allowing the plan to affect the rights of third parties who may or may not be creditors of the debtor or have filed claims in the bankruptcy. *See,*

e.g., 11 U.S.C. §1123(b)(2) (allowing the plan to assume, reject, or assign any executory contract or unexpired lease of the debtor); *id.* §1123(b)(3) (allowing the plan to settle or adjust any claim or interest of the debtor or the estate); *contra* U.S.Br.22-23. Moreover, the structure of §1123 defies the Trustee's effort to artificially constrain §1123(b)(6). Section 1123(a) specifies terms a plan "shall" include, §1123(c) specifies a term that certain plans "may not" include, and §1123(b) includes a variety of provisions a plan "may" include. There is no basis for artificially constraining those permissive, non-mandatory terms beyond §1123(b)(6)'s own limitations that they be "appropriate" and "not inconsistent with the applicable" Code provisions. Finally, as previously explained, bankruptcy courts have often relied on §1123(b)(6) to confirm plans containing a wide variety of provisions that do not specifically concern creditor-debtor relationships and are not otherwise expressly authorized by the Code. *See supra* p.22.

3. The Trustee next tries to raise the bar, asserting that "'more than simple statutory silence' is required to conclude that Congress 'intends a major departure' from a 'basic underpinning' of bankruptcy law." U.S.Br.28 (brackets omitted) (quoting *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464-65 (2017)). That argument fails. First, the Bankruptcy Code is not "silent" here; it clearly and explicitly confers on bankruptcy courts the power to approve *any* appropriate plan provision that is not inconsistent with the Code. 11 U.S.C. §1123(b)(6). It is the Trustee who seeks to interpose an unwritten third-party-release-exception that is absent from the text of the statute. To be sure, the Bankruptcy Code

does not specifically mention third-party releases. But the Code does expressly address how to assess that kind of silence when it comes to the terms of a plan: As long as those terms are appropriate and not inconsistent with an applicable Code provision, they are affirmatively authorized. Second, third-party releases are not a "major departure" from any "basic underpinning" of bankruptcy law, *contra* U.S.Br.28; on the contrary, as already described, they fall comfortably within a bankruptcy court's traditional and accepted authority to issue appropriate orders to enable a successful reorganization, even if in certain circumstances those orders may also affect third parties.

None of the cases the Trustee invokes helps his cause. Neither *Czyzewski* nor *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012), involved §105(a) or §1123(b)(6), or shed any light on the issue here. The Trustee next invokes *Law*, which at least involves §105(a), but does nothing for the Trustee's position. In *Law*, the bankruptcy court decided to sanction the debtor by "surcharging" his entire $75,000 homestead exemption, even though §522 of the Bankruptcy Code explicitly entitled the debtor to exempt that asset from the bankruptcy estate and made it "not liable for payment of any administrative expense." 571 U.S. at 422. This Court, unsurprisingly, held that the bankruptcy court had exceeded its §105(a) authority by attempting to "contravene specific statutory provisions" in the Code. *Id.* at 421. That unremarkable holding has no relevance here, beyond showing the kind of inconsistency with specific Code provisions that is lacking here. *See supra* pp.30-41.

Finally, the Trustee invokes *Callaway v. Benton*, 336 U.S. 132 (1949), but that case only demonstrates the dangers of relying on cases pre-dating the Code. *Callaway* applied the Bankruptcy Act of 1898, which limited bankruptcy jurisdiction to "the debtor and its property" and "any rights that may be asserted against it." *Id.* at 142, 147. In the Code, Congress purposefully expanded the jurisdiction and powers of the bankruptcy courts to reach "more than simple proceedings involving the property of the debtor or the estate," including all civil proceedings related to a bankruptcy case. *Celotex*, 514 U.S. at 308; *see* 28 U.S.C. §1334(b). *Callaway*'s narrower understanding of bankruptcy court authority under the 1898 Act says nothing useful about the expanded scope of bankruptcy court authority under the Code.

4. The Trustee's constitutional arguments ignore the ample process provided in this case and by the Code more generally. "Due process requires 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." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010). The claimants received both. As to notice, the bankruptcy court found (and the Trustee does not dispute) that Purdue undertook an "unprecedentedly broad" notification campaign that was remarkably successful, with an estimated 98% percent of adults in the United States and 86% of adults in Canada receiving notice of the plan and the confirmation hearing. JA300-02, 852. The claimants likewise had ample opportunities to be heard. The bankruptcy court held a six-day trial, took testimony from 41 witnesses, reviewed thousands of

exhibits, and listened to two days of oral argument before issuing an opinion that the district court called a "judicial *tour de force*" for its "extensive findings of fact" and its analysis of "every conceivable legal argument in great detail." JA706. Those procedures fully satisfy due process.

The Trustee tries to draw an analogy to class actions under Rule 23(b)(3), suggesting that due process requires that a claimant have "an opportunity to remove himself." U.S.Br.42 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). But bankruptcy with opt-out rights is an oxymoron. As the Second Circuit explained, "the Trustee's argument would essentially call into question all releases through bankruptcy," and the entire bankruptcy system would collapse if claimants had a due process right to opt out of bankruptcy proceedings. JA899. The Trustee has no response.

5. Finally, the Trustee raises a series of policy considerations that he claims support his position. Of course, when it comes to policy, "the pros and cons of [third-party releases] are for the consideration of Congress, not the courts." *RadLAX*, 566 U.S. at 649. But in any event, none of the Trustee's asserted policy justifications for his position moves the needle in the Trustee's direction.

The Trustee asserts that the Second Circuit's opinion is a "roadmap for corporations and wealthy individuals to misuse the bankruptcy system to avoid mass-tort liability" and "deprive tort victims of their day in court without consent." U.S.Br.44-45. Not so. The Trustee simply ignores the overwhelming degree of creditor support for the plan and the fact that the settlement and release of the claims against the Sacklers generated $5.5 to $6 billion for the creditors. The Trustee cannot pretend that all those benefits for creditors would remain forthcoming in the absence of a release. That is not how any settlement works, and it fully explains the overwhelming creditor support for the plan.

The Trustee ends by suggesting that there are other avenues for resolving mass-tort litigation, pointing to a recent settlement of some 300,000 lawsuits through the tort system after a bankruptcy court "rejected [an] effort to use the bankruptcy system" to resolve that liability. U.S.Br.47. But the reorganization effort there was rejected long before plan confirmation based on concerns that the debtor had ample resources. No one makes a similar claim about Purdue, and nothing in the Aearo bankruptcy or anything else supports the notion that when the debtor is actually insolvent, third-party releases from closely related parties are off-limits or non-bankruptcy settlements will be forthcoming without them. In reality, third-party releases are a recurring feature of bankruptcy practice, especially in the mass-tort context, and not because anyone is trying to do the released third parties a favor. Instead, the definitive resolution of claims against third parties with close relationships to the debtor, like insurers and board members, are key to generating value for the estate necessary for a confirmable plan. In that context, there is no reason to reward hold-outs who stand in the way of a plan with overwhelming creditor support, and no reason to deprive bankruptcy courts of a critical tool that has proven enormously useful in resolving some of the most complex and otherwise intractable controversies.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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